

# The Ethos of Sovereignty: A Critical Appraisal

*Panu Minkkinen*

Taking as its starting point the commonly held claim about the obscurity of the concept of sovereignty, the article first identifies a fundamental paradox between the classical Westphalian notion of state sovereignty and human rights. In the rhetoric of international politics, attempts to establish the responsibility of states to respect human rights and fundamental freedoms within their jurisdictions are often countered with claims referring to the “sovereign equality” of all states and the subsequent principle of non-intervention. The article suggests that in a more contemporary understanding of sovereignty the responsibility of a state to respect human rights and fundamental freedoms is seen as a constituent ingredient of the state itself. The chapter continues to elaborate how this change has come about. The classical notion of sovereignty is illustrated through a reading of Bodin’s *Six Books of the Commonwealth* (1576). In Bodin’s world, sovereignty is a constitutive element of the state, and the possibility of a multitude of sovereign entities in a global world logically denying the possibility of any “supra-national” normative framework is still a minor consideration. This possibility is only worked out with the emergence of international law. In both classics such as Emmerich de Vattel’s *The Law of Nations* (1758) and more contemporary treatises such as Lassa Oppenheim’s *International Law* (1905), state sovereignty has become conditional to recognition by other sovereign states and a subsequent membership in the “family of nations.” The conditional membership in the “family of nations” involves a contradiction: a sovereign state must act in a “dignified” manner, it must use its sovereignty with “restraint” by respecting the human rights and fundamental freedoms of its citizens, i.e., it must employ its sovereignty in a non-sovereign way. This restriction of sovereignty, addressed as “ethical sovereignty,” becomes a constitutive element in a post-Westphalian state and a central ingredient in the contemporary doctrine of humanitarian intervention. The article further criticizes the various uses (and abuses) of “ethical sovereignty” in the regulation of “failing” and “rogue” states and concludes by identifying its general political dangers. Finally, with reference to Jacques Derrida’s *Rogues* (2003), the article suggests a more radical reappraisal of the concept of sovereignty.

*It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs.*<sup>1</sup>

—Lassa Oppenheim

*But to invoke the concept of national sovereignty as in itself a decisional factor is to fall back on a word which has an emotive quality lacking meaningful specific content. It is to substitute pride for reason.*<sup>2</sup>

—Eli Lauterpacht

### Sovereignty and Cooperation

Article 2(1) of the Charter of the United Nations (26 June 1945) states among other things that the organization is based on the principle of the sovereign equality of all its members.<sup>3</sup> The principle is quoted often enough in the rhetoric of international politics,<sup>4</sup> but its substantial content has always been controversial. Although the principle is built on the premise of the equality of the sovereign states that make up the international community, it has always been recognized that, indeed, some states are more equal than others. This is, of course, already apparent in the extraordinary powers of the permanent members of the Security Council. But in addition to this, there is an apparent contradiction between the notion of non-intervention implicit in the principle of sovereign equality and “taking effective collective measures,” that is, the international cooperation that Article 1(1) of the Charter calls for.<sup>5</sup>

In 1946, in order to clarify the position of the equal and sovereign partners, the UN General Assembly instructed the International Law Commission to prepare a Draft Declaration on the Rights and Duties of States for the members of the new union.<sup>6</sup> Although the Draft Declaration was never officially adopted, it did reiterate in a more or less unambiguous way the principles of sovereignty and non-intervention as they had been formulated in the Peace of Westphalia in 1648.<sup>7</sup> At the same time, the rights and duties of the Draft Declaration restate the contradiction of the Charter. Every state was to have the right to independently exercise its legal powers (Article 1), the right to jurisdiction over things and persons within its territories (Article 2), the right to equality in law amongst other states (Article 5) and the right to self-defense (Article 12). These state rights were contrasted with a set of duties, the most important of which being the duty to refrain from intervening in the internal affairs of other states (Article 3) and the duty to settle disputes with other states through peaceful means (Article 8).

How are we to understand this contradiction?

Referring to the Charter and the Draft Declaration, Karl Loewenstein claimed that the mutually exclusive nature of the notions of state sovereignty and international co-operation that the Charter seemed to put forward was merely apparent. Loewenstein, writing towards the beginning of the cold war—the deepest bipolarisation of world power “since the antagonism of the Christian and the Moslem world”<sup>8</sup>—noted that the co-operation amongst states that the Charter required necessarily involved restrictions on state sovereignty that would formerly have been inconceivable. In fact, the reality of power relations between states indicated that the assumptions of equality and independence, both central elements of the classical notion of sovereignty, were mere fictions:

In reality the notion of sovereignty and its corollaries of equality and independence are largely semantic and escapist formulae ignoring the fact that the dynamism of inter-state power relations is no longer—if it ever was—controllable by the rules of international law. The independence and equality of states have disappeared because, in this technological age with its vastly increased density of economic inter-penetration and political

interdependence, an individual state can exist in isolated sovereignty no more than an isolated individual can in society.<sup>9</sup>

Even if a legal definition of cooperation was not possible, Loewenstein maintained that the legal character of interstate activity was demonstrated in the instruments through which cooperation was made possible: treaties, conventions, agreements, and so on. Through such instruments, states define their mutual rights and duties in “reciprocal action patterns.” By committing themselves to certain duties, states exercise their sovereignty by voluntarily sacrificing their self-determination in exchange for benefits that are mutually agreed upon in a given treaty or agreement. In this sense, state sovereignty and co-operation are complimentary rather than antithetical.

But the practical implementations of co-operation in a bipolarized world take place under an ever deepening division of the world into blocs or alliances. Within the alliances, a fundamental inequality of individual member states, incompatible with the traditional notion of sovereignty, develops:

Although equality is considered the principal attribute of sovereignty, it may not exist in fact in international co-operation. The hegemonial structure of each power bloc does not easily lend itself to preserving the equality of rights and duties amongst the participating states that international law presupposes. The very existence of a hegemonial center within the co-operating group cannot fail to result in the diversity of rights and duties which the smaller and weaker partners may well consider onerous limitations of their self-determination, or intervention, even if voluntarily undertaken.<sup>10</sup>

Notwithstanding the practical limitations of sovereign equality that Loewenstein refers to, the Draft Declaration also tempered the essentially non-interventionist notion of the classical doctrine of sovereignty with a duty that did not pertain to the external relations of a state to its counterparts. This duty had more to do with the ways in which a state exercised its internal sovereignty *vis-à-vis* its own subjects:

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion (Article 6).<sup>11</sup>

The monitoring of how individual states fulfill their duty to respect such rights and freedoms would, in Loewenstein’s terms, constitute an example of international co-operation in humanitarian issues.<sup>12</sup> Cooperation through reciprocal rights and duties would subsequently also suggest that if a state did not comply with its duty to respect human rights and fundamental freedoms, effective countermeasures were both required and justified. By taking on such a duty, a state has voluntarily forfeited its sovereignty to such an extent that if it violated against particular obligations, an intervention by another party—another state or an international organization—would be called for.

The Draft Declaration, however, does not seem to understand the duty to respect human rights and fundamental freedoms as a contractual obligation that follows

from either membership in a treaty or voluntary commitment to an agreement; the duty requires no ratification, acceptance, approval or accession. Indeed, Hans Kelsen, who was highly critical of the legal status of the draft to begin with, noted that the duty to respect human rights had no basis in general international law, nor could such a duty be legally concluded from the Charter of the United Nations.<sup>13</sup> It would, then, seem that this duty follows from the mere fact that the state is what it is namely that it is a sovereign subject.

How can such a duty be inferred from sovereignty? Rather than sovereignty and state obligations being complementary as Loewenstein claims, can normative obligations arise from sovereignty itself?

### *Sovereignty and State*

Answering these questions requires an overview of how the notion of state sovereignty has developed and mutated. Jean Bodin is usually quoted as the first writer to have introduced a theoretical definition of sovereignty. Bodin's sixteenth century book has two explicit aims. First, it is an attempt to define the meaning of a "republic." In this particular context, the "republic" is not, of course, a particular form of regime but rather the *res publica*, the *polis*, or the "public affairs" that belong to all forms of government. In short, Bodin's book is a theory of the state.<sup>14</sup> But secondly, the book also attempts to determine which particular form of government, i.e., monarchy, aristocracy, or the "popular state," is the best. It is well-known and documented how Bodin's point-of-departure is an apology of and for the French monarchy, and as such, many of its central arguments can be said to be built on that premise. But the preference for monarchy over other forms of state refers to the very idea of sovereignty:

But the principal aspect of a state, namely the right of sovereignty [*le droit de souveraineté*], can strictly speaking exist and subsist only in a monarchy, because in a state only one can be sovereign. If there are two or three or more, there is no sovereign because then no one can either give law to or receive it from his companion....<sup>15</sup>

Sovereignty, then, is always an issue of law.

Bodin begins his main argument with a rudimentary definition of the state: a state is the rightful (*droit*) government of a multitude of households and their common interests by a sovereign power.<sup>16</sup> There are, accordingly, three different characteristics to a state. First, a government is rightful to the extent that it is ordered according to the laws of nature which, Bodin insists, is also the "true sign of friendship."<sup>17</sup> Rightful government must pursue the principal end of the state as true happiness, i.e., the sovereign good. The sovereign good and the ultimate purpose of the individual as well as of the state is the contemplation of things natural, human, and divine after basic material needs have been satisfied.<sup>18</sup>

Secondly, a family well administered is the image of the rightful order of the state. A family lives under the sovereign power of its head who manages the household's common affairs.<sup>19</sup> Like a state, a family as a household requires the sovereign au-

thority of its head to unite the different members into a single entity. The sovereign authority of the head of the household is, of course, the *patria potestas*, the power of the Roman father over the persons of his descendants and, more generally, the rights and privileges that he enjoys by virtue of his paternity.<sup>20</sup> But a household is also the main constituent of a state. However, a single family is not enough and, moreover, the numerous households that make up a state must share a “public domain”—the government of which they are willing to submit to a sovereign ruler.<sup>21</sup>

And finally, a state presupposes the existence of a sovereign power:

But just as a ship is but timber lacking the form of a vessel without a keel to support the ribs, the prow, the poop and the tiller, neither can there be a state without a sovereign power to unite all its several members and parts, be they households or colleges, into a single body ... for it is not the town or the individuals who make up a city, but the union of a people under a sovereign authority....<sup>22</sup>

How should one characterize such sovereign power? For Bodin, it is both absolute and perpetual. Sovereign power cannot be founded on a commission, let alone on a time-limited mandate. For the essential characteristic of sovereignty is that however much power is delegated, the true sovereign retains his power through a curious logic of supplement and reserve:

the person of the sovereign is in legal terms always excepted in relation to the power and authority that he gives to another, and he can never give so much of it that he would not always retain more. He can always command or acknowledge by way of prevention, accord, evocation, or in any way that pleases him regarding matters that he has placed into the hands of the subject<sup>23</sup>

In a democracy or a popular state where the people have elected a representative to govern over them, the latter can be sovereign only if his power is absolute. In such a case, the people must necessarily have “relinquished and shed themselves of sovereign power.”<sup>24</sup> But because the sovereign cannot recognize a rival authority, he cannot be bound by the laws that his subjects must abide by. Consequently, the sovereign is not bound by either his own laws or those of his predecessors.

But Bodin tempers this seemingly absolute notion of sovereignty with four exceptions. First, even the sovereign must comply with the laws of God and nature that all worldly creatures must abide by.<sup>25</sup> Second, civil laws insofar as they are equitable and reasonable, are often but reflections of the principles inherent in the laws of nature and are, consequently, equally binding.<sup>26</sup> Third, the sovereign is limited in relation to the fundamental laws that concern the constitution of the realm especially insofar as they are directly annexed to the existence of the Crown.<sup>27</sup> And lastly and most importantly, the sovereign is bound to the covenant that he has consented to with his subjects. For sovereignty is only significant in relations of law:

Law and contract must not be confused: whereas law relies on the sovereign that can oblige all his subjects but not himself, a covenant obliges both parties reciprocally. Neither party may contravene with prejudice without the consent of the other. In this case, the Prince has nothing superior in relation to the subject.<sup>28</sup>

In the original covenant, both parties must by necessity be recognized as equals, for otherwise Bodin would be compelled to define the fundamental constitution of the state merely as yet another act of legislation, i.e., a dictate of a sovereign will. In the covenant, Bodin continues, the subject is defined as citizen and the initial contents of the social contract are constituted:

The citizen is, then, characterised by the free subject's [*franc sujet*] recognition of and obedience in relation to his sovereign Prince, and the Prince's guidance, justice and defence in relation to the subject....<sup>29</sup>

It is, therefore, obvious that sovereign power is intimately related to law:

One can therefore see that the principal aspect of sovereign majesty and absolute power lies mainly in giving laws to subjects in general and without their consent.<sup>30</sup>

For Bodin, law is by definition the rightful command of the sovereign ordering all subjects without exception in general or in particular, save the sovereign law-giver himself, for the sovereign must necessarily be excluded from the power and authority of the laws that he himself gives.<sup>31</sup> The principal attribute of sovereignty is the power of legislation, the ability to give valid and effective laws, and all other possible attributes can be inferred from the power of legislation:

Included in the very power to give and to abolish laws are all the other rights and attributes of sovereignty and, in fact, strictly speaking one can say that this is the only attribute of sovereignty. For it includes within itself all other rights such as waging war and making peace, acknowledging in the last instance the judgements of all magistrates, appointing and dismissing the highest officials, imposing taxes and levies on the subjects, granting grace and exemption against the rigour of the law, increasing or decreasing the titre, evaluating and weighing the coinage, receiving oaths of loyalty from both subjects and liegemen alike regardless of who their pledge is due....<sup>32</sup>

But if sovereignty obeys a logic of supplementarity and reserve, if Bodin's sovereign can, for example, delegate his legislative powers either partially or totally to a representative body—an Assembly of the Estates, a Parliament, etc.—but still remain “seized [*saisis*] of the power and jurisdiction” involved, what is the reserve that persists? Bodin gives no unambiguous answer. But if sovereignty is for the most part exercised in lawgiving, this reserve may well be understood as the normative validity of all laws. For even if the representative lawgiver may order the subject to act in certain ways, the subject acknowledges his general obedience in relation to all law only through the majesty of a sovereign power.<sup>33</sup>

### *Sovereignty Externalized*

For Bodin, then, the existence of a sovereign power is the essential prerequisite of a state. In the work of Grotius, this “internal sovereignty” is coupled with its external counterpart that establishes the national sovereign's position in an ever-expanding mercantilist world. Defending Dutch colonial interests against declining Portuguese

power in the East Indies, Grotius first defines sovereignty as a form of ownership including both legal title and factual possession. And for this reason sovereignty cannot be claimed in relation to the sea:

because the sea is just as insusceptible of physical appropriation as the air, it cannot be attached to the possessions of any nation.<sup>34</sup>

Later Grotius continues that sovereignty is by definition a power that is not subject to the control of another so that it could be annulled or abolished at will. When speaking of political entities, sovereign power resides in the civil state (*civitas*) understood as the perfect association of men. But by making a distinction between common and proper subjects, Grotius clarifies that this power can be exercised by one or more persons according to the laws and customs of a given nation.<sup>35</sup>

Writing some half a century later, Pufendorf, on the other hand, is much more straightforward in defining the state as the sovereign authority:

Authority over an *equal*, as such, is impossible. Therefore, when Grotius argues that the people, at least, are equal to the Prince because in some particular cases they may compel him, he must at the same time allow that neither Prince nor people have authority or sovereignty over the other, which is repugnant to the nature of a civil state.<sup>36</sup>

He devotes much time and effort to contest assumptions concerning the divine origin of sovereignty. In addition to a title or a style that signifies the rightful employment of civil authority, sovereignty requires a “natural strength,” i.e., a factual ability to compel. Majesty is not conferred to a mundane authority by a divine entity that, unlike an ungoverned multitude of men, would originally be its possessor. Quite the contrary, sovereignty is an attribute of government, a moral quality that is produced when several non-sovereign attributes concur in a harmonious unity. Sovereignty, accordingly, resides originally in the association of men as a civil state. Pufendorf, however, is far too pragmatic to dwell longer on the essence of sovereignty, whether sovereignty is capable of transmigrating in royal metempsychosis, and so on:

to enquire after the cause of majesty or sovereignty, taken in an abstracted sense, is no better than impertinence in as much as it never exists except in the concrete. It is just the same as if I should take a particular search into the cause of human nature abstractly considered when as to the cause of *men*, in the concrete, I have sufficient information.<sup>37</sup>

As far as sovereignty is concerned, Pufendorf is also a strict monist. Although it can be approached through the different powers it entails—for Pufendorf, these are the power of legislation, judiciary power, the power of war and peace, and the power of appointing magistrates—sovereignty is first and foremost a consolidation of these different attributes in a single body. But once again Pufendorf’s arguments are rather pragmatic than theoretical:

these parts of the sovereign power are naturally so united, and, as it were, interwoven with one another, that should we suppose some of them to inhere in one person, some in others, the regular frame of the state must absolutely be destroyed.<sup>38</sup>

Grotius's and Pufendorf's contributions to the sovereignty debate have less to do with state theory itself than with the recognition of a logical problem that arises from it: if the world is understood as the battlefield of a number of sovereign entities—nations, states, Princes, etc.—how is an orderly global existence possible without positing a super-sovereign power? How can equal sovereignties coexist without compromising their majesty? This has been one of the key issues of international law ever since it has been recognized as a discipline of its own.

The first consistent attempt after Pufendorf to develop the concept of sovereignty in relation to a world order was Emmerich de Vattel's *Le droit des gens*, originally published in 1758. Quite unlike the pragmatic emphases of Pufendorf, Vattel finds his theoretical inspiration from Christian Wolff's rationalist philosophy of natural law.<sup>39</sup> For Vattel, the law of nations was a legal science [*sic*] that examines a supra-positive law (*droit*) amongst nations or states and the corresponding obligations that such a law implies.<sup>40</sup> Because nations are formed of free and autonomous men for whom the laws of nature apply, the law of nations must also be derived from natural law:

One must, then, apply to nations the rules of natural law in order to find out what their obligations and their rights are. Consequently the *law of nations* is originally merely *natural law applied to nations*.<sup>41</sup>

Following Wolff, Vattel calls this the *necessary* law of nations. It is necessary because it is not founded on the rights that nations may have in relation to one another, but on the obligations that they must comply with without exception. These obligations cannot be altered or renounced in conventions or covenants; they belong to the associations of free men as such.

A nation being a political body that follows from the necessary association amongst men, Vattel identifies the sovereignty within this state as the public political authority that is required to govern the association. A state is sovereign if it governs itself without outside interference.<sup>42</sup> Sovereignty is the autonomy of the state understood as a moral person, its ability to commit itself to the duties and obligations that follow from natural law:

*sovereignty* is the public authority that commands in civil society ordering and directing what everyone must do in order to reach that end. This authority belonged originally and essentially to the very body of society to which everyone submitted himself and gave up the rights he had received from nature to act in all matters as he wills according to his own reason, and to do himself justice.<sup>43</sup>

Sovereign and autonomous states have two primary obligations: preservation and perfection. First, the nation is obliged to maintain and to care for the core of the initial association:

In the act of association through which a multitude of men together form a state or a nation, each individual is committed in relation to all to procure the common good, and all are committed in relation to one another in facilitating for themselves the means to provide



for their needs, to protect them and to defend them. It is evident that such reciprocal commitments can only be complied with by maintaining the political association.<sup>44</sup>

But secondly, the ultimate end of the state is a civil society where the needs of individual citizens have all been satisfied. Perfection, i.e., the fulfilled happiness of its individual members is, then, both the moral obligation of the state as a whole and the civic duty of its citizens.<sup>45</sup> In his treatment of these two primary obligations, Vattel displays a certain instrumental morality. The legal or moral quality of the state is defined primarily by way of its obligations and duties, whereas state rights are secondary. Both primary obligations of the law of nations can be concluded from the ultimate end of human association as civil society. The nation must both preserve the initial constitution required in the pursuit of civil society and dedicate its individual activities to the “double perfection” of both itself and the state into civil society. On the other hand, the corresponding rights are laconically defined as all possible means necessary to achieve these ends.<sup>46</sup>

In relation to the external world, the duties and the rights of a representative sovereign are the same as those of his nation. But his authority is always limited by the mandate he has received, for the true sovereign is always the association of men as a nation and a state:

Dignity and majesty reside originally in the body of the state; the sovereign receives his dignity and majesty by representing the nation.<sup>47</sup>

For Vattel, the world must consequently consist of a number of equally sovereign state-entities represented by individual monarchs and leaders. But because there are no coded norms that could legitimately regulate intersovereign relations, the sovereignty of an individual state *vis-à-vis* another must necessarily be based on something resembling voluntary recognition. Vattel understands this recognition as the reciprocal respect that arises from communal membership:

Every nation, every sovereign and independent state is worthy of consideration and respect because it immediately appears in the great society of mankind, because it is independent in relation to all power on the earth, and because it is an assemblage of a large number of men that is undoubtedly more important than any individual. The sovereign represents the whole nation, in his person he unites it in all of its majesty.<sup>48</sup>

If a sovereign state is *internally* by nature obliged to both preserve and to perfect itself, *externally*, i.e., in relation to other sovereign states, it enjoys certain rights. It would seem that such rights arise from the respect due to a nation that partakes in the family of nations by taking its obligations seriously. With regard to their primary obligations of preservation and perfection, all nations and sovereign states enjoy the right to security, i.e., a perfect right to protect themselves with preventive, compensatory, and punitive measures against anything that would endanger their commitment.<sup>49</sup> But even if retaliation may be justified in certain circumstances, interference in the internal matters of another state is otherwise forbidden. The normative power of this prohibition is, once again, founded on the respect that sovereignty entails:

It is a manifest consequence of the freedom and independence of nations that they all have the right to govern themselves as they deem appropriate, and one nation has no right to interfere in the government of another. Of all the rights that belong to a nation, sovereignty is undoubtedly the most precious, and it should be respected by others as scrupulously as possible if they wish to avoid doing harm.<sup>50</sup>

When Vattel speaks of sovereignty, it would seem that he is using the term in two different ways. For the most part he is referring to the representative sovereignty of the Prince that is always conditional. Even in international relations, the sovereignty of the Prince is always dependent on the mandate that the nation has given. If abused, the mandate can be revoked, although the nation should use this unalienable right with reserve. But sovereignty seems to also refer to the autonomy and independence of one nation and state in relation to another. The sovereignty of nations is not regulated by written codes and rules but by the respect and dignity that natural law prescribes to the free associations of men, at least as far as they are committed to their primary obligations. True sovereignty resides in the nation as an association of men under natural law. More accurately, sovereignty as moral autonomy and political independence is a “human right” that belongs to man under natural law.

Man, however, does not refer here to an individual or essential being, but to the social being who has by necessity allied with his fellows into a political body in the pursuit of well-being. Sovereignty belongs to the nation or to the state only insofar as it is understood as a moral person that employs understanding and will and is thus capable of obligations and rights.

### *Ethical Sovereignty*

If any intermediate conclusions can be drawn from these brief sketches, it would seem that despite its uses and abuses in the factual world of politics, the notion of sovereignty has developed and transmuted in a fairly consistent way. Bodin’s first attempts at a definition of sovereignty arose from the need to establish a secular foundation for state power. As it was represented in the symbolic figure of a *pater patriae*, sovereignty was the absolute power exercised in lawgiving that constituted the disparate populace as a unified nation. What unifies the nation is, of course, its unconditional submission: “what makes us one is that we all submit.” But in an ever-expanding cosmology, this internal state logic was bound to require an expansion. Now subjected within the state according to a constitutional logic, the true bearer of sovereignty was soon to be identified as the nation, i.e., a unified association of free men: true sovereignty does not reside in the power that subjects into one but, rather, in the power of being one in subjection.

However, if we are to hold on to the central idea that sovereign nations and states are all equal in their naturally endowed obligations and rights, their interrelations present a problem that must somehow be overcome, a problem that could perhaps be described as the contradiction between “internal” and “external” sovereignty.<sup>51</sup>

Because sovereign entities cannot (logically) acknowledge anything “higher” or “above,” their mutual affairs would at first sight seem to take place in a lawless and belligerent state of nature. So in order to account for the rights that sovereign nations and states must inevitably enjoy, Vattel draws on the voluntary recognition of sovereign states as moral persons that comply with their primary, naturally endowed obligations. Compliance implies membership in a community, in a curious “family of nations” that is no longer built on the absolute power of the *paterfamilias*. What we have instead is a fragile network of unilateral acknowledgements and corresponding respect where sovereign power is seen as an irregular *potentia* rather than *potestas*.<sup>52</sup>

How does this development manifest itself in the contemporary world?

In his influential treatise on international law, Lassa Oppenheim identifies sovereign states as international persons, that is, the subjects of international law. In addition to the more or less material conditions of an identifiable people, a territorial country, and a structured regime, the government of such a state must be sovereign:

Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all around, within and without the borders of the country.<sup>53</sup>

As a heuristic tool of analysis, Oppenheim recognizes three overlapping aspects in sovereignty: external independence, territorial supremacy, and personal supremacy. External independence refers to the ability of the state to manage its international affairs according to its own discretion, its ability to form treaties and alliances, and, in the last instance, to make war and peace. Territorial supremacy, on the other hand, is an allusion to the ability of the state to adopt, for example, the constitutional framework of its choice, to legislate as it sees fit, and to arrange its internal safety in the most appropriate way. Both external independence and territorial supremacy seem to imply the existence of a sovereign power or a government that is capable of materializing the potential characteristics of a state. But it is especially the third aspect, namely personal supremacy, that presents problems. Personal supremacy allegedly grants the state dominion over its subjects “according to discretion.”<sup>54</sup> Even if this sovereign dominion in all its three aspects is restricted and, unlike what many of Oppenheim’s continental counterparts claim,<sup>55</sup> is not to be understood as a state’s right, the restrictions that Oppenheim identifies are formal and legal in nature: the sovereignty of foreign states must be respected, the obligations of international treaties must be complied with, and so on.

For Oppenheim, the only way to become a subject of international law or, in other words, an international person as a sovereign state, is through the recognition of other sovereign states.<sup>56</sup> Although the recognition of a sovereign state is in general categorical—if a state is securely and permanently established, recognition should more or less automatically follow—it is also a matter of policy and can, accordingly, be conditional. Oppenheim does not treat the matter explicitly, but the recognition of sovereignty also pertains to a dignity that is expected of all sovereign states:

A State that enters into the Family of Nations retains a natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the interest of that of other States.<sup>57</sup>

Sovereignty can, then, be understood as a dual structure in which a supreme authority that is “independent of any other earthly authority” is coupled with the self-restrictive mentality that dignity requires. Self-restriction is not a delimitation of the self-determination of individual states. When it is employed in cooperative relations with other sovereign states, dignified self-restriction is a manifestation of sovereignty itself, because only a state that acts with dignity can be recognized as sovereign. As supremacy over territory and subjects and concurrent self-imposed restrictions, sovereignty is both right and duty, the simultaneous right of unconditional supremacy and the obligation to use that right with restraint. A state is sovereign only if it is recognized as such, and it is recognized and consequently admitted into the “family of nations” only if it exercises its sovereignty in a non-sovereign way.<sup>58</sup>

This dignity-induced obligation of self-restriction is at the core of the new “ethical sovereignty”<sup>59</sup> that is often referred to in the rhetoric of contemporary international politics. One starting point of the current debate can be traced to the Secretary-General’s address to the Fifty-Fourth session of the UN General Assembly in September 1999 in which he contrasted the sovereignty of states with the sovereignty of individual human beings:

The sovereign state, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each and every individual, as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.<sup>60</sup>

The new notion of “ethical sovereignty,” that is, a state’s sovereign power coupled with the rights and freedoms of the individuals that make up its subjects, is, perhaps, an echo of Article 6 of the Draft Declaration and constitutes a clear departure from the essentially non-interventionist core of classical Westphalian sovereignty. It has been used as a justification for intervention in at least two ways.

First, it has enabled humanitarian intervention into tragedies that have arisen from civil wars and conflicts as in the cases of Kosovo and Bosnia. A key responsibility of a state or, in other words, an element of its sovereignty is to guarantee a minimum acceptable level of well-being for its citizens. If this should not be possible due to the disintegration of the state structure because of war or conflict—the rhetoric speaks of “failed” and “collapsing” states—intervention is both ethically right and legally legitimate. “Ethical sovereignty” as the *right to intervene* is a restrictive interpretation of intervention into the internal matters of another state. The limits of intervention are, however, strictly humanitarian. In a well-known albeit controversial ruling from 1986, the International Court of Justice stated that while a state may form an appraisal of how human rights are respected in another state, the use

of force is not the appropriate method to monitor or ensure such respect. The protection of human rights is, the Court claims, a strictly humanitarian objective and is, therefore, incompatible with military measures.<sup>61</sup>

But, second, “ethical sovereignty” has also been interpreted in a more expansive way in that it not only establishes a right to intervene but also a *responsibility to protect*. While sovereignty as the right to intervene implies a restrictive logic in which the exceptional use of intervention must be tested against a set of established criteria—preferably legal criteria—sovereignty as the responsibility to protect justifies intervention in a reverse way: there is, if not a legal, then at least a universal moral responsibility to monitor and to secure the fundamental needs, rights, and freedoms of all people. These needs, rights, and freedoms go beyond traditional humanitarian issues and are often collectively called “human security.” For example, a report by the International Commission on Intervention and State Sovereignty claims that:

Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.<sup>62</sup>

A state is accountable for protecting the human security of its subjects, and if it fails to do so, an outside party—another state or an international organization—is obliged to act. Human security is not always threatened by war or conflict, for the object of such an intervention is often characterized as a “rogue” state or a politically unacceptable regime.

The responsibility to protect involves two obliged parties. There is, first, the responsibility of the state to see to the protection of human security within its own jurisdiction, a responsibility establishing the accountability of sovereign states in relation to their own subjects. But because human security is a set of allegedly universal individual rights—human rights, if you will—these rights must also be respected and protected by the global community at large. The responsibility of the global community understood both as individual states and international organizations to protect human security overrides any claim to sovereignty that a state might make.<sup>53</sup> In the absence of legal instruments proper that could establish global legal obligations,<sup>54</sup> this responsibility can only be inferred from a recognized sovereignty as membership in the international community.

### *Sovereignty against Sovereignty*

In Jean de la Fontaine’s fable, the malicious wolf that has come upon the feeble lamb at a spring accuses the latter of all his miseries and refuses to listen to the lamb’s rational counter-arguments. No, enough with explanations, the wolf proclaims:

il faut que je me venge.  
 Là-dessus, au fond des forêts  
 Le Loup l'emporte, et puis le mange,  
 Sans autre forme de procès.<sup>65</sup>

In *Voyous*, Jacques Derrida addresses the “irrational” position of the wolf and its philosophical implications in relation to the “rogue states” of international politics. It is one of the most openly political books Derrida has written, and it continues a line of thought that expounds on his notion of a “democracy to come.”<sup>66</sup> According to Derrida, democracy understood literally as the “power of the people” suggests that a people, a *demos*, can and may decide in a sovereign way what it essentially is. In other words, in democracy, the people defines what it is “itself,” its “ipseity,” through the power to give itself its law, its force of law, its representation of itself and its sovereign union. The sovereign power that this democracy presupposes is, in a way, circular. For the decision already presupposes a *demos*, and yet, in democracy, it exercises its sovereignty by deciding what it is:

Democracy would, then, be this, namely a force (*kratos*), a force that is determined in sovereign authority ... and, consequently, the power and the ipseity of the people (*demos*). This sovereignty is a circularity or, indeed, a sphericity. Sovereignty is round, it is a rounded district [*arrondissement*].<sup>67</sup>

But in order to function, the circularity of sovereignty must also include the figure of a “rogue.” Without a rascal that stands for how something that is already sovereign is to be further democratized, the circular sovereignty of the people would enclose within itself and collapse. This wily exists beyond the borders of organized society in a domain that has traditionally been associated with freedom or, to put it in another way, with lawlessness. Derrida emphasizes that it is this wily figure, this “rogue” that makes the freedom necessary for autonomous self-determination possible to begin with. Before any self-determination can be exercised and the corresponding decisions made, one must presume a more general possibility to play with different options, a radical indeterminacy and indecision that belongs to the very concept of democracy.<sup>68</sup>

What is democratic about democracy is this dangerous leeway, and it also leads to something that Derrida calls democracy’s auto-immunity. As the experiences of the Algerian parliamentary elections of 1992 indicated, democracy often denies itself if it is threatened by some “rogue” element deemed “undemocratic.” In Algeria this element was the Islamic movement; in contemporary America, it would, perhaps, be the diverse terrorist threats that have endorsed the compromise of constitutional rights and freedoms through PATRIOT legislation. As democracy denies itself, a state of emergency deferring established rights and freedoms is set up. This auto-immunitary suicide also reveals a paradigmatic process to the extent that, as Derrida rightly points out, numerous totalitarian regimes have risen to power through formally democratic processes. Democracy’s auto-immunity always involves its possible postponement (*renvoi*) either to another place under the pretext of protecting it from its enemies or to a better time in the future.<sup>69</sup>

So who is the undemocratic “rogue” referred to in contemporary debate? After a rich etymological analysis of its French equivalent *voyou*, Derrida concludes that the word is seldom used as a noun. The adjectival characterization as in “rogue this-or-that” is, for the most part, an attribute used in the derogatory interpretation of an institution, and as such it prepares its object for or justifies a sanction. If the attribute is understood as indifference to accepted democratic procedures and established human rights, then, Derrida claims, the most perverse and violent of all “rogue states” must surely be the United States and its allies. However, the “rogue” abuse of power is an internal element of sovereignty. There are only “rogue states,” either potential or actual. The “rogue” is the state itself.<sup>70</sup>

Derrida’s “democracy to come” refers to an interminable project pursuing something that could be called the “other sovereignty,” a democratic power that can never complete itself. It challenges the sort of political naïveté and rhetoric that addresses democracy as something already established. That democracy is “to come” does not only refer structurally to a promise, but it also implies that democracy can never be present: democracy remains aporetic. It is the only constitutional system that facilitates, at least in principle, the right to openly question everything, including the very idea, concept, history and name of democracy.<sup>71</sup>

Not surprisingly, Derrida finds the traces of this “other sovereignty” in human rights in seemingly much a similar way as the advocates of “ethical sovereignty”:

The attempt to impose limits to the sovereignty of nation states is often done, and mostly in vain, by referring democratically to the Universal Declaration of Human Rights. One example among others would be the laborious creation of an International Criminal Court. But the Declaration of Human Rights does not constitute a principle of sovereignty that would limit the sovereignty of nation states understood as a principle of non-sovereignty. No, it is sovereignty against sovereignty. Human rights establish and presuppose man (equal, free, self-determined) as sovereign. The Declaration of Human Rights declares an *other* sovereignty and, consequently, reveals the auto-immunity of sovereignty in general.<sup>72</sup>

The difference is, however, clear. If in “ethical sovereignty” the sovereignty of the state is subjected to a higher ethical obligation to respect human rights and fundamental freedoms or, as the more current euphemism puts it, the “responsibility to protect human security,” Derrida’s “other sovereignty,” a “shared sovereignty,”<sup>73</sup> addresses the conflict as an undecidable antinomy inherent in sovereignty itself. Just as sovereignty as state power is always susceptible to abuse, sovereignty also includes within itself the democratic “rogue” that makes human rights, a particular domain of freedom and “lawlessness,” possible to begin with.

Understanding “ethical sovereignty” through the expansive rationale of the “responsibility to protect” lies undoubtedly behind the acceleration of crude power-politics that we are witnessing today. On the other hand, these developments do not necessarily imply the demise of international law as some have seen it. For as it had been argued already some half a century ago, regulating inter-state power relations through concepts of international law such as sovereignty may well be more

or less of a “semantic and escapist” gesture. I believe that the reasons are far more fundamental. It is the disrepute of normative thinking as such in favor of a “realist” and instrumental position that appropriates the world with the boorish finesse of a Machiavellian Prince.

“Sans autre forme de process,” the fable’s wolf would have added.

And it is, perhaps, worth remembering that not even the most conservative strains of legal thinking were ever willing to go this far:

The legal unity of *humankind* that is only temporarily and by no means conclusively ordered into more or less voluntarily established *states*, the *civitas maxima* as the *organisation of the world*: this is the *political core* of the legal hypothesis on the primacy of international law [PM: over the sovereignty of national law] and, at the same time, the fundamental notion behind *pacifism* that, in the area of international politics, constitutes the opposite of imperialism.<sup>74</sup>

### Notes

1. Oppenheim, 1905, p. 108.
2. Lauterpacht, 1997, p. 141.
3. Restated in e.g. Article 4 of the UN Convention against Transnational Organized Crime, Document A/55/383 (2 November 2000).
4. See, e.g., two recent Security Council Resolutions on Iraq, UN Documents S/RES/1500 (2003) (14 August 2003) and S/RES/1511 (2003) (16 October 2003).
5. Cf. Derrida, 2003, p. 140-143.
6. See UN Documents A/RES/38(I) (11 December 1946), A/RES/178(II) (21 November 1947) and A/RES/375(IV) (6 December 1949).
7. On the significance of the Treaties of Osnabrück and Münster, see e.g., Gross, 1948.
8. Loewenstein, 1954, p. 225.
9. *Ibid.*, p. 223.
10. *Ibid.*, p. 226.
11. The Draft Declaration on Rights and Duties of States is annexed to UN Document A/RES/375(IV) (6 December 1949).
12. “Little progress to date has been achieved towards extending international co-operation to the point of an effective intra-state guarantee and protection of human rights. International solidarity would no longer countenance, nor can state sovereignty continue to justify, a government’s abuse of its national, racial, and religious minorities.” Loewenstein, 1954, p. 234.
13. Kelsen, 1950, p. 261 and p. 269-270.
14. In most English literature, this “state” is addressed as the “commonwealth.” I will use the term “state” hereafter. Cf. Hobbes, 1997, p. 95-96 (Chapter XVII).
15. Bodin, 1579, p. 670. “The tyranny of a prince is pernicious, and the tyranny of many is even worse. But as Cicero says, there is nothing more dangerous than the tyranny of the people.” Bodin, 1579, p. 653.
16. Bodin, 1579, p. 1.
17. *Ibid.*, p. 3.
18. *Ibid.*, p. 6. Cf. Aristotle, *EN* 1177b 16-26.
19. *Ibid.*, p. 7-8.
20. Cf. *Ibid.*, p. 20-32.
21. *Ibid.*, p. 10.
22. *Ibid.*, p. 9.
23. *Ibid.*, p. 85.
24. *Ibid.*, p. 88.



25. Ibid., p. 91-92.
26. Ibid., p. 105.
27. Ibid., p. 95.
28. Ibid., p. 94.
29. Ibid., p. 64-65.
30. Ibid., p. 99.
31. Ibid., p. 150.
32. Ibid., p. 155.
33. It is especially this aspect of Bodin's book that gives Schmitt reason to call it the first *legal* theory of sovereignty. Schmitt, 1995, p. 403.
34. Grotius, 1845, p. 683-684 (Chapter V). The non-appropriable nature of Grotius's *mare liberum* was soon to be contested by a justifiable dominion over a *mare clausum*. See Selden, 1636, p. 60.
35. Grotius, 1625, p. 66-67 (Book 1, Chapter 3, VII).
36. Pufendorf, 1703, p. 172 (Book VII, Chapter IV, XIV) [PM: wording modernized]. "The good of the people is the sovereign law..." Pufendorf, 1741, p. 109 (Book II, Chapter XI, § III).
37. Pufendorf, 1703, p. 163 (Book VII, Chapter III, IV) [PM: wording modernized]. Pufendorf's reluctance at contemplating on the origins of sovereignty resonates with Kant's notion of the "inscrutability" of sovereign power.
38. Ibid., p. 168 (Book VII, Chapter IV, IX) [PM: wording modernized]. See also Pufendorf, 1741, p. 72-81 (Book II, Chapter VII, §§ I-IX).
39. It is, perhaps, worth mentioning that Vattel's justification of liberal revolutions made his book very influential in America although his Wolffian influences would not seem to support such an affiliation. The book was translated into English as early as 1760.
40. Vattel, 1758, p. 1 (Introduction, § 3).
41. Ibid., p. 3 (Introduction, § 6). Cf. Wolff, 1761, p. 449 (§ 1088). Grotius goes so far as to identify natural law with the law of nations. Grotius, 1625, p. 21 (Book 1, Chapter 2, IV).
42. Vattel, 1758, p. 17-18 (Book 1, §§ 1-4).
43. Ibid., p. 39 (Book 1, § 38). To pursue one's rights by force is, indeed, the very definition of war. Vattel, 1758, p. 1 (Book 3, § 1).
44. Vattel 1758, p. 24 (Book 1, § 16).
45. Ibid., p. 27-28 (Book 1, § 21).
46. Ibid., p. 26 and p. 28 (Book 1, §§ 20 and 23).
47. Ibid., p. 286 (Book 2, § 37). If such a sovereign has violated the fundamental laws on which his mandate rests thus giving his people a legitimate reason to rise against him, Vattel insists that any external power has the right to assist an oppressed people who has asked for help even if this right must be exercised with caution. Vattel, 1758, p. 297-300 (Book 2, §§ 55-56).
48. Vattel, 1758, p. 285 (Book 2, § 35).
49. Ibid., p. 295-296 (Book 2, §§ 49-52). "Lets us, then, say that generally speaking the foundation or the cause of all just wars is *injury* that either has occurred or that is imminent." Vattel, 1758, p. 21 (Book 3, § 26).
50. Vattel, 1758, p. 297 (Book 2, § 54).
51. A "classical" case from more recent times where this contradiction is spelled out is *S.S. Wimbledon* decided by the Permanent Court of International Justice in 1923. An excellent analysis can be found in Klabbers, 1998.
52. With reference to Henri François d'Aguesseau, Bentham seems to imply that the very term "international law," as a law "between" rather than "above" nations, is an attempt to somehow come to terms with this "logical contradiction." Bentham, 1789, p. 324, footnote (Chapter XVII, § 2, XXV).
53. Oppenheim, 1905, p. 101.
54. Ibid., p. 170-172.
55. See e.g., Liszt, 1918, p. 34-40 and Pradier-Fodéré 1885, p. 231-232 and p. 242-243.
56. Oppenheim, 1905, p. 108-110. Fauchille makes a distinction between the "enjoyment" (*jouissance*) and the exercise of internal sovereignty as a right. Recognition can, then, only be declarative, never constitutive. Fauchille, 1923, p. 306-308.
57. Oppenheim, 1905, p. 160.

58. This is what Lauterpacht seems to be saying when he claims that internal sovereignty—"sovereignty within the British legal system"—is "reality" whereas external sovereignty—"sovereignty on the international plane"—is a "myth." Lauterpacht, 1997, p. 149.
59. See Cohn-Bendit-Laïdi, 1999.
60. UN Document A/54/PV.4 (20 September 1999). The Secretary-General continued the debate in, e.g., his report to the Millennium Assembly: "Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict." UN Document A/54/2000 (27 March 2000), paragraph 218. See also Annan, 1999.
61. International Court of Justice, *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, paragraph 268.
62. *The Responsibility to Protect* 2001, p. 13.
63. See e.g. Haass on the "limits of sovereignty": "What you're seeing from this administration is the emergence of a new principle or body of ideas.... Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene." Quoted in Leeman, 2002.
64. See however Articles IV and VIII of the Convention on the Prevention and Punishment of the Crime of Genocide (UN Resolution 260 (III) A, 9 December 1948).
65. Fontaine 1872, p. 60. "I must avenge myself. I With that, deep into the forest I the wolf dragged the lamb, and then ate it, I without further ado."
66. The book itself contains, in fact, two presentations delivered in 2002, and it is the first of these, "La raison du plus fort" – a reference to de la Fontaine's fable – that is relevant here. Derrida's engagement in international politics also led to an unlikely public collaboration with Jürgen Habermas. See Derrida-Habermas 2003.
67. Derrida, 2003, p. 33.
68. *Ibid.*, p. 41-47.
69. *Ibid.*, p. 57-59.
70. *Ibid.*, p. 145-146.
71. *Ibid.*, p. 126-127.
72. *Ibid.*, p. 127-128.
73. Derrida calls the current foreign policy of the United States "sovereign unilaterality" or "unshared sovereignty" (*non-partage de souveraineté*). *Ibid.*, p. 147-148. "Sharing" (*partage*) is an integral part of Nancy's elaborations on community. See e.g. Nancy, 1988, p. 91-98.
74. Kelsen 1981, p. 319.

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