

# The Challenges to State Sovereignty from the Promotion of Human Rights

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ADAM HALL, NOV 17 2010

Traditionally, the promotion of Human Rights and the concept of state sovereignty have been fundamentally opposed. The rights of states and the 1648 Peace of Westphalia pitted against the right of the individual and the 1969 Universal Declaration of Human Rights. The very definition of sovereignty entitles states to non-intervention in their domestic affairs. The idea of *Universal* Human Rights and the protection of an individual within a state would appear to come into direct conflict with this very definition. As such, International Human Rights obligations are regularly seen as “eroding state sovereignty” (Ayoob, 2001:93). The coexistence of the two has not been easy; more often than not the two principles have confronted rather than partnered. By definition, Human Rights give the basic liberties and freedoms entitled to all simply because of being human. This principle of rights due rational, moral beings is not a new concept. For century’s liberal thinkers like Locke stressed the merit of the individual and the rights they were consequently due. Despite this, the institutionalisation of Human Rights in the international system is a relatively new concept. It wasn’t until after the Second World War that the challenge of Human Rights upon state sovereignty emerged. This essay attempts to offer a new stance upon this relationship. Previously, it has been thought that that the emergence of Human Rights has had a direct impact upon sovereignty. However, it appears the rapid growth in the protection of Human Rights is less a challenge on the very concept of sovereignty, rather a re-definition.

It is important to note that theoretically, any such promotion of universal Human Rights by the international community is a restraint on a states’ sovereignty. Clarity does not abound when referring to the term sovereignty; ‘No once meaningful word has become more misunderstood and misused.’ (Best, 1995). Nonetheless, the idea of supreme authority usually sits at the center of most definitions. The *Oxford English Dictionary* defines the term ‘sovereign’ as “one who has supremacy or rank above, or authority over, others; a superior; a ruler, governor, lord, or master.” Customarily, the notion of sovereignty refers to the idea of supreme, independent authority over a territory. If a state is sovereign over a territory, its leader (be it a monarch, government, president or sheikh) has the unreserved authority within that land. This principle of sovereignty has been seen as total and unconditional within international law for centuries; “States trumped any attempts to limit or even question the absolutism of their sovereign power” (Popovski, 2004). A clear example of this idea is seen in the 1919 Treaty of Versailles. The treaty established a commission to investigate any persons liable for war crimes – most notably Kaiser Wilhelm II of Germany. The victorious allies opposed such an idea citing that any trial of a national head of state in an international court was “contrary to the basic concept of national sovereignty” (Sunga, 1992). Many scholars believe that the victorious allies were more concerned that any standards set may later be used against them. In 1945, post World War Two, it appeared the international community had learnt from its mistakes. Judges began to reject the state centered tradition of protection and held individuals directly accountable for their actions under international law. The idea naturally followed that if individuals can be bound and prosecuted by international law, they were protected under the very same. “The idea of individual accountability logically twinned with a strong international sympathy toward individual Human Rights” (Thakur and Malcontent, 2004). Consequently, the acknowledgment of international duties led to the acknowledgement of international rights. This recognition of accountability and rights of an individual was accordingly codified. The fundamental Universal Declaration of Human Rights agreed upon in December 1948 by the

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general assembly of the United Nations was a pivotal document that did just that. It outlines an extensive and detailed list of Human Rights that are to be upheld by all nations and enjoyed by all individuals. Article 2 of the Declaration states, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (*Article 2*, Universal Declaration of Human Rights, 1948). The clear, universal standards set out in the Declaration go above and beyond any of the consenting states domestic laws. The United Nations Declaration states that a nations action, its laws and all it is should mirror the standards set out in the document. The Universal Declarations of Human Rights was never intended to be an optional set of guidelines but a binding doctrine that challenged the very behavior and authority within a state. In particular, it challenges the states power to create any law it desires, placing a framework of values upon the state and holding it accountable to a superior system.

From what we have explored so far, it would seem that the promotion of Human Rights has embarked upon a successful challenge to the concept of state sovereignty. However, as previously alluded to, it is not necessarily the case that the two concepts are incompatible. Human Rights, far from challenging or even undermining state sovereignty, are embedded within the very concept of sovereignty itself. Dominant understandings of sovereignty (and Human Rights) have indeed been significantly reshaped. Nevertheless sovereignty remains strong and, at least with respect to Human Rights, largely unchallenged. In all practicality, Human Rights are not legally binding upon states and are not practically enforced in any way. Put simply, both politically and legally, Human Rights hold very little power and as such pose little threat to the traditional Westphalian concept of sovereignty. Having said this, rather questionably some claim, “the Universal Declaration has attained something of the status of customary international law, so that the rights it contains are in some important sense binding on states” (Art and Jervis, 2007: 548). This view can be called into question as an extensive respect for an international convention can in no way be said to make it a binding international law. Undeniably, if a state chooses to ignore it, it may legitimately do so. Most notably, the Soviet Union objected to the strong wording of several provisions guaranteeing individual liberties in the Universal Declaration of Human Rights. More currently, Saudi Arabia refuse to adhere to the condition in Article 18 that sets out the right to change religion, as well as to the wording of articles guaranteeing women’s rights, both of which it finds offensive to Islam. “Although International legal obligations may attempt, and frequently do, restrict a States’ freedom of action and thereby the exercise of its sovereignty, they do not diminish or deprive it of its sovereignty as a legal status.” (Steinberger 2000: 512)

Unlike other international agreements or even domestic laws; no individual body explicitly enforces the Human Rights set out within the Declaration – “Unless there is an explicit enforcement mechanism attached to the obligation, its enforcement rests simply on the good faith of the parties. The Universal Declaration contains no enforcement mechanisms of any sort. Even if we accept it as having the force of international law, its implementation is left entirely in the hands of individual states.” (Donnelly and Howard, 1987: 87). Thomas G Weiss (2007), a leading political scientist in Human Rights and Humanitarian Intervention, highlights how state sovereignty has formed the foundation to interstate relations and world order for the past several centuries; “The concept, defined as the independent and unfettered power of a state in its jurisdiction; lies at the heart of customary international law and the UN Charter” (2007). States human right duties are exclusive to their own nationals. According to the UN Charter, it is neither the right nor the responsibility of the state to apply or enforce Human Rights in any territory outside their jurisdiction. “Chapter VII was intended to augment the sovereignty of states and protect them from external aggression and unwanted intervention, not to intervene in their domestic affairs” (Ayoob, 2001: 2). Despite the presence of national and transnational NGOs such as Amnesty International, international action within failing states is highly restricted. Monitoring of Human Rights and its abuse is however prevalent. The international community is well informed of Human Rights violations and abuse, but has very little statutory power to do anything. As such, the implementation and enforcement of such rights are left to individual states and their respective territories. Jack Donnelly (2004) further supports the idea that state sovereignty remains strong, proclaiming; “There is nothing particularly surprising about this sovereignty-respecting construction of International Human Rights. International society remains largely a society of sovereign states. Most international law is implemented and enforced nationally. Human Rights have simply been incorporated into the established state-based system of international law and politics”. The second article in the UN Charter clarifies this for us even further stating, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state” (Article 2, United Nations Charter). A clear tension has been portrayed here between global Human Rights and

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international law. Human Rights could potentially be seen as a rival to state sovereignty, but in all practicality; the concept of state sovereignty is too well protected and enshrined within the international system to be seriously challenged. It can be said then that Stephen D. Krasner (1999: 123) is misleading in his assertion that “Human Rights [is] an issue area in which conventional notions of sovereignty have been compromised.” States still hold ultimate authority (sovereignty) over Human Rights within their jurisdiction. State authority to implement and then enforce Human Rights has not been lost or even transferred to any other actor. In fact, “by establishing and consenting to Human Rights limitations on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring.” (Koskeniemi 1991: 406)

Despite the seeming lack of legal legitimacy on the international stage, the protection of Human Rights seems to have played a significantly greater role in recent years since the Cold War. Thakur (2004) notes how the role of the United Nations in Human Rights protection has significantly increased; “Many situations involving systematic Human Rights violations—in the former Yugoslavia, Somalia, Liberia, Haiti, Rwanda, Timor-Leste, Sierra Leone and recently Sudan— have been qualified by the United Nations Security Council as threats to peace” (Popovski, 2004). It is clear that the increased importance placed on Human Rights has coincided with the sharp increase, post cold war, in Humanitarian Intervention. The attitude within the international community towards Human Rights is gradually being changed, indicated clearly by the widespread institutionalisation of Human Rights. A great example of this lies in the growing number of states adopting the EU’s ‘European Convention on Human Rights’ since its founding in 1950. The coming together of a number of key factors has led to a re-conceptualisation of state sovereignty. The traditional definition of sovereignty is shifting and natural Human Rights can be found at the core of this change; the conventional definition of sovereignty is being hastily worn away as sovereignty becomes enshrined in line with the individual citizen of a state and not the state itself. This notion of sovereignty no longer comes into conflict with, but rather incorporates this idea of Human Rights, still growing in influence. No longer is a state able to claim absolute sovereignty without showing the international community they can fulfill their “duty” to protect their citizens’ rights. Stanley Hoffmann wrote: “The State that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects. It is from their rights that it derives its own. When it violates them, what Walzer called ‘the presumption of fit’ between the Government and the governed vanishes, and the State’s claim to full sovereignty falls with it.”(Hoffman, 1995) When any government fails to protect Human Rights, or is even deliberately violating the basic liberties due an individual, a new precedent seems to have been set external powers to intervene and apply force to keep safe any at risk – despite it seemingly being “outlawed” within the United Nations Charter. As such it could possibly be said that, “sovereignty is not becoming less relevant; it remains the essential ordering principle of international affairs. However, it is the people’s sovereignty rather than the sovereign’s sovereignty” (Weiss, 2007).

In response to the question being discussed, we can be confident in arguing that although the recent proliferation in Human Rights promotion has not directly challenged the sovereign right of a state, it has been key in redefining the view that the international society upon this once sacrosanct concept. Changes seen in the perception of sovereignty reflect a process of expressing new standards, and new understandings of old norms, into the structure of international law and politics. “Over the past half-century, Human Rights have been widely, and increasingly deeply, incorporated into the practices of international law and politics, and thus insinuated into our understanding of sovereignty” (Donnelly, 2004). The growing understanding that Human Rights are equally important alongside territorial integrity gives states and their leaders a “dual responsibility”. External respect for the territorial boundaries of other states now coincides with the internal respect for the safety and well being of its people. Today one can supplement the classical definition of a state with a further requirement: “the State is internationally recognized upon satisfactory protection of the rights of the people living on its territory” (Donnelly, 2004). In 2001, a pivotal report was released that has contributed greatly to this definition of state sovereignty – The International Commission on Intervention and State Sovereignty (ICISS Report). The ICISS Reports’ simple aim was to redefine the sovereignty of a state to include an element of ‘responsibility’ – “ State sovereignty implies responsibility, and the primary responsibility for the protection of its peoples lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect” (ICISS, 2001; C. XI). This report deems sovereignty to be a highly conditional concept. A state is deemed to be legitimately sovereign once it is supporting the right of the individual and granting all the basic rights and liberties of life. Accordingly, once a

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state fails to protect its citizens, by definition it relinquishes the previously unshakable sovereignty it once possessed. Although encouraging progress seems to have been made, many criticise the ICISS document as a mere veil used to legitimize Western intervention within developing states as they make a bid to boost their natural resource stocks. Additionally, many Human Rights activists place doubt on the inactivity of states in the face of blatant rights violations. Outrageous atrocities in Zimbabwe, Sudan and North Korea (let alone the major powers of China and Russia) have been ignored, while seemingly lesser incidences in Iraq have been followed. The lack of integrity has lead many to question the true consistency of the states following the prevalent notion of "Humanitarian Intervention".

Despite the relative widespread acceptance of responsibility as an international norm, again it does not hold any corresponding legal status. Despite increased action by the United Nations Security Council. Intervention by various members within the international society in nations such as Kosovo, Afghanistan and Iraq (despite wide disagreement on the reason for involvement) has shown a growing hunger to protect the individual from the grasp of unruly states unwilling to show regard for basic Human Rights. Having said this, we must be careful not to make too much of this shift in definition. Although the change can be thought as considerable, the language used in the "responsibility to protect" document issued by the ICISS is very narrow and arguably rather prophetic rather than definitive. Although there is evidence of a growing moral responsibility among states, there is no proof of any legal responsibility. Rather, "the international community has chosen instead to leave itself at liberty, legally and politically, to protect or not as it sees fit, guided by no agreed upon principles" (Donnelly, 2004). This new focus upon Human Rights can be said to have been defined within, rather than as an alternative to state sovereignty.

So in summation, the sovereignty of States is no longer a simple right to exercise power on a defined territory as laid out in the foundational Peace of Westphalia. It has rather been redefined and retooled as a complex duty to exercise power in an acceptable manner. International law, although considerably state centered, has become more lenient regarding cross-border intervention to protect Human Rights. The implementation of Human Rights lies ultimately within the grasp of sovereign states themselves. Although not directly challenging the core concept of state sovereignty, Human Rights undoubtedly challenges the ability of the state to act within its borders without question. Human Rights continue to grow in importance and it is not out of the question to claim that as Liberal ideas continue to spread across the developing world, Human Rights will continue to challenge states sovereignty in a more direct and changing fashion.

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