

Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders

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This article looks at emergent challenges to the sanctity of international borders. It first provides a brief discussion of international law on the issues of uti possidetis and territorial integrity. It then examines challenges to these ideas that have emerged in recent years through the notion of contingent sovereignty and its relation to earlier calls for humanitarian intervention and current discussions around reform of the United Nations. In contrast the other side of the coin is the notion of earned sovereignty, where new states can enjoy transitional paths to independence or secession. The former has enjoyed much more international support, but both ways of rethinking the notion of sovereignty have important territorial implications. The article concludes by raising questions about this relation and the question of borders more generally.

Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries.¹ The United Nations Charter underlines this in its first chapter, when it notes that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations (Article 2, Paragraph 4).²

Other articles of the founding Charter, as well as Security Council and General Assembly resolutions since, have continually stressed these central founding principles. They are interrelated in that the notion of territorial integrity means both territorial preservation and territorial sovereignty, and political independence requires both exclusive internal and equal external sovereignty.

Many other international organizations stress the importance of these notions, especially territorial integrity, in their founding charters, including the Arab League (1945), the Organization of Arab States (1948), the Organization of African Unity Charter (1963), the African Union (2000),

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and the Helsinki Final Act (1975). NATO and the European Union require states seeking membership to settle their external borders before joining, through the use of the International Court of Justice if necessary. The *Treaty Establishing a Constitution for Europe*—currently stalled following “no” votes in the French and Dutch referenda—strikes an uneasy balance between an envisioned European space and the territorial integrity of its member-states.³ Territorial integrity receives further emphasis in the 1978 Vienna Convention on Succession of States in respect of Treaties, which in Article 11 notes that “a succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.”⁴

This norm calling for the perpetuation of the territorial *status quo* was equally apparent during decolonization, when states inherited the boundaries of colonial divisions under a legal principle known as *uti possidetis*. The Organization of African Unity declared in 1964 that “the borders of African States, on the day of their independence, constitute a tangible reality.”⁵ This model was inherited from South American practice and has helped to condition the break-up of other empires, including the Soviet Union. As the International Court of Justice has stated, this is “not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs.”⁶

As Michael N. Barnett and Martha Finnemore have suggested, UN actions on decolonization therefore helped to couple sovereignty with territorial integrity, and this “norm of sovereignty-as-territorial-integrity” has been reinforced since.⁷ In practice, this has meant that self-determination applies to colonies or what the United Nations calls Non-Self-Governing Territories, but not to independent countries, for which territorial integrity overrides other possible claims by groups of people. Self-determination is enshrined in the UN Charter (Article 1) but is generally trumped by territorial integrity. The 1970 General Assembly Resolution clarified the position:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.⁸

As Allen Buchanan notes, “the consensus among legal scholars at this time is that international law does not recognize a right to secede in other circumstances, but that it does not unequivocally prohibit it either.”⁹ Thus international law largely attempts to protect existing borders rather than recognizing their artificial nature in many places.

That these ideals have been violated frequently is, of course, incontestable. And that these principles were recognized as the building blocks of an international settlement before the United Nations enshrined them—even in the 20th century precedents can be found in Woodrow Wilson’s Four-

teen Points, the Charter of the League of Nations and the Kellogg-Briand Pact—should not blind us to the way that for half a century they formed the basis for the international system.¹⁰

Over the last decade, however, a number of arguments against these norms have emerged. In particular, these arguments have attacked this notion of territorial integrity, challenging either state borders themselves or their sanctity.

New arguments have challenged either state borders themselves or their sanctity.

Sovereignty and Borders

In his book *Just and Unjust Wars*, Michael Walzer outlines a number of the assumptions behind territorial thinking and the issues at stake. Although boundaries may be arbitrary, rooted in history and subject to the politics that condition the making of maps, they are the grid that creates a “habitable world.” State sovereignty generally provides a measure of protection within those borders. While he recognizes that adjustments may be necessary, in most cases borders should be preserved. Indeed, if “an invasion has been threatened or has actually begun, it may be necessary to defend a bad border simply because there is no other.”¹¹

Walzer’s defense of established borders is not absolute. He suggests that intervention sometimes can be justified, even though “the practice of intervening often threatens the territorial integrity and political independence of invaded states.”¹² Three possible circumstances may justify intervention: 1) a particular community seeks secession or “national liberation” within a set of boundaries; 2) counter-intervention is necessary to protect boundaries that already have been crossed; or 3) a terrible “violation of human rights,” such as “cases of enslavement or massacre” has occurred.¹³

For Walzer, these three instances can “open the way for just wars that are not fought in self-defense or against aggression in the strict sense.”¹⁴ The second instance is the most straightforward and would fall under the right of self-defense or coming to the aid of a country under attack, allowed under the UN Charter, Article 51. The other two instances raise more complicated questions. The first provides for a right of secession, under strictly controlled guidelines, while the third outlines what has come to be known as humanitarian intervention. Walzer justifies this through an argument not against sovereignty, but through a particular understanding of it.

States can be invaded and wars justly begun to assist secessionist movements (once they have demonstrated their representative character), to balance the prior interventions of other powers, and to rescue peoples threatened with massacre. In each of these cases we permit or, after the fact, we praise or don’t condemn these violations of the formal rules of sovereignty, because they uphold the values of individual life and communal liberty of which sovereignty itself is merely an expression.¹⁵

Sovereignty in this sense is an important development, given that it is usually understood as the expression of a state’s power. Sovereignty is a

complicated issue, but Stephen Krasner has helpfully outlined four dominant ways of thinking about it: “interdependence sovereignty, domestic sovereignty, international legal sovereignty, and Westphalian sovereignty.”

Interdependence sovereignty refers to the ability of a government to regulate the movement of goods, capital, people, and ideas across its borders. Domestic sovereignty refers both to the structure of authority within a state and to the state’s effectiveness or control. International legal sovereignty refers to whether a state is recognized by other states, the basic rule being that only juridically independent territorial entities are accorded recognition. Westphalian sovereignty, which actually has almost nothing to do with the Peace of Westphalia, refers to the autonomy of domestic authority structures—that is, the absence of authoritative external influences. A political entity can be formally independent but *de facto* deeply penetrated. A state might claim to be the only legitimate enforcer of rules within its own territory, but the rules it enforces might not be of its own making.¹⁶

We can see how these different types of sovereignty interrelate, particularly in relation to the three norms of the international system outlined above. As Jieli Li writes, “if sovereignty concerns the way in which exclusive jurisdiction is exercised over respective territories of an empire or a nation-state, then the power of a sovereign state is more than the authority of bureaucratic administration; it hinges on territorial integrity.”¹⁷ The challenge to these semi-absolute notions of sovereignty has come from a number of sources. International law has provided a number of conditions that states must adhere to, either as a condition of membership of the United Nations or through other agreements into which they have entered. For some the European Union project has eroded sovereignty. For others it is a response to globalization and the increasingly interdependent world. Both sides tend to recognize that absolute sovereignty is a chimera and that international agreements of many kinds have created a system in which sovereignty is necessarily pooled, interdependent and limited. However, even the United Nations requires the “necessary fiction” of sovereignty as a means of structuring international relations—particularly relating to the question of boundaries.

Contingent Sovereignty for Security

This ideal of state sovereignty has come under increased pressure recently, particularly through the notion of “contingent sovereignty.” Since the terrorist attacks of Sept. 11, 2001, key voices in the Bush administration have promoted the idea that in certain key circumstances—in particular, when states harbor terrorists or seek to acquire weapons of mass destruction—norms of sovereignty do not apply. A 1998 report co-authored by Philip Zelikow, later executive director of the 9/11 Commission and author of the 2002 National Security Strategy, outlined the contours of contingent sovereignty:

International norms should adapt so that such states are obliged to reassure those who are worried and to take reasonable measures to prove they

are not secretly developing weapons of mass destruction. Failure to supply such proof, or prosecute the criminals living in their borders, should entitle worried nations to take all necessary actions for their self-defense.¹⁸

One of the key voices has been Richard N. Haass, now President of the Council on Foreign Relations, but previously Director of Policy Planning in Colin Powell's State Department as well a member of the administrations of Carter, Reagan, and George H. W. Bush. Haass has argued that sovereignty entails obligations or responsibilities, including humane treatment of citizens and the commitment not to support terrorism or pursue weapons of mass destruction. As Haass declared in 2002, "sovereignty does not grant governments a blank check to do whatever they like within their own borders."¹⁹

Tellingly, Haass defines support for terrorism not merely as active assistance, but also as a state's inability to control terrorist activities within its borders. In other words, a state that fails to exercise one of the standard definitions of sovereignty—effective political control or the "monopoly of legitimate physical violence" within its territory—finds that its sovereignty more generally may be deemed contingent.²⁰ Stewart Patrick, Haass' former colleague at the State Department, elaborates:

Historically, the main obstacle to armed intervention—humanitarian or otherwise—has been the doctrine of sovereignty, which prohibits violating the territorial integrity of another state. One of the striking developments of the past decade has been an erosion of this non-intervention norm and the rise of a nascent doctrine of "contingent sovereignty." This school of thought holds that sovereign rights and immunities are not absolute. They depend on the observance of fundamental state obligations.²¹

These suggestions have found their way into policy documents. For instance, the National Defense Strategy of March 2005 declares that

It is unacceptable for regimes to use the principle of sovereignty as a shield behind which they claim to be free to engage in activities that pose enormous threats to their citizens, neighbors, or the rest of the international community . . . The U.S., its allies, and partners must remain vigilant to those states that lack the capacity to govern activity within their borders. Sovereign states are obligated to work to ensure that their territories are not used as bases for attacks on others.²²

Similar claims can be found in the National Security Strategy and the National Strategy for Combating Terrorism.

In practice such arguments have been used for the interventions in both Afghanistan and Iraq. Yet they cannot be dismissed simply as the re-making of international relations under the "neoconservatives." It is true that many of the key figures shaping U.S. foreign policy believe that the founding principles of the United Nations should be relative, not absolute. As William Shawcross notes, however, distinct parallels exist between these beliefs and "mainstream liberal internationalist thought."²³

Contingent Sovereignty and Reform of the United Nations

As an example, I will cite some of UN Secretary-General Kofi Annan's recent speeches and writings. Writing in *The Economist* in 1999 he argued that

State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.²⁴

Annan went on to discuss the tension between events in Rwanda and Kosovo. In Rwanda, the international community failed to respond to genocide. Yet Annan believed NATO's response to the crisis in Kosovo "raised equally important questions about the consequences of action without international consensus and clear legal authority."

It has cast in stark relief the dilemma of so-called "humanitarian intervention." On the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.²⁵

This dilemma is even more apparent today. Annan worried about the way states and groups of states—in this case NATO—would act outside of UN sanction, and whether this would undermine "the imperfect, yet resilient, security system created after the second world war" and set "dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances."

Trying to work through these issues, Annan strove to articulate what he hoped would become an international consensus for protecting innocent civilians from grave human rights abuses. He proposed four conditions:

1. Intervention need not entail force. It can extend "to peacekeeping, to humanitarian assistance, to rehabilitation and reconstruction," but it is important that this be done more evenly, with a "universal" commitment to humanitarian action.
2. Norms of sovereignty are a problem, but so too are national interests. For many challenges "the collective interest is the national interest."
3. The Security Council must "rise to the challenge." Unity and inaction (Rwanda) and division with regional action (Kosovo) should not be the choices. "In both cases, the UN should have been able to find common ground in upholding the principles of the charter, and acting in defense of our common humanity."
4. Finally, "the international commitment to peace must be just as strong as was the commitment to war," and this too must be done consistently.

These then, are the key questions and commitments that condition “this developing international norm in favor of intervention to protect civilians from wholesale slaughter.” For Annan, “national sovereignty was never meant to be a shield behind which massacres are carried out with impunity.”²⁶ Yet the world should address this problem through the existing structures of the United Nations and international law, rather than engaging in wholesale reform or abandoning core principles. Annan claimed that he stood before the United Nations “as a multilateralist—by precedent, by principle, by Charter and by duty”²⁷, and in the debates preceding the war on Iraq he stated that

Any State, if attacked, retains the inherent right of self-defense under Article 51 of the Charter. But beyond that, when States decide to use force to deal with broader threats to international peace and security, there is no substitute for the unique legitimacy provided by the United Nations.²⁸

Annan’s writings and speeches provide good examples of the humanitarian arguments in favor of limitations to state sovereignty. These arguments have found their way into recent reports discussing ways the United Nations could evolve in the face of new threats, ideas that were adopted in part at the World Summit that was ongoing at the time of this writing. The initial reports advanced the idea of “sovereignty as responsibility,” by which states have duties to uphold and face penalties for failure. Signing up to the UN Charter, these reports stress, is an “international obligation voluntarily accepted by member states” that allows them to be welcomed as “a responsible member of the community of nations” but also requires them to accept “the responsibilities of membership flowing from that signature.” The reports argue that “there is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties.”²⁹

The responsibilities of sovereignty are thus threefold: State authorities are responsible for protecting the safety and lives of citizens and promoting their welfare, responsible to their citizens internally and to the international community through the United Nations, and responsible for their actions, both acts of commission and omission. The broader context in which these responsibilities are articulated is the “ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.”³⁰ These responsibilities demonstrate the limitations of sovereignty. In terms of “genocide, war crimes, ethnic cleansing and crimes against humanity,” the reports advocated a “collective international responsibility to protect,” with Security Council authorization of “military intervention as a last resort.”³¹ This became a “shared responsibility,” in drafts of the outcome document,³² which ultimately asserted that the international community is

prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national

authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.³³

The World Summit reports assert that the United Nations, broadly in its existing form, is appropriate for this involvement, that Article 51 “needs neither extension nor restriction of its long-understood scope, and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront.” Thus the task is “not to find alternatives to the Security Council as a source of authority but to make it work better than it has.”³⁴ Indeed, the World Summit failed to reach agreement even on limited reforms to the Security Council.

Related arguments against sovereignty increasingly are being used for more than just humanitarian intervention. This inevitably gives rise to the same issues of legitimacy, responsibility and potential conflict between the United Nations, regional organizations, and *ad hoc* coalitions of the “willing.” Despite the opposition, then, between calls for U.S. exceptionalism and this multilateralism in terms of the challenge to sovereignty, similar logics are at work. Both advocate a limitation of the right of sovereignty understood as independent action within existing borders, though the mechanisms for legitimating this challenge—multilateral or unilateral—differ dramatically. This tension is well highlighted in John Bolton’s proposed change to paragraph 60 of the document for the 2005 World Summit. The original first point read: “We resolve to: Appeal to all States to take action, in a multilateral framework, to prevent the proliferation of weapons of mass destruction and their means of delivery in all its aspects.” Bolton deleted the phrase “in a multilateral framework” and replaced it with “unilaterally, bilaterally or multilaterally.”³⁵ The relevant section did not make it through to the final agreed document.

Earned Sovereignty

If states can lose sovereignty, can they gain it? This is the much less explored corollary to these arguments. As noted above, the norm for states gaining independence from colonial rule has been to inherit the boundaries of colonial divisions. Federations that have split have tended to break along similar lines. The state’s territorial integrity subsequently receives protection under international law. *Uti possidetis* and the inviolability of existing frontiers were key criteria of the Badinter commission of the European Union, which examined the legal and political basis for the secession of constituent republics from former Communist countries in Central and Eastern Europe in the early 1990s and set conditions for their international recognition. This condition has come under sustained scrutiny. For Steven R. Ratner, “when a new state is formed, its territory ought not to be irretrievably predetermined but should form an element in the goal of maximal internal self-determination. *Uti possidetis*, for its part, assumes that any benefits to internal self-determination from changes in borders are always outweighed by the risk of conflict.”³⁶ Indeed, Ratner claims that the Badinter commission “erred in its comprehension of the nature and purpose of *uti*

possidetis.” He suggests that in the absence of the goal it was intended to serve, namely orderly decolonization, and with other ideas about internal self-determination and political participation possible, this legal concept’s foundations were “weak, and the validity of the principle for noncolonial breakups suspect.”³⁷

The problem, Ratner claims, is that while the principle might be a necessary first step, it should not become “a permanent solution by default.” The key to the Badinter criteria is that changes can be made by agreement. However, circumstances soon showed this to be an inadequate response to the situation. Indeed, as Lord Owen suggests, the very idea that the boundaries could be negotiated was barely countenanced, creating a “straitjacket that greatly inhibited compromises between the parties in dispute.”³⁸ Ratner therefore argues that there is “a compelling need to respect the original Roman-law meaning of *uti possidetis*: to preserve the status quo only until states can resolve their competing claims, rather than apply the gloss from decolonization whereby states effectively presumed independence-day lines to be permanent.”³⁹ He concludes that “only by directly engaging the territorial question, with all its dimensions, is the international community likely to control the breakup of states in an orderly manner consistent with human dignity.”⁴⁰

For this reason, among others, Halim Moris suggests that “the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders.”⁴¹ It is certain, as Michael P. Scharf suggests, that “the maintenance of territorial integrity is vital in light of the disruptive consequences of breaches of that integrity.”⁴² Yet this is only worthwhile if territorial integrity really provides stability and protects the people’s interests. If states fail to follow particular norms, the question is how to resolve this tension. Is a “slavish devotion to territorial integrity” appropriate?⁴³ As Michael Freeman notes, “the UN had always been based on a political theory that had sought to reconcile the principle of territorial integrity of states with that of the self-determination of peoples.”⁴⁴ However, it is clear that in practice territorial integrity usually has prevailed. Sovereignty has been applied strictly to states, not peoples, leading some to argue that it is time to rethink that political theory.

One of the ways this is being advanced in law is through the notion of what has been called “earned sovereignty,” in which sovereignty can be incremental and conditional rather than absolute. It may be transferred from another state, held in trust by the United Nations, returned after occupation or returned through the reconstitution of a successor regime. Advocates explicitly promote this as “a concept that seeks to reconcile the principles of self-determination and humanitarian intervention with the principles of sovereignty and territorial integrity.”⁴⁵ What is telling in this formulation is the relation of self-determination to humanitarian intervention and the explicit linkage between sovereignty and territorial integrity. Other names for this concept include “intermediate sovereignty, provisional statehood, conditional recognition, and earned recognition.”⁴⁶ This concept comes

from the Public International Law and Policy Group (PILPG), put forward in a number of articles, working papers and consultancy reports.⁴⁷

Rather than seeing sovereignty as virginity, as something you either have or do not have, as something that once lost can never be regained, and as something that cannot be shared⁴⁸, state sovereignty is viewed as a fluid concept. Total independence featuring unlimited and undivided sovereignty is not the only possible outcome. Rather, several issues can be negotiated:

1. the right to territorial integrity;
2. the right to defend the state through the use of force;
3. the right to govern by establishing, applying and enforcing law;
4. eligibility for international organizations;
5. the capacity to act as a legal entity for owning, purchasing or transferring property;
6. grant of sovereign immunity for non-commercial activities and consular relations;
7. capacity to sign international agreements;
8. the duty to respect other nations; and
9. the obligation to abide by international law.⁴⁹

The three core elements of earned sovereignty are “provision for shared sovereignty, measures enabling some type of internal institution building, and negotiations for final status,” while the three optional elements are phased sovereignty, conditional sovereignty and constrained sovereignty. In phased sovereignty, changes are incremental. Conditional sovereignty requires the state to fulfill key responsibilities. States with constrained sovereignty would face “continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and/or military presence, and limits on the right of the state to undertake territorial association with other states.”⁵⁰ Final status may therefore be less than full sovereignty and territorial integrity. This idea is reflected, for example, in some plans envisaged for Palestine.

Scharf suggests this may not be a new phenomenon, given that sovereignty historically has not always been absolute. However, legal norms have not reflected this. “The time has come to embrace *de jure* the new reality of earned sovereignty that is emerging from diplomatic practice.”⁵¹ Examples of this concept in practice include the Road Map in the Middle East, the Good Friday Agreement, the Machakos Protocol for Sudan, the Baker Peace Plan for Western Sahara, UNSC Resolution 1244 for Kosovo, the Dayton Accords for Bosnia, UNSC Resolution 1272 for East Timor, the Comprehensive Agreement for Bougainville and the new constitution for the Union of Serbia and Montenegro.⁵²

It is worth noting that this notion of earned sovereignty is designed to go further than the notion of territorial autonomy, which under a system of devolved power grants some degree of self-governance to regions of larger states. Hans-Joachim Heintze has usefully clarified the use of the term “territorial autonomy”:

It means that under the principle of territorial integrity, one region is given a special status. The latter comprises the competence of self-government

organs to regulate certain matters. These competencies go beyond local and regional self-government and include specific problems of the minority or group. Territorial autonomy as a form of group protection can only be implemented if the group in question lives in a defined area, i.e. in a geographically secluded territory, and constitutes the majority there. As a consequence of a region being autonomous, all people living in it are subject to this status, not only members of certain groups. On the other hand, members of a minority living outside the autonomous area do not enjoy this status.⁵³

Territorial autonomy has been the preferred solution, for example, for indigenous peoples. It is worth noting that this concept is dependent on individual state practice, as international law does not provide for territorial autonomy in any more than a limited way. However, territorial autonomy increasingly is welcomed as a means of allowing some measure of self-rule within the confines of state territorial integrity.⁵⁴

Unresolved Paradoxes

On the one hand, then, territorial sovereignty increasingly is seen as contingent, not merely for states that commit human rights violations, but now also for those that harbor terrorists and develop weapons of mass destruction. On the other hand, theoretical arguments are being advanced in favor of challenges to territorial preservation. Territorial integrity, which encompasses both territorial sovereignty and territorial preservation and is part of the post-World War II security settlement, therefore is under increased pressure.

And yet, while the sovereignty of some states is in question, other states are increasingly looking to retain or regain it. Consider, for example, the U.S. withdrawal from many multilateral agreements in the early days of the Bush administration, the European constitutional debates, and the debates in Britain over the euro versus the pound as a symbol of sovereignty. (Indeed, one irony of the current situation is that the U.S. government's opposition to the International Criminal Court led it to abstain from Security Council Resolution 1593 referring Sudan to the Court, rather than vetoing it, as was anticipated.) Parallel to this assertion of sovereignty, states have increased border security as a response to Sept. 11, 2001 and more recent attacks in Europe and elsewhere.⁵⁵ As Amy Kaplan tellingly asks,

What is the relation between contracting the borders around the territorial homeland and waging a highly mobile and deterritorialized war against terrorism by a nation, which has announced its unilateral right to launch overt and covert attacks across any sovereign borders, regardless of whose homeland or of international law?⁵⁶

This question raises a set of questions that clearly hinge on the relation between sovereignty and territory. What is clear is that the notion of "contingent sovereignty," in both its humanitarian and security guises, profoundly affects the question of territorial integrity in both senses. While there has been much discussion of the putative deterritorialization taking place under globalization, there has generally been a lack of discussion of

the concomitant reterritorialization of state/space relations in the present era.⁵⁷ Space and territory do not cease to be important, but their remaking and reordering raise a number of crucial questions. What do borders mean

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today, how do they operate, how are they maintained, and how and where, if necessary, should they be redrawn? The theoretical and political discourses discussed in this essay thus challenge the orthodox and recent understanding of the sanctity of borders. In theory borders themselves may change, but in practice it is more likely that some states may cease to be sovereign within them.

Notes

¹ I am grateful to colleagues in the International Boundaries Research Unit for discussions around the themes in this essay, and in particular to Martin Pratt for his useful comments on an earlier version.

² www.un.org/aboutun/charter/chapter1.htm.

³ For an analysis, see Luiza Bialasiewicz, Stuart Elden and Joe Painter, “The Constitution of EU Territory”, *Comparative European Politics*, vol. 3 (2005), 333–63.

⁴ www.un.org/law/ilc/texts/tresufra.htm.

⁵ Organization for African Unity, “Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cario, UAR from 17 to 21 July 1964”, www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/hog/bHoGAssembly1964.pdf.

⁶ International Court of Justice, *Case Concerning the Frontier Dispute Burkina Faso/Republic of Mali*, 22nd December 1986, www.icj-cij.org/icjwww/icas/iHVM/ihvm_ijudgment/ihvm_ijudgment_19861222.pdf. For a discussion, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal and Kingston: McGill’s-Queen’s University Press, 2002).

⁷ Michael N. Barnett and Martha Finnemore, “The Politics, Power, and Pathologies of International Organizations,” *International Organization*, vol. 53, no. 4 (1999), 699–732, 713.

⁸ UN General Assembly, 25th Session Resolution 2625 (XXV) <http://www.un.org/Depts/dbl/resguide/gares1.htm>.

⁹ Allen Buchanan, “Theories of Secession,” *Philosophy and Public Affairs*, vol. 26, no. 1 (1997), 31–61, 33.

¹⁰ For a fuller discussion of the historical and contemporary issues, see Stuart Elden, “Territorial Integrity and the War on Terror,” *Environment and Planning A* 37, no. 12 (2005), 2083–2104.

¹¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Second Edition, New York: Basic Books, 1992), see particularly 57.

¹² *Ibid.*, 86.

¹³ *Ibid.*, 90.

¹⁴ *Ibid.*, 90.

¹⁵ *Ibid.*, 108. See also Kurt Mills, “Sovereignty Eclipsed?: The Legitimacy of Humanitarian Access and Intervention,” *The Journal of Humanitarian Assistance*, www.jha.ac/articles/a019.htm.

¹⁶ Stephen D. Krasner, “Problematic Sovereignty”, in Stephen D. Krasner (ed.) *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001), 2. The rest of the volume provides a series of case studies around these issues. For a discussion of the relation between sovereignty and territory, and in particular a challenge to dominant readings of Westphalia, see Stuart Elden, “Missing the Point: Globalisation,

neapolis: University of Minnesota Press, 1998); and Campbell, “Apartheid Cartography: The Political Anthropology and Spatial Effects of International Diplomacy in Bosnia,” *Political Geography* 19 (1999), 395–435.

³⁹ Ratner, “Drawing a Better Line,” 617.

⁴⁰ *Ibid.*, 624.

⁴¹ Halim Moris, “Self-Determination: An Affirmative Right or Mere Rhetoric?” *The ILSA Journal of International and Comparative Law* 4 no. 1, cited in Michael P. Scharf, “Earned Sovereignty: Juridical Underpinnings,” *Denver Journal of International Law and Policy*, vol. 31, no. 3 (2003), 373–87, 373.

⁴² Scharf, “Earned Sovereignty,” 386.

⁴³ Hurst Hannum, “Territorial Autonomy: Permanent Solution or Step toward Secession?”, 2000, www.zef.de/download/ethnic_conflict/hannum.pdf.

⁴⁴ Michael Freeman, “The Right to Self-Determination in International Politics: Six Theories in Search of a Policy,” *Review of International Studies*, vol. 25, no. 3, 355–70, 358.

⁴⁵ Scharf, “Earned Sovereignty,” 374.

⁴⁶ Paul R. Williams, Michael P. Scharf, and James R. Hooper, “Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty,” *Denver Journal of International Law and Policy*, vol. 31, no. 3 (2003), 349–54, 350 n. 4; also see Paul R. Williams, “Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo’s Final Status,” *Denver Journal of International Law and Policy* vol. 31, no. 3 (2003), 387–430, 392.

⁴⁷ See www.publicinternationallaw.org/.

⁴⁸ “The truth is that sovereignty is not some magical commodity, which lies locked up in a vault at Westminster. It is not like virginity—either you have it or you don’t—as Geoffrey Howe has famously argued.” Leon Brittain, “A Pro-European Policy for Conservatives,” 21st July 1999, <http://core2.trg.org.uk/publications/proeuropeanpolicy.html>.

⁴⁹ www.publicinternationallaw.org/areas/peacebuilding/earnedsov/.

⁵⁰ Public International Law and Policy Group, “Earned Sovereignty,” <http://www.publicinternationallaw.org/areas/peacebuilding/earnedsov/> see Williams, et. al., “Earned Sovereignty,” 388–9.

⁵¹ Williams, et. al., “Earned Sovereignty,” 387.

⁵² *Ibid.*, 355–75; see also Public International Law and Policy Group, “Intermediate Sovereignty As A Basis For Resolving The Kosovo Crisis” (1998), www.publicinternationallaw.org/docs/Kosovo/Intermediate_Sovereignty_as_a_Basis_for_Resolving_the_Kosovo_Crisis.doc; and Paul R. Williams and Francesca Jannotti Pecci, “Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination,” *Stanford Journal of International Law* vol. 40, no. 1 (2004), 1–40.

⁵³ Hans-Joachim Heintze, “Territorial Autonomy: A Possible Solution of Self-Determination Conflicts?” paper delivered at *Autonomy for Papua—Opportunity or Illusion?* (Conference), June 4–5, 2003, <http://home.snafu.de/watchin/AfP2003heintze.htm>.

⁵⁴ For an analysis, see Asbjørn Eide, “Territorial Integrity of States, Minority Protection, and Guarantees for Autonomy Arrangements: Approaches and Roles of the United Nations,” in *Local Self-government, Territorial Integrity and Protection of Minorities: Proceedings of the UniDem Seminar Organised in Lausanne on 25–27 April 1996* (Council for Europe, 1997), 273–303.

⁵⁵ See, for instance, Peter Andreas and Thomas J. Biersteker, (eds) *Rebordering of North America: Integration and Exclusion in a New Security Context* (London: Routledge, 2003).

⁵⁶ Amy Kaplan, “Homeland Insecurities: Reflections on Language and Space,” *Radical History Review*, no. 85 (2003), 82–93, 89.

⁵⁷ See Elden, “Missing the Point”, “The State of Territory Under Globalization: *Empire* and the Politics of Reterritorialization”, in Maria Margaroni and Effie Yiannopoulou (eds.), *Metaphoricity and the Politics of Mobility* (Amsterdam: Rodopi, forthcoming, 47–66); and more generally Neil Brenner, Bob Jessop, Martin Jones and Gordon MacLeod (eds.) *State/Space: A Reader* (Oxford: Blackwell, 2003).