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NEGATIVE SOVEREIGNTY AND POSITIVE SOVEREIGNTY

(Why the Great Powers Invade Outlaw States)

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Abstract

This paper attempts to answer several questions: why a state invades other states? Why a state claims an authority, in the name of civilization, democracy, freedom, security or humanitarian intervention, to enter into other sovereign states? How then it is legalized? Why the doctrine of state sovereignty sometime cannot protect a particular state from the aggression of other states? In answering this question, I will utilize two terms that used to demarcate sovereignty of states: positive and negative sovereignty. It is about 'sovereign to' and sovereign 'from'. I will also use two terms that differentiate two families of nation: the Great Powers and Outlaw States. In this paper I argue that positive sovereignty which usually possessed by the Great Powers tend to make these states to be 'authoritarian states', the states which conduct and behave merely based on their interest and not pursuant to international law. Domestically this state can be very democratic and liberal. I will demonstrate that to some extent this behavior is part of the game. Civilizing mission, preemptive security act and humanitarian mission are the common reasons used by these group of states to intervene other sovereign outlaw states. But, this unilateral authoritarian behavior of the Great Powers can be the source of problems for the international order. War on terrorism and the U.S intervention in Iraq will be briefly discussed and used as an example of how the Great Powers utilized their claim in international relations. This paper will firstly discuss the basic concept of positive and negative sovereignty. I will also discuss the idea of the Great Powers and outlaw states and liberal anti pluralism as a policy that can transforms the Great States to be 'authoritarian state'. This will be followed by discussing the authoritarian behavior of the Great Powers in its relation with other sovereign states.

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1. Positive and Negative Sovereignty

Regardless the variety of their sizes, powers, prosperities, capabilities, and other qualities, all nations are equal. Chapter I article 2(1) the UN Charter says that the UN is an organization which is ‘based on the principle of the sovereign equality of all its Members’¹. The principle of sovereign equality also can be found clearly in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which has been adopted by the General Assembly on 24 October 1970. The Declaration says ‘All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature’². Moreover, President Basdevant of the International Court of Justice in 1951 said that ‘before this court there are no great or small states...’³. Thus, because of its universality, sovereign equality of states is regarded as *jus cogens* in international law⁴.

However, what the legal document says about equal sovereignty of states is different from what the reality says about sovereignty. It is obvious to argue that some states are more powerful, capable, richer, and bigger than others. No doubt that these qualities not necessarily means that the powerful states can do anything they want in their relation with other states. The normative principle of sovereign equality protects the dignity and sovereignty of small-weak states from arbitrary action of the powerful states. But, due to the historical process and their role in maintaining world order, some states enjoy certain privileges in international law. Veto right of the five Great Power states, the US, Russia, China, French, and the UK as stated in article 27 of the UN Charter is an obvious example of this reality. The distinction between developed and less-developed countries as stated in Part IV of the General Agreement on Tariffs and Trade of GATT

¹ The Charter of United Nations, 26 June 1945. Accessed from <http://www.un.org/en/documents/charter/intro.shtml> at 2 October 2009

² The UN General Assembly, 2625.Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970. Accessed from <http://www.un-documents.net/a25r2625.htm> at 2 October 2009

³ Quoted from Gerry Simpson, *Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order* (2004) 26-27

⁴ Gerry Simpson, *ibid*

of 30 October 1947, is the other example of how different states enjoys different quality of sovereignty⁵.

It is interesting, in relation to this issue, to discuss the concept of sovereignty as argued by Robert Jackson⁶. Jackson's conception of sovereignty can captures the very basic distinction of sovereignty which is enjoyed differently by different states. He argues that in discussing the concept of sovereignty, two types of sovereignty can be proposed: positive and negative sovereignty. For student of political science or Western philosophy, these two concepts are quite familiar. Indeed, Isaiah Berlin's famous essay, *Two Concepts of Liberty* was the inspiration of Jackson's conception of sovereignty⁷. While Berlin's conception is used to separate two type of liberty or freedom at individual level, Jackson applied it to analyze state sovereignty in international relations. Obviously, in exercising this analysis Jackson was aware that individuals are not strictly similar with state. But, by applying this analysis to international relations of states Jackson has found special problems that exist in international relations which do not exist in relation among individuals⁸.

I am going to begin from the question of what is the negative sovereignty. Before answering this question, let's look first briefly the idea of negative freedom as Berlin has explained⁹. In his essay, *Two Concept of Liberty*, Berlin says that negative liberty is 'the area within which a man can act unobstructed by others'¹⁰. Someone is said to be free if no man interferes or hinders his activities. It means that if I coerce or prevent someone to do or not to do something I have robbed his freedom. But, not all incapability is defined as coercion. If I cannot fly by myself, or cannot understand the concept of metaphysic of Martin Heidegger in *Being and Time*, it is not means that I lost my freedom¹¹. Berlin says that 'coercion imply deliberate interference of other human beings

⁵ J. G. Starke, *Introduction to International Law* (9th edition, 1984) 106. This is what Gerry Simpson called as legalized hegemony. He describes legalized hegemony as 'the existence within an international society of a powerful elite of states whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality'. Simpson, above n 5 p. 68

⁶ Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (1990)

⁷ Isaiah Berlin, *Four Essay on Liberty* (1969) 118-172

⁸ To find the difference, see Jackson, above n 8, p. 28

⁹ It is beyond the purpose of this essay to discuss in detail Berlin's idea of the concept of liberty. Thus, I will only quote his particular idea that is relevant to my essay.

¹⁰ Isaiah Berlin, above n 9, p. 122

¹¹ I use Berlin's style in this sentence.

within the area in which I could otherwise act'¹². This concept of liberty or freedom is famous, as Berlin calls it, as the concept of 'freedom from'.

If human beings enjoy liberty, states possess sovereignty. States in international relations are analogues with individuals in municipal law. Of course not all qualities, rights and duties of these two entities are similar. But, to some degree, they possess similarity. If individuals enjoy a space of freedom in which no other person can hinder what he or she wants to do, then the states as well. The principle of non-intervention in which no single state can invade 'the territorial integrity or political independence of any state' is stated clearly by article 2(4) the UN Charter. This is negative sovereignty. Using definition from Schwarzenberger and Brown¹³, Jackson says that negative sovereignty is the 'freedom from outside interference: a formal legal condition'. For Jackson, negative sovereignty or non intervention principle is a basic principle in classical international law. Jackson adds that 'negative sovereignty is the legal foundation upon which society on independent and formally equal states fundamentally rests'¹⁴.

We have to note that Jackson used the term of negative sovereignty to discuss the condition of state sovereignty in post-colonial era, especially in Africa. Even though the process had started since, let's say, 1823 with the rise of Monroe Doctrine that guaranteed the American continent to be freed from European imperialism¹⁵, colonization was formally ended in 1960. The General Assembly Resolution 1514 of 1960 on the Granting of Independence to Colonial Countries and Peoples marked this era. Thus, following this year, new independent states came into being. But, even though these new emerging states possess equal legal sovereignty, they suffered by the lack of or enjoy very limited statehood: no effective government, no citizen basic rights, lack of freedom and so forth¹⁶. They became independent not because they were capable to achieve it, but simply because someone gave it to them. It is a gift¹⁷. These states are not really state, but 'quasi-states' or semi-state¹⁸. Jackson defines quasi-state as state that 'consisting not of self-standing structures with domestic foundations – like separate buildings – but of territorial jurisdictions

¹² Berlin, above n 9, p. 122

¹³ Schwarzenberger and Brown, *A Manual of International Law* (1976) 54-55

¹⁴ Jackson, above n 8, p. 27

¹⁵ Gerry Simpson, above n 5, p. 132

¹⁶ Jackson, above n 8, p. 21-22

¹⁷ See David Raic, *Statehood and the Law of self Determination* (2002) 196

¹⁸ Jackson, above n 8, p. 21. Gerard Kreijen use this term to analyze the state failure or state weakness in Africa. See, Gerard Kreijen, *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004) 103-105

supported from above by international law and material aid – a kind of international safety net’¹⁹. This quasi-state possesses what Jackson called as negative sovereignty or ‘sovereign from’. I want to call it as sovereignty by given—in contrast to sovereignty by achievement.

In contrast to this condition, positive sovereignty is defined as ‘capability which enable government to be their own masters: it is substantive rather than formal condition’²⁰. States with this type of sovereignty enjoy not only the right of nonintervention and immunities but also they are capable to provide political goods for their citizens. They are able to collaborate with other states in performing various activities in international relations like defense alliances, commerce and many others²¹. Moreover, states with positive sovereignty are capable of taking benefit from their independence to improve their condition by making good, effective and strong government. It is a type of ‘sovereign to’—in contrast to ‘sovereign from’. The real picture of this sovereignty is the sovereignty of developed states. Historically, this type of sovereignty was not the product of decolonization. States with positive sovereignty have achieved their independence and sovereignty through a natural process in which they have survived as a nation because they have demonstrated ability of self-government and they were capable of defending themselves from the invasion of other states²². They were the winner of wars in the past. In general, they possess sovereignty because they are sovereign. That is why I want to call this as sovereignty by achievement—because they have achieved this condition through a struggle.

Following Jackson argument, the trace of Berlin’s idea of positive liberty is clearly seen. Positive liberty is defined as desire in human being in which he or she wishes to be his own master. I am a subject not an object. I can do and realize whatever I want to do not because I depend on someone or something, but because I can do it²³. It is ‘freedom to’: ‘being active, self-directive, choosing, pursuing, and realizing goal’²⁴. According to Berlin, this is possible because men are rational being. This is the type of Cartesian consciousness of human being in which men are autonomous being, capable of thinking, willing, and bearing responsibility for whatever they do. For Jackson, if negative sovereignty is merely a minimum requirement for states, positive

¹⁹ Jackson, above n 8, p. 5

²⁰ *Ibid*, p. 29

²¹ *Ibid*

²² *Ibid*, p 32-40, see also Gerard Kreijen, above n 20, p. 105-108

²³ Berlin, above n 9, p. 131

²⁴ Jackson, above n 8, p 29

sovereignty is condition in which states can be masters for its own affairs: active, capable and responsible.

Jackson saw positive sovereignty in an optimistic point of view. That what makes his idea of positive sovereignty is different from the idea of positive freedom of Isaiah Berlin. Berlin was very suspicious in seeing positive freedom. For him, positive freedom can transform someone to be a despot or authoritarian and ‘destroy too many negative liberty’²⁵. Jackson was aware of this difference. In his book he argues that negative sovereignty, different from negative freedom, will bring more negative effect and harm for states than positive sovereignty²⁶. It is because negative sovereignty makes a state becomes weak, ineffective, dependant and finally unable to take advantages from their independence for their goodness. Negative sovereignty makes state become not a real state, but a quasi-state, while positive sovereignty is the other way around.

We can understand Jackson’s point of view if we see that the focus of his book is on the problems of the Third World countries like poverty, dependency, corruption, and other symptoms of state failure, that has risen since these countries gained independence—a gift from colonial powers—in 1940s. Jackson argues that the sole problem was because these states have become sovereign not because they showed their capability of self-govern but simply because the colonial powers gave independence to them. Interestingly, this situation brings a dilemma. On the one hand, these quasi-states are protected by principle of non-intervention because they have legal sovereign equality, but on the other, their backwardness is the reason for them to ask help—also intervention—from international community. ‘They have’, Jackson says, ‘contradictory expectations: the right of independence (reciprocity) but also right to development (non-reciprocity)’²⁷.

This dilemma cannot be separated from the history of imperialism. Before 1940s, positive sovereignty was expressed clearly in colonialism and imperialism²⁸—something that Berlin worried about. The principle rule at that moment was that the weak states would be defeated while the strong states became a winner and then possessed a right to control other territories. The real self, rational and civilized nations were acting like parent who taught, disciplined and educated

²⁵ Berlin above n 9, p. 163

²⁶ Jackson, above n 8, 30-31

²⁷ Jackson *ibid*, p. 181

²⁸ *Ibid*, p. 1

backward, uncivilized and like-children people. However, after 1945, this practice is no longer can be legalized. But, this not necessarily means that the form of paternalism disappears from international relations²⁹. It takes new form: right to development. I see it as neo-colonialism. Positive sovereignty claims themselves as civilizer, teacher educator. May be this is true. But, this attitude historically has transformed them to be exploiter and invader. Hard colonization in the past has taken a shape of soft colonization in the present. In this stand I depart from Jackson. I argue that both colonialism and neo-colonialism has risen because some states exercise too much positive sovereignty. Just like Berlin worried about positive freedom that can transforms someone to be a despot, I also worry about positive sovereignty that can transforms a state from ‘teacher’ to be invader and exploiter, as we seen during colonialism era—and also neo-colonialism.

2. The Great Powers Vs. Outlaw States

In history, states that possessed positive sovereignty, on the one hand, because their ability to govern, economics success, military power, ability to defend their territories and won various wars, can be classified as the Great Power states³⁰. Gerry Simpson identifies the Great Powers as:

‘the norms that place certain states in a separate normative universe and there is an identifiable connection between the propensity of the Great Powers to intervene on behalf of the international community and the labeling as outlaws some of those states subject to intervention’³¹

This is a group of civilized nations. This elite group of states, no doubt, is the subject of alteration, rise and fall. Austria and Prussia, for instance, were part of this group in 18th century. Now they are not considered as part of it. In contrast, America was not a super power player in 18th century, but now they are the leader of the Great Powers. Possibly one hundred years to go the US will no longer part of this elite group while China or India will become the super powers. Paul Kennedy notes that military and economic powers are two dominant aspects that influence this alteration³².

²⁹ *Ibid*, p. 186-187

³⁰ See John Agnew, *Globalization and Sovereignty* (2009) 85

³¹ Gerry Simpson, above n 5, p. 6

³² Paul Kennedy, *The Rise and Fall of the Great Powers, Economic Change and Military Conflict from 1500 to 2000* (1988) xv-xxv

Negative sovereign states, on the other hand, because they were the losers, weak, ‘uncivilized’, criminals, and illiberal, can be classified as Outlaw States³³. This group of states were being colonized and exploited; they are the followers, minor players and supplement. However, international lawyers, as Simpson has indentified, have set the standard of outlawry differently. Some international lawyers see the outlawry is based merely on illiberal and tyrannical condition and violation of human rights³⁴. Other Scholars argue that outlawry cannot be defined simply based on undemocratic or illiberal internal condition of a particular state. A particular state is regarded as an outlaw state if it is illiberal and aggressive in its relation with other state or if it is ferocious and violent internally³⁵.

The Great Powers, despite their claim as the teacher of civilizations, ‘the gentle civilizer of nations’³⁶ and the maker of the world order, have transformed to be the colonizer, invader and exploiter of nations. Colonialism and imperialism were the real example. These Great Powers naturally, in the first place, came into being as the winner, survival and civilized nations. Derived by impulse to teach other nations they occupied the rest of the world in the name of civilizing mission. Indeed, economics impulse, finding new markets and getting raw materials, was much bigger than the holly mission. Probably, the civilizing mission was simply a cover to hide their real impulse to conquer the world and getting economics and political benefit from it. In this case, positive sovereignty, as worried by Berlin, could easily change the Great Powers from teacher to be exploiter. To support my argument, I will use Simpson’s terminology of liberal pluralism and liberal anti-pluralism. In general I want to say that states with positive sovereignty which have became the Great Powers, because their policies in international relations is based on liberal anti-pluralism principles, have transmuted themselves to be exploiters and invaders. Iraq war and war on terror in Afghanistan represent this reality today.

In discussing the transformation of the Great Powers from the position of the maker of world order to be exploiters and invaders, the concept of liberal anti-pluralism is essential. This perspective is based on a belief that world is composed of two contrasting positions, a bipolar

³³ Gerry Simpson, above n 5, p. 4-7, 127-129

³⁴ This is the opinion of Fernando Teson. See Gerry Simpson, Two Liberalisms, *EJIL* (2001) 12(3) 537-571, p. 563-564

³⁵ This is the opinion of John Rawls, *Ibid*

³⁶ This is a title of Martti Koskenniemi’s book. See Martti Koskenniemi, *The Gentle Civilizer of the Nations, The Rise and Fall of International Law 1870-1960* (2004)

worlds. Indeed, this world view is inherent in every civilization. In the Islamic legal traditions, for instance, world can be divided into *dar al-islam* (peaceful territory) and *dar al-harb* (territory of war or chaos)³⁷. *Dar al-islam* is a peaceful, civilized and justice territory due to its submission to a certain normative legal order, while *dar al-harb* is a chaotic, uncivilized, injustice territory due to the lack of legal foundation in this region. *Dar al-islam* claims a superiority and authority to teach and transform this chaotic territory to be part of their civilized territory. Western Christian civilization also possesses this perspective. The concept of the *civitas terrena*, the city of earth, and *civitas dei*, the city of God, as St. Augustine has defined points out this phenomenon³⁸. In modern actualization, this perspective is clearly seen in differentiation of the world into civilized and uncivilized, lawful and outlaw and liberal and illiberal states. The civilized-liberal states, like its cousin of *dar al-islam*, claims a right to control or transform uncivilized-outlaw states to be civilized nations. Wars, conquests, subjugations and even violations have been part of the mission as St. Augustine said: ‘the enemies of the church are to be coerced even by war’³⁹. Inherent in this world view is the belief that there is only one side of the truth: *dar al-islam*, *civitas dei*, civilized nation. The world outside my border is totally wrong and that land is an object that has to be conquered. This evangelical feature is embedded in liberal anti-pluralism of the Great Powers⁴⁰.

This perspective grows together, but in contention, with what Simpson called as liberal pluralism. Both concepts begin with an assumption that individual rights and autonomy are the sole foundation in maintaining order. In international law, when states are treated like individuals in municipal law, states possess negative sovereignty in which every state has an autonomy and rights to be not being intervened by the others. Liberal pluralism regards states as an equal legal entity. The United Nations and classical international law formally adopt this perspective⁴¹. This is the feature of international order since Westphalia. Liberal anti-pluralism, however, treats states as equal only if these states meet a certain provisions: domestically they must implement certain liberal principles like rule of law, respecting human rights, adopting democracy and so forth⁴². Without these provisions, states will not be treated as equal and they are regarded as Outlaw states.

³⁷ See for example James Turner Johnson, Two Worlds, *Humanities* (2000) 21 (6)

³⁸ *Ibid*

³⁹ Quoted from James Turner Johnson, *ibid*

⁴⁰ Simpson, above n 5, 231

⁴¹ *Ibid*, 76-83

⁴² *ibid*

Inherent in this debate are two perspectives in seeing state sovereignty. For liberal pluralism, states are legally equal sovereign entity. In contrast, liberal anti-pluralism regards states in a hierarchical quality where liberal states are in a higher position over outlaw states, a phenomenon that is called as legalized hegemony by Simpson.

History of international law has been decorated by the rise and fall of these two perspectives of liberalism (liberalism and liberal anti-pluralism) and sovereignty (equal sovereignty and legalized hegemony)⁴³. It is interesting to note very briefly how these two perspectives of liberalisms and sovereignty were institutionalized in international law.

If the flowing of history of state sovereignty was started from the Peace of Westphalia in 1648 and, let say, stopped at the formation of the United Nation in Chicago in 1945, 'the form of a 'dialectic' between hierarchical and egalitarian models of inter-state relations' can be drawn as follow⁴⁴. First stage was from 1648 of the Peace of Westphalia to the Congress of Vienna in 1815 where the general feature of this stage of history was equal sovereignty and liberal pluralism. The Peace of Westphalia is a foundation for the very basic principle of state sovereignty in modern history. Westphalian sovereignty is, according to Stephen D Krasner, 'an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures'⁴⁵. This is also a foundation for negative sovereignty.

Second stage had started since the Congress of Vienna in 1815 when the Great Powers, learned from Napoleonic wars, legalized their power into formal treaty of international law to prevent Napoleon aggression⁴⁶. This was a moment when the status of outlawry was formed and legalized hegemony prevailed. The UK, Prussia, Austria, Russia, initiated the formation of alliance to guarantee peace in Europe for periods. Essential in their alliance were a cultural similarity where these states were bound by Christianity. Other powers at that moment, like China (Confucian) and Ottoman (Islam) were treated as 'the other' outlaw states simply because they were not part of the Christian-European family.

⁴³ *Ibid*, 9

⁴⁴ I follow Gerry Simpson in this case, partly. I do not include Kosovo simply, for a practical reason. See Simpson, above n 5, Part III (91-223)

⁴⁵ Stephen D Krasner, *Sovereignty, Organized Hypocrisy* (1999) 20

⁴⁶ Simpson, above n 5, footnotes no 3 p 91.

This situation was not change until the Second Hague Conference was held in 1907 where negative-equal sovereignty took an ‘extreme sovereignty’. This is the third stage where in this stage, Westphalian sovereignty were dominant. Included in this stage was the formation of the League of Nations. In this stage, the Great Powers enjoyed less formal legal privilege in international law.

The last stage was started in Chicago in 1945 when the United Nation Charted was formulated. The Great Powers learned from the fail of the League of Nation that took equal sovereignty in maintaining peace and order. Order in international law would not be achieved if the Great Powers ignored the reality of inequality among nations. This inequality should be recognized in international law. On the other hand, request for equal sovereignty especially from new post-colonial states was very demanding and could not totally be ignored. The structure of the UN as we find today is based on this tension. In the General Assembly and membership of the UN equal sovereignty is clearly seen, while the legalized hegemony of the Great Powers institutionalized in the veto rights of the Security Council. This last stage, I assume, represents a syntheses from the previous stage of history. However, unequal sovereignty and liberal anti-pluralism, especially with the rise of the US as single superpower, is part of the recent dominant reality.

3. The Great Powers Hegemony and Negative Sovereignty

Both outlaw states and the Great Powers have a similar potentiality in making world disorders. Outlaw states like Iraq made insecure Middle East, by invading Kuwait in 1990, because of its outlawry: aggressive, illiberal and violent. The Great Power, however, made more insecure world because of their claim to maintain order. The Great Powers outlawry⁴⁷ probably can be more dangerous than the outlawry of outlaw states. If outlaw states invade aggressively other states, the Great Powers can easily stop them. But, who will stop the Great Powers if they invade, in the name of humanitarian intervention, preemptive self-defense or what so ever, other states? This problem is more acute since the downfall of the Soviet bloc in which America has become the single superpower.

⁴⁷ I use this term with an assumption that liberal state sometime can act illiberally in its relation with other state in International relations. See Simpson, above n 5, p. 298. It is interesting also to see an article by Jose Alvarez, Do Liberal State Behaves Better, *EJIL* (2001) 12 (2) 183-246

What has made the outlaw states and the Great Powers actions are different, probably, is simply its status of legality. The Great Powers poses what Simpson calls as ‘special legal privileges’ to justify their actions which are not be possessed by outlaw states. I want to discuss briefly how the Great Powers exercise this legal privilege by seeing Iraq war 2003 as a case. This war was the real picture of how positive sovereignty of the Great Powers, because of the prevailing of the liberal anti-pluralism in these states, has transformed to be a dangerous deadly action and eroded a space of negative sovereignty of other states. However, discussing the aspect of legality of this war is beyond the purpose of this paper⁴⁸. I am not interested to discuss this issue also because it seems like fruitless to discuss this aspect. For the Great Powers, everything can be included under the category of legality. They have legal privilege to extend, select and distinguish law. In international relations, law has been created, extended, innovated, interpreted and even manipulated depend on the willing of the Great Powers⁴⁹. Furthermore, in relation to the Iraq war, as can be applied to every war, an international lawyer said that ‘from the purely legal standpoint, all wars are equally just or unjust; or, properly speaking, they are neither just nor unjust’⁵⁰

Can we justify a war? There is no such thing called as ‘just war’ according to Buddhism⁵¹. Just war simply ‘a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre’⁵². However, no single invasions or wars, I think, would like to be labeled as ‘unjust’. Because of that, seeking legitimacy and justification for every war has become part of the war itself. Take America as an example. Looking into the codename of several operations can be a simple way to see how the US has grounded their interventions on a justifiable reason. When the US intervened Panama in 1989, the codename that was used was ‘Operation Just Cause. In Somalian intervention, the US used ‘Operation Restore Hope’. In fighting terrorism, the war rhetoric that has been used is ‘Operation Enduring Freedom’. In their last war in Iraq in 2003, the

⁴⁸ There are a lot of books and articles about this issue. See for example, Phil Shiner and Andrew Williams, *The Iraq War and International Law* (2008), Dominic McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’ International Law in An Age of Complexity* (2004)

⁴⁹ See, for example Michael Byers and Georg Nolte, *United State Hegemony and the Foundation of International Law* (2003). See also Phil Shiner, *The Iraq War, International Law and the Search for Legal Accountability* in Phil shiner and Andrew Williams, *The Iraq War and International Law* (2008) 19.

⁵⁰ Amos Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (New York, 1906), 67, quoted from Hew Strachan, *Preemption and Prevention in Historical Perspective*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 25

⁵¹ Anthony Anghie, *Imperialism, Sovereignty, International Law* (2004) 273

⁵² *Ibid*

US used ‘Operation Iraqi Freedom’⁵³. Almost all invasions have been grounded on the rhetoric of freedom and liberation. The US has acted, like what Europe did during colonization, as a hero who will come to help uncivilized, rough and backward states to achieve freedom. What make the US occupation of Iraq was different from, let says, the British occupation of India during colonization is something that Anghie calls as a ‘denial of imperialism’⁵⁴. The US claimed that the occupation of Iraq was directed to liberate Iraq, to make sure that Iraqi people would have an ability of self-government under a democratic regime, restoring the sovereignty of Iraqi people, and it was not intended to colonize Iraq.

Anghie interestingly compared the US occupation of Iraq with the US occupation of Philippine after the Spanish was defeated by the US in 1898⁵⁵. In taking control over Philippine, the US rhetoric at that time was, like in Iraq, the liberation of Filipinos from injustice heinous Spanish imperial rule. In Iraq, the image of Spanish was replaced by the ‘rouge’ regime of Saddam Husain. The US promised that in the near future, when the Filipinos were ready to self-govern, the independence would be granted⁵⁶. Filipinos, who initially welcomed the coming of the US troops, took rebellions against the United States. The rebellion was the nature for every occupation. No one would like to be directed, occupied, and hindered by other. The war at that moment killed around 200.000 civilians—compare to Iraq war where about 102.624 Iraqi people have killed⁵⁷. In both moments, the denial of imperialism was part of war justification.

Both wars—also other wars like Vietnam War—has generated a controversy mainly among the US citizens and scholars. The US who was born out of war of independence against British colonialism suddenly replicated the practice of imperialism, something that for centuries has been condemned. The US, by occupying Iraq and other states, is convicted by part of their citizens as doing a violation of their ‘sacrosanct principles of American identity’⁵⁸. Defending this sacred American identity is something that lingers behind the denial of US imperialism.

Essential in the debate about Iraq war is the discussion of self-defense doctrine which has already extended by the US practice to be ‘preemptive self-defense’—Bush doctrine. Self-defense

⁵³ Michel J. Buthler, U.S Military Intervention in Crisis, 1945-1994: An Empirical Enquiry of Just War Theory, *The Journal of Conflict Resolution* (2003) 47(2) 226-248, p. 227

⁵⁴ Anghie, above n 53, p. 279

⁵⁵ Anghie, *ibid*, p. 281-288

⁵⁶ It is similar to the Trusteeship or Mandate system of the UN. See Anghie, *Ibid*

⁵⁷ This is a maximum estimation. See <http://www.iraqbodycount.org/>. Accessed at 15 November 2009

⁵⁸ Anghie, above n 53, p 282

doctrine is a fundamental principle in which a state maintains its negative sovereignty by resisting reflectively every kind of act that can deprives their sovereignty. It is a justified reason to use of force in international law as stated by the UN Charter under chapter VII. In his advice to the British prime minister Tony Blair on Iraq war, British Attorney General also recalled this principle, said that the use of force only can be legalized under three circumstances: self-defense, overwhelming humanitarian catastrophe or if it is authorized by the Security Council acting under Chapter VII of the UN Charter⁵⁹. In contrast to self-defense, preemptive self-defense is a highly controversial issue in international law. Preemptive self defense is a war against enemy ‘who has not yet attacked but whose attack is clearly imminent’⁶⁰. The aspect of imminence is essential but controversial in this matter. Who has an authority to decide an imminent attack? For the US, Iraq was poised to attack American soil and because of that the US had a right to attack Iraq first on behalf of anticipatory self defense, while for the UN and other states, the aspect of imminence was not clearly seen. Because the aspect of imminence is unclear, the line that separates between preemptive and preventive self-defense is hard to be drawn⁶¹. Preventive war, little bit different with preemptive war is, as Michael Walzer says, an ‘attack that responds to a distant danger, a matter of foresight and free choice’⁶². This kind of war is cannot be justified and prohibited in international law⁶³.

Because of the great possibility to be corrupted, Hugo Grotius is suspicious to accept both preventive and preemptive attack. While he agrees firmly that defensive war is justifiable in international law, Grotius is very dubious in accepting offensive war even if it is carried out to anticipate attack. Grotius, as quoted by Larry May, very interestingly says:

*Wherefore we can in no wise approve the view of those who declare that it is a just cause of war when a neighbor who is restrained by no agreement builds a fortress on his own soil, or some other fortification which may some day cause us harm. Against the fears which arise from such actions we must resort to counter fortifications on our own land and other similar remedies, but not to force of arms*⁶⁴

⁵⁹ British Attorney General’s Advice to Blair on Legality of Iraq War, quoted from <http://globalpolicy.org/security/issues/iraq/document/2003/0307advice.htm> accessed at 20 October 2009

⁶⁰ David Rodin, *The Problem with Prevention*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 144.

⁶¹ See Larry May, *Aggression and Crime Against Peace* (2008) 75-85

⁶² Quoted from David Rodin, above n 62, p. 5

⁶³ See Allen Buchanan, *Justifying Preventive War*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 126

⁶⁴ Quoted from Larry May, above n 63, p. 79

Relate to his statement above, Grotius formulates a very important and relevant reason why he is reluctant to accept anticipatory attack. For Grotius, in establishing reasons to make an anticipatory attack, someone commonly bases his action merely on pretexts not on the real fears of the enemy. Pretext is a reason declared intentionally to hidden the real reason for waging war. The real reason is unjustifiable if it is declared openly to public⁶⁵. A clear example of confusing between pretext and fear in recent time is Iraq war in 2003. In several occasion Bush declared that Iraq was attacked because it was poised to attack America by possessing weapons of mass destructions (WMD). The linkage between Saddam Husain and Al-Qaida was another reason. These two reasons, WMD and the linkage to the terrorist group had formed a sufficient reason for the US to attack Iraq in the name of preemptive self-defense. Indeed, this was not a fear, but rather merely a pretext. Because the real reasons behind the Iraq war 2003, as stated by The UK Poet Laureate, Andrew Motion, was ‘elections, money, empire, oil and Dad’⁶⁶

For this reason, in recent practice, especially after 9/11 tragedy, self-defense doctrine has become, as Anghie says, ‘the vehicle for a new form of imperialism, defensive imperialism’⁶⁷. Anghie further argues that this new term operates as legitimacy for occupation just like old imperialism was justified by the law of war. Anghie cites how, for example, Spanish imperial rule in American continent was legalized by self-defense reason: the Spanish was waging war against native Indian merely because the Spanish had to defense themselves from Indian attack. Importantly, Anghie adds, American new doctrine of the preemptive self-defense sounds more convincing since it has been combined with other doctrine: human rights, humanitarian intervention, freedom and democracy. All these things have formed what Anghie called as a new management to reaffirm an old practice of imperialism that based on a classical sacred rhetoric of civilizing mission⁶⁸.

Thus, negative sovereignty is in a real danger of being eroded and violated by the rise of aggressive positive sovereignty which uses the mask of self-defense rhetoric. This concern is not without a real evident. For the Great Powers, intervention to other sovereign states, implicit or

⁶⁵ *Ibid* 80.

⁶⁶ Quoted from Dominic McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’ International Law in An Age of Complexity* (2004) 20. To see further this issue see also for example David Harvey, *The New Imperialism* (2003)

⁶⁷ Anghie, above n 53, p. 294

⁶⁸ *Ibid*, p. 292-293

explicitly, is part of their behavior. The US has used preventive war regularly since 1945, mainly as part of the management to maintain their imperial power. Between the 1950s and 1960s, for instance, America attacked other sovereign states by a military power once every eighteen month to remove government that seen as a threat for American interest⁶⁹. War in Iraq and Afghanistan are the two recent example of this behavior.

This authoritarian behavior of the Great Powers is not without risks. Externally, ambition for imperialism—even if it is denied—can gradually harm the UN systems. The UN systems, as Anghie notes, now are gradually subordinated by the unilateral use of force of the Great Powers, especially under the doctrine of self-defense⁷⁰. In this situation, state sovereignty is in a danger situation and it is vulnerable of being violated. Internally, this unilateral intervention to other sovereign states is really costly and can, in the long term, erode the Great Power financial and economic power. Paul Kennedy has mentioned how military and economic capacity is the foundation for the Great Powers to maintain their influence. The rise and fall of the Great Powers depend on these two aspects⁷¹. In relation to Iraq war, Joseph Stiglitz and Linda Bilmes explains how war that is predicted will exceed a trillion dollars costs has affected American economic conditions⁷².

Conclusion

I have tried to answer the question of why a state invaded other states and how it was justified. I have argued that positive sovereignty has a dark side because it can transform a state to be an invader or exploiter. The motif of civilizing mission, teaching, liberating and sending freedom to other states has been the motif behind this transformation. If it happens, negative sovereignty is in a real danger of being eroded and violated. However, International law has set regulations that protect every sovereign state from the invasion of other states. But, in the reality, some outlaw states, because they were illiberal and aggressive broke down the rule by invading other states. The invasion of Iraq to Kuwait in 1990 was an example. However, a group of elite

⁶⁹ Quoted from Hew Strachan, *Preemption and Prevention in Historical Perspective*, in Henry Shue and David Rodin, *Preemption, Military Action and Moral Justification* (2007) 38

⁷⁰ Anghie, above n 53, p. 300

⁷¹ See Paul Kennedy, above n 34, p. xv-xvii

⁷² Linda Bilmes and Joseph Stiglitz, *The Economic Cost of the Iraq War: An Appraisal Three Years after the Beginning of the Conflict*, NBER Working Paper Series, National Bureau of Economic Research, February 2006. Accessed from <http://www.nber.org/papers/w12054> at 1 November 2009.

states that called as the Great Powers also possess this behavior. For me it can be more dangerous because their outlawry is built upon the claim of ‘special legal privilege’ to behave above the law while still using legal language to justify their actions. The invasion and intervention of American government since 1945 and clearly seen recently in Iraq and Afghanistan obviously shows this reality. Liberal anti-pluralism policies, I conclude, is behind the transformation of the Great Powers from peace maker to be occupier.

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