Have the Norms of Sovereignty Altered to Provide for Humanitarian Interventions?

https://www.e-ir.info/2014/01/31/have-the-norms-of-sovereignty-altered-to-provide-for-humanitarian-interventions/

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More than 20 years ago Secretary-General Boutros-Ghali stated, in his 1992 report *An Agenda for Peace*, that 'The time of absolute and exclusive sovereignty (…) has passed; its theory was never matched by reality'(UN, 1992:4; omitted 'however'). Many commentators, mostly coming from the developed world, contend that the last decades have confirmed and even expanded the reach of that statement, especially in the definition of the legitimacy of the practice of humanitarian intervention. Traditional sovereignty, incorporated in the Charter of the United Nations, is characterised by the norms of non-interference and state equality. Humanitarian intervention challenges this notion, creating a tension between the norms of state sovereignty and the protection of human rights. In fact, there is a growing belief that the limits of state sovereignty and the principle of non-interference in the domestic affairs of a country are represented by the duty of the state institution to protect its citizens. According to the 2001 International Commission on Intervention and State Sovereignty's (ICISS) report *The Responsibility to Protect*, when a state fails in doing so, is time for the international community to step in. This may appear relatively uncontroversial: why should an abstract and instrumental concept like state sovereignty be prioritised over the protection of human lives?

In this essay I will argue that the norms of sovereignty have still not changed to allow for unauthorised humanitarian intervention. The only interventions for humanitarian purposes that seem to be widely accepted are those authorised by the Security Council under the provisions of the Chapter VII of the Charter of the United Nations. The discussion of this point will require an analysis from both legal and political perspectives, which are inextricably interwoven. From a merely legal point of view, there is no evidence that a customary international norm has emerged. From a political point of view, we must recognize that 'sovereignty' and 'humanitarian intervention' are not value-free concepts. Their definition and their advocacy are dependent upon power relations between developed countries and developing ones: the idea of humanitarian intervention implies a unidirectional performance in which the only sovereignty that is seriously at stake is the one of the second group.

If we consider the opinion of developing states, is to say the majority of states, there is still no support for a norm that provides for humanitarian intervention outside the framework of a Security Council resolution. In the first section I will frame the legal and moral dilemma, discussing the centrality of sovereignty as the foundation of the contemporary world order and presenting the rising challenge of a more human-centred idea of security, from the notion of 'just war' to the concepts of 'human security' and 'responsibility to protect'. I will then examine the legality of humanitarian intervention in the current state-centric world order, underlining the political nature of the issue. The third part will assess the political dimension, contending that the emergence of a norm is a matter of perspectives from which the problem is considered. In fact, the sacred character of sovereignty is a guarantee to the independence of developing countries from the interference of the West. In this context, the relatively more binding framework of the Chapter VII of the UN Charter is preferred when it comes to violate one state's sovereignty for humanitarian purposes. I will finally draw some conclusions, highlighting how the recent interventions in Libya and Mali suggest that UN-sanctioned interventions are still preferred to unilateral ones.

State equality, non-interference and the challenge of humanitarian intervention

The concept of sovereign state dates back to the Peace of Westphalia in 1648, which designed a system of

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independent nations based on 'the principles of autonomy, territory, mutual recognition and control' (Krasner, 2001;17). Its modern philosophical definition is normally ascribed to Jean Bodin, that described the nature of sovereignty as the absolute power over a territory which only obligations and conditions are dictated by the laws of God and nature (Bodin, 1955:27). According to Held, its contemporary meaning had not already been defined in the Westphalian treaties, but it is rather a construction of the 18th and 19th centuries, 'when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society' (2003:162-163).

Sovereignty has traditionally had two, intertwined, meanings. An internal one, of 'supreme authority within a country', and an 'external' one, regarding the right of being independent and not be subjected to any interference from other countries (Philpott, 1997:20). Philpott underlines as the importance of this idea of sovereignty as non-interference and non-intervention is also reconfirmed in the Charter of the United Nations (1997:20) that in the article 2.4 that states 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state' (UN, 1945 art. 2.4). Article 2.7 also affirms 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'(UN, 1945 art. 2.7). In historical terms, the relevance of this vision of sovereignty is most remarkable in its security implications. A global order that has the state as its basic unit and central subject, will consequently adopt a state-centric account of security. The Charter is surely coherent with this vision that was inherited by the 19th century and the two World Wars. 'War' in the Charter, is inter-state war. This is also suggested by the fact that, besides Security Council-authorised interventions, the other cited exception to the prohibition of the use of force is the right of individual or collective self-defence when a member state is attacked (UN, 1945 art. 51).

Nonetheless, this historical vision of state sovereignty faces a parallel narrative that, especially in the last century, has endorsed the necessity to prioritise a more human-centric idea of security that allows for an 'instrumental' vision of sovereignty, that has its inherent *raison d'être* in the protection of the citizens. The idea that sovereignty is not absolute in front of the living conditions of people in a state was already expressed by some authors in the past. In the fifth century, St. Augustine wrote: 'In the absence of justice, what is sovereignty but organized brigandage?'(Augustine, 1950:195). Hugo Grotius even suggested the possibility of intervention from other countries in the case of atrocities committed by a sovereign authority against its citizens (Holzgrefe, 2003:26).

However, the strongest challenge to the absolute character of sovereignty has a recent development. The progressive focus of the international community on issues of human rights after the II World War has surely contributed to shifting the focus to the security of individuals. The strongest conceptual change took place after the end of the Cold War, when the consciousness of the growing independence among countries opened the door to the possibility of a more legitimate use of humanitarian intervention (Hehir, 1998:34-35). Most wars were now intra-state ones, and the idea that conflict resolution depends upon democratisation and development of the affected societies became predominant (Kotzé, 2007:62-63). This allowed for the progressive legitimisation of the promotion of 'liberal and democratic governance and free market capitalism', perceived 'as the means by which the standard of living could be raised throughout the South and intrastate violence abated.'(Christie, 2010:173). Additionally, a focus on the people as new referent objects of security policies also emerged. A key document in this sense has been the 1994 UN Development Programme's *Human Development Report* which introduced the concept of 'human security', defining it as a new way to look at security issues, with an approach that is 'people-centred' (UNDP, 1994:23).

The rationale behind this conceptual shift contains the seeds of a radical challenge to the traditional vision of sovereignty. The report in fact states: 'The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy' (UNDP, 1994:22). The concept of human security progressively gained popularity among foreign policy actors (King and Murray, 2001: 585). In the human security discourse, state sovereignty can no longer be prioritised over the security of people. This idea implicitly suggests that, when the security of a community is seriously threatened, concepts as the non-interference in the internal affairs of a state, that belong to a traditional definition of sovereignty, cannot represent an absolute impediment to the protection of individual lives. Human security and the possibility to use the tool of

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humanitarian intervention are therefore strictly related. The debate concerning the latter, in fact, had a great relevance during the 1990s. In Holzgrefe's definition, humanitarian intervention is:

"the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied (2003:18)."

Some events in particular showed the need to define the conditions and limits to the use of force by the international community to save human lives. Among them, those which played a stronger role have been the UN operations in Somalia in 1992 (see Sahnoun, 1998:87), the 'failed' intervention in Rwanda in 1994 (see Martin, 1998) and, above all, the intervention in Kosovo. The latter, that was not authorised by the Security Council (Mertus, 2000:1759), created a serious challenge to the existing rules and the underlying state-centric global order, posing the question of whether the time to reform the bases of the international legal system was come (Greenwood, 2002:141).

The suggestion that the post-Cold War global security could lead to a change in the definition of sovereignty was already advanced by Kofi Annan in 1998, who called for an interpretation of 'sovereignty as a matter of responsibility, not just power.'(1998:56). Here lies the potential change in the norms of sovereignty. The first who theorised this shift was Francis Deng, who explained how the concept of sovereignty is undergoing a fundamental change in the last decades (1995:260-261), moving toward the idea of 'responsible sovereignty'(1995:272). Drawing upon Deng's work, the ICISS developed the 2001 report *The Responsibility to Protect*. The commission was created by the Canadian government, and the report can be seen as an attempt to redefine the limits of sovereignty in order to answer the question expressed by Annan: 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?' (UN, 2000:48). The report suggests that 'sovereignty' in its Westphalian meaning of 'sovereignty as control', should be re-conceptualized as 'sovereignty as responsibility' of a state towards its citizens and the international community (ICISS, 2001:12-13). According to the ICISS, when a state is 'unwilling or unable' to protect its citizens, who are experiencing humanitarian disasters, military intervention is a viable option, primarily under the authority of a Security Council resolution (ICISS, 2001:16).

While the ICISS report is quite clear in the describing the emergence of a norm that would allow for intervention within the Chapter VII of the UN Charter (2001:16), it takes a more ambiguous stance when it comes to assess the legality of unauthorised intervention when the Security Council fails to reach a consensus. In this last instance, it recognises the lack of agreement among different states (2001:54) , suggesting the possibility of acting through some 'loopholes' like *ex post facto* authorizations (2001:54) or legitimisations by the General assembly (2001:53), without taking a strong position on the feasibility of unauthorised interventions *per se*. Humanitarian intervention after this new conceptual definition has ranged from the contested war in Iraq in 2003, to which the American administration gave, after the failure to find Weapons of Mass Destruction, an humanitarian character (Reisman, 2004:519) to the 2011 intervention in Lybia, legally authorised by the Security Council. Nonetheless, as I will discuss in the following section, even if the concept of Responsibility to Protect has not lost its strength in public discourse, there is still no agreement on the limits of humanitarian intervention with regard to sovereignty.

Sovereignty and the illegality of unauthorised interventions: a political problem

The concept of state sovereignty, in both its internal and external meaning, lies at the centre if the contemporary legal international order. Its importance is embodied in the Charter of the United Nations. The already cited Article 2.4 is particularly focused on the external dimension, stating the principles of territorial integrity, and political independence against threats from other states (cf. UN, 1945 art. 2.4). The emergence of a legal challenge to the concept of sovereignty as incorporated in the Charter has been conceptualised in two ways.

The first way, particularly discussed in the aftermath of the military operations in Kosovo, is the development of a right of humanitarian intervention, an actual 'right to intervene', that caused a strong debate during the 1990s, being opposed by the advocates of the importance of national sovereignty (Evans, 2006:706). The stalemate caused by this opposition has brought to a re-conceptualization of the issue, which has shifted the focus from the emergence of

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a new right to intervene to the changing nature of concept of sovereignty itself. The newly developed idea of 'sovereignty as responsibility', was presented in the ICISS report as the conceptual basis that would allow for the emergence of a 'responsibility to protect', able to take the place of the 'outdated an unhelpful' 'right to intervene' (ICISS, 2001:11). The nature of the shift should not be overstated. If the main difference is the more cautious approach that the R2P takes on the issues of unauthorised interventions, the conceptual change per se in highly rhetorical and 'adds nothing substantially new', especially because, at the end of the day, is the practical application of the concept that makes the difference (Chomsky, 2009:3).

The R2P has been adopted in many documents following the ICISS report, most importantly in the articles 138 and 139 of the 2005 World Summit final Document (UN, 2005). The latter is more explicit about the fact that any intervention has to be pursued through the Chapter VII of the Charter (UN, 2005 art. 139). On the contrary, some authors take an approach that, rather than supporting the simple possibility to justify an 'excusable breach' of the charter provisions on the basis of moral norms, claims the actual emergence of a legal norm that allows for unilateral, unauthorised humanitarian interventions (Stromseth, 2003:244). Has such a norm emerged in customary international law? The emergence of a customary norm needs two preconditions: it must be confirmed by the practice of states (*usus*) and believed to be existent and required 'as a matter of law' (*opinio juris*) (Henckaerts and Doswald-Beck, 2005: xxxviii). With regard to the former, the practice of states should be 'constant and uniform' (International Court of Justice, cited in Shaw, 2008:76).

The practice of the states in the last decades is neither constant nor uniform. On the contrary, humanitarian interventions the second half of the 20th century have been either for non-humanitarian purposes, or under the authorisation of the Security Council, with the only partial exception being the non-flight zone in Iraq in 1991 and Kosovo (Byers and Chesterman, 2003:183-184). Even the 2003 war in Iraq, can hardly be described as a widely agreed humanitarian intervention. The task of proving the formation of an *opinio juris* over the legality of unauthorised interventions is even more problematic. This is also complicated by the fact that the concept of sovereignty described by the Charter has an even higher status than normal customary law.

In a traditional approach to international law, the norm embodied in Article 2.4 of the Charter is recognised as *jus cogens*, is to say that it is 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character' (Simma, 1999:3). To assess whether or not there is a new norm of *jus cogens* the reshapes sovereignty in a way that allows for unilateral humanitarian intervention, we must evaluate if this is supported by an 'overwhelming majority of states, crossing ideological and political divides' (Shaw, 2008:126-127). This is surely not the case. Since the existence of the legal norm is tied to states' opinion, the problem of the changing role of sovereignty takes a political character and concerns power relations in the international community. Therefore, paraphrasing Holzgrefe, we can affirm that 'any attempt to separate legal questions from political ones is doomed to failure' (2003:49; original: 'moral ones'). The last section will illustrate how the support for a more flexible concept of sovereignty that allows for humanitarian intervention is mainly supported by developed, Western countries, while it is opposed by developing ones.

Sovereignty as described in the Charter is still relevant to developing states

International law and power relations are inevitably tied. The former, especially in its customary forms, is often subjected to the influence of the most powerful states. Krisch points out how the policies of dominant states in international law always tend to oscillate between instrumentalization and withdrawal (2005:382).The first tendency is embedded in the advantage that powerful, developed, states have both in defining state practice and in publicizing their *opinio juris*. In fact, their larger availability of diplomatic, political, economic and military means makes it easier for them to shape 'the development, maintenance or change of customary rules' (Byers, 1999:37).

This disparity of influence seems particularly true in the case of the change of sovereignty norms for the legalization of unilateral intervention. After the Kosovo intervention, developed countries and particularly the US claimed the emergence of a right of humanitarian intervention (Byers and Chesterman, 2003:187). These claims found a strong scepticism among developing countries, which feared that the weakening of the traditional concept of sovereignty as

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non-intervention could foster the creation of 'a more coercive, Western-dominated, international order'(Chandler, 2004:60). According to Chandler, the re-conceptualization of 'sovereignty as responsibility' operated by the ICISS in 2001, was particularly developed to overcome this *impasse* and find an agreement between the different positions (2004:60).

The division nonetheless, remained. A clear example is the already mentioned outcome document of the 2005 World Summit. The latter, approved by the General Assembly, which is mostly composed of developing states, clearly states that the R2P has to be exerted through the UN system and the Chapters VI and VII of the Charter (UN, 2005 art. 139). The US, nonetheless, claimed that this provision should not exclude the possibility of unauthorised interventions (Stahn, 2007:109). The survival of the Western perception of potential legality of unauthorised interventions has been made possible by the neglect of the positions expressed by developing states, particularly through the G77 group, which today are less considered than in the early post-colonial period (Byers and Chesterman, 2003:189). The 2005 Outcome Document in fact is explicit on the necessity of a UN authorisation, and this formulation is even beyond the expectations that were preceding the realisation of the report, influenced by the strong opposition of many developing countries to the R2P (Badescu, 2010:106). These oppositions are consistent with the stance taken by developing countries, particularly through the G77 group, on the issue of unilateral humanitarian intervention. In 2000 the G77 rejected the idea of 'right' of humanitarian intervention, stating that it has 'no legal basis in the United Nations Charter or in the general principles of international law' (G77, 2000 art .54). This position was already expressed in 1999, in a Ministerial Declaration which also highlighted how humanitarian assistance should be provided according to the principles indicated in the Annex to General Assembly resolution 46/182 (G77, 1999 art. 69-70). The latter stressed the necessity of respecting the 'sovereignty, territorial integrity and national unity' of the recipient country, providing assistance with its consent on the basis of its request to do so (UN, 1991 art. 3 ANNEX).

This opposition is dictated by the fact that a traditional conception of sovereignty as non-interference is one of the few guarantees for developing countries' independence *vis-à-vis* Western power. As the ICISS Report itself acknowledges, 'In a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best – and sometimes seemingly their only – line of defence', being also a 'recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny' (ICISS, 2001:7). This framework clearly shows that there is still no 'overwhelming majority' (Shaw, 2008:126) in the international community ready to support a shift in the traditional concept of sovereignty in order to allow for unauthorised humanitarian interventions. Therefore, the norms of sovereignty remain those indicated in the Charter of the United Nations, based on non-interference and state equality, which recognise the possibility of military interventions under the provisions of the Chapter VII.

Conclusions

In this essay I have attempted to describe the emergence of different challenges to the traditional norms of sovereignty. The latter, incorporated in the structure designed by the Charter of the United Nations, is characterised by supreme authority over the national territory, non-interference in other states' internal affair and state equality. The notion of humanitarian intervention, both in its historical forms and in its new conceptualisation as 'Responsibility to Protect', has challenged the absoluteness of sovereignty, suggesting the possibility, for external forces, to intervene in a sovereign country to save human lives. The progressive re-conceptualization of 'sovereignty as control' into 'sovereignty as responsibility' is believed to have provided to a new legal basis for intervention.

Some Western countries like the US claim that this shift supports the already existing possibility of unauthorised humanitarian interventions. Nonetheless, many developing countries still see the forcible actions taken under the provisions of the Chapter VII of the Charter as the only legal solutions. Therefore, there is no emergent international custom allowing for the use of unauthorised intervention, because many states are still supporting the norms of sovereignty described in the UN Charter and the related mechanism of legitimate use of force. This is because the traditional concept of sovereignty is still a guarantee for the independence of the majority of states, which would be otherwise legitimately subjected to the most powerful states' interference. A general support for UN authorised interventions is also suggested by the most recent developments represented by the 2011 intervention in Libya and

the 2013 military operations in Mali. In fact, both were authorised by the Security Council, with the resolution 1973 (UN, 2011) and 2071 (UN, 2012) respectively.

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