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Limiting Sovereignty and Legitimising Intervention

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International law's elevated focus on the protection of human rights has resulted in a shift from a purely state-centered body of law to one that is increasingly focused on individual rights. This has been accompanied by a shift away from the concept of sovereignty as protection against external interference, to one of sovereignty as *responsibility*. According to [Anne Peters](#), sovereignty can no longer be regarded as the "first principle" of international law; rather "it should be seen to exist only in function of humanity." While this is desirable, this article argues that it presents a rather utopian and unrealistic understanding of international law as it is currently formulated. To what extent has sovereignty been limited by human rights and what are the implications of this for non-intervention?

Sovereignty and its limits

Sovereignty entails the exclusive right of a government to rule over its internal affairs without external interference. The legitimacy of governmental authority derives from it being democratically conferred by the people, or because it functions to "[to protect human rights, to create and preserve a space for individual and collective self-fulfillment](#)." Thus, legitimacy is the basis of sovereignty. Therefore external intervention is prima facie not permitted as it lacks the same legitimacy as the state government. Moreover, allowing external intervention may set a dangerous precedent by which powerful states would increase their interventions into weaker states and eventually contribute to the instability of the international legal order. This would negatively affect the individual citizens of the states subject to intervention. Therefore, external intervention must itself be legitimised before it is contemplated.

One function a government must carry out in order to maintain its legitimacy and, thereby, its sovereignty, is to effectively protect the human rights of its citizens. This is what [Peters](#) refers to as the "humanisation of sovereignty". Related to this idea is the concept of 'sovereignty as responsibility': each government is responsible for the protection of the human rights of its citizens, and where it fails to carry out this responsibility, its sovereignty can be limited. However, because of the well-established principle of non-intervention ([Article 2\(4\) and 2\(7\) of the UN Charter](#)), the threshold for intervention must be high.

Intervention should only be contemplated when there is no question about the legitimacy of its objective. In order for sovereignty to be limited to the point of justifying external intervention, the state must display a clear unwillingness to protect human rights on a large scale, or an active violation thereof vis-a-vis its population. In such scenarios, the discourse shifts from a *right* to intervene, to a *duty* to intervene. The nature of this duty is discussed below.

A legal versus a moral duty to intervene?

It is difficult to speak of a universal morality in international law as this is often shot down by cultural relativists (see [Mutua](#) or [An-Na'im](#)) who argue that claims of universality are premised on 'Western' values, and that any attempt to impose them on non-Western states constitutes a form of moral or cultural imperialism. However, some human rights are indisputable, a violation of which may justify external intervention (i.e. genocide, war crimes, ethnic cleansing, and crimes against humanity).

Whether this constitutes a legal *duty* to intervene is debatable. This position has been advanced under the concept of "[responsibility to protect](#)" (R2P) which arose out of a desire to prevent a repeat of the atrocities committed in Rwanda and Kosovo, for example. R2P is premised on the idea that it is the primary responsibility of a state to protect the human rights of its citizens, but where it fails to, an obligation arises on the international community to intervene to protect those rights. This is qualified by the requirement that the intervention be authorised by the [Security Council](#). However, the extent to which R2P has been accepted as a legal norm is not clear as state practice and *opinio juris*¹¹ have not provided a solid basis to qualify this as a rule of customary law. The reluctance of the international community to set this out as a clear legal obligation indicates its reluctance to fully accept the idea of sovereignty as responsibility. The international community is not prepared to let go of the concept of non-intervention, even where it is needed to protect individuals from grave human rights violations.

Should there be a legal duty to intervene?

Although there is currently no clear legal *duty* to intervene to prevent large-scale violations of human rights, these waters should be navigated while maintaining respect for the principle of equality of states. Sovereignty should not be a barrier at this point because where such violations of human rights occur, a state should have its sovereignty [suspended](#).

It is submitted that unilateral humanitarian intervention (without the authorisation of the Security Council) should not be an option as it undermines the (formal) equality of states, and because it assumes that one state is not only in a better position to protect human rights, but also in a position to determine which states are in need of external intervention. Moreover, history has shown that it is susceptible to [abuse](#) (Iraq 2003). Therefore, in line with the R2P criteria, any intervention must be done with the authorisation of the Security Council. Furthermore, in order for it to be effective, R2P must impose a [legal obligation](#) on the Security Council to authorise proportional intervention where it recognises that serious violations of human rights are occurring.

However, considering the current composition of the Security Council^[2], a veto by a permanent member would be inevitable in many cases. Therefore, a framework must be constructed whereby a veto in cases where there is an indisputable violation of serious human rights would itself be not only illegitimate, but also *unlawful*. This has been articulated by [Peters](#) who has argued that the Security Council is bound by customary human rights law, and by Article 24(2) of the [UN Charter](#) which obliges the Security Council to act in accordance with “the Purposes and Principles” of the Charter in discharging its duties. Therefore, R2P is an obligation not only imposed on states, but also on the Security Council. Because the decisions of the Security Council are subject to the rule of law, “[t]he endorsement of R2P as a legal principle fully thought through means that a permanent member’s exercise of the veto power in a [clear] R2P case would be illegal.” If the exercise of the veto by a permanent member in such cases is illegal, this would necessarily trigger the member’s international state responsibility which in cases where the human rights violations in question are considered *erga omnes*^[3], could be invoked by any member of the UN.

In light of these considerations, sovereignty can no longer be seen as a definitive excuse for non-intervention; rather, along with sovereignty comes a serious responsibility to protect human rights which, if not carried out, can legitimise external intervention. However, consensus on the role of human rights in international law remains elusive, and to claim that human rights have completely altered the international understanding of sovereignty (as existing only in “function of humanity”) is not realistic. Moreover, there is still much disagreement regarding the implications human rights violations, so to claim that they give rise to a legal duty of intervention, as desirable as it may be, is inaccurate.

^[1] Opinio juris is the second requirement, along with widespread and representative state practice (North Sea Continental Shelf Case 1967), for establishing customary international law. It is the subjective belief of a State that it is acting in accordance with a legal obligation.

^[2] The Security Council is currently composed of five members: United States, United Kingdom, France, Russia and China. Each member has a veto power which could block any action by the Security Council which means decision making by this body is highly politicised.

^[3] Obligations owed by all States towards the entire international community of States.

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