

**Sovereignty Beyond Borders:
Sovereignty, Self-Defense and the Disciplining of States**

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Abstract. This paper examines how the concept of sovereignty has been used to stretch the boundaries of self-defense. Originally, the right to self-defense was included in the UN Charter as a limited and temporary exception to the prohibition on the use of force. In that way, it underscored the fundamental transformation in the reading of sovereignty and war that emerged in the 20th century. Where in the *Jus Publicum Europaeum* sovereignty entailed the right to determine the ways to fight a public enemy, including war, the UN Charter linked sovereignty to the protection against acts of aggression. Paradoxically, the attempts to outlaw the use of force resulted in the creation of several new discursive spaces to legitimize the use of force: armed force could (and should) now be justified in terms of exceptions, as exceptional measures aimed at restoring normalcy. This discursive practice already started in the late 1940s but gained new momentum after the 9/11 attacks. This paper focuses on the recent attempts to further stretch the limits of self-defense and to link this right to large-scale reconstructions of domestic societies through the alleged connection between State failure and terrorism.

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‘The terrors of lawlessness must be responded to ... if need be, by the terrors of the law’ – James Lorimer, *Institutes of International Law*, 1883, at 93

‘Does this morality [that the strong are best at proving they’re right] teach us, as is often believed, that force “trumps” law? Or else, something quite different, that the very concept of law, that juridical reason itself, includes a priori a possible recourse to constraint or coercion and, thus, to a certain violence?’ – Jacques Derrida, *Rogues*, 2005, at xi

Introduction

This paper examines how the concept of sovereignty is linked to justifications of foreign intervention, especially when the use of force is involved. At first sight, this might seem counterintuitive. In many writings, the concept of sovereignty is understood as the logical corollary of the principle of non-intervention. Already in the 16th-18th century natural law school, the principle of non-intervention was understood as an *a priori*, a dictate of reason without which a community of sovereign, independent States would be impossible.¹ In similar fashion, Vattel argued that ‘it clearly follows the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another...’.² In the post 1945 international legal order, the link between sovereignty and non-intervention became even closer, tight up as it was with the prohibition on the use of force as a peremptory norm of international relations³

Yet, international practice shows many examples where States have sought to justify foreign interventions in terms of the protection of sovereignty, i.e. as a matter of self-defense⁴ In order to understand these argumentative practices, it is necessary to take a closer look at State sovereignty as a fundamental principle of international law and politics. This will be undertaken in section 1 of this paper. It will be argued that sovereignty is to be understood as an ‘interpretive concept’. In this way, it is possible to understand both the evolution of sovereignty *and* the way in which its function has remained stable in the last

¹ For an analysis see: R. Vincent, *Non-Intervention and International Order*, Princeton: Princeton University Press, 1974; P. Winfield, The History of Intervention in International Law, *British Yearbook of International Law*, 1922-1923, 130-149.

² E. de Vattel, *The Law of Nations or the Principles of Natural Law*, Washington, 1758, Book II, iv, para 54.

³ See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. 1986.

⁴ For concrete examples see the sections 3 and 4 of this article.

few centuries. Subsequently, section 2 will explicate the function of sovereignty as an ordering principle, that established a link between rights and freedoms on the one hand and responsibility on the other. In turn, it will be argued that this sovereignty/responsibility link enables the disciplining of the primary subjects of international law. Section three will take a closer look at this disciplinary potential via the relation between sovereignty and the use of force. It will set out how sovereignty evolved from a concept which left States free to determine their public enemies and the ways to fight them, to a concept that forced States to rely on exceptionalism in order to justify their foreign interventions. This practice, as will be demonstrated in the final section, has been furthered in the recent ‘war’ on terror, by stretching the principle of self-defense on the one hand, and the link between terrorism and State failure on the other hand. Thus sovereignty has become bound up with large-scale interventions and attempts to recreate and discipline former enemy States.

1. Sovereignty as an Interpretive Concept

This paper argues that, in order to be able to understand the resilience of State sovereignty – i.e. its combined endurance and flexibility– it is necessary to prevent two fallacies. The first is the ‘descriptivistic fallacy’, the idea that sovereignty must necessarily represent a corresponding state of affairs in empirical reality (the signified). The second is the ‘normativistic fallacy’: the idea that the meaning of sovereignty, as a normative concept, merely represents a bundle of rights, duties and competencies. While the descriptivistic and normativistic fallacy are fundamentally different, they share the idea that, in order to make sense of ‘sovereignty’, it must represent something else (either a state of affairs or a bundle of rights, duties and competencies). This paper takes a different perspective, emphasizing not primarily what sovereignty *represents*, but rather what it *presents*, what it brings about.⁵

In order to capture its constitutive function, we understand sovereignty as an *interpretive concept*. The term ‘interpretive concept’ was coined by Ronald Dworkin in his critique of positivist legal theories and his attempts to make sense of US constitutional practice.⁶ An interpretive concept is a normative institution which *i*) ascribes social status and *ii*) contains a set of norms of conduct. Characteristic of an interpretive concept, moreover, is that the members of a society do not treat the rules of the institution as a taboo which cannot be

⁵ For this argument see also W.G. Werner, ‘Speech Act Theory and the Concept of Sovereignty. A Critique of the Descriptivistic and Normativistic Fallacy’, *Hague Yearbook of International Law* 14, 2001, pp. 73-84

⁶ R. Dworkin, *Law’s Empire*, Fontana Press, London, 1986, pp. 45-86.

questioned or changed. On the contrary: the members of the society take a so called ‘interpretive attitude’ towards the institution; an attitude which has two components:⁷

- The first is that the members act upon the believe that the institution ‘does not simply exist but as value, that it serves some interest or purpose or enforces some principle – in short, that is has some point- that can be stated independently of just describing the rules that make up the practice’
- The second is that the rules of the institution, what the institution requires, ‘are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or modified or qualified or limited by that point’.

From this conceptualization of institutions as interpretive concepts follows that they are dynamic concepts too: agents consider the institution in the context of its point or purpose and restructure the rules of the institution in the light of that function. This means that –as has been the case with sovereignty– an institution can survive fundamental changes in a society. An example of this is the survival of the concept of State sovereignty in international society despite the fundamental transformation from dynastical legitimacy to self-determination as one of the guiding principles of international legitimacy.

Whereas an interpretive concept is an intersubjective institution, shared by members of a community, it is not necessary that they all agree on the application of such a concept to an individual case. They might very well disagree on what the institution requires in a particular situation – in fact, that is what an *interpretive* concept is about. As long as the ‘international community’ (implicitly or explicitly) agrees on the most general and abstract propositions about the institution, they share a background which makes genuine disagreement on the requirements and scope of an institution meaningful. In this context, it is helpful to recall Dworkin’s distinction between ‘concept’ and ‘conception’. In order to illustrate the distinction between concepts and conceptions, Dworkin uses the example of the institution of courtesy in an imaginary community.⁸ In this community, people share the concept of courtesy and agree, at the most general level, that courtesy stands for ‘respect’. There are major differences of opinion, however, about the correct interpretation of what respect requires in different circumstances (does it mean showing respect to people of a

⁷ Dworkin (1986), p. 47.

⁸ Dworkin (1986), p. 90-96.

higher rank or does it require a more egalitarian interpretation, does it require a different treatment of man and women or does it require an equal treatment of both? etc.). There are, in other words, different *conceptions* of the institution or concept of courtesy. The parallels between Dworkin's example and the concept of sovereignty are clear: there is, at the most general level, agreement that sovereignty stands for 'freedom', 'equality' and 'independence'.⁹ However, what these abstract notions consist of in practice is less unambiguous. That is to say, from the status of sovereignty itself no 'given, determinate, normative implications' follow.¹⁰ This leads to competing conceptions of sovereignty, and disputes where both parties appeal to the sovereignty principle to support their respective claims. It also enables the aforementioned practice of justifying intervention practices on the basis of sovereignty.¹¹

In order to decide which of the competing conceptions of sovereignty is legally correct in a concrete case, it is necessary to rely on specific rules and principles valid under international law at the time of the dispute. This does not mean, however, that sovereignty is thereby reduced to these rules and principles. It remains relevant as a general concept (or institution in Dworkinian sense) which structures legal and political discourse and which, in turn, is kept alive by the enduring disputes about its proper meaning. The current discussion hence is akin to insights from the linguistic turn in both legal thought and International Relations theory, inspired by Wittgensteinian conceptions of language games, notably in their rejection of a given referent (signified), and the ensuing move from a correspondence notion to the constitutive role of language. Taking an 'interpretive' stance to sovereignty, such post-positivist approaches focus on its changing meaning and historical contingency instead.¹² However, by addressing in more detail the function of institutions, Dworkin's notion of the 'interpretive concept' enables us to scrutinize what sovereignty *does* beyond its, by now widely accepted, disposition as a social construct or

⁹ For key formulations of sovereignty in abstracto, see the *Austro German Customs Union Case*, Separate opinion Judge Anzilotti, PCIJ Series A/B, no. 41, 1931; and *Island of Palmas Case*, Permanent Court of Arbitration, 2 RIAA 829, 1928.

¹⁰ M. Koskeniemi, 'The Future of Statehood', *Harvard International Law Journal* 32(2), 1991, pp. 397-410 at 408.

¹¹ For a poststructuralist analysis of the sovereignty/intervention boundary arguing that intervention practices participate in the stabilisation of the meaning of sovereignty, see C. Weber, *Simulating Sovereignty. Intervention, The State and Symbolic Exchange*, Cambridge University Press, 1995.

¹² See, *inter alia*, J. Bartelson, *A Genealogy of Sovereignty*, Cambridge University Press, 1995; T.J. Biersteker and C. Weber, eds, *State Sovereignty as a Social Construct*, Cambridge University Press, 1996; and W.G. Werner and J.H. de Wilde, 'The Endurance of Sovereignty', *European Journal of International Relations* 7(3), 2001, pp. 283-313.

discursive fact. Thus, our perspective moves beyond the contingency notion by elaborating meaning in relation to the *dual* function of institutions, and by distinguishing two uses of sovereignty (as *status* and as *rights/duties*) in order to analyse its resilience. To understand how it operates as a general concept it is necessary to further elaborate the ‘point’ of sovereignty within the legal order.

2. *Sovereignty as a Way of Organizing Responsibility*

Within the framework of international law, the concept of State sovereignty is used in at least two interrelated ways, running parallel to Dworkin’s interpretive concept. In the first place, sovereignty is used to describe the status of a political community (the status of ‘sovereign’ or ‘independent’ statehood). Secondly, the concept of sovereignty is used to endow States with certain fundamental rights, powers and duties (their sovereign rights), establishing norms of conduct. State sovereignty in international life, therefore, performs functions which are akin to those performed by the concept of individual liberty in the national context. Both the individual liberty and the State sovereignty argument take as their starting point the existence of independent (‘free’ or ‘sovereign’) agents who are equal by ‘nature’, endowed with a minimum core of fundamental rights and whose freely expressed consent forms the basis order and society.¹³ As Koskenniemi has summarized this analogy between individual liberalism and state sovereignty: ‘Both characterize the social world in descriptive and normative terms. They describe social life in terms of the activities of individual agents (‘legal subjects’, citizens, States) and set down the basic conditions within which the relations between these agents should be conducted’.¹⁴

The notions of State sovereignty and individual liberty are easily misunderstood as being purely individualistic and anti-social. The institution of sovereignty is then construed as a variant of ‘possessive individualism’¹⁵, whereas sovereign States have been presented as essentially outside international society.¹⁶ This reading of sovereignty can be found within

¹³ This most famously transpires from Vattel’s (naturalist) formulation: ‘Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations ... are by nature equal and hold from nature the same obligations and the same rights ... A dwarf is as much man as a giant is; a small republic is no less a sovereign State than the most powerful Kingdom’ (Vattel, 1758, Book I, para 18).

¹⁴ M. Koskenniemi, *From Apology to Utopia, the Structure of International Legal Argument*, Finnish Lawyers Publishing Company, Helsinki, 1989, p. 192.

¹⁵ See J. Ruggie, Continuity and Transformation in the World Polity. Towards a Neorealist Synthesis, *World Politics* 35(2), 1983, pp. 276-279.

¹⁶ H. Patomäki, State is Not a Person: On the Theoretical and Practical Consequences of State-Antropomorphism, paper for the 43d Annual International Studies Association, New Orleans, 2002.

the traditional body of International Relations writings, as well as political discourse, on sovereignty. Conceiving of sovereignty notably in terms of ‘freedoms, rights, immunities’, i.e. autonomy and independence from outside interference, this basically takes an individualistic stance on sovereignty, whilst concomitantly linking it to notions of power and control. This is reflected most clearly in light of the debates on globalization, regional integration, and the erosion of sovereignty.¹⁷ It also materializes in the discussion of international law as impinging sovereignty by limiting the freedom of maneuver –in particular through the development of the human rights regime that is central to the intervention debate. In other words, sovereignty and sovereign Statehood are presented as given entities, which exist independent from their international environment, in a vacuum. Any international development (including integration, globalization and international law) then necessarily reduces this freedom and hence erode sovereignty as a zero-sum game (the more globalized, Europeanized and/or ‘legalized’, the less sovereignty is left).

Such readings of sovereignty, however, fail to grasp one of the essential features of the (legal) institution of sovereignty: i.e. the specific way it orders international life by linking freedom and responsibility. Through the notion of sovereignty international law not only presents States as free and equal, but also creates subjects (legal persons) that, by virtue of their privileged status, are held to respect an extensive set of obligations. The freedom and equality of States exists within an (international) normative order which dictates the scope and content of this room to maneuver.¹⁸ Within this order ‘sovereignty’ hence entails not only the capacity to make legal claims on the basis of possessed rights, but also the possibility of being held accountable for one’s acts.

From its inception in modern international law, the idea of the State as a sovereign legal person has been linked to attempts to civilize power. Thus, when the term ‘international legal personality’ was coined, the aim was not to create a normatively free sphere in which States could operate. On the contrary: the concept of international legal personality was advocated as a way to recognize the new power configurations in Europe, *in order to* bring the newly arising powers within an overarching normative structure. Through the assignment of a specific, privileged status, the normative order constituted its own

¹⁷ Key representative in this debate is S. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, Princeton, 1999.

¹⁸ M.N. Shaw (2003), *International Law*, 5th edition, Cambridge University Press, Cambridge, p. 190.

sovereign subjects and presented them as the principal bearers of international responsibility.¹⁹ As Nijman has argued: ‘...the concept of international legal personality functioned to legitimise the participation of the German Princes in international life, but by *the same legal move* established their *responsibility* to conform to the justice-based rules of the law of nations’.²⁰

The elements of recognition, legitimation and responsibility also come together in the very term ‘international legal personality’. Etymologically speaking, ‘personality’ does not stem from the idea of a self-contained, free individual, but from the term *persona*- which signified a theatrical mask in classical antiquity plays.²¹ The mask of sovereignty, then, is best understood as a way of presentation in a play that (re)defines one’s identity and role. Just like in a play, it does not make much sense to ‘unmask’ the actor to see what ‘really’ goes on: the reality is given, or rather: constituted within the play itself. In that sense, it is not so much the States that play sovereignty games, it is the sovereignty play that constitutes those who are in the game, and are granted a ‘voice’ in the first place.²² Thus it is the game itself that creates the conditions of possibility of sovereign ‘being’ at all.²³

The relation between sovereignty and responsibility is not just a theoretical invention. In international legal and diplomatic practice, the ability and willingness to live up to international obligations has long been recognized as one of the core elements of what it is to be a sovereign State. In the *Island of Palmas* case (1928), for example, arbiter Huber argued that territorial sovereignty not only gives States the right to exercise jurisdiction

¹⁹ G.W. Leibniz is the main advocate of the theory of international legal personality, which he linked to a notion of relative sovereignty. This paragraph builds on its excellent treatment by Janne Nijman, *The Concept of International Legal Personality, An inquiry into the History and Theory of International Law*, T.M.C. Asser Press, The Hague, 2004, pp. 58-80.

²⁰ Idem, p. 499 (emphasis added).

²¹ Idem, chapter 6

²² Most likely the word ‘persona’ stems from the Latin *per sonare* (literally ‘to sound through’); the construction of the mask was invented to strengthen the sound of the player’s voices.

²³ In other words, the game should not be mistaken for merely regulating international affairs of pre-existing state entities, which would reduce the institution to norms of conduct only. Such a reading in fact transpires from Nijman’s elaboration of the mask metaphor. She expands the mask as a camouflage or conceal of states’ internal structures from their international personality of sovereign statehood within the Westphalian model (p. 448). This runs parallel to Robert Jackson’s quasi-statehood thesis (R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge University Press, 1990). Rendering sovereignty and law mere regulative principles, such a reading however overlooks the point regarding the constitutive nature of sovereignty as status or identity, as defined within the game itself. For this argument see also T.E. Aalberts, ‘The Sovereignty Game States Play: (Quasi-)States in the International Order’, *International Journal for the Semiotics of Law* 17(2), 2004, 245-257.

over their territories, but also puts them under an obligation to respect the rights of other states:

‘Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to the circumstances, the State cannot fulfil this duty’.²⁴

The logic underpinning the *Island of Palmas* case is echoed in the modern criteria for Statehood. According to the 1933 Montevideo Convention the existence of a ‘government’ is one of the criteria for Statehood in modern international law.²⁵ Under customary international law, this criterion is usually interpreted in terms of ‘effective and independent government’, precisely in light of the obligations of Statehood under international law.²⁶ In similar fashion, the 1949 Draft Declaration on Rights and Duties of States reconfirms the relation between sovereignty and responsibility by emphasizing the need for self-discipline and the obligations that come with sovereign Statehood. The Declaration contains 10 articles defining duties, whereas only 4 formulate rights that are related to the status of sovereign Statehood.²⁷ One of the core articles lays down that ‘Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law’.²⁸ By extension it can be conceived as rights *as* obligations, as has been explicitly formulated by the ILC: ‘If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations’.²⁹ This reverses the widespread conception of sovereignty as legitimizing a sphere of freedom to sovereignty as a specific way of organizing international responsibility. More specifically, as a normative institution it assigns a social status (legal personality as sovereigns), *and* contains norms of conduct (sovereign rights and duties) with the function (‘point’) to hold

²⁴ *Island of Palmas case* (Netherlands v. United States), RIAA II 829, 1928.

²⁵ 165 LNTS 19, 1936. See also T.D. Grant, ‘Defining Statehood. The Montevideo Convention and its Discontents’, *Columbia Journal of Transitional Law* 37(2), 1999, pp. 403-457.

²⁶ J. Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 2006

²⁷ Yearbook of the United Nations, 1948-1949, p. 948.

²⁸ Article 13, Yearbook of the United Nations, 1948-1949, p. 948.

²⁹ Yearbook of the International Law Commission, 1973, II, p. 177. See also the award in the *Spanish Zones of Morocco claims case* (Britain v. Spain), 2 RIAA 615, 1925, p. 641 (‘[R]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility’) and the separate opinion of judge Sfériadès in the *Lighthouses in Crete and Samos case* (France v. Greece), PCIJ Series A/B no. 62, 1937, p. 45.

agents accountable. Sovereignty then entails a task to fulfill, rather than a freedom to indulge.

In international relations practice, one can detect a political translation of this logic in the *Responsibility to Protect* report by the International Commission of Intervention and State Sovereignty. As a rejoinder to the sovereignty/intervention dilemma formulated in the Secretary General's Millennium Report, the report reformulates sovereignty. By the example of the UN Charter, it pinpoints both the agency and the responsibility that follow from a sovereign status: 'There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* [sic] to *sovereignty as responsibility* in both internal functions and external duties'.³⁰ Moreover, the report also testifies a shift from sovereign duties in relation to the rights of fellow-sovereigns (such as their territorial integrity and the rights of their nationals, as formulated in the *Island of Palmas case*), towards duties as concomitant to sovereignty rights in relation to one's own population, which in addition are increasingly conceived as international responsibilities.³¹

The intrinsic relation between sovereignty and responsibility has important implications for the topic of this paper. It implies that international law can be used to identify irresponsible States and accordingly to legitimize measures aimed at disciplining such States. If the obligations of States are primarily limited to the protection of narrowly defined interests of fellow sovereigns, such disciplining acts have a fairly limited character as well. However, if international law is deployed for the protection of universal values and the interests of the international community as a whole, irresponsible behavior calls for a much stronger response. As will be set out in the next sections, this logic has been mobilized in the recent 'war on terror' in order to legitimize interventionist strategies against the most irresponsible sovereigns: the rogue States and the failed States.

³⁰ ICISS, *The Responsibility to Protect*, para 2.14, emphasis in the original (available at www.iciss.ca/pdf/commission-Report.pdf).

³¹ This in turn runs parallel to the development of *erga omnes* obligations within the international legal order. Although not crystallised as an established rule with particular consequences yet, genocide, slavery and racial discrimination and the use of force are recognised as examples (*Barcelona Traction case* (Belgium v. Spain), ICJ Rep. 1970, para 34).

3. *Stretching Sovereign Space: The Fluid Limits on the Use of Force*

In *Jus Publicum Europaeum*, the right to use force was considered to be an attribute of State sovereignty; a right which is *inherent* to the concept of sovereignty.³² This not only meant that the determination of the ways to fight a public enemy was left to the State, but also that acquisition of territory by means of conquest constituted a valid title to territory in international law.³³

With the decline of the *Jus Publicum Europaeum* the relation between sovereignty and the use of force changed drastically. As was set out in the introduction, in the course of the 20th century, sovereignty became linked up with a more radical prohibition of intervention, including the prohibition on the use of force as a peremptory norm of international law. This further materialized in article 2(4) of the UN Charter, which also formulated the only exceptions to this rule: ‘threats to international peace and security’ (articles 39 and 42) and ‘self defense’ against armed attacks (article 51) and/or imminent threats.³⁴ Documents like the Charter or the 1970 Resolution 2625 (reflecting customary law) not only formulate the prohibition on the use of force, but also stress that the basis of this norm is the principle of sovereign equality. GA Resolution 2625 explicitly states that the inviolability of the territorial integrity and the political independence (and thus the right to be free from outside armed intervention) is *included* in the notion of State sovereignty.³⁵ In light of the foregoing, it is noteworthy that rather than formulated as a negative right, the Resolution also refers to *inter alia* ‘the obligation not to intervene’ and the ‘duty of States to refrain from ... any form of coercion aimed against the political independence or the territorial integrity of any State’. Thus parallel to the 1949 Draft Declaration on Rights and Duties, the resolution emphasizes negative rights in terms of positive duties. Moreover, an explicit

³² For a general analysis see: Grewe, Wilhelm G., *The Epochs of International Law*, Transl. by Byers, Michael, De Gruyter, Berlin, 2000; Schmitt, Carl, *Der Nomos der Erde in Völkerrecht des Jus Publicum Europaeum*, Duncker & Humblot, Berlin, 1974.

³³ See for an analysis of the doctrines in the 18th and 19th century especially: I. Brownlie, *International Law and the Use of Force by States*, Clarendon, Oxford, 1991, pp. 14-51. See also P. Malaczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, 1993.

³⁴ Article 51 of the UN Charter reads as follows: ‘Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, *until* the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security’ (emphasis added). The broadening of the use of force in response to armed attacks to their pre-emption in case of imminent threats derives from the *Caroline Case* (1837).

³⁵ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Resolution 2625 (XXV), October 24, 1970

link is made between equality as a matter of status as well as a right *and* duty: ‘All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community’.

As exception to the egalitarian foundation of the UN, the Security Council was established in order to replace traditional war by collective enforcement mechanisms in the name of community values such as international peace and security, and the fight against aggression. Strictly speaking, such a collectivisation implies the elimination of the traditional concept of war as an armed struggle between equal States (and thus equal enemies). However, the prohibition on the use of force did not imply a decline in the actual use of force in (international) society. While ‘war’ was officially banned from post 1945 international legal discourse, in practice the use of force remained. As was predicted by critics like Carl Schmitt, the prohibition on the use of force would not do away with enmity and war, but rather lead to new discursive possibilities to legitimize the use of force. The notion of war as a matter between formally equal enemies was thus replaced by the idea that force was used against a law-breaker or a threat against international peace and security. As a consequence, it would become difficult to distinguish between a *justus hostis* and criminals or elements that need to be dealt with in the name of humanity.³⁶

In this context, it is important to recall that the Cold War environment of the East-West rivalries generally precluded the operation of the collective security arrangements in post-1945 practice. This meant that States, when resorting to the use of force, had to rely on the only legal justification left: individual self-defense. While the right of self-defense was originally incorporated in the Charter as a limited and temporary measure (‘... until the Security Council has taken measures...’), in international practice it turned out to be the major justification invoked by States using force against other States. This was also the practice in cases where humanitarian emergencies took place, such as with the intervention in Pakistan in 1971 and the interventions in Cambodia and Uganda in 1978.³⁷ In this context, Neff has spoken of the ‘self-defense revolution’: ‘...the full emergence of self-defence to the front and centre of the international stage, as a kind of all-purpose justification for unilateral resorts to armed force’.³⁸ Post 1945 self-defense has been

³⁶ Schmitt (1974), pp. 112-183

³⁷ N.J. Wheeler, *Saving Strangers. Humanitarian Intervention in International Society*, Oxford University Press, Oxford, 2000.

³⁸ Stephen Neff, *War and the Law of Nations*, Cambridge University Press, 2005, at p. 315.

stretched as to include the rescue of nationals abroad, the anticipatory use of force, and actions against serious foreign subversion. In effect, it meant that self-defense moved to the centre of a neo just war doctrine, whose core consists of the protection of State sovereignty against armed intervention, with the use of force as an exceptional mechanism to ensure the sovereignty of States. This trend of the deployment of the right to self-defense as an all-purpose justification for the use of force is buttressed by the framing of the recent 'war on terror'.

Shortly after the 9/11 attacks, the Security Council affirmed the right of self-defense.³⁹ Although the Security Council only referred to the right to self-defense in general terms ('*Recognizing* the inherent right of individual or collective self-defense in accordance with the Charter...'), in light of the above the symbolic meaning of this recognition immediately after the 9/11 attacks was clear and compelling. Equally clear was the support from the NATO member-states, who for the first time in the history of the alliance invoked article 5 of the NATO Charter (defining an attack to one member as an attack to the whole alliance). On 12 September, NATO decided that, if it is determined that the attack against the United States was directed from abroad, it shall be regarded as an action covered by the right to collective self-defense.⁴⁰ After the member states were convinced the 9/11 attacks were conducted by Al-Qaida, they accepted the applicability of article 5 of the NATO Charter.⁴¹ The effects of accepting such a collective and/or individual right to self-defense in response to terrorist attacks are far-reaching. Self-defense now not only covers immediate responses to attacks by identifiable actors, but also open-ended operations against an amorphous enemy. The invocation of 'self-defense' in response to attacks by terrorist networks raises questions as to the boundaries of the right to self-defense in at least three respects: temporal, spatial and qua object. The temporal limits of self-defense are put into question, because it can become unclear when the attack that triggered the right of self-defense took

³⁹ Resolution 1368 of 12 September 2001, S/Res/1368 (2001). This was reaffirmed in Resolution 1373 of 28 September 2001, S/Res/1373 (2001).

⁴⁰ Press release PR/CP (2001)124, available at www.nato.int/docu/pr/2001/p01-124e.htm [accessed on 19/04/2007].

⁴¹ Note, however, that the US argued that such multilateral support the war on terrorism was welcome, but not strictly necessary. Colin Powell made this position clear when he stated that 'At the moment, notwithstanding all of the coalition building we have been doing, President Bush retains the authority to take whatever actions he believes are appropriate in accordance with the needs for self-defense of the United States and of the American people. We will be going to the UN for additional support ...but, at the moment, should the President decide that there are more actions he has to take, he will make a judgment as to whether he needs UN authority or whether he can just rely on the authority inherent in the right of self-defence....'. Secretary Colin Powell, Remarks with His Excellency Brian Cowen, Minister of Foreign Affairs of Ireland, 26 September 2001 available at http://www.yale.edu/lawweb/avalon/sept_11/powell_brief19.htm

place. The right of self-defense against terrorist attacks can follow from a ‘consistent pattern of violent terrorist action’ against a State.⁴² It is difficult to tell when such a consistent pattern exists and it is possible that a State can conclude that, in hindsight, it had already been at war with a terrorist organization for a considerable time.⁴³ Moreover, it is indeterminate when the war on terrorism will stop. The war on terrorism is, after all, not only a self-defense operation designed to do away with a specific attack, but an open-ended operation that will only end when ‘every terrorist group of global reach has been found, stopped and defeated’.⁴⁴ Such a sustained operation knows no spatial limits either. Terrorists are, after all, spread out throughout the world and could, as both the 9/11 attacks and the 7/7 London bombings have shown, even hide in the homeland. Thus, after the 9/11 attacks, the US (and their allies) not only emphasized the need to deal with States harbouring terrorists, but also engaged in extra-territorial operations such as targeted killing of suspected Al-Qaida members abroad. Finally, as the war against Afghanistan has shown, the object of self-defense is broadened considerably. Here, a self-defense operation was used to realize a regime change (the Security Council expressed its ‘strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government’),⁴⁵ and thus went beyond an operation aimed at repelling an armed attack. The operation rather aimed at incapacitating the enemy in very broad terms, i.e. to take away ‘safe havens’ for terrorists. This was emphasized in Resolution 1368 through the notion of State responsibility: ‘... *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these [terrorist] acts will be held accountable’.⁴⁶ Whereas the claim regarding the extension of self-defense and State responsibility for harbouring terrorism was already formulated in the so-called Shultz

⁴² See also A. Cassese, The International Community’s “Legal” Response to Terrorism, *International and Comparative Law Quarterly*, 1989, 589

⁴³ See Bob Woodward and Thomas E. Ricks, Washington Post Staff Writers, Wednesday, October 3, 2001, ‘CIA Trained Pakistanis to Nab Terrorist But Military Coup Put an End to 1999 Plot’, available at <http://home.pacbell.net/reichar/operation.html>: ‘In the aftermath of last month’s attacks on the United States, which the Bush administration has tied to bin Laden, Clinton officials said their decision not to take stronger and riskier action has taken on added relevance. ‘I wish we’d recognized it then’, that the United States was at war with bin Laden, said a senior Defense official, ‘and started the campaign then that we’ve started now. That’s my main regret. In hindsight, we were at war’

⁴⁴ President George W. Bush, Address to a Joint Session of Congress and the American People, 20 September 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html [accessed on 19/04/2007]

⁴⁵ Resolution 1378, 14 November 2001, S/Res/1378(2001).

⁴⁶ Resolution 1368, 12 September 2001, S/Res/1368(2001). In the follow-up resolution this was reaffirmed with reference to the aforementioned 1970 GA Resolution 2625(XXV) and the Security Council Resolution on terrorism of 13 August 1998, S/Res/1189(1998), namely the principle that ‘Every State has *the duty to refrain* from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts’ (emphasis added). Subsequently, the Security Council invoked Chapter VII for the authorisation of the use of force.

Doctrine in the 1980s,⁴⁷ in light of the ‘war on terrorism’ self-defense arguments are more explicitly linked to the struggle for a world without rogue regimes and failed States, i.e. to restore normalcy; and more widely accepted as such by the international community at large.⁴⁸

4. *Sovereign Equality as a Ground for Making Distinctions*

From the preceding section, it can be inferred that the ‘war on terror’ is based on a specific reading of sovereignty: the notion of sovereign equality, which underpins both the right to self-defense and to non-intervention, is used in order to make a distinction between different types of States. Decent or responsible States are set apart from irresponsible States; from unwilling, rogue States and unable, failed States. The net result is that the right to self-defense, while formally still equally applicable to all States, is applied in a discriminatory fashion. What was at stake in the war against Afghanistan, for example, was not just the protection of one State (the United States) against a formally equal State (Afghanistan). The widespread support for the US led coalition cannot be isolated from the way in which Afghanistan had been branded as an irresponsible, undisciplined State since the 1990s. In a series of UN Security Council Resolutions, Afghanistan was condemned for the manifold ways in which it violated fundamental norms of international law and put under scrutiny of UN sanctions committees.⁴⁹ Especially if such an ‘irresponsible State’ confronts a hegemonic State with special legal powers (as a permanent membership of the Security Council), the boundaries of the prohibition of intervention become more fluid. As Simpson has argued,

‘certain States, pre-designated as outlaws [i.e. Afghanistan under the Taliban regime, Iraq and Libya], lack the immunities available to other States in warding off

⁴⁷ US Secretary of State George Shultz argued in 1986 that ‘[T]he Charter’s restrictions on the use or threat of force in international relations include a specific exception for the right of self-defense. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbour terrorists or guerrillas’. Israel and Apartheid South Africa were US allies in this stance, whereas the majority of the international community was less supportive (George Schultz, ‘Low-Intensity Warfare: The Challenge of Ambiguity’, Address to the National Defense University, Washington DC, 15 January 1986; quoted in Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’, *International and Comparative Law Quarterly* 51, 2002, pp. 401-414 at 406).

⁴⁸ See for a similar ‘diagnosis’ of the war on terror: Ronnie Lippens, ‘Surgical Strikes, Viral Contagion and Anti-Terrorism. Notes on Medical Emergency, Legality and Diplomacy’, *International Journal for the Semiotics of Law* 17(2), 2004, pp.125-139

⁴⁹ See in particular Security Council Resolutions S/Res/1193(1998), S/Res/1214 (1998), S/Res/1267(1999), and S/Res/1333 (2000).

the possibility of armed intervention. So regardless of any evidence showing links between, say, Pakistan or Saudi Arabia and the attacks on Western interests, it is improbable that these [reputed lawful] States find themselves on the peripheries and subject to attack in the near future (...). The distinction is not simply one of politics. The breaches of international law committed by [Afghanistan] contribute to outlaw status and the outlaw status determines the legality of the measures taken against these states...'.⁵⁰

Whereas Simpson emphasizes that this sets the irresponsible states outside the legal order (as literally out-laws), we want to emphasize that the disciplinary element is provided by the sovereignty status within the legal order itself. The State in question is not disciplined because it is outside the law, but exactly because it is constituted and regulated by law; because it wears the legal *persona* of sovereignty. The link between sovereignty and responsibility is thus used to justify intervention in States that lack the discipline to grasp the relation between freedom and self-constraint. In this sense, the term 'outlaw' is a bit of a misnomer, insofar as it lays emphasis on exclusion, ignoring the more nuanced inclusion/exclusion logic at play. Discipline is not exercised through exclusive membership rules and gatekeeping, but through the subsequent imposition of a norm of appropriate and responsible being for all equal members included in the international society.⁵¹ Thus, irresponsible states, be they rogue or failed states, are *outlaws within* the law of nations.⁵²

Indeed, the relation between sovereignty and responsibility, coupled to conceptions of outlawry also figures prominently in the discourse of failed States within the 'war on terrorism'. To be sure, state failure (in rudimentary terms being States lacking empirical capacities of effective control and monopoly of force) is not a new phenomenon. As a political issue it has been on the agenda since the end of the Cold War, but as an empirical

⁵⁰ Gerry Simpson, *Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order*, Cambridge University Press, 2004, p. 340.

⁵¹ For a Foucaultian elaboration of this argument, see T.E. Aalberts, 'Sovereignty as Discipline', paper presented at the 31st Annual BISA Conference, Cork, 18-20 December, 2006.

⁵² This inclusion/exclusion logic is very prominent in Ferdinand Tésón's liberal theory of international law, which parallels illiberal states to criminal individuals in domestic society. This means in his perspective that, as criminal elements within and to the international order, illiberal states do not benefit from the full range of membership rights but are still bound by its elementary principles (F.R. Tésón, 'The Kantian Theory of International Law', *Columbia Law Review* 92(1), 1992, pp. 53-102).

phenomenon it arguably dates at least back to the Concert of Europe.⁵³ Moreover, 19th century international lawyers already distinguished between ‘civilized’, ‘barbarian’ and ‘savage’ communities, thus foreshadowing the discourse on failed States.⁵⁴ There are, however, at least two essential differences between 19th century discourses on ‘civilization’ and post Cold War discourse on ‘failed States’. In the first place, the notion of ‘tribes’ or ‘uncivilized societies’ that were excluded from international society, is now replaced by the notion of equal, sovereign States that fail to perform their duties. Thus the logic of difference and exclusion that characterized the 19th century international society, is now integrated into the sovereignty discourse. Disciplining measures, therefore, must be justified within the sovereignty discourse, too.

In this context, it is important to note that the breakdown of governmental authority within a State does not automatically imply that such a State ceases to exist as a international legal person. Although effective government is one of the criteria relevant for the emergence of statehood,⁵⁵ its endurance is based on the *presentation* (not *representation*) of an entity as State – thus taking transient eruptions in case of civil war, foreign occupation, collapse of central government, or even government in exile into account in accordance with the principle of continuity: ‘[T]emporary absence [of government] (*which may last for years*) [...] does not affect the identity [i.e. international personality] of the State concerned’.⁵⁶ In these situations the concept of State sovereignty is used to uphold the status quo and to prevent the termination of one of the members of international society. Metaphorically speaking, the failed State is like a mask, a sovereign *persona*, without an actor that effectively performs the corresponding role. However, given the relation between State sovereignty and responsibility, especially if it comes to fundamental obligations of States, State failure constitutes a major problem for international law.⁵⁷ It is, therefore, not

⁵³ S.N. Grovogui, ‘Regimes of Sovereignty: International Morality and the African Condition’, *European Journal of International Relations* 6(2), 315-338. For an early discussion of anarchy/statehood, see also T. Baty, ‘Can an Anarchy be a State?’, *American Journal of International Law* 28(3), 1934, pp. 444-455.

⁵⁴ M. Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2002, pp. 70-76.

⁵⁵ See also *Western Sahara Advisory Opinion*, ICJ Reports 1975.

⁵⁶ U. Fastenrath, ‘States, Extinction’, in R. Bernhardt (ed), *Encyclopedia of Public International Law*, North Holland, Amsterdam, 1995, pp. 669-672, at 670 (emphasis added).

⁵⁷ D. Thürer et al., *Der Wegfall effektiver Staatsgewalt: ‘The Failed State’ (The Breakdown of Effective Government)*, C.F. Müller Verlag, Heidelberg, 1996; N.L. Wallace-Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’, *Netherlands International Law Review* 47(1), 2000, pp. 53-73; G. Kreijen, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, Martinus Nijhoff, Leiden, 2004; R. Koskenmäki, ‘Legal Implications Resulting from State Failure in Light of the Case of Somalia’, *Nordic Journal of International Law* 73, 2004, pp. 1-36

surprising to find that failed states are presented as legal anomalies, or even ‘impossibilities’.⁵⁸ And it is through the newly imputed link with terrorism that allegedly renders them a dangerous political anomaly, too. This constitutes the second difference with 19th century discourse. In light of their potentiality as breeding ground for terrorism,⁵⁹ failed States have gained renewed prominence as a security issue in the ‘war on terrorism’.

In the recent war on terror, at least two routes have been followed to deal with the anomaly of state failure. The first follows the logic of the law of State responsibility by linking the question of responsibility to the question who exercises control over (unlawful) conduct. Article 9 of the Articles on the Responsibility of States for internationally wrongful acts, for example, provides that in cases where governmental authority is absent or default, the conduct of a person or group shall be considered an act of a State if the person or group is in fact exercising elements of the governmental authority.⁶⁰ This provision echoes the rationale of article 8, which holds that the conduct of a person or group shall be regarded an act of a State if that person or group is in fact acting under instructions of, or under the direction or control of the State concerned. In the legal justifications offered for the attack on Afghanistan, this logic played an important role. It was argued that the relations between the Taliban and Al-Qaida were so close that it was difficult to tell who was acting under whose instruction, control or direction. Based on a relatively liberal reading of the test of ‘control’,⁶¹ it was argued that the 9/11 attacks could be attributed to the (failed) State of Afghanistan, thus legitimizing acts of self-defense against this State.⁶² Such acts,

⁵⁸ M. Herdegen, ‘Der Wegfall effektiver Staatsgewalt im Völkerrecht: “The Failed State”’, in: D. Thürer (1996), pp. 49-85, at p. 77

⁵⁹ See for instance T. Dempsey, ‘Counterterrorism in African Failed States: Challenges and Potential Solutions’, Strategic Studies Institute, April 2006.

⁶⁰ Articles on Responsibility of States for Internationally Wrongful Acts, as formulated by the International Law Commission, and adopted by the General Assembly [GA/A/Res/56/83, 28 January 2002].

⁶¹ This is not the place to discuss the different interpretations given to the term ‘control’ in the area of State responsibility. Suffice it to say that the International Court of Justice took a relatively strict position in the *Nicaragua* case, holding that control meant ‘effective control’, that is: directing or enforcing the acts in question (*Military and Paramilitary Activities in and against Nicaragua* Nicaragua v. United States of America, Judgment of 27 June 1986, para 115). In the *Tadic* case, the ICTY took more qualified position. While reiterating the principle of control, it stated that the degree of control may vary. The Tribunal argued that it was sufficient to have ‘overall control’, that is: a role in the organizing, coordinating or planning of the acts in question (ICTY, *Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999). In the justification of the attack on Afghanistan, the US and its allies choose to rely on the more flexible interpretation of the ICTY.

⁶² It should be noted that prior to the ‘war on terror’ the Taliban had only be recognized as the legal government of Afghanistan by Pakistan, United Arab Emirates and Saudi Arabia. The latter two cut diplomatic ties with the Taliban on September 21st and 25th, 2001 respectively. Despite the international non-recognition, as the *de facto* regime of Afghanistan the Taliban was addressed by the Security Council for international obligations since the late 1990s; see for instance S/Res/1267 (1999) and *supra* fn49.

as we set out in the previous section, were not limited to repelling an immediate attack, but covered attempts at a whole-scale reconstruction of the State and society in question.

The second route goes beyond the confines of positive international law. It is based on the argument that, since failed states are incapable of meeting their duties as sovereigns, it is the responsibility of the international community to step in and take action. In this context, it is not always clear who may take such action on behalf of the international community. While the UN Security Council has a clear legal mandate, some States who claim to represent the international community can offer only more shaky legal and moral foundations for their actions. In this context, an interesting merger of self-defense and humanitarian intervention is taking place. Whereas the notion of ‘secondary responsibility’ in the Responsibility to Protect report related to human rights, and arguably testifies a move beyond Hobbesian international politics in the post-Cold War period, with the ‘war on terror’ it is conceived in terms of high politics of security again - this time mixed with a muscular humanitarianism.⁶³ Failed States, in other words, are portrayed as dangerous to citizens, fellow sovereigns, and the international community and/or humanity at large alike. Moreover, assistance or harbouring terrorism is conceived not only an ‘internationally wrongful act’ in itself, but in particular in relation to the right to territorial integrity of fellow-sovereigns.

This move also clarifies how in political discourse failing states and ‘rogues’ are increasingly coupled, whereas allegedly they occupy extreme positions on a scale of statehood – lacking effective control in the one case, displaying an abundance of control in the other: ‘From one perspective, totalitarian regimes and failed or failing states are at opposite ends of the spectrum. But there are similarities: one is unable to avoid subverting international law; the other is only too willing to flout it’⁶⁴ – i.e. neither is living up to its international responsibilities of the international community. Both then are designated as outlaws (or even criminal elements within the international order), forfeiting by extension in both cases their sovereign rights within the community:⁶⁵ ‘Whether the dangers to

⁶³ A. Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Intervention,’ *European Journal of International Law* 10, 1999, pp. 679–711. See also A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge University Press, 2003

⁶⁴ J. Straw, ‘Principles of a Modern Global Community, 10 April 2002, available at www.britemb.org.il/news/straw100502.html, emphasis added [accessed on 23 April 2007]

⁶⁵ Again, the parallels to the Standard of Civilization transpire, as Lorimer declared that intolerant anarchies cease to be fully equal sovereigns (quoted by Simpson 2005, p. 239)

international order come from totalitarianism or chaos, all countries have the right to respond'.⁶⁶ Accordingly, one can detect three shifts with regard to state failure as a political issue: from a humanitarian to a security issue, from a domestic to an international responsibility, and from a multilateral to a unilateral issue (a matter of individual self-defense).

As an illustration to this shift of the sovereignty game within political discourse, and in particular our argument regarding the link between sovereignty and responsibility, it is worthwhile to quote a US governmental official, Richard Haass (Director Policy Planning of the State Department) at length:

'What you're seeing from this Administration is the emergence of a new principle or body of ideas—I'm not sure it constitutes a doctrine—about what you might call the limits of sovereignty. Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the *normal* advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene. In the case of terrorism, this can even lead to a right of preventive, or preemptory, self-defense. You essentially can act in anticipation if you have grounds to think it's a question of when, and not if, you're going to be attacked'.⁶⁷

A similar emphasis on rights and responsibilities as structuring the international order is central to Blair's 'doctrine of the international community', which was first formulated in the nineties but also became a prominent wager in the 'war on terrorism'. Explaining its principles, then Foreign Secretary Jack Straw is even more explicit: 'The rights of members of the global community depend exclusively on their readiness to meet their global responsibilities' – and this means, according to the Blair administration, that the principle of non-interference requires qualification in certain respects.⁶⁸ Whilst taking a more

⁶⁶ Ibid. For the qualification of the non-interference principle, see also T. Blair, 'Doctrine of the International Community', Economic Club Chicago, 24 April 1999, available at www.number-10.gov.uk/output/page1297.asp [accessed on 23 April 2007].

⁶⁷ Richard Haass, quoted by Nicholas Lemann, 'The Next World Order', *The New Yorker*, April 1 2002, p. 45-6 (emphasis added)

⁶⁸ Straw, 10 April 2002 (*supra* fn64) and Blair, 24 April 1999 (*supra* fn66).

multilateral route than the Bush administration, it still remains unclear who has the authority to speak and act on behalf of the international community. In an imprecise way it appears to be linked to responsible behaviour again. Thus the relationship of sovereignty and responsibility is turned around in political discourse – it is not just that sovereignty via legal personality relates to State responsibility and legal accountability, but vice versa that ‘responsible’ behavior identifies the ‘true sovereigns’, whereas irresponsible behavior requires a qualification of that sovereign status. Responsibility subsequently easily slips from a legal-procedural matter into a political-substantive issue. Whereas Blair makes a reservation regarding regime change in 1999, three years later Jack Straw is more obtrusive in his definition of modern global community, linking terrorism with state failure with the lack of democracy, and subsequently with a call for early intervention.⁶⁹ Taking it a step further, some have indeed defended regime change in the context of (the broadening of) the right to self-defense: ‘A war of self-defense may be fought in an offensive mode to the last bunker of the enemy dictator, with a view to the total collapse of the belligerent State (including, as a by-product, a regime change)’.⁷⁰

In this way, the concept of sovereignty thus underpins an exceptional right of self-defense that goes well beyond a limited, temporary right to ward off an armed attack. Through the linkage between sovereignty and responsibility, it becomes possible to use an egalitarian principle *par excellence* as a basis for making distinctions between States. Within the sovereignty game, the right to sovereign equality then translates into a duty to be ‘equally sovereign’ in terms of performing the same rights and duties in a similarly responsible manner (i.e. to be sovereign of a certain kind and/or certain manner). It is the (self-assigned) task of responsible sovereigns to take action against irresponsible States and restore normalcy. Such action might require the stretching of legal boundaries, or paradoxically, even require the violation of international norms in order to protect them.

⁶⁹ Straw, 10 April 2002 (*supra* fn64). See also his speech on ‘Failed and Failing States’, European Research Institute, Birmingham, 6 September 2002, available at www.eri.bham.ac.uk/events/jstraw060902.pdf [accessed on 27 April 2007]

⁷⁰ Y. Dinstein, *Ius ad Bellum Aspects of the ‘War on Terrorism’*, in: W.P. Heere (ed.), *Terrorism and the Military*, T.M.C. Asser Press, 2003, at p. 20, emphasis added. In the updated National Strategy for Combating Terrorism, the US administration also explicitly links the defensive combat against terrorism to regime change operations. Recognizing ‘that we are at war and that protecting and defending the Homeland, the American people, and their livelihoods remains our first and most solemn obligation’, the US administration explicitly puts the stakes on effective democracy as a counter to all the sources of terrorism attacking principles of liberty and human dignity (available at <http://www.whitehouse.gov/nsc/nsct/2006/>). In the words of Secretary Condoleezza Rice: ‘Attempting to draw neat, clean lines between our security interests and our democratic ideals does not reflect the reality of today’s world’ (Op-Ed in *The Washington Post*, December 11, 2005).