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What Does the State Owe to Its People? Toward a “Responsibility to Develop”

Amit Khardori

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What Does the State Owe to Its People? Toward a “Responsibility to Develop”

*Amit Khardori**

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I. INTRODUCTION: MAPPING THE ORIGINS AND POTENTIAL FUTURE OF DEVELOPMENT

International development is generally lauded as an altruistic global effort for the betterment of humankind. But it is national governments that give official development assistance, often to other governments. They do this for reasons of national interest, out of a common recognition of state responsibility to their own citizens, and as part of the international community. To this point, for example, the long title of the main United States government authority for foreign aid, the Foreign Assistance Act of 1961, as amended—the very first sentence—is: “AN ACT To promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic development and internal and external security”¹

In 2019, the forty-five countries that make up the longstanding consortium of traditional donors of official development assistance

1. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961).

(ODA) to developing countries gave almost \$156 billion in ODA funding for aid in other countries.² This is an objectively very large sum (though it only comes to about 0.3% of their gross national incomes on average).³ What do the donor governments expect to come of their voluntary foreign assistance? What do the recipient governments and their citizens expect? Who is accountable for which inputs and which outputs? What does a state owe to its people?

In international relations, purportedly longstanding principles have dictated that governments have absolute territorial sovereignty—absolute discretion on how to manage their internal governance and relationships with their citizens. Yet, throughout the history of the state, there have always been practical standards for legitimate and functional statehood. In the post-Cold War era, for various reasons, the international community recognized a state level “responsibility to protect” (R2P), acknowledging that there may be a limit to absolute sovereignty when a state’s failure or refusal to provide security to its own people—to respect and protect their liberty—creates domestic instability that threatens international security.⁴ In such circumstances, the international community may invoke R2P to justify international humanitarian intervention.

A separate discourse that predates but has not progressed as much as R2P concerns state and international responsibilities regarding international development assistance. Human rights advocates and developing countries have asserted a human “right to development” (RTD).⁵ Governments of more economically advanced countries (hereinafter, “donor governments”) have balked at the assertion of development as a right, out of fear that this concept could be used to create a binding international commitment to provide development assistance—which would

2. *Net ODA*, OECD iLibrary, <https://data.oecd.org/chart/6doV> (last visited Dec. 25, 2020).

3. *Id.*

4. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001) [hereinafter COMM’N ON INTERVENTION], <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; see also S.C. Res. 1973 (Mar. 17, 2011), [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)).

5. G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986), <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>.

effectively compel them to provide development assistance and undermine their foreign policy discretion.

This Article proposes to link the discourses with a new concept: a “responsibility to develop” (R2D), as a necessary corollary to R2P and a logical counterpart to RTD. It will review the history of state sovereignty, demonstrating that it has always entailed domestic and international commitments. It will then summarize the related histories of domestic governance of the state at home and “development” abroad to identify the state practices that have been at least implicitly accepted as necessary for legitimate statehood.

II. SOVEREIGNTY: THE EVOLUTION OF INTERNATIONAL AND DOMESTIC LEGITIMACY OF THE STATE (OR) HOW ABSOLUTE TERRITORIAL SOVEREIGNTY WAS NEVER REALLY A THING

State sovereignty has always carried domestic responsibilities, and the international community has always recognized international implications of domestic governance. As the concept of states evolved to obtain their legitimacy through popular sovereignty—the will of the people—this recognition became all the more relevant, notwithstanding brief assertions otherwise that were never followed in practice.⁶ The international community can set binding standards for domestic governance—for the state’s relationship with its people. In fact, it always has.

A. *The Enlightenment Era*

1. *Individual rights at the inception of the state*

Conventional wisdom cites the 1648 Treaty of Westphalia as the origin of the nation-state system, and often alludes to it as the foundation of the concept of absolute domestic territorial sovereignty and non-intervention by the international community regarding domestic matters. But that is incomplete and misleading.⁷ For most of the history of the nation-state, international recognition was conditioned on domestic conduct. The first treaty recognition of absolute, unconditional domestic

6. The idea of absolute domestic territorial sovereignty has been asserted much more than it was ever followed. See *infra* Section I.B.1.

7. LUKE GLANVILLE, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY 49 (2014).

territorial sovereignty did not occur until the 1920 Covenant of the League of Nations, where the state parties agreed “to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”⁸ But a brief survey of actual state practice over the past 500 years reflects that the international community has always had certain expectations for domestic governance.

State recognition of individual liberties domestically has been a matter of international concern since the inception of the state. Dating back to the Protestant Reformation in Europe in the 1520s, there has been a consistent question of the state’s treatment of religion, or individual liberty originally in service of religion. Contemporary review of the Treaty of Westphalia shows that, by its own terms and immediate effect, it established the idea of international expectations of domestic governance and the individual civil right of the free exercise of religion. For that matter, the idea of free will of an individual (initially as a necessary element of the practice of religion) goes back still centuries further, to at least St. Augustine’s *On the Free Choice of the Will* around AD 395. The 1555 Treaty of Augsburg expressly established that rulers within the Holy Roman Empire could dictate the religion of their regions, “*cuius regio eius religio*” (he who rules, his is the religion), setting the stage for the Thirty Years’ War (1618–48) between Catholic and Protestant states.⁹ The Treaty of Westphalia, which ended that war, included a section on “Liberty of Conscience,” requiring the state parties (the German princely states of the Holy Roman Empire) to tolerate the free exercise of religion of their subjects, i.e., to accept and not discriminate against religious minorities (specifically, Protestant or Catholic, within their jurisdictions).¹⁰ Far from establishing absolute sovereignty over territory, it codified an individual civil right: freedom of religion. So, if anything, the

8. *Id.* at 85; *The Covenant of the League of Nations: Article 10*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/20th_century/leagcov.asp (last visited Nov. 16, 2020).

9. HUMANITARIAN INTERVENTION: A HISTORY 77 (Brendan Simms & D.J.B. Trim eds., 2011); GLANVILLE, *supra* note 7, at 51–52.

10. GLANVILLE, *supra* note 7, at 51–52 (quoting the Treaty of Osnabruck 1699 art. XXVIII, 228–29); *see also* Treaty of Westphalia art. XXVIII, *The Avalon Project*, https://avalon.law.yale.edu/17th_century/westphal.asp. The Treaty of Westphalia had two parts: The Treaty of Osnabruck and the Treaty of Muenster; the clause is in the former part.

Treaty of Westphalia stands for the principle of states' acceptance of domestic governance responsibilities and the international community's willingness to hold them accountable for it.

2. *Popular sovereignty: State legitimacy through the will of the people*

The next step in the evolution of sovereignty was domestic: popular sovereignty. Several Enlightenment-era revolutions posited that the legitimacy of the state should come from the consent of the governed and its representation of the general will of the people. The concept built steadily through influential treatises and state practice.

In 1651, Thomas Hobbes wrote in *Leviathan* that the state is responsible for the security of its people, on behalf of its people:

The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man This done, the Multitude so united in one Person, is called a COMMON-WEALTH This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that Mortall God, to which wee owe, under the Immortall God, our peace and defence [,] . . . inabled to forme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.¹¹

This is a clear assertion of a concept of state responsibility to protect its people. It is also a clear assertion that, respecting individuals' liberty in a state of nature and free will to choose to collaborate with others, the state's authority comes from acting on behalf of its people.

An important next step in practice for state accountability to its people was the "Glorious" Revolution in England in 1688. It removed a Catholic king, James II, from power over the

11. THOMAS HOBBS, *LEVIATHAN* 160–61 (Lerner Publ'g Grp. 2018) (1651) (spelling and formatting in original).

majority-Protestant population, and placed important new limitations on the authority of the monarchy. The 1689 English Bill of Rights recognized “ancient rights and liberties” of the people individually and through their representatives in Parliament.¹² These included certain civil and political rights, such as free elections; Parliament’s power to make laws; freedom of speech within Parliament; the right of petition; and prohibitions of excessive fines and cruel and unusual punishments.¹³

In the same period, John Locke’s *Second Treatise of Government* (1689) elaborated on the legitimacy of the English government, specifically, Parliament. It starts with natural rights of man: asserting a law of nature for all mankind, “that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”¹⁴ These individuals exchange some of their natural liberty for “*the bonds of civil society*” to “unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.”¹⁵ This civil society, in turn, has the authority to remove its representative government, to hold it accountable:

[T]here remains still *in the people a supreme power* to remove or *alter the legislative*, when they find the *legislative act* contrary to the trust reposed in them. For all *power given with trust* for the attaining an *end*, being limited by that end, whenever that end is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the power devolve into the hands of those that gave it . . .¹⁶

Thus framed, a representative government receives its legitimacy from popular sovereignty, with a duty to serve the general will of the people. In other words, it owes a duty of care to its people.

12. *English Bill of Rights 1689*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/17th_century/england.asp (last visited Nov. 16, 2020); John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment*, 27 WM. & MARY BILL OF RTS. J. 989, 1015 (2019).

13. Bessler, *supra* note 12, at 1015.

14. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 4 (Richard Cox ed., 1982).

15. *Id.* at 58.

16. *Id.* at 92.

Next in the progression of Western thought, Jean-Jacques Rousseau's *On the Social Contract* (1762) put forward ideas echoed in the American and French revolutions. First, he explained, legitimacy matters:

Force is a physical power; I fail to see what morality can result from its effects. To give in to force is an act of necessity, not of will If one must obey because of force, one need not do so out of duty; and if one is no longer forced to obey, one is no longer obliged. Clearly then, this word "right" adds nothing to force Let us then agree that force does not bring about right and that one is obliged to obey only legitimate powers.¹⁷

That legitimacy is determined by the general will:

*Each of us places his person and all his power in common under the supreme direction of the general will At once, in place of the individual person of each contracting party, this act of association produces a moral and collective body . . . which receives from this same act its unity, its common self, its life and its will. This public person, formed thus . . . is called state by its members when it is passive, sovereign when it is active As for the associates, they collectively take the name people; individually they are called citizens, insofar as they are participants in the sovereign authority, and subjects, insofar as they are subjected to the laws of the state.*¹⁸

Thus, according to Rousseau, the representative state owes its people something—something agreed to and consolidated into the general will.

The United States Declaration of Independence in 1776 similarly framed the legitimacy of the state on accountability to the people based on its effectiveness in ensuring individual rights:

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with *certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation

17. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 71-72 (Donald A. Cress trans., 2d ed., Hackett Publ'g Co. 2019).

18. *Id.* at 80.

on such Principles, and organizing its Powers in such Form, as to them shall seem most likely *to effect their Safety and Happiness*.¹⁹

The U.S. Constitution in 1787 itself further emphasized the principle that sovereignty was bestowed on the state by the people, for the benefit of the people:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²⁰

Before even getting into the details of a Bill of Rights—and, later, a proposed second Bill of Rights—the founding documents indicate a duty placed by the people onto the state to provide domestic stability, security, individual liberty, and other elements deemed necessary for the common good. Similarly, at the outset of the French Revolution, the French National Assembly approved the Declaration of the Rights of Man and Citizen in 1789, which asserted, “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.”²¹

The political philosophy of the Enlightenment era established the baseline for modern political thought. As demonstrated by the way these ideas have been enshrined in the founding documents of England and the United States, and the way they have since come into common acceptance by other states, the legitimacy of a state government founded on popular sovereignty is tied to its commitment to respect certain individual rights.

3. A brief counter-revolution: A short period of opportunistic reactionary non-intervention that was notable for multiple interventions

The idea that a state’s legitimacy is based on popular sovereignty was a clear threat to non-democratic governments. Predictably, democratically illegitimate regimes responded by

19. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

20. *The Constitution of the United States: A Transcription*, NAT’L ARCHIVES (May 4, 2020), <https://www.archives.gov/founding-docs/constitution-transcript>.

21. *Declaration of the Rights of Man – 1789: Article 2*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Nov. 16, 2020).

asserting that questions of state legitimacy are purely domestic issues and none of the business of the international community. The idea of absolute domestic territorial sovereignty thus became a useful tool for democratically illegitimate regimes or purposes.

As part of France's popular revolution, the French National Assembly even went so far as to issue the Edict of Fraternity in 1792, promising "fraternity and aid to all peoples who wish to recover their liberty."²² They went too far. The domestic politics of one country, France, became a direct threat to the security of other states and international stability.

The resulting Revolutionary and Napoleonic wars led to the Congress of Vienna in 1815, which redrew territorial borders among the five Great Powers (France, Britain, Russia, Austria, and Prussia) and expressly reaffirmed monarchical, or dynastic, rule – a direct repudiation of one of the fundamental pillars of popular sovereignty, the right of the people to replace their government.²³ To be clear, this was not some significant intellectual shift. It was not even initially proposed by the allied Great Powers who defeated Napoleon in 1814. It was a strategic argument by France's representative, Charles-Maurice Talleyrand, to force those other four Great Powers to recognize a restored French monarchy, in light of their own claims to territorial sovereignty.²⁴ He argued that France had been motivated by its advocacy of sovereignty of the people, and the effect of the agreements of the 1815 Vienna Congress – specifically, the "Final Act of the Congress" – was to maintain the domestic monarchies.²⁵ The Final Act reaffirmed monarchical rule in Europe; therefore, the King of France should be reinstated and its territorial integrity also respected.²⁶ Thus, the representative of France, which had previously justified foreign intervention based on the principle of state legitimacy based on popular sovereignty, argued:

22. GLANVILLE, *supra* note 7, at 71.

23. CHRISTIAN REUS-SMIT, *THE MORAL PURPOSE OF THE STATE: CULTURE, SOCIAL IDENTITY, AND INSTITUTIONAL RATIONALITY IN INTERNATIONAL RELATIONS* 136–39 (1999). The Vienna Congress did many other things, too, including laying down an international marker of opposition to slavery on moral and humanitarian grounds.

24. *Id.*

25. *Id.*

26. *Id.* at 137.

The presence of a minister of Louis XVIII[, the king of France, by birthright,] consecrates here the principle upon which all social order rests. The first need of Europe is to banish forever the opinion that right can be acquired by conquest alone, and to cause the revival of that sacred principle of legitimacy from which all order and stability spring. To show today that France troubles your deliberations, would be to say that true principles are no longer the only ones that guide you, and that you are unwilling to be just.²⁷

And so, a group of monarchs agreed among themselves that monarchs are legitimate and revolutions against them are not. This is best understood, however, as a historical blip, not an actual change in the trajectory of the perceived legitimacy of state power.

These monarchs asserted that no state should intervene to support a popular revolution within another state. But they did not establish any agreed principle or practice of non-intervention—of complete deference to the internal governance of any state. They very much recognized that “the internal politics of states could represent a grave threat to international order.”²⁸ They were far from the pre-Westphalian expectation of absolute sovereignty of a monarch. In fact, the practice was the opposite.

In the 1820s, three of the Great Powers—Russia, Prussia, and Austria—formed a “Holy Alliance” to agree to intervene *against* popular uprisings. They did so in Spain in 1820–21.²⁹ In a joint declaration, they rationalized that they had come “to the assistance of a subdued Peoples, and they considered it as coming in support of their liberty, and not as an attack against their independence . . . the object of that policy will always be the preservation of the Independence and of the rights of each State.”³⁰ In other words, they intervened in a matter of domestic stability based on concern for international security.

The Great Powers also intervened repeatedly in the affairs and territory of the Ottoman Empire to protect the religious freedom of

27. *Id.* at 137–38.

28. GLANVILLE, *supra* note 7, at 75.

29. *Id.*; HUMANITARIAN INTERVENTION, *supra* note 9, at 122.

30. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 253 (2004) (quoting the Declaration of the Allied Sovereigns of Austria, Prussia and Russia (Laybach), 12 May 1821, in EDWARD HERTSLET, THE MAP OF EUROPE BY TREATY 667–69 (1875)); GLANVILLE, *supra* note 7, at 75.

the minority Christians. Russia took the role of protector of orthodox Christians. The Crimean War between Russia and an Ottoman-British alliance ended with the 1856 Treaty of Paris. That treaty recognized the Ottoman Empire's sovereignty, required Russia to demilitarize the Black Sea, and required the Ottoman Empire to establish domestic religious freedom and non-discrimination against Christians in certain areas (e.g., taxation and eligibility for public service).³¹ In 1860, in response to mass killings of around 2,000 Christians in Damascus over a one-week period, France advocated for joint European intervention for the purpose "of obtaining the satisfaction *due to humanity, and of assisting in the reestablishment of peace in Syria.*"³² France negotiated with the other European powers and the Ottoman Empire for consent for 12,000 European troops (half from France) to enter Ottoman territories to end the pogroms against Christians. France obtained Ottoman consent after explaining "that the reasons for the intervention were related to the manifest impotence of the Ottoman authorities, which made foreign help required if the collapse of the Ottoman Empire were to be avoided."³³ By the time the troops actually arrived, the killing had ended, and the troops found themselves carrying out humanitarian activities, such as burying the dead and cleaning up the wreckage.³⁴ This episode presents an early example of humanitarian intervention based on a mutually agreed failure of a state's responsibility to protect certain guaranteed domestic rights (in this case, the civil right of religious freedom).

4. Non-intervention in the public discourse: The long history of talk by commentators (with no relation to the actual actions of governments)

Though hardly ever implemented in practice, the idea of non-intervention has a long history in theory. The question of whether to intervene into the domestic affairs of another state predates the Westphalian state itself. Hugo Grotius rationalized in his 1625 foundational treatise, *On the Law of War and Peace (de jure belli ac pacis)*, if "a prince 'should inflict upon his subjects such treatment

31. Treaty of Paris of 1856 art. IX, Mar. 30, 1856, https://content.ecf.org.il/files/M00934_TreatyOfParis1856English.pdf; HUMANITARIAN INTERVENTION, *supra* note 9, at 186.

32. HUMANITARIAN INTERVENTION, *supra* note 9, at 173.

33. *Id.* at 173–74.

34. *Id.* at 175–76.

as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded.”³⁵ In other words, when a sovereign mistreats his people, the international community outside his kingdom might have a right to intervene.

By contrast, the idea of absolute sovereignty over a territory is attributed to Emmerich de Vattel and his contemporary, Christian Wolff. Vattel’s treatise, *The Law of Nations*, published in 1758, used popular sovereignty as an argument against intervention. He asserted:

A nation then is mistress of her own actions so long as they do not affect the proper and perfect rights of any other nation—so long as she is only *internally* bound, and does not lie under any *external* and *perfect* obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her.³⁶

If a state is internally legitimate, Vattel opines that there should be no space for external input on its conduct. That was his opinion, notwithstanding the actual state practice in seventeenth- and eighteenth-century Europe. Simms and Trim put it best: “[T]he concept of inviolable state sovereignty was not so much elaborated by Wolff and Vattel as simply invented by them.”³⁷ That said, even Vattel conceded that there may be a basis for intervention for civil war or crimes against humanity—specifically, violation of the civil right of freedom of religion.³⁸

A century later, another prominent proponent of non-intervention, J.S. Mill, argued against intervention against another state if that state’s government is legitimized by popular sovereignty (i.e., represents the will of the people). At the same time, he conceded that popular sovereignty depends upon the condition of domestic liberty of the people within the state—how free and able they are to shape their government. That domestic

35. *Id.* at 40 (quoting HUGO GROTIUS, *DE JURE BELLI AC PACIS* 584 (Francis W. Kelsey trans., 1925) (1625)).

36. EMMERICH DE VATTEL, *THE LAW OF NATIONS* lxiii (Joseph Chitty ed., 1844) (1758), https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/DeVattel_LawOfNations.pdf#page=60.

37. HUMANITARIAN INTERVENTION, *supra* note 9, at 91 (citing Stephen D. Krasner, *Rethinking the Sovereign State Model*, 27 *REV. INT’L STUDS.* 17 (2001)).

38. VATTEL, *supra* note 36, at 55.

liberty depends on the level of “civilization” of the people.³⁹ Thus, he advocated for popular sovereignty, while defending colonialism as a form of international development assistance. Granted, to be charitable, his language was representative of his time and place as a British colonial officer in India. In his 1859 essay, *A Few Words on Non-Intervention*, Mill rationalized that if a state is legitimate by way of popular sovereignty, i.e., reflecting the general will of the people, then it ought to be able to stand on its own; it should not need or expect external intervention to maintain stability.⁴⁰ If anything, as long as it is not causing harm in the international community, a state—along with all other states in the international community—has an interest in collective self-defense against any foreign intervention that seeks to alter the internally negotiated governing relationship between the state and its people.⁴¹ In a legitimate government, the expectations of the people and the duties of the state are a matter of internal negotiation. He wrote:

With respect to the question, whether one country is justified in helping the people of another in a struggle against their government for free institutions[:] When the contest is only with native rulers, and with such native strength as those rulers can enlist in their defence, the answer I should give to the question of the legitimacy of intervention is, as a general rule, No. . . . The only test possessing any real value, of a people’s having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation. I know all that may be said, I know it may be urged that the virtues of freemen cannot be learnt in the school of slavery, and that if a people are not fit for freedom, to have any chance of becoming so they must first be free. And this would be conclusive, if the intervention recommended would really give them freedom. But the evil is, that if they have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent.⁴²

39. MICHAEL W. DOYLE, *THE QUESTION OF INTERVENTION: JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 222–23 (2015).

40. *Id.*

41. *Id.*

42. *Id.*

To Mill, the government of a state is legitimate if based on the consent of the governed exercising their free will; that internal legitimacy cannot be externally imposed. He allowed for intervention against foreign invasion and civil wars as a matter of mutual self-defense and international security interests.⁴³ Foreign intervention to establish freedom, he concluded, is wrong, but—again, as an apologist for colonial occupations—he also argued that the state has a responsibility to groom its people for freedom. In his 1856 treatise, *On Liberty*, he reasoned that the state may only restrict individuals in the exercise of their freedom insofar as they may harm others, but may restrict “uncivilized peoples” to the extent that the state actively helps them reach the so-called civilized state at which they are capable of exercising their liberty:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. . . .

[T]his doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. . . . Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.⁴⁴

So, free people have the right and authority to legitimize their state. And toward that end, the state has a duty to respect and, as necessary, cultivate their capacity to exercise their freedom. This is an important argument in the history of foreign aid, which is very much rooted in colonial and missionary zeal, but it also informs

43. *Id.* at 221, 225.

44. JOHN STUART MILL, *ON LIBERTY* 13–14 (1859).

present expectations of all states regarding the range of human rights: economic, social, cultural, political, and civil.

All that said, these were just opinions of thinkers, not binding on the actions of states. They nevertheless demonstrate how attitudes towards sovereignty have shifted up to the current time and influenced modern state practice.

B. The Modern Multilateral System

The Enlightenment Era advanced the form and content of the state, including its relations with its people and with other states. It established the international community and began to outline what states should expect of other states in their relations with their people. It did not, however, establish a tradition of non-intervention. Far from it. In the modern era, the international community created the multilateral system of international organizations to further define their expectations of domestic governance and mediate their international relations. The concept of absolute territorial sovereignty would become an artifact of the first failed attempt at forming the multilateral system.

1. The League of Nations: The first, brief, limited recognition of absolute territorial sovereignty

The international community unambiguously bound itself to non-intervention based on absolute territorial sovereignty for the first time in 1920—relatively recently in the history of the state—and that decision had almost immediate, disastrous results. In the wake of World War I, the 1920 Covenant of the League of Nations stated, “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”⁴⁵ This absolute territorial sovereignty, without reference to any expectations of internal governance, was further bolstered by a stated principle of collective self-defense. Article 11 set out, “Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League.”⁴⁶ The concept was nonbinding, but

45. League of Nations Covenant art. 10.

46. *Id.* art. 11; *see also id.* art. 16.

even so, it was too much for the United States Senate; a significant majority of Senators did not want the United States to be obliged to intervene. Even though the covenant was U.S. President Woodrow Wilson's idea, the United States Senate refused to ratify it.⁴⁷ This historical moment did not reject the possibility of humanitarian interventions or the responsibilities of states to their people, but it did reflect a recurring principle that influential states did not want to be bound or compelled to intervene.

An interesting, little-known footnote to this story involves the International Relief Union. In 1922, an Italian representative to the League of Nations, who recalled surviving the Messina earthquake of 1908, proposed a sub-organ for the League that would implement a mutual commitment to humanitarian aid in response to natural disasters – he even initially termed it a “right to relief.”⁴⁸ Though not a party, the United States viewed this potential new norm as a threat to foreign policy discretion, so it worked with Britain's representative to defeat it. They did not want to be obligated to intervene. One account summarized,

[F]rom the outset, the United States had seen the . . . project as a dangerous foreign scheme that threatened US values by involving governments in disaster relief based on the idea of mutual insurance, and potentially jeopardized their determination to use disaster relief as an instrument of US foreign policy.⁴⁹

As much as the concept of absolute territorial sovereignty is touted as individual states' protection against international intervention, it was also an excuse for the international community not to intervene. And it was only a very brief moment in the history of national and international rights and responsibilities.

47. *The Senate and the League of Nations: Henry Cabot Lodge (1925)*, U.S. SENATE, https://www.senate.gov/reference/reference_item/Versailles.htm (last visited Nov. 14, 2020) (summarizing Henry Cabot Lodge's history of the Senate's consideration of the Treaty of Versailles).

48. John F. Hutchinson, *Disasters and the International Order – II: The International Relief Union*, 23 INT'L HIST. REV. 253, 261 (2001).

49. *Id.* at 281.

2. *The United Nations: The post-World War II reemergence of state responsibilities to their people and to each other*

Just two decades later, the 1945 United Nations Charter set off a march back to international expectations for the domestic conduct of a state, eventually introducing the concept of “failed states” and culminating with “the Responsibility to Protect.”⁵⁰

The Charter establishing the United Nations in the wake of World War II maintained respect for territorial sovereignty, but significantly strengthened the collective self-defense mechanism. It also reversed course from the League of Nations by setting up universal expectations for domestic governance. Article 2(4) states, “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.”⁵¹ Further echoing the Covenant of the League of Nations, with a significant addition, Article 2(7) adds,

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; but this principle shall not prejudice the application of enforcement measures under Chapter VII [Security Council measures, including use of force].⁵²

The Charter promises non-intervention, but also recognizes the potential for domestic matters to create international security threats. Chapter VII discusses potential international threats and options for collective self-defense. Article 39 authorizes the U.N. Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”⁵³ Article 41 authorizes the Security Council to impose economic sanctions, restrict travel and communication, or restrict diplomatic relations.⁵⁴ Article 42 authorizes use of force: If Article 41 responses are

50. U.N. Charter; Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL’Y 3 (1992); COMMENT ON INTERVENTION, *supra* note 4.

51. U.N. Charter art. 2, ¶ 4.

52. *Id.* art. 2, ¶ 7.

53. *Id.* art. 39.

54. *Id.* art. 41.

insufficient, the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁵⁵ And Article 51 acknowledges “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”⁵⁶ So, the Charter forecloses interference into domestic affairs, but contemplates action to respond to threats that cross borders.

For the next fifty years, the Cold War era, the questions of when a country had crossed a line to be a threat to international security warranting some sort of intervention focused on outward acts of aggression and conflicts between governments, not internal conflicts of governments with non-state actors, including their own citizens.⁵⁷ From 1945 to 1992, whatever the debates on the merits were, proposals for intervention were vetoed in the Security Council 279 times.⁵⁸ This very short period in the history of sovereignty ended with the fall of the Soviet Union and the “third wave” of democratization in the late 1980s and 1990s.

a. Bringing state capacity back in: Responding to “failed states” and “fragile states.” By the early 1990s, the international relations lexicon gained terms like “fragile states” and “failed states.” Once again, domestic governance—including the lack thereof—was acknowledged as a source of threats to international peace and security. In an oft-cited defining 1992 article, *Saving Failed States*, Gerald Helman and Steven Ratner (a former U.S. Ambassador to the United Nations and an attorney in the U.S. Department of State’s Office of the Legal Adviser, respectively) observed,

[A] disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community. Civil strife, government breakdown, and economic privation are creating more and more modern *debellatio*s, the term used in describing the destroyed German state

55. *Id.* art. 42.

56. *Id.* art. 51.

57. See, e.g., *Charter of the United Nations: Chapter VII – Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39 & 51*, CODIFICATION DIV. PUBL’NS REPERTORY OF PRAC. OF U.N. ORGANS (Aug. 23, 2016) <https://legal.un.org/reperory/art39.shtml> (summarizing practices since 1945).

58. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 14, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

after World War II. As those states descend into violence and anarchy—imperiling their own citizens and threatening their neighbors through refugee flows, political instability, and random warfare—it is becoming clear that something must be done. The massive abuses of human rights—including that most basic of rights, the right to life—are distressing enough, but the need to help those states is made more critical by the evidence that their problems tend to spread. Although alleviating the developing world's suffering has long been a major task, saving failed states will prove a new—and in many ways different—challenge.⁵⁹

For several reasons, the number of democratic governments in the world increased dramatically during this period. Many of these new democracies welcomed development assistance in the form of democracy-promotion support from abroad. Donor governments responded. For example, until this period, the United States Government did not have any expressly stated democracy-promotion authorities. In quick succession between 1985 and 1992, the U.S. Congress passed the Central America Democracy, Peace, and Development Initiative; the Support for East European Democracy (SEED) Act of 1989; and the Freedom for Russia and Emerging Eurasian Democracies and Open Markets (FREEDOM) Support Act of 1992.⁶⁰

There was also a shift in views on access for humanitarian aid for domestic crises (e.g., famine and internal displacement). In 1986, the International Court of Justice (ICJ) held in *Nicaragua v. United States* that assistance provided by the United States to the military and paramilitary activities of the *contras* in Nicaragua through 1984 was “a clear breach of the principle of non-intervention,” but added in what some consider dicta,

The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985 . . . , the United States Congress has restricted the use of funds appropriated for assistance to the *contras* to “humanitarian assistance” There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country,

59. Helman & Ratner, *supra* note **Error! Bookmark not defined.**, at 3.

60. International Security and Development Cooperation Act of 1985, Title VII, Pub. L. No. 99-83, § 701, 99 Stat. 190; Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298; Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, Pub. L. No. 102-511, 106 Stat. 3320.

whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.⁶¹

The ICJ thus countenanced the idea that foreign assistance to mitigate the suffering of a state's population would not necessarily be a violation of its territorial or political sovereignty. It would not necessarily undermine the state's responsibility for the security of its people, but it could help mitigate the consequences of its apparent failure toward that end.

In multiple resolutions, the U.N. General Assembly emphasized that states should allow and even facilitate foreign humanitarian aid. The 1990 U.N. General Assembly Resolution 45/100 acknowledged territorial and political sovereignty, but "[i]nvite[d] all States whose populations are in need of such assistance to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential."⁶² Soon after that, the U.N. Security Council (SC) issued binding resolutions demanding humanitarian access in Iraq, Bosnia, and Somalia. U.N. SC Resolution 688 (1991) "[i]nsist[ed] that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations."⁶³ U.N. SC Resolution 770 (1992), regarding Bosnia, "[d]emand[ed] that unimpeded and continuous access to all camps, prisons and detention centres be granted immediately to . . . relevant humanitarian organizations and that all detainees therein receive humane treatment, including adequate food, shelter and medical

61. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 242 (June 27). The ICJ relied on a definition of "humanitarian assistance" provided by the International Committee of the Red Cross (ICRC) referring to "assistance . . . to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being." *Id.* The Court also highlighted Congress's legislative text limiting U.S. intervention going forward: It could include "the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death." *Id.* ¶ 243.

62. G.A. Res. 45/100, ¶ 4 (Dec. 14, 1990) ("Humanitarian assistance to victims of natural disasters and similar emergency situations.").

63. S.C. Res. 688, ¶ 3 (Apr. 5, 1991).

care”⁶⁴ and “that all parties and others concerned take the necessary measures to ensure the safety of . . . personnel engaged in the delivery of humanitarian assistance.”⁶⁵ U.N. SC Resolution 794 (1992) on Somalia demanded “that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia.”⁶⁶ This resolution actually went further: it expressly authorized the use of force to ensure the safety of humanitarian aid personnel.⁶⁷

In his 1992 report, *An Agenda for Peace*, U.N. Secretary-General Boutros Boutros-Ghali made a foundational argument for access for the international community when there is a void created by a state’s failure to carry out its responsibilities: the international community should respect states’ territorial sovereignty, but states should accept that when their internal governance has international effects, at a certain point they will need to accept and facilitate an international response. The report observed,

The foundation-stone of [peace] is and must remain the State. Respect for its *fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. . . .*

. . . .

In . . . situations of internal crisis the United Nations will need to respect the sovereignty of the State; to do otherwise would not be in accordance with the understanding of Member States in accepting the principles of the Charter. The Organization must remain mindful of the carefully negotiated balance of the guiding principles . . . that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality; that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the

64. S.C. Res. 770, ¶ 3 (Aug. 13, 1992).

65. *Id.* ¶ 6.

66. S.C. Res. 794, ¶ 2 (Dec. 3, 1992).

67. *Id.* ¶¶ 3, 10, 16.

Charter of the United Nations; and that, in this context, humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal by that country.⁶⁸

Domestic governance affects international security. “Absolute and exclusive sovereignty” was never actually absolute. States have a responsibility to take care of “victims of emergencies occurring on their territory,” and that responsibility includes asking for humanitarian aid when needed or, at least, allowing humanitarian aid providers access to people in need – and that aid would not be a breach of sovereignty.⁶⁹ This principle echoes both the 1856 French assertion to the Ottoman Empire regarding minority religious rights and the 1986 ICJ *Nicaragua v. United States* opinion that humanitarian aid does not violate sovereignty.⁷⁰

The international community responded inadequately to several domestic state failures in the 1990s, including Bosnia, Somalia, and Rwanda, among others. Before the September 11, 2001, attacks on the World Trade Center, Robert Kaplan warned of “The Coming Anarchy” the world would experience as a consequence of failed states, using Sierra Leone as an example.⁷¹ At the end of that decade, U.N. Secretary-General Kofi Annan gave his *Two Sovereignties* speech. Addressing the U.N. General Assembly in 1999, he sought to recognize a sovereignty of individuals, as well as sovereignty of states, and a responsibility for states and the international community to be responsive to it:

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. At the same time, *individual sovereignty – and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter*—has been enhanced by a

68. U.N. Secretary-General, *supra* note 58, ¶¶ 17, 30 (emphasis added).

69. *Id.*

70. Boutros-Ghali thus effectively called back to the pre-League of Nations era – within limits. He also suggested that the world should not re-create the French revolutionary wars: “The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.” *Id.* ¶ 17.

71. Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC (Feb. 1994), <https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/>.

renewed consciousness of the right of every individual to control his or her own destiny.

....

Nothing in the Charter precludes a recognition that there are rights beyond borders. Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.⁷²

By this point, it should be clear that nothing in his speech was new: Secretary-General Annan was referring to the responsibilities of a state to its people. He described the now-axiomatic concept that a state's legitimacy should come from popular sovereignty – the consent of the governed – and that the state must respect and even cultivate the individual liberties of the governed in order to obtain their consent.

In the United States, the final National Security Strategy of the Clinton administration highlighted failed states, observing,

At times in the new century, we can expect that, despite international prevention efforts, some states will be unable to provide basic governance, safety and security, and opportunities for their populations, potentially generating internal conflict, mass migration, famine, epidemic diseases, environmental disasters, mass killings and aggression against neighboring states or ethnic groups – events which can threaten regional security and U.S. interests.⁷³

Clinton's successor, George W. Bush, had campaigned on a non-interventionist foreign policy platform but would also recognize the security threat posed by failed states in the wake of the 9/11 attacks. His first national security strategy flatly stated,

72. Press Release, U.N. Secretary-General Kofi Annan, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136/GA/9596 (Sept. 20, 1999) (emphasis added).

73. WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 2 (1999), <https://clintonwhitehouse4.archives.gov/media/pdf/nssr-1299.pdf>.

"America is now threatened less by conquering states than we are by failing ones."⁷⁴

The actual longstanding global consensus had returned: absolute territorial sovereignty for domestically unstable states posed too much of a risk to international security.

b. Defining the "responsibility to protect." In December 2001 (after years of work that pre-dated 9/11, made all the more urgent by it), the International Commission on Intervention and State Sovereignty (ICISS), a working group tasked by the U.N. Secretary General, published their report formally introducing the term, "the responsibility to protect."⁷⁵ It further emphasized the renewed international consensus that state legitimacy must be based on popular sovereignty, which creates certain responsibilities for the state toward its people, asserting:

The defense of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. . . . It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.

This modern understanding of the meaning of sovereignty is of central importance in the Commission's approach to the question of intervention for human protection purposes, and in particular in the development of our core theme, "the responsibility to protect"⁷⁶

As much as the ensuing discourse on "responsibility to protect" (R2P) has focused on security, it bears noting that the original definition in the ICISS report is expansive. In popular sovereignty, the people give legitimacy to the state, and the state in turn provides security – it protects their liberty. As defined by the ICISS,

74. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), <https://2009-2017.state.gov/documents/organization/63562.pdf>.

75. COMM'N ON INTERVENTION, *supra* note 4.

76. *Id.* ¶¶ 1.35, 1.36.

liberty is more than just physical security: “Human security means the security of people—their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.”⁷⁷

R2P also reframes sovereignty⁷⁸ from a question of foreign intervention into one of domestic legitimacy; rather than negating potential international action, it demands affirmative domestic action. The ICISS report concluded,

[T]he debate about intervention for human protection purposes should focus not on “the right to intervene” but on “the responsibility to protect.” The proposed change in terminology is also a change in perspective, reversing the perceptions inherent in the traditional language, and adding some additional ones:

First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. . . .

Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. . . .⁷⁹

This acknowledgment of an internal responsibility was significant. It shifted sovereignty from a myopic focus on foreign intervention to a comprehensive survey of human, national, and international security. It described a new criterion for state conduct for potential international enforcement, using any means available in Chapter VII of the U.N. Charter (including use of force).

c. Invoking the “responsibility to protect.” Ten years after the U.N. created the R2P concept, the U.N. Security Council agreed to invoke it for the first time in Libya in 2011. Observing the Libyan government’s violent response to a popular revolution, the U.N. Security Council was careful not to intervene to support efforts to

77. *Id.* ¶ 2.21.

78. *Id.* ¶ 2.15.

79. *Id.* ¶¶ 2.21, 2.29.

overthrow the government, but it did authorize the use of force to protect the civilian population from state violence. U.N. SC Resolution 1973 outlined the Security Council's main considerations:

Reiterating the *responsibility of the Libyan authorities to protect the Libyan population* and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians . . .

[And e]xpressing its determination to ensure the protection of civilians . . . [a]nd unimpeded passage of humanitarian assistance and the safety of humanitarian personnel . . .⁸⁰

The resolution authorized Member States "[t]o take *all necessary measures* . . . to protect civilians and civilian populated areas under threat of attack."⁸¹

The practical results of the authorized limited intervention in Libya were mixed. When the prospect came up again in the Syrian conflict, ongoing since 2011, efforts to invoke R2P were muted. This was partly due to opposition by Russia and China, who vetoed no fewer than twelve U.N. Security Council resolutions between 2011 and 2019.⁸² But there was reticence in U.S. foreign policy circles, too. Just as with the League of Nations and the International Relief Union, members of the Senate did not want any precedent compelling intervention; they wanted to maintain discretion to exercise the foreign policy option.⁸³ The ICISS report itself, though, had already addressed this concern by framing R2P as a binding responsibility on a state for its own internal affairs, potentially justifying a determination of a "right to intervene"—not a responsibility of the international community. Still, the ultimate takeaway is that R2P *can* be invoked. In the case of Libya, the

80. S.C. Res. 1973 (Mar. 17, 2011) (emphasis added).

81. *Id.* ¶ 4 (emphasis added).

82. Yasmine Nahlawi, *Overcoming Russian and Chinese Vetoes on Syria Through Uniting for Peace*, 24 J. CONFLICT & SEC. L. 111, 123 (2019).

83. Mark Landler, *U.S. Urged to Adopt Policy Justifying Intervention*, N.Y. TIMES (July 23, 2013), <https://www.nytimes.com/2013/07/24/us/politics/us-urged-to-adopt-policy-justifying-intervention.html> ("To some critics, particularly on the right, R2P smacks of a multilateral approach to foreign policy that encroaches on American sovereignty. An aide to [Senator] Corker, for example, said he wanted to make sure that . . . the United States should only decide to act militarily based on its own national interests.").

international community showed it can choose to hold a country to this standard.

Besides U.N. Security Council deliberations, there has been at least one other binding statement of concrete actions a state must take as part of its R2P regarding its own people: a regional agreement, the African Union's 2009 Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).⁸⁴ In multiple places, the agreement binds African Union countries to facilitate humanitarian assistance within their own borders and even requires them to request it. Article III(1)(j) binds State Parties to "[e]nsure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel."⁸⁵ Article V(6) calls on state parties to request humanitarian aid where their own "available resources are inadequate."⁸⁶ As of 2019, 30 of the 50 Member States of the African Union are party to the convention.⁸⁷ An International Committee of the Red Cross ten-year review of the status of implementation reports that several state parties have passed domestic legislation and engaged in sub-regional and peer-to-peer exchanges, and all of the parties jointly agreed to the Harare Plan of Action for the Implementation of the Kampala Convention in 2017 and produced a model law for domestic implementation in 2018.⁸⁸ This regional agreement shows a way to use domestic commitments to increase international engagement.

States have a responsibility to respect and protect the liberty of their people, who in turn can confer legitimacy, and the international community has an interest in that state's fulfillment of its responsibilities as a matter of international security. The history of sovereignty shows this has always been the norm.

84. Kampala Convention: African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, *adopted* Oct. 23, 2009 (entered into force Dec. 6, 2012), https://au.int/sites/default/files/treaties/36846-treaty-kampala_convention.pdf.

85. *Id.* art. III(1)(j).

86. *Id.* art. V(6).

87. INT'L COMM. OF THE RED CROSS, THE KAMPALA CONVENTION: KEY RECOMMENDATIONS TEN YEARS ON 5 (Dec. 2019), <https://shop.icrc.org/the-kampala-convention-key-recommendations-ten-years-on-pdf-en>.

88. *Id.* at 12, 19, 33.

Through the multilateral framework, the international community has formally acknowledged this, even if it has not codified it yet.

III. DEVELOPMENT: THE EVOLUTION OF HUMAN RIGHTS AND STATE RESPONSIBILITIES

Accepting that state legitimacy comes from popular sovereignty, and thus should reflect the general will of the people, the first necessary condition for a legitimate state is the free will of individuals. It is a feedback loop. A state is legitimized by the consent of the governed; in order to give that consent, the governed must be able to exercise free will. Their ability to develop that free will depends on the circumstances that surround them, including the security and services provided by the state.

The concept of “development” itself has evolved over time. Early on, it was a civilizational project, then a state project, and now since the 1945 U.N. Charter, increasingly a human rights concept, with implications for the responsibilities of states to their own people and to other states. The consistent through line has been its focus on cultivation of the individual. U.N. declarations and covenants point toward a global consensus on the constituent parts of that cultivation: they include civil, political, economic, social, and cultural rights. There is no consensus on what parts—or to what extent—the state and the international community are responsible for.

The history of the “development” endeavor indicates that it is best understood as a human right for which the state is necessarily responsible. The state is responsible to its people to help ensure and cultivate their exercise of free will, and it is responsible to the international community as part of its responsibility to protect. To the extent there is a human “right to development” and a “responsibility to protect,” there is a state “responsibility to develop.”

A. Liberty: Cultivating and Exercising Individual Free Will

It is not a coincidence that the first proponents of development and leaders of the anti-slavery movement were religious missionaries. The anti-slavery movement is often referred to as the first human rights campaign, but the history of state sovereignty

shows a cause that predates it: freedom of thought in service of religion itself.

For all of the innovations of the Enlightenment era, including the Westphalian state and popular sovereignty, the idea of individual free will was a longstanding necessary prerequisite. Around AD 395, St. Augustine asserted in his treatise *On the Free Choice of the Will* that man has free will, and thus has the personal responsibility to choose between good and evil. He wrote,

If a person is something good and could act rightly only because he willed to, then he ought to have free will, without which he could not act rightly. We should not believe that, because a person also sins through it, God gave it to him for this purpose. The fact that a person cannot live rightly without it is therefore a sufficient reason why it should have been given to him.

Free will can also be understood to be given for this reason: If anyone uses it in order to sin, the divinity redresses him [for it]. This would happen unjustly if free will had been given not only for living rightly but also for sinning. How would God justly redress someone who made use of his will for the purpose for which it was given?⁸⁹

This responsibility to choose to be good—to choose and follow a religion as a matter of free will—informs the liberty of conscience that the Treaty of Westphalia provided in 1648. The direct connection was acknowledged by Enlightenment-era thinkers. Hegel, for example, observed,

It was first the Germanic peoples, through Christianity, who came to the awareness that *every* human is free by virtue of being human, and that the freedom of spirit comprises our most human nature. This awareness arose first in religion, in the innermost region of Spirit. But to introduce this principle into worldly reality as well: that was a further task, requiring long effort and civilization to bring it into being

This application of the principle of freedom to worldly reality—the dissemination of this principle so that it permeates

89. AUGUSTINE, ON THE FREE CHOICE OF THE WILL, ON GRACE AND FREE CHOICE, AND OTHER WRITINGS 31 (Peter King ed. & trans., Cambridge Univ. Press 2010), <https://philonew.files.wordpress.com/2016/08/augustine-augustine-on-the-free-choice-of-the-will-on-grace-and-free-choice-and-other-writings-2010.pdf>.

the worldly situation—this is the long process that makes up history itself.⁹⁰

Development was a civilization-level collaboration among individuals to help each of them increase their ability to exercise their own free will. In his history of the term “civilization,” Brett Bowden summarized Hegel’s logic well:

In order to comprehend Hegel’s “Idea of Freedom” and its realization in and through the state, it is necessary to have a general understanding of his theory of the state, for they go hand-in-hand. . . . For Hegel, a person is free only to the extent that she or he is a rational self-determining individual with the ability to think and apply the powers of reason. As mere individuals, however, human beings are incapable of ever being truly free or fulfilling their rationality without the rational state. For it is only in the state that true freedom can be actualized, whereby “right and duty coalesce, and by being in the ethical order a man has rights in so far as he has duties, and duties in so far as he has rights.”⁹¹

The purpose of a state, as Hegel conceptualizes it, is to facilitate the realization of individual freedom, which in turn legitimizes the state: individuals exercising their individual liberty cooperate to create the general will of the people, which can confer popular sovereignty on the state. A state that does not have individuals exercising their freedom to consent to their government, then, has no legitimate sovereignty. This rationale helped justify colonial empire—the mission of “civilizing” peoples outside of their countries’ borders while acting as trustees over those foreign territories.

It also informed evangelical missionaries like William Carey. He advocated for education and institution-building around the world to help potential converts comprehend and choose to accept their religious preaching. His 1792 *Enquiry into the Obligations of Christians to Use Means for the Conversion of the Heathens* was of its time in its tone and description of non-Europeans, but it advocated

90. G.W.F. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY 21 (Leo Rauch trans., Hackett Publ’g Co. 1988) (1840).

91. BRETT BOWDEN, THE EMPIRE OF CIVILIZATION: THE EVOLUTION OF AN IMPERIAL IDEA 68–69 (2009) (quoting G.W.F HEGEL, PHILOSOPHY OF RIGHT 109 (1820)).

against slavery and encouraged evangelical outreach as a “civilizing” mission. He wrote,

After all, the uncivilized state of the heathen, instead of affording an objection *against* preaching the gospel to them, ought to furnish an argument *for* it. Can we as men, or as [C]hristians, hear that a great part of our fellow creatures, whose souls are as immortal as ours, and who are as capable as ourselves, of adorning the gospel, and contributing by their preaching, writings, or practices to the glory of our Redeemer’s name, and the good of his church, are [e]nveloped in ignorance and barbarism? Can we hear that they are without the gospel, without government, without laws, and without arts, and sciences; and not exert ourselves to introduce amongst them the sentiments of men, and of Christians? Would not the spread of the gospel be the most effectual mean of their civilization? Would not that make them useful members of society?⁹²

This view that the role of government is to facilitate the individual liberty was also fundamental to the abolition of slavery; it was antithetical to an idea of a state that enforces human bondage. Hence, in a landmark decision for the global anti-slavery campaign, a British court declined to enforce ownership rights of an American slaveowner who visited with his slave, James Somerset, in 1772. (The decision applied only to British territory; it did not apply to any of its colonies.) The Court held that, absent any “positive law” expressly authorizing slavery, the natural law respecting individual liberty in England could not enforce slavery:

So high an act of dominion must be recognized by the law of the country where [slavery] is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by

92. WILLIAM CAREY, AN ENQUIRY INTO THE OBLIGATIONS OF CHRISTIANS TO USE MEANS FOR THE CONVERSION OF THE HEATHENS 69–70 (1792), <https://www.wmcarey.edu/carey/enquiry/anenquiry.pdf>; see also MICHAEL BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM 64 (2011).

the law of England; and therefore the black [sic] must be discharged.⁹³

The fundamental role—the responsibility—of a legitimate state, in this conception, was to facilitate and secure individual liberty. In other words, the decision framed development as freedom: a longstanding foundation of the concept, as Amartya Sen put it 1,600 years after St. Augustine.⁹⁴

B. Evolving Expectations of the State at Home: Social Services and Safety Nets

1. Framing expectations of the state

As the Enlightenment era transitioned to the Industrial Revolution and individuals became factors of economic production, public thinkers, bureaucrats, tradespeople, and factory workers began to raise the question of the state's role in insuring against poverty and other widespread, common constraints on individual liberty. They articulated that role as what are now referred to as social rights.

In 1776, the same year the United States declared independence, Adam Smith made the economic and political argument that, in addition to security and safety, the state has an interest in providing public infrastructure and public education—and even favorably mentioned public health in the process. Though invariably associated with the idea of the “invisible hand,” whereby individual creativity and an unfettered free market will drive economic growth, he actually also advocated for a role for the state in cultivating its citizens to help improve economic productivity and to promote good governance and legitimate government. He wrote in his treatise, *The Wealth of Nations*:

For a very small expense the public can facilitate, can encourage, and can even impose upon almost the whole body of the people the necessity of acquiring those most essential parts of education

. . . .

93. *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (K.B. 1772); see also JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 20 (2012).

94. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

[T]o prevent [ignorance] . . . from spreading . . . through the great body of the people, would still deserve the most serious attention of government, in the same manner as it would deserve its most serious attention to prevent a leprosy or any other loathsome and offensive disease . . . from spreading itself among them

A man without the proper use of the intellectual faculties of a man . . . seems to be mutilated and deformed in a still more essential part of the character of human nature

The state, however, derives no inconsiderable advantage from their instruction. The more they are instructed the less liable they are to the delusions of enthusiasm and superstition, which, among ignorant nations, frequently occasion the most dreadful disorders. An instructed and intelligent people, besides, are always more decent and orderly than an ignorant and stupid one They are more disposed to examine, and more capable of seeing through, the interested complaints of faction and sedition, and they are, upon that account, less apt to be misled into any wanton or unnecessary opposition to the measures of government. In free countries, where the safety of government depends very much upon the favourable judgment which the people may form of its conduct, it must surely be of the highest importance that they should not be disposed to judge rashly or capriciously concerning it.⁹⁵

So, the state has an interest in providing at least a certain level of education to help make better informed, more reasonable, more productive citizens.

Similarly, Thomas Paine, author of the influential pamphlet *Common Sense*, which advocated for American independence from Britain in 1776, also described the rights of man that should be expected in a state whose government is based on popular sovereignty. In his 1791 essay, *Rights of Man*, he defended the French Revolution as an action by the people to legitimize their government⁹⁶ and advocated for more political rights (voting rights) for more citizens (beyond landowners) to help entrench legitimate government.⁹⁷ Paine asserted that the social compact between the state and the people in a democratically legitimate

95. ADAM SMITH, *THE WEALTH OF NATIONS* 1044, 1048–49 (Elec. Book Co. 2001) (1776).

96. THOMAS PAINE, *THE RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION* (Floating Press 2010) (1791).

97. *Id.* at 85–86.

government is an ongoing negotiation based on protection and cultivation of certain rights.⁹⁸ Echoing the Enlightenment era consensus that “man” has a natural right to liberty, he asserted that the only reason people would enter into a social compact and consent to be governed as a group is to secure and cultivate that liberty:

Man did not enter into society to become worse than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind [(including freedom of thought, which includes freedom of religion)], and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.⁹⁹

Accordingly, Paine concludes, the state has affirmative duties to the people in service of their liberty:

Whatever the form or constitution of government may be, it ought to have no other object than the general happiness. When, instead of this, it operates to create and increase wretchedness in any of the parts of society, it is on a wrong system

. . . .

When, in countries that are called civili[z]ed, we see age going to the workhouse and youth to the gallows, something must be

98. *Id.* at 34, 37. On the constant negotiation of government, he wrote particularly colorfully, “A greater absurdity cannot present itself to the understanding of man . . . [to say] that a certain body of men who existed a hundred years ago made a law, and that there does not exist in the nation, nor ever will, nor ever can, a power to alter it The [British] Parliament of 1688 might as well have passed an act to have authorized themselves to live for ever [sic], as to make their authority live for ever [sic]. All, therefore, that can be said of those clauses is that they are a formality of words, of as much import as if those who used them had addressed a congratulation to themselves, and in the oriental style of antiquity had said: O Parliament, live for ever [sic]!” *Id.*

99. *Id.* at 75–76.

wrong in the system of government. . . . [T]here lies hidden from the eye of common observation, a mass of wretchedness, that has scarcely any other chance, than to expire in poverty or infamy. Its entrance into life is marked with the presage of its fate; and until this is remedied, it is in vain to punish.

Civil government does not exist in executions; but in making such provision for the instruction of youth and the support of age, as to exclude, as much as possible, profligacy from the one and despair from the other.¹⁰⁰

From this, he outlined several social protections a state should be expected to provide, including anti-poverty protections, like old age and disability pensions; economic rights, including freedom of labor (e.g., to negotiate fair compensation); and political rights and social services necessary for them, including universal suffrage and public education. On the importance of the link between education and political rights and state legitimacy, he emphasized, “A nation under a well-regulated government should permit none to remain uninstructed. It is monarchical and aristocratical government only that requires ignorance for its support.”¹⁰¹

For reasons similar to those cited by Smith and Paine, Thomas Jefferson advocated for public education of citizens in America, sponsoring multiple bills in his home state, Virginia, including the 1779 Bill for the More General Diffusion of Knowledge and the 1817 Bill for Establishing a System of Public Education. He described America’s new republican form of government as “a government by its citizens in mass, acting directly and personally according to rules established by the majority,” and he described education of the citizens as necessary to “facilitate the people’s ‘good sense’ on which ‘we may rely with the most security for the preservation of a due degree of liberty.’”¹⁰²

So, even at the foundation of the modern liberal state, the thinkers and framers who shaped it understood that the state has responsibilities to provide certain services to facilitate the exercise of individual liberty.

100. *Id.* at 305, 316–17.

101. *Id.* at 356.

102. James Carpenter, *Thomas Jefferson and the Ideology of Democratic Schooling*, 21 DEMOCRACY & EDUC. 1, 3 (2013) (quoting XV THE WRITINGS OF THOMAS JEFFERSON 19, 918 (A.A. Lipscomb & A.E. Bergh eds., 1903)).

2. Implementing expectations of the state

The Industrial Revolution over the first half of the 1800s changed social and economic relationships among people and between people and the state.¹⁰³ As more people combined their labor and cities grew around factories, and economic growth in the state came to rely on “labor” as an economic and social class, states and the people increasingly recognized a role for the state in providing certain social goods or benefits to ensure their general well-being. To be clear, this was a very minimal level of “well-being”; it is more accurate to describe the social protections of the era as safety nets against abject destitution. Still, it established the concept of social rights.¹⁰⁴

The elements of social rights and economic protections rose in Europe, the United States, and throughout the world pursuant to industrialization and the creation of non-partisan administrative state bureaucracies that were perceived by the public as capable of administering social benefits without political or personal bias.¹⁰⁵ States began to provide these services and protections for multiple reasons, including domestic stability (responding to or preempting unrest from laborers, a growing social class), recognizing healthy labor as needed economic inputs, and as a political consequence of the evolving social compact.¹⁰⁶ As Stein Kuhnle and Anne Sander summarized,

The experience of industrialization sustainably altered the debate on the nature of social contingency and perceptions of poverty. Old age or sickness had of course been perceived as a threat to the well-being of individuals from time immemorial. Now, however, a new-found understanding of unemployment and of the operation of the business cycle made for a rethinking

103. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 77 (Beacon Press 1957) (1944).

104. Technically, state acts of welfare could be traced back to the British Elizabethan Act for the Relief of the Poor in 1601 and similar state acts through the Prussian *Landrecht* of 1794, but these were acts of charity of a monarch that supported local initiatives. See Stein Kuhnle & Anne Sander, *The Emergence of the Western Welfare State*, in *THE OXFORD HANDBOOK OF THE WELFARE STATE* 61, 62–63 (Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger & Christopher Pierson eds., 2010).

105. See Ann Shola Orloff & Theda Skocpol, *Why Not Equal Protection? Explaining the Politics of Public Social Spending in Britain, 1900–1911, and the United States, 1880s–1920*, 49 *AM. SOCIO. REV.* 726, 726–50, 740–42 (1984).

106. Kuhnle & Sander, *supra* note 104, at 64–65.

of the whole notion of welfare, with the focus changing to provisions that addressed the most significant social deficits with the most evident social consequences. The evolving ‘social question’ accompanying industrialization served as an important spur for the crystallization of the notion of social rights, as workers started to perceive themselves as one class and as the labor movement gained increasing importance. Focusing on the question of how economic progress could be secured in face of the political and moral threat imposed by the condition of the working class, the solution was increasingly seen as some kind of state action. Prior decades had seen the spread of democracy and political rights. Directly or indirectly, these now smoothed the way for social rights.¹⁰⁷

The nineteenth century saw a wide range of domestic social legislation, including social insurance, as well as labor standards and protections, public health, and public health measures.¹⁰⁸ The British Factory Act of 1802 limited workday hours to some extent and required factory owners to provide a minimal level of literacy to “apprentices” (i.e., child laborers), which was progress for its time. In 1834, Britain’s first “New Poor Law” recognized a state responsibility to provide a very minimal economic safety net, a sort of limited economic security.¹⁰⁹ Notably, just three years following that acknowledgment, Britain provided famine relief to its colonial subjects in India for the first time—extending the logic of this first acknowledgment of an economic responsibility to the people under the state’s dominion.¹¹⁰ From the beginning of the Industrial Revolution through the end of World War I in 1918, thirty-two countries in the world had established some sort of social insurance or compensation benefit for workplace injuries, eighteen countries had some form of public healthcare benefit or insurance, and thirteen had old-age disability or survivor’s benefits.¹¹¹

The United States lagged behind most Western states in providing what are now considered social rights. Scholars Theda Skocpol and Ann Orloff attribute this to the United States being relatively late to establish a non-partisan civil service that could be

107. *Id.* at 63.

108. *Id.* at 64–65.

109. BARNETT, *supra* note 92, at 63.

110. *Id.*

111. Kuhnle & Stander, *supra* note 104, at 69–70.

trusted to administer social services fairly.¹¹² Until the Civil Service Act of 1883, the U.S. federal bureaucracy was staffed under a “spoils” system, whereby most positions were filled by appointees of each new President, and they invariably favored short-term patronage over long-term benefits.¹¹³ In the United States, race was apparently less of a domestic factor in delaying a general benefit than it would be on the international level (see discussions herein on the League of Nations and U.N. human rights negotiations) because, whatever benefits were provided domestically (dating back to Civil War pensions) could—and did—simply exclude non-white people until the Civil Rights Act of 1964 prohibited such distinctions.¹¹⁴

Overall, worldwide social insurance and social security policies were an evolutionary step forward for the state. Security and stability of the state became more than just questions of foreign intrusion and domestic violence; it now recognized human security, which itself expanded beyond the merely physical to include economic and social aspects.¹¹⁵ Not coincidentally, this rationale would be echoed another century later in the 1990s discussions on failed states and responsibility to protect.

C. Expanding Statehood: Trusteeship Abroad

1. Defining “civilization”

While negotiating domestic responsibilities of a state, the European Great Powers were able to dictate expectations for peoples and potential states abroad in their colonies. Speaking from his experience as a British colonial officer in India, J.S. Mill wrote in his 1836 essay, *Civilization*, that the term “is a word of double meaning . . . [including] *human improvement* in general, and sometimes . . . *certain kinds* of improvement in particular.”¹¹⁶ He further described the “ingredients of civilization”:

112. See Orloff & Skocpol, *supra* note 105, at 739.

113. See *id.* at 731; U.S. OFF. OF PERS. MGMT., *BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE* 9 (2012).

114. See Orloff & Skocpol, *supra* note 105, at 729.

115. Kuhnle & Stander, *supra* note 104, at 64.

116. JOHN STUART MILL, *CIVILIZATION*, reprinted in *ESSAYS ON POLITICS AND CULTURE* 51 (Gertrude Himmelfarb ed., Doubleday 1962) (1836) (emphasis in original).

[A] savage tribe consists of a handful of individuals, wandering or thinly scattered over a vast tract of country: a dense population, therefore, dwelling in fixed habitations, and largely collected together in towns and villages, we term civilized. In savage life there is no commerce, no manufacture, no agriculture, or next to none; a country in the fruits of agriculture, commerce, and manufactures, we call civilized. In savage communities each person shifts for himself; except in war (and even then very imperfectly) we seldom see any joint operations carried on by the union of many; nor do savages find much pleasure in each other's society. Wherever, therefore, we find human beings acting together for common purposes in large bodies, and enjoying the pleasures of social intercourse, we term them civilized.¹¹⁷

Many Enlightenment-era thinkers articulated individual freedom as a purpose of the state. Some also rationalized that individual freedom must be expanded to all states as a matter of international security: truly democratic states would be highly disinclined to go to war with each other. Bowden summarizes Immanuel Kant on this point: Kant's *Idea for a Universal History* described the individual's "highest purpose of Nature" as "realizable only in a 'society with the greatest freedom' under a 'perfectly just civic constitution'" —the individual needs the institutions of the state, administered objectively, to help them most fully realize their individual freedom.¹¹⁸ In turn, in such an ideal-type state with a representative government, the represented individuals would be unlikely to exercise their free will to commit themselves to war. Per Bowden, Kant

affirms that the "republican constitution, besides the purity of its origin . . . also gives a favorable prospect for the desired consequence, i.e., perpetual peace." The "reason is this: if the consent of the citizens is required in order to decide that war should be declared (and in this constitution it cannot but be the case), nothing is more natural than that they would be very

117. *Id.* at 52.

118. BOWDEN, *supra* note 91, at 84–85 (citing IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW*, reprinted in KANT: ON HISTORY 11, 16 (Lewis White Beck ed., Bobbs-Merrill 1963) (1784); PERPETUAL PEACE, reprinted in KANT: ON HISTORY 85, 93–95 (1798)).

cautious in commencing such a poor game, decreeing themselves all the calamities of war.¹¹⁹

The consent of free, “civilized” citizens to their government helps to ensure domestic stability of the state. States beholden to that consent help ensure international security. Hence, national interest becomes a basis for exporting the elements for Westphalian governance—including as a justification for colonialism (framed independently of the more prosaic economic extraction motive).

The 1885 Berlin Conference among European powers settled the “scramble for Africa,” dividing African territories for their respective colonial control. The Treaty of Berlin (also referred to as the General Act) outlined a trustee-type relationship. Article 6 stated,

All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves *to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.*¹²⁰

They implicitly acknowledged that they did not have legitimacy in the form of consent of the governed, but they justified their dominion by rationalizing that the people lacked the ability to provide that consent. Their relationship was paternalistic; they created and took on a state responsibility to develop the territory and people to “bring[] home to them the blessings of civilization.”¹²¹ This, as Rudyard Kipling infamously described in advocating for the United States to provide development assistance to the Philippines after gaining control over it in the Spanish-American War in 1898, was “the white man’s burden.”¹²²

The emerging consensus standard of civilization among European states and thinkers was a state that represents the will of

119. *Id.*

120. General Act of the Berlin Conference on West Africa art. 6, Feb. 26, 1885 (emphasis added).

121. *Id.*

122. Rudyard Kipling, *The White Man’s Burden: The United States and The Philippine Islands*, MCCLURE’S MAG., Feb. 1899, at 12.

the people of its territory in international relations externally and protects the private life, liberty, and property of individuals regardless of nationality internally.¹²³

That standard is still very relevant today; it informs the international community's general end-goal for a "developing" country: a government whose legitimacy is based on popular sovereignty (which implicates civil and political rights), exercised without bias (rule of law and civil rights), and committed to protecting property (economic rights) and respecting—and necessarily cultivating—liberty (social and cultural rights—e.g., especially, religion).

2. Acknowledging self-determination . . . at some indeterminate future point

After Berlin, the next international agreement to address colonies was more specific: the Charter of the League of Nations in 1919 established the Mandates system in the wake of World War I, reframing colonial rule as a transitional authority. Article 22 of the Charter stated,

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

*The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.*¹²⁴

The "well-being and development" of the people became a "sacred trust" of the occupying authority.¹²⁵ It also begged the question: Would that not also be the case for a legitimate

123. BOWDEN, *supra* note 91, at 123.

124. League of Nations Covenant art. 22 (emphasis added).

125. *Id.*

government? Article 23 laid out the elements of this governing stewardship, including responsibilities to

endeavour to secure and maintain fair and humane conditions of labor . . . ;

undertake to secure just treatment of the native inhabitants . . . ;

make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League[; and]

endeavour to take steps in matters of international concern for the prevention and control of disease.¹²⁶

The affected former colonial territories were divided into three classes within the League's Mandate system, based on perceptions of their level of "civilization" or "development."¹²⁷ From Class A, the French Mandate for Syria and Lebanon included terms such as Article 1, directing the governing Mandatory to "facilitate the progressive development of Syria and the Lebanon as independent States"; Article 6 to "establish . . . a judicial system which shall assure to natives as well as to foreigners a complete guarantee of their rights"; and Article 8 guaranteeing "the free exercise of all forms of worship" and "encourag[ing] public instruction."¹²⁸ Class A and Class B mandates also included clauses on the security of all people and property (for nationals of any member of the League) and free trade. From Class C, Australia's mandate in New Guinea did not mention improvement of "the natives," but Section 15 did outlaw slavery and commit to "free exercise of all forms of worship."¹²⁹

At the outset of the negotiations for the Charter, U.S. President Woodrow Wilson asserted an ideal of universal self-determination in his "Fourteen Points" speech:

What we demand . . . is nothing peculiar to ourselves. It is that the world be made fit and safe to live in; and particularly that it be

126. *Id.* art. 23.

127. Denys P. Myers, *The Mandate System of the League of Nations*, 96 ANNALS AM. ACAD. POL. & SOC. SCI. 74 (1921).

128. COUNCIL OF THE LEAGUE OF NATIONS, *French Mandate for Syria and the Lebanon*, 3 LEAGUE NATIONS OFF. J. 1013, 1013-14 (1922).

129. *New Guinea Act 1920* (Cth) (Austl.) (codifying terms of the Australian Mandate for New Guinea).

made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression. All the peoples of the world are in effect partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us.¹³⁰

The Charter itself was significantly less emphatic. Indeed, a Japanese proposal to include a statement on racial equality in the Charter was rejected due to concerns of the American and Great Powers representatives over implications for their domestic governance.¹³¹ But it did contemplate self-determination for the Class A Mandates, describing “the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”¹³² The trustee governments were expected to provide basic state administration, including labor and commerce regulation and infrastructure, and fair administration of justice. Though the United States ultimately did not ratify the Charter, it had taken on for itself similar responsibilities in the territories it had gained control of in the Spanish-American War of 1898. It also provided public health interventions, with sanitation and yellow

130. Woodrow Wilson, *President Woodrow Wilson's Fourteen Points*, AVALON PROJECT (Jan. 8, 1918), https://avalon.law.yale.edu/20th_century/wilson14.asp. In response to the advocacy for self-determination, W.E.B. Du Bois and other leaders of the NAACP traveled to the Paris negotiations in hopes of petitioning for self-determination for black people. The group deliberately mirrored the fourteen-point speech in presenting a nine-point declaration. Point 8 used the “civilization” rhetoric, as well: “*Civilized Negroes*: Wherever persons of African descent are civilized and able to meet the tests of surrounding culture, they shall be accorded the same rights as their fellow citizens; they shall not be denied on account of race or color a voice in their own government, justice before the courts and economic and social equality according to ability and desert.” See Arnulf Becker Lorca, *Petitioning the International: A ‘Pre-history’ of Self-determination*, 25 EUR. J. INT’L L. 497, 500 (2014). Their petition was not successful, and the final Charter took a more limited approach to self-determination. *Id.*

131. Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 HIST. J. 379, 382 (2004) (“A Japanese proposal that the League commit itself to racial equality was unceremoniously and improperly blocked by the major Powers, despite the support it had attracted from other states. . . . So far as Whitehall [(a colloquialism for the British government)] was concerned, the League was not going to be allowed to pontificate about racial segregation in the USA, nor about the English treatment of Catholics or Chinese in Liverpool.”); Seth Mohnney, *The Great Power Origins of Human Rights*, 35 MICH. J. INT’L L. 827, 833 (2014).

132. League of Nations Covenant art. 22.

fever eradication campaigns in the Philippines and Cuba, which benefited American security and economic interests.¹³³

D. The United Nations Charter: Transition to Human Rights-Based Obligations

1. Post-war: The New Deal at home and abroad

During World War II, U.S. President Franklin Delano Roosevelt contended with domestic responsibilities of the state at home, which influenced his proposals that significantly shaped the United Nations Charter in 1945 and the U.N. Declaration of Human Rights in 1948.

Having become president in the midst of the Great Depression, Roosevelt initially focused on establishing economic and social safety nets at home. He worked with Congress to pass the Social Security Act of 1935. As a bill, it also briefly mentioned health, but according to an authoritative account, it was “struck out . . . because of objections by Southern political leaders that the federal government might use such phrases to force their states to pay higher pensions to blacks than they thought desirable.”¹³⁴ Still, it established America’s minimal social safety net. Roosevelt’s 1941 State of the Union address, which became known as the *Four Freedoms* speech, identified domestic economic and social conditions as causes of state instability and, consequently, threats to international security, and proposed state intervention accordingly:

Certainly this is no time for any of us to stop thinking about the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world. For there is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: Equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it. The ending of special privilege for the few. The preservation of civil liberties for all. The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.

133. See RANDALL M. PACKARD, *A HISTORY OF GLOBAL HEALTH: INTERVENTIONS INTO THE LIVES OF OTHER PEOPLES* 17–19, 28–31 (2016).

134. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 269 (2017).

....

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression – everywhere in the world.

The second is freedom of every person to worship God in his own way – everywhere in the world.

The third is freedom from want – which, translated into world terms, means economic understandings which will *secure to every nation a healthy peacetime life for its inhabitants* – everywhere in the world.¹³⁵

In 1945, he would further propose a “Second Bill of Rights” to guarantee economic rights within the United States. He framed it as a matter of individual liberty:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all – regardless of station, race, or creed.¹³⁶

He listed nine specific rights in the speech, including a right to employment, a right to a living wage (“enough to provide adequate food and clothing and recreation”) adequate medical care “and the opportunity to achieve and enjoy good health,” social security (“adequate protection from the economic fears of old age, sickness, accident, and unemployment”), and education.¹³⁷ These did not become binding domestic U.S. rights—arguably for uniquely

135. Franklin Delano Roosevelt, *Transcript of President Franklin Roosevelt's Annual Message (Four Freedoms) to Congress (1941)*, OUR DOCUMENTS (emphasis added), <https://www.ourdocuments.gov/doc.php?flash=false&doc=70&page=transcript> (last visited Jan. 29, 2021).

136. Franklin Delano Roosevelt, *State of the Union Message to Congress*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM (Jan. 11, 1944), http://www.fdrlibrary.marist.edu/archives/address_text.html. For further discussion on Roosevelt's speech, see Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 *DRAKE L. REV.* 205, 207 (2005).

137. Roosevelt, *supra* note 136.

domestic U.S. reasons¹³⁸— but they greatly influenced human rights commitments elsewhere.

And he was not alone. As Europe faced reconstruction after World War II, Sir William Beveridge submitted his report, *Social Insurance and Allied Services*, frequently cited as a foundational document of the modern welfare state, to the government of the United Kingdom in 1942.¹³⁹ This was shortly before the international aid effort for the reconstruction of Europe (including establishment of the Bretton Woods institutions in 1944 and the Marshall Plan speech in 1947). The Beveridge report laid out three guiding principles for a comprehensive social safety net:

The first principle is that any proposals for the future [should be comprehensive]. Now, when the war is abolishing landmarks of every kind, is the opportunity for using experience in a clear field. A revolutionary moment in the world's history is a time for revolutions, not for patching.

The second principle is that . . . social insurance should be treated as one part only of a comprehensive policy of social progress. Social insurance fully developed may provide income security; it is an attack upon Want. But Want is one only of five giants on the road of reconstruction and in some ways the easiest to attack. The others are Disease, Ignorance, Squalor and Idleness.

The third principle is that social security must be achieved by co-operation between the State and the individual. The State should offer security for service and contribution. The State in organising security should not stifle incentive, opportunity, responsibility; in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family.¹⁴⁰

The proposed baseline, then, was an economic safety net—a minimum economic right of individuals, provided by the state

138. In particular, race in America. See Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 187 (2001) (comparing racial compositions and views of poverty in America and Western European countries); STARR, *supra* note 134, at 269 (explaining how race was a factor in removing healthcare from the U.S. Social Security Act of 1935).

139. WILLIAM BEVERIDGE, *SOCIAL INSURANCE AND ALLIED SERVICES* 1 (1942), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf.

140. *Id.* at 6–7.

through compulsory contributions (taxation), and separate arrangements for healthcare and education.

2. *The Charter*

The 1945 United Nations Charter itself further developed international expectations of a state, while emphasizing domestic discretion and expressly precluding international enforcement of many of those expectations. In the preparatory negotiations for the Charter at Dumbarton Oaks, the Great Powers recognized the need to set limits on domestic state conduct that threatened international security, but they also sought to ensure that they would not be compelled to intervene, and, more urgently, that the new international organization could not enforce standards they might establish internationally against themselves domestically.

Even with these caveats, the Chinese delegation caused complications when it proposed “that there should be a clear overarching commitment to the principle of racial equality, and to human rights in general.”¹⁴¹ The American and British delegations, joined by the Russians, again expressed concern about domestic implications. The latter two opposed reference to human rights at all. The American delegation insisted on including human rights, but also created insulation against enforcement thereof. As Mark Mazower describes,

President Roosevelt had let it be known privately that he was strongly in favour of some reference to human rights. The administration felt caught between the Scylla of isolationists, anxious to preserve the constitution of the U[nited] S[tates] from outside intervention [, and to forestall international pressure on domestic U.S. racial policies], and the Charybdis of internationalists who were inspired by Roosevelt’s idealistic rhetoric and believed the administration should take seriously its mission of building a freer world. Hence the Americans proposed a formulation which would allow them to have their cake and eat it too, posing as defenders of *both* universal human rights *and* domestic state rights.

The International Organization should refrain from intervention in the internal affairs of any state, it being the responsibility of each state to see that conditions prevailing within

141. Mazower, *supra* note 131, at 391.

its jurisdiction do not endanger international peace and security and, to this end, to respect the human rights and fundamental freedoms of all its people and to govern in accordance with the principles of humanity and justice.¹⁴²

Thus, Article 2 of the Charter reaffirms the concept of sovereignty first established by the League of Nations, stating, “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. . . .”¹⁴³

Though territorial sovereignty is typically characterized as a defensive mechanism for former colonies, it bears noting that the Great Powers did not agree to it as a concession to them; they insisted on it as insurance against commitments to them – and were partly motivated by hopefully outdated views on racial discrimination.¹⁴⁴ (The U.S. Civil Rights Act of 1964 and Voting Rights Act of 1965 were still twenty years away at the time.)

Elsewhere, the Charter established an international standard – or, at least, expectation – for domestic governance.¹⁴⁵ Article 1(3) set out among the United Nation’s purposes “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all.”¹⁴⁶ Article 55 in Chapter IX, on International Economic and Social Cooperation, elaborates,

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

higher standards of living, full employment, and conditions of economic and social progress and development;

142. *Id.* at 391–92 (quoting PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (1998)).

143. U.N. Charter art. 2, ¶ 4.

144. Mohny, *supra* note 131, at 839.

145. U.N. Charter art. 2, ¶ 7.

146. *Id.* art. 1, ¶ 3.

solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁴⁷

Granted, unlike security issues under the purview of the Security Council, these expectations for the state have no binding enforcement mechanism. Other than asking the Security Council to consider security-related implications of an issue, the main recourse for the Economic and Social Council is to send “recommendations” to an individual member state or the General Assembly.¹⁴⁸

3. The trusteeship system

Along with the aspirational statement on state responsibilities, the U.N. Charter also included a Trusteeship Council to continue the transition from colonialism started by the League of Nations’ Mandate system. Under the U.N. Charter, the trusteeship system is arguably the only binding guidance for expectations of a state. Chapters XII and XIII established the U.N. Trusteeship System and the Trusteeship Council to oversee it. The system was effectively limited to the remaining trustee arrangements from the League of Nations’ Mandate system, and the Council was disbanded in 1994 upon the independence of the final Trust territory, though it technically remains available to be recalled by the General Assembly.¹⁴⁹

Chapter XII specified expectations of trustees and criteria for independence of the trust territories. Article 76 listed “basic objectives” of the system, including

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely

147. *Id.* art. 55.

148. *Id.* art. 62, ¶ 2.

149. Trusteeship Council Res. 2200 (LXI), at 2 (May 25, 1994).

expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.¹⁵⁰

Article 88 required administering trustees to submit annual reports on “the political, economic, social, and educational advancement of the inhabitants of each trust territory.”¹⁵¹ The deliberations for the provisional (template) questionnaire focused on infrastructure, education, and social services, including health insurance, as well as political rights (and non-discrimination in all of these).¹⁵² In reality, the trust territories petitioned for and ultimately were granted their independence in the absence of robust implementation of economic, social, and cultural rights, but the marker of expectations was at least there.

E. Human Rights: Nonbinding and Binding

1. The Universal Declaration of Human Rights

A few years later, the 1948 Universal Declaration of Human Rights presented the next evolutionary leap. It was much more specific than anything that preceded it, though still expressly nonbinding. Eleanor Roosevelt led the U.S. delegation, with instructions from the State Department to not agree to a binding covenant at the time. For her part, she convincingly argued that a nonbinding declaration would be an immediate statement and beacon for the world, while avoiding the damaging counter-narrative of American rejection – almost certain defeat in a U.S. domestic ratification debate with American southern state

150. U.N. Charter art. 76(b)–(d).

151. *Id.* art. 88.

152. U.N. TCOR, 1st Sess., Compilation of Questions in the Formulation of Questionnaires: Item 8 of the Provisional Agenda, U.N. Doc. T/9 (Mar. 25, 1947).

senators.¹⁵³ She also successfully advocated within the U.S. delegation and directly with President Truman to agree to include economic, social, and cultural rights in the declaration at all. (She directly invoked President Roosevelt's New Deal and the *Four Freedoms* speech.)¹⁵⁴

The resulting Declaration states in its preamble that it is "a common standard of achievement for all peoples and all nations."¹⁵⁵ It includes several provisions on civil and political rights and liberties:

Article 18: Everyone has *the right to freedom of thought, conscience and religion*; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19: Everyone has *the right to freedom of opinion and expression*; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20:

Everyone has *the right to freedom of peaceful assembly and association*.

No one may be compelled to belong to an association.

Article 21:

Everyone has *the right to take part in the government of his country, directly or through freely chosen representatives*.

Everyone has the right of equal access to public service in his country.

*The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*¹⁵⁶

And it includes several provisions on economic, social, and cultural rights:

153. Mohney, *supra* note 131, at 853–56.

154. MICHELIN R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 222 (2d. ed. 2008).

155. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

156. *Id.* arts. 18–21 (emphasis added).

Article 3: Everyone has the *right to life, liberty and security of person*.

Article 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the *economic, social and cultural rights* indispensable for his dignity and the *free development of his personality*.

Article 23:

Everyone has *the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*.

Everyone, without any discrimination, *has the right to equal pay for equal work*.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

Article 25(1): Everyone has the right to a *standard of living* adequate for the *health and well-being* of himself and of his family, including *food, clothing, housing and medical care and necessary social services*, and the right to security in the event of [personal tragedy] beyond his control.

Article 26:

1) Everyone has the right to *education*. . . .

2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. . . .¹⁵⁷

This is all to say, the Declaration spoke at length about several rights the state should be responsible for, but expressly did not hold them to any of it. Under the circumstances, it was a strategic success. It sent a message and established a norm, and the ensuing decades would prove Eleanor Roosevelt right: the U.S. Senate

157. *Id.* arts. 3, 22–23, 25–26 (emphasis added).

rejected attempts at binding human rights commitments even decades later.

2. *The International Bill of Rights: Two covenants*

In December 1950, U.N. General Assembly Resolution 421 (V) called for the Commission on Human Rights, under the direction of the U.N.'s Economic and Social Council (ECOSOC), to draft a single, binding "International Covenant on Human Rights," including "provisions rendering it obligatory for States to promote the implementation of the human rights and fundamental freedoms proclaimed [therein] to take the necessary steps . . . to guarantee to everyone the real opportunity of enjoying those rights and freedoms."¹⁵⁸

Almost immediately, that commission recognized the two key questions: How exactly would states implement such rights? And to what extent would the international community be responsible to provide assistance?¹⁵⁹ They observed that civil and political rights are individual rights against the state; they could be legislated, implemented, and enforced within a state through courts. But economic, social, and cultural rights would be more complicated.

Daniel Whelan summarized the challenge of economic, social, and cultural rights:

Of significant difficulty for the Commission in 1951 – and indeed for us today – was determining the scope of obligations and the appropriate international institutional mechanisms for the protection and promotion of economic, social, and cultural rights. Do the obligations rest solely on states-parties, and how strong are those obligations? Should international assistance be made available to states-parties in order for them to meet their obligations? Would states be *required* to seek assistance from the international community to meet their obligations? Would they have a right to assistance? What, exactly, would "assistance" include? Would Western states, independent of the U.N. and its specialized agencies, have obligations to developing states?¹⁶⁰

158. G.A. Res. 421(V) (Dec. 4, 1950).

159. DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 96 (2010).

160. *Id.*

For the newly independent former colonial states, sovereignty and protection against foreign intervention without their consent was important, but they also saw a role for international assistance to help meet their domestic governance responsibilities. For former colonial powers and other advanced economies, the primary goal was to avoid a binding duty to provide assistance; they preferred to maintain discretion to provide assistance—as they had since the League of Nations and to this day. In those early 1951 negotiations, Yugoslavia proposed a clause on international cooperation, whereby “Signatory States whose economic situation was difficult would thus be aware that they could rely on help from the international community in implementing economic, social and cultural rights.”¹⁶¹ India’s representative, Hansa Mehta, added that India would agree to a term that expressly established an affirmative international responsibility to assist. She even offered a framework: India would support such a term

if the meaning was that when the resources of a State were inadequate it would receive international help on certain conditions which it would have to accept. . . . It should be for a State to declare that its resources are inadequate and to ask the United Nations for assistance, which should be granted provided the request was justified.¹⁶²

This approach was not adopted. From the would-be donor government perspective, Mrs. Roosevelt made clear that the United States would not support an interpretation that would, as Whelan put it, “translate states-parties’ *national* obligations to progressively implement economic, social, and cultural rights through international cooperation into *interstate obligations*—rights-claims for development assistance.”¹⁶³ She also accurately predicted the U.S. Senate would not ratify a covenant with economic, social, and cultural rights.¹⁶⁴ Fellow U.S. representative, John Humphrey, supported a system whereby states self-report progress toward implementation of economic, social, and cultural rights, which donor governments and U.N. agencies would use to guide—but not compel—their assistance. While also reaffirming the view that

161. *Id.* at 98 (quoting U.N. Docs. E/CN.4/SR.232, 13) (emphasis omitted).

162. *Id.* at 98 (quoting U.N. Docs. E/CN.4/SR.233, 11–12).

163. *Id.* at 108.

164. *Id.* at 110.

facilitating these rights are a domestic state responsibility, he wrote, “The idea is to help governments to fulfil their obligations rather than to penalize them for violations; and use is made of the technical assistance program.”¹⁶⁵

As originally conceived, all of the rights in the Universal Declaration were meant to work together. Economic, social, and cultural rights were supposed to be necessary pre-conditions for the exercise of civil and political rights.¹⁶⁶ The U.N. General Assembly resolution calling for a binding follow-up to the declaration had, after all, expressly contemplated that all of the rights needed to coexist, observing,

[T]he enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent. . . . [W]hen deprived of economic, social, and cultural rights, man does not represent the human person whom the Universal Declaration [of Human Rights] regards as the ideal of the free man.¹⁶⁷

But it was not to be. Recognizing the impasse, India proposed to split the two sets of rights into the two separate covenants that now exist.¹⁶⁸ The United States supported this; the Soviet Union opposed but was ultimately overruled dozens of meetings and multiple votes later.¹⁶⁹

Even after the proposed “International Bill of Rights” was split into two, it would still take decades to complete them: the U.N. International Covenant on Civil and Political Rights (ICCPR) and the U.N. International Covenant on Economic, Social, and Cultural Rights (ICESCR) were each adopted in 1966 and ratified in 1976. For the United States, Jimmy Carter, the first Democratic President since their adoption, signed both in 1977. And the U.S. Senate ratified ICCPR in 1992, within months of also passing the

165. *Id.* at 102 (quoting 2 JOHN HUMPHREY, ON THE EDGE OF GREATNESS: THE DIARIES OF JOHN HUMPHREY, FIRST DIRECTOR OF THE UNITED NATIONS DIVISION OF HUMAN RIGHTS, 1950–1951, 210 (A.J. Hobbins ed., McGill University Libraries, 1996)).

166. *Id.* at 106.

167. G.A. Res. 421(V), ¶ 6 (Dec. 4, 1950).

168. WHELAN, *supra* note 159, at 106.

169. *Id.* at 107.

FREEDOM Support Act to promote democracy in former Soviet states.¹⁷⁰ As of 2020, the U.S. Senate has not ratified ICESCR.

For its part, the ICCPR acknowledged the link between civil and political rights and those in the ICESCR. Article 1(1) states, “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”¹⁷¹ It sets out the following civil and political rights:

Article 6: Right to life. “Every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life.”

Article 7: Prohibition on “cruel, inhuman, or degrading treatment or punishment.”

Article 8: Ban on slavery.

Article 9: “Everyone has the right to liberty and security of person.”

Article 14: Rule of law. “All persons shall be equal before the courts and tribunals.”

Article 17: Right to Privacy. “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence”

Article 18: “Everyone shall have the right to freedom of thought, conscience and religion.”

Article 19: Freedom of expression.

Article 21: “The right of peaceful assembly shall be recognized.”

Article 22: Freedom of association.

Article 25: Right to vote. “Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote . . . at genuine periodic elections which shall be by universal and equal suffrage and shall

170. Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR (Jun. 29, 1992), <https://www.cartercenter.org/news/documents/doc1369.html>; Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, Pub. L. No. 102-511, 106 Stat. 3320.

171. International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

be held by secret ballot, guaranteeing the free expression of the will of the electors.”¹⁷²

The ICESCR has the same Article 1(1) as the ICCPR, further linking the two sets of rights.¹⁷³ Its Preamble recognizes that

in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.¹⁷⁴

The ICESCR clause on state responsibility and international cooperation, Article 2(1), provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means¹⁷⁵

So, each state party accepted the responsibility to work toward full realization of these rights, subject to trade-offs they may make based on financial and other constraints. They committed to collaborate through international assistance, but this collaboration was left to discretion and negotiation; it is not automatic or compelled. The specific rights the state parties committed to work toward include the following:

Article 7: Labor rights. “[T]he right of everyone to the enjoyment of just and favourable conditions of work,” which expressly includes fair pay; living wages (“a decent living for themselves and their families”); and “[s]afe and healthy working conditions.”

Article 9: Social security, “including social insurance,” i.e., a social safety net.

Article 11: Freedom from hunger. Anti-poverty protections (as an aspirational goal that may require voluntary foreign aid). “[T]he right of everyone to an adequate standard of living . . . including

172. *Id.* arts. 6–9, 14, 17–19, 21–22, 25.

173. *See* International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

174. *Id.* pmbl.

175. *Id.* art. 2, ¶ 1.

adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

Article 12: Health care. "[T]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Article 13: Education as a necessary condition for full exercise of political and other rights. "[T]he right of everyone to education. [States Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace." This provision states that primary education "shall be compulsory and available free to all," and secondary and higher education shall be made generally available and "accessible to all," with a goal of "the progressive introduction of free education."¹⁷⁶

The enforcement mechanism here—more appropriately described as an implementation monitoring process—is for the States Parties to submit periodic progress reports to ECOSOC, which can inform development assistance activities of U.N. agencies and other governments.¹⁷⁷ ECOSOC may also forward reports and information to the Commission on Human Rights for recommendations.¹⁷⁸

The arc of "development" enterprise, from the concept of state sovereignty to popular sovereignty to colonialism to the unwinding of colonial empires has held to a pattern: the great powers of their eras dictated to the rest of the world the standards for legitimate and functional statehood; as they clarified these concepts, two ideas remained constant: they should not be judged by these standards, and they should not be forced to assist in other states' attainment thereof.

176. *Id.* arts. 7, 9, 11–13.

177. *Id.* arts. 16–22.

178. *Id.* art. 29.

F. Enter “the Right to Development”: The Developing Countries’ Response

By the 1970s, the ranks of former colonies and other newly independent members of the United Nations had reached a critical mass, and they had a forum—for nonbinding declarations, at least—in the General Assembly. Several allied to articulate a developing country perspective in the international discourse. Their first sustained response was a proposal for a “new international economic order” (NIEO), which would re-shape institutions and relationships away from great power dominance toward a more level playing field.¹⁷⁹ It did not succeed, but it introduced concepts that have helped shape the development dialogue, including the idea of the right to development.

In 1986, the U.N. General Assembly adopted the Declaration on the Right to Development as a nonbinding resolution.¹⁸⁰ Its preamble observed “that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized” (also citing the ICCPR and ICESCR).¹⁸¹ Its articles expressly framed the full range of civil, political, economic, social, and cultural rights as “indivisible and interdependent” human rights and state responsibilities:¹⁸²

Article 1(1): The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy *economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized.

Article 3(1): States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

Article 6:

. . . .

179. ISABELLA BUNN, *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS* 35–36 (2012).

180. G.A. Res. 41/128, *supra* note 5, pmbl.

181. *Id.*

182. *Id.*

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

States should take steps to eliminate obstacles to development resulting from failure to observe *civil and political rights*, as well as *economic, social and cultural rights*.¹⁸³

It also calls for an international responsibility or duty to provide development assistance:

Article 3(3): States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States¹⁸⁴

This, predictably, has been the main obstacle to donor government support. The United States voted against this nonbinding resolution; eight other donor governments abstained.¹⁸⁵ For the United States, the Reagan administration expressed ideological opposition to economic, social, and cultural rights. In the drafting negotiations, U.S. representative Michel Novak rejected the idea of a right to international assistance, asserting that individuals had a responsibility to develop themselves. In his words,

[I]n addressing this item, my delegation finds it useful to translate the phrase “right to development” into terms rooted in our own experience. . . .

In 1881 . . . no one spoke of a “right to development.” But our nation had an *opportunity* to develop, perhaps even a *responsibility* to develop. Our people knew that a responsibility to develop was imposed on them by their own capabilities and blessings, and by their new ideas about political economy.¹⁸⁶

183. *Id.* arts. 1, 3, 6 (emphasis added).

184. *Id.* art. 3, ¶ 3.

185. Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 138, 142–43 (2004).

186. *Id.* at 144 (perhaps making a cultural assertion, evoking Max Weber’s “Protestant Work Ethic”).

This was an ahistorical assertion, to put it mildly, ignoring among other things the developmental gains in the United States that resulted from the New Deal era. Regardless, the U.S. delegation also expressed a longstanding, ideologically neutral U.S. position that foreign assistance should be a foreign policy tool subject to each government's discretion, not a compulsion or duty. U.S. administrations have consistently opposed a binding commitment to provide international assistance for a right to development. Even the Democratic Clinton and Obama administrations consistently abstained from any measures advancing a "right to development."¹⁸⁷

Notably, around the same time as the Declaration on the Right to Development, a separate U.N. World Commission on Environment and Development issued a report in 1987, *Our Common Future* (also referred to as the Brundtland Report) that created the term "sustainable development." It framed the environment as a global commons and international security issue, for which all states should take additional precautions and incur additional costs when implementing development activities.¹⁸⁸ It proposed additional burdens on states, to which a coalition of developing countries responded by calling on donor governments to facilitate "technology transfer"—to help them gain access to industrial technology at less than full market costs. To this day, there have been no concrete commitments on this—per the donor government position that they should not be compelled to provide foreign assistance, though they may choose to as a matter of foreign policy discretion.¹⁸⁹

Since then, the most notable statements of international expectations for state responsibility for development are the 2000

187. See, e.g., U.S. MISSION TO INT'L ORG. IN GENEVA, *Item 1: Decision Adoption – EOY by the United States of America – Right to Development Resolution* (Oct. 1, 2009), <https://geneva.usmission.gov/2009/10/01/item-1-right-to-development/>.

188. WORLD COMM'N ON ENV'T & DEV., *OUR COMMON FUTURE*, ch. 1, ¶ 27 (1987), <http://www.un-documents.net/our-common-future.pdf>.

189. For example, for all the urgency of the 2015 Paris Agreement on Climate Change, the agreement itself only goes so far as to "recognize the importance of . . . technology transfer and capacity-building," committing "[d]eveloped country Parties" only to "provide information on financial, technology transfer and capacity-building support provided to developing country Parties." Framework Convention on Climate Change, Paris Agreement, art. 6, ¶ 8, art. 13, ¶ 9, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), <https://unfccc.int/process/conferences/pastconferences/paris-climate-change-conference-november-2015/paris-agreement>.

U.N. Millennium Development Goals (MDGs) and the follow-on 2015 Sustainable Development Goals (SDGs). The nonbinding 2000 U.N. Millennium Declaration observed, “Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally.”¹⁹⁰ It set out goals in eight areas, including eradicating hunger and poverty, achieving universal primary education, improving public health infrastructure (with a focus on communicable diseases and maternal health), and improving environmental sustainability.¹⁹¹

The 2015 follow-on SDGs go into more detail, with more categories of goals in more areas of governance. These include, among others:

- No poverty,
- No hunger,
- Good health,
- Clean water and sanitation,
- Renewable energy,
- Good jobs and economic growth,
- Innovation and infrastructure,
- Sustainable cities,
- Climate action, and
- Peace and justice.¹⁹²

The health goals include “achiev[ing] universal health coverage, including financial risk protection.”¹⁹³ The education goals include “free, equitable and quality primary and secondary education,” and literacy for all youth.¹⁹⁴ The goals for peace and justice include promoting rule of law; developing “effective,

190. G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/2.

191. *Id.*

192. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

193. *Id.* at 16 (Goal 3).

194. *Id.* at 17 (Goal 4).

accountable and transparent institutions at all levels”; and ensuring “responsive, inclusive, participatory and representative decision-making at all levels.”¹⁹⁵

Notably, the resolution for the SDGs also expressly invokes the Declaration on the Right to Development. It states,

The new Agenda is guided by the purposes and principles of the Charter of the United Nations. . . . It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration, and the 2005 World Summit Outcome. It is informed by . . . the Declaration on the Right to Development.¹⁹⁶

In January 2020, a working group under the U.N. Human Rights Council produced a first draft of a proposed binding international covenant on the Right to Development. It does well to draw many of the connections discussed here, between the rights that already exist and between domestic governance and international interests. The draft Preamble frames it as

[e]mphasizing that the right to development is an inalienable human right of all human persons and peoples, . . .

. . . .

[r]ecognizing that development is a comprehensive economic, social, cultural, civil, and political process that aims at the constant improvement of the well-being of the entire population and of all individuals . . . ,

. . . .

[r]eaffirming the universality, indivisibility, interrelatedness, interdependence, and mutually reinforcing nature of all civil, cultural, economic, political and social rights, including the right to development, [and]

. . . .

[c]onsidering that peace and security at all levels is an essential element for the realization of the right to development and that such realization can, in turn, contribute to the establishment,

195. *Id.* at 25 (Goal 16).

196. *Id.* at 4.

maintenance and strengthening of peace and security at all levels¹⁹⁷

Other provisions assert something that could be interpreted as a binding commitment on the international community to provide assistance. Draft Article 4, defining the right to development, states,

Every human person and *all peoples* have the inalienable right to development by virtue of which they are entitled to participate in, contribute to and enjoy economic, social, cultural, civil and political development that is consistent with and based on all other human rights and fundamental freedoms.¹⁹⁸

The reference to “peoples” raises the possibility that the right is more than an individual human right, and potentially also a state right at the international level. Articles 10, 11, and 12 describe an “obligation to respect,” “obligation to protect,” and “obligation to fulfil” the right to development.¹⁹⁹ These clearly place a responsibility on the state vis-à-vis its people. Articles 12 and 13 go potentially further on international cooperation: The former states, “Each State Party undertakes to take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development. . . .”²⁰⁰ The latter adds an international “duty to cooperate” through “joint and separate action.”²⁰¹ Based on the history of international commitments—in particular, donor states’ reticence to be required to provide assistance—a covenant with a provision to this effect is extremely unlikely to ever gain the support of the governments with the most resources to provide aid. For better or worse, foreign intervention or assistance in any form has always been a discretionary act.

At this point, there have been enough statements on the appropriate substance of development and the role of the state in facilitating it to form a consensus—albeit nonbinding—understanding. The state is bound internally by the social compact

197. Draft Convention on the Right to Development, Working Group on the Right to Development, Hum. Rts Council, U.N. Doc. A/HRC/WG.2/21/2 (Jan. 17, 2020), https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf.

198. *Id.* art. 4 (emphasis added).

199. *Id.* arts. 10–12.

200. *Id.* art. 12.

201. *Id.* art. 13.

with its people and externally by its commitments as a member of the international community. To the extent there is a human right to develop (made up of civil, political, economic, social, and cultural rights) and a state responsibility to protect, there is necessarily a state responsibility to develop.

IV. CONCLUSION: SYNTHESIZING A “RESPONSIBILITY TO DEVELOP”

Across the spectrum of potential motivations for international development assistance, from individual human rights to international security, there is a common interest in the development enterprise among all actors, at the individual, national, and international levels. These actors can coordinate constructively toward the end of providing meaningful international development assistance, or they can negotiate the consequences of failures to do so. R2P is now a recognized tool for dealing with the consequences—even if it is never used again. History shows it has always been an option even before it was ever specifically articulated. The RTD campaign has sought to compel cooperation to help preempt the R2P option. But history shows that is extremely unlikely to happen; foreign assistance has never worked that way. A potentially more feasible approach to increase the mutually understood urgency of international development cooperation would be to more expressly link it to R2P. R2P already implicitly includes a broad spectrum of domestic governance responsibilities. Expressly agreeing to a domestic “responsibility to develop” as a corollary to R2P could help do that. It would not compel international assistance, but it could help encourage and focus it.

Re-framing the discourse around a state “responsibility to develop” would reduce possible opposition to a binding international commitment, while highlighting a link to the “responsibility to protect” and potential international security implications, which in turn could increase the perceived urgency of international assistance. It would keep primary responsibility for the development effort, including cultivation of the full range of individual human rights, at the individual state level but could help the international community—governments and their people—recognize their self-interest in providing assistance toward that purpose.

In the one hundred years since the League of Nations Charter purportedly drew the line of absolute territorial sovereignty, the international community has become increasingly specific about the expected responsibilities of a legitimate state. And it has always recognized the impact of domestic governance on international security, going back to the Treaty of Westphalia. For all the individual human rights that have been – and may eventually be – recognized, the conduct of the state is a necessary condition; the state has a counterpart responsibility. Whether the international community chooses to enforce it or not, a precedent has been set: the state has a responsibility to protect – to provide security and respect liberty at home to ensure domestic stability – and in so doing contribute to international security. As a necessary condition for any human right to development, and as a logical corollary to a responsibility to protect, the state has a “responsibility to develop.” On this much, there appears to be consensus. Any attempt to seek further binding agreement or promote international cooperation should focus on that.

