

COSMOPOLITANISM AND GLOBAL LEGAL REGIMES

*Dennis Patterson**

I will speak about cosmopolitanism and the global human rights regime. I think human rights are important. But, human rights claims are metaphysically difficult to sustain. Human rights scholar Amartya Sen, for example, entreats us to think about human rights claims as proposals for changing substantive law.¹ I want to talk about human rights from the point of view of international law. My goal in this short paper is to identify a place where human rights discourse makes contact both with current events and with larger concepts in political theory. The larger concept I have in mind is “sovereignty.”

When the society of nation-states fashioned a global governance regime after World War II, that regime was a normative order with the nation-state as the fundamental unit of analysis.² Sovereignty was essential to understanding the political nature of the society of states. Global institutions such as the United Nations (the “U.N.”) presupposed sovereignty as a fundamental feature of global order. Everything from global trade³ to the laws of war reflects a particular conception of sovereignty.

I think the society of states is in the process of abandoning the conception of sovereignty presupposed by the society of states after World

* Board of Governors Professor of Law and Philosophy, Rutgers University, New Jersey, USA; Professor of Law and Chair in International Trade and Legal Philosophy, Swansea University, Wales, Professor of Law and Chair in Legal Philosophy and Legal Theory, European University Institute, Florence. My thanks to Anna Södersten, Guilherme Vasconcelos Vilaca, and Benedict Wray for comments on a draft of this paper.

1. Amartya Sen, *Elements of a Theory on Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004).

2. For example, the first principle of the U.N. from article 2, paragraph 1 of the *U.N. Charter* states: “[t]he Organization is based on the principle of the sovereign equality of all its Members.” U.N. Charter art. 2, para. 1.

3. See generally DENNIS PATTERSON & ARI AFILALO, *NEW GLOBAL TRADING ORDER* (Cambridge Univ. Press 2008) (exploring the trade aspects of the global order).

War II. It is this phenomenon that I will discuss. I begin by detailing my points about the various forms of sovereignty and why I think one is replacing another. I then look at one implication of this evolution in the concept of sovereignty, that being the responsibility to protect. Finally, I explore the implications of this development in the context of humanitarian intervention (the duty to prevent).

I. HUMAN RIGHTS AND SOVEREIGNTY

I think the best place to begin is with a conception of “cosmopolitanism.” For this I turn to philosopher Thomas Pogge. Pogge provides the following account of the concept:

Three elements are shared by all cosmopolitan positions. First, *individualism*: the ultimate units of concern are human beings, or persons Second, *universality*: the status of the ultimate unit of concern attaches to every living being equally Third, *generality*: this special status has global force.⁴

With this conception of cosmopolitanism in view, let us turn to sovereignty. The society of states that comprise global institutions such as the U.N. and the World Trade Organization (the “WTO”) all enjoy sovereignty. It is in virtue of the sovereignty of states that international law is possible.⁵ Within its jurisdiction, the State is sovereign over its people and territory. *Ceteris paribus*, no state may interfere in the domestic sphere of another sovereign state.⁶ States may forge agreements with other states—treaties—that draw their validity from the power of one sovereign to bind itself to another by consent. Consent without sovereignty is a meaningless gesture.

4. Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48–49 (1992).

5. For example, the central document regulating the international treaty as a legal source, the Vienna Convention on the Law of Treaties, declares its commitment to principles of “sovereign equality and independence of all [s]tates” and “non[interference in the domestic affairs of [s]tates.” Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. 331, 332. The main sources of international law—treaties, customs, and general principles of law recognized by civilized nations—also originate in actions and consent of nation-states. See Statute of the International Court of Justice art. 38, para 1.

6. Exceptions include economic sanctions and military interventions employed by the Security Council under the *U.N. Charter*. U.N. Charter ch. 7.

In the American conception of limited government, sovereignty lies with the people.⁷ Citizens are possessed of rights which are “inalienable.”⁸ Power is granted to the government but in a limited fashion. Unlike the *Magna Carta* or the *Universal Declaration of Human Rights*, which conceive of rights as granted to the people, all powers not granted to the United States government are “reserved . . . to the people.”⁹

The American view of sovereignty contrasts sharply with the Westphalian nation-state conception of state sovereignty. When Europeans began to replace rulers—for instance, princes and kings—with institutions, the nation-state was born. As Martin Van Creveld describes:

What made the [S]tate unique was that it replaced the ruler with an abstract, anonymous[] mechanism made up of laws, rules, and regulations. The laws, rules[,] and regulations were the main thing[:]; the people who staffed them and put them into practice merely incidental and, as Stalin once said, replaceable.¹⁰

After the Eighteenth Century, nation-states were formed out of sovereign territorial states, out of which the idea of the nation-state was created.¹¹ From the *Treaty of Paris* through the *Lisbon Treaty*, the European Union has gradually forged its own unique conception of sovereignty.¹² “Member States” remain sovereign within the Union. Yet, the actions of Member States are subject to review by a variety of

7. In 1793, Chief Justice John Jay distinguished the American conception of popular sovereignty as follows: “Sovereignty is the right to govern; a nation or [s]tate sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the Prince; here, it rests with the people” *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793).

8. THE DECLARATION OF INDEPENDENCE (U.S. July 4, 1776). The *Declaration* considers these rights to be at the foundation of popular sovereignty, according to which the government derives its legitimate authority “from the consent of the governed.” *Id.*

9. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

10. Martin Van Creveld, *The State: Its Rise and Decline*, MISES DAILY (Oct. 16, 2000), <http://mises.org/daily/527>.

11. See generally Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. OF INT’L L. 20 (1948).

12. Jan Dalhuisen has suggested to me that a more appropriate reference point here could be the *Treaty of Rome*, establishing the European Economic Community. I take the point. But, it seems to me that the *Treaty of Paris*, which set up the European Coal and Steel Community, was motivated by the idea of limited sovereignty that has characterized the European Union ever since.

supranational institutions, especially courts, such as the European Court of Justice and the European Court of Human Rights. What is unique about the European view of sovereignty is that it allows “the assessment of the legality of the acts of sovereign [Member] [S]tates by an international legal body whose purview penetrates the veil of sovereignty.”¹³

Philip Bobbitt describes the three views of sovereignty just sketched with this vocabulary:

[O]paque sovereignty[:] a traditional concept that holds that events within a state’s borders are entirely internal matters, beyond the judgment of other states; [T]ranslucent sovereignty[:] an outgrowth of European integration . . . ; [and] [T]ransparent sovereignty[:] . . . because a regime’s sovereignty arises from its compact with its people as well as with the society of states, sovereignty can be penetrated when a state commits widespread acts of violence against its own people¹⁴

In the context of human rights, understood in a cosmopolitan fashion, we can see a global struggle over the role of sovereignty in the protection of human rights. I want to suggest that, over the course of the last twenty years, we have witnessed an increasing international recognition of human rights, one that reflects the American conception of sovereignty vesting in a people and not a state. Curiously, our global institutions (in particular the U.N.) have been playing catch up with developments on the ground. As humanitarian interventions increase, the global society of states has seen itself contort the norms that govern relations between states. Sovereignty, especially opaque sovereignty, is under increasing pressure. If we are to make sense of recent events, we need to see that transparent sovereignty is replacing opaque sovereignty, the very form of sovereignty presupposed by the institutions that join the global society of states.

When I speak of “recent events,” to what am I referring? Since 1990, the U.N. has sanctioned interventions in a variety of situations previously thought to be outside the legitimate sphere of power of the society of nation-states.¹⁵ I have in mind Bosnia, Somalia, Rwanda, and

13. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 468 (2008).

14. *Id.* at 469–70.

15. For an overview, see Jon Western & Joshua S. Goldstein, *Humanitarian Intervention Comes of Age: Lessons From Somalia to Libya*, 90 *FOREIGN AFF.* 48 (2011).

Cambodia, just to name a few. But events have started to outstrip the structure of existing institutional discourse.

I am thinking of interventions like that of the North Atlantic Treaty Organization (“NATO”) in Kosovo. Although later ratified by the U.N. Security Council, NATO’s incursion into Kosovo was not initially approved.¹⁶ What could justify such action? Bobbitt suggests it can only be transparent sovereignty.¹⁷ This seems right. Only if sovereignty lies with a people can it be legitimate for one nation to violate the sovereignty (traditionally understood) of another in military action that halts violations of the human rights of the population. Killing one’s own people is not protected under the umbrella of “sovereignty.”

Recent events in Libya suggest the rise of transparent sovereignty as a justification for military intervention in the affairs of a sovereign nation where that sovereign is committing serious human rights violations. In its resolution on Libya, the Security Council made the protection of civilians an explicit mandate of the *Charter*.¹⁸ In so interpreting the

16. For legal issues surrounding the NATO’s intervention in Kosovo, see Ian Brownlie & C. J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT’L & COMP. L.Q. 878 (2000).

17. BOBBITT, *supra* note 13, at 469 (“This doctrine holds that a state’s acts toward the state’s own citizens, within its own territory, can be judged by other states and serve as a predicate for armed intervention even in the absence of an endorsement by the appropriate international institutions.”).

18. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

The *Security Council* . . .

Acting under Chapter VII of the Charter of the United Nations,

1. *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;
2. *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution;
3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights[,] and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

Protection of civilians

4. *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures,

Charter,¹⁹ the Security Council can be seen to have embraced transparent sovereignty.

II. HUMANITARIAN INTERVENTION

The *U.N. Charter* does not recognize humanitarian intervention. Yet, human rights guarantees are growing by leaps and bounds with validation in treaties²⁰ and by international institutions.²¹ Lee Feinstein and Anne-Marie Slaughter have made a bold proposal for a change in international law to recognize a “duty to prevent.”²² As they see it, the “duty to prevent” is a corollary of “the responsibility to protect.” Here is their account of how the “responsibility to protect” originated:

In the name of protecting state sovereignty, international law traditionally prohibited states from intervening in one another's affairs, with military force or otherwise. But members of the human rights and humanitarian protection communities came to realize that, in light of the humanitarian catastrophes of the 1990s, from famine to genocide to ethnic cleansing, those principles will not do. The world could no longer sit and wait, reacting only when a crisis caused massive human suffering or spilled across borders, posing more conventional threats to international peace and security. As a result, in late 2001, an international commission of legal practitioners and scholars, responding to a challenge from the U[.]N[.] [S]ecretary-[G]eneral, proposed a new doctrine, which they called

notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council

Id.

19. U.N. Charter art. 39 *et seq.*

20. See CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 1–129 (Gráinne de Búrca et al. eds., 2d. ed. 2008).

21. See *generally* NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION (Kevin Boyle ed., 2009).

22. Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, COUNCIL ON FOREIGN AFFAIRS (Jan./Feb. 2004), <http://www.foreignaffairs.com/articles/59540/lee-feinstein-and-anne-marie-slaughter/a-duty-to-prevent>.

“The Responsibility to Protect.” This far-reaching principle holds that today U[.]N[.] member states have a responsibility to protect the lives, liberty, and basic human rights of their citizens, and that if they fail or are unable to carry it out, the international community has a responsibility to step in.²³

As mentioned, the “duty to prevent” is a corollary of the responsibility to protect. Here is how Feinstein and Slaughter justify their proposal:

We propose a corollary principle in the field of global security: a collective “duty to prevent” nations run by rulers without internal checks on their power from acquiring or using WMD [weapons of mass destruction]. For many years, a small but determined group of regimes has pursued proliferation in spite of—and, to a certain extent, without breaking—the international rules barring such activity. Some of these nations cooperate with one another, trading missile technology for uranium-enrichment know-how, for example. Their cooperation, dangerous in itself, also creates incentives for others to develop a nuclear capacity in response. These regimes can also provide a ready source of weapons and technology to individuals and terrorists. The threat is gravest when the states pursuing WMD are closed societies headed by rulers who menace their own citizens as much as they do their neighbors and potential adversaries.²⁴

Feinstein and Slaughter take the position that the global security context has changed from what it was in 1945 when the current rules governing the use of force were devised. States, they maintain, need to be “proactive rather than reactive.”²⁵ The juridical structure they propose is that of a duty, specifically, a duty imposed upon U.N. members. The duty has three principal features:

1. Control not only the proliferation of WMD but also the people [including states] who possess them;
2. An emphasis on prevention with a strategy of potential measures; and
3. The duty to prevent should be exercised collectively, through a global or regional organization.²⁶

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Even if we accept that the marriage of global networked terrorism and the commodification of WMD constitute a qualitatively new threat to global security,²⁷ what is the connection with sovereignty? Feinstein and Slaughter reprise the story of U.N. Secretary-General Kofi Annan's challenge, made first in 1999 (and then again in 2002) to the Security Council to address the question of "the best way to respond to threats of genocide or other comparable massive violations of human rights."²⁸ The Security Council failed to address Annan's plea, but a commission headed by Annan's special advisor issued a report in 2001 entitled "The Responsibility to Protect."²⁹ In this report the commission members made the point that, as Feinstein and Slaughter describe it, "the controversy over using force for humanitarian purposes stemmed from a 'critical gap' between the unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order."³⁰ To fill this gap, the commission "identified an emerging international obligation—the 'responsibility to protect'—which requires states to intervene in the affairs of other states to avert or stop humanitarian crises."³¹

This is the point at which the duty to prevent collides with sovereignty, at least the traditional understanding of the notion. As Feinstein and Slaughter state:

This concept challenges the traditional understanding of sovereignty by suggesting that it implies responsibilities as well as rights. According to the commission, sovereignty means that 'the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare;' that 'the national political authorities are responsible to the citizens internally and to the international community through the U[.N.];' and that 'the agents of state are responsible for their actions; that is to say they are accountable for their acts of commission and omission.' The commission's boldest contribution, however, was to argue that the responsibility to protect binds both the individual states and the international community as a whole. The commission insists that an individual state has the primary responsibility to protect the

27. This is one of Bobbitt's central arguments in *THE SHIELD OF ACHILLES: WAR, PEACE*

AND THE COURSE OF HISTORY (2002).

28. See Feinstein & Slaughter, *supra* note 22.

29. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (2001).

30. Feinstein & Slaughter, *supra* note 22.

31. *Id.*

individuals within it. But[,] where the [S]tate fails to carry it out, a secondary responsibility to protect falls on the international community acting through the U[.]N[.], even if enforcing it requires infringing on state sovereignty. Thus, ‘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 nonintervention yields to the international responsibility to protect.’³²

Notwithstanding the changing conception of sovereignty outlined here, we need to make a connection—I would say a conceptual connection—between the responsibility to protect, WMD/global networked terrorism, and the duty to prevent. Feinstein and Slaughter make this connection with their claim that “the danger posed by WMD in the hands of governments with no internal checks on their power is the prospect of mass, indiscriminate murder.”³³ It is the prospect of this state of affairs that motivates Feinstein and Slaughter to argue “that a new international obligation arises to address the unique dangers of proliferation that have grown in parallel with the humanitarian catastrophes of the 1990s.”³⁴

Let us take stock of where the argument has been moving and what conclusions we may begin to draw. I began by advancing a conception of cosmopolitanism that recognizes the individual as the ontological centerpiece of human rights. I then introduced the concept of sovereignty, making the point that the traditional understanding of sovereignty is that it rests with the State. The American conception of sovereignty contrasts sharply with this view, as that conception locates sovereignty in a people. A further contrast was drawn with the introduction of the conception of sovereignty pursued by the European Union. Under this conception of “pooled sovereignty,” supranational institutions govern some of practices of Member States which retain the bulk of the attributes of sovereignty that is traditionally understood.

When we look at recent (that is, since 1990) events such as the rise of humanitarian intervention, we are forced to say that the idea of sovereignty lying with the [S]tate and not the people is waning. Sovereignty, it seems, is something a state can forfeit when it commits human rights violations on a massive scale. This is the lesson of Kosovo and Libya.

The American conception of sovereignty, which sees sovereignty as

32. *Id.*

33. *Id.*

34. *Id.*

lying with a people, is the only conception of sovereignty that can explain recent events. Under the U.N.'s 1945 rules for intervention, humanitarian intervention is not permitted. As I have said, recent events signal the abandonment of what I characterized as "opaque sovereignty" and the rise of "transparent sovereignty."

The argument then ties the development of transparent sovereignty to the international duty to protect and, subsequently, the duty to prevent. This is where we are now. The next logical question to ask is: how should a global human rights regime be structured if we take seriously the evolution of transparent sovereignty and the duty to prevent?

The connection starts with the recognition that the protection of human rights mandates control of the spread of WMD. Not only is there a duty to stop the use of WMD against civilian populations, the duty to protect requires that efforts be made to stop the proliferation of WMD. This implicates the difficult question of preemption. Owing to the nature of these weapons, the duty to prevent will necessarily involve questions of preemption. As Feinstein and Slaughter state, in this context: "[t]he contentious issue is who decides when and how to use force."³⁵

If we take the global legal regime of human rights seriously, not only will we need to answer the question of preemption, we will also have to consider what legal rules are necessary to stop the proliferation of WMD. Targeting the role of states in the proliferation of WMD should be a top priority. But, how is such a legal regime to be constructed when some of the very states that sponsor terrorism and commit massive human rights violations are themselves part of the very institutions that have this duty?

III. CONCLUSION

In this short article, I am not purporting to provide answers to all the questions raised. Rather, I can at least hope to ask the right questions. These questions start from the premise that the individual is the fundamental unit of normative analysis in the context of human rights. The protection of human rights trumps the rights of a sovereign state to control its jurisdiction. In other words, sovereignty is defeasible. If sovereignty is defeasible, then we need to know when and under what circumstances a sovereign loses its right to control its jurisdictional

35. *See id.*

space.³⁶ If we extend the protection of human rights to the context of the duty to prevent, we come face-to-face with a vexing political problem, articulated here as the duty to prevent. I think the duty to prevent is the next stop in the chain of reasoning that starts with the recognition of transparent sovereignty. The journey from human rights to the duty to prevent may not be direct, but it seems inexorable.

36. Again, in the Libyan context, Libya lost its sovereignty by abusing the human rights of its population. See generally Alex J. Bellamy, *Libya and the Responsibility to Protect: The Exception and the Norm*, 25 ETHICS & INT'L AFF. 263 (2011); and Jennifer Welsh, *Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP*, 25 ETHICS & INT'L AFF. 255 (2011).