
Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters

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1 Introduction

Often the duty to intervene in sovereign states to prevent mass atrocity is used as a starting point for engaging in broader questions of global justice.¹ While debate on this issue has historically centred on the existence of a right to intervene, this has changed with the recent promulgation and adoption of the Responsibility to Protect (R2P).² Rather than employing the language of rights, the Responsibility to Protect instead insists that sovereign states have a primary responsibility to protect their populations from genocide, ethnic cleansing, crimes against humanity, and war crimes. Where states manifestly fail to protect their citizens from

mass atrocity, the international community has a residual responsibility to do so.

Anne Peters in 'Humanity as the A and Ω of Sovereignty' argues that a 'reversal of the principal-agent relationship between the state and human beings' (at 515) is occurring and the result is the humanization of the principle of sovereignty. The endorsement of R2P, for Peters, 'ousted the principle of sovereignty from its position as a *Letztbegründung* (first principle) of international law' (at 514). For Peters, the principle of humanity is now the foundation and *telos* of state sovereignty. This response suggests two critiques of Peters' argument. Both concern political limitations to the principle of humanity in international law. The first concerns the theoretical justification for limiting intervention to clear instances of genocide and crimes

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¹ For instance, Beitz in 'Justice and International Relations', 4 *Philosophy and Public Affairs* (1975) 360 accepts that military intervention is necessary in the face of mass atrocity and extrapolates this finding to argue for global distributive justice.

² The notion of a 'responsibility to protect' was first proposed by the International Commission on Intervention in State Sovereignty in 2001 and subsequently adopted in a more circumscribed

form by the UN in 2005. See International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001), available at: www.iciss.ca/pdf/Commission-Report.pdf; and UN Doc. A/RES/60/1, 15 Sept. 2005, at paras 138–139, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> ('R2P Documents').

against humanity when the principle aims to ensure that all human beings have their basic needs, interests, and security fulfilled. The second questions the concept of an illegal Security Council veto as well as the contention that the rule of law applies to Security Council decisions. Broadly, both critiques concern the emergence of ‘political limits’ in a new global space organized by a conception of sovereignty rooted in the principle of humanity.

2 The Problem of Constructing Limits under the Principle of Humanity

For Peters, the ‘normative status of sovereignty is derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted’ (at 514). Here the principle of humanity serves both as the foundation of the international legal system and as its *telos*. From the perspective of humanity, argues Peters, ‘conflicts between state sovereignty and human rights should not be approached in a balancing process ... but should be tackled on the basis of a presumption in favour of humanity’ (at 514). While this is the formula Peters provides for conflicts between state sovereignty and human rights, Peters limits the instance of military intervention to clear cases of mass atrocity or, more specifically, to clear cases of genocide and crimes against humanity. There are a number of political and ethical reasons to limit military interventions in this way. What is unclear, however, is how this constraint arises for Peters under the governing principle of humanity. Put

another way, if external sovereignty, for Peters, is contingent upon a state’s willingness and ability to secure the basic rights, needs, interests, and security of its people, then how is sovereignty preserved in all cases of human rights abuse falling short of genocide and crimes against humanity? This is a conceptual and normative question. If sovereignty is ‘humanized’ as Peters posits, the category of legitimate military intervention must be broader than the article suggests. Paradoxically, Peters insists on this limit to military intervention while also arguing that where a state fails to provide for basic human rights ‘such omissions lead to the suspension of external state sovereignty’ (at 526).

Peters asserts that the principle of humanity qualifies the right to sovereignty and suggests that only ‘an illegitimate state would be estopped from asserting a right against economic or even military intervention’ (at 521). While Peters cautions that a weakening of the norm of non-intervention could negatively impact on human security, she does not explain how the principle of humanity must itself be attenuated in cases of human rights abuse other than genocide and crimes against humanity.

Noting this conceptual and normative gap, Peters’ framework appears ill-suited to answering certain important questions concerning the international legal system. For instance, in the context of human rights, is a state acting contrary to international law only when it engages in genocide or crimes against humanity? What is the international legal threshold for human rights abuse? Is it illegal or illegitimate for a state to implement economic policies which result in some of its people lacking certain basic

goods? Noting Peters' foundational commitment to human interests, would it be illegal or illegitimate for a political policy to prevent persons from pursuing their basic interests? How personalized is this conception of interest? How broad is Peters' conception of human need? For instance, Martha Nussbaum's illuminating list of human needs includes bodily integrity.³ This includes the need 'to move freely from place to place; being able to be secure against violent assault, including sexual assault ... having opportunities for sexual satisfaction and for choice in matters of reproduction'.⁴ Under an international legal regime premised upon a 'humanized sovereignty', why would a state which systematically permitted violations of the bodily integrity of its female population not render it a suitable subject for military intervention?

These questions highlight the inconsistency of premising sovereignty upon the principle of humanity whilst also strictly limiting the grounds for military intervention to clear cases of genocide and crimes against humanity. Peters' rationale for this critical threshold is absent from the article. And, while it is persuasively argued that states provide functions which make possible self-determination and human rights regimes, the question remains why intervention is appropriate only in cases of genocide and crimes against humanity when sovereignty is, for Peters, premised upon the principle of humanity.

3 The Political Limits of an 'Illegal' Security Council Veto

Peters argues that 'the humanization of sovereignty has shifted the focus from rights of states to the needs of humans and has thus promoted a significant evolution of international law in the direction of a legal obligation of the Security Council to take humanitarian action' (at 540). Peters suggests that '[u]nder the rule of law, the exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member' (at 540). What's more, if R2P were, over time, considered a 'relevant rule of international law' (at 540) a veto could eventually be considered illegal in the face of mass atrocity. While an 'illegal' veto is presented in the article as a possible outcome of the adoption of R2P principles into international law, it is important to consider that the notion of limiting the veto, proposed in the original report of the International Commission on State Sovereignty, was not included in the outcome document of the UN World Summit in 2005.⁵ As such, the version of R2P to be potentially considered as a relevant rule of international law is unlikely to contain provisions regarding the Security Council veto. Nonetheless, two further critiques of this argument follow. First, this assumption that, over time, R2P practice could result in the possibility of an 'illegal' veto misunderstands the political nature of the Security Council and political power more generally. Secondly, it is unclear that the Security

³ M.C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice* (2002), at 41–42.

⁴ *Ibid.*

⁵ R2P Documents, *supra* note 2, at paras 138–139.

Council is constrained by the Rule of Law as proposed by the article.

First, the Purpose of the Security Council, as stated in Article 1, is to ‘take effective collective measures for the prevention and removal of threats to the peace’. Peters argues that, under the principle of humanity, the Council ‘has the duty to authorize humanitarian action if the very narrow conditions of right cause, proper purpose and proportionality are fulfilled’ (at 544).⁶ Suggesting that a veto could be considered illegal in the future requires both that the motives and/or reasons why a P5 member vetoed an intervention are publicly known and also that the need for an intervention can be objectively determined outside the Security Council. At present, there is no duty placed upon the P5 to provide reasons for their use of the veto power. While one might argue that Section 1(1) of the United Nations Charter provides for this duty, this has not been the practice. And, even if a duty to provide reasons arose, there would still be the age-old issue between rhetoric and political motive to contend with.⁷ Simply stated, a P5 member could exercise its veto based on an improper motive and, publicly, reason that a particular criterion for intervention had not been satisfied. Indeed, Security Council debates concerning

military intervention often centre on the characterization of the conflict. For instance, while intervention is generally accepted in cases of genocide and ethnic cleansing, it is not in cases of civil war. A P5 member can effectively veto an intervention by arguing that a particular conflict is, in fact, a civil war. And unless we have accurate tools with which to discern the motives behind state action, P5 members will be able to exercise the veto power, without repercussion, where they publicly disagree over the characterization of a conflict. In addition, powerful states can take critical purchase away from the charge of an ‘illegal veto’ in even more obscure ways. In legal argument, facts and evidence persuade. However, it will be the well-resourced and networked nations, more often than not, which have the resources to see, interpret, and even manipulate the facts on the ground of a particular conflict. For instance, the delay of intervening forces in Rwanda can, in part, be attributed to the limited number of countries which had accurate information about the nature of violence transpiring in the country. While public facts about a conflict might assist in limiting the scope of rhetoric used by a P5 member to avoid humanitarian action, it is important to note that, generally, the facts concerning the conflict are collected and disseminated by P5 members or their allies.

Secondly, the article states that the ‘rule of law also governs decisions of the Security Council’ (at 538). The second Purpose of the United Nations Charter does state that the Council is to further its mandate ‘in conformity with the principles of justice and international law’. However, exactly how the rule of law

⁶ It is also important to note here that the proposal to include criteria for intervention, including the just war criteria posited by Peters, was explicitly rejected by most Western nations and was not included in the Outcome Document.

⁷ See, e.g., Pericles’ Funeral Oration, Bk II, at paras 35–46, in *The Peloponnesian War: Thucydides* (trans. T. Hobbes).

operates to constrain the Security Council is a matter of great contestation.⁸

If Peters is suggesting that there is a right to review Security Council decisions, this question has not yet been definitively answered. Indeed, the International Court of Justice has not yet ruled on the right to review Security Council actions.⁹ Furthermore, the European Court of Justice (ECJ) in the recent *Kadi* decision found that it had no authority to review Security Council resolutions in the absence of domestic or Community implementation.¹⁰ The ECJ found that ‘the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty’.¹¹ However, the ECJ, overturning the CFI’s suggestion, explicitly found that in the absence of domestic or Community implementation, it has no authority to review Security Council resolutions for compliance with even the most fundamental international norms of *jus cogens*. What’s more, the ECJ found that Security Council resolutions should be accorded ‘special importance’ in matters of international peace and security.¹²

Peters argues that, as the rule of law binds the Security Council, it could legally compel the authorization of military intervention. The rule of law constrains the exercise of power. The doctrine traditionally and overwhelmingly operates to limit or shape decisions only after a political body has decided to pursue action. It is, of course, true that the rule of law can operate to compel some state action such as requiring an administrative body to hear a respondent’s reply. However, it is contentious to assert that the rule of law operates to compel policy decisions. Peters suggests that ‘[r]ecent state practice and case law on UN Sanctions which risk infringing human rights have made clear that the Security Council is bound at least by customary human rights law and by the “Principles of the Charter”’ (at 538). These examples, however, illustrate that once the Security Council has acted, certain legal norms are applicable. This is importantly different, however, from requiring an explicitly political body, such as the Security Council, to act.

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⁸ See, e.g., J. Alvarez, *International Organizations as Law-makers* (2006), in particular Chs 3 and 4 on the Security Council.

⁹ *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States and United Kingdom)*, Request for Indication of Provisional Measures [1992] ICJ Rep 114, and ICJ Press Release 2003/29, 10 Sept. 2003.

¹⁰ Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakat v. Council of the European Union*, 3 CMLR 41 (2008) (Kadi).

¹¹ *Ibid.*, at para. 281 citing Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, at para. 23.

¹² *Kadi*, *supra* note 10, at 294.