

<sup>12</sup> For a discussion of the benefits of subsidiarity and governance by local jurisgenerative communities see generally Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003) 38.

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## 1 Introduction

Recent developments in international law imply the need for a reconceptualization of the traditional framework of interstate relations. Individuals have been vested with rights (and, less commonly, obligations) at the international level. The exponential growth of humanitarian law is altering the discourse of policy-making,<sup>1</sup> while the Responsibility to Protect (R2P) doctrine is gaining acceptance within the United Nations. These developments could be understood as quirks in what otherwise remains a static order of state relations. Alternatively, they may be manifestations of an incremental shift in the undergirding principles of international law. Peters' project is firmly in the latter camp. Less empirical than deductive, Peters uses R2P as a litmus test to highlight a subtle shift in the values informing the international legal order. Despite her assertions Peters is not, however, engaged in a neutral exercise of 'diagnosis'.<sup>2</sup> She is invested in this process of 'humanization', if the process is indeed occurring. Her project is not a declaration of a completed shift, but rather ballast to an ongoing recalibration.

It is difficult simultaneously to diagnose and to bolster a movement. Empirically, Peters is more convincing when submitting that the *telos* of sovereignty is

evolving<sup>3</sup> than when arguing that it has been 'thoroughly transformed'.<sup>4</sup> However, to understand this project as an element of the 'humanization' movement goes some way towards harmonizing these two claims. This is a performative article. And as a navigation of a transition, rather than a declaration of an endpoint, it provides a strong contribution to the debate on the direction of international law and the normative ramifications of a 'humanized' system.

## 2 Inversion of Emphasis

Reading Peters' article as endorsing a shift in the foundations of international law informs an understanding of its methodological approach. Peters relies heavily on the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS). As a 12-member commission under the authority of the Canadian government the ICISS is not a representative body. Although the Commission's findings have been affirmed by the General Assembly, the Security Council, and by the UN Secretary-General, R2P remains, as Peters acknowledges, a 'precarious' doctrine.<sup>5</sup> A critique could therefore be made that there is simply not enough evidence to support a finding that sovereignty has been humanized. From a different angle, however, the acceptance of R2P within the UN system raises the question of how a principle so inimical to traditional ideas of state sovereignty could gain sway at all. Just as Georges Cuvier hypothesized the entire structure of an

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<sup>1</sup> Teitel, 'Humanity's Law', 35 *Cornell Int'l LJ* (2002) 359.

<sup>2</sup> Peters, 'Humanity as the A and Ω of Sovereignty', at 544.

<sup>3</sup> *Ibid.*, at 514.

<sup>4</sup> *Ibid.*, at 543.

<sup>5</sup> *Ibid.*, at 524.

organism from a fragment of bone, Peters suggests that approval of a doctrine which undercuts basic principles of the international legal order implies a broader shift in accepted values. Logically, the inconsistency between R2P and traditional conceptions of external sovereignty calls for an interrogation of the default centrality of state sovereignty. If one seeks to affirm sovereignty as a foundational principle, that theoretical position must itself be analysed, justified, and legitimated.

In this analysis, Peters finds the traditional conception of external sovereignty as self-legitimizing both normatively and doctrinally flawed. Peters' critique of the modern meaning of 'sovereignty' is a study in inversion of emphasis. What was once a right or capability of states – the right to intervene on behalf of nationals abroad, for example, or to protect one's own citizens internally – is now, she argues, more frequently perceived as an obligation.<sup>6</sup> This approach is apparent in Peters' claim that non-intervention is displacing sovereignty as a constitutive principle of the international legal order. In Peters' assessment, situating sovereignty as a *Letzbegründung* of the international order emphasizes any violation as a sin against statehood. Impermeable boundaries protect institutions rather than constituents. Non-intervention shifts the locus of attention from offences against the state to offences against the person – the respect of territorial boundaries is intrinsically linked to the protection of peoples, of that sphere in which self-determination has the capacity to flourish. To Peters, this is a shift in discourse. The rationales that inform decision-making on the international level are changing.

<sup>6</sup> See *ibid.*, at n. 56.

At times Peters does seem to overstate her claims. For example, the 1929 *Island of Palmas* award appears less an early example of 'the obligation to protect individuals as a corollary of sovereignty'<sup>7</sup> than affirmation of the severity of the duty to protect the rights of other sovereign powers. Protection in Huber's context is resolutely owed to states, not individuals. The award reiterates that the system of sovereign equality requires deference to a foreign state even within one's own territory. That deference may extend, if the state so deems, to deference to its citizens. It is within a state's power to declare an affront to a citizen to be an affront to the state itself.

That said, current discourse on state protection of foreign nationals does suggest an ongoing movement from right to obligation, at least within the domestic sphere. In the United Kingdom, the doctrine of legitimate expectations at least requires that the government consider whether to take up the cause of one of its nationals abroad.<sup>8</sup> The refusal of a state to protect a citizen abroad is a serious matter, one which may require a state to give some justification to its own constituents.<sup>9</sup> On the international level, the International Law Commission has included a recommendation in the

<sup>7</sup> Peters, at 525.

<sup>8</sup> *Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & the Secretary of State for the Home Department* [2002] EWCA Civ 1598, [2002] All ER (D) 70, at paras [99] and [104].

<sup>9</sup> As an example, the Australian government's initial refusal to mediate on behalf of Mamdouh Habib and David Hicks during their incarceration at Guantanamo Bay stimulated serious debate within Australia on the obligations of a government to its citizens.

Draft Articles on Diplomatic Protection that states give ‘due consideration’ to the possibility of exercising their right to diplomatic protection.<sup>10</sup> The ILC’s phrasing is a subtle gesture towards reconceptualizing the right of protection as an obligation, but is at most a nascent shift.

### 3 Domestic Comparisons

In mapping the transition from a state-based to ‘humanized’ system of international law, Peters draws an analogy between the international and the domestic spheres. Just as internal sovereignty has evolved to a level where raw power must be based in ‘other, higher order, values’,<sup>11</sup> so, she argues, should external sovereignty be justified. Peters characterizes internal sovereignty as based in and responding to the will and needs of the polity:

In contemporary thought, a government’s exercise of (delegated) sovereign powers enjoys both input and output legitimacy when it takes into account the concerned natural persons’ voice (i.e. is based on popular sovereignty) and fulfils certain overlapping functions (as valued by the affected individuals themselves), namely to protect human rights, to create and preserve a space for individual and collective self-fulfilment, to enable and host political participation, and to provide a point of reference and identification.<sup>12</sup>

The legitimacy described by Peters is fundamentally democratic. It is based not merely on the government’s capacity to provide for its citizens, but the citizens’

capacity to participate in the public sphere. However the democratization of power is a process driven by individuals. Revolutions occur not from above but from below, and the history of the last two centuries has taught that the right to political participation is rarely ceded without significant effort by the disenfranchised. In contrast, the value-shift that Peters perceives on the international plane is not occurring through external pressure. If there has been a change, it is clear that what has changed is the rhetoric, not the orator. A ‘humanization’ of the law does not catapult individuals onto the international stage as agents. States remain the building blocks of the international order, although their duties are read as encompassing basic protections of the individuals within their borders. Peters attempts to skirt round this fact by rewriting states as their constituents. The obligation to intervene in cases of conscience-shocking atrocities is represented as being owed ‘to individual states (which represent their population), and to the international community as a whole, which includes human beings everywhere’.<sup>13</sup> In an act of ventriloquism, states on the international level are conceived of as mouthpieces for their populations, thus cementing the ‘individualization’ and ‘humanization’ of international law. However, if it is accepted that some states do not adequately represent their citizenry, it is difficult to conclude that, as a whole, the international community represents ‘human beings everywhere’. There is a disjunct here, which can be surmounted only by recognizing that humanization does not necessarily empower individuals.

<sup>10</sup> *Draft Articles on Diplomatic Protection* (2006), at Art. 19.

<sup>11</sup> Peters, *supra* note 2, at 518.

<sup>12</sup> *Ibid.*, at 519.

<sup>13</sup> *Ibid.*, at 534.

Without devolution of power to individuals as agents, the people ostensibly ‘owed the obligation’ of non-intervention seem oddly passive participants in this shift of power in their favour.

#### 4 What Does It Mean to ‘Humanize’ International Law?

This passivity gestures at a deeper question. If we are to accept that external sovereignty is undergoing a process of ‘humanization’, what are the effects of the shift? The model of a ‘humanized’ system that Peters is outlining remains extremely state-centric. It is, after all, the Security Council which is vested with the potential responsibility to act on behalf of individual needs. The individual at the heart of the humanized order is not imbued with the capacity to participate either in decision-making or in the incremental development of international law. A ‘humanized’ order conceives of the individual as an object, rather than a subject. Without a concomitant vesting of obligations in the individual at an international level, the shift appears to be predominately a shift in the language of the existing power-brokers on the international stage – states themselves.

The consequentialist objection to intervention that Peters addresses is based precisely in the concern that the actors charged with ‘humanizing’ the international sphere are states, which may have interests external to the needs and wellbeing of individuals. Peters acknowledges this to be a serious concern, on the basis that ‘abstract reasoning applied to the wrong circumstances can engender pernicious

results’.<sup>14</sup> However, she does not squarely address the method by which an accurate balance between the principle of external state sovereignty and a ‘humanized’ sovereignty can be drawn if it is to be drawn entirely on the level of inter-state relations.

This problem of states policing the boundaries of a ‘humanized order’ also emerges if we probe the logical ramifications of a humanized approach. If the very existence of sovereignty is ‘determined and qualified’ by humanity, the principle has the potential to reach more broadly than conscience-shocking cases of internal human rights abuses. If states are indeed understood as legitimate only insofar as they ‘represent their population’,<sup>15</sup> then logically states with poor democratic credentials should be impacted on on the international stage in spheres beyond the question of intervention and borders. As an example, if the ‘humanization’ of sovereignty is to be taken seriously, it is arguable that a state with poor democratic credentials be held less capable of entering into treaty relations, or perhaps carry less weight as a ratifier in determining whether a treaty has entered into force.<sup>16</sup> Further, if, as Peters suggests, a state’s right to vote in the General Assembly could conceivably be stripped from it for failure to attend to internal rights abuses, a major upheaval in the current framework of state relations would seem inevitable.

Of course, it is unlikely that these questions would be carried to their logical conclusions, precisely because states are likely to be moderate in the extent to which they allow questions of human rights and needs to impinge on the existing model

<sup>14</sup> *Ibid.*, at 533.

<sup>15</sup> *Ibid.*, at 534.

<sup>16</sup> I am indebted to Professor J.H.H. Weiler for this point.

of sovereignty. The velocity of the ‘humanization’ revolution that Peters anticipates is necessarily slowed by the fact that states, not individuals, are charged with its fulfilment.

This is not to say that there will be no repercussions from the importation of values of humanity to traditional conceptions of sovereignty. Peters’ ‘humanization’ is a shift in the principles which underlie decision-making. Re-defining the substructure of the international order implies a re-characterization of the weight of various principles in debate. If the prohibition on intervention is conceived of as based in the need to protect a population’s right to self-determination and freedom, the effect that an intervention would have on that underlying principle will carry greater weight than a knee-jerk prohibition on crossing a sovereign border. In decisions on intervention or the imposition of sanctions, this sub-structure of rights may develop into an essential tool in resolving disputes and hierarchically ordering international principles. At times, it is likely that two conceptions of rights will come into conflict with one another, as the appropriateness of Security Council measures to restore international peace and security are balanced against their effect on the individuals within the borders of a state. The value of ‘humanization’ lies therefore in its effect on the realm of discourse within which political decisions are made. A transition towards founding external sovereignty in the protection of individuals within the jurisdiction of a state will alter the language of inter-state relations. Peters rightly suggests that, by perceiving individuals beneath the veil of sovereignty, individual needs will gain legitimacy as a rationale for action or

restraint in negotiations on the international level.

## 5 Conclusion

Peters identifies and endorses a loosening of the default position that external state sovereignty is the undergirding principle of international law. An emphasis on the presence of individual needs in the global order alters the framework of debate and refigures the values that govern decisions on intervention. The article does not give a definitive answer to where this reconfiguration will lead. It is instead providing a normative assessment of the benefits of furthering a shift towards values of ‘humanization’, while mapping some possible ramifications for the Security Council and state relations. Although empirically Peters may at times overstate the extent of the development of sovereignty, this attests to her position as a standard-bearer of the humanization of sovereignty rather than an impartial observer of a developing trend.

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