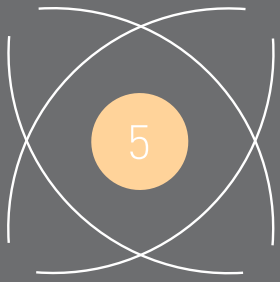

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Sovereignty and human rights: external, internal and structural reconfigurations

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This article aims to understand the link between human rights and sovereignty. Sovereignty, as a concept, has been acquiring a stable and fixed meaning throughout the past centuries. The Peace of Westphalia's norm of sovereign statehood set these standards for sovereignty: it made the sovereign state the legitimate political unit; it established the basic attribute of statehood – the existence of a government with control of its territory; and, as it came to be practiced, it meant that there were no legitimate restrictions on a state's activities within its territory. These characteristics were further reinforced by subsequent historical transitions. They have, however, been challenged by an increasingly strong discourse on human rights.

With the end of the Cold War the idea that states were lords of their internal affairs came under challenge by an emerging discourse on human rights. Changing practices of intervention changed what for some centuries seemed to be the most basic principle of behavior amongst states: respect for non-intervention. This new discourse has produced changes in the way external sovereignty was understood.

On the other hand, the widening gap between the rulers and the ruled and the acquisition of rights by the latter were consolidated by a reconfiguration of the notion of sovereignty in the name of human rights. This article seeks to address how international elites and actors increasingly perceive sovereignty as encompassing responsibilities as well as rights, responsibilities which include respect for human rights. Ultimately, legitimate state authority derives from the individuals within the state and that the state can lose legitimacy if it abuses the sovereignty which is on loan from the people. The people, in this sense, came to acquire new rights with the end of the Cold War. These transformations are contributing to changing perceptions of internal sovereignty.

The changes promoted by the aforementioned debates have enhanced a further structural debate over whether an international authority to promote human rights is being created or in the process of being created. Issues related to human rights, self-determination, and international responses to humanitarian crises are forcing a recasting of the concept of sovereignty. There is a need to think in terms of the consequences these changes have for international order itself and the ways in which

international institutional innovation has contributed to a reconsideration of the parameters of sovereignty.

This article will be divided into four parts, plus the conclusion, in order to provide an overview of how human rights issues are recasting the notions of sovereignty downwards and upwards. It will focus on challenges to the non-intervention principle; the legality of external interference in internal matters; 'degrees' of sovereignty, i.e. absolute versus relative sovereignty; and the status of human rights in international relations and International Relations theory. Theoretically, rather than emphasizing how a particular structure of rules provides, in itself, the reason for the changes; the article will focus on how norms are not just structures but also constructed by the actors – other than states – that participate in their formation. The creation of legal norms presupposes a previous emphasis on the political norms that lead to the process of institutionalization. Norms are both structured *and constructed.* Attention to what academics, international elites and other groups say is therefore central to assess this social quality of norms rather than just focus on how a particular norm was formalized in a particular moment.

On sovereignty: a brief overview of the concept

The genealogy of the modern notion of sovereignty and the non-intervention principle may be traced back to the 1648 Westphalian Peace Accord in which belligerent countries solemnly pledged not to intervene in each other's internal matters.[1]

Despite the fact that the doctrine of sovereignty (together with the doctrine of the equality of states), had been called "the basic constitutional doctrine of the law of nations",[2] in Lassa Oppenheim's opinion "there exists perhaps no connection which is more controversial ... [It] has never had a meaning which was universally agreed upon".[3] The primordial notion of sovereignty was conceptualized around two core components of the notion of the state: the territory and the population. To accept sovereignty is, on the other hand, to accept the impermissibility of intervention as a challenge to authority. In this way sovereignty is the source of international boundaries: walled territory becomes the physical form of the state, which as an abstract identity, a self, necessitates the existence of 'the other'. And 'the other' is something to be excluded. This view of internal authority and external independence, however, took some time to develop and consolidate.

The origins of this view of sovereignty lie in the Roman Empire. The Hellenistic monarchies were restricted by the Greek notions of law as something more valid than the community or its rulers. As such the king 'personified law' since his will amounted to the rules of order. This was a departure from the divinity of the ruler in the Near East and ancient India, where the king may have governed by the grace of gods but was, like his subjects, subordinate to the external laws of the universe, or dharma. In the Roman Empire, however, it was argued that if there is a source of law then it must be above the law. Consequently, the Emperor was regarded as "above the law; and by the law was now meant the codes, customs and constitution of the society itself. These are the essential

elements in a theory of sovereignty and it was now, from about the end of the first century AD, that they were first enunciated".[4] Roman sovereignty was not only final and absolute but by definition it meant that "no final and absolute authority exists elsewhere".[5] In this sense sovereignty was a logical consequence of an empire that had physically unified the known world, and, for that matter, extended into the heavens since the emperor was himself considered a god. If there was a final point of authority, it was reasonable for it to be absolute. And in this universalized world, intervention had no meaning.

The Middle Ages were characterized by fragmentation. Despite attempts to unify and centralize authority, for instance by the Carolingians and the Holy Roman Empire, large concentrations of secular power never attained the distinct feature of sovereignty. Its metaphorical implications were monopolized by the church, on which the emperor relied for legitimacy. Interestingly, while Roman identity had a universalist tendency and was based on the oneness of Roman citizenry, identity in Christendom was also universalist and based on the openness of mankind. Complete territorial unity and complete territorial disunity fostered comparable worldviews.

The first articulation of the modern theory of sovereignty appeared in 1576 in Jean Bodin's *De la republique.* It came in an unprecedented context, during a conflict between the universal empire and local kings claiming supremacy on the basis of Roman law. The king was proclaimed to be Emperor within his own kingdom and "had of right all the attributes – including the power to interpret the law and to make new law – which, on the basis of the same Roman law but in relation to al Christendom, the Roman lawyers were claiming for the Emperor and the canon lawyers were claiming for the Pope".[6] Christendom could not withstand the physical unification occurring locally as communities became increasingly organized and integrated. It was only a matter of time before authority was linked exclusively to territory.

Bodin's sovereignty transformed this linkage between sovereignty and territory into an absolute. It was initially formulated as a reaction to the civil and religious wars in France at the time of the Reformation. A Protestant right of resistance and rebellion based on customary and divine law was pitted against Roman Law and Divine Right asserting the absolute powers of the French crown. Bodin sought to restore harmony to the political community by integrating the ruler and the ruled in the body politic. This was a search, as others had done before and still others would do afterwards, for the finality and determinacy that had characterized the Roman Empire. Although he rejected the immorality of Machiavelli's *raison d'état,* Bodin gave him his due, for Machiavelli had sought to reconcile the prince and the community and concluded this was only possible by the total absorption of the community by the unfettered will of the ruler. Bodin feared anarchy more than he disliked tyranny. Sovereignty was not absolutism that operated in a vacuum capable of disregarding all laws. It was meant to be limited by "the nature of the body politic as a political society comprising both ruler and ruled".[7] In effect, it was an abstraction that fostered the perception of indivisibility of ruler and ruled. It did so by

elevating the link to an absolute and metaphysical plane, comparable to the final point of authority in the Roman Empire. Both were subsumed under a common identity so complete that de-linkage could not be imagined. The linkage of the ruler with delimited territory as the ruler with the ruled created the conditions for state identities which were similarly abstract and elevated and therefore capable of apparent unification.

Continuing with the theme developed by Bodin, for writers such as Hugo Grotius and Thomas Hobbes, sovereign statehood denoted the absolute and secular legislative power mainly within the *domestic* policy domain. They were only to a very limited degree concerned with the states' external relations, and consequently with the issue of non-intervention. Moreover, since they had denied any higher authority above the sovereign state, they also rejected the earlier doctrines claiming superiority of universal law(s) such as the Roman *ius gentium* or the Christian concept of Christendom;[8] the two doctrines contained some ideas that were to be taken up centuries later, albeit in another form, by modern human rights. Their ideas, therefore, initiated a transition of the perception of sovereignty from the early discourse, that emphasized the ability of a political authority to exercise control over a given territory and matters taking place within this territory, to a later discourse focused on freedom *from* any external interference.

Even though the prevailing paradigm was that sovereign state power is absolute, Grotius and Thomas Hobbes acknowledged that it was not the state (the ruler), but a Man who in the first state of creation had the sovereignty and the power. Naturally, this was an implicit acknowledgement that the preponderance of state power might be called into question in certain circumstances; for example, if the state was unjust. This powerful idea of 'justice' was taken up subsequently by revolutionary doctrines, notably during the French Revolution. Revolutionaries claimed that any abuse of state power in relation to the populace constituted a violation of the "first social contract" between the ruler and the population, upon which the very idea of sovereignty was built. This therefore legitimated an uprising against a tyrant.[9] Understandably, there has been a shift in the focus of the sovereignty debate; relations between the sovereign and individuals gradually moved away from the centre of the discourse. Instead, territorial sovereignty and the state's external relations become the focus of attention. A non-intervention principle and a principle of equality of states within the international arena were conceptualized in the 18th century by Emerich de Vattel and Christian Wolf. Wolf's theorizing on non-intervention drew heavily on the "equality axiom" of natural law, rather than empirical observations of states' eternal behavior. De Vattel separated positive law from natural law and opted for the static (normative) approach to the analysis of inter-state relations: the binding nature of international norms was contingent upon *a priori* acceptance by the state.

With De Vattel, sovereignty came to acquire all its internal and external dimensions and crystallized itself as a concept. This process took some time to develop but the trajectory of what occurred can be outlined: while the early sovereignty discourse

emphasized the ability of a political authority to exercise control over a given territory and matters taking place within this territory, as well as an active role in the balance of power system, the later discourse focused on freedom *from* any external interference. It came to designate "an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states".[10] Sovereignty is a particular kind of authority. It is a concept that refers to (1) power that is above the law and (2) the fiction that the ruler and the ruled are integrated. Sovereignty is not a fact, like energy or power. It is a characteristic and it is not measurable as more or less. It is definitive and does not permit derogation without being rendered illogical. As an absolute beyond reproach, sovereignty provides finality and determinacy in the international system. In other words, it creates order. Order means predictability and while the immutability of sovereignty meant reliability, through its incapacity to change, the formula of sovereignty is becoming unworkable. The rest of this article is going to address precisely how this is so with regards to human rights. This positivist idea of sovereignty facilitated the shielding of human rights abuses committed within state territory. This is, however, changing.

Human rights and the reconfiguration of external sovereignty

The principle of non-intervention became the cornerstone of international rhetoric about state independence and freedom of action. Therefore, the common response to totalitarian regimes to initiatives which sought to limit a state's action was that such initiatives constitute an impermissible interference in the state's internal affairs.[11]

The most vigorous supporters of the principle of non-intervention were just those states who were most subjected to foreign interference. The non-intervention principle was, for example, sanctioned by the young French Republic in articles 118 and 119 of the Constitution of 1793. In the 1823 Monroe Doctrine, the United States pledged not to intervene in European affairs and declared that any European intervention in the Western hemisphere would be regarded as an unfriendly act by the United States.[12] During the 19th century, the newly independent South American states became major defenders of the non-intervention principle. These informal processes eventually led to the first formal conceptualization of the non-intervention principle – albeit only on a regional scale – that took place in December 1933, in the Convention on Rights and Duties of [American] States.

Situation before the creation of the United Nations

The theory of humanitarian intervention came into being at the turn of the 20th century when an increasing number of scholars began to morally authorize its legality while numerous other authors explicitly denied the legality of humanitarian intervention.[13] In Stephen Krasner's opinion the doctrinal differences raised by these debates have been in essence related to the fact that neither writers nor governments made a clear distinction

between "intervention by states in order to protect their own citizens (which as lawful at that time), humanitarian intervention, and mere intercession in favor of individuals mistreated by their own states".[14] Any assessment of the legality of humanitarian intervention in the period before the creation of the League of Nations (1920) and the Kellogg-Briand Pact (1928) must be weighted in light of considerable freedom enjoyed by states to resort to armed intervention. In this period armed intervention was considered to be lawful instrument in interstate relations, independent of the claims – humanitarian or not – made by states which had begun the hostilities.

After the entry into force of the Covenant of the League of Nations and the Kellogg-Briand Pact, states rarely used claims of humanitarian intervention to justify the use of force. The 1928 Convention on Rights and Duties in the affairs of another state, and in 1933 the Montevideo Convention on Rights and Duties of States solemnly declared that no state "has the right to intervene in the internal or external affairs of another".[15] The only exception was the German claim of "humanitarian" intervention in its occupation of Bohemia and Moravia in 1939. In the proclamation made on March 13, 1939, Hitler stated that 'wild excesses' were taking place in Czechoslovakia to the detriment of the population of German origin. Unlike the state's right to use force to protect its own nationals abroad, the lawfulness of humanitarian intervention was somewhat dubious prior to the signing of the United Nations Charter.

Even despite these dubious conditions, these initial judgments on humanitarian intervention allowed for innovations in the formal perception of how human rights can serve as a reason for intervention. Some exceptions were allowed by international law to the principle that human rights belong to the internal policy domain, and international concern was regarded as legitimate in some cases. These exceptions included situations when: (a) domestic developments elsewhere could undermine the intervening state's own security, either by stimulating international conflict or by questioning the legitimacy of the state's own regime; (b) promotion of some higher values (e.g. justice) were concerned that were only loosely related to the intervening states' material or security interests.[16] In addition, numerous interventions were undertaken in order to change a domestic regime or to change or influence the very nature of the polity, the cardinal principle or norm used to legitimate political authority. The reason was the fear that internal developments in one country would undermine the stability of the international system in general or adversely affect political stability in other states.[17]

The most prominent immediate cause for interventions concerned the duty of states to observe certain minimum standards in their treatment of aliens. Since the alien was not regarded by legal theory as a subject of international law, the wrong was considered to have been done not to the alien, but to the state of his or her origin. Other prominent causes of humanitarian intervention involved the abolition of slavery and the slave trade; the violation of rights of various categories of people in situations of armed conflict and the treatment of minorities.[18]

The end of World War II and beyond

The tragic abuses of the alleged 'humanitarian' intervention by Hitler and by Stalin before and during World War II, as well as pressure from weak states, brought about a formal prohibition of external intervention "in matters which are essentially within the jurisdiction of a state" in Article 2(7) of the UN Charter (1945). The prohibition was repeated by General Assembly Resolution 2131 (XX) 1965 and 2625 (XXV) 1970. Intervention was prohibited except for individual and collective self-defense under Article 51 of the Charter, and UN enforcement was limited to the maintenance or restoration of international peace and security under Chapter VII. This formal prohibition was, however, not something taken for granted.

In the period between the creation of the UN in the mid-1940s and the end of the Cold War at the end of the 1980s, very few genuine humanitarian interventions took place despite extensive violations of human rights all over the world. Within the academic community, even a decade ago humanitarian intervention was still regarded by such prominent scholars as John Vincent and Hedley Bull as radically contrary to Article 2(7) of the UN Charter.[19] There was, however, a growing group of experts representing so-called "liberal internationalism" who began to rethink the issue of humanitarian intervention.[20] On the other hand, the non-intervention principle and the domestic jurisdiction clause were repeatedly misused by the communist regimes to prevent external scrutiny of human rights abuses committed within their territory. Human rights became an issue of East-West contention. For example, during the Helsinki Process respect for human rights was defined as a *sine qua non* for the transfer of Western high technology and know-how to the East.

These changes were further consolidated with the end of the Cold War, when world politics moved beyond the image of solidarity between rulers and ruled and the exclusivity of territory that this relationship engendered. International politics – including international debate on human rights – could be freed from ideological restraints. Non-intervention, as a principle, it was argued, seemed to be in danger. During the Gulf War (1990/1991), the Soviet Union for the first time abstained from using its veto to block international military humanitarian intervention. Security Council Resolution 688 of April 1991 legitimated Allied Coalition forces' pursuit of humanitarian actions in favor of Kurds and Shiites displaced by the Iraqi civil war and by human rights violations of Saddam Hussein's regime. Altogether, during the Gulf crisis, the UN Security Council passed a lengthy series of resolutions related to various political and humanitarian aspects of the Gulf crisis.

Not surprisingly, the international response to the humanitarian emergency in Iraq was regarded by many as an indication of how a 'New World International Order' would handle massive humanitarian emergencies. In particular it revitalized an international discourse on the feasibility of the centrality of sovereignty principle for global governance, and especially on the relative rights of governments *vis-à-vis* civil populations. It is in such

a context that the former UN Secretary General, Javier Pérez de Cuéllar[21] and the UN High Commissioner for Refugees Sadako Ogata[22] urged an elevation of human rights to the pedestal of international relations on equal footing with the sovereignty principle. Disruptions to the principle of non-intervention during the 1990s therefore created the opportunity for a confrontation between sovereignty and human rights.

Since these judgments were passed without adequate attention to their far-reaching legal consequences, they created an on-going tension between the Security Council and the United Nation's humanitarian machinery.[23] For example, Security Council Resolution 688, which legitimated operations 'Safe Haven' and 'Provide Comfort' in Iraq, abstained from explicitly quoting human rights violations as grounds for international military intervention in internal matters of a member-state of the United Nations (i.e. Iraq). What is more, to avoid any misinterpretations that the sovereignty principle is no longer sacrosanct in the UN system, the Security Council labeled Saddam Hussein's atrocities against Kurds and Shiites a threat to international stability and security. Consequently, it quoted instead as its legal foundation chapter VII of the UN Charter.

Consensus with regard to the legality of humanitarian interventions in the post-Cold War era is therefore missing. Still, Cornelio Sommaruga, President of the International Committee of the Red Cross, claims that already today sufficient legal foundations exist – based mainly on customary, human rights and humanitarian laws, and especially upon the four 1949 Geneva Conventions and the 1977 Protocol II on the treatment of civilian population in situation of internal military conflicts – to maintain that already the international community not only has a right but even a duty to initiate humanitarian action inside a sovereign state.[24] Moreover, by introducing the obligation – Cf. Article 1 common to all four Geneva Conventions, and Article 1 of Additional Protocol I of 1977 – for all states who signed the Geneva Conventions to 'ensure respect for' these Conventions, international humanitarian law establishes at least an obligation to remain vigilant. Yves Sandoz, Christophe Swinarski and Claude Pilloud maintain that the Charter of the United Nations, for example Art. 2, does in fact lay down certain principles governing action by the Organization "and its Members" in pursuit of the United Nations objectives, including respect for human rights (Art. 1.3).[25] Ved Nanda goes even further and insists that: "Article 2(7) of the UN Charter mandating non-intervention is a *doctrine that has been changing because of changed circumstances.* At the end of World War II, it was clear that state sovereignty would not permit intervention. But today, considering events in South Africa on the question of apartheid, and domestic human rights violations throughout the world, the right to intervene is a right and norm that is complementary to state sovereignty".[26]

For Michael Reisman, "there are higher values affirmed in customary international law – the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographic boundaries to stem categorical moral imperatives and ultimately, the confirmation of sanctity of human life, without reference to place or to transient circumstances – that take precedence over principles of non-intervention".[27]

Maurice Torrelli argues that while awaiting a formal recognition of legality of intervention, the duty to intervene is created by moral considerations. For him, since "the right of initiative [of humanitarian action] has been legally accepted by states it cannot be denounced as undue interference when exercised. By recognizing this right, states have simply expressed their sovereignty".[28] Indeed, this view is supported by many provisions, such as Article 27 of the First Convention, and Articles 64 and 70 of Protocol I as he further argues. Consent – the expression of sovereignty – is hence "a basic principle in the exercise of the right of humanitarian intervention in armed conflicts".[29]

According to Denise Plattner, "the civilian population became an entity to be protected from any belligerent whatsoever, even if that belligerent was its own state".[30] For example, Article 70 of Additional Protocol I to the four Geneva Conventions obliges a State to agree to relief action which is humanitarian and impartial and conducted without any adverse distinction, and if the civilian population in its territory is insufficiently supplied with goods essential to its survival.[31]

A similar interpretation seems to be held by the International Court of Justice. In its decision concerning military and paramilitary activities in and against,[32] the International Court of Justice confirmed that humanitarian assistance, if limited to the underlying purposes of the Red Cross and if given without discrimination, was not to be condemned as an intervention in the internal affairs of a state. The resolution, adopted in September 1989 by the Institute of International Law, stresses in Article 5 that "an offer by a state, a group of states, an international organization, or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another state in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that state".[33] Yves Sandoz, however, recognizes that while in a globalized world states are no longer allowed a "right of indifference", "it would clearly be excessive to infer from this that there consequently exists a duty to intervene by force outside of a security system as defined by the Charter of the United Nations".[34]

The post-Cold War international discourse on humanitarian intervention and relative rights of dictatorial regimes *vis-à-vis* innocent civil populations seems to exhibit a growing international awareness of what Stanley Hoffman designates as "duties beyond borders"[35] or "cosmopolitanist morality".[36] This is an acknowledgement of the existence of certain universally binding values that always must be protected, and rules which unconditionally must be respected in civilized international relations.[37]

Human rights and the internal reconfiguration of sovereignty

Charles Taylor refers to the "malaise of modernity", a kind of post-modern identity crisis within Western society in which relativism and extreme individualism, isolated self-identification, have fostered fragmentation. Populations have self-defeated themselves: fragmented and unable to coalesce around a common purpose and form a common

will, people have failed to govern themselves even in the most democratic societies. As members of a fragmented society find it harder and harder to identify with their political society as a community, the de-linkage of the ruler and the ruled becomes apparent.[38] Consequently, in a powerless community without effective leadership, government governs easily. The identity of the state, no longer the identity of territory or population, becomes the identity of government, or more properly of government officials. The de-linkage of the ruler and the ruled is different from the above described changes promoted by practices of intervention. Whereas practices of intervention promote the erosion of traditional conceptions of (external) sovereignty, challenges to the identity of the state promote a change in the ingredients of the statehood formula. An international law reserved for states becomes international law for government officials. This was considered an unsustainable proposition of law in a universalizing world.[39] This identity crisis of the state is causing the legal concept of statehood to become undefined under international law.

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States defined statehood as possessing four qualifications: (1) a permanent population; (2) a defined territory; (3) government and (4) capacity to enter in relations with other states. The first three are the concrete forms of the state while the fourth, an abstraction, is the affirmation that these in combination constitute a state. "Capacity" in this sense is recognized sovereignty. If the concrete ingredients existed as facts, then a state was said to exist and could participate as a subject of international law. If one of the elements was missing, then the whole package did not exist according to law. Once a kind of critical mass point is reached then the three concrete qualities are fused and catapulted through recognition to a sovereign status. Once affirmed as a state, the burden of proof of losing this status, because of the untouchable nature of sovereignty, is even higher. If a government collapses, as in the Congo in the 1960s, Lebanon in the 1980s or Somalia in the 1990s, or if territorial boundaries are in flux, as the borders of Israel still are, then statehood persists. Sovereignty maintains the fusion even as the criteria delink.[40] Over time this formula was challenged and certain qualitative characteristics were added. Not only did the factual criteria have to be present, but their combination had to be of a certain kind: Was there a willingness and ability to observe international law? Was the regime racist or unlawfully constituted? Was independence achieved in accordance with the principle of self-determination? Was the prohibition on the use of force violated? This represented a shift from an objective set of criteria for defining statehood to a subjective test of legitimate statehood.

At the governmental level these changes can also be identified. The catalyst for the shift in this case was the human rights abuses in Ghana following Britain's recognition of the government in 1979. The boldest statement to this effect was by the United Kingdom's government in 1980. In the House of Lords the Foreign Secretary, Lord Carrington, announced that following "a re-examination of British policy ... and a comparison with

the practice of our partners and allies ... we have decided that we shall no longer accord recognition to governments. The British government recognizes states in accordance with common international doctrine".[41] The practice of Great Britain had been to recognize governments on the basis of effective control of territory, but also as a form of approval. Recognition of government and statehood was synonymous. Carrington's statement was an attempt to distance recognition from a form of approval. There was a need to enter into relations with governments which the United Kingdom did not approve or did not want to appear to approve of. It was also the practice of other governments. The United States had made its statement in 1977. By recognizing the state as distinct from government the United Kingdom was establishing a subjective standard of legitimacy. It implies that recognition virtually occurred by itself, on the basis of the facts. But this presupposed that there was an adequate checklist of criteria on which to base recognition devoid of judgment. There had been a marked shift from quantitative to qualitative characteristics of statehood. In the end, the process of recognition relied on a dual process: the legitimacy of the state was tested subjectively, and its acceptance of the state as a state relied on objective criteria.

This phenomenon is coupled with a physical fragmentation of the state as population, government and territory are delinked. This is particularly apparent as individuals and peoples become independent actors internationally, as international law becomes directly applicable to them, and as state governments are circumvented as a filter for international relations.

People: human rights

The first case in which there is a fragmentation of state as population, government and territory become less than unitary can be seen by discussions around people's rights and, therefore, claims for human rights.

A consensus is missing on the very concept of human rights. Jack Donnelly defines human rights as moral rights of a higher order, stemming from "socially shared moral conceptions of the nature of the human person and the conditions necessary for a life in dignity".[42] Samuel Kim argues that human rights represent "claims and demands essential to the protection of human life and the enhancement of human dignity" and "should therefore enjoy full social and political sanctions".[43] Neil Nickel characterizes human rights as norms which are: definite, high-priority (and, therefore, mandatory), universal, existing and valid independently of recognition or implementation in the customs or legal systems of particular countries, socially perceived to be important, creating duties/obligations both for individuals and governments, establishing minimal standards of decent social and governmental practice.[44] For Richard Falk human rights are not merely legal or moral abstractions, but they "are embedded in historical process ... closely intertwined with the on-going anti-imperial struggle against political, economic and cultural structures of international domination".[45]

Yves Szabo puts human rights within the framework of constitutional law, the purpose of which is "to defend by institutional means the rights of human beings against abuses of power committed by the organs of the State and, at the same time, to promote the establishment of humane living conditions and the multi-dimensional development of human personality".[46] The roots of this rights theory may be traced back to ancient Greece and Rome and should be understood as the law which nature teaches to all human beings. Consequently, (natural) rights were owed to 'men' wherever they would go.

Marcus Tullius Cicero maintained that natural law was eternal and immutable law that applies to all peoples at all times, and has God as its source. In the Middle Ages, St. Thomas Aquinas (drawing on Aristotle) viewed natural law as deriving from "right reason". It was Grotius who first definitely rejected natural law's roots in the will of God and claimed instead that natural law is the law of 'reason'. Upholding 'reason' as the source of law was gradually extended to the laws of the state.[47]

The conception of rights, as understood today in both their legal and theoretical contexts, primarily emerged in the 17th and 18th centuries as 'natural *rights'* and the 'rights of man'. Rights were seen as claims on others (primarily existing rulers) to a certain kind of treatment. Development of the rights doctrine has been accelerated by the process of separation of the citizen from the state: the emergence of capitalism out of feudalism necessitated a society of 'free individuals' under the rule of constitutions enunciating and clarifying individual rights. As William Felice concludes, "the ideas of rights thus corresponded to changes in the world social and economic system, otherwise the need for such new ideas would not have been felt. The ideas of 'freedom' and 'equality', which were to dominate political debate and dialogue for the next two hundred years, were not merely abstract constructions imposed upon social systems ... (but) key ideological components of the reorganization of the mode of production ... from one dominated by monarchy and lords to one dominated by a bourgeois (middle) class".[48]

In the 20th century the modern concept of 'human rights' has evolved and gained such gravitas that it may be comparable to the importance of 'natural rights' in the past. The creation of the United Nations in particular marked a fundamental change concerning protection of human rights. "Promoting and encouraging respect for human rights and for fundamental freedoms to all without distinction as to race, sex, language or religion" is defined in Art. 1(3) of the UN Charter as one of the fundamental purposes of the United Nations. Article 55 of the UN Charter provides for the promotion of "... universal respect for, and observance of, human rights and fundamental freedoms". In Article 56 member states of the UN pledge "to take join and separate action in cooperation with the Organization for the achievement of the purpose set out in Article 55". Other human rights provisions of the Charter may be found in Art. 13(1b); Art. 62(2); Art 68; Art 76(c); Art. 105.

(a) The legal consolidation of human rights

Since the very entry of the Charter into force there has been an ongoing debate over the legal significance of the Charter's pledges to promote human rights. Some scholars have argued that the cumulative effect of the human rights provisions of the Charter cannot be ignored and that the principle of "good faith" in the UN Charter necessitates a conclusion that member states are under a duty to observe fundamental human rights. They maintain that member states have undertaken defined legal obligations toward the inhabitants of their territory by ratification of the United Nations Charter. Other scholars argue instead that the vague language of the Charter, which refers to "promoting", "encouraging", and "assisting in the realization of" human rights, and to "guaranteeing" or "protecting" them, does not create binding obligations. Hans Kelsen, for example, argued that since the human rights provisions of the Charter do not identify explicitly those rights which are to be promoted, it is impossible to speak of a 'right' unless its precise legal context is known.[49] In 1971, though, the International Court of Justice held that the Charter does indeed impose upon member states legal obligations with regard to human rights.

On December 10, 1948, the Universal Declaration of Human Rights was passed by the UN General Assembly. It was in the Declaration that those "basic rights" which the UN Charter had pledged to promote three years earlier were specifically named. Once again, a consensus is still lacking as to whether the Declaration is merely a solemn statement of good intentions or whether it has already become customary law. However, since the legal form of the Universal Declaration of Human Rights was the General Assembly *resolution,* and not an international treaty, the rights proclaimed in it still could not be seen as 'rights' in the technical sense of legal enforceability.[50] Still, there is no doubt that the Universal Declaration of Human Rights had a substantial impact on strengthening of respect for human rights and fundamental freedoms in subsequent decades. On one hand, it served as a common international standard of conduct and a framework of reference for appeals to government to observe human rights. On the other hand, numerous global and regional treaties have transformed the Universal Declaration into international treaty law; the European Convention on Human Rights is one example. Finally, national constitutions, legislations, and court decisions have been influenced by the Declaration.

In December 1966 the General Assembly of the United Nations adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[51] These covenants not only described in more detail the rights proclaimed in the Universal Declaration but also formulated optional complaint procedures to ensure that parties to the Covenants fulfill their obligations. Only a state that recognized the competence of the Human Rights Committee to consider the complaints in regard to itself is authorized to set the procedure in motion with regard to another state party. Moreover, the Optimal Protocol I of the Civil and Political

Covenant allows, in Article 1, that even an individual may complain to the Human Rights Committee that a state party to the Optional Protocol has violated the rights guaranteed under the Covenant.

The procedural access granted to the individual was not gained without a struggle, hence the inclusion of the right of an individual petition in a separate protocol, instead of in the body of the Covenants themselves. This solution was enforced by the developing and Communist countries, which rejected the very idea of the individuals' *locus standi* in international proceedings, recalling traditional theoretical arguments that only states are the subjects of international law.[52]

Moreover, the Third World's opposition to granting an individual access to complaint procedure signaled a growing conceptual gap and political controversy between the South and the North in the issue of human rights. While for the North individual political and civil rights (freedoms) constituted the very essence of human rights, for the South economic and social rights or even "common good" – type rights should be given priority. For example, Southern claims for a more just distribution of resources between poor and rich nations have been gradually transformed into a claim for the so-called 'right to development', leading to the passage of the Declaration on the Right to Development by the UN General Assembly on 4 December 1986.[53]

The two Covenants together with the 1948 Universal Declaration of Human Rights formed the so-called International Bill of Human Rights, which constitutes the cross-national normative consensus concerning four groups of rights:

- "Survival" rights: right to life, food and health care;
- "Membership" rights: assurances of equality in society, family rights and protection from discrimination;
- "Protection" rights, which guard the individual against abuses of power by the state: rights of *habeas corpus* and an independent judiciary; and,
- "Empowerment" rights, which provide the individual with control over the course of his or her life, and in particular, control over (not merely protection against) the state: right to education, a free press, and freedom of education.

According to Jack Donnelly and Rhoda Howard, the categorization above should not be seen as hierarchy: "[S]urvival rights ... are no more, and no less, basic or important than empowerment rights, listed last, although no rights can be enjoyed unless one is alive, the right to life has no *moral* priority; it may be prerequisite to enjoying other rights, but that does not make it a 'higher' right".[54]

Another classification of human rights has been suggested by Karel Vasak,[55] who distinguishes three generations of rights. The first generation constitutes *political* and *civil* rights (e.g. freedom from oppression, freedom from arbitrary detention or arrest; freedom of opinion; conscience and religion; freedom of assembly; freedom of movement; right to private property; freedom of the press; freedom from interference in private property); the second generation comprises *economic, social and cultural rights* (right to

decent working conditions, right to social security; right to education; right to health); and the third concerns the so-called *'solidaristic'* or *common good/human rights* (right to peace, right to clean environment; right to development; right to food; right to free flow of information' right to the common heritage of mankind; right to humanitarian assistance).
On June 6, 1967, the United Nations Economic and Social Council (ECOSOC) established in Resolution 1235 (XLII) a procedure under which allegations of *gross and widespread violations of human rights* could be the subject of public discussion in the UN Commission on Human Rights and its sub-Commission on Prevention of Discrimination and Protection of Minorities. Under the authority of this resolution, ECOSOC has established working groups, special rapporteurs, special representatives, and experts to monitor human rights violations in a number of countries.
In 1970, ECOSOC resolution 1503 (XLVIII) established a confidential complaints procedure that is available against all member states of the United Nations.[56] It authorizes the UN Human Rights Commission to investigate communications (complaints) that "appear to reveal a consistent pattern of gross and reliably attested violations of human rights". Resolution 1503 sets up a relatively elaborate process that culminates in an announcement by the chair of the Commission of a list of some the worst violators of human rights – provided that these violators are not already being considered under other UN procedures. In cases where such an inquiry reveals a consistent pattern of gross violations of human rights, the situation in the country concerned may be further taken up by a working group of the Sub commission on the Prevention of Discrimination and Protection of Minorities.
There are no procedures for investigating, let alone attempting to address, particular violators. The complaint procedure under the International Covenant and Optional Protocol is available only against certain states which are party to the covenants. Moreover, although individuals are allowed to communicate grievances, the 1503 procedure deals only with situations of gross, systematic violations.
On November 19, 1981, the UN General Assembly passed a resolution which noted recent suggestions for a New Humanitarian Order.[57] It called upon the Secretary General to seek the views of governments on the proposal and requested the General Assembly to consider the question at its 1982 session. The Secretary's General report laid the groundwork for a second resolution on "International Cooperation to Avert New Flows of Refugees".[58] However, this second resolution insisted on the primacy of the principle of non-intervention in the domestic affairs of sovereign states, even in cases of such flagrant abuses of human rights as massive expulsions. The resolution established a group of government experts to study the problem and make proposals for international cooperation.
In addition to the global instruments designed to ensure respect for human rights, a multitude of regional documents have been drafted. For example, in 1950 the Council of Europe drafted the [European] Convention for the Protection of Human Rights and

Fundamental Freedoms (entered into force on September 3, 1953). The Convention and its Protocols guarantee personal, legal, civil, and political rights. Under Art. 24, a state has the right to bring a complaint against another state. Moreover, under Art. 25 any person, non-governmental organization or group of individuals claiming to be victims of a violation by one of the High Contracting Parties of the rights set forth in this Convention may lodge a petition, provided that the high contracting party concerned has accepted the right of individual petition.[59]

Economic and social rights are laid out in the 1961 European Social Charter (entered into force on February 26, 1965). The highly developed European human rights regime deserves special interest, especially the strong monitoring powers of the European Commission of Human Rights and the authoritative decision-making powers of the European Court of Human Rights.[60]

The above review of the changing status of human rights in the international system indicates that human rights law is consistently compromised by the same "undisputed rule of international law"[61] that every state has exclusive control over individuals within its territory. It also indicates that at the heart of the problem remains the peculiar status of enforcement in international society: given the absence of community enforcement capabilities, the system depends, in turn, on perceived self-interest. Consequently, a serious divergence of opinions with regard to human rights may be seen not only among politicians, but also within the academic community. For proponents of 'liberal statism' – perhaps best represented in the works of Hedley Bull[62] and earlier works of John Vincent[63] – forceful promotion of human rights was at odds with the proper functioning of the international system. They maintained that any serious implementation of human rights is necessarily interventionary, and interventionary in a particularly dubious way: strong states with imperial interests and expansionist tendencies acting against weak states situated in "alien" cultural and ideological regions of the world.[64] The so-called 'liberal internationalism' of the Carter Administration, Freedom House, and such scholars as Tom Farer, Louis Henkin, Richard Lillich, John Norton Moore and Michael Reisman, viewed the world as "an imperfect place where many terrible abuses of state power occur. Therefore, carefully confined interventionary missions [could] be beneficially undertaken even by strong states to alleviate some of this suffering".[65] Under this view of the role of human rights in the international system, the individual is not only a subject of the law, but under certain treaties an individual has a procedural access to international tribunals in order to seek his or her justice.

Peoples: claims to self-determination

The second case in which there is a fragmentation of state as population, government and territory can be seen in the appeals to the rights of peoples and claims to self-determination. Some groups are agitating or fighting for autonomy, others for their own state, still others for bare survival. All of them do this under the banner of self-

determination. Yet, this concept is one of the most controversial and least understood in global politics and is a major force which threatens to undermine some of the bases of the international community, namely the sanctity of borders and the internal sovereignty of states. Communal conflict can have many other serious consequences, including genocide and the generation of massive refugee flows. Such conflict is so widespread that a comprehensive approach to dealing with ethnonationalism is needed. This subsection will address these issues. It will do so by separating changes in legal norms concerning principles of self-determination from the embeddedness of these changes in the broader discussion over self-determination.

(a) Self-determination as a legal norm

Self-determination is a norm of international law. However what this means is not always clear. Some claim it is a principle, others a right, and some identify it with *jus cogens*. Further, the content of the norm is also contested, although most state practice has restricted it to decolonization.

The Universal Declaration of Human Rights does not explicitly make reference to self-determination. However, Article 21 does state that: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives ... The will of the people shall be the basis of the authority of the government". It is thus concerned with individuals as part of a community rather than as individuals as such, and may be construed as a reference to one of the aspects of the reconstructed sovereignty put forth in the last chapter: popular sovereignty. The 'self' is the political community in general, not a political community based upon further considerations such as ethnicity.

The two International Covenants on Human Rights do, however, make specific reference to a right to self-determination in their common Article 1: "All peoples have the right to self-determination". When this article was up for discussion during the drafting process, it was objected to on the grounds that it was a collective right, and not a human right, and thus should not be included in a document dealing with individuals. However, defenders pointed out that it affected every individual and was crucial for the enjoyment of other human rights: "Although the principle of equal rights and self-determination of peoples constitutes a collective right, it nevertheless concerns each individual, since deprivation of that right would entail the loss of individual rights. The right to self-determination is a fundamental right without which other rights cannot be fully enjoyed".[66]

The Charter of the UN has two explicit references to self-determination. Article 1, paragraph 2, refers to one of the purposes of the UN: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace". The introductory part of Article 55 refers to "respect for the principle of equal rights and self-determination of peoples...". Further, Article 73 of Chapter XI ("Declaration Regarding Non-Self-Governing Territories") and Article 76 of Chapter XII ("International Trusteeship

System") both make reference to self-determination in terms of self-government and independence for colonial and trust territories.

Any question whether self-government was ever more appropriate than independence for colonial peoples was put to rest in 1960 when the General Assembly adopted Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Territories. The General Assembly noted "the need for the creation of conditions for stability and friendly relations based on respect for the principles of equal rights and self-determination of all peoples..." and "that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of national territory". It then declared in Article 1 that: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and cooperation". Article 2 affirmed that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development". Article 6 provided the state-centric foundation for the aforementioned resistance to applying self-determination beyond colonial territories: "Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

Three days later, the General Assembly passed resolution 1541 (XV), "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter". It provided criteria on how to decide if a territory was "non-self-governing", which included being "geographically separate" and "distinct ethnically and/or culturally from the country administering it". This was known as the "salt-water" theory of colonialism. It meant that minorities could not be classified as a non-self-governing entity and thus entitled to self-determination. However one might ask why an ocean or other territorial expansion takes precedence over other kinds of boundaries: "there is no good reason why other defining characteristics, including historical boundaries or *de facto* boundaries established through the hostile action of the governments in question, might not also be relevant".[67] Further, Resolution 1541 noted how a territory could become self-governing: "(a) Emergence as a sovereign state; (b) Free association with and independent state; or (c) Integration with an independent state". Independence was the preferred option.

The 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations" makes several references to the principles of self-determination, while at the same time seeming to restrict it to colonial – "non-self-governing" – territories. On the first point, it proclaimed that: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status

and to pursue their economic, social and cultural development". It also recognized the modes of self-determination mentioned in Resolution 1541. The second point, that of restricting self-determination to colonial peoples, was also affirmed, and once a territory was decolonized the right to self-determination ends and territorial integrity reigns supreme. However, the Declaration also seems to indicate that states which do not represent all of the people within their borders might be vulnerable to further actions of self-determination from within. Some contend that since there was a specific racial reference, only racist governments such as the *apartheid* regime in South Africa would be vulnerable. However, there is also a reference to creed – that is belief, religious or other – which might be construed as further opening up the non-colonial or post-decolonization aspects of self-determination. Others still cling to the decolonization-only option and maintain that political unity takes precedence over self-determination. At the time of the declaration then, "while there is no doubt that there is an international legal right to self-determination in the context of decolonization", the extension of that right to non-colonial situations was not clear.[68]

The 1981 Banjul Charter on Human and Peoples' Rights was the first regional human rights convention to make specific reference to the right to self-determination. Article 19 recognized the equality of peoples: "All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another". Article 20 recognizes the right to self-determination and states in part: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen".

The charter also makes specific reference to self-determination in the context of decolonization. However, African state practice has been to confine self-determination to that context and has regarded 'peoples' to be synonymous with states, regardless of the multi-ethnic or multi-national character of states, with territorial integrity replacing self-determination once decolonization is achieved.[69]

The waters were muddied slightly in December 1992 when the General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. It recognizes certain rights based on communal identities. Article 1 states in part: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity". Article 2 declares further "persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and public, freely and without interference or any form of discrimination". The Declaration also makes the requisite reference to territorial integrity.

Thus, this declaration, while affirming, yet again, the inviolability of boundaries, also recognizes that "national or ethnic, religious and linguistic" groups have certain communal rights which they may exercise. This has relevance not only for minorities *vis-à-vis* the central government, but also for minorities with respect to other minorities. In addition, paragraph 5 of Article 2 states: "Persons belonging to minorities have the right to establish and maintain without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties". This means that groups may have rights with regard to other states of which they are not citizens. It is an implicit recognition that groups have interests or loyalties beyond state borders. Insofar as these loyalties come to supplant loyalties to the particular state in which people reside, state control over the minds of their citizens is undermined.

Finally, a 1992 declaration by the Conference on Security and Cooperation in Europe (CSCE) provides a precedent for a right to self-determination. The CSCE declared that Yugoslavia could not use force to preserve its internal borders. Yugoslavia was essentially stripped of its sovereign rights to prevent the country from disintegrating, and the rights of peoples were given preference over the rights of a state. This action could have far-reaching consequences for other communal conflicts, and it certainly represents a shift away from the automatic preference given to states, at least in the context of internal conflict.

(b) The self of self-determination

All of these legal norms and changes in legal configurations lead to the following questions: who is the 'self' who is entitled to self-determination, what form(s) should that determination take, and how does one reconcile competing claims, not just between groups but between groups and individual rights? In other words, how is it possible to include the tensions between groups and between groups and individuals in a reconstructed notion of sovereignty?

For some, no particular community or type of community has an absolute claim to determine its status without regard to other communities. Michael Walzer points out that "self-determination has no absolute subject".[70] In other words, each community must pursue its common life in some sort of harmony with other common lives. This is because each community is comprised of, comprises, and overlaps with other communities, which also want to pursue their own autonomous common lives.

Regarding the value of communal identity, Neil MacCormick notes that "a sense of nationality is for many people constitutive in part of their sense of identity and even of selfhood",[71] and it thus must be respected. Indeed our identity is usually constituted by membership in, and identification with, a number of different communities, territorially and non-territorially based. They are part of who we are, and can provide for certain

material and psychological wants and needs. However, the specific type of community is not decided in advance. And, the bases of communities can be simultaneously constructive and destructive: "ethnicity is one of those forces that is commonly building in moderation, community-destroying in excess. It is both fruitless and undesirable to attempt to abolish ethnic affiliations, but not at all fruitless to attempt to limit their impact".[72] Walzer further maintains: "Tribalism names the commitment of individuals and groups to their own history, culture, and identity, and this commitment (though not any particular versions of it) is a permanent feature of human social life. The parochialism that it breeds is similarly permanent. It can't be overcome; it has to be accommodated: *not only my parochialism but yours as well and his and hers in their turn".*[73] It is this last portion that is particularly relevant. The claims of all communities must be given attention, yet the outcomes must be different.

More specifically, what this does not indicate is what the entities should look like that should have a right to self-determination. Should subjective self-determination be the basis for self-determination? Should there be some numerical threshold which a group must attain before it has rights? Certainly there is some sort of minimum number of people and resources a community must have in order to be able to survive in the global industrial/postindustrial milieu. Or, alternatively, is the world community willing to take on even more "charity" cases in order to provide some sort of self-determination? The answer to these questions will depend, partly, on what form of self-determination one is discussing.

Colonial peoples have a right under international law to break free of the state which rules them from afar. This is certainly reasonable, for having governmental decisions made by others outside of the community can destroy the very basis of the community. Beyond this, things get murkier. However, there is no reason why a community which is not subject to domination from outside its particular state should not also be free to determine the scope and outline of itself: "One searches in vain, however, for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of the cartographers, annexed to an independent state must forever remain without the scope of the principle of self-determination".[74]

There is no fundamental difference, in other words, between a territorial entity which, if it were not dominated by an outside state, would be considered a state, and a community within a state which experiences discrimination. The former is called 'colonialism', the latter has been characterized as 'internal colonialism'. Since the state is not a natural entity with attendant natural rights above and beyond other communities, there is a no *a priori* justification for treating the two cases as having different moral qualities. Thus, it is possible to treat claims on the part of different kinds and sizes of communities more or less equally. There is no inherent imperative to favor and preserve the status quo. What

is important is the balance between competing claims. It is usually minority communities that make claims against the state. Another type of community which can make claims on the basis of self-identification as a distinct group is the indigenous community.

(c) Accommodating claims

As we discuss who deserves self-determination, we must be mindful that selves are always determined in relation to other selves, which must be accommodated. In addition, frequently the way self-determination is implemented comes into conflict with other collective and individual rights, and a balance must be struck. Neither is inherently more important, for each can buttress the other. While I have established that to varying degrees and in varying contexts self-determination became considered as a right, what this means in concrete terms is still unclear. In other words, to what extent does it imply a right to independence and to what extent is self-determination tied more to other forms of self-government? I shall argue that the form of self-determination is not set in advance nor is it a final event, where once an action of self-determination takes place, this sets the political arrangements for all time. Self-determination involves a series of different possibilities. This might include secession and the resulting creation of an independent state; consociationalism, where minorities are given a greater say in the overall governing of a country; federalism; and, relatedly, autonomy, where certain regions which are distinct from the rest of a territorial entity are given various measures of self-government. The form and extent of this right is ambiguous, applicable in different situations in different ways. Yet, I will begin by agreeing with James Crawford "Self-determination as a legal right would represent the significant erosion of the principle of sovereignty. It is a dynamic principle which, if consistently applied, could bring about significant changes in the political geography of the world".[75]

One interpretation of self-determination, used by many groups asserting communal identity, is the creation of independent states: "sovereignty is a dry, legal question for those nations who have acquired statehood. Sovereignty is a passionate crusade for those who do not have it".[76] Insofar as independence is the norm, sovereignty is upheld and the state system is left more or less intact. At the same time, however, those who want their own state pose a direct challenge to already established states. Since the world is already almost completely divided up as states, any new states would have to come out of the territory of established states. Thus even though self-determination as statehood upholds Westphalian norms and falls directly within the sovereignty discourse, it is also a direct assault on sovereignty as an established, unchangeable linking of territory, people and government.

Further, even where the aim of self-determination is not the creation of an independent state, sovereignty can still be eroded. Indeed, it "requires a more subtle view of sovereignty",[77] and the consideration of the possibility of shared or partial or divided sovereignty. When a community gains a certain amount of autonomy or self-rule, it

begins to share sovereignty with the state of which it is part. It may have the opportunity to decide how to define and pursue its 'common life', while doing so in conjunction with another, more comprehensive entity, which carries out some of the other more 'external' functions necessary in this era of dwindling distances and increased interdependence. As a substate autonomous community begins to have more contacts across permeable state borders independent of a state, it engages in a further erosion, or evasion, of sovereignty. Communal assertions will persist, and that in and of itself is cause for worry. All types of communities can be useful; indeed, they are necessary for the attainment of human rights and general human assistance. Thus various ethnic and national groups and peoples will have to be, and should be, accommodated and allowed to express their defining diversity. However, the forms such accommodations will take will also be varied. Most communities will not get their own states. Indeed, I have demonstrated how hard it is for different 'selves' to be disentangled. Eric Hobsbawn observes that "xenophobia and racism are symptoms, not cures. Ethnic communities and groups in modern societies are fated to coexist, whatever the rhetoric which dreams of a return to an unmixed nation. Mass murder and mass expulsion (repatriation) did indeed drastically simplify the ethnic map of Europe, and might be tried in some other regions. Yet the movement of peoples has since restored the ethnic complexity which barbarism sought to eliminate. Only today the typical 'national minority' in most countries receiving migration, is an archipelago of small islands rather than a coherent land mass".[78]

A structural move upwards?

Sovereignty, human rights and international authority

State boundaries represent the unity of a government, its population and territory, and their inviolability as a construct. As this imagined linkage is eroded, the identity of the construct and its boundaries become indeterminate, and intervention ceases to have logical relevance. The growth of a human rights regime overshadows territorial limits to the application of law. The normative aspect of the equation includes a redefinition of the relationship between individuals, groups, communities, states and the overall global community. The sovereignty discourse has assigned a preeminent position to the state. That is, it has been identified as the ultimate arbiter of the existence of power and authority. Yet, claims to sovereignty – which cannot be absolute in any case – must involve three principles – human rights, popular sovereignty and self-determination. Any entity which does not carry out its responsibilities according to these principles cannot make a legitimate claim to authority. This is a significant departure from sovereignty discourse in and of itself. Further, even when it can make such a claim, its claims to sovereignty are tempered by other claims to sovereignty which may overlap. In fact, the very act of recognizing the principle of self-determination for a wide range of communities necessarily means recognizing numerous loci of semi-sovereign power and authority.

In addition, this does not mean only sub-state entities. Rather trans-state communities

also have a right to communal expression and contact, and the global community as a whole also forms one of many centers of power and authority. To find an era where interventions were justified by the 'might makes right' logic one need look back no further than the 19th and early 20th centuries, when powerful states adopted a double standard: the principle of non-intervention generally applied in relations among the civilized states in Europe, but in Europe's relation with weaker states such as China, Persia, Egypt, Turkey, and the countries of Latin America, intervention was routine. In the 21st century, movement away from this logic and towards a shift in the balance in favor of the sovereign authority of states seems to be more real. The international community appears to have gained more powers with regards to the possibilities of intervening in the name of a common morality, moving beyond old versions rooted in power politics.[79]

Whether or not the expanding constraints on internal sovereignty will lead ultimately to a fundamental transformation of the Westphalian system depends, first, on the extent to which recent, prominent cases of international intervention represent the beginnings of a trend or are single occurrences in exceptional circumstances. Interventions in the name of human rights promote changes from the power of states to the power of international community; and second, for there to be fundamental change, these and similar interventions must represent more than constraints or infringements on the sovereign authority of states. They must also represent a legitimate transfer of authority to a credible and viable international community.[80]

Thus far, however, there is no evidence to suggest that the balance has shifted towards a global community. It would require, among other things, the emergence of a fully legitimate and capable international community; agreement among the members on the definition of universal principles; a willingness on the part of powerful states to intervene when called upon by the international community and to be subjects of intervention; and a willingness on the part of weaker states to abandon their tenacious defense of the sovereignty principle in deference to universal principles. What seems to be occurring, however, is a more de-centralized view of intervention where the goals of action by a particular interested agent coincide with the occurrence of a particular humanitarian disaster.[81]

It seems that while human rights have won the battle with sovereignty, rights proponents do not know what to do with the victory. That is, while human rights and humanitarian principles are increasingly recognized, and statehood increasingly imbued with responsibility as well as rights, for many around the world the victory appears hollow. There is no consistency in practices to consolidate changes in legal norms. For every instance where humanitarian principles have been implemented in practice, one can name many more in which the international community has shown little will to act and atrocities have continued unabated. If territorial walls crumble before international law has been strengthened and underwritten by UN security forces, violence will be widespread as power is exercised unfettered by both large and small states. The

challenge is to recognize these underlying trends and move in a post-modern age beyond the territorial definitions of an early modern period.[82]

Even though an international government is far from existence, however, the back of sovereignty has been broken. Its days as an absolute ordering principle are over. The concept of sovereignty has been evolving and will continue to evolve. The new sovereignty increasingly includes greater respect for human rights and humanitarian principles. In addition, the sovereignty for the future will recognize a much wider array of loci of power and authority, such that rather than being able to point to a single sovereign centre, a much more ambiguous situation will emerge where states, sub-state and trans-state communities, NGOs, international organizations and other actors will all hold a piece of a continually changing global puzzle. Rules allowing intervention under UN auspices to curb human rights abuses and promote peaceful regime change within states are making their appearance.[83] Many other international organizations benefit from both the pulverization of sovereignty and the acknowledgement that a larger purpose transcends state sovereignty and permits some measure of intervention in members' affairs. Private organizations break the monopoly of agency held by governments and extend to international organizations. The respect accorded to human rights groups such as Amnesty International, coupled with the manifest inability of international organizations to deal with the bulk of human rights abuses, has prompted a rule allowing these groups to undertake a wide range of acts, including fact finding, advocacy, and communication with governments and international organizations. In the name of human rights, sovereignty is being submitted to the rule of foreign interference and agency.

Conclusion

This article aimed to understand how human rights are reconfiguring external and internal sovereignty. The emphasis was placed on how increased attention should be paid to how norms are not just structures, but are also constructed by the actors – other than states – that participate in their formation. The goal was on stressing the importance of these political norms in order to understand how human rights have been challenging sovereignty especially since the end of the Cold War.

First, notions of external sovereignty are being challenged. With the end of the Cold War, the idea that states were lords of their internal affairs came under challenge. Changing practices of intervention changed what for centuries seemed to be ground rules of the behavior amongst states: respect for non-intervention. The post-Cold War international discourse on humanitarian intervention and the relative rights of dictatorial regimes *vis-à-vis* innocent civil populations seems to demonstrate a growing international awareness of what Stanley Hoffman designates as "duties beyond borders" or John Vincent as a "cosmopolitanist morality". This is an acknowledgement of the existence of certain universally binding values that always must be protected, and rules which unconditionally must be respected in civilized international relations.

Second, notions of internal sovereignty also suffered changes. Statehood came to acquire new qualitative characteristics. Not only did the factual criteria have to be present, but their combination had to be of a certain kind: Was there a willingness and ability to observe international law? Was the regime a power racist or unlawfully constituted? Was independence achieved in accordance with the principle of self-determination? As these questions started to emerge, so did the shift that they imply from an objective set of criteria for defining statehood to a subjective test of legitimate statehood.

This phenomenon is coupled with a physical fragmentation of the state as population, government and territory are delinked. This is particularly apparent as individuals and peoples become independent actors internationally, as international law becomes directly applicable to them, and as state governments are circumvented as a filter for international relations. On a first level of analysis, different actors, academics, organizations and international elites increasingly perceive sovereignty as encompassing responsibilities as well as rights, responsibilities which include respect for human rights. The first case in which there is a fragmentation of state as population, government and territory become less than unitary can be seen by discussions around people's rights and, therefore, claims for human rights. From the end of the Cold War on, the state acquired a particular social purpose: to provide for the well being of its inhabitants. From this purpose comes the principle that the state's claim to legitimacy rests upon its will and ability to carry out this purpose. These changing understandings and the transformation of perceptions contributed to formal and legal changes. The Universal Declaration of Human Rights, the international human rights covenants, numerous other human rights declarations, as well as the body of international humanitarian law, represent a codification of an evolving balance between individuals and states, and actions on behalf of human rights contribute to a reification of this codification. Human rights are generally seen as restrictions of state power.

On a second level of analysis, arguments were raised over how legitimate state authority derives from the individuals within the state and that the state can lose legitimacy if it abuses the sovereignty which is on loan from the people. A second issue which a concern for human rights raises has to do, therefore, with self-determination. In the quest for community, borders have become contested by split communities. Such split communities, as well as many instances where groups have been thrown together in majority-minority relationships, have resulted in chronic communal conflict. Thus, artificial borders, reified by the concept of sovereignty, have created situations where borders are actually dysfunctional for the attainment and maintenance of certain types of communities, as well as upholding human rights. The need to uphold groups' rights is a restriction on the state, which traditionally has been the subject of self-determination. Especially with the end of the Cold War, however, various groups are making different types of communal claims and struggling for different kinds of outcomes. These claims are being vindicated, for even as some states are attempting to isolate communities,

adjustments are being made to enable transnational communities to maintain contact and identity. The possible arrangements arising out of a claim to self-determination are varied, some leading to statehood and some to various forms of sub-state autonomy or, in a few instances, international trusteeship. All of this means that in the quest for community, power and authority is being transferred away from the state. This is being done directly, as sub-state communities gain autonomy directly from the state, and indirectly, as suprastate entities enhance this autonomy with resources from these same states or restrict the ability of states to exercise authority over certain communities.

These changes also promote a debate over whether an international authority to promote human rights is being created or is in the process of being created. The core issue is where rights and responsibilities as well as power and authority will and should reside in the future. Whether or not the expanding constraints in the name of human rights will lead ultimately to a fundamental transformation of the Westphalian system depends, however, on the extent to which recent, prominent cases of international intervention represent the beginnings of a trend or are single occurrences in exceptional circumstances. Additionally, for there to be fundamental change, these and similar interventions must represent more than constraints or infringements on the sovereign authority of states. They must also represent a legitimate transfer of authority to a credible and viable international community. This transfer needs to be regulated and solidified by legal contracts. Thus far, however, there is no evidence to suggest that the balance has shifted towards a global community.

The inviolability of sovereignty has been broken. The days of sovereignty as an absolute ordering principle are over. The new sovereignty is increasingly flexible, including greater respect for humanitarian principles and human rights and greater possibilities for international intervention.

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