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# 'Sovereignty vs. Suffering'?<sup>1</sup>

## Re-examining Sovereignty and Human Rights through the Lens of Iraq

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### Abstract

*Increasing use has been made by some international lawyers of a simple binary opposition, holding that the preservation of sovereignty inherently vitiates concepts of human rights while conversely the erosion of sovereignty is a bell-wether of progress for human rights. Developments in and around Iraq during the last decade have shown this to be, at best, an unhelpful simplification. It is unquestionable that, when misused, the concept of sovereignty can shield perpetrators of human rights violations from international reaction or even scrutiny. However, the erosion or violation of sovereignty can also occasion grave abuses. In the instant case, the Iraqi government has trounced most of the rights of its people and has sought to shroud this reality in a cloak of sovereignty. Simultaneously, the actions of others, including governments and the United Nations, have also given rise to violations of the human rights of the Iraqi people. This has happened, in particular, through the use of force and the imposition of sanctions, both so-called penetrations of sovereignty. Hence, it is time to reassess our understanding of the role of sovereignty in the human rights equation, retrieving what benefits it can offer, even while remaining wary of the risks it can pose.*

<sup>1</sup> This portion of the title is borrowed from a *New York Times* Op-Ed suggesting that it was Iraqi *sovereignty* which obstructed international protection for the Kurds. This appeared less than a month after the Gulf War, a conflict which had, at least ostensibly, been about defending the very national sovereignty of Kuwait and had occasioned terrible human suffering. The piece noted, without perhaps a sense of the full meaning in this context, that '[w]eighed against human suffering, a nation's sovereignty usually triumphs'. Urquhart, 'Sovereignty vs. Suffering', *NY Times*, 17 April 1991, A23.

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## 1 Introduction

Since the early 1990s some international lawyers have made use of a simple binary opposition, holding that the preservation of sovereignty inherently vitiates concepts of human rights while conversely the erosion of sovereignty is a bell-wether of progress for human rights.<sup>2</sup> Developments in and around Iraq during the last decade have shown this to be, at best, an unhelpful simplification. It is unquestionable that, when misused, the concept of sovereignty can shield perpetrators of human rights violations from international reaction or even scrutiny. However, the erosion or violation of sovereignty can also occasion grave abuses. In the instant case, the Iraqi government has trounced most of the rights of its people and has sought to shroud this reality in a ghastly cloak of sovereignty. Simultaneously, the actions of others, including governments and the United Nations, have also given rise to violations of the human rights of the Iraqi people. This has happened, in particular, through the use of force and the imposition of sanctions, both so-called ‘penetrations’<sup>3</sup> of sovereignty. What lesson should we draw from this? It may seem a form of apostasy coming from a human rights lawyer, but perhaps we should re-assess our understanding of the role of sovereignty in the human rights equation.

## 2 On Sovereignty

### A *Historical Origins*

For all its flaws, sovereignty is one of the primordial principles of the state system. In simple terms, there would be no *international* law without the nation-state and no nation-state would have developed and prevailed but for the idea of sovereignty.<sup>4</sup> As its etymology would suggest, sovereignty, in its post-Westphalian configuration, aimed for the exclusive and unsupervised power of the monarch (*souverain*) within his

<sup>2</sup> See, for example D. Forsythe, *Human Rights and World Politics* (1989), at 6: ‘[T]he international law of human rights is revolutionary because it *contradicts* the notion of national sovereignty ...’ (emphasis added). Henkin opines that human rights law is a ‘radical derogation from the axiom of “sovereignty”’. Henkin, Sibley Lecture: ‘Human Rights and State “Sovereignty”’, 25 *Ga. J. Int’l. & Comp. L.* (1995) 38. It is not only US writers that enunciate such views. Urquhart, a former UN Under Secretary General for Special Political Affairs, notes with regard to the post-Gulf War plight of Iraqi Kurds: ‘the standoff between national sovereignty and concern for human rights is sickeningly familiar’. See Urquhart, *supra* note 1.

<sup>3</sup> The gendered language used to describe the relationship of human rights to sovereignty is troubling and worthy of another paper. Ideas of ‘penetration’ or ‘piercing’ of ‘once impregnable walls’ or ‘impenetrable barriers’ recur; the consent of the object being penetrated appears irrelevant.

<sup>4</sup> See Klabbers, ‘Clinging the Concept of Sovereignty: Wimbledon Redux’, 3 *Austrian Review of International and European Law* (1998) 345. One does not wish to carry this argument too far. To paraphrase the view of Hersch Lauterpacht from as early as 1927: there is nothing which inherently requires such an approach to transnational law, it is merely the way in which states, comprising the ‘organs of international legislation’, have caused the system to develop. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), at 78.

borders. Still, in providing an effective challenge to papal and feudal power, the idea represented a step forward.<sup>5</sup>

Though medieval Europe is the location most often depicted as the birthplace of sovereign states, thinkers in other cultures also postulated similar ideas. The Muslim scholar Ibn Khaldun (1332–1406), for example, put forward the idea that the local kingdom, as opposed to the larger Islamic Caliphate, was the real political unit that mattered and that an orderly state would have to be based upon the local king and his local support.<sup>6</sup>

## B *Evolving Definitions of Sovereignty*

During its long history, the meanings of sovereignty have metamorphosed; in the present, its usage continues to slip.<sup>7</sup> Throughout the contemporary argosity of scholarship on the topic, the term 'sovereignty' is used to refer to a number of different, albeit interrelated, concepts. First, it denotes claim to territory. Second, it refers to the power of the state *vis-à-vis* its citizens. Third, it encompasses 'sovereignty on the international plane', the freedom of action of a state in relation to other states, otherwise known as sovereign equality.<sup>8</sup> An obvious — but important — legal fiction,<sup>9</sup> the latter is a basic tenet of the contemporary international system.<sup>10</sup> Finally, sovereignty is sometimes read today to mean popular sovereignty or 'the will of the people'.

## C *The Limits of Sovereignty*

There seems to have been a basic misunderstanding in approaches to sovereignty by many governmental proponents and non-governmental opponents. They have overlooked that it has become an attribute that states are required to exercise *in accordance with international law*. As long ago as 1928, this was stressed by the arbitrator in the *Island of Palmas* case<sup>11</sup> and has been reiterated by the General

<sup>5</sup> On the historical development of the concept of sovereignty see H. Spruyt, *The Sovereign State and Its Competitors* (1994) and F. H. Hinsley, *Sovereignty* (1986).

<sup>6</sup> See discussion in Hinsley, *supra* note 5, at 52.

<sup>7</sup> See Steinberger, 'Sovereignty', in 10 *Encyclopedia of Public International Law* (1987) 397. For a diagnosis of the problems involved in defining sovereignty, see Nagy, 'Ephemeral Sovereignty and the Longing for the Absolute', in Gombár *et al.* (eds), *The Appeal of Sovereignty: Hungary, Austria and Russia* (1998) 259.

<sup>8</sup> See Lauterpacht, 'Sovereignty — Myth or Reality?', 73 *Int'l Affairs* (Jan. 1997) 140.

<sup>9</sup> As Koskenniemi notes with apt wit, 'To speak of sovereignty as a uniform quality with respect to the United States and Andorra, for example, is not a piece of impressive sociological analysis.' Koskenniemi, 'The Wonderful Artificiality of States', 88 *Proc. ASIL* (1994) 28.

<sup>10</sup> See, i.e., U.N. Charter, Art. 2(1): 'The Organization is based on the principle of the sovereign equality of all its members.'

<sup>11</sup> *Island of Palmas Case*, (Netherlands v. US) (1928), Permanent Court of Arbitration, 2 *RIAA* 829. Sole arbitrator Huber noted that territorial sovereignty 'has as corollary a duty: the obligation to protect within the territory the rights of other States . . . together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its . . . sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty . . .'

Assembly in the 1970s.<sup>12</sup> In propounding the importance of the sovereign equality of states, the Assembly underscores that this includes for each state ‘a duty to comply fully and in good faith with its international obligations’.<sup>13</sup> These must be read to include obligations in the realm of human rights.

A few scholars have noted that even in its earliest forms, the idea of sovereignty was subject to some limits. As Stephen Krasner suggests, ‘in Western Europe, the area that generated the notion of Westphalian sovereignty, most rulers have never enjoyed full autonomy with regard to the treatment of their own subjects’.<sup>14</sup> By the early 20th century, the limitation of sovereignty was clearly recognized in the *Wimbledon* case, in fact the very ceding of sovereign powers through the conclusion of a treaty was reflexively deemed to be a sovereign act.<sup>15</sup>

In the last decades of the 20th century, limits on states’ sovereignty have increasingly narrowed the power which the holder of sovereignty (a now contested agent) may exercise and have shrunk the borders in which those powers may be exercised. This narrowing has been the result of synergistic factors: the bundle of ambivalence called globalization, the triumph of neo-liberalism, the recognition of transnational hazards like AIDS, and developing legal constructs — human rights law in particular.<sup>16</sup> This has led to the development of what has alternatively been posited as a relativizing of sovereignty or its disaggregation. Our understanding of the term now is radically different than in 17th-century Europe. As political scientist Kathryn Sikkink phrased a contemporary view, ‘sovereignty is a set of intersubjective understandings about the legitimate scope of state authority, reinforced by practices’.<sup>17</sup>

#### D *The End of Sovereignty?*

Literature on the ‘withering away’ of sovereignty has poured forth in the last decade from international lawyers, political scientists, scholars of international relations,

<sup>12</sup> See GA Res. 2625, 24 Oct. 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, [hereinafter Declaration on Principles of International Law].

<sup>13</sup> *Ibid.* Richard Falk has developed this notion into what he calls ‘responsible sovereignty.’ See Falk, ‘Sovereignty and Human Dignity: The Search for Reconciliation’, in Deng and Lyons (eds), *African Reckoning: A Quest for Good Governance* (1998) 14.

<sup>14</sup> S. Krasner, *Sovereignty: Organized Hypocrisy* (1999) 126.

<sup>15</sup> ‘(T)he right of entering into international engagements is an attribute of State sovereignty.’ *The S.S. Wimbledon*, 1923 PCIJ Series A, No. 1, at 25.

<sup>16</sup> For a thorough discussion of the impact upon traditional notions of sovereignty of technological, environmental and other contemporary factors, see Grossman *et al.*, ‘Are We Being Propelled Towards a People-Centered Transnational Legal Order?’, 9 *Am. U. J. Int’l L. & Pol’y.* (1993) 11.

<sup>17</sup> Sikkink, ‘Human Rights, Principled Issue-networks, and Sovereignty in Latin America’, 47 *Int’l. Org.* (1993) 441.

human rights advocates and others.<sup>18</sup> Just as the West was congratulating itself on winning the Cold War, some Western international lawyers and scholars were paradoxically reappropriating the basic Marxist-Leninist idea about the fading of the state.<sup>19</sup> In line with the millennial 'end of . . .' trend, readers were told by some of the impending demise of antediluvian notions of sovereignty and the great promise this held for the advancement of human rights.

Sovereignty, we were told, was 'almost everywhere in retreat'.<sup>20</sup> In the United States, some of our most distinguished scholars propounded the view that 'the "S word" was a mistake built upon mistakes, which has barnacled an unfortunate mythology'.<sup>21</sup> In this brave new world order, many championed 'humanitarian intervention', albeit with honorable intentions, as a sort of *deus ex machina* for human rights.<sup>22</sup> Along with sovereignty, we began to lose the sense that armed conflict was inherently dangerous for human rights and to be avoided<sup>23</sup> and that democracy and self-determination were not only important ends but also necessary means.

### ***E The Sovereignty/Human Rights Polarity***

Some human rights advocates, primarily but not exclusively in the West, prominently championed the death of sovereignty. This development was seen to herald a new age of positive human rights enforcement and exposure of perpetrators. 'We will remember 1999 as the year in which sovereignty gave way in places where crimes against humanity were being committed', Kenneth Roth, the executive director of Human Rights Watch, told the *New York Times*.<sup>24</sup> This suggests that the very dismantling of sovereignty should be a goal of both human rights theory and practice.

Human rights lawyers and activists can easily be forgiven for coming to loathe the 'S word'.<sup>25</sup> Sitting through meetings at the United Nations during which regimes mouth sovereignty as an alibi, obnubilating their use of extra-judicial killings, the death penalty or torture, is enough to make one bridle whenever the term is mentioned. A weakening of sovereignty seemed a sort of avatar for removing statist barriers between individual victims on the one hand and international law and

<sup>18</sup> For a range of such narratives, see Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 447; S. Hashmi (ed.), *State Sovereignty* (1997); Weiss *et al.*, 'Sovereignty under Siege: From Intervention to Humanitarian Space' in G. Lyons and M. Mastanduno (eds), *Beyond Westphalia?: State Sovereignty and International Intervention* (1995) 87; Camilleri and J. Falk, *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World* (1992), Rosas, 'The Decline of Sovereignty: Legal Perspectives', in Livonen, *The Future of the Nation State in Europe* (1993); *Daedalus*, Vol. 124, No. 2, 'What Future for the State?' (Spring 1995). For a critique of this trend, see Koskenniemi, *supra* note 9.

<sup>19</sup> Koskenniemi, *supra* note 9, at 22.

<sup>20</sup> See Urquhart, *supra* note 1.

<sup>21</sup> Henkin, *supra* note 2, at 2.

<sup>22</sup> See, i.e., Tesson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988).

<sup>23</sup> This is the very policy concern which motivated the UN Charter's prohibition on the use of force.

<sup>24</sup> Cited in Whitney, 'Hands Off: The No Man's Land in the Fight for Human Rights', *NY Times*, 12 Dec. 1999, Week in Review, 1.

<sup>25</sup> See, i.e., the poignant and principled argument in Mayotte, 'Civil War in Sudan: The Paradox of Human Rights and National Sovereignty', 47 *J. Int'l Aff.* (1994) 497.

mechanisms which might be able to offer them a remedy on the other. It promised individual accountability for international crimes, even those committed by heads of state, whether in an international tribunal or through the exercise of universal jurisdiction by a national court.

Unfortunately, as the Iraq case study will elucidate, what some human rights activists and lawyers interpret as positive developments, also have other meanings which shed a bleaker light on the relative weakening of state power and legitimacy. Sovereignty, though tarnished through its repeated misuse as a human rights red herring, has also been a defence of the weak facing off with the strong, as for example in Nicaragua's case against the US in the International Court of Justice.<sup>26</sup> Thus, the removal of the sovereignty barrier at this historical moment necessarily has ambiguous consequences. As Claudio Grossman and Daniel Bradlow warned with regard to what they perceived as the emergent international legal order:

[A] people-centered legal order provides no obstacle to stronger states or social groups interested in making an unjustified intervention in the internal affairs of weaker states or social groups. This in turn creates the risk that a people-centered legal order could result in the centralization of power in the international community.<sup>27</sup>

An argument can be made that this is precisely the use which has been made of the anti-sovereignty thesis during the Gulf War and since with regard to Iraq.<sup>28</sup>

### ***F Diverse Historical Understandings of the Relationship between Sovereignty and Human Rights***

Views about relations between the dead hand of sovereignty and the El Dorado of human rights make sense in light of divergent understandings of human rights history. Many Western theorists take the European experience of the Second World War, primarily the Holocaust, as the (often sole) catalyst for the development of the modern international human rights law framework.<sup>29</sup> However, in other parts of the world, it is rather the revolt against colonialism, and all of its attendant forms of gross human rights violation, and the struggle for self-determination, which are often the major referents for concepts of human rights.<sup>30</sup> While in the case of the Holocaust sovereignty is understood to have been part and parcel of shielding Nazi war crimes,<sup>31</sup> in relation to colonialism the blatant denial of claims to sovereignty was seen to

<sup>26</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. US) ICJ Reports (1986) 14.

<sup>27</sup> Grossman, *supra* note 16, at 24.

<sup>28</sup> See Quigley, 'Prospects for the International Rule of Law', 5 *Emory Int'l L. Rev.* (1991) 316.

<sup>29</sup> See, for example, Henkin, Lecture: 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', 68 *Fordham L.Rev.* (1999) 4; Lillich *et al.*, *International Human Rights: Problems of Law, Policy and Practice* (1995) 5.

<sup>30</sup> One must complicate the concepts at play here, noting that through the concept of *uti posseditis*, the limits of self-determination were seen to be colonially imposed boundaries. Self-determination within such borders was, at best, unwelcome. Paradoxically, loyalty was then meant to focus on sovereign states within boundaries imposed by colonialism, itself. See, i.e., Quigley, *supra* note 28, at 314.

<sup>31</sup> See, i.e., Grossman, *supra* note 16, at 2. One could point out that many of the atrocities were also enabled by the decimation of the sovereignty, itself, of the Netherlands, Poland, France, etc.

occasion the human rights violations in question. Thus, for people fighting colonial domination, sovereignty, itself, became a touchstone of human rights.<sup>32</sup> This reality reinforces what Koskenniemi has noted, namely that 'sovereignty was originally taken as a progressive, egalitarian principle and that it still carries these connotations'.<sup>33</sup> For, as Michael Ignatieff reminds us:

State sovereignty safeguards self-determination and if we move into a world in which coalitions of the willing believe that human rights considerations automatically override the claim of state sovereignty we may actually arrive at the paradoxical and unwelcome result of using human rights arguments to sacrifice human rights.<sup>34</sup>

His point is not invalidated by the grim reality — which he notes — that in practice sovereignty does not always safeguard self-determination, a fact which the Iraq scenario underscores.

### 3 The Iraq Experience

Since 1990 Iraq has been a crucible for concepts of human rights and sovereignty. Perhaps nowhere has the complicated relationship between these notions had more devastating, and contradictory, human consequences in recent years.

#### *A Iraqi Government Violations of Human Rights*

There is little left to be said about the nightmarish violations of the vast majority of the human rights of the Iraqi population by the Ba'ath regime under the leadership of President Saddam Hussein. Insulting the President is a capital offence. Reports of widespread extra-judicial killings, torture whose cruelty defies the imagination, prolonged detention without trial or charge, mass 'disappearances', persecution of the Shi'a of the south, and genocidal acts against the Kurdish minority have been abundantly documented.<sup>35</sup> While many Western governments and media personify these atrocities in the numen-like figure of 'Saddam', in fact, a sophisticated and far-reaching bureaucracy has been involved.<sup>36</sup> The Iraqi state offers a Westphalian nightmare of absolutist ideas of sovereignty in their ugliest guise: an unaccountable state apparatus exercising absolute power over its terrified citizenry.<sup>37</sup>

<sup>32</sup> This explains the references to self-determination in the International Bill of Human Rights. See Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>33</sup> M. Koskenniemi, *From Apology to Utopia* (1989) 204.

<sup>34</sup> M. Ignatieff, *Whose Universal Values?: The Crisis in Human Rights* (1999) 21.

<sup>35</sup> For recent information, see Human Rights Watch, *World Report* (2000) and Amnesty International, *Annual Report* (2001) and the most recent report of the UN Special Rapporteur on Iraq, Andreas Mavrommatis, E/CN.4/2001/42, 16 January 2001.

<sup>36</sup> See generally Middle East Watch, *Bureaucracy of Repression: The Iraqi Government in Its Own Words* (1994).

<sup>37</sup> For a controversial portrait of these aspects of the Iraqi state apparatus, see S. al-Khalil, *Republic of Fear: The Politics of Modern Iraq* (1989).

### 1 *The Response of the International Human Rights Community*

Every conceivable arrow in the quiver of the traditional international human rights machinery has been aimed at this dire reality. Both the UN Commission on Human Rights (the Commission) and its Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) have adopted repeated resolutions.<sup>38</sup> In 1991, the Commission appointed a Special Rapporteur to look into the situation.<sup>39</sup> The thematic mechanisms of the Commission have also documented these abuses and raised them with the Iraqi government, and UN treaty bodies have voiced urgent concern.<sup>40</sup> International NGOs have produced page after page, stained with the blood of Iraqi victims, all to no avail.

None of these measures per se implicates sovereignty. In our contemporary understanding, gross human rights violations are clearly understood to be matters of legitimate international concern. At the same time, however, none of these measures has been able to induce substantial improvements, though at the very least they have kept the issue alive at the international level. This has perhaps not always had the intended consequences. In a tragic twist, the documentation of human rights abuses has been harnessed by those with particular political agendas regarding Iraq, detracting from the credibility of the enterprise in the eyes of many, and sometimes facilitating actions which have had lethal consequences for the Iraqi people themselves.<sup>41</sup>

### 2 *The Sovereignty Shield*

Faced with international scrutiny, the Iraqi government has made explicit reference to the concept of sovereignty — and its correlate principle, non-intervention — to try and insulate its practices. Such arguments abound in the government's official replies to the reports of the UN Special Rapporteur on Iraq. For example, it has denounced his idea of sending UN human rights monitors to Iraq as 'flagrant interference in its internal affairs and ... blatantly incompatible with the concepts of sovereignty and independence ... [that] would create a precedent to ... threaten third world peoples and any State desiring to preserve its sovereignty and independence'.<sup>42</sup> The

<sup>38</sup> The Commission has adopted a yearly resolution condemning Iraqi human rights abuses since 1991. See Resolutions E/CN.4/RES/1991/74, 1992/71, 1992/60, 1993/74, 1994/74, 1995/76, 1996/72, 1997/60, 1998/65, 1999/14 and 2000/17. It is interesting to note that attempts to pass such a resolution prior to Iraq's invasion of Kuwait were met with a lukewarm reception despite the horrendous Anfal campaign against the Kurds. See Burkhalter, 'Bargaining away Human Rights: The Bush Administration's Human Rights Policy toward Iraq and China', 4. *Harv. Hum. Rts. J.* (1991) 107.

<sup>39</sup> Resolution E/CN.4/RES/1991/74, at para. 5. Max van der Stoep, the first Rapporteur, assumed the post in 1991. Andreas Mavrommatis succeeded him in 2000. Both Special Rapporteurs have been denied any access to Iraq.

<sup>40</sup> See, i.e., Concluding Observations of the Committee on the Rights of the Child: Iraq, UN Doc. CRC/C/15/Add.94 or the views of the Human Rights Committee at CCRP/C/79/Add.84.

<sup>41</sup> President George Bush made great use of an Amnesty International report on allegations about conditions in Iraqi-occupied Kuwait to build domestic support for the use of force against Iraq in January 1991. Burkhalter, *supra* note 38, at 108.

<sup>42</sup> UN Document A/50/150, Reply of the Government of Iraq to the report of the Special Rapporteur on the human rights situation in Iraq, at para. 8.



government has criticized Security Council resolutions as 'prejudicing the sovereignty of Iraq and dividing its people on an ethnic and sectarian basis'.<sup>43</sup> In response to the food for oil resolution (996 of 1995), the government has opined that it 'divests Iraq of its natural right as an independent sovereign State to dispose of its assets in the interests of the Iraqi people'.<sup>44</sup> In defending its treatment of ethnic minorities, the regime has claimed that: 'The country's sovereignty, as well as its territorial unity and integrity, must be respected.'<sup>45</sup> On the basis of sovereignty, it has complained bitterly about the imposition of the no-fly zones.<sup>46</sup> It has even challenged the right of the Special Rapporteur to suggest the need for change in the politico-legal structure of Iraq that shapes its human rights practices as 'blatant and completely unwarranted interference . . . in the internal affairs of Iraq'.<sup>47</sup> While some of these concerns may be legitimate, most reflect a typical governmental misuse of the notion of sovereignty. In any case, these protestations have had a relatively small impact on the ways in which the international community has been willing to engage with the Iraqi situation.

### **B Human Rights Violations Occasioned by 'Piercings' of the Sovereignty of Iraq**

In spite of protests by the Iraqi government, a wide range of attempts have been made, ostensibly to bring Iraq into compliance with UN resolutions through what might otherwise be termed 'intervention' in the internal affairs of Iraq. (These measures should be distinguished from the traditional human rights efforts detailed above.) In part, these efforts have been implemented by the Security Council under Chapter VII of the UN Charter and are thus seen as legal exceptions to traditional sovereignty norms.<sup>48</sup> Others have, however, been carried out unilaterally by states or groups of states (especially the US and the United Kingdom), at times claiming to be acting in furtherance of UN resolutions. Unfortunately, these measures have largely been those perceived to be in the national interests of the states involved,<sup>49</sup> rather than necessarily in the interests of the human rights of the Iraqi people. For example, while traditional notions of sovereignty were defied by putting weapons inspectors on the ground, a choice was made not to abrogate such ideas through the placement of human rights monitors. Instead, measures taken against Iraq include the now controversial sanctions regime, the creation of no-fly zones and the repeated use of military force against targets in the country. It is to the effect of some of these actions on the human rights of the Iraqi people that we now turn.

<sup>43</sup> *Ibid.* at para. 29.

<sup>44</sup> *Ibid.* at para. 31.

<sup>45</sup> UN Doc. E/CN.4/1996/199, at para. 37.

<sup>46</sup> UN Doc. A/C.3/51/3 of 25 Sept. 1996, Annex, at para. 7

<sup>47</sup> UN Doc. A/C.3/51/3, Annex, at para. 14.

<sup>48</sup> See Art. 2(7) of the UN Charter, and the Declaration on Principles of International Law, *supra* note 12, which conditions its prohibition on intervention as not 'affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.'

<sup>49</sup> Consider, for example, reports that US and UK intelligence agents may have operated within UNSCOM. P. Lashar *et al.*, 'MI6 Officers Worked in Iraq as UN Inspectors', *The Independent*, 25 January 1999.

### 1 *Sanctions and Human Rights*

Economic sanctions were first imposed on Iraq in August 1990 after its illegal invasion of Kuwait.<sup>50</sup> Originally established by Security Council Resolution 661 (1990), they prevent the import by any state of any Iraqi product or commodity and the sale or supply of any commodities or products (excepting those strictly intended for medical purposes and limited foodstuffs) to Iraq by any state. They further prohibit the provision of any financial assistance to the government of Iraq or to any commercial, industrial or public utility in the country and any remittances whatsoever, save those for strictly medical or humanitarian purposes and limited foodstuffs.<sup>51</sup> Any exceptions must be allowed by the sanctions committee, comprised of members of the Security Council. The last clause of Article 2(7) of the UN Charter notwithstanding, this represents the de facto abnegation of the sovereign powers of engaging in foreign trade and overseeing a national economy.

In 1995 the Security Council, ‘concerned by the serious nutritional and health situation of the Iraqi population’, passed Resolution 986 (oil-for-food). This essentially allowed Iraq to sell an amount of oil not exceeding \$US 1 billion every 90 days. Such sales were subject to stringent conditions and deductions to fund the UN oversight of the plan itself and the Compensation Fund, and as such were also subject to delays. The amount left over was to be used to meet the humanitarian needs of the Iraqi population. Interestingly, the Security Council noted in the penultimate paragraph of this resolution that ‘nothing in this resolution should be construed as infringing the sovereignty . . . of Iraq.’<sup>52</sup> While such a statement may indicate Chapter VII’s status as an exception to non-intervention principles in law, it misrepresents facts on the ground.

Still in place after more than a decade, these sanctions appear to have been relatively useless in undermining the power of the Iraqi regime and on the other hand have had an apocalyptic effect on the population of Iraq.<sup>53</sup> This is despite the oil-for-food modifications. NGOs and the International Committee of the Red Cross have spoken out on the humanitarian impact of the sanctions.<sup>54</sup> Absurdly, the UN’s own specialized agencies have drawn attention to and documented the human devastation wrought by the sanctions (and perhaps compounded by Iraqi govern-

<sup>50</sup> This kicked off the so-called sanctions decade. Kofi Annan commented that ‘(s)anctions have been used far more frequently in the 1990s than ever before, but with results that are ambiguous at best.’ UN Doc. A/54/1, 31 August 1999, at para. 62.

<sup>51</sup> S/RES/661, 6 August 1990.

<sup>52</sup> S/RES/986, 14 April 1995, at para. 18.

<sup>53</sup> See, for example, the conclusion of the Security Council’s own Humanitarian Panel that due to being forced to rely on the distribution of humanitarian supplies to meet basic needs, the Iraqi population now faces ‘increased government control over individual lives.’ UN Doc. S/1999/356, 30 March 1999, Annex II: Report of the second panel established pursuant to the note by the President of the Security Council of 30 January 1999 (S/1999/100), concerning the current humanitarian situation in Iraq, at para. 27 [*hereinafter* Security Council Panel Report].

<sup>54</sup> See i.e. ‘Red Cross Warns of Deteriorating Living Conditions in Iraq’, *Agence France Presse*, 8 May 1999; Human Rights Watch, *Letter to UN Security Council*, 4 Jan. 2000, available at <<http://www.hrw.org/hrw/press/2000/01/iraq-ltr.htm>>.

mental response to the sanctions), while other branches of the UN have been in charge of carrying out these same sanctions.

The Sub-Commission, noting, *inter alia*, that the 'catastrophic health situation is leading to about 6,000 deaths a month among children under the age of five' and 'a return to illiteracy' caused by 'the embargo', has called for a lifting of those sanctions provisions 'affecting the humanitarian situation of the population.'<sup>55</sup> UNICEF has detailed the more than doubling of the infant mortality rates in the country since 1990. The Security Council's own Panel on Humanitarian Issues has said that '[e]ven if not all suffering in Iraq can be imputed to external factors, especially sanctions, the Iraqi people would not be undergoing such deprivations in the absence of the prolonged measures imposed by the Security Council and the effects of the war'.<sup>56</sup> The UN Committee on the Elimination of Racial Discrimination (CERD) also appealed to the international community to lift those aspects of the sanctions impacting the humanitarian situation of Iraqis.<sup>57</sup> Mass movements of NGOs opposed to the sanctions have sprung up around the world to campaign for the lifting of the sanctions and in some cases to openly defy them. Despite this, largely due to support from two permanent members of the Security Council, the US and the UK, the sanctions regime has persisted.

Beyond mere humanitarian concern, it is important to view the impact of the sanctions in human rights terms. Perhaps most importantly, the sanctions have devoured that most central of all human rights, the right to life,<sup>58</sup> by impeding provision of essential medical care or drugs, clean water and adequate nutrition.<sup>59</sup> They have undermined the enjoyment of the full panoply of economic, social and cultural rights. These include: the right to the highest attainable standard of health,<sup>60</sup> the right to education,<sup>61</sup> the right to food,<sup>62</sup> the right to social security,<sup>63</sup> and the right to an adequate standard of living, including food, clothing and housing.<sup>64</sup> They have also infringed upon the right to work,<sup>65</sup> the right to earn a decent living,<sup>66</sup> as well as

<sup>55</sup> Sub-Commission decision 1999/110, 26 August 1999, UN Doc. E/CN.4/SUB.2/DEC/1999/110. This appeal was reiterated in August 2001. See E/CN.4/Sub.2/2001/L.42.

<sup>56</sup> Security Council Panel Report, *supra* note 53, at para. 45.

<sup>57</sup> See A/54/18, para. 340.

<sup>58</sup> Codified in ICCPR Art. 6 and UDHR Art. 3. Article 6 of the Convention on the Rights of the Child (CRC) guarantees the right to life of every child and further requires States Parties to 'ensure to the maximum extent possible the survival and development of the child.'

<sup>59</sup> The Human Rights Committee has stressed that 'the right to life has been too often narrowly interpreted ... In this connection ... it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.' Human Rights Committee, General Comment 6 on Article 6, The Right to Life, Sixteenth Session (1982).

<sup>60</sup> As contained, *inter alia*, in the UDHR, Art. 25; CRC, Art. 24; ICESCR, Art. 12.

<sup>61</sup> Enshrined in the UDHR, Art. 26; CRC, Art. 28; and ICESCR, Art. 13.

<sup>62</sup> UDHR, Art. 25; CRC Art. 27; and ICESCR, Art. 11.

<sup>63</sup> See, *inter alia*, the UDHR, Art. 22; ICESCR, Art. 9.

<sup>64</sup> UDHR Art. 25; CRC Art. 27; and ICESCR, Art. 11.

<sup>65</sup> UDHR Art. 23; ICESCR Art. 6.

<sup>66</sup> UDHR Art. 23; ICESCR Art. 7.

other rights specifically pertaining to women and to children.<sup>67</sup> Despite its abysmal record in the field of civil and political rights documented above, the Iraqi government had improved the material standard of living<sup>68</sup> of its people in the decades prior to the Gulf War, and, especially when compared to neighbours like Saudi Arabia, had taken steps toward the advancement of women.<sup>69</sup> All this was obliterated during the 1990s, at least partly due to the sanctions.

The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 8 has pushed the formulation of the sanctions dilemma in human rights terms, emphasizing the 'need to inject a human rights dimension into deliberations on this issue'.<sup>70</sup> The CESCR, while stressing that it took no position on the implementation of sanctions per se, emphasized the need to consider the human rights impact, including the impact on rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) of any such measures, especially on vulnerable groups.

In so doing, it pointed out that all the permanent members of the Security Council have signed the ICESCR (though China and the US have yet to ratify it). Under the Covenant's Article 2(1) the CESCR opined, they have an obligation to take steps, including at the international level, to move towards the full realization of the Covenant's guaranteed rights.<sup>71</sup> It also pointed to the Convention on the Rights of the Child (nearly universally ratified) and to the highly lauded Universal Declaration of Human Rights (UDHR). Thus, human rights responsibility stretches to those governments imposing the sanctions as well as to Iraq.

The summary above explains why one commentator ironically dubbed sanctions 'weapons of mass destruction'.<sup>72</sup> It also serves as a stark reminder of the dangers which internationally imposed measures may pose to human rights. Ironically, while the Iraqi government was not effectively prevented from exercising its sovereign powers negatively against its people in active human rights violations (executions, brandings, arbitrary detentions) all of which continued,<sup>73</sup> it was largely hindered from exercising its positive sovereign power in terms of ensuring that their human needs were met. As such, the Iraqi people were left suffering from the burdens of sovereignty while being deprived of the benefits it does offer. The double-edged sword of sovereignty cuts more than one way in the field of human rights, an idea which the following consideration of military intervention in Iraq further makes clear.

<sup>67</sup> See, generally, the CRC (Iraq is a state party, the US is not) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (neither US nor Iraq are parties) as descriptions of these rights.

<sup>68</sup> See, i.e., Moushabeck, 'Iraq: Years of Turbulence', in Bennis and Moushabeck (eds), *Beyond the Storm: A Gulf Crisis Reader* (1991) 31.

<sup>69</sup> This is noted even by critics like al-Khalil, *supra* note 37, at 88–93.

<sup>70</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), at para. 6.

<sup>71</sup> Signatories to a treaty, according to Article 18 of the Vienna Convention on the Law of Treaties, must 'refrain from acts which would defeat the object and purpose of (the) treaty ...'

<sup>72</sup> Mueller *et al.*, 'Sanctions of Mass Destruction', *Foreign Affairs*, May/June 1999, at 43.

<sup>73</sup> In fact, in some cases these practices worsened. Note for example the penal sanctions (branding, amputations) imposed for a range of economic offences in the wake of sanctions. See E/CN.4/1998/38, 24 December 1997, Report of the Special Rapporteur on torture, at para. 412.

## 2 The Use of Force and Human Rights in Iraq

### (a) The Gulf War of 1991

A full litany of the human rights consequences of the Gulf War is not possible here due to space constraints.<sup>74</sup> The focus here is to demonstrate, in human rights terms, the lesser-known impact of the 'piercing of Iraq's sovereignty' by the use of armed force during the Gulf War. It is clear that those consequences were both grave in nature and enormous in scale. Though the Allies could claim to be acting under Chapter VII of the Charter and in accordance with Security Council Resolution 678 in the use of armed force to oust Iraqi occupation forces from Kuwait, it is questionable that such authorization could be read to allow the human suffering which resulted.

Human rights organizations have detailed the impact on civilians of the bombardment of Iraq by the 'Allied Powers'. Reportedly, more than 88,500 tons worth of explosives rained down on the country during *Operation Desert Storm*.<sup>75</sup> US sociologist and human rights expert, Dr. Louise Cainkar, who visited Iraq after the Gulf War, estimated that somewhere between 11,000 and 24,500 civilians may have been killed as a direct result of the bombings.<sup>76</sup> A lower estimate comes from Middle East Watch, which in a comprehensive work on the subject declared that 'an upper limit of 2500 to 3000 Iraqi dead' were civilians.<sup>77</sup> The exact figure may be somewhere in between.

Perhaps the single worst event was the bombing of the Amariyah Shelter on the morning of 13 February 1991. As many as 1,600 people — reportedly exclusively civilian residents of the area — may have been incinerated alive.<sup>78</sup> According to researchers who carried out fieldwork in the area, the shelter had been largely filled with women and children, men having been banned due to social norms disfavouring the mixing of the sexes in public sleeping space. With tragic irony, in the literal penetration of the shelter by US bombs, 'the people who were supposed to die if the neighborhood was bombed remained alive, and the people who were supposed to be protected from death were all dead'.<sup>79</sup> The *Columbia Journalism Review* described footage of the aftermath shown in the Middle East but deemed too graphic for US viewers:

Nearly all the bodies were charred into blackness; in some cases the heat had been so great that

<sup>74</sup> This section of the paper sets aside the question of the *jus ad bellum*, focusing instead on the *jus in bello*. For an erudite Middle Eastern perspective on the causes of the war see W. Khalidi, *The Gulf Crisis: Origins and Consequences* (1991).

<sup>75</sup> Gellman, 'U.S. Bombs Missed 70% of the Time', *Washington Post*, 16 March 1991, A1.

<sup>76</sup> See also her excellent discussion of methodological difficulties inherent in making such an assessment. Cainkar, 'Desert Sin', in Bennis and Moushabeck, *supra* note 67, at 338–345.

<sup>77</sup> See Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (1991) 19. However, explicitly excluded from this figure were those killed by sanctions, by related disease and from the secondary effects of the destruction of Iraq's power grid.

<sup>78</sup> Cainkar, *supra* note 76, at 342.

<sup>79</sup> *Ibid.*, at 341.

entire limbs were burned off. Among the corpses were those of at least six babies and ten children, most of them so severely burned that their gender could not be determined.<sup>80</sup>

The Amariyah horror is but one example of the particular impact on women of the ‘penetration’ of their nation’s sovereignty. Women suffered greatly, as did men, from the impact of the bombardment as well as of the sanctions. Additionally, care-giving responsibilities traditionally given to women in Iraq as in most societies were terribly aggravated in the calamitous circumstances. The destruction of targets such as the baby formula plant in Abu Ghuraib, on the theory that the plant was really for chemical weapons manufacture, left women struggling to feed their children. The sanctions too placed a tremendous burden on women in providing food for their children. Subsequent food rationing is reported to have had a particular impact on pregnant or lactating women.

One of the deadliest consequences of the ‘piercings’ of Iraq’s sovereignty has been the diminishing of the country’s infrastructure which provided clean water and power to its population.<sup>81</sup> That, together with sanctions which blocked its ability to rebuild, has returned life in Iraq to a ‘pre-industrial state’.<sup>82</sup> *Washington Post* correspondent Barton Gellman noted that as part of their military strategy against Iraq, the Allies ‘deliberately did great harm to Iraq’s ability to support itself as an industrial society’.<sup>83</sup> As Louise Cainkar reported following her mission to Iraq, ‘within a 45-day period they had gone from 1991 to the 19th century ...’<sup>84</sup> Such dismantling of the country materially is symbolic of the dissolution of its sovereignty as any type of shield at the international level. In its wake we find a humanitarian situation the gravity of which the Security Council’s Panel declared to be ‘indisputable and cannot be overstated’.<sup>85</sup>

#### (b) The Use of Force against Iraq since the End of the Gulf War

Intermittent small-scale military attacks against Iraq have taken place since the end of the Gulf War. These have been aimed at the capital as well as parts of the north and south of the country, often hitting what are called military targets, with casualties unknown and unreported internationally. While sometimes states have claimed to be acting in accordance with UN resolutions, experts have noted the tenuous basis of such claims.<sup>86</sup> Such attacks have been justified for a range of reasons, from Iraqi troop movements to Iraqi radar locking onto US planes in the no-fly zones, all of which have

<sup>80</sup> Garrett, ‘The Dead’, 30 *Columbia Journalism Review* (May/June 1991) 32.

<sup>81</sup> Note the UN’s own post-war assessment, made by Under-Secretary-General Ahtisaari, annexed to UN Doc. S/22366, 20 March 1991.

<sup>82</sup> See i.e., Human Rights Watch, ‘Letter to Tony Blair’, 10 Nov. 1998, available at <<http://www.hrw.org>>. The letter, intended to inspire US and UK forces to minimize the harm to civilians in 1998 strikes, describes the impact of earlier attacks: ‘(T)he destruction of Iraq’s electrical capacity had a devastating impact on civilian water supplies, sanitation, health and agriculture.’

<sup>83</sup> Gellman, ‘Allied War Struck Broadly in Iraq’, *Washington Post*, 23 June 1991, A1.

<sup>84</sup> Cainkar, *supra* note 76, at 340.

<sup>85</sup> S/1999/356, at para. 49.

<sup>86</sup> ‘There is no entitlement in the hands of individual members of the United Nations to enforce prior Security Council resolutions by the use of force.’ R. Higgins, *Problems and Process: International Law and the Way We Use It* (1994), at 259.

been taken to imply that in some way Iraq has now almost entirely lost the shield of its sovereignty. It is as if Article 2(4) of the UN Charter has been suspended *vis-à-vis* Iraq and the nation has become a free-fire zone.

For example, in June of 1993 the US launched cruise missiles at Baghdad, targeted at the headquarters of Iraq's Intelligence Service, apparently in retaliation for an alleged plot to assassinate former President George Bush (a sort of attack on US sovereignty). Several of the missiles missed their targets and landed in residential neighbourhoods killing as many as eight civilians and injuring many more.<sup>87</sup> Again in 1996, in response to the entrance of Iraqi troops into the Kurdish city of Irbil at the behest of the Kurdistan Democratic Party (which was locked in a power struggle with another Kurdish group, Talabani's Patriotic Union of Kurdistan), the US again launched attacks — reportedly comprised of 44 cruise missiles — on Baghdad and southern areas.<sup>88</sup> Iraq claimed that the attacks on the capital alone killed five and wounded 19 and displayed television images it claimed were the ruins of a home in Baghdad, while US military sources denied any knowledge of such events.<sup>89</sup>

On several occasions these strikes have been sustained and have had graver consequences still. For example, in December 1998 following a report by the chair of UNSCOM to the Security Council indicating Iraqi governmental failure to cooperate, the US and the UK carried out four nights of bombardment. Amnesty International pointed to reports that as many as 30 people were killed and 100 others wounded during the first night of attacks alone when some 10 missiles were reported to have fallen on residential neighbourhoods damaging homes.<sup>90</sup> Since that time to the present, there have been repeated attacks, both in the so-called no-fly zones and in and around Baghdad.<sup>91</sup> Iraqi sources have claimed that this has resulted in hundreds of civilian casualties; US military spokesmen have denied the veracity of such claims.<sup>92</sup> While the depth of civilian suffering remains unclear, international observers have related the human impact of the strikes which they have been able to authenticate. For example, Amnesty International reported the killing of a shepherd and six family members when their tent near Mosul in the north of Iraq was hit in such an attack on 30 April 1999.<sup>93</sup>

<sup>87</sup> See Quigley, 'Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters', 17 *Hastings Int'l & Comp. L. Rev.*(1994) 241 and Surchin, 'Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad', 5 *Duke J. Comp. & Int'l L.* (1995) 457.

<sup>88</sup> See Harris, 'After Quick Response to Iraq, A Lengthy Debate on Motive', *Washington Post*, 8 Sept. 1996, A29. The article notes the role of the contemporaneous US presidential campaign.

<sup>89</sup> See Graham, 'U.S. Launches More Cruise Missiles against Iraq: Air Defenses Near Baghdad Hit; "No-Fly" Zone Extended in South', *Washington Post*, 4 Sept. 1996, A1.

<sup>90</sup> See Amnesty International, 'Iraq: Amnesty International says governments must protect civilian life', MDE 14/007/1998, 17 December 1998.

<sup>91</sup> The most recent attacks occurred on 10 August 2001 when three sites in southern Iraq were bombed. See Burns, 'US, British Planes Bomb Iraq Sites', *Associated Press*, 10 August 2001. Such strikes look likely to continue. See 'U.S. Planes Sustained Strikes in Iraq', *NBC News and Wire Reports*, 14 August 2001, available on <[www.msnbc.com](http://www.msnbc.com)>.

<sup>92</sup> See Human Rights Watch, 'Iraq: Human Rights Developments', *World Report* (2000) 2, available on <<http://www.hrw.org>>.

<sup>93</sup> Amnesty International, 'Iraq', in *Annual Report* (2000) 2, available on <<http://www.amnesty.org>>.

Given that Iraq's borders have become essentially meaningless in this scenario, others have gotten into the act for their own reasons. For example, Turkey's armed forces regularly pursue bands of Kurdistan Workers' Party (PKK) fighters back across the Iraqi frontier. According to Human Rights Watch, just one such raid in 2000 resulted in the killings of 38 Iraqi Kurdish civilians.<sup>94</sup> US media reports have suggested that some US attacks may have been carried out for reasons more closely tied to US domestic politics than the situation in Iraq.<sup>95</sup> This serves as a stark reminder of the dangerous possibilities once sovereignty is gone.

In human rights terms, the right to life is seriously implicated by this sustained violation of Iraq's sovereignty through the use of military force. There is also a considerable effect on a range of other rights, including the right to health, the right to education, the right to a decent standard of living and the right to a livable environment.<sup>96</sup> In the terms of humanitarian law, some of these actions may qualify as war crimes, either as indiscriminate attacks or attacks on objects necessary for the maintenance of civilian life.<sup>97</sup> All told, they give civilians the feeling of being caught in a seamless web of powerlessness, bounded on the one side by the undemocratic Iraqi government over which they have no control and on the other by international intervention into which they have no input. The Iraqi people who were the victims of Iraqi governmental violations were again victimized by the permeation of their country's sovereignty. This practical experience must inform our views of the relationship between sovereignty and human rights.

### 3 *Intervention, Iraq and the Sovereignty Discourse*

In some human rights and international legal circles, the use of armed force against Iraq and, initially, the use of sanctions against the nation were lauded as examples of a situation in which human rights had at long last trumped sovereignty, permitting a range of so-called compliance measures. Some have gone so far as to argue that the violations of human rights by the Iraqi government constituted a waiver of the nation's sovereignty.<sup>98</sup> This is, in a way, a logical conclusion of the move in mainstream US international legal scholarship to championing a right of humanitarian intervention.

Some scholars have suggested that sovereignty should be understood today as representing the will of the people instead of the will of the *de facto* government of a state. While this idea sounds appealing, it can have ambiguous consequences. For example, the use of force to change a government, which would classically be understood as foreign intervention, can be seen to be in defence of sovereignty, rather

<sup>94</sup> See Human Rights Watch: 'Iraq and Iraqi Kurdistan: Human Rights Developments', in *World Report* (2001) 7.

<sup>95</sup> See, i.e., Harris, *supra* note 88, and 'Operation Desert Prick', *The New Republic*, 30 September 1996, at 7.

<sup>96</sup> See Greenpeace, *On Impact: Modern Warfare and the Environment, A Case Study of the Gulf War* (1991).

<sup>97</sup> See Needless Deaths, *supra* note 77.

<sup>98</sup> See i.e. Beres, 'Why and How Saddam Must Be Punished: A Jurisprudential/Philosophic Explanation', 75 *U. Det. Mercy L. Rev.* (1998) 667, and Meyers, 'A Defense of Unilateral or Multi-Lateral Intervention Where a Violation of International Human Rights Law By a State Constitutes an Implied Waiver of Sovereignty', 3 *ILSA J. Int'l. & Comp. Law* (1997) 895.



than trouncing it.<sup>99</sup> This is reminiscent of the official defence provided by the US government to the Security Council for its invasion of Panama one year prior to the Gulf War. '[T]he people, not governments, are sovereign', remarked US Representative to the UN Thomas Pickering — qualifying this as a 'revolutionary idea' without visible embarrassment over the context.<sup>100</sup>

Some international lawyers signed on to the view propounded by Pickering, noting like d'Amato what they perceived to be 'the positive implication for the development of human rights resulting from the United States intervention in Panama'.<sup>101</sup> D'Amato denounced international legal critics of the invasion as being 'statist', arguing that they are incapable of 'see[ing] through the abstraction that we call the "state" to the reality of human beings struggling to achieve basic freedoms'.<sup>102</sup> However, this obscures the reality of modern warfare in which civilians are most likely to be the casualties. It is also doubly unfair to expect those who live in the South to live without any of the benefits yielded by state sovereignty if their governments violate human rights, while the rest of the world benefits from the state system. D'Amato's claims with regard to the invasion of Panama must be considered in light of the reality that this action itself was undertaken by a (highly powerful) *state* apparatus. The problem of course remains that, as one journalist has phrased it, 'some countries are more sovereign than others'.<sup>103</sup>

## 4 The State, the International Community and Human Rights

Clearly, in human rights terms, the state has a duality of functions. On the one hand, it is a most likely perpetrator of human rights abuses. One need but think of the Iraqi state, the Burmese state or Pinochet's Chile. In response, human rights law must limit the role of the state, delimit its sovereign powers. On the other hand, the state is also the agent thought most likely to be able to protect its citizens from harms committed by others, whether they be non-governmental armed groups, private persons, multinationals or foreign aggressors. The state is also vital to building the rule of law. Hence, a radical ambivalence. As Monique Chemillier-Gendreau expresses it: '*Telle est l'ambivalence persistante de l'Etat. Tout propos univoque à son sujet écorche la réalité.*'<sup>104</sup> International lawyers and the human rights movement have struggled with this dilemma.

Paradoxically, it was just about the time that worldwide movements to hold *states* accountable for treatment of their citizens had made significant gains that real power began to evacuate the state and take up residence elsewhere: in multinational

<sup>99</sup> For a view in this vein, see Reisman, Comment: 'Sovereignty and Human Rights in International Law', 84 *AJIL* (1990) 866.

<sup>100</sup> UN Doc. S/PV.2902, 23 Dec. 1989, at 7.

<sup>101</sup> D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *AJIL* (1990) 516.

<sup>102</sup> *Ibid.*

<sup>103</sup> Whitney, *supra* note 24, at 1.

<sup>104</sup> Chemillier-Gendreau, *Humanité et Souverainetés: essai sur la fonction du droit international* (1995) 310.

corporations and international financial institutions like the World Bank and the World Trade Organization. International human rights law is largely referenced around states. Even when private abuses are targeted, it is through the frame of the state.<sup>105</sup> Thus, even as it may be seen to offer hope, the movement of power away from the state — which at least one possesses tools to challenge — to uncontrolled entities that have barely begun to be subjects of international law can also be a frightening spectre in human rights terms. Hence the world of private prisons, of corporate security forces, of mercenaries and what Amnesty International refers to as non-governmental entities, non-state armed groups committing atrocities in all regions of the world. While segments of the human rights movement lauded the putative end of sovereignty, they scrambled to find ways to deal with these other increasingly important and yet utterly unaccountable actors.

Faced with the reality of state violations or the alternative nightmare of collapsed states, what is often posited as the solution: international intervention — unilateral, multilateral, by a regional or international organization, even by the UN itself — can have ambiguous human rights consequences.<sup>106</sup> One need only think of NATO's actions in Kosovo<sup>107</sup> or US/UN action in Somalia for examples. Yet, there are few tools so far to contend with the human rights implications of such phenomena. Paradoxically, the same international human rights organizations which have documented Iraqi government brutality over the years must now also compile the roster of horrors inflicted on the Iraqi population by international action and campaign against such abuses.<sup>108</sup>

While the state — starkly obvious in the case of Iraq — needs democratization, so too do international organizations.<sup>109</sup> One must not forget that occluded provision of the Universal Declaration of Human Rights which provides that, '[e]veryone is entitled to a social and *international* order in which the rights and freedoms set forth in this Declaration can be fully realized'.<sup>110</sup> In the words of Chemillier-Gendreau: '*contrôle par les destinataires de l'action est à peine embryonnaire*'. Perhaps when one lives in a state which is a permanent member of the Security Council — or one of its close allies — and is thus protected by the ubiquitous veto power, one might feel more comfortable with a notion of international solutions threaded through its needle. Elsewhere, the situation may look rather different.

As Stanley Hoffman has noted, 'Internationalism, so far, has been too superficial, or hollow, to serve as the ideal that could bring about a new revolution in sovereignty, away from the State.'<sup>111</sup> Furthermore, if, as Soheil Hashmi notes in the same volume,

<sup>105</sup> See, i.e., CEDAW.

<sup>106</sup> For an interesting analysis of intervention, see Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *Harv. Int'l L. J.* (1997) 443.

<sup>107</sup> For discussion of this topic, see 'Editorial Comments: NATO's Kosovo Intervention', 93 *AJIL* (1999) 824.

<sup>108</sup> For example, Amnesty International issued 'worldwide appeals expressing concern about the continuing loss of civilian lives as a result of these airstrikes.' Annual Report, *supra* note 93, at 2. See also HRW letters to Blair and Clinton, *supra* note 82.

<sup>109</sup> See Chemillier-Gendreau, *supra* note 104, at 324.

<sup>110</sup> UDHR Art. 28, emphasis added.

<sup>111</sup> See Hashmi, *supra* note 18, at ix.

sovereignty has become 'fundamentally an idea of who ought to wield power that is accepted by a community', the input of a community is required with regard to any infiltration of sovereignty if we are serious about democracy.<sup>112</sup>

## 5 Conclusion: The Sovereignty/Human Rights Polarity Revisited

Where does this complicated reality leave us? The law needs bright line rules, but reality often proves difficult to mould to such constraints. One can but hazard a few humble suggestions.

If we are going to live in a world that 'pierces' sovereignty and assumes that sovereignty is meant to reflect the will of the people, rather than the will of leaders alone, then we are all going to have to live in it on equal terms. Powerful governments cannot be allowed to take advantage of such an arrangement, to use the evolution of sovereignty with the aid of human rights law as a policy tool, facing off with defenceless populations elsewhere. Citizens of a state must not lose the benefits they may receive from sovereignty because their government commits crimes against humanity. Michael Ignatieff opines that, in fact, the very shift towards an emphasis on individual rights and away from sovereignty may give rise to such paradoxical conclusions when he notes that 'the impact . . . has not necessarily been to the benefit of oppressed individuals, but rather to the benefit of the states which intervene in other states in the name of human rights'.<sup>113</sup> Such a state of affairs merely delegitimizes vital human rights principles. Those concerned with the international rule of law and human rights might do well to reclaim the importance of Article 2(4).

Furthermore, if we are to seriously consider alternatives to sovereignty, any such alternatives must be democratized and in accordance with human rights principles. As Claudio Grossman and Daniel Bradlow have framed this problem: 'These developments also pose an important challenge to international law: to balance the ability to intervene so as to maintain peace and security with concerns about undue interference by the most powerful members of the international community.'<sup>114</sup> Such challenges require attempts to consult with local populations and to involve them in efforts to change the national realities within which they live, whether by national or international means. This is the very approach which former UN Special Envoy to Somalia, Mohamed Sahnoun, suggested before it was dismissed by the UN.<sup>115</sup> It is also reminiscent of a desirable aspect of the world constitutive process as enumerated by McDougal *et al.* in the now seemingly prehistoric year of 1980: 'all who are affected by, or who can affect, authoritative decisions should, or should be made to, participate

<sup>112</sup> *Ibid.*, at 5.

<sup>113</sup> Ignatieff, *supra* note 34, at 19.

<sup>114</sup> Grossman, *supra* note 16 at 22.

<sup>115</sup> As Chris Giannou, surgical director for the ICRC in Somalia in 1992 noted, 'Sahnoun knew that Somalis had to participate in the restabilization of their society . . .' Giannou, 'Reaping the Whirlwind: Somalia after the Cold War', in Bennis and Moushabeck (eds), *Altered States: A Reader in the New World Order* (1993) 359.

in the making of such decisions'.<sup>116</sup> There is no question that such an approach is extremely difficult, particularly in a situation of dictatorship like Iraq. On the other hand, to skip this essential aspect of the project is to make the possibility of human rights violations occasioned by any interventions more likely.

Sovereignty does not automatically provide us with a normative road map to sort out these tough problems. As shown, the responsible exercise of sovereignty can be good for human rights just as the irresponsible skewering of sovereignty may lead to debacle, and vice versa, such that no easy binary opposition is possible. Perhaps the concept of sovereignty is useful only as a caution, an invitation to step back from the moral enthusiasm that often drives intervention and ask which important values might be threatened by such action. An inquiry about human rights consequences is relevant to a proposed 'penetration' of sovereignty even as it is to the actions of a sovereign state. As the CESCR thoughtfully remarked, 'lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to . . . collective action'.<sup>117</sup> Understood in this way, and not as an absolute, sovereignty performs a useful function, and the fashionable rhetoric that trivializes it as outmoded is as dangerous as the former rhetoric that regarded it as an adequate answer to almost any question.

<sup>116</sup> McDougal *et al.*, *Human Rights and World Public Order* (1980) 400.

<sup>117</sup> CESCR, *supra* note 70, at para. 16.