

Slicing up the cake: divisible sovereignty in the pre and post-Westphalian order

Oliver Jütersonke¹ and Rolf Schwarz²

Sovereignty is neither inherently territorial nor exclusively in the hands of states. It is neither an invention of the Westphalian Treaties of 1648 nor is sovereign power indivisible. In practice, sovereignty has for centuries been divided among a variety of actors and shared by them across territorial boundaries. Modern international lawyers have paid little attention to these facts and continue to affirm the undivided nature of sovereignty over a given territory. It remains unquestioned why sovereignty should be conceived in absolute terms, why it should entail territorial definitions of political authority, and why states should be its only proprietors. Scholars across a number of fields—from Geography to Sociology to International Relations (IR)—have shown that the traditional view of undivided sovereignty is in need of being critically rethought (Agnew, 2004; Bierstecker and Weber, 1996; Sidaway, 2003).

In widely acknowledged publications, a number of scholars have recently proposed the distinction between *de jure* and *de facto* sovereignty (Murphy 1996), coupled with the recognition that Westphalian sovereignty has constantly been violated (Krasner, 1999). All of these attempts at recasting sovereignty imply that there is a pure *de jure* and an “original” Westphalian notion from which *de facto* sovereignty differs, and that it is only the latter that can be violated. Yet no such ideal Westphalian model has ever existed in practice, nor as an undisputed concept in legal and political theory (Shinoda 2000). Indeed, discussions of sovereignty have always revolved around *de facto* sovereignty and, contrary to some, do not possess an “either-or” quality (Lake, 2003). Furthermore, *de facto* sovereign control has always been held by various agents, and not only by states.

In our view, there is thus a need to change the terms of the debate about sovereignty. We propose to do this by means of the notion of “divisible” sovereignty. The paper is thus a continuation of our reflections on a conceptualisation of divisible sovereignty that we had earlier applied to the situation in Iraq (Schwarz and Jütersonke, 2005). There, following the work of Keene (2002), we had suggested that the current world order might be described most adequately by transcending Westphalian notions of indivisible, absolute sovereignty for one that allows for the transferral of sovereign prerogatives across multiple agents. Such a notion of “pre-Westphalian” sovereignty, it was argued, can be derived from the work of Hugo Grotius. Building on these previous explorations, this paper seeks to distil more general observations that capture what we believe to be the essential features of the 21st-century, “post-Westphalian” world order.

¹ Graduate Institute of International Studies, Geneva and Research Centre for Ethics, University of Zürich. mailto: juterso0@hei.unige.ch

² Research Associate, Programme for Strategic and International Security Studies (PSIS), Graduate Institute of International Studies, Geneva. mailto: schwarz1@hei.unige.ch

Hugo Grotius and divisible sovereignty

Sovereignty is best understood as *de facto* supreme power in a given area not subject to the control of another authority. Hugo Grotius has defined sovereignty as “that power whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will” (Grotius, 1625: book 1, chapter 3, para. 7).

For Grotius, sovereignty (*summa potestas*) is limited by certain actions which might be under the legal control of another (*alterius iuri subessent*). Grotius is usually remembered in International Law and IR as having conceived of an international society of states, in contrast to the Hobbesian denial of such a society and the Kantian insistence on a world community of mankind (Keene, 2002: 41). This conception has also shaped Grotius’ understanding of sovereignty. Sovereignty implies *de facto* control and might only be limited by divine law, by the law of nature, by the law of nations, and by the contractual understanding between the ruler and the ruled. It is therefore capable of division and resides simultaneously in the government and in the state. In his *De Jure Belli ac Pacis* of 1625, Grotius affirmed the overall importance of law-guided behaviour in order to avoid anarchy (Grotius, 1625: Prolegomena 22).

Grotius’ ideas regarding divisible sovereignty are best understood by looking at his thoughts on the rights of war and peace. For Grotius, all sovereign states are equally bound by international law, but they do not possess equal rights and duties. An equal capacity for rights does not mean that there are *de facto* no differences between states, but rather that any differences that may exist among great powers are derived from political asymmetries and not from a legal basis.³

This hierarchical understanding is already reflected in Grotius’ understanding of society: society, according to Grotius, is characterised by relations between unequals—relations of father and son, master and slave, king and subject, God and man. Furthermore, Grotius conceived of the state as an association (*consociatio*) not of atomised individuals, but of many fathers (*patres familiarum*) united in one people and one state (*in unum populum ac civitatem*) (Grotius, 1625: Book 2, chapter 5, para. 23).

Starting from these hierarchical notions of society and state, Grotius considered international relations to be hierarchical as well. In the international realm, even the existence of unequal treaties (*inaequali foedere*) does not automatically render sovereignty obsolete. While it may indeed be the case that some of the contracts imposed by command are highly unequal and unjust—Grotius mentions the example of Rome’s treaties with its allies—it also holds true that the inferior party gains from the imposed patron-client relationship. The inferior party retains its sovereignty, provided that the party is “under protection, not under domination”, “under patronage, not under subjection” (Grotius, 1625: Book 1, chapter 3, paras. 21.2, 21.3), and only *transfers* its sovereignty. In practice, such a transfer may lead to some kind of division of sovereignty, because he “who has the position of vantage in a treaty, if he is greatly

³ See Suganami (1990: 226). The view that many writers on the law of nations in the formative years of international law did not share Grotius’ opinion is brought forward by Dickinson (1920). See below.

superior in respect to power, gradually usurps the sovereignty properly so called” (Grotius, 1625: Book 1, chapter 3, para. 21.10): either those who had been allies become subjects, or there is a division of sovereignty (*partitio fit summi imperii*) (Grotius, 1625: Book 1, chapter 3, para. 21.11).

In *De Jure Belli Ac Pacis*, Grotius offered a variety of exceptions, of cases of *summitatis divisio*. He demonstrated that divisible sovereignty may exist in both theory and practice (see also Keene, 2002: 44). Grotius gives two telling examples: the seizure of the Santa Catarina and his justification for the Dutch Revolt. In the first instance (Santa Catarina), Grotius makes the claim that the law of nations entailed rights and duties for individuals and private corporations, including the right to defend themselves by violent means for self-protection (Keene, 2002: 52). In the second instance (the Dutch Revolt), he shows that sovereignty had been transferred from one prince to the people and its representative institutions, thereby bestowing them with the right to wage war (Keene, 2002: 48).

With regard to the rights of war and peace, a traditional view at the time of Grotius affirmed that public wars could only be declared by the sovereign, i.e. by the prince or ruler himself. Grotius argued that private trading corporations could also obtain the sovereign right to declare public wars. Grotius’ view on this topic can be found in his defence of the East India Company (Tuck, 1999: 80). In *De Jure Praedae Commentarius* (1604), Grotius offered a justification for the seizure of a Portuguese ship, the Santa Catarina, by the Dutch. Building on the sovereignty of the King of Johore, a Dutch ally, the right to war (for the Dutch) was acquired *ipso iure* for the East India Company. Warfare was a feature of international society, but it was never to be undertaken except to assert rights (Vincent, 1990: 244). Grotius had thus made the claim that a public war could be waged in order to assert the rights of a trading company. This broader view of sovereignty, according to which legal rights could be acquired, partitioned, alienated, or transferred from one entity to another if they so chose—in this case the transfer of sovereignty to a European trading company occurred in exchange for military services—is congruent with Grotius’ view of unequal treaties and the exchange of sovereign prerogatives for mutual benefits.

The idea of divisible sovereignty also becomes clear from Grotius’ thoughts on the Dutch Revolt, which he defended not by advocating the right of ordinary people to use violence in defence of their natural liberties (a line of argument that was popular in Holland at the time) but by stressing that the revolt represented a just public war. The crucial proposition in his argument was again that sovereignty is divisible, such “that it may be possible for some marks [of sovereignty] to reside ... with persons or assemblies, while others do not” (Grotius, 1603-08: ad thesin 4; Borschberg, 1994: 227). Grotius illustrated this point by referring to the right of the states of Holland to raise taxes, which had been bestowed upon them by Philip II of Spain. The revolt could then be justified on the grounds that Philip’s representative in the Netherlands, the Duke of Alva, had violated his prerogatives by levying taxes on his own initiative, and the Dutch states were hence entitled to defend their prerogatives by waging a just public war against the Spanish. Grotius had earlier affirmed that “a public war ought not to be waged except by the authority of him who holds the sovereign power” (Grotius, 1625: Book 1, chapter 3, para. 5.7). The crucial linkage is that it suffices for someone who

holds a part of the bundle of prerogatives and rights which form *summa potestas* (sovereignty) to wage such a war, for “whoever possesses a part of the sovereign power must possess also the right to defend his part” (Grotius 1625: Book 1, chapter 4, para. 13).

Both instances—the seizure of the Santa Catarina and the defence of the Dutch Revolt—confirm that Grotius saw sovereignty as a right in its own sense that could be acquired, partitioned, alienated or exchanged (Haggenmacher, 1983: 538).

The crucial element in Grotius’ legal thought on divisible sovereignty, then, is that the law of nations was not exclusively a law for nations, but also included rights and duties for individuals and private companies. Grotius’ account of sovereignty revolves around the distinction between public and private wars, and between the public rights of sovereigns and private rights of property. While seemingly conservative in its rejection of popular resistance, Grotius still subscribed to a notion of divisible sovereignty according to which individuals or private organisations defended the property of the sovereign and thereby acquired the right to wage public wars to defend this property. His defence of the seizure of the Santa Catarina in *De Jure Praedae Commentarius*, and his defence of the Dutch Revolt in *Commentarius in Theses XI*, illustrate his legal teaching on this point. While neither subscribing to an absolutist notion of sovereignty nor to a monarchomachic understanding of popular resistance, Grotius offered a “third way” by proposing the divisibility of sovereignty. As we will argue below, this “third way” may also be useful for analysing the contemporary world order.

Debunking the myth of Westphalian sovereignty

The contemporary understanding of sovereignty, as enshrined in Article 2 of the UN Charter, is based on the principles of sovereign equality, the prohibition of the use of force, and the right to non-intervention. This is what is generally understood by the term “Westphalian sovereignty” (Krasner, 1999), or “sovereignty as control” (ICISS, 2001: 12).

As Krasner himself notes, the label “Westphalian sovereignty” is highly inaccurate (Krasner, 1999: 20). It is generally held that our modern notion of sovereignty (as well as the correlate “sovereign equality of states”) can be traced back to the Treaties of Westphalia, and has its roots in “pre-classical” or “primitive” scholarship of the likes of Vitoria, Suarez, Gentili and Grotius (see Kennedy, 1986). Yet while “absolute” notions of sovereignty as being about supreme power over citizens and subjects unrestrained by law can indeed be found in the work of Bodin, Grotius himself never advocated anything of the sort. As Lauterpacht wrote, “The very notion of sovereignty, which Grotius conceived, like property, as dominion held under law, helped to deprive it of the character of absoluteness and indivisibility” (Lauterpacht, 1946: 30-31). This is also one of the reasons Grotius never advocated the sovereign equality of states. As Dickinson argued:

The international society of which Grotius conceived was not grounded upon an equal capacity for rights among its members. There was a disposition to recognize quite the contrary principle. He held that important

limitations upon the exercise of political power were consistent with the enjoyment of international personality and even of perfect sovereignty. States could be united in a federal bond yet remain sovereign. Feudal vassals might be sovereign. Sovereignty was not infringed by an unequal alliance which imposed a permanent obligation upon the inferior state to concede precedence, to have the same friends and enemies, to refrain from fortifying or posting armies in designated localities, or from acquiring more than a limited number of vessels... (Dickinson, 1920: 58; footnotes omitted).

Indeed, as Kennedy has pointed out, “To find in the Grotian secular system of sovereignty a traditional notion of international law based upon autonomous and authoritative sovereigns is to distort the integrity of his elaborate system” (Kennedy, 1986: 78). As in the case of other pre-classical scholars such as Gentili, that system was based on the belief in a pre-existing normative order that could be revealed by both “faith” and “reason”. Whether linked to God or nature, it is assumed that “obligation is transcendental and discoverable in immediate reflection or deduction from first principles” (Koskenniemi, 2005: 97). Hence values were not subjective, but objectively knowable: there was no doubt in the human capacity to know the good. For Grotius, therefore, there was no need to balance, or reconcile, freedom (the Prince’s sovereignty) and (the normative) order: the sovereign’s individual actions already manifest the content of the normative order in its authenticity (Ibid.: 102). “Public” and “just” were identical concepts.

In contrast to Suarez and Vitoria, Grotius sought to secularise natural law by distinguishing it from divine will. Yet his subsequent examination of actual state practice did not have the positivist purpose of demonstrating the binding force of sovereign authority, but simply to prove the content of natural law: as in the case of the other pre-classicists, moral and legal authority were one, and the normative force of the legal order is derived from outside the authority or will of the Prince (Kennedy, 1986: 81). This is also why it is misleading to view Grotius as the founder of modern international law. For the central distinctions between moral and legal, natural and positive, and municipal and international norms, we would have to wait until the advent of the publicists.

It was to a large extent the profound rationalism of Hobbes that put the final nail in the coffin of the pre-classicists. Although Hobbes never wrote a specific treatise on the law of nations, his scepticism over the objectivity of values, and on the way the likes of Grotius qualified their assertion through reference to scripture and *recta ratio*, were to lead the way, via Wolff and Vattel, to the classical argument of Samuel Pufendorf. As Midgley writes, Classicism arose from

...almost a methodological doubt about the capacity of any human being, whether ruler or ruled, to judge rightly those matters of fact and law which determine the objective justice or injustice of State policies (Midgley, 1975: 189; cited in Koskenniemi, 2005: 106)

By equating the natural equality of men (and thus the law of nature) with the law of nations, Hobbes set the scene for a conceptualisation that, though conceived only centuries after the Treaties of Westphalia, we now label “Westphalian sovereignty”:

The principle of state equality in international law was a creation of the publicists. It was derived from the application to nations of theories of natural law, the state of nature and natural equality. An analogy was drawn between nations in international society and men in a state of nature. Thus the natural law became the law of nations, international society was regarded as a state of nature, and nations were presumed to enjoy a perfect equality of natural rights. The conception of state equality was first developed as part of a coherent theory by the naturalists of the seventeenth and eighteenth centuries. Grotius neither discussed the conception nor based his system upon it. It was not established by the Peace of Westphalia. It had its beginning as a naturalist doctrine in the writings of that school of publicists who acknowledged the leadership of Pufendorf and the inspiration of Thomas Hobbes. The early positivist developed no such conception. It was not until the middle of the eighteenth century, in the period of Burlamaqui, Vattel, Wolff, and Moser, that publicists of all schools included the equality of states among their leading principles. Once established by the process of reasoning summarized above, the principle was reinforced by theories of sovereignty. The absolute equality of sovereign states became one of the primary postulates of *le droit des gens théorique*. (Dickinson, 1920: 334).

We insist on this point because in order to make the link between the contemporary world order and the work of Grotius, between what we call pre- and post-Westphalian orders, it is important to highlight the differences between the thought of Grotius and modern understandings of sovereignty. Grotius’ starting point for his reflections on the law of nations was not a pre-normative state of nature and the domestic analogy, but an essentially normative framework based on divine and natural law. Current reconceptualisations of sovereignty, we argue, show a remarkable resemblance to some of these pre-classical frameworks.

Divisible sovereignty in the Westphalian order: protectorates, civilised nations, and federal systems

We have so far tried to show above how Hugo Grotius can help us conceptualise the divisibility of sovereignty. By discussing the cases of the Santa Catarina incident and the Dutch Revolt, we have also tried to exemplify the practical realisation of the notion of divisible sovereignty at the time of Grotius. Grotius and his contemporaries, we argued, can be conceived as part of a “pre-Westphalian” order that is markedly different from our modern understanding of the international system. In this section, we will now give further examples of how the notion of divisible sovereignty was presented in theoretical and practical terms well beyond the Westphalian treaties of 1648.

Firstly, the idea of divisible sovereignty was present during much of the 19th century through the terms “semi-sovereign” and “*mi-souverain*” (Klüber, 1819: 46). It found its

concrete expression in the establishment of Protectorates, a legal arrangement that indicates a particular system of relations between two states—the protector state and the protected state—under which protection affects only the external relations of the protected state: the protector state fulfils all diplomatic functions and representations, including the signing of treaties, while the territorial sovereignty of the protected state remains intact (Nguyen, Daillier, Pellet, 1999: 316). In addition, questions of “semi-sovereignty” emerged in the discussion of the legal status of the British Dominions in the League of Nations, posing significant challenges for a legal understanding of absolute, undivided sovereignty (Baker, 1929: 371)

Secondly, divisible sovereignty was expressed through notions of “civilisation” and “civilised nations” during the era of imperialism. The prevalence of the notion of “civilised nations” was particularly profound during the 19th century and the apogee of colonialism, but remained a feature of internal order well into the 20th century (Keene, 2002: 120-144). Article 22 of the League Covenant, for example, stipulated that certain territories belonging to the former Ottoman Empire, “which are inhabited by peoples not yet *able* to stand by themselves under the strenuous conditions of the modern world” ought to be administered by “advanced nations” best able to assume this responsibility on behalf of the League of Nations according to 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” (Schuman, 1948: 990-991; emphasis added).

Thirdly, divisible sovereignty found practical expression in federal systems of government, such as in the United States of America, Switzerland and the German Confederation in the 19th century. These were political unions of sovereign states in which the member states were deemed to have retained sovereign rights and international personality (Keene, 2002: 107).

All three practical expressions of divisible sovereignty (Protectorates, the Mandate System of the League of Nations, and federal systems of government) were reflected in theoretical legal scholarship. Henry Sumner Maine, for example, spoke of sovereignty as a “bundle or collection of powers” that can be separated from one another, and the Edinburgh professor Arthur Berriedale Keith defended that sovereignty “may be shared by various authorities” (quoted in Keene 2002: 108). Hersch Lauterpacht also concluded that sovereignty was a “delegated bundle of rights” (Lauterpacht, 1970: 8). These three characteristics, a “bundle of rights”, disaggregation, and delegation, are at the heart of divisible sovereignty. To quote Maine again:

“a ruler may administer civil and criminal justice, may make laws for his subject and for his territory, may exercise power over life and death, and may levy taxes and dues, but nevertheless he may be debarred from making war and peace, and from having foreign relations with any authority outside his territory” (Maine, 1915: 58; cited in Keene, 2002: 108).

Although its proponents may have advocated such a conceptualisation of divisible sovereignty for slightly different reasons than primitive scholars (Keene, 2002: 109), 19th century legal thinkers were quite close to the Grotian understanding of sovereignty as being a bundle of rights that can be divided and shared by various authorities. We

will now turn to the contemporary world order, and argue that it, too, may benefit from a more explicit reflection on its own presuppositions.

Divisible Sovereignty in the post-Westphalian order: Sovereignty as control and new forms of governance

Today, the “sovereign equality of states”, still propagated by most international lawyers, seems far way from the reality of international affairs. Rather, new governance structures have emerged that reflect the *de facto* holders of sovereign powers within states (warlords, local gangs and militias, private military companies, etc) and power asymmetries between sovereign states. Scholars have therefore come to speak of the “new Middle Ages” (Rapley, 2006; Cerny, 1998). In the contemporary era, we can, firstly, discern new elements of the old concept of civilisation—economic progress and development; good governance, and respect for individual and human rights. These are once again becoming visible in the notion of neo-trusteeships and the establishment of internal administrations that are to assure good governance in war-torn territories (Caplan, 2002). Secondly, we witness in the use of the term “empire” the idea that technological progress and economic development are best advanced through informal arrangements that resemble that of empire or informal empire (Wendt/Friedheim, 1996; Ferguson, 2004; Chandler, 2005). Thirdly, the notion of a “responsibility” to protect individuals from serious threats to their existence, coupled with the idea that the respect for human rights is linked to the provision of security to individuals (expressed in the agenda of human security), all point to a state of affairs in which sovereign equality is no longer the central tenet.

The move towards performance criteria of sovereignty must be seen in historical perspective. Just as in pre-Westphalian times, when medieval noblemen held direct control of land and people irrespective of claimed sovereignty of pope and emperor, local power holders today also possess *de facto* control over many areas within sovereign states. The rise of the modern state in early modern Europe was, of course, accompanied by the power to tax people and to extract financial and human resources from society. Through this it became necessary for absolutist monarchs to extend rights of representation in government to those capable of paying the taxes necessary to finance wars they wished to fight. The expansion of political rights to the gentry, the bourgeoisie, and later the working class thereby became associated with states whose relative legitimacy permitted them to raise more taxes and build larger military capabilities. The much larger and technologically sophisticated armies sponsored by these states also required more developed and effective administrative structures to extract resources. The use of these enhanced capabilities to prosecute successful wars then led to even greater administrative and political capacities to tax and extract other resources (Schwarz, 2007a).

Many states in the Third World have failed to follow this historic path of state-formation (Sørensen, 2001) and have not been able to create state capacity that allow them to fulfil state functions, such as taxation and the provision of public goods. While much of this weakness went unnoticed as long as states possessed enough external revenues (development aid, military aid, etc.), states became vulnerable when they ran

out of resources and when they had to adjust to cutbacks in public services and welfare provisions (Schwarz, 2007a). As pressures for integration in a globalised world economy have risen, so have economic activities become detached from sovereign states. The state's ability or willingness to tax its population has thereby waned (Schwarz, 2008). The retreat of the state in delivering public services has been filled in many instances by private actors (non-state groups, Islamist civil-society networks, warlords, and others). Not only have these groups started to tax their constituents, but they also provide basic state functions such as health care and education. This "new medievalism" is, however, not necessarily "malignant or violent" but simply a reaction to the withdrawal of the state and the emergence of traditional political actors (Pouligny, 2005; Rapley, 2006).

A concrete example of the rise of new governance structures in this context is the phenomenon of uncontrolled urbanization. According to the United Nations (2005), we have now reached the stage at which the world's urban population exceeds the rural; moreover, while the rural population is set to remain relatively constant and may even begin to decline, it is the world's cities that will have to bear the brunt of all future population growth. The result is an ever-increasing number of "megacities" of more than eight million inhabitants, and even "hypercities" with over 20 million. In 2005, these megacities (20 in total) already accounted for nine percent of the world's urban population (UNDESA, 2005). Rampant urbanization and population growth will be particularly dramatic in Africa, South and East Asia, and Latin America.

A consequence of this urbanization trend is also the mushrooming of slums or shantytowns. Already today, more than one billion people live in slums, and while one of the UN Millennium Development Goals is to improve the plight of at least 100 million slum dwellers by 2020, the numbers are actually going up by around 25 million per year (UN-HABITAT, 2005). Dhaka (Bangladesh), for example, a city of around 16 million inhabitants, has almost 10 million slum dwellers, with 70 percent of the population living on only 20 percent of the surface area (Davis, 2006: 95).

The result of these mind-boggling developments is the increasing fragmentation of public space. City authorities try to cope with the rising squalor through strategies of isolation, exportation, or containment: either the slums are pushed out to the city's periphery in efforts to clean up the city centre (Delhi, Mexico City), or the rich simply move out of the centre themselves and locate to the suburbs (Cairo). This transformation of urban landscapes is often driven by individual or collective reactions to perceived (subjectively experienced) versus real (empirically observed) insecurities (Jütersonke, Krause and Muggah, 2007). Middle- and upper-class residents react to these reinforcing mechanisms by shielding behind intricate security measures and private security forces, while slums and shantytowns take on the character of forbidden gang and crime zones shunned even by the police.

The resulting spatial constellation of gated communities on the one hand, and slums or shantytowns on the other, brings us back to the issue of the issue of divisible sovereignty. As will be remembered, the key issues there were the division of sovereign prerogatives among multiple agents; the second postulates that if no established political

authority acts to protect their rights, individuals have the right, under the law of nations, to conduct “private war” in their defence.

The situation we are witnessing today in many parts of the world is one in which the state indeed no longer controls parts of its territory: on the one hand are private military companies protecting the property of the wealthy, on the other are gangs and vigilante groups patrolling the streets of *favela*-type neighbourhoods and districts into which the public authorities no longer venture. In a sense, then, it is appropriate to talk of functional state failure, in terms of the key functions of a state of providing security, welfare and representation to individuals residing on its territory (Schwarz, 2005). The state may continue to have international legal sovereignty, but the element of territorial control that defines Westphalian conceptions of sovereignty no longer applies.

John Rapley characterises the “New Middle Ages” as “the rise of private “statelets” that coexist in a delicate, often symbiotic relationship with a larger state” (Rapley, 2006: 96). Importantly, these bits of territory are not necessarily any less orderly or more violent than the territory controlled by the state: indeed, gang-controlled communities in Jamaica appear to be among the safest in the country (*ibid.*) As Rapley writes:

In the cities of the developing world, groups ranging from criminal gangs to Islamist civil-society networks have assumed many of the functions that states have abandoned, funding their operations through informal taxes as well as proceeds from the drug trade, human trafficking, and money laundering (Rapley, 2006: 102).

In such circumstances, thinking in terms of Westphalian sovereignty may no longer adequately capture the contemporary world order. Empirically, many states around the globe are losing control of parts of its territory, and the people living on it. These developments resemble more a Grotian understanding of divisible sovereignty held by various actors. Moreover, the developments just described have been coupled with normative developments in international affairs that have conceptualised statehood with a view to performance-based criteria and which have arguably contributed to the undermining of the traditional understanding of the sovereign equality of states

Sovereignty today: normative orders and performance criteria

We have tried to show that sovereignty is best understood as a bundle of sovereign prerogatives that can be delegated and disaggregated. Among these are security control, the provision of external security, the right to legislate, the right to pass judgement and to grant pardon, and the right to tax people.⁴ This understanding of sovereignty departs from traditional legal understanding that continues to adhere to the myth of the sovereign equality of states. Rather we see sovereignty linked to the fulfilment of basic state services in the effort of guaranteeing and protecting basic human needs of citizens. Where states possess *de facto* sovereignty, they have actual control to fulfil these functions—i.e. the provision of security, taxation, rendering justice, providing welfare provisions, and representation (Schwarz, 2005). Where they no longer do so, other

⁴ This is again in line with Grotius though, who speaks in his *Commentarius in Thesis XI* of “marks of sovereignty” (*actus summae potestatis*). See Borschberg (1994: 119).

actors—non-state actors of one sort or another—fill the void and fulfil functions previously provided by states. This development has been captured in a new normative argumentative structure of liberal internationalism.

Ever since the end WWII and the establishment of the UN Charter, debates over the legitimacy of external intervention revolved around what were perceived to be two incompatible principles of the UN system: sovereign equality on the one hand—as expressed in Articles 2(1), 2(4) and 2(7)—and inalienable human rights on the other, as found in the Preamble and Article 1(3). The liberal internationalism prevailing in the post-Cold War era make this incompatibility ever starker. In a world of globalisation, live media coverage of human suffering, international terrorism, the increase in the visibility and sheer number of non-state actors of all sorts, the proliferation of internal conflicts, and the raised awareness that civilians represent the majority of deaths it has become virtually impossible, as one commentator put it, for Western democracies to wage war “without describing it to some extent in humanitarian terms” (Rieff, 2002: 240; cited in Welsh, 2006: 25).

After the debacles of Bosnia, Rwanda and Somalia, the debate was finally brought to a head with NATO’s intervention in Kosovo in 1999. Humanitarian aid agencies and organisations had become increasingly vocal that linking the words “humanitarian” and “intervention” ultimately leads to a militarization of the word “humanitarian”, which could seriously undermine the efforts of the humanitarian community to assist and to protect civilians in armed conflict. All this induced then UN Secretary-General Kofi Annan to call for a rethinking of how the international community, and in particular the United Nations, should act in the face of gross human rights violations (cf. Annan, 2000; Annan, 1999). In early September 2000, Canadian Prime Minister Jean Chrétien announced at the UN Millennium Summit the establishment of an independent International Commission on Intervention and State Sovereignty (ICISS) as a response to Kofi Annan’s call. A year later, the Commission reappeared with its report, “The Responsibility to Protect” (ICISS, 2001). The Commission argued that the problem with the notion of “humanitarian intervention” was that it was based on the argument for or against a “right to intervene”. Rather than talk about a “right to intervene”, the Commission argued, one should focus on the “responsibility to protect”—and, as corollaries, on the responsibility of the international community to prevent, react and rebuild in cases where vulnerable groups were at risk.

The two basic principles of the report were as follows (ICISS; 2001: xi):

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

The first principle effectively negates Article 2(1) of the UN Charter. As we argued above, the concept of sovereign equality is linked to an “absolute” understanding of sovereignty as derived from the works of Bodin and others, and can be captured by the notion “sovereignty as control”: a sovereign state is empowered in international law to

exercise exclusive and total jurisdiction within its territorial borders. This “sovereignty as control” the Commission now proposed to replace with what they call “sovereignty as responsibility”: sovereign prerogatives are not a given, but are based on performance. In other words, they have to be earned—or, to put it differently again, the right to sovereignty is a conditional right, conditional on the state fulfilling its responsibilities towards the populations on its territory.

The second principle then throws undermines the corollary, namely the corresponding obligation to respect every other state’s sovereignty: this is the norm of non-intervention is enshrined in Article 2(7). And here we have the agenda of human security at work: the basic rights of the individual may override the sovereignty of the state. The responsibility to protect (R2P), as it came to be known, was thus seen as a useful way of merging the human rights agenda with notions of human security. As the Commission writes:

This Commission certainly accepts that issues of sovereignty and intervention are not just matters affecting the rights or prerogatives of states, but that they deeply affect and involve individual human beings in fundamental ways. One of the virtues of expressing the key issue in this debate as “the responsibility to protect” is that it focuses attention where it should be most concentrated, on the human needs of those seeking protection or assistance (ICISS, 2001: 15)

Although versions of the R2P argument have meanwhile made it into the Outcome Document of the 2005 World Summit, as well as into Security Council Resolution 1674 on the protection of civilians in armed conflict, it is, of course, not without its critics (see, for example, Rodin, 2006). But we need not go into the details here. Important for our present purpose is simply the point that performance-based notion of sovereignty as responsibility presupposes that it is possible to judge whether or not a state has “earned” its sovereignty, whether it has fulfilled its obligations towards the people residing on its territory. In other words, it presupposes standards of good governance, a normative framework that can “objectively” decide on what is “good” and what is not.

Part of this normative vocabulary of liberal internationalism is also the notion of weak, failing or fragile states (see Krause and Jütersonke, 2007). Again, such terminology implies that if it is possible to objectively know when a state is weak, or failing, it must also be possible to know when it is strong, or not failing. Yet the normative judgement that a state is ‘strong’ is no longer exclusively tied to its military might or economic power, but to standards of good governance: a strong state is one that not only has control over the legitimate means of violence, but also fulfils its internal obligations—and thus, in turn, also possesses the authority to judge, as part of the international community, the performance of other states.

This is where the parallels with the “pre-classical” scholarship of the likes of Grotius are the most apparent. The performance-based contemporary world order does not function according to the notion of the sovereign equality of states, founded on the idea of states being in pre-normative natural state analogous to individuals in a Hobbesian state of nature. Instead, it is based on a normative framework whose central features can be objectively known. If you push the “sovereignty as responsibility” argument to its

logical conclusion, you arrive at a vision of divisible, shared or partial sovereignty that would look very familiar to Grotius: there are degrees of sovereignty, depending on a state's performance along criteria of political authority. These criteria are defined in terms of the human rights and human security of individuals on the state's territory. If a state fails to fulfil its obligations towards these people, it also loses its claim right to sovereign prerogatives—and the flipside of the state's "no-claim" to sovereignty" is a liberty right of the international community to intervene for the protection of those under threat.

It is worth pointing out that Stephen Krasner, author of a widely read book on sovereignty (1999) and one of the household names in IR on the issue, has recently also written on precisely the issue of "sharing" sovereignty, as he calls it. Yet while his argument is akin to the one we just sketched out above, he does not question the normative element of his reasoning. Indeed, he begins by renaming what he used to call international legal and Westphalian sovereignty "conventional sovereignty", which "assumes a world of autonomous, internationally recognized, and well-governed states" (Krasner, 2004: 85). "De facto trusteeships", "protectorates", and "shared sovereignty" are then described as ways of "improving domestic sovereignty in poorly governed states" (Krasner, 2004: 120). Again, for Krasner it appears self-evident that there are some sorts of generally accepted guidelines for distinguishing between "well-governed" and "poorly governed" states—at least, this seems to be taken for granted.

States that tend to be ranked on the "poorly governed" side of the spectrum are obviously somewhat uneasy about these developments. Just as with the issue of intervention as such, you are back to the issue of thresholds: when are things bad enough to merit intervention? And who decides?

A second concrete example of how notions of divisible sovereignty have entered theoretical debates in international affairs relates to the conception of weak and failed states (see also Schwarz, 2007b). Indeed, a number of think tanks, especially those close to donor governments, have recently attempted to devise ways of assessing the risk that a particular state will 'fail.' Two such efforts at ranking state fragility have been launched by the Fund for Peace (in collaboration with the Carnegie Endowment for International Peace), and by the Country Indicators for Foreign Policy (CIFP), supported by the Canadian International Development Agency (CIDA). The Fund for Peace rank countries "about to go over the brink" according to 12 "indicators of instability:" demographic pressures, refugees and displaced persons, group grievance, human flight, uneven development, economic decline, delegitimation of the state, public services, human rights, security apparatus, factionalised elites, and external intervention. In 2005, the Ivory Coast came out first with a total of 106 points. The CIFP's state fragility index is somewhat more sophisticated, in that it employs relative assessments based on a state's levels of authority, legitimacy and capacity, together with cluster-based summaries in the areas of governance, economics, security and crime, human development, demography, and environment. There is also a cross-cutting gender dimension. Burundi tops its list, with a fragility index of 8.25 (out of 10).

A comparison of the two lists already reveals some of the problems with such attempts at creating indexes of fragile states. For a start, the two methods bring very different

results. In the Fund for Peace's Failed States Index, for instance, North Korea ranks 13th and Venezuela 21st; both of these states are missing from the top forty fragile states in the CIFP index. But even along the same indicators, the scores were far from similar. Zimbabwe and Myanmar/Burma scored highly in the Failed States Index in terms of demographic pressures, for instance, whereas in the CIFP index, their demography scores were among the lowest. In any event, the arbitrariness and politically loaded nature of such exercises are clear. As Koskenniemi (2002: 176) so aptly writes in his depiction of the history of international law:

That most international lawyers enthusiastically welcomed decolonization was completely conditioned by their interpretation that this meant the final universalization of Western forms of government. When in more recent years those forms of government have nonetheless failed, international lawyers have been left uneasily poised between exhaustion and arrogance in face of the endemic political, social and economic crises in the third world: either leaving the colonies a playground of "tribal" policies and Western private economic domination, or suggesting ever more streamlined versions of civilized guardianship over "failed States." Both are reaction formations to an unarticulated—yet pervasive—liberal unease about the virtues of Western political institutions.

Conclusion: Thinking Divisible Sovereignty

The starting point for our reflections is the assumption that not only is it possible to observe historical instances in which sovereignty has been divided (we have given examples from the pre and post Westphalian order), but also that this is compatible with a theory of sovereignty. Several 19th and 20th century legal scholars shared the Grotian understanding of sovereignty (i.e. being a bundle of rights that can be divided and shared by various authorities). Henry Sumner Maine, for example, stressed that sovereignty was a bundle of powers that can be separated, and Hersch Lauterpacht saw sovereignty as a delegated bundle of rights and questioned the absoluteness and indivisibility of sovereignty.

We have argued two things in this article. Firstly, that sovereign prerogatives are divisible from one another, allowing for sovereignty to be divided among multiple institutions within a political community, or for another state to acquire and exercise some of the sovereign prerogatives of that state. Secondly, that individuals have assumed state-like functions in the absence of functioning states in the post-Westphalian order. Non-state actors have filled state functions in the area of security, taxation, justice, welfare provisions and representation. The rise of these new governance structures has led scholars to speak of a "New Middle Ages" and examples of this abound, as we have shown with reference to the phenomenon of uncontrolled urbanization, new protectorates and debates on R2P. Whether as part of the rise of newmedievalism individuals have also obtained a legitimate right to protect their rights and to conduct "private wars" in their defence (Keene, 2002: 3) remains an open question.

What is clear is that sovereignty is no more (and never was) inherently territorial nor exclusively in the hands of states and that the myth of the sovereign equality of states, still claimed by most international lawyers, is in need of serious rethinking. This must first of all recognise the hierarchical nature of the post-Westphalian world order and the fact that sovereignty can be divided among a variety of actors and shared by them across territorial boundaries.

This theoretical understanding of divisible sovereignty is best expressed in the work of Samuel Baldwin (1918; 1919), who argued that an international constitutional sovereignty could be developed that offered a division of sovereignty in the international realm based on constitutional principles, just as in the domestic realm. This would include the vesting of part of the bundle of sovereignty exclusively in one public agency and the rest of that bundle in another agency. This delegation or division would resemble indeed current practices of liberal internationalism, neo-trusteeships and international administration of war-torn societies. From that perspective it certainly makes sense to talk of both a “Bodinian or Hobbesian sovereignty as an animating principle of order in the European political system” and “in terms of the Grotian idea of divisible sovereignty” beyond Europe (Keene, 2002: 95)

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