

---

# Humanity as the $A$ and $\Omega$ of Sovereignty

Anne Peters\*

## Abstract

*The article argues that the principle of sovereignty is being ousted from its position as a Letztbegründung (first principle) of international law. This trend is welcome. Sovereignty must and can be justified. The normative value of sovereignty is derived from and geared towards humanity that is the legal principle that human rights, interests, needs, and security must be respected and promoted. State sovereignty is not merely limited by human rights, but should be seen to exist only in function of humanity. It has thus been humanized. Consequently, conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity. A humanized state sovereignty implies responsibility for the protection of basic human rights and the state's accountability. The humanization of sovereignty also suggests a reassessment of humanitarian intervention. In contrast to sovereignty, non-intervention is constitutive for the international legal order and must be upheld as a rule. Moreover, the independent principles of human rights protection and self-determination constitute additional shields against unilateral interventions. But when human rights, needs, and interests are acknowledged as the systematic and doctrinal point of departure of the legal argument, the focus is shifted from states' rights to states' obligations towards natural persons. A state which grossly and manifestly fails to discharge these duties has its sovereignty suspended. Starting off from human needs leads, in a system of multilevel governance and under the principle of solidarity, to a fall-back responsibility of the international community, acting through the Security Council, for safeguarding humanity. In that perspective, the Council has under very strict conditions the duty to authorize proportionate humanitarian action to prevent or combat genocide or massive and widespread crimes against humanity. The exercise of the veto by a permanent*

\* Prof. Dr. iur., LL.M (Harvard), chair of public international and constitutional law, University of Basel. Thanks to Simone Peter, Jost Delbrück, Andreas Føllesdal, Andras Jakab, Emmanuelle Jouannet, Benedict Kingsbury, Jan Klabbers, Enrico Milano, Karolina Milewicz, Jörg Paul Müller, Sabine von Schorlemmer, Stephen Wheatley, Véronique Zanetti, and the participants in the research seminar at the Centro de Estudios Políticos y Constitucionales de Madrid, notably Julio Baquero Cruz, for helpful comments on previous versions. Email: Anne.Peters@unibas.ch.

*member in such a situation should be considered illegal or abusive. The ongoing process of a humanization of sovereignty is a cornerstone of the current transformation of international law into an individual-centred system.*

## Introduction

A dynamic process in which sovereignty is being complemented, and eventually replaced, by a new normative foundation of international law is going on. One decade ago, the lecturer of the General Course on Public International Law at The Hague Academy of International Law asserted that ‘the international legal order cannot be understood any more as being based exclusively on State sovereignty. ... States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights. At the present time, it is by no means clear which one of the two rivalling Grundnorms will or should prevail in case of conflict. Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State sovereignty as a somewhat formal principle. The transformation from international law as a State-centred system to an individual-centred system has not yet found a definitive new equilibrium.’<sup>1</sup>

This article argues that the international legal system has since 1999 moved much further in the direction of an individual-centred, humanized system – on a track that had of course already been laid with the codification of international human rights after the Holocaust and World War II. A big step was the endorsement of the responsibility to protect (R2P), which definitely ousted the principle of sovereignty from its position as a *Letztbegründung* (first principle) of international law. It has become clear that the normative status of sovereignty is derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the *telos* of the international legal system. Humanity is the  $A$  and  $\Omega$  of sovereignty. State sovereignty remains foundational only in a historical or ontological sense, to the extent that the states’ mutual respect for each other’s sovereignty constitutes the legal system of juxtaposed actors and governs law-making. State sovereignty is not only – as in the meanwhile canonical view – limited by human rights, but is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests, and needs. It has thus been humanized. Consequently, conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity.

<sup>1</sup> Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law’, 281 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (1999) 11, at 161–162.

After clarifying the concept of sovereignty (section 1), the article argues that the humanization of sovereignty has two major consequences: external state sovereignty requires – just as internal sovereignty – a justification (section 2), and sovereignty implies responsibility (sections 3 and 4). Section 5 discusses normative, doctrinal, and consequentialist objections against the humanization of sovereignty. Sections 6 and 7 demonstrate that the humanization of sovereignty does not compel unfettered interventionism. Systematically, non-intervention – not sovereignty – is constitutive for the international legal order. The principles of human rights protection and self-determination can and should be maintained as additional shields against unilateral interventions. In contrast, Security Council-authorized action is, under strict conditions, in the humanity paradigm not only admissible but mandated under strict conditions. I conclude that the recent evolution of international law as analysed in this article has finally endorsed what has long been acknowledged in constitutional and political theory: a reversal of the principal–agent relationship between the state and human beings (part 8).

## 1 Sovereignty as a Legal Status

Sovereignty is a legal status<sup>2</sup> (ascribed to political actors by others or claimed by actors for themselves) from which certain legal consequences, in particular rights, but also obligations, are derived. As a legal phenomenon, sovereignty is not a physical reality, but pertains to ‘world 3’ in a Popperian sense.<sup>3</sup> This status is constituted and defined by legal texts, together with accepted and acknowledged practice, although the term ‘sovereignty’ still connotes a pre-legal dimension of power.

The so-called internal sovereignty had been developed with a view to the relationship between the state (or its institutions) and non-state actors spatially located within the territory of that state (the church, local rulers, and the estates; today arguably the people and organizations of civil society). Internal sovereignty is ascribed to the state as a body-politic, and to persons or groups within that state: first, internal sovereignty describes competences and power of the state (acting through its institutions), in relation to society.<sup>4</sup> Secondly, notably in the Anglo-Saxon tradition, where the

<sup>2</sup> While the legal status of sovereignty is constituted by law, this law reflects and incorporates politics, ideas, social practices, and culture. In particular, law and politics are mutually constitutive and containing, and in tension, so that any legal status is a political status as well. Sovereignty is crucially a borderline concept in which the tension between law and politics is particularly manifest.

<sup>3</sup> Without committing himself ontologically, Popper distinguished epistemologically between a World 1 of phenomenal matters, a World 2 of mental states, and a World 3 of ideas and symbolism (or, more accurately, the contents of thoughts and symbols). Typical representatives of World 3 would be ‘The Well-Tempered Piano’ by Bach, the Pythagorean Theorem, or a Civil Code. Popper, in K.R. Popper and J.C. Eccles, *The Self and its Brain* (1977), at 36. The three realms theory goes back to philosophers of the 19th and early 20th centuries such as Bolzano, Lotze, Simmel, Frege, and Rickert. See Gabriel, ‘Reich, Drittes, 2.’, in J. Ritter and K. Gründer (eds), *Historisches Wörterbuch der Philosophie* (1992), viii, cols 499–502.

<sup>4</sup> The state has the capacity and the delegated authority to take binding decisions, to make the laws with regard to persons and resources in a given territory, it has the *Kompetenz-Kompetenz* (the legal competence to decide on one’s own competences), and it owns the monopoly on the legitimate use of force in its territory.

concept of the state as a moral person has not fully gained ground, sovereignty has been bestowed on Parliament (parliamentary sovereignty). Thirdly, the idea that the people is the ultimate authority in the state is encapsulated in the concept of popular sovereignty, which is, first of all, a title of legitimacy.

External sovereignty refers to the relationship between states in their quality as international legal persons *vis-à-vis* other states or other international legal persons, but does not necessarily refer to things happening outside the state's territory. External sovereignty is connoted with certain rights and obligations.<sup>5</sup> Although these seem to some extent to constitute the legal status itself, they are best understood as legal consequences of the status of state sovereignty. These consequential rules are notably legal independence,<sup>6</sup> jurisdiction over people and territory,<sup>7</sup> self-determination,<sup>8</sup> territorial integrity, non-intervention, diplomatic immunity, legal personality, and capacity (notably the treaty-making power, the capacity to be held liable, and the capacity to become a member of an international organization).<sup>9</sup> Finally juridical equality can be seen as a logical corollary of sovereignty.<sup>10</sup>

External and internal state sovereignty (as opposed to parliamentary or popular sovereignty) are probably best understood not as two different things, but as two dimensions of an attribute of the state: its (still more or less) exclusive authority over people and territory directed at the inside (at non-state actors) and at the outside (at other states).<sup>11</sup>

<sup>5</sup> The Friendly Relations Declaration (UN Doc. A/RES/2625 (XV) of 24 Oct. 1970) spells this out as follows: 'In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.'

<sup>6</sup> I avoid the term 'recognition' used by many in this context in order to avoid confusion with the unilateral act of recognition of states, which has – according to prevailing legal doctrine – only a declaratory effect on statehood. Moreover, it is contested whether states are legally entitled to legal recognition.

<sup>7</sup> This jurisdiction encompasses the sovereign power to legislate, to adjudicate, and to enforce. Traditional points of reference of jurisdiction are in the first place territory and in the second place persons.

<sup>8</sup> A political entity's right to design its political system according to its own preferences and to be to that extent independent from other states is covered by the international legal principle of self-determination of peoples (see in detail *infra* section 7.A.), but also by state sovereignty (*Military and Paramilitary Activities (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, at para. 263).

<sup>9</sup> Legal personality and legal capacity are legal institutions which enable actors to participate in the international legal process and which allow them to be held accountable. While contemporary international law does not reserve the international legal personality and the treaty-making power to sovereign entities, only sovereigns (traditionally: states) are considered to possess 'full' and 'original' personality and the corresponding full treaty-making power.

<sup>10</sup> See on juridical equality in more detail *infra* section 5.B.

<sup>11</sup> To some extent, internal and external sovereignty entail each other and interact in a positive feed-back process. On the one hand, respect for external sovereignty (non-intervention) is a factual precondition for the development of internal structures of authority and control within states. On the other hand, a political entity has to display control over territory and persons in order to be eligible as externally sovereign by other sovereigns.

Internal sovereignty is important for my argument because I see the current evolution of external sovereignty as a parallel to the former. As internal sovereignty has evolved from a primarily power-based to a legitimacy-impregnated concept and from the idea of uniformity to the division of powers, so is external sovereignty now evolving. Notably, the new concept of *sovereignty as responsibility to protect* infuses external sovereignty with elements of internal sovereignty, because it conditions non-intervention (a consequence or corollary of external sovereignty) on the capability properly to discharge the internal functions of a sovereign, and postulates the sovereign's accountability *vis-à-vis* the population (see *infra* section 3).

The concept of sovereignty has co-emerged and -evolved with the concept of the state as an institutionalized form of government.<sup>12</sup> External sovereignty has traditionally been the hallmark of states. It is a typical legal incident or consequence of statehood,<sup>13</sup> but not a necessary quality of states.<sup>14</sup> Internal sovereignty has likewise traditionally been closely attached to states, as it is attributed to state institutions (parliament, or the people, conceived as an organ of the state), or justifies state power (popular sovereignty).

In contemporary positive international law, the legal status of sovereignty is no matter of degree (like illness or health). It is, in legal terms, still mostly conceived as an all-or-nothing status (like being alive or dead, or being married).<sup>15</sup> Although states have more or less political, economic, and military power and may possess (due to international legal commitments) more or fewer legal competences, they are – under international law – equally legally sovereign. The international law of sovereignty has so far remained highly formalist and to some extent counter-factual. States' limited factual capacity to exercise sovereign powers has so far not been translated into black-letter-law categories of differentiated sovereignties, although an enormous body of contemporary international relations scholarship is proposing 'gradations'<sup>16</sup> or 'unbundling' of sovereignty. The formalism of positive law is probably the lesson drawn from the historical experience of domination and subjugation, which had been supported by legal categories such as semi-sovereign and suzerain states.<sup>17</sup>

<sup>12</sup> Political entities are accepted as sovereign states (in their relations to other states) when certain factual requirements, which cannot be enumerated in a definite and exhaustive manner, are met. The most important ones are those elements which simultaneously constitute statehood, namely a government exercising some degree of control over a people in a territory.

<sup>13</sup> J. Crawford, *The Creation of States* (2nd edn, 2006), at 89.

<sup>14</sup> There may be non-sovereign states (e.g. the sub-entities (states) within federal states).

<sup>15</sup> This is self-evident for those who understand sovereignty as essentially formal, namely as the possession of legal competences which may be transferred, but are always revocable, and/or as the constitutional independence from other sovereigns (see, e.g., G. Jellinek, *Die Lehre von Staatenverbindungen* (1882), at 22; A. James, *Sovereign Statehood* (1986), at 24–25; Hillgruber, 'Souveränität – Verteidigung eines Rechtsbegriffs', 57 *Juristenzeitung* (2002) 1072, at 1073; Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *J Int'l Economic L* (2003) 841, notably at 852). It is less evident for those who relate sovereignty to some substance and for whom only actors which possess a certain wealth of competences and powers are sovereign. In that perspective, sovereignty is incumbent upon a political entity only if it has surpassed a threshold of powers (qualitatively and quantitatively).

<sup>16</sup> Notably Keohane, 'Political Authority after Intervention: Gradations in Sovereignty', in R. Keohane and J. Holzgrefe (eds), *Humanitarian Intervention* (2003), at 275–298.

<sup>17</sup> See the references *infra* in note 75.

Sovereignty (in both its internal and its external dimension) arguably fulfils specific functions. The existence of a sovereign power guarantees order, security, stability, and predictability (externally and internally). Through its monopoly on the legitimate use of force, the sovereign state is able to protect human rights. Sovereignty may be an instrument to allocate competences (vertically and horizontally). The sovereign state is the reference point for attributing responsibility and liability. Non-intervention, a corollary of sovereignty, shields the principal arena within which self-determination is worked out and thus protects diversity. Finally, the sovereign state is often considered to be an indispensable container for democratic processes. The search for functions implies that state sovereignty is no end in itself, but must and can be justified through the functions it fulfils (output-legitimacy). This will be discussed now.

## 2 Sovereignty Needs Justification

The claim that humanity (i.e. the principle that public power must serve human rights, interests, and needs) is the normative source and end of sovereignty implies that sovereignty is not self-sustaining and no end in itself, but must be justified. The demand for justification is not new. There is a longstanding argument that sovereignty is '[m]orally speaking, an empty vessel'.<sup>18</sup> Sovereignty must be grounded in other, higher-order, values, which sovereign states are thought to realize. This line of reasoning has first become visible with regard to the internal aspect of sovereignty within a constitutional state, which will therefore be addressed first.

### A *Internal Sovereignty*

Internal sovereignty is closely linked to the concept of legitimacy, understood as a standard of moral rightness of the state's law, its political institutions, and their exercise of power. Historically, internal sovereignty was conceptualized to overcome the quarrels over the legitimacy of the rulers who derived their authority from competing religious sources. Sovereignty blended that question of genetic legitimacy out and provided a new, legal-positivist type of legitimacy, which collapsed into legality: the sovereign itself became the source of legitimacy (*auctoritas non veritas facit legem*). In parallel, already renaissance political theory<sup>19</sup> and notably contractual theory suggested what we would now call both an 'input' and an 'output' legitimation of sovereign rule. The sovereign and its acts were deemed legitimate because they had been established by a social contract *and* provided order and security for persons.

<sup>18</sup> D. Rodin, *War and Self-Defense* (2002), at 119.

<sup>19</sup> F. Guiccardini, *Dialogue on the Government of Florence* (ed. and trans. A. Brown, 1994 (orig. around 1520)), at 14: 'I suggest that if we want to judge between different governments, we should consider not so much what type they are but their effects, calling better or less bad the government which has the better or less bad effects. For example, if someone who has usurped power rules better and to the greater benefit of his subjects than someone else who rules legitimately ['uno principe naturale'], wouldn't we say his city was better off and better governed?' Cf. on Guiccardini J.G.A. Pocock, *The Machiavellian Moment. Florentine Thought and the Atlantic Republican Tradition* (1975), at 223 and n. 9.

For Hobbes, the sovereign was legitimate not mainly because authority had been conferred on him by mutual covenants, but *because and only as long as* he effectively provided protection to the subjects ('at home' and against 'enemies abroad').<sup>20</sup> For Rousseau, popular sovereignty was also justified by the performance of functions: The purpose (*la fin*) of the installation of the sovereign *volonté générale* was the realization of the common good.<sup>21</sup>

In contemporary thought, a government's exercise of (delegated) sovereign powers enjoys both input and output legitimacy when it takes into account the concerned natural persons' voice (i.e. is based on popular sovereignty) and fulfils certain overlapping functions (as valued by the affected individuals themselves), namely to protect human rights, to create and preserve a space for individual and collective self-fulfilment, to enable and host political participation, and to provide a point of reference and identification. The focus on the effective provision of goods by the way explains why sovereignty presupposes factual control. What matters is not only the willingness, but also the capability, of a government to guarantee human security and so on. The factual powers of a government form part of its output legitimacy, and thereby not only constitute its sovereignty, but also justify it. To conclude, the standard view is now that the internal sovereignty of a government depends on its legitimacy, and that its legitimacy is the basis of its sovereignty.<sup>22</sup>

## B External Sovereignty

The transformation of the relationship between external sovereignty and legitimacy repeats the evolution of internal sovereignty as just described. In order to become and remain universal, international law, with external sovereignty as its basic norm, had blinded itself to the constitutional set-up and the political regime of states. With the extension of the *Ius publicum Europaeum* around the globe, the requirement that states, to become full members of the international legal system, must conform to the 'civilized nation' standard, had been abandoned. The obvious reason for blending out the question of the legitimacy of governments was the absence of universally agreed

<sup>20</sup> T. Hobbes, *Leviathan* (ed. R. Tuck, 1991), ch. XVII, at 120–121 (originally 87–88), emphasis added: 'For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is enabled to conforme the wills of them all, to Peace at home, and mutual aid against their enemies abroad. And in him consisteth the Essence of the Commonwealth; which (to define it,) is: One person, of whose Acts a great Multitude, *by mutuall Covenants one with another*, have made themselves every one the Author, *to the end* he may use the strength and means of them all, as he shall think expedient, *for their Peace and Common defence*. And he that carryeth this Person, is called soveraigne, and said to have Sovereaign Power; and every one besides, his subject'. 'The obligation of Subjects to the Soveraign, is understood *to last as long, and no longer, than the power lasteth, by which he is able to protect them*': ch. 21, at 153 (originally 114), emphasis added. See also ch. 30, at 231 (originally 175).

<sup>21</sup> J.-J. Rousseau, *Du contrat social* (1954 (orig. 1762)), livre II, ch. I, at 249–250.

<sup>22</sup> M. Kriele, *Einführung in die Staatslehre* (5th edn, 1994), at 19. In contrast to P. W. Kahn, *Putting Liberalism in its Place* (2005), at 13 and 20, I would insist that this legitimization must be rational, and not merely consist in 'belief' or 'faith' in the sovereign because otherwise no intersubjective understanding on the sovereign's legitimacy is possible.

standards of legitimate political rule. Consequently, the choice of a system of government was deemed protected by external sovereignty. This reasoning informed the International Court's *Nicaragua* judgment of 1986. Here the World Court responded to the United States' claim that Nicaragua's government was establishing 'a totalitarian communist dictatorship' by stating that 'adherence of a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the *fundamental principle of State sovereignty*, on which the whole of international law rests, and the *freedom of choice of the political, social, economic and cultural system of a State*'.<sup>23</sup>

To be a state, a political entity had to satisfy criteria based primarily on *effectiveness* (territory, people, effective government), and arguably also on international legality,<sup>24</sup> but not on the legitimacy of its government.<sup>25</sup> The decoupling of statehood and state sovereignty from the question of legitimate government and the focus on effectiveness did however not mean that external sovereignty was a mere factual concept. It has always been a normative concept, within which factual rule is acknowledged as the basis of the right to rule. A political entity which as a matter of fact enjoys certain qualities: control over territory, independence from other powers, and the like, does possess a right to enjoy those qualities. This is the meaning and function of the international legal principle of effectiveness.<sup>26</sup> To some extent, right here follows might. However – and this is important – although factual may be a necessary, it need not be a sufficient condition for the acknowledgement of (sovereign) rights. The continuing validity of the principle of effectiveness does not prohibit setting up additional requirements for the exercise of external sovereignty.

One set of additional requirements are the standards of international law. Since the acknowledgment of international human rights it is clear that such legal limits may even apply to situations which are spatially located within the territory of the state. However, the traditional view suggested, first, that the international legal limits to sovereignty are imposed on the state from the outside. Secondly, and most importantly, the traditional view considered respect for human rights as a limitation on state sovereignty and thereby built up a tension between two conflicting goods. The traditional view implied that state sovereignty was not constituted by international law, whereas

<sup>23</sup> *Military and Paramilitary Activities (Nicaragua v. United States of America)*, Merits, *supra* note 8, at para. 263 (emphasis added); see also para. 258.

<sup>24</sup> Crawford, *supra* note 13, at 107: a state may not be created in violation of a people's international right to self-determination and through unlawful use of force.

<sup>25</sup> *Ibid.*, at 37–95: the occasional practice of withholding recognition for considerations of legitimacy (e.g. in South America) related to the recognition of governments, not of states. See on the post-1989 legitimacy-based international practice of supporting the emergence of legitimate states d'Aspremont, 'La création internationale d'Etats démocratiques', 109 *RGDIP* (2005) 889.

<sup>26</sup> The international legal principle of effectiveness integrates power and control into the law. Effective control or simply actual power or practice figures as a condition for the existence of a rule or entitlement (e.g. in prescription, recognition, *uti possidetis* etc.). The rationale is that in the absence of a centralized international law-enforcement agency, the legal subjects must enforce their rights in a decentralized fashion, e.g. by sanctions. If they lack the power to do so, their rights remain hollow. In the long run, such a situation would undermine the international legal order as a whole.



the humanistic view presupposes that sovereignty exists only within the confines of international constitutional law, and that '[s]overeignty is the legal status of a state as defined (and not only "protected") by international law'.<sup>27</sup>

The constitution-blindness and the principle of effectiveness led to the view that external state sovereignty represented the justificatory (normative) basis of international law, and was itself in that sense the 'source' of a host of international legal rules. Complementary to the idea of external sovereignty as the first principle of international law was the assertion that external sovereignty itself cannot and need not be normatively justified. The parallel to the early notion of Bodin's and Hobbes' internal state sovereignty is striking: In order to accommodate the plurality of world-views and to eclipse the question of legitimate government, external state sovereignty had been installed in the default position of the legal order.

After the collapse of the Soviet Union and the corresponding rise of the Western model of liberal, pluralist democracy, it was suggested that only internally legitimate states should enjoy full external sovereignty: 'a state is sovereign when it is internally legitimate. . . . Sovereignty is the outward face of legitimacy.'<sup>28</sup> States' 'sovereign authority is empty where individual rights are violated by states claiming sovereignty'.<sup>29</sup> The linkage of external state sovereignty (and with it the principle of non-intervention) to the internal legitimacy of its government, as proposed by those voices, would have one eminently practical consequence: the state's right to be free from coercive intervention would become a qualified right. An illegitimate state would be estopped from asserting a right against economic or even military intervention. In essence, only a legitimate state would be allowed to claim immunity from intervention.<sup>30</sup> However, the proposal to condition, as a general matter, external state sovereignty and with it non-intervention on the state's internal political order, notably on its democratic credentials, has potentially detrimental consequences for human security both in the concerned state and elsewhere. Awareness of this risk counsels against a broad notion of sovereignty-suspension on account of governmental illegitimacy,<sup>31</sup> and suggests considering humanitarian intervention with much more caution (see *infra* section 6).

The issue of legitimacy should be played on a lower key only: the humanized view of state sovereignty (only) implies that external state sovereignty does not constitute the basis of legitimacy of international law, but that it must itself be legitimized.<sup>32</sup> With this move, external sovereignty is to some extent realigned to internal sovereignty. Just as it is appropriate to justify the internal sovereignty of governmental institutions (e.g. parliament) with the fact that they are constituted on the basis of elections

<sup>27</sup> Fassbender, 'Sovereignty and Constitutionalism in International Law', in N. Walker (ed.), *Sovereignty in Transition* (2003), at 115, 129.

<sup>28</sup> F. Tesón, *A Philosophy of International Law* (1998), at 40 and 57.

<sup>29</sup> C. Jones, *Global Justice: Defending Cosmopolitanism* (1999 (repr. 2004)), at 226, also at 220.

<sup>30</sup> Luban, 'Just War and Human Rights', 9 *Philosophy and Public Affairs* (1980) 160, at 169.

<sup>31</sup> See B.R. Roth, *Governmental Illegitimacy in International Law* (1999).

<sup>32</sup> C. Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity and Institutional Rationality in International Relations* (1999), at 30 and 159; I. Clark, *Legitimacy in International Society* (2005), at 160.

(popular sovereignty) and perform public tasks, it is appropriate to justify external sovereignty with the functions it fulfils relating to human rights, interests, and needs.

### 3 Sovereignty Implies Responsibility

The insight that human well-being is the source and end, the  $A$  and  $\Omega$ , of sovereignty offers a sound foundation for the responsibility to protect, as enounced in the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS).<sup>33</sup> The political background of this report was the international community's failure to prevent human catastrophes in Somalia (1993), and the genocides in Rwanda (1994) and Srebrenica (1995) on the one hand, and the unauthorized Kosovo intervention of 1999 on the other. The authors of the report sought to provide a new concept, responsibility to protect (R2P), which has the potential to justify or even mandate political action which would prevent such disasters. The co-chair of the ICISS has qualified the 'responsibility to protect' as a 'guiding principle' and as an 'emerging norm'.<sup>34</sup> Indeed, the re-characterization of sovereignty as responsibility to protect has been endorsed by the United Nations, by states, and in the ICJ case law. UN Secretary-General Kofi Annan highlighted the responsibility to take action *vis-à-vis* massive human rights violations in his Millenium Report of 2000,<sup>35</sup> and reaffirmed the obligation to protect in at least two reports.<sup>36</sup> The UN-mandated report of the High-level Expert Panel of 2004 devoted an entire sub-chapter to the responsibility to protect.<sup>37</sup> At the World Summit of 2005, the heads of state and government reaffirmed each individual state's 'responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>38</sup> This statement

<sup>33</sup> International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001), available at: <http://www.iciss.ca/pdf/Commission-Report.pdf>. See Peters, 'Le droit d'ingérence et le devoir d'ingérence: vers une responsabilité de protéger', 79 *Revue de droit international et de droit comparé* (2002) 290; Société française pour le droit international (ed.), *Colloque de Nanterre, La responsabilité de protéger* (2008); C. Verlage, *Responsibility to Protect* (2008).

<sup>34</sup> Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention', *ASIL Proceedings*, 98th annual meeting (2004), at 78, 83. See also Evans, 'The Responsibility to Protect: An Idea whose Time has Come ... and Gone?', 22 *Int'l Relations* (2008) 283.

<sup>35</sup> 'We the Peoples: The Role of the United Nations in the 21st century', Report of 27 Mar. 2000, UN Doc. A/54/2000, ch. IV, at 48 (paras 217–219).

<sup>36</sup> 'In larger freedom: towards development, security and human rights for all', Report of the Secretary General of 21 Mar. 2005 (UN Doc. A/59/2005), at para. 135; 'Uniting our strengths: Enhancing United Nations support for the rule of law', Report of the Secretary General of 14 Dec. 2006 (UN Doc. A/61/636-S/2006/980), at para. 6.

<sup>37</sup> 'A more secure world: our shared responsibility', Report of the High-level Panel on Threats, Challenges and Change of 2 Dec. 2004 (UN Doc. A/759/565), sub-ch. 3: 'Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect', at paras 199–203.

<sup>38</sup> Resolution adopted by the General Assembly, World Summit Outcome, UN Doc. A/RES/60/1 of 24 Oct. 2005, at para. 138: 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.'

was explicitly reiterated in two Security Council resolutions of 2006.<sup>39</sup> Finally, the ICJ's genocide judgment of 2007 spelled out the obligation to prevent and to punish genocide, a core element of the obligation to protect.<sup>40</sup> The Holy See, a traditional international legal subject, extensively referred to the 'principle of the responsibility to protect'. In an address to the General Assembly, Pope Benedict XVI stated that this principle 'has only recently been defined, but was already present implicitly at the origins of the United Nations, and is now increasingly characteristic of its activity'.<sup>41</sup> On the regional level, the Constitutive Act of the African Union of 2002, while proclaiming the principle of 'sovereign equality and interdependence among Member States of the Union', enshrines 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: War crimes, genocide and crimes against humanity'.<sup>42</sup> The Report of the Ad Hoc Working Group on Conflict Prevention and Resolution in Africa considers the two sanctions mechanisms of the AU and ECOWAS as giving a 'practical expression to the concept of the "responsibility to protect"'.<sup>43</sup> In a recent address to the African Union Summit, the Secretary-General stated: 'I am fully committed to keeping the momentum that you the leaders have made at the 2005 World Summit and will spare no effort to operationalize the responsibility to protect.'<sup>44</sup> The outbreak of ethnic-related violence in Kenya after the elections of 2007 was qualified as an R2P situation by Archbishop emeritus and nobel prize winner Desmond Tutu.<sup>45</sup> However, it must be ensured 'that R2P is seen not as a Trojan Horse for bad old imperial, colonial and militarist habits'.<sup>46</sup> The principle should therefore be construed very narrowly. Properly understood, R2P does not cover all human security issues, but its application is limited to extreme, conscience-shocking cases of mass atrocities.<sup>47</sup>

<sup>39</sup> UN SC Res. 1674 (2006), at para. 4, a thematic resolution on the protection of civilians in armed conflict, while repeating in its preamble the SC's 'respect for the sovereignty of all states', confirmed in its operational part the provisions of paras 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. UN SC Res. 1706 (2006), on the conflict in Darfur, preamble para. 2, again recalled paras 138 and 139 of the 2005 World Summit Outcome Document.

<sup>40</sup> *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, not yet reported, at paras 425–450.

<sup>41</sup> Address of 18 Apr. 2008, available at: [www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html).

<sup>42</sup> Art. 4 lit. a) and h) of the Constitutive Act of the African Union of 11 July 2002.

<sup>43</sup> UN Doc. S/2005/833 of 30 Dec. 2005, at para. 10. The new mechanisms put under international scrutiny questions previously considered to pertain to the exclusive jurisdiction of national sovereignty, and are operational without the consent of the host country.

<sup>44</sup> Addis Abbaba, 31 Jan. 2008, available at: [www.un.org/news/press/docs/2008](http://www.un.org/news/press/docs/2008). The UN SG appointed Edward Luck as a Special Adviser on the Responsibility to Protect in Feb. 2008, to work under the overall guidance of the Special Representative for the Prevention of Genocide and Mass Atrocities. Letter of SG Ban Ki-Moon (S/2007/721 of 7 Dec. 2007), and report of the SG (A/HRC/7/37 of 18 Mar. 2008), at paras 11–12.

<sup>45</sup> Tutu, 'Taking the Responsibility to Protect', *International Herald Tribune*, 19 Feb. 2008.

<sup>46</sup> Evans, 'The Responsibility to Protect', *supra* note 34, at 289.

<sup>47</sup> See on the threshold for the responsibility to protect Decaux, 'La question des seuils de déclenchement de la responsabilité en cas de violations graves des droits de l'homme', in Société française (ed), *supra* note 33, at 333–342.

Subsequent state practice confirms, if at all, a narrow reading. During the natural and ensuing humanitarian catastrophe following the cyclone in Myanmar in May 2008, China and Indonesia rejected the French characterization of that situation as an R2P situation. The French president unsuccessfully asked for a Security Council mandate to enforce the access of foreign aid personnel to the country, which had been denied by the government.<sup>48</sup> In contrast, the situation in Darfur since about 2001 has, according to all evidence, transgressed the threshold of inhumanity which triggers the subsidiary responsibility of the international community,<sup>49</sup> but still the United Nations and the African Union did not take sufficiently robust action to prevent and combat mass atrocities, and thus did not honour the principle here. It has been argued that the Security Council's political selectivity is irrelevant because of the principle that equal treatment is not required in the sphere of illegality.<sup>50</sup> However, this maxim applies only when the realm of illegality is clearly established – whereas this realm is exactly the problem here. The question with regard to the obligation to protect is precisely whether international law already prohibits passivity, and in this context the inaction of the Security Council constitutes relevant practice which may prevent the formation of a customary law obligation to intervene.

The reiteration of the principle of sovereignty as implying a responsibility to protect, and its limited, but partly inconsistent application in practice, has promoted its ongoing process of crystallization into hard international law, which is however not complete and remains precarious.<sup>51</sup>

## 4 The Two Predicates of Sovereign Responsibility

Responsibility engendered by sovereignty exists *for* something (the task to be performed) and *towards* somebody.

### *A Responsibility for Something: The Obligation to Protect Basic Human Rights*

First, the responsible sovereign must fulfil certain tasks or duties (responsibility *for*). By discharging the functions properly, the sovereign acquires output legitimacy.

<sup>48</sup> See for an invocation of R2P Lellouche, 'Scandale birman: plus jamais ça!', *Le Monde*, 24 June 2008, at 17.

<sup>49</sup> See for an analysis of the human rights situation in Darfur within the framework of the responsibility to protect UN Human Rights Council, Implementation of GA Res. 60/251, Report of the High-Level Mission on the situation of human rights in Darfur pursuant to HR Council decision S-4/101 ('Jody Williams report', UN Doc A/HRC/4/80 of 9 Mar. 2007). The report concludes 'that the Government of the Sudan has manifestly failed to protect the population of Darfur from largescale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its responsibility to protect has become evident and urgent.' However, the steps of the international community 'have not proven adequate to in ensuring effective protection on the ground' (especially at paras 67 and 76). See also UN SC Res. 1706 (2006), preamble, para. 2.

<sup>50</sup> Bothe, 'La responsabilité de protéger en action: le contenu de l'intervention', in Société française (ed), *supra* note 33, at 327.

<sup>51</sup> See for the argument that R2P does not have the status of a legal or even of a social norm Delcourt, 'La responsabilité de protéger et l'interdiction du recours à la force: entre normativité et opportunité', in Société française (ed), *supra* note 33, at 305, 306–308.

According to the ICISS, the sovereign's duties extend in two directions (external and internal duties): the state must externally respect the sovereignty of other states, and internally protect the dignity and basic rights of all persons within the state.<sup>52</sup> The external obligation is constitutive for the international legal order consisting of multiple sovereigns.

The internal task of protection of human rights is more complex. The ICISS asserted that every sovereign state is obliged to protect its inhabitants against avoidable catastrophes, such as famine, mass murder, and mass rape. This obligation comprises three dimensions: The obligation to prevent, to react, and to rebuild.<sup>53</sup>

The idea that the status of sovereignty entails not only rights, but also obligations, is not new. Notably the focus on 'protection' has historical pedigree. We have seen that for political theorists, beginning with Hobbes, protection is the first objective and justification of the state.<sup>54</sup> And the famous arbitral award on territorial sovereignty, the Palmas award of 1929, delivered by the Swiss arbitrator Max Huber, postulated the obligation to protect individuals as a corollary of sovereignty: '[t]erritorial sovereignty . . . has as corollary a duty: *the obligation to protect* within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with *the rights which each State may claim for its nationals* in foreign territory'.<sup>55</sup> Contemporary scholarship has asserted that a political entity, in order to be sovereign, must be capable of guaranteeing the protection of core human rights.<sup>56</sup>

The inward-oriented task of protecting human rights implies a positive activity and not only respect of human rights in the form of governmental abstention from interference. It also seems as if the obligation to protect basic rights goes a significant step further than the obligation 'to respect and to ensure respect' in common Article 1 of the Geneva Conventions of 1949.<sup>57</sup> It requires governmental action to prevent and to combat threats originating from private actors (such as criminal violence), from nature (such as natural disasters), or from combined factors (such as famine). The emphasis on protection corresponds to the evolution of the contemporary human rights discourse, in which protection has become the overarching doctrinal paradigm.<sup>58</sup>

<sup>52</sup> ICISS, *supra* note 33, para. 1.35.

<sup>53</sup> *Ibid.*, *supra* note 33, at ch. 3.

<sup>54</sup> *Supra* note 20.

<sup>55</sup> Permanent Court of Arbitration, arbitral award rendered between the United States of America and the Netherlands, relating to the arbitration of differences respecting sovereignty over the island of Palmas (or Miangas), award of 4 Apr. 1928 (M. Huber), XI RIAA 831; reproduced in 1/part II *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929) 1, at 17 (emphasis added). Given the fact that individuals were in the pre-international human rights era completely mediated, and protected in foreign territory only by the law of aliens, the obligation to protect was in doctrinal terms owed to the state of nationality.

<sup>56</sup> Müller, 'Wandel des Souveränitätsbegriffes im Lichte der Grundrechte', in R. Rhinow, S. Breitenmoser, and B. Ehrenzeller (eds), *Fragen des internationalen und nationalen Menschenrechtsschutzes* (1997), at 45, 62.

<sup>57</sup> But see Boisson de Chazournes and Condorelli, 'De la "responsabilité de protéger", ou d'une nouvelle parure pour une notion déjà bien établie', 110 *RGDIP* (2006) 11, at 16.

<sup>58</sup> Seminally App. No. 87/1997/871/1083, *Osman v. United Kingdom*, Reports 1998-VII, 3214, at paras 115–122. On the universal level see UN Commission on Human Rights, General Comment No. 31 [80], 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' of 26 May 2004, at paras 6–8.

The consequence is that under certain conditions states' inaction may violate human rights. The new question is whether such omissions lead to the suspension of external state sovereignty, and the concept of R2P answers this in the affirmative.

### **B Responsibility Towards Someone: Two Principals**

The responsible sovereign is accountable to one or several principals. This accountability or responsiveness constitutes the sovereign polity's input legitimacy. The ICISS and earlier scholarship name two principals, an internal and an external one: The population of the state on the one hand, and the international community on the other hand.<sup>59</sup> As far as the 'internal' responsibility is concerned, the ICISS view reflects classic, Lockean, liberalism, according to which the citizens entrust governments with sovereign powers, which are consequently intrinsically limited, revocable, and merely in the service of the principals.<sup>60</sup> This is the decisive turn away from Hobbesian absolutism, the sovereign of which is responsible only to God, and not to humans.<sup>61</sup>

A difference is that the liberal trust-givers are the citizens (the nation), whereas the ICISS principals are all persons within the state's territory, including foreigners. The ICISS does not rely on, and does not ask for a democratic relationship between, the electorate and the elected government. So the ICISS does not conceive of responsibility as political accountability (to be 'enforced' by voters in elections or by the international community through diplomatic representations), but as legal responsibility.

Most importantly, the 'internal' and the 'external' legal duty as described above are in the ICISS report not split up and due to separate principals. The obligation to protect basic rights of all persons within the state is owed not only to them, but also to the international community. Although the expert report does not explicitly say so, this means in doctrinal terms that the obligation to protect is an obligation *erga omnes*. The legal consequences flowing from obligations *erga omnes* are obscure. While it is granted that even non-affected states may 'invoke' the international legal responsibility of a state which has breached an obligation *erga omnes*,<sup>62</sup> it remains disputed

<sup>59</sup> ICISS, *supra* note 33, at para. 2.15. See for the responsibility of sovereign governments both externally to other sovereigns and internally to their citizens: R.H. Jackson, *Quasi-states* (1990), at 28. See for responsibility towards the international community Myres McDougal, 'In its attitudes toward territorial communities ... such an international law [of human dignity] will, of course, respect the equality of states, ... but the equality it respects will be a genuine equality of shared power and responsibility': McDougal, 'Perspectives for an International Law of Human Dignity' (orig. 1959) in M. McDougal et al., *Studies in World Public Order* (1964), at 987, 1010 (emphasis added).

<sup>60</sup> John Locke argued that 'the legislative being only a fiduciary power to act for certain ends, there remains still in the people of supreme power to remove or alter the legislative, when they find the legislative to act contrary to the trust reposed in them': J. Locke, *Two Treatises of Government* (ed. P. Laslett, 1960 (orig. 1690)), at 413, para. 149.

<sup>61</sup> Hobbes, *supra* note 20, ch. 30, at 231: 'The office of the sovereign (be it a Monarch, or an Assembly,) consisteth in the end, for which he was entrusted with the Sovereign Power, namely the procuration of the safety of the people, to which he is obliged by the Law of Nature, and to render an account thereof to God, the Author of that law, and to none but him' (emphasis added).

<sup>62</sup> See Art. 42 lit. b) and 48 (1) lit. a) and b) of the ILC Arts on the Responsibility of States for International Wrongful Acts of 2001, UN Doc A/CN.4/L.602, Rev.1.

whether and how states are entitled to enforce such obligations.<sup>63</sup> In any case, the qualification of the responsibility to protect as an obligation *erga omnes* in no way automatically gives rise to an entitlement to military enforcement by means of a humanitarian intervention. A situation where the territorial state does not discharge its obligation to protect is at best a necessary, but not a sufficient condition for the legality of military force. If humanitarian interventions are at all admissible, then it is only under additional and very strict conditions, which will be discussed below (section 6).

## 5 Objections Against ‘Humanized’ Sovereignty

Various objections against the ‘humanization’ of state sovereignty and the relativization going with it may be raised. The normative objection is that the prioritization of human well-being manifests an anti-pluralist moral absolutism. The doctrinal objection is that taking cognizance of respect for human rights by states violates the principle of equality of states. The consequentialist objection is that the reconceptualization of state sovereignty promotes interventionism and empire.

### *A The Normative Objection: Anti-pluralist, ‘Western’ Moral Absolutism*

It has been pointed out that the abandonment of state sovereignty as a normative foundation of international law ‘translates into an intolerant and interventionist version of liberal anti-pluralism’, into ‘*Gleichschaltung*’ and ‘moral absolutism’.<sup>64</sup>

That objection grounds non-intervention (the most important legal consequence of external state sovereignty) in a cultural relativism of values. Notably Michael Walzer has pleaded for respect for a community’s (or the majority of its members’) judgments of justice and political prudence. He considered it ‘morally necessary’ to presume that there exists a certain ‘fit’ between the community and its government and that the state is ‘legitimate in terms of its own traditions’. Though this fit between a government and its community may not be democratic, there is still a fit of some sort, which foreigners are – according to Walzer – bound to respect.<sup>65</sup> To protect only those communities by strong state sovereignty the internal historical and political struggles of which have generated a single philosophically correct and universally approved outcome would – according to Walzer – amount to protecting only individuals who have arrived at certain opinions and lifestyles.<sup>66</sup> Walzer concluded that external state sovereignty can be dispensed with, and intervention justified, only when the lack of

<sup>63</sup> *Ibid.*, Art. 54 leaves the question open, as this provision allows only ‘lawful’ countermeasures.

<sup>64</sup> Cohen, ‘Sovereign Equality vs. Imperial Right: The Battle over the “New World Order”’, 13 *Constellations* (2006) 485, at 486, 489, and 502.

<sup>65</sup> Walzer, ‘The Moral Standing of States: A Response to Four Critics’, 9 *Philosophy and Public Affairs* (1980) 209, at 212 and 216: a people (or the greater part it) may accept or merely tolerate its regime, because it judges rebellion to be imprudent or uncertain of success, or because it is accustomed to it, or because it is personally loyal to its leaders.

<sup>66</sup> *Ibid.*, at 225.

fit is ‘radically apparent’.<sup>67</sup> In essence, the argument is that we are not able to make objective value judgements, are therefore not allowed to judge a foreign community, and are therefore – except in extreme cases – not allowed to intervene in the activities of a foreign state and infringe state sovereignty.

This line of reasoning faces two objections (leaving aside the fundamental objection that cultural relativism is unsound, which cannot be elaborated here<sup>68</sup>). First, even if we accepted the culturalist-relativist rationale of non-intervention, this would not actually shield state sovereignty. A cultural relativist-based prohibition on intervention does not commit us to relying on state sovereignty as a fundamental norm; on the contrary: in the cultural relativists’ framework, non-intervention does not in the first place protect state sovereignty, but the cultural self-determination of a people within its state. So even in the cultural relativist framework, the reconceptualization of state sovereignty does not weaken the prohibition of intervention, but merely underscores its *telos*, which is the protection of the self-determination of peoples, not the states.

Secondly, cultural relativism leads to absurd results when applied to the question of non-intervention. In order not to be self-defeating, cultural relativists would have to refuse to judge communities whose culture is aggressive and interventionist, because that would constitute an evaluation on the basis of norms external to their culture. This refusal would, however, render the norm of non-intervention inoperable and unenforceable.<sup>69</sup> So non-intervention, the core legal incident of external state sovereignty, cannot be reasonably founded in cultural relativism.

Inversely, just as cultural relativism does not really support non-interventionism, the non-relativist worldview does not inevitably lead to interventionism. There is a huge difference between pronouncing universalist value judgements, and even underscoring them by political activities short of coercive intervention such as conditioned development aid, and using universalist value judgements as a justification or pretext for intervention with economic or even military means. This position is supported by the humanized conception of sovereignty, which does not give up state sovereignty, but merely puts it in its place.

### ***B The Doctrinal Objection: Incompatibility with the Juridical Equality of States***

The idea of conditioned sovereignty might be irreconcilable with the juridical equality of states. In fact, it invariably leads to distinctions between states. There are states in which human rights are fully respected, and others in which they are less respected or even massively violated. Allowing this distinction to become legally relevant facially runs counter to the principle of juridical equality of states. Equality is a corollary of state sovereignty as traditionally conceived, because the idea that states are independent from each other and directly subject to international law, but not to the laws of

<sup>67</sup> *Ibid.*, at 214.

<sup>68</sup> See for a good discussion S. Caney, *Justice Beyond Borders* (2006), at 25–62.

<sup>69</sup> Rodin, *supra* note 18, at 154.



another state, logically entails an equal status of states in international law: '[e]quality, too, is nothing but a synonym for sovereignty, pointing to a particular aspect of sovereignty. If all nations have supreme authority within their territories, none can be subordinated to any other in the exercise of that authority. ... International law is law among coordinated, not subordinated, entities. Nations are subordinated to international law, but not to one another; that is to say, they are equal.'<sup>70</sup>

However, there is no doctrinal contradiction between sovereignty conditioned on humanity and sovereign equality, because equality in law is no abstract and absolute claim. Justice requires *proportional equality* (*suum cuique*, not *idem cuique*). This means that a formally differentiated treatment of states, notably within concrete legal regimes, is permissible if and as long as this is necessary and adequate to fulfil objectives enshrined in international law.<sup>71</sup> Put differently, the states' entitlement to formally legal treatment may be curtailed by countervailing considerations and must be balanced against other concerns.<sup>72</sup>

A state's respect for the most basic human rights is a legitimate criterion for legal distinctions between states which would leave proportionate equality intact. Although the permissibility of distinctions ultimately depends on the context in which that distinction is made, there is a basic presumption that criteria embedded in the international legal order generally constitute legitimate grounds of distinction for most purposes. It is therefore in order to evaluate and distinguish states according to criteria documented in the UN System, such as observance of the prohibition on the use of force, respect for the rule of law, and human rights.<sup>73</sup>

A concern for humanity (i.e. for human rights, interests, needs, and security) is fully engrained in international human rights law and in other parts of international law, and may therefore outweigh the interest in observing formal equality. It would therefore be in principle in line with the right to sovereign equality to condition voting rights, e.g. in the UN General Assembly, on respect for human rights.<sup>74</sup>

<sup>70</sup> H.J. Morgenthau, *Politics among Nations, The Struggle for Power and Peace* (ed. Kenneth W. Thompson and David Clinton, 7th edn, 2005 (orig. 1948)), at 320.

<sup>71</sup> Peters, 'The Growth of International Law between Globalization and Great Power', 8 *Austrian Rev Int'l and European L* (2003) 109, at 130–135. See for a powerful argument that the constitutionalization of international law inevitably requires the reconsideration of the principle of state equality Preuss, 'Equality of States – Its Meaning in a Constitutionalized Global Order', 9 *Chicago J Int'l L* (2008) 17.

<sup>72</sup> Cf. P.H. Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law* (1964), at 112.

<sup>73</sup> Cf. Feinstein and Slaughter, 'A Duty to Prevent', 83(1) *Foreign Affairs* 136. For example, a central concern of the international order is security and effective peace-keeping. World peace cannot be guaranteed without the support of the most powerful states. This reasoning is a valid starting point for a defence of the veto power in the Security Council (which would additionally have to be shown to be adequate and proportionate in relation to the objective of peace-keeping).

<sup>74</sup> Such a measure could be based on an extensive reading of Art. 5 of the UN Charter allowing for the suspension of the exercise of the GA rights of member states against which preventive or enforcement action has been taken.

Distinguishing states in function of their human rights performance does not imply the creation of fixed categories of states, as in 19th century doctrine.<sup>75</sup> All states have the presumptive right to formally equal treatment, which can, in concrete legal contexts, be relativized on account of their committing or tolerating massive human rights violations and mass atrocities.

Evidently, a universal consensus on the concrete meaning of ‘absence of massive human rights violations and mass atrocities’ would first have to be built. It would have to start off from acknowledged international legal standards and would have to be far more exacting than a rough distinction between ‘liberal’ and ‘illiberal’ states which lends itself to vulgarization (such as the rogue state doctrine) and abuse.

### ***C The Functional Objection: Only Foundational State Sovereignty can Fulfil Indispensable Tasks***

It might be objected that only a foundational state sovereignty, i.e. state sovereignty independent of and not merely contingent on respect for basic human rights is, in its internal and external dimension, able to fulfil the indispensable functions mentioned above, such as guaranteeing order, allocating competences, and enabling democratic processes.<sup>76</sup>

However, the claim that state sovereignty is necessary and sufficient to fulfil these functions is problematic. First, it seems as if other legal concepts, which have historically been associated with state sovereignty, but which today have an independent standing, such as the state’s legal personality or non-intervention, provide a sufficient legal basis for some of the functions mentioned above, e.g. the allocation of competences and responsibility. Secondly, the assumption that democracy is only possible within the confines of a state is questionable.<sup>77</sup> Thirdly, the factual question whether states – under conditions of globalization and European integration – actually have the full power to perform these tasks by themselves must probably be answered in the negative. Other entities may – at least in a complementary fashion – take over these jobs, if only in part. If the defence of sovereignty depends on the state being sufficient for the fulfilment of the various functions, then that defence is flawed, given contemporary global realities.<sup>78</sup>

<sup>75</sup> Notoriously, James Lorimer divided humanity into three concentric zones: ‘civilised humanity’, ‘barbarous humanity’, and ‘savage humanity’, to which three different types of recognition could be awarded, ranging from ‘plenary political recognition’ through ‘partial political recognition’ to ‘mere human recognition’. ‘Barbarous communities’ in ‘political nonage’ did not have a right to recognition, but merely a right to guardianship. Lorimer also assumed that some non-European states were imbecile or criminal states and therefore unrecognizable: J. Lorimer, *The Institutes of the Law of Nations* (1883), i, at 101–103 and 156–162; see also J.L. Klüber, *Europäisches Völkerrecht* (2nd edn, 1851), at 28 and 41–42; A.W. Heffter, *Das europäische Völkerrecht der Gegenwart* (7th edn, 1881), at 111; H. Wheaton, *Elements of International Law* (1878), ch. 18, at 44; J. Westlake, *International Law: Part I, Peace* (1910), at 21 and 321; L.F.L. Oppenheim, *International Law. A Treatise* (2nd edn, 1912), i, at 107–115.

<sup>76</sup> See above section 1.

<sup>77</sup> See A. Peters, ‘Dual Democracy’, ch. 6 in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (forthcoming 2009). See on global popular sovereignty Benhabib, ‘Crépuscule de la souveraineté ou émergence de normes cosmopolites?’, in M. Wieviorka (ed.), *Les sciences sociales en mutation* (2007), at 183.

<sup>78</sup> Jones, *supra* note 29, at 218 and 226.

One core function of sovereignty deserves special discussion: the function of securing justice. Thomas Nagel has argued that justice can be achieved only within a sovereign state, because it requires government as an 'enabling condition'. In fact, the realization of justice (however conceptualized) depends on the coordinated conduct of large numbers of people. According to Nagel, this cannot be achieved without law backed up by a monopoly of force. The collective self-interest cannot be realized unless each person has the assurance that others will conform if he does. This insurance, Nagel points out, requires an incentive provided by the sovereign. It cannot be provided by voluntary conventions supported solely by the mutual recognition of a common interest. Consequently, a 'collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government. . . . Without the enabling condition of sovereignty to confer stability on just institutions, individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression.'<sup>79</sup>

Nagel's argument is concerned solely with the power aspect of internal state sovereignty which is manifest in the state's monopoly on the legal use of force. However, modern governments increasingly refrain from using traditional modes of governance based on hierarchy, courts, and the police. Instead, they conclude agreements with the private sector and encourage self-regulation, and privatized conflict resolution and law enforcement.<sup>80</sup> Most importantly, even if we concur with Nagel that a 'back up' in the form of some legitimate real power is needed in order to incite fair collective behaviour, this does not necessarily imply that state sovereignty is self-sustaining and thus constitutes the deep structure of a legal and political system. On the contrary, internal sovereignty, which is a legitimacy-loaded concept, is ultimately vested in the citizens, who elect and dismiss their government ('popular sovereignty'). The 'sovereign government' that Nagel has in mind is only the agent, not the principal. The assumption that sovereign government is needed to guarantee practical justice is perfectly compatible with the claim that sovereignty is normatively derived from humanity.

### ***D The Consequentialist Objection: Promotion of Coercive Intervention and Empire***

Opponents of my reconceptualization of state sovereignty might make two related consequentialist arguments.

The first objection might be that – generally speaking – the prioritizing of respect for human rights is likely to be abused by powerful states as a welcome pretext for interventions.<sup>81</sup> This argument is far from speculative, but can point to historical

<sup>79</sup> Nagel, 'The Problem of Global Justice', 33 *Philosophy and Public Affairs* (2005) 113, at 116.

<sup>80</sup> A vast body of research is struggling with the question whether the government's renouncement of the exercise of traditional sovereignty only functions because it takes place in the shadow of hierarchy and of state law: see A. Peters, L. Koechlin, T. Förster, and G. Fenner (eds), *Non-State Actors as Standard-Setters* (forthcoming 2009).

<sup>81</sup> Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599, at 624. See also Alvarez, 'The Schizophrenias of R2P', 2373 *ASIL Newsletter* (summer 2007), 1.

experience. Since the 19th century, self-interested interventionism, occupation, and subjugation have been frequently camouflaged by proclaimed humanitarian motives, which were in reality at best secondary.

Secondly, and building on the first assertion, it is claimed that the danger of abuse is multiplied by the current constellation of global politics, in which the USA is the sole remaining superpower. Notably Jean Cohen has argued that giving up state sovereignty is ‘in the current context . . . abstract and utopian in the worst sense’. The state-sovereignty-based model of international law ‘appears to be ceding . . . to an imperial project of dominance and indirect control of key “peripheries”’. Its logical consequence is – according to Cohen – ‘to play into the imperialists’ hands. Why? There is in fact no cosmopolitan order in place nor is there one in the immediate horizon. There are instead two contending legal orders, each of which is in transition: International law and imperial right. Undermining the former gives free reign to the latter.’<sup>82</sup>

This second claim must be assessed on the facts. Although the USA is the world’s biggest economy with by far the largest defence budget, that nation cannot afford world-wide interventionism for numerous reasons. First, there are financial restraints. Already the military presence in Afghanistan and Iraq is becoming too expensive.<sup>83</sup> Secondly, the danger of regional atomic contamination with unforeseeable global effects will be taken into account. Thirdly, the political and psychological infrastructure of a liberal democracy is genuinely anti-interventionist.<sup>84</sup> The United States’ military superiority cannot be fully exploited because a political consensus on costly military action abroad is not easy to reach. Notably the lives of soldiers can only to a limited extent be sacrificed on foreign battlefields, if this must be justified before the electorate.

Fourthly and most importantly, the existing web of global linkages precludes interventionism and empire. Issues such as terrorism and drugs, climate change, migration, financial stability, or infectious diseases can be reasonably dealt with only through institutionalized global cooperation. Joseph Nye has convincingly explained ‘why the world’s only Superpower can’t go it alone’,<sup>85</sup> by pointing to the complex interdependencies which force America to cooperate with other actors in order to tackle global problems. The era of globalization is post-imperial.<sup>86</sup>

<sup>82</sup> Cohen, *supra* note 64, at 491.

<sup>83</sup> The Congressional Budget Office (CBO) projected that additional war costs for the next 10 years from financial year (FY) 2009 to FY 2018 inclusive could range from \$440 billion, if troop levels fell to 30,000 by 2010 to \$865 billion, if troop levels fell to 75,000 by about 2013. Under these CBO projections, funding for Iraq, Afghanistan, and the Global War On Terror could total about \$1.3 trillion or about \$1.7 trillion for FY 2001 to FY 2018. See Congressional Research Service, CRS Report RL 33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations since 9/11* (updated 15 Oct. 2008), available at: <http://www.fas.org/sgp/crs/natsec/RL33110.pdf> (visited on 23 Dec. 2008).

<sup>84</sup> Vagts, ‘Hegemonic International Law’, 95 *AJIL* (2001) 843, at 845.

<sup>85</sup> J.S. Nye, *The Paradox of American Power: Why the World’s only Superpower can’t go it alone* (2002), at 40: ‘The paradox of American power at the end of this millennium is that it is too great to be challenged by any other state, yet not great enough to solve problems such as global terrorism and nuclear proliferation’ (quoting Joffe, ‘America the Inescapable’, *New York Times [Sunday]Magazine*, 8 June 1997, at 38).

<sup>86</sup> M. Hardt and A. Negri, *Empire* (2000); E. Todd, *Après l’Empire: Essai sur la décomposition du système américain* (2002).

These observations have been challenged with the argument that the USA need not act unilaterally, but may also instrumentalize the international institutions. This is only partly correct. Notably with regard to Iraq, the USA was in 2003 *not* able to use the United Nations, although it tried hard to win the Security Council's authorization for military intervention.

All things considered, the warnings against empire must be taken seriously. Empirical arguments must inform principled arguments, because abstract reasoning applied to the wrong circumstances can engender pernicious results. Some form of external state sovereignty is indispensable to prevent self-interested, partial, and even abusive interventionism. However, this does not warrant a sovereignty fetish. If state sovereignty is properly relegated to its place, other international legal principles will protect states and thereby their inhabitants from intervention. This will be discussed in the next sections.

## 6 Humanized Sovereignty and Humanitarian Intervention

What are the consequences of a humanized understanding of state sovereignty for the international rules on intervention? The humanization of sovereignty seems to open the way for humanitarian interventions, and this is a risky path. By humanitarian interventions, I understand coercive, notably military action across state borders by a state or a group of states aimed at preventing or ending widespread and grave violations of human rights of individuals other than its own citizens without the permission of the state in whose territory force is applied.<sup>87</sup>

### *A Right or Obligation to Intervene?*

The principle of non-intervention is conventionally considered as the corollary of external state sovereignty, conceived as state autonomy. However, both principles have slightly different rationales. State sovereignty was initially ascribed to the holder of factual political power, and the legal principle still incorporates elements of effectiveness.<sup>88</sup> Therefore, sovereignty inevitably has an extra-legal or 'untamed' face. In contrast, the rule of non-intervention has its origin in the society of states. It arises from their coexistence and provides for their continued existence.<sup>89</sup> So non-intervention is constitutive for the international legal order, while sovereignty is not. The prior imperative is therefore non-intervention. The crucial difference between relying on state sovereignty and – as proposed here – applying the principle of non-intervention is that state sovereignty, for the reasons just stated, tends 'to swallow up international law',<sup>90</sup> while non-intervention does not have this tendency. But even if non-intervention

<sup>87</sup> J.L. Holzgrefe, 'The Humanitarian Intervention Debate' in Keohane and Holzgrefe (eds), *supra* note 16, at 15, 18.

<sup>88</sup> See *supra* section 1.

<sup>89</sup> R.J. Vincent, *Nonintervention and International Order* (1974), at 333. See for a similar conclusion, based on the insight that the idea of state autonomy is a misleading analogy to individual autonomy, Graham, 'The Justice of Intervention', 13 *Rev Int'l Studies* (1987) 133, at 134–135: sovereignty can be defined only in terms of the right to non-intervention, not the other way round.

<sup>90</sup> Vincent, *supra* note 89, at 333.

occupies a slightly different doctrinal and symbolical space from sovereignty, its normative foundation does not really differ from the normative foundation of sovereignty. Because the international system does not exist for its own sake, the prohibition on intervention is, just like sovereignty, ultimately grounded in the well-being of natural persons. Non-intervention protects, first, the inhabitants of potential victim-states (via their states). Additionally and equally importantly, it secures international stability, including the stability of state boundaries, as a whole. Any single intervention, even an illegal one, can be rightly or wrongly referred to as a precedent, and may thereby encourage abusive interventions elsewhere. Therefore, the obligation not to intervene coercively is owed both to individual states (which represent their population), and to the international community as a whole, which includes human beings everywhere. The loosening or abandonment of the prohibition on intervention would lead to a global instability of living conditions and to massive human suffering through interventionist and imperialist wars. Because of its pernicious consequences, non-intervention must be upheld as the rule, while admitting exceptions to that rule.

On the premise that the prohibition on intervention is normatively derived from concerns for humanity, the *Lotus* principle does not apply. The starting point of the analysis is not the presumption that states enjoy freedom of action, unless this is prohibited by a norm of international law.<sup>91</sup> States are not analogous to individual persons in the state of nature,<sup>92</sup> and state sovereignty is no inalienable, natural, or fundamental right.<sup>93</sup> If state sovereignty and non-intervention are valuable, they are so for very different reasons from the individual freedom of a natural person.<sup>94</sup>

<sup>91</sup> But see PCIJ, *The SS Lotus (France v. Turkey)*, PCIJ Reports Ser. A No. 10 (1927).

<sup>92</sup> The implicit endorsement of this domestic analogy still pervades contemporary international legal thought. It has its origins in the discipline of *ius natuerae et gentium*, which viewed international law as the law of nature, applied to states. See on the analogy between states and individuals as one of the most decisive features of the teachings of Hugo Grotius seminally Lauterpacht, 'The Grotian Tradition of International Law', first published in 23 *British Yrbk Int'l L* (1946) 1, here as published in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1970–1978), ii, at 307, e.g. at 336. See for a nuanced treatment C. Wolff, *Ius Gentium Methodo Scientifica pertractorum* (trans. J.H. Drake, 1764), ii, in J.B. Scott (ed.), *The Classics of International Law* (1934), preface (at 5 of the translation) and paras 2–3 (at 9); E. de Vattel, *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires de Nations et des Souverains* (1758), i, in Scott (ed.), *supra*, *passim* (e.g. préliminaires, para. 18; bk II, ch. III, at 285; J.-J. Rousseau, *Du contrat social* (1954 (orig. 1762)), livre I, ch. VII, at 245: 'à l'égard de l'étranger, il [the state] devient un être simple, un individu'. Draft of Abbé Grégoire for a declaration of the rights of peoples of 23 Apr. 1793: '2. Les peuples sont respectivement indépendants et souverains, quel que soit le nombre d'individus qui les composent et l'étendue du territoire qu'ils occupent. Cette souveraineté est inaliénable. 3. Un peuple doit agir à l'égard des autres comme il désire qu'on agisse à son égard; ce qu'un homme doit à un homme, un peuple le doit aux autres', in W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations* (1988), ii, at 660 (emphasis added). See in later scholarship the analogical arguments in G.F. de Martens, *Précis du droit des gens moderne de l'Europe* (2nd edn, 1864), i, at 37, 40–41; N. Politis, *The New Aspects of International Law* (1928), at 8–9.

<sup>93</sup> See seminally on the 'natural rights' of states Wolff, *supra* note 92, at para. 255. Wolff however realized that, 'since, indeed, nations are moral persons and therefore only subject to certain rights and duties, . . . their nature and essence undoubtedly differ very much from the nature and essence of individual men as physical persons': preface, at 5.

<sup>94</sup> F. Tesón, *A Philosophy of International Law* (1998), at 40, 42; C. Beitz, *Political Theory and International Relations* (1979), at 81.

Therefore, the starting point of analysis must be the needs of human beings, notably of potential victims of mass atrocities. Therefore, the examination of the rules on intervention should not begin, as in the traditional public international law perspective, with an eventual exceptional right of states to intervene in extreme cases, but with the need of human beings for help. The relevant question is therefore not the right to intervene, but that of an eventual, though exceptional, *obligation* of third states or (organized) groups of states to intervene in certain extreme situations, notably in the face of impending mass atrocities.

## ***B Suspension of Sovereignty and Residual Responsibility in a System of Multilevel Governance***

The ICISS report paves the way for a requirement of humanitarian intervention in two doctrinal steps. First, the report explicitly conditions the enjoyment of external state sovereignty on the absence of extreme, conscience-shocking cases of mass atrocities in a state's territory. To the extent that the state's obligation to prevent and combat genocide or crimes against humanity is not fulfilled, the corollary of external state sovereignty, non-intervention, is suspended or at least diminished.

Secondly, the ICISS assumes a residual responsibility to protect which falls on the international community.<sup>95</sup> When the state is unable or unwilling to grant the most basic protection against mass atrocities, the international community's fall-back duty to protect is triggered.<sup>96</sup> This obligation is merely postulated in the ICISS report. It needs to be justified by an additional set of arguments. The first missing link is the concept of international community, and the idea that international legal obligations may not only arise between states, but may be incumbent on the international community (and be owed to that community).<sup>97</sup> The second and to some extent competing missing link seems to be the concept of *multilevel governance*. This concept assumes that the totality of governance activities is dispersed on various levels, ranging from local through national and regional supra-national units to the global level. The idea is that powers and competences are allocated to the various levels in a flexible manner, depending on considerations of effectiveness, subsidiarity, culture, and so on. Under this premise, it is logical that the responsibility to protect is naturally incumbent on the higher level of governance, once the national level has failed. A third and again different explanation of the relationship between the two responsibilities is the idea of the social contract: R2P could be a kind of social contract between the state and the international community as a whole. The state commits itself to protect its population

<sup>95</sup> See in earlier scholarship on the responsibility of the international community e.g. Henkin, 'That "s" Word: Sovereignty, and Globalization, and Human Rights, et cetera', 68 *Fordham L Rev* (1999) 1, at 5–6: 'If sovereignty has imploded sufficiently, so that the human community feels responsible for what goes on inside territories, we have to find ways of addressing problems occurring in other states, ways that are legally, morally, and politically acceptable'.

<sup>96</sup> ICISS, *supra* note 33, esp. at paras 2.29–2.33 and 4.1.

<sup>97</sup> This 'communitarian' view of international law is of course not new, and there are still numerous problems associated with it, for instance the question how the international community can be construed as a legally relevant actor to whom rights and responsibilities can be attributed.

in exchange for respect of its sovereignty by the community.<sup>98</sup> Finally, an additional conceptual source of the residual responsibility of the international community is the emerging international legal principle of solidarity.<sup>99</sup> This principle is apt to bolster populations' claims for humanitarian assistance by other states.

The ideas of a defeasibility of sovereignty and of a fallback international responsibility, linked together by the concepts of multilevel governance and solidarity, taken together lead to the conclusion that under grave circumstances, namely war crimes, genocide, and crimes against humanity, the intervention of outsiders acting on behalf of the international community does not infringe state sovereignty. On the contrary, the international community's residual responsibility to protect even *requires* intervention.<sup>100</sup> The follow-up questions are under which (narrow) conditions and under observance of which limitations an intervention may (or rather must) take place, and – very importantly – who may or must authorize it.

### **C Interventions not Authorized by the Security Council**

Clearly, current international law does *not* impose an obligation to intervene on individual states. In contrast to legal scholars, quite a few moral philosophers seem to defend a *moral* duty of individual states to intervene in third states where massive human rights violations occur or are imminent.<sup>101</sup> The existence of a moral obligation to furnish humanitarian aid, in the extreme case also with military means, potentially has consequences for the realm of law and justice as well. One consequence might be that such a humanitarian intervention would be 'illegal, yet legitimate', as the expert report on the Kosovo intervention concluded.<sup>102</sup> A more audacious legal construct would be to consider the moral obligation as extraordinary permission to deviate from the legal rule of non-intervention. The moral obligation would then serve as a legally relevant defence to the violation of the legal prohibition on intervention. Defences grounded in morality are generally accepted, though in varying doctrinal terms, in the criminal legal systems of the world, and are therefore apt to constitute a general principle of law in terms of Article 38(1)(c) of the ICJ Statute. The legal consequence of this reading of the juridical framework would be legal, not merely moral, permission for states to intervene in extraordinary cases of humanitarian catastrophes, under specified formal and material conditions.

<sup>98</sup> Szurek, 'La responsabilité de protéger, nature de l'obligation et responsabilité internationale', in *Société française* (ed.), *supra* note 33, at 91, 134.

<sup>99</sup> Seminally Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations', in R. St. J. MacDonald and D.M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005), at 775.

<sup>100</sup> ICISS, *supra* note 33, at para. 2.31.

<sup>101</sup> See for a 'default duty' of states to take a fair share in preventing genocide in other states as a limitation of their own sovereignty to stand idly, Shue, 'Limiting Sovereignty', in J. Welsh (ed.), *Humanitarian Intervention and International Relations* (2004), at 11. See also Schaber, 'Humanitäre Intervention als moralische Pflicht', 92 *Archiv für Rechts- und Sozialphilosophie* (2006) 295; G. Meggle (ed.), *Ethics of Humanitarian Interventions* (2004).

<sup>102</sup> The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned* (2000), at 186.



Potential legal conditions for such extraordinary permission to intervene have been amply discussed in the aftermath of the Kosovo intervention, and were to my mind best formulated by the High-level Panel on Threats, Challenge, and Change.<sup>103</sup> Many observers, including the Expert Panel, implicitly or explicitly draw on the traditional criteria of the Just War theory, which were *auctoritas*, *justa causa*, and *recta intentio*.<sup>104</sup> The modern version of the question of *auctoritas* is whether humanitarian wars may only be authorized by the Security Council (I will come back to this below). The modern version of the *justa causa* is that only genocide, war crimes, and crimes against humanity (including ‘ethnic cleansing’) may be a sufficiently serious threat justifying military intervention. The ICISS report explicitly excludes human rights violations falling short of outright killing or ethnic cleansing, for example systematic racial discrimination, systematic imprisonments, or the violent overthrow of a democratic regime, as a ground for military intervention.<sup>105</sup> The modern version of the *recta intention* requirement is that the primary purpose of the proposed military action must be to halt or avert the threat, and that only disinterested states may engage in humanitarian action. An additional, in itself complex criterion has been established in the modern debate, which may be roughly called proportionality. This new threshold requires that the employed means must stand in a reasonable relation to the ends, that the prospects of success must be estimated beforehand, and that the consequences of action must be compared to and balanced against those of inaction.

However, permission to intervene on humanitarian grounds, even under those very narrow conditions, is not granted in international law as it stands.<sup>106</sup> State practice and *opinio iuris* do not support the claims scholars have made in favour of a rule on humanitarian intervention without a Security Council mandate, and the law has not evolved in the direction of the experts’ proposals, however morally desirable such a rule may be. The cautious endorsement of the responsibility to protect by international actors barely affected the law on unilateral interventions, because R2P was quickly limited to UN-authorized action, as will be showed in the next section.

## D Interventions Authorized by the Security Council

The ICISS was ambiguous on the question of *auctoritas*. Both the High Level Panel on Threats, Challenges, and Change, and the heads of states at the World Summit of 2005 made clear that the international community may only act through the Security Council.<sup>107</sup> The Security Council is the sole permanent representative of the international

<sup>103</sup> High Level Panel, *supra* note 37, at paras 207–209; see also Kälin, ‘Humanitäre Intervention: Legitimation durch Verfahren? Zehn Thesen zur Kosovo-Krise’, 10 *SZIER* (2000) 159.

<sup>104</sup> See Peters and Peter, ‘Lehren vom “gerechten Krieg” aus völkerrechtlicher Sicht’, in G. Kreis (ed.), *Der “gerechte Krieg”* (2006), at 43.

<sup>105</sup> ICISS, *supra* note 33, at paras 4.25–4.26.

<sup>106</sup> S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), esp. at 226.

<sup>107</sup> High Level Panel, *supra* note 37, at para. 203; Resolution adopted by the General Assembly, World Summit Outcome, *supra* note 38, at para. 139; ICISS, *supra* note 33, at paras 6.27–6.28 and 6.37–6.39.

community in matters of international peace and security. There is – unlike in the case of unilateral state action – no risk of misconceiving ‘rights’ of the Security Council as fundamental rights. Because the Council is an agency established to perform tasks in the public interest, the first question is that of its competences (what may it do?), and the second question is that of its obligations (what must it do?).

Since the 1990s, it has been uncontroversial that the Security Council may authorize humanitarian military action as a matter of international law. At that time, the Security Council began to qualify gross human rights violations as a threat to the peace in terms of Article 39 of the UN Charter.<sup>108</sup> UN Member States have renounced any right to invoke protection from intervention with regard to threats to the peace (Article 2(7) of the UN Charter). The Security Council may also authorize preventive coercive action in order to forestall imminent human rights violations.<sup>109</sup>

The first remaining controversy in that context is whether the Security Council enjoys unfettered discretion in qualifying factual situations, e.g. merely slight human rights problems in a country, fraudulent elections or the like, as ‘a threat to the peace’. The traditional reading of the UN Charter was that the Security Council was the quintessential political organ of the organization, and had full discretionary powers without international legal limits. This traditional view was defensible with the observation that pernicious consequences need not be feared. The danger of excessive or even abusive UN interventionism seemed nil, because in the real world the permanent members’ antagonist interests and their right to veto prevented such interventions. However, in a constitutionalizing international system, the traditional view of Security Council actions in a basically law-free realm is no longer tenable. The rule of law also governs decisions of the Security Council. Recent state practice and case law on UN sanctions which risk infringing human rights have made clear that the Security Council is bound at least by customary human rights law and by the ‘Principles’ of the Charter (*cf.* Article 24(2) of the UN Charter). Both the High-level Panel on Threats, Challenge, and Change and the Secretary General’s report were right to formulate the narrow criteria for humanitarian military interventions not only with a view to unilateral action, but also to imposing them also or even primarily on Security Council-led humanitarian actions.<sup>110</sup>

The second controversial question is that of the Security Council’s *duty* to intervene. This question is very salient, because the real problem is not that the United Nations would intervene too often, but that the Security Council has abstained from authorizing robust military activities even in situations such as Ruanda or Darfur, which fulfil the narrow criteria of admissible humanitarian interventions, as sketched out above. Again, this duty could be (only) a moral one or (even) a legal obligation to take action.

<sup>108</sup> Since SC Res. 688 (1991) – Iraq; SC Res. 794 (1992) – Somalia.

<sup>109</sup> Peters and Grubenmann, ‘Diplomatie préventive, prévention des conflits et réforme des Nations Unies’, in J. Cardona Llorens (ed.), *La ONU y el mantenimiento de la paz en el siglo XXI: Entre la adaptación y la reforma de la Carta* (2008), at 29, 51–53.

<sup>110</sup> High Level Panel, *supra* note 37, at paras 207–209; UN Secretary General, ‘In larger freedom’, *supra* note 36, at para. 126.

The Secretary General stated in his millennium report that ‘surely no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a *moral duty* to act on behalf of the international community.’<sup>111</sup>

The ICISS report goes in the same direction, and even further into the realm of the law. The report’s innovative element is its implication that the Security Council is not only authorized, but – if the circumstances so warrant – morally or even *legally* obliged to act. Although the term ‘responsibility’ has the misleading connotation of secondary norms, it clearly refers to the primary level of international obligations. The responsibility to protect is an obligation to protect, which is breached by inaction, omissions, or by inadequate responses.

We have seen that this obligation to protect is an emerging international legal norm the exact scope of which however still needs concretization. The legal consequences of an eventual full maturation of R2P into hard law would be very complex.<sup>112</sup> Non-fulfilment of this obligation would be a breach of international law apt to engender the international legal responsibility (in the technical sense of the term) of those international legal subjects to which the breach is attributable. Illegal inaction would have to be, depending on the circumstances, attributed to the territorial state, and/or to neighbouring third states which are in a position to help, and/or to the United Nations as a legal subject and as the only clearly visible representative of the international community. Circumstances excluding legal responsibility, such as *force majeure* in a failed state, would have to be considered. The question of the collective nature of the obligation to protect and of an ensuing joint responsibility would arise.

A hard legal obligation of the international community, acting through the Security Council, to protect populations threatened by genocide or by crimes against humanity would especially fall on the permanent members of the Security Council, whose privilege within this body is in a constitutionalized order only justifiable with a view to those members’ special military and economic capabilities. The veto power is thus intrinsically correlated with a special responsibility. The endorsement of R2P as a legal principle fully thought through means that a permanent member’s exercise of the veto power in an R2P case would be illegal.

For sure, the traditional reading of the UN Charter could hardly accommodate the notion of an illegal veto or of a ‘blockage’ of the Security Council, because exactly this blocking option was part of the deliberate institutional design of the organization. Initially, the decisions or non-decisions of the Council, including the exercise of the veto, were considered to be in a law-free zone. But this zone has meanwhile been imbued with the rule of law. The rule of law not only prohibits arbitrary measures of

<sup>111</sup> The report continues: ‘The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished’: Secretary General’s millennium report ‘We the Peoples: The Role of the United Nations in the 21st century’, 27 Mar. 2000, UN Doc. A/54/2000), at para. 219 (emphasis added).

<sup>112</sup> See on this issue notably Szurek, *supra* note 98, at 91.

the Security Council as a whole, as stated above, but should also govern the Council members' votes approving of or preventing those measures. Under the rule of law, the exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member.

The procedural rule of Article 27(3) of the UN Charter which provides for unanimity of the five permanent members could be interpreted systemically, and take into account the responsibility to protect as a 'relevant rule of international law' in the sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). The systemic interpretation would lead to qualifying an illegal or abusive refusal to concur by a P5 either as legally irrelevant or as a mere abstention which, according to established practice, cannot prevent a positive decision of the Council. The legal irrelevance of an abusive veto also flows from the general principle that the United Nations may not invoke internal procedural problems to justify its breach of international law.<sup>113</sup> Besides, an illegal veto would trigger the relevant member state's international legal responsibility, the precise relationship of which to the organization's legal responsibility would still have to be defined. And because the obligation to protect is, as stated above, an obligation *erga omnes*, third states could at least invoke this illegality under Article 48(1)(b) of the ILC Articles. The Security Council's obligation to intervene, flowing from the obligation to protect, would thus be to some extent enforceable, but only by addressing the Council's members individually.<sup>114</sup>

To conclude, the law as it stands does not allow humanitarian interventions outside the framework of the UN Charter, and the idea that sovereignty is derivative of humanity does not condone such a view. But the humanization of sovereignty has shifted the focus from rights of states to the needs of humans and has thus promoted a significant evolution of international law in the direction of a legal obligation of the Security Council to take humanitarian action. The legal strategies to enforce this nascent obligation still await elaboration. In terms of legal policy, such an obligation is recommendable precisely to obliterate the need for unilateral action and to forestall the pretexts.

## 7 Operative Legal Substitutes for Sovereignty

The reconceptualization of sovereignty conditions the correlated right to non-intervention on the absence of widespread and massive human rights violations. We have seen that this piercing of the state veil does not lead to general permission to intervene using military means in states on the ground that they do not respect human rights, because even proponents of the concept of R2P or of humanitarian interventions

<sup>113</sup> This general principle of international legal responsibility has so far been codified only for the special case of the failure to perform a treaty (*cf.* both Arts. 27 of VCLT 1969 and 1986).

<sup>114</sup> The fact that even grossly shocking inaction of the Security Council cannot be directly sanctioned, because the Council is merely an organ of the UN and not an international legal person which can be held liable and because no dispute settlement institution is available, furnishes an additional argument for the supporters of a legal permission of subsidiary unilateral humanitarian interventions.

formulate very narrow additional conditions for the use of military force. Moreover – and this will be discussed now – further international legal principles seriously restrain interventions.

### *A Self-determination*

One international legal principle which restrains foreign intervention is self-determination. Technically, the holders of this collective legal right are ‘peoples’.<sup>115</sup> Indirectly, the principle protects the states those people live in and, most importantly, it protects individuals. Self-determination can hardly be conceived as a right for the sake of collectives as such. The collectives are secondary, because it is impossible to identify them by abstract criteria (such as ethnicity, language, or political will), and to distinguish them in a principled way notably from minorities who enjoy only minority protection. International practice, which denies the status of a people, e.g., to the Kurds, is not consistent but opportunistic. Moreover, the systematic position of the right to self-determination within the first Article of the Human Rights Covenants demonstrates that the rationale of this right is the individual’s human rights to flourish in a community, to associate, and to act collectively.<sup>116</sup> Self-determination does not protect a people’s right to choose, but the right of natural, physical persons (who form part of this community and act through representatives) to determine their fate in and through the community. For these two reasons, the international legal right to self-determination, even if it is technically a collective right, is compatible with the normative priority of individual human rights.

But this international legal principle would be insufficient for the protection of all peoples, and thereby of humans, against foreign interventions if it were conditioned on democratic self-rule, as is nowadays frequently argued. The argument is that political self-determination can happen only in a democratic society, where the group members’ political choices are free. And if a people freely decides in a formally democratic vote to abolish democracy, the citizens’ exercise of self-determination results in the destruction of political self-determination for future generations and is thus not sustainable. This observation could lead to the conclusion that the international legal principle of self-determination is intrinsically linked to democracy.

However, the international legal right to self-determination not only reserves a space for distinct political processes, but also preserves a particular cultural and historical heritage. The law as it stands encompasses both aspects (see common Article 1 of the UN Covenants: ‘political status’ and ‘cultural development’). The international principle should therefore still be understood to protect the capacity to choose a political system commensurate with one’s national culture, even if this results in an illiberal and authoritarian regime. Peoples and individuals not living in a democracy are protected by international law as well.

<sup>115</sup> Not only nations (the sum of the citizens of a state) and not only peoples under colonial domination, but also sub-groups within a multi-national state may qualify as a ‘people’.

<sup>116</sup> UN Commission on Human Rights, General Comment No. 12 (1984), at para. 1, available at: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument).

This ‘external’ dimension of self-determination is not prejudiced by the recent legal evolution of the ‘internal’ aspect of self-determination, which today appears to include a people’s entitlement to democratic government against its rulers.<sup>117</sup> The external shield of self-determination against foreign interference still plays for all peoples, for the same, consequentialist reasons which support the principle of non-intervention in such situations (see *supra*, section 6A). We need not rely on unqualified state sovereignty to reach this end.

## B Human Rights

Finally, international human rights protect persons against excesses occurring in the course of military or otherwise coercive interventions by foreign states. Any state intervening in another state is bound by the entire gamut of human rights prescriptions, including those rules which proscribe arbitrary killings and arbitrary detentions.

The doctrinal foundation lies in the universal human rights covenants, which oblige every state party to ‘respect and ensure to all individuals within its territory and subject to its jurisdiction’ the covenants’ human rights.<sup>118</sup> The ‘and’ is not a cumulative preposition, but an alternative one.<sup>119</sup> This means that states are bound to comply with the covenants’ provisions even when they exercise jurisdiction outside their territory.<sup>120</sup> This holds also for extraterritorial governmental activities short of occupation, because the object and purpose of the Human Rights Covenants is to secure the effective protection of human rights, and because a state’s potential to infringe human rights is not smaller when it acts outside its territory.

Human rights law is not eclipsed in the course of military conflicts, although international humanitarian law may additionally be applicable.<sup>121</sup> War is not *per se* a public emergency which would allow the intervening state to derogate from its human

<sup>117</sup> Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46, at 52 and 55; Eide, ‘In Search of Constructive Alternatives to Secession’, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), at 139, 147: ‘The right to self-determination above all is a right to democratic governance’.

<sup>118</sup> Art. 2(1) CCPR, 999 UNTS 171; see similarly Art. 2(1) of the Convention on the Rights of the Child, GAOR 44th Sess. Res., 8.166.

<sup>119</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 131, at paras 107–113 with references to the practice of the UNHRC; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, [2005] ICJ Rep 168, at para. 178.

<sup>120</sup> In contrast to the ICJ and the UNHRC, the ECHR has been more reluctant to apply the ECHR outside the territory of Convention States (notably App. No. 52207/99, *Bankovic and others v. Belgium and others*, 2001-XII ECtHR 333, at paras 59–80). However, the Court based its more recent decisions in which it declined jurisdiction for acts outside the territory of a Member State *not* on territorial grounds, but on other considerations: see App. No. 23276/04, *Saddam Hussein v. Albania and others*, decision on inadmissibility of 14 Mar. 2006: inadmissibility because governmental power transferred to Iraqi authorities; App. No. 78166/01, *Saramati v. France, Germany and Norway*, Grand chamber decision on admissibility of 2 May 2007 (inadmissibility based on incompatibility *ratione personae*). In App. No. 48787/99, *Ilaşcu v. Moldova and Russia*, judgment of 8 July 2004, ECtHR 2004-VII, at paras 310–331, the Court held Moldova responsible even in the absence of effective control over the Transdniestrian region within the state of Moldova.

<sup>121</sup> *Wall*, *supra* note 119, at para. 106.

rights obligations (*cf.* Article 4 of the ICCPR). In any case, no derogation is possible from core rights such as the right to life.

Overall, the legal principles just mentioned constitute legal obstacles to foreign interventions or condition the permissible methods. Although the mechanisms for enforcing these principles are weak, and largely depend on action taken by an attacked state, they have a normative power. Reconceptualizing state sovereignty as derived from and geared towards humanity does not imply unfettered interventionism.

## 8 Conclusions

The old concept of sovereignty has been thoroughly transformed by the much more recent concept of human rights. This transformation mirrors the shift in our perception of the nature of political order which the emergence of the rights discourse had caused: the traditional relationship between the state and the citizen is inverted, the basic rights of the citizens are regarded as primary, and the principal–agent relationship between sovereign and subject has been reversed.<sup>122</sup>

Secondly, and most importantly, the claim that state sovereignty has its source and *telos* in humanity, understood as the principle that the state must protect human rights, interests, needs, and security, eliminates the basic antinomy between human rights and state sovereignty. There is no incompatibility or clash. It is conceded that human rights need, in order to be effectively enjoyed, some form of power which guarantees them. It is also conceded that, because persons normally live in societies in which their interests may collide, human rights are inherently limited. The sovereign polity must spell out and operationalize these limits, but only so far as to secure the rights and needs of other persons or groups.<sup>123</sup> Therefore human rights remain foundational.

Thirdly, state sovereignty is not the first principle (*Letztbegründung*) of international law, but must and can be justified. Not only internal, but also external, state sovereignty implies responsibility for the protection of basic human rights and the government's accountability to humans. To some extent, the idea of a merely derivative and functional (in a way 'earmarked') sovereignty brings external sovereignty in line with internal sovereignty which likewise evolved from a primarily power-based into a legitimacy-impregnated concept.

Fourthly, humanity is no domestic affair, but an international concern. Because not only internal, but also external, state sovereignty is conditioned on the protection of human rights, interests, needs, and security, no state can claim that its state sovereignty forbids cross-border concern for humanity: to make a sovereign claim is to declare oneself open to inspection in that regard.<sup>124</sup>

<sup>122</sup> Stephan, 'The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order', 70 *Colorado L Rev* (1999) 1555, at 1570; M. Loughlin, *Sword and Scales, An Examination of the Relationship between Law and Politics* (2000), at 202.

<sup>123</sup> Moreover, the task of guaranteeing and coordinating the exercise of rights is not necessarily incumbent upon the state. It has already been partly transferred to other, notably international, institutions.

<sup>124</sup> Jones, *supra* note 78, at 220.

Fifthly, the humanized concept of sovereignty leads to a reassessment of humanitarian intervention, all the while insisting that the prohibition on intervention must be upheld as the rule. The rule must stay in order to protect the self-determination and human rights of persons in a threatened state, and potentially all other populations which are endangered by the instability that would be caused by a general admission to intervene in other populations' affairs. When humanity, i.e. human needs, is taken as the doctrinal and systematic starting point of the legal argument, the focus is shifted from states' rights to states' obligations towards natural persons. The admission of a temporary defeasibility of state sovereignty, conceived as responsibility for humans, leads, in a system of multi-level governance and under the principle of solidarity, to a fall-back responsibility of the international community, acting through the Security Council. In the humanist perspective, the Council has the duty to authorize humanitarian action if the very narrow conditions of right cause, proper purpose, and proportionality are fulfilled. The exercise of the veto in such situations is in that perspective illegal or abusive.

Against the background that in 2008 still, millions of persons became victims of deadly violence committed within states which in most cases shielded themselves from outside interference by insisting on their sovereignty, the mostly implicit reconceptualization of the international legal status of state sovereignty in current doctrine and practice, as diagnosed and highlighted in this article, is welcome. It is in doctrinal terms not sufficient to acknowledge human rights protection as a legal limitation of sovereignty. It is my claim that sovereignty has already been relegated to the status of a second-order norm which is derived from and geared towards the protection of basic human rights, needs, interests, and security. When this doctrinal move has been completed, international law will be the 'individual-centered system'<sup>125</sup> which was predicted in the 1999 General Course.

<sup>125</sup> Tomuschat, *supra* note 1.