6-23-2004

State Sovereignty and Human Rights

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human rights & human welfare

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<u>working paper no. 21</u>

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Posted on 23 June 2004

http://www.du.edu/gsis/hrhw/working/2004/21-donnelly-2004.pdf

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STATE SOVEREIGNTY AND HUMAN RIGHTS
Jack Donnelly

Sovereignty and human rights typically are seen as fundamentally opposed: the rights of states pitted against the rights of individuals; 1648 (the Peace of Westphalia) versus 1948 (the Universal Declaration of Human Rights). Sovereignty entitles states to non-interference in their internal affairs. There would seem to be few more purely internal matters than how a state treats its own nationals on its own territory. But that is precisely the focus of internationally recognized human rights. International human rights obligations thus are regularly presented as

- assaulting (Mills 1998: 10; Clapham 1999: 533; Cardenas 2002: 57),
- challenging (Aceves 2002; Butenhoff 2003: 215-216),
- besieging (Weiss and Chopra 1995),
- undermining (Schwab and Pollis 2000: 214),
- busting (Lutz 1997: 652),
- weakening (Jacobsen and Lawson 1999),
- chipping away at (Kearns 2001: 522),
- compromising (Krasner 1999b: 125),
- contradicting (Forsythe 1989: 6)
- breaking down (Bettati 1996: 92),
- breaching (Lyons and Mayall 2003: 9),
- perforating (van Hoof 1998: 51), or
- eroding (Ayoob 2002: 93; Henkin 1999: 3-4; Lapidoth 1995)

state sovereignty -- which is portrayed as giving way (Aceves 2002: 265), even surrendering (Lauterpacht 1968 [1950]: 304-311), to higher human rights norms that "provide legal and moral grounds for disregarding the sovereign rights of States." (Shen 2000: 435) "Human rights have revolutionized the international system and international law." (Henkin 1995: 43-44)

I offer a substantially different reading. Sovereignty has been modestly transformed, rather than undermined or eroded, by human rights. The reshaping of sovereignty by human rights has left states today no less sovereign than they were fifty, a hundred, or three hundred and fifty years ago. Contemporary human rights constraints on the freedom of action of states are completely compatible with "full" "Westphalian" sovereignty. Rather than 1948

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challenging, let alone triumphing over, 1648,[1] the society of states has made space for human rights within the practices of state sovereignty.

1. SOVEREIGNTY

Confusion over the term sovereignty is a common lament. "No once meaningful word has become more misunderstood and misused."(Best 1995: 778; Compare James 1999: 457; Henkin 1999: 1; Brownlie 2003: 105-106; Crook 2001) At the core of most well established uses, however, is the idea of supreme authority. (Compare Philpott 2001: 16)

"Sovereign" comes from the Old French *soverain*, from the Latin *superanus*, from *super*, above. A sovereign is superior, supreme, or pre-eminent. The *Oxford English Dictionary* thus defines sovereign as "one who has supremacy or rank above, or authority over, others; a superior; a ruler, governor, lord, or master;" "the recognized supreme ruler of a people or country;" "of power, authority, etc.: supreme." Put more negatively, to be sovereign is to be subject to no higher authority. Alan James' account of sovereignty as constitutional independence (1986; 1999) nicely captures this central idea. Or, as I often put it in teaching, sovereignty means never having to say you are sorry.

International law replicates this ordinary understanding. "Sovereignty is supreme authority."(Jennings and Watts 1992: 122) "Sovereignty is the supreme power by which any State is governed."(Wheaton 1866: 31) "The sovereign is the person to whom the Nation has confided the supreme power and the duty of governing."(Vattel 1916 [1758]: Bk. II, Ch. IV) "Sovereignty. 1) Supreme dominion, authority, or rule. 2) The supreme political authority of an independent state. … Supremacy, the right to demand obedience." (*Black's Law Dictionary*, 7th edition, 1999) A sovereign state "is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law." (Steinberger 2000: 512)

My focus will be on external or international sovereignty, the rules by which sovereigns, actors who recognize no higher authority, interact. My focus is further limited to sovereignty practices of modern international society, not philosophical theories or the desirability of sovereignty. This section considers sovereignty in general. The following section examines the impact of human rights on state sovereignty (and vice versa).

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[1] "The Peace of Westphalia was not a clear break with the past: political entities with exclusive control over a well-defined territory existed well before the Peace, and feudal and universal institutions … continued well after it." (Krasner 1993: 235) For ease of exposition, however, I will accept the standard iconographic representation of Westphalia. My argument emphasizes contingency and variability in sovereignty practices. It would only be strengthened by emphasizing the "slow extruding" (Krasner 1993: 235) of modern sovereignty practices.

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A. *Authority, Capability, and Power*

Sovereignty is a matter of authority, the *right* to regulate or rule. It is often, however, confused with control over outcomes.

- "Current legal theory [holds] that countries are totally able to determine their own internal policies."(Brown and Alexander 1994) This is nonsense. Sovereignty is the right, not the ability, to determine one's policies. Like any right it may or may not be effectively enjoyed, infringed, violated, or ignored.

- "Sovereignty … has become … steadily less absolute. Even for a so-called superpower … internationalism is inescapable."(Howe 1995: 129) Unilateralism and internationalism, however, have nothing to do with sovereignty (supreme authority in one's own territory). They concern the costs and benefits of unilateral and collective action.

- "No sovereign state, and not all state sovereignties together, seem to be sovereign enough to solve the problems … [of] our human society at the end of the twentieth century."(Henkin 1999: 6) Sovereign authority, however, is no guarantee of the capability to solve any particular problem.

Sovereignty and control are subtly interconnected yet clearly distinguished. Raw power may over time become a source of authority. Authority usually is an important source of control. Conversely, if the link between authority and control is severed completely, authority may be undermined or lost. We can even say that most political power involves a complex combination of capabilities and authority, which mutually support and reinforce one another.

Nonetheless, "interdependence between phenomena does not make them one and the same."(Goldman 2001: 62) Capabilities and authority -- force and legitimacy -- are very different kinds or sources of power. Especially where they lie in different hands, we must avoid the pitfalls of both "legalism" (considering formal authority while ignoring the realities of power and control) and "realism" (considering raw, lawless power while ignoring the realities of right and authority).

Figure 1 presents a simple typology.

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Figure 1: Authority, Capabilities, and Sovereign Power

AUTHORITY

	Supreme	None
High	Effective Sovereign Rule	Domination
Low	Formal Sovereignty	(Material and Normative) Weakness

CAPABILITIES

Actors with supreme authority are, by definition, sovereign. If they also have low capabilities they are weak but formally sovereign. We must resist the temptation to say "merely" formally, though, because sovereignty is *essentially* formal, a matter of rights and authority. Effective control adds something else to, rather than perfects, sovereignty. Actors with no authority but high capabilities exercise domination, which is not imperfect sovereignty but a different type of rule.

B. The Sources of Sovereignty

Three aspects of the sovereignty practices of the modern society of states deserve special attention:

- The sources of sovereignty -- where does it come from?

- The subjects of sovereignty -- who holds it?

- The rights of sovereignty -- what does it give you?

The (objective) criteria of statehood specified in international legal manuals -- typically, a government that exercises control over a territory and a population and participates in international law -- are neither necessary nor sufficient conditions. Not all sovereign states

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meet these criteria: consider "failed" states. And some entities that do, most notably Taiwan, are universally considered not to be sovereign.

Sovereignty arises not from a pre-existing internal power or authority that imposes itself on other states but from the mutual recognition of exclusive jurisdictions.[2] Sovereigns are those whose sovereignty is recognized by (the society of) sovereign states. International recognition creates rather than acknowledges rights. Even where recognition is caused by the power of a state or its allies, it has an essential constitutive dimension. What Chayes and Chayes (1995) call "the new sovereignty," the right to participate fully in international law and politics, is another way of formulating the constitutive character of sovereignty. But this has *always* been an essential part of modern sovereignty practices.

When at Westphalia the parties agreed not to seek to impose a particular confession on one another, they created the resultant sovereign rights. The differences between the Gold Coast in 1950 and Ghana in 1960 were largely due to the (constitutive) granting of independence and its international recognition. The contrasting statuses of Slovenia and Kosovo or Georgia and Chechnya are more recent illustrations.

Or consider what Robert Jackson (1990) calls "quasi-states." These extremely weak states (located at the bottom left of Figure 1) exist not because of their own power (or the power of allies) but because they have been internationally recognized. The pejorative "quasi" suggests that something is fundamentally wrong with these states. Their sovereignty, however, is in no way defective. Quite the contrary, internationally recognized sovereignty is the principal power resource of these states and the elites that control them. (Clapham 1999)

In a world of power politics, the standard route to sovereignty is the capability to maintain one's independence, alone or with the help of allies. The existence of numerous "quasi-states" is evidence of a very different sovereignty regime, rooted in distinctive post-colonial conceptions of self-determination and sovereign equality. But the sovereignty of "Real-states" no less than that of "quasi-states" is constituted through mutual recognition within the society of states.

C. The Subjects of Sovereignty

Who are the subjects of sovereignty, the holders of supreme authority? States is the obvious answer today. But this need not be the case.

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[2] Recall that our topic here is external or international sovereignty. Internal sovereignty, by contrast, has, within modern Western history, rested on grounds that include divine donation, prescription, legitimate succession, and (most recently) the will of the people.

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Most sovereigns in early modern Europe were real flesh and blood rulers -- "Kings, and Persons of Soveraigne authority," as Hobbes put it in Chapter 13 of *Leviathan*, published just three years after Westphalia. These sovereigns recognized each other, not abstract territorial entities. For example, the first article of the Peace of Westphalia speaks of a peace "between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty, the House of Austria, and its Heirs, and Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of his said Christian Majesty, and all their Heirs and Successors."

Well into the Westphalian era "sovereignty meant proprietary kingship" in which the monarch "regarded and treated the state as the private patrimonial property of the reigning dynasty."(Teschke 2002: 9, 13; Compare van Creveld 1999: 170-175) Territory, rather than being a fixed and defining attribute of a polity, more or less came with the ruler. Sovereignty remained fundamentally dynastic (rather than territorial) well into the eighteenth century: consider the wars of the Spanish (1702-1713) and Austrian (1740-1748) successions. The Holy Alliance illustrates the persistence of the dynastic principle into the nineteenth century.

Modern dynastic and territorial sovereignty share a unitary conception: one sovereign per polity. The *Oxford English Dictionary*, however, includes definitions that attribute sovereignty to mayors and to superiors of monasteries and convents. The medieval and early modern division of authority between Pope and Emperor and between the Emperor and other princes also suggests a decentralized or functional conception of divided sovereignty. As the leading British authority on international law notes, "sovereignty is divisible both as a matter of principle and as a matter or experience."(Brownlie 2003: 113)

The idea of multiple sovereignties within a territory has few implications for contemporary international human rights. It does, however, point to the extremely relevant fact that sovereigns need not have supreme authority over *all* matters within a territory.

D. The Rights of Sovereigns

"The original meaning of the word is simply 'superiority', without any connotation of absoluteness or illimitability."(Brierly 1958: 19-20) In practice, modern sovereigns have never had total license or absolute authority over everything. As no less a realist than Georg Schwarzenberger put it, "State practice is unanimous in its affirmation of the existence of legal rules … in the relations between sovereign States."(1951: 89) "Sovereignty is a legal status within but not above public international law. … As a juridical status protected by international law, it is embedded within the normative order of this law ."(Steinberger 2000: 512, 518)

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From 1648 on sovereigns have been restricted in what they could legitimately do even to their own nationals in their own realms. The Treaty of Westphalia, while mandating religious non-interference, the foundation for a broader principle of non-intervention, imposed substantive restrictions on sovereigns. For example, Article 28 guarantees adherents of the Confession of Augsburg "the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses." External sovereignty (with respect to religion) was established simultaneously with, and contingent upon, restrictions on sovereign prerogatives.

The rights of the sovereign are not only limited but contingent and variable. "The status of statehood can be associated with various sets of rights and duties. It carries no given, determinate, normative implications."(Koskenniemi 1991: 408) The (international societal) constitution of sovereignty has changed substantially throughout the Westphalian era. New rights are recognized. Old rights are lost. But through it all, sovereigns have remained fully sovereign.

The most striking example lies at the heart of realist high politics. In the nineteenth century a sovereign state was the sole judge of what was necessary for self-preservation. This was taken to imply a right to go to war when, where, and for whatever reason it chose.(e.g., Wheaton 1866: §290) "The prevailing view was that resort to war was an attribute of statehood and it was accepted that conquest produced title."(Brownlie 2003: 697) Today the legitimate use of force is restricted to self-defense. But we certainly would not say that the United States was less sovereign in 1990 than 1890 because it had no right to launch a war for national gain or territorial conquest.

Or consider the "sovereign right" to control one's exchange rates and money supply. Under the classic gold standard states had no such right. Under the Bretton Woods system of fixed exchange rates they did. Today the power of international financial markets and institutions has provoked concern over the loss of economic sovereignty.(e.g. Matthews 1997: 57; Chossudovsky 1998: 309; Lowenfeld 2002) But if Britain, the United States, France, and Germany were economically sovereign in 1900 -- and no one at the time doubted that they were -- they were economically sovereign in 2000 as well.

The growing permeability of borders is another frequently advanced example of eroding sovereignty.(e.g. Mills 1998: 1, 25-26, 122) States today, however, have at least as much authority to control trans-border population flows as they did in the early nineteenth century, before passports began to be widely used. Turning from authority to capabilities, the borders of almost all states are *less* permeable to the flow of people today than they were a hundred years ago. And even if all we do is measure levels of flows, at least in the case of the United States the total numbers are about equal for the first two and last two decades of

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the twentieth century, and as a percentage of population are substantially lower today than a century ago. To talk of a loss of sovereignty today would again require us to make ridiculous claims about the absence of sovereignty in the eighteenth and nineteenth centuries.

The variability of sovereignty extends even to sovereign equality, which with some justice has been described as "the essence of our understanding of the Westfalian [sic] system," (Rosas 1995: 63)a principle that "has attained an almost ontological status in the structure of the international legal system."(Kingsbury 1998: 600) Sovereign equality has meant very different things in the seventeenth century world of dynastic sovereignty, the nineteenth century world of Great Power politics, and the post-colonial world of the late twentieth century. And throughout the Westphalian era, sovereign equality has been understood to be fully compatible with different states possessing different rights.

Honors, titles, and status differences were of considerable importance in the seventeenth and eighteenth centuries.(e.g., Vattel 1916 [1758]: Bk. I, ch. XV, § 191; Bk. II, ch. III, esp. § 37, 48; Bk. IV, ch. VI, §79) Great Powers in the nineteenth century had special rights and responsibilities (Simpson 2004: esp. ch. 4) -- a practice that lingers today in the veto in the Security Council. Many states created in the nineteenth century (e.g. Belgium and Greece) operated under treaty restrictions that limited the range of their rights. The League Minorities System imposed obligations on some states but not others. And so forth.

Of course, not every change in rights would leave sovereignty undiminished. Were states to lose authority over a wide range of activities central to prevailing conceptions of the nature of politics we might be justified, even compelled, to talk of a loss of sovereignty. Nonetheless, the rights of sovereigns are and always have been variable. And sovereignty -- except perhaps the sovereignty of God -- never has been absolute and over everything.

The rights of sovereigns are determined by the practices of (the society of) sovereign states, not by theoretical or conceptual logic. "It is widely accepted that no subject is irrevocably fixed within the reserved domain" of sovereign prerogative. (Brownlie 2003: 291) As the Permanent Court of International Justice authoritatively put it, "whether a certain matter is or is not solely within the jurisdiction of a state is essentially a relative question; it depends upon the development of international relations."[3]

"Sovereignty is not merely a bundle of rights, but consists in a status (being sovereign) and in the use of this status to legitimize certain rights, duties and competences (the sovereign rights)." (Werner and De Wilde 2001: 297) The status of recognized supremacy defines sovereignty and has remained constant through variations in the details of sovereign rights.

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[3] *Nationality Decrees Issued in Tunis and Morocco* (1923) P.C.I.J. Ser. B., no. 4, p. 24.

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The specific bundle of rights, which is contingent and variable, determines only the particular character of sovereignty. So long as states are not constitutionally subordinated to another actor they remain sovereign. So long as rights previously held are not transferred to a "higher" authority, no sovereignty (supremacy) has been lost.

E. Sovereignty: Social Reality not Organized Hypocrisy

To pull together many of the points made above and set up some of the discussion of human rights and sovereignty below, I conclude this section by contrasting my analysis with that of Stephen Krasner, who extensively documents the failure of state practice to correspond to "the Westphalian model" of complete and absolute state autonomy.[4] Despite this superficial similarity, Krasner offers a fundamentally opposed account of sovereignty rooted in an implausible and unhelpful analysis of its meaning and significance.

Krasner repeatedly claims that any external "influence" on domestic political institutions violates sovereignty. (1999b: 33, 121, 226; 1995: 116, 127) "Westphalian sovereignty is violated when external actors influence or determine domestic authority structures." (1999b: 20) Using the Universal Declaration of Human Rights in lobbying one's own government, according to Krasner, infringes sovereignty. (1999b: 32) If a treaty alters domestic views on an issue, sovereignty has been violated. (1995: 127) The influence of the Catholic church on beliefs about abortion and birth control is, for Krasner, a transgression of sovereignty. (1995: 116) He even considers the exclusive economic zones created under the 1982 United Nations Convention on the Law of the Sea a violation of sovereignty (because they involve less than perfect rights of territorial sovereignty). (1999b: 36; 1995: 116) By creating new rights for themselves where they previously had none, Krasner would have us believe that states -- without knowing it; in fact, thinking that they are doing something quite different -- violated their own sovereignty!

If we were to follow Krasner, most of foreign policy, to the extent it is successful, would have to be considered a violation of sovereignty, because it seeks to influence other states to act in particular ways. The same is true of international law, which aims to and often

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[4] Krasner actually identifies four senses of sovereignty, but focuses on what he calls international legal sovereignty (recognition of sovereign status) and Westphalian sovereignty (autonomy). (1999b: 3-4, 10; 1999a: 40-49) Taken together, they encompass sovereignty understood as supreme authority. I do not, however, distinguish Westphalian and international legal sovereignty, because in practice they are inseparable. Recognizing a state as sovereign grants it not merely an abstract status but also the rights of sovereignty (i.e., autonomy and supreme authority over certain activities). Conversely, those who have autonomy as a matter of sovereign rights, rather than mere capabilities, are those whose legal status as sovereign is recognized. (Thus Krasner is mistaken to claim (1999a: 35) that Taiwan has Westphalian *sovereignty*. The autonomy that Taiwan enjoys is *not* a matter of sovereign right.)

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succeeds in influencing the decisions of states. This is clearly an untenable conception of sovereignty, a stipulative theoretical model with little connection to the realities of international law and politics.

Krasner claims that his purpose is to "understand what sovereign statehood has meant in actual practice." (1999b: 5) This cannot be done by judging practice according to standards that contradict those of the participants. Krasner's absolutist "Westphalian model" is rejected by the practice and self-understandings of the society of states.

Particularly striking is his insistence that treaties (contracts and conventions) that restrict a state's autonomy violate sovereignty. (1999b: 7, 26, 33-36, 40, 224, 226; 1995: 124-135) This view has been authoritatively rejected, repeatedly. "Restrictions on the exercise of sovereign rights accepted by treaty by the state concerned cannot be considered as an infringement of sovereignty."[5] "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty."[6]

However we define sovereignty, though, violations are frequent and often striking. This leads Krasner to label sovereignty "organized hypocrisy," which he defines as a situation in which "institutional norms are enduring but frequently ignored."(1999b: 66)

Almost all social norms, though, are frequently ignored. By Krasner's standard, most of social life is "organized hypocrisy." Stop signs, marriage, property, courtesy, honesty among friends, taxation, and equal protection of the laws are "organized hypocrisy". For that matter, so is *Realpolitik*: the norm of pursuing power is frequently ignored in favor of legality, compassion, or furthering the interests of friends or campaign contributors.

Krasner claims to be writing in opposition to "the failure to recognize that the norms and rules of any international institutional system, including the sovereign state system, will have limited influence and always be subject to challenge." (1999b: 3) But who actually has ever failed to recognize this? -- or that sovereignty has not always "prevented the powerful from violating its precepts"? (1995: 149) or that state authority "has always been problematic and could never be taken for granted"? (1999a: 34) Despite emphasizing that Westphalian sovereignty is about authority rather than control, (1999b: 10, 223) Krasner ultimately refuses to take seriously the fact that infringements of rights are a normal part of social and political life, nationally and internationally.

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[5] *Jurisdiction of the Danube Commission* (1927) P.C.I.J. Ser. B., No. 14, p. 36.

[6] *The S. S. Wimbledon* (1923) P.C.I.J. Ser. A, no. 1, p. 25.

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If it really were true that "talk and action do not coincide" (Krasner 1999b: 8; Compare 1999a: 49) -- never, or even only rarely -- we would have organized hypocrisy in an interesting sense of that term. But all Krasner shows is that principle and practice often diverge. This is true of virtually all principles and practices, national no less than international. It is what makes principles principles and norms norms, rather than laws of nature.

"In practice, the strong have been better able to enjoy their territorial integrity and autonomy than the weak."(1995: 147) This is true of almost all rights, domestically as well as internationally. So long as "departures from the standard norm have not … generated alternative logics of appropriateness" (1999b: 8) -- and Krasner agrees that they have not -- it is simply a reminder that authority is no guarantee of effective control.

Sovereignty is not a hard shell, an impermeable barrier at the borders of a territory. It does not guarantee the efficacy of the unfettered will of the state. Sovereignty is a complex social practice that allocates jurisdiction, rights, and obligations among sovereigns, actors that recognize no superior.[7]

Like all social practices, sovereignty both persists and is transformed over time. But Krasner's work, for all the interesting historical material he presents, is fundamentally ahistorical, even anti-historical. By imposing a static stipulative theoretical model, he obscures the reality of sovereignty in practice. And a narrow focus on deviations from that model diverts our attention from changes in the pattern of practice over time. Krasner thus misses important transformations in sovereignty -- including, I will argue, those produced by the development of the global human rights regime.

2. HUMAN RIGHTS AND STATE SOVEREIGNTY

Human rights, far from undermining or eroding state sovereignty, are embedded within sovereignty. Dominant understandings of sovereignty (and human rights) have indeed been significantly reshaped. But sovereignty remains robust and, at least with respect to human rights, largely unchallenged.

A. National Implementation of Internationally Recognized Human Rights

If human rights are universal rights held equally and inalienably by all individuals, how could they not be fundamentally opposed to the supreme authority of states? The simple answer is

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[7] Some of the better known works of the past decade that share this general perspective include (Bartelson 1995), (Fowler and Bunk 1995), (Weber 1995), (Bierstecker and Weber 1996), and (Philpott 2001).

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that actual legal and political practice has made human rights and state sovereignty fully compatible.

The Universal Declaration on Human Rights (1948), the International Human Rights Covenants (1966), and several single-issue treaties and declarations establish an impressive body of international legal obligations.[8] These instruments regularly use the language of universal rights: "No one shall be …," "Everyone has the right …" But universal human rights have been embedded in a statist system of national implementation.

The international human rights obligations of states are solely to their own nationals (and others under their territorial jurisdiction). States have neither a right nor a responsibility to implement or enforce the human rights of foreigners on foreign territory. And international supervision of national human rights practices is extremely restricted.

Considerable international monitoring takes place. Numerous human rights treaties require periodic reports to an international committee of experts. With the six principal international human rights treaties having an average of 161 parties,[9] this amounts to a not negligible quantity of formal international scrutiny. The United Nations Commission on Human Rights also examines human rights situations in countries of concern and for selected rights. National and transnational NGOs assure a surprisingly free flow of information on human rights practices. Some states have made monitoring human rights an integral part of their foreign policy. But with very limited exceptions -- primarily weak and rarely used individual complaint mechanisms and a strong system of regional judicial enforcement in Europe -- implementation and enforcement are left to states in their own territories.[10]

There is nothing particularly surprising about this sovereignty-respecting construction of international human rights. International society remains largely a society of sovereign states. Most international law is implemented and enforced nationally. Human rights have simply been incorporated into the established state-based system of international law and politics.

How states treat their own nationals on their own territory has become a legitimate, and increasingly regular and important, topic in bilateral, multilateral, and transnational

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[8] For an extensively hyper-linked collection of approximately one hundred instruments, see http://www.unhchr.ch/html/intlinst.htm.

[9] See http://www.unhchr.ch/pdf/report.pdf, which records ratifications through 2 November 2003.

[10] For overviews of the multilateral human rights machinery, see (Donnelly 2003: ch. 8) and (Forsythe 2000: ch. 3). Much more extensively, see (Bayefsky 2000) and (Alston and Crawford 2000).

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international politics. States and other international actors are free to use most ordinary policy instruments short of the threat of force to influence national human rights practices. But the society of states has, with very few and extremely limited exceptions, no significant role in the enforcement of human rights. It simply is not true that "human rights claims no longer depend on geographic limitations, and may be as appropriately addressed to the broader international community as they are to a nation state's sovereign" (Stacy 2003: 2049) -- if those claims are for implementation, enforcement, or legal remedy, which remain the domain of states exercising their sovereign prerogatives within their own territories.

It simply is not true that "human rights [is] an issue area in which conventional notions of sovereignty have been compromised." (Krasner 1999b: 125) States still retain final authority -- sovereignty -- over human rights within their territories. State authority to implement and enforce human rights has neither been lost nor, with the limited exception of Europe, transferred to another actor.

B. Constancy and Change in Sovereignty and Human Rights

"The struggle to establish international rules that compel leaders to treat their subjects in a certain way has been going on for a long time." (Krasner 2001: 22; Compare 1999a: 43, 49) This is not untrue. But it obscures the no less important fact that the form and consequences of these efforts have changed substantially in the past half century.

The contemporary global human rights regime is not without precursors. Largely effective international prohibition regimes were established for the slave trade and slavery. (Nadelman 1990: 491-498; Weissbrodt and Anti-Slavery International 2002) Minority rights issued were recurrently addressed and regulated in limited ways in new states. (Krasner 1999b: ch. 3; Claude 1955; Thornberry 1991: pt. 1) But such isolated, ad hoc and sporadic efforts were quantitatively and qualitatively different, in both substance and impact, from the activities of the past half century. There simply was nothing even vaguely like today's comprehensive and extensive international concern with human rights.

Prior to World War II, even talking about human rights violations in other countries, except in very limited contexts, was considered an unjustified infringement of states' sovereign prerogatives. Human rights are not mentioned in the notoriously "idealist" Covenant of the League of Nations. There were no multilateral treaties, let alone multilateral institutions, devoted to human rights (as opposed to particular rights that we today consider human rights). No states regularly addressed human rights in their foreign policy. Transnational action was extremely limited in both quantity and impact.

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Much as the sovereign right of self-preservation left states at liberty to launch aggressive wars, the sovereign right of political independence left them at liberty to violate (what we today call) human rights. "Until the middle of the twentieth century, States had succeeded in juridically protecting their free will; or more precisely, their free willfulness. International law required no behavioral norms, and no obligation of tolerance, in regard to a State's own nationals."(Bettati 1996: 91) Today, however, states can no longer can claim sovereign rights to violate human rights. Authoritative international human rights norms require certain kinds of behavior and prohibit others. We should neither underestimate nor overestimate the significance of this change.

The considerable normative power of the global human rights regime has dramatically facilitated the work of human rights advocacy, both by altering domestic conceptions of legitimacy and by opening multiple avenues of international and transnational support. The spread of international human rights norms is even part of the explanation for the collapse of the Soviet Union and its empire (Thomas 2001), the demise of military and civilian dictatorships in Latin America, and processes of political liberalization that are taking place in most of Africa and Asia.

Normative strength, however, is matched by procedural weakness. The international community lacks the authority to stop even gross and systematic violations, except in the case of genocide (see below). Final authority -- sovereignty -- still resides with states.

C. International Norms and State Sovereignty

Authoritative international norms have always been part of modern international relations. International legal obligations "restrict a States' freedom of action and thereby the exercise of its sovereignty, but they do not diminish or deprive it of its sovereignty as a legal status." (Steinberger 2000: 512)

During the first two centuries of the Westphalian era sovereigns were held to be under a variety of natural law obligations. This was not seen as in any way incompatible with sovereignty. Sovereigns remained supreme within their domains, subject -- answerable -- only to God.

In the nineteenth century, the so-called standard of civilization set substantive requirements for fully equal participation in international relations. But the prohibition of "barbarous" behavior was completely compatible with the "full sovereignty" of civilized states -- a status that was available to "barbarous" states that changed their practices to meet the standard, as Japan did in the 1890s. Again, despite normative restrictions on the range of legitimate action of states, there was no subordination to a higher (legal or political) authority. And any

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inequality that arose from the doctrine was a matter of some sovereign states not meeting "universal" substantive standards.

Today, in addition to international human rights norms, states, largely irrespective of their will, are bound by the norms of customary international law, obligations *erga omnes*, and *jus cogens*. And they are bound by a wide range of treaty-based obligations. So long as international obligations do not subordinate states to a higher authority -- and they clearly do not in the case of the global human rights regime -- they are completely compatible with full sovereignty. Supremacy means that one is subject to no higher authority, not that one's authority is absolute and unlimited.

Sovereignty is always changing, as states, individually and collectively, grapple with new problems and opportunities, pursue new interests, elaborate new norms, and learn from their past practices. Transformations of sovereignty reflect a process of articulating new norms, and new understandings of old norms, into the framework of international law and politics. Over the past half century, human rights have been widely, and increasingly deeply, incorporated into the practices of international law and politics, and thus insinuated into our understanding of sovereignty.

No less importantly, though, sovereignty has been insinuated into our understandings of internationally recognized human rights. Implementation lies ultimately with sovereign states. The politics of international human rights still is largely about influencing sovereign states.

D. Genocide and the Responsibility to Protect

Genocide is the principal, and recent, exception to the rule of national implementation. It is now generally accepted that multilateral armed intervention against genocide is permitted if authorized by the Security Council.[11] Genocide thus has been removed from the sphere of sovereign prerogative. To the extent that enforcement authority has been transferred to the society of states, we can even speak of a (tiny) loss of sovereignty.

This does not, however, suggest more radical changes. The right of states to commit genocide has suffered the same fate as the right of states to wage aggressive war -- with no broader implications for sovereignty. It is a gross exaggeration to talk about contemporary practices of humanitarian intervention "subduing sovereignty." (Heiberg 1994)

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[11] For an excellent account of the evolution of international practice through Kosovo, see (Wheeler 2000). (Murphy 1996) is a standard legal overview.

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International enforcement of even a substantial segment of internationally recognized human rights would indeed represent a fundamental transformation of our sovereignty practices. Removing such a wide range of politically central issues from the authority of states would represent a substantial loss of sovereignty. But there is no evidence of widespread acceptance in theory, let alone in practice, of a right to armed intervention for violations of other -- that is virtually all -- human rights. There is not even evidence in the past decade of significant strengthening of regional or global human rights institutions.[12] Genocide, for the next few decades at least, is almost certain to remain the exception that proves the rule of national implementation.

It simply is not true that "a strong claim of sovereignty by a state that is committing human rights abuses will not be respected by the international community." (Stacy 2003: 2035) For all human rights other than genocide -- that is, to repeat, for virtually all human rights -- states still retain ultimate enforcement authority. They can and do advance strong claims of sovereignty. And those claims are accepted, however reluctantly, by other states and the international community.

The narrow demarcation of the right to humanitarian intervention can even be seen as reaffirming the general principle of non-intervention, and thus state sovereignty. (Compare Malmvig 2001) It is not exactly the same sovereignty as before, but no less real and robust.

The increasingly popular language of the responsibility to protect[13] is prescriptive or predictive, not descriptive. There is perhaps growing acceptance of a certain moral responsibility, but no evidence of an emerging legal <u>duty</u> (responsibility) of humanitarian intervention. The international community has chosen instead to leave itself at liberty, legally and politically, to protect or not as it sees fit, guided by no agreed upon principles.

Even this represents significant, if very limited, humanitarian progress. New "humanitarian space" (Weiss and Chopra 1995) has been created. But it has been created *within* rather than as an alternative to state sovereignty.

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[12] Individual international criminal liability under the Statute of the International Criminal Court, the 1984 Convention Against Torture, and various national laws (e.g., the Alien Torts Claims Act in the United States) does represent a significant change in doctrines of sovereign immunity. But individual liability for violations of a few rights has virtually nothing to do with international authority to implement and enforce human rights generally. This not insignificant humanitarian advance represents but a tiny transformation of sovereignty.

[13] The key document is the report of the International Commission on Intervention and State Sovereignty (2001; http://www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp). The idea was first brought to prominence by Francis Deng (1995; 1996).

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E. Economic and Social Rights

The relationship between sovereignty and economic and social rights in contemporary international relations is complex. Here I will consider globalization and structural adjustment, both of which are regularly seen as eroding sovereignty (e.g., Matthews 1997: 56; Buchanan 1998; Rondinelli 2002: 366-367) and threatening economic and social rights. I will argue that the threats to human rights are very real but not connected to eroding sovereignty.

The threats to economic and social rights posed by internationally-mandated programs of structural adjustment[14] arise from weakness not lack of authority. States voluntarily accept loans and grants that impose economic and political conditions. They are free to refuse assistance under such terms, as a few states (e.g. Malaysia in the late 1990s) have. Yet many governments are so desperate that they feel as if they have no real choice. Let us grant, then, that there is a coercive aspect to most structural adjustment programs.

Sovereign authority, however, is no guarantee that exercising that authority will be without costs. If A allies with B because it fears C, A's sovereignty has not been compromised, violated, or infringed. An inventor who gives a substantial share of the stock in her company to venture capitalists because she cannot get bank financing has not had her rights violated. And it is no more a violation of sovereign equality that only poor and weak states must accept conditional assistance than it is a violation of equal protection of the laws that wealthy private borrowers often get better terms than ordinary borrowers.

Coercion, whether it arises from internal desperation or external pressure, is, up to a point, compatible with voluntary choice. At some point, of course, it is not. But coercion per se no more violates sovereignty than offering positive inducements to behave in a particular way. Only external imposition -- particularly imposition through the threat or use of force -- violates sovereign autonomy. There is a clear qualitative difference between "Take it or leave it" and "Your money or your life!"

Sovereignty is (only) the authority to decide, the right to choose among alternative courses of action the one that appears most beneficial or least harmful. So long as the compulsion under which states operate is a matter of choosing between alternatives -- even if all the options are unattractive -- sovereignty has not been infringed. If borrowers have a

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[14] Although some groups may benefit even in the short run from structural adjustment programs -- for example, farmers and rural laborers may be helped by reductions in food price subsidies -- structural adjustment almost always involves significant declines in the enjoyment of some economic and social rights for some significant segments of society, often the poor and the marginalized. See, for example, (Sadasivam 1997), (Halvorsen and Michelsen 2002), and (Morgan-Foster 2003).

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significant say in negotiating the terms of conditionality we might even say that their sovereignty has been actively respected.

The IMF, for all its power, is not a global central bank. Nor is the Bank for International Settlements. National central banks still have the authority to set national monetary policy. Whether their decisions have negative externalities or will be swamped by those of international markets and institutions are questions of capabilities not authority. The Group of 7/8 is a mechanism for leading sovereign states to coordinate policies, not an authoritative policy-making body. The Paris Club is an "informal" (that is, voluntary) mechanism for creditor countries to coordinate their relations with each other and common debtor countries. And so forth.

Globalization presents a very similar picture. By reducing the ability of states to control and tax large firms and capital, globalization has restricted the ability of many states to implement economic and social rights.[15] But this has nothing to do with eroding economic sovereignty.

Firms have always had the right to operate globally. Recently they have begun to acquire the ability to take advantage of that right. States have always had the authority to regulate and tax businesses. Recently they have faced increasing difficulty in using that authority to extract resources sufficient to fund social programs at desired levels.

The balance of power has shifted. But neither firms nor states have gained or lost rights/authority/sovereignty. The right/authority of states to regulate banks and businesses has not been renounced, transferred, or taken away. The threat to economic and social rights posed by globalization cannot be remedied by enhancing state sovereignty. States already have supreme and essentially unregulated authority.

Some analysts (e.g. Cox 1987; Panitch 1994; Pijl 1998; Robinson 2002) suggest that globalization is changing the character of the state -- or state-society complexes -- to a transnational or global state oriented towards protecting global (rather than national) capital and the interests of an emerging transnational capitalist class. Here too erosion of sovereignty is not the issue. These threats to economic and social rights arise from the purposes for which states exercise their sovereignty.

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[15] Although the distributional consequences of globalization are extremely complex, at least some groups have suffered and will continue to endure both absolute and relative declines in the enjoyment of economic and social rights. The reports of the Special Rapporteurs on Globalization and its Impact on the Full Realization of Human Rights (UN documents E/CN.4/Sub.2/2000/13, E/CN.4/Sub.2/2001/10, and E/CN.4/Sub.2/2003/14) provide wide-ranging negative assessments. See also (McCorquodale and Fairbrother 1999: 745-747; Pease 2000; Senarclens 2003: 149-150).

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I do not mean to underestimate the impact of globalization. Quite the contrary, globalization seems to me by far the gravest threat to human rights to emerge over the past two decades, much more serious and widespread than ethnic conflict, which absorbed so much of our attention in the 1990s, let alone the recent hysteria over terrorism. But we must understand the nature of the problem if we are to confront it effectively. It concerns the capabilities or intentions of states, not their authority.

The current system of national implementation of internationally recognized human rights leaves economic and social rights dependent on the capabilities of states to extract the resources needed to realize the rights of their citizens. Barring the creation of new institutions or duty-bearers, states and human rights advocates alike must grapple with developing effective strategies to use the authority and capabilities of states, individually and collectively, to assure that internationally recognized economic and social rights are effectively realized and enjoyed.

This might be done in ways that put state sovereignty to productive use. For example, Third World states, with the support of many first world activists and transnational NGOs, blocked the Multilateral Agreement on Investment, which would have significantly restricted their authority to regulate certain forms of corporate activity.

Sovereignty, however, may be more of a problem than a solution. One possible strategy for re-asserting control over firms would be for states to pool their authority in a regime of joint regulation or even transfer authority to a global regulatory body. In other words, giving up some sovereignty, to gain greater effective control, is one obvious (although politically problematic) way to deal with the threats to economic and social rights posed by globalization.

3. CONCLUSION

The preceding discussion suggests a (limited) decentering of the state. This might involve changes in or transfers of sovereignty. But states and their sovereignty might simply be bypassed or marginalized. What are the implications for human rights?

Human rights advocates typically see the state as the problem -- which it often is. But the state is also the principal protector of human rights. Until we develop alternative mechanisms to deliver goods, services, opportunities, and protections to large numbers of people -- and it must be emphasized that no substantial progress seems likely in the next

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couple decades[16] -- states, for all their problems, are pretty much what we have in the way of legal and political institutions for implementing human rights.

States per se are neither good nor bad for human rights. It depends on what particular states do in particular circumstances. Today, in part because of the growth of the global human rights regime, more states than ever before respect a wider range of human rights, and fewer states than ever before engage in the sort of gross and persistent human rights violations that were the statistical norm just a quarter century ago.

Sovereignty per se is neither good nor bad for human rights. It depends on which particular sovereign rights states have and how they exercise them. The global human rights situation today, although by no means good, is significantly less bad than it has been, in some measure because of the way in which human rights have become incorporated into our understandings of state sovereignty.

For all the (amply justified) complaints about the current system of national implementation of international human rights, only a small minority of citizens, and few if any states, are willing to transfer final authority to other actors over the wide range of important and sensitive issues covered by internationally recognized human rights. People, states, and the society of states increasingly value human rights. But they also value states and sovereignty. In the end, they seem satisfied to leave sovereignty tempered and modestly humanized by, but in no serious way subordinated to or eroded by, human rights. This has left human rights not a challenger to but deeply embedded within state sovereignty.

Although my focus here has been analytical rather than normative, I want to close by suggesting that this is not, all things considered, such a bad thing. I agree with Henry Shue that "provisions for non-intervention and sovereignty ought to be judged by how well they serve fundamental human values, like the protection of rights." (1998: 79) But that judgment must take into account not only ideal standards. It must also consider practical possibilities, including both where we have come from and what alternatives are realistically available in the coming years and decades.

The current situation is hardly ideal -- far from it. But it certainly is preferable to what prevailed before sovereignty was transformed by human rights. And until we develop

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[16] A growing body of literature (e.g. Ratner 2001; Paust 2002; Weissbrodt and Kruger 2003) addresses the human rights responsibilities of national and especially transnational businesses. Most of the discussion, however, focuses on corporate violations rather than making firms direct providers of internationally recognized economic and social rights. And the American experience with employer-based access to health care -- not to mention the marketplace logic of efficiency that dominates the activities of firms -- suggests that we should not place much hope in this alternative.

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alternative institutions capable of implementing internationally recognized human rights, the prudent course is to continue to insist on the combined rights and obligations of states to implement and enforce internationally recognized human rights; that is, on the particular coordination of human rights and state sovereignty represented by the global human rights regime.

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