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A Framework of Norms: International Human-Rights Law and Sovereignty

Douglass Cassel

Notre Dame Law School, doug.cassel@nd.edu

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A framework of norms

Author: Cassel, Douglass.

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Abstract: The international legal boundary between states; rights and human rights is not fixed. Long ago, the Permanent Court of International Justice - the judicial arm of the League of Nations and the precursor to the present International Court of Justice - recognized that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations." In recent decades international relations concerning both sovereignty and rights have developed quickly. An examination of those rights and the evolving realities of sovereignty are examined.

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International Human-Rights Law and Sovereignty

International human-rights law, by definition, limits state sovereignty: it restricts how governments may treat their own citizens within their own borders. In the wake of the explosive growth of international human-rights law in the second half of the 20th century, what space remains for state sovereignty? To what extent does sovereignty shield states from international human-rights norms and enforcement? These questions must be viewed in historical context. The international legal boundary between states' rights and human rights is not fixed. Long ago, the Permanent Court of International Justice-the judicial arm of the League of Nations and the precursor to the present International Court of Justice-recognized that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations." In recent decades international relations concerning both sovereignty and rights have developed rapidly. Before examining rights, we must first examine the evolving realities of sovereignty.

Defining Sovereignty

There is no single internationally recognized definition of sovereignty. For the purpose of human rights, sovereignty may be defined from both international and domestic perspectives. In its international dimension, sovereignty is the right of a state to rule itself and those who live within its territory; to choose its own constitution, form of government, and economic system; to write and enforce its own laws; to exercise a territorial monopoly on publicly sanctioned use of force through its police and military; to set its own taxes and allocate the spending of government revenues; to exercise police powers to regulate the economy and society; and to enter into agreements with other states. A state that can do all these things, unfettered by outside dictates or interference, enjoys full sovereignty; a state that is not free to exercise these powers is, to that degree, not sovereign.

For the purposes of international human-rights law, the most critical element of sovereignty is the right of a state to treat its citizens within its borders as it sees fit, free of outside intervention. Under early 20th-century international law, one core element of sovereignty was, according to Lassa Oppenheim, a state's authority to "treat its subjects according to [its] discretion."

Pact of Customs

The turn of the century reveals sovereignty to be unprecedented and nearly universally formal in law, in a real world in which few governments are free to exercise it. Legal claims of sovereignty amount to bargaining chips, but not trump cards, for governments to play in negotiations with outsiders over the conduct of their most important internal affairs.

State sovereignty, in one sense, is hopelessly at odds with international human-rights law. International human-rights law imposes externally defined norms and enforcement on how a state treats citizens within its borders. As Kipling would say, "Ne'er the twain shall meet," or so it would appear.

In practice, of course, this pure polarity is never attained. Few governments in modern times have ever had complete license to govern their peoples as they saw fit. Yet the contradiction between sovereignty and international human rights is more than theoretical. It can be seen in the relative immunity enjoyed by powerful states—those which possess, in fact, the greatest degree of sovereignty from international humanrights enforcement. The United States, for example, formally accepts international human-rights norms but systematically rejects effective external enforcement. China routinely rebuffs even the mildest efforts to examine its record before the UN Commission on Human Rights. Regional powers such as Brazil, India, Nigeria, and Saudi Arabia are considered "untouchable" by the Commission. And Russia's recent pounding of Chechen civilians provoked little more than hand-waving by the international community.

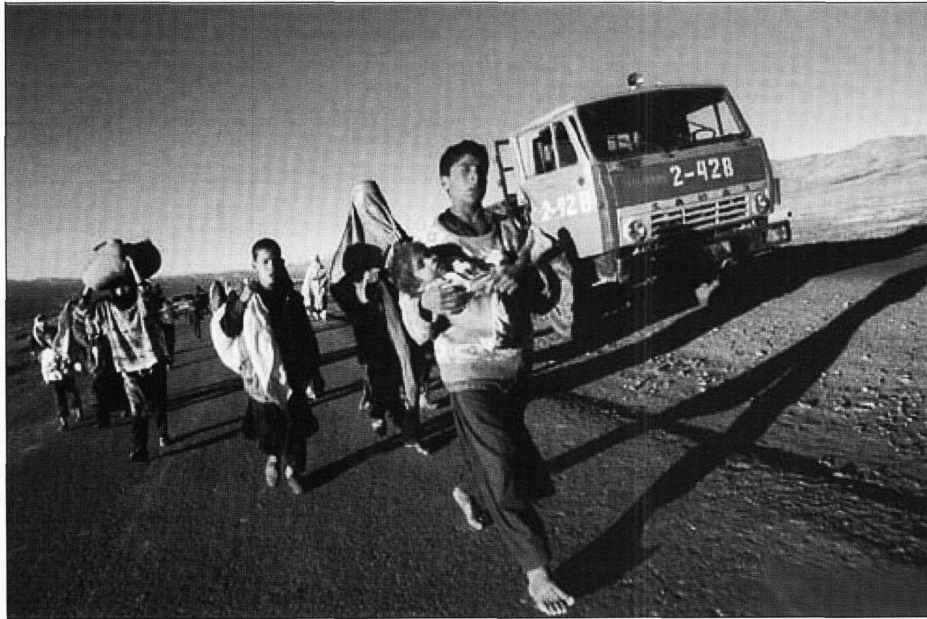
Even weaker states invoke sovereignty as a pretext against international claims of human rights. Whenever their records are criticized by the likes of Amnesty International or a UN Special Rapporteur, governments typically protest the outside interference in their sovereign affairs.

A claim of sovereignty is often an effective shield. By invoking its legitimizing power, as well as its appeal to the common interests of all states, a government raises the stakes in the debate. Other states may still agree to overcome or pierce the claim of sovereignty, but the political and diplomatic obstacles to agreement are higher and may not be overcome. In countless cases, claims of sovereignty in practice defeat claims of rights.

At the same time, however, state sovereignty is a powerful, even necessary instrument of international human-rights law. This is because sovereignty contains within it the seeds of its own diminution: a state free to decide all matters pertaining to its affairs may decide to surrender a portion of its sovereignty. It has the sovereign right to become less sovereign. Even if this proposition might once have been debatable, the practice of states in the second half of the 20th century—not only in human rights but in trade, environment, arms control, and other fields—has long since mooted any such debate.

The exercise by states of their sovereign right to surrender sovereignty has in fact become the most important engine of expansion of international human-rights law. It began with the UN Charter, to which nearly all states are party. It continued with the two most comprehensive UN human-rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both ratified by more than 140 of the 189 UN Member States.

The Covenants, in turn, are the core of a sprawling corpus of treaties ratified by comparable numbers of states. The more important UN treaties protect the rights of children, women, and refugees, as well as ban torture, genocide, and racial discrimination. The International Labor Organization has adopted major treaties on rights to collective bargaining, and against forced labor or employment discrimination. The International Committee of the Red Cross sponsored the 1949 Geneva Conventions and the 1977 protocols on international and non-international armed conflict, requiring respect for basic human rights in wartime. Regionally, treaties with broad coverage of mainly civil and political rights have been adopted in Europe, the Americas, and Africa.



By entering into such treaties, states have voluntarily created and submitted to most contemporary international human-rights law. A role remains for customary international law that binds even those states that have not joined a particular treaty. Most arguments for customary rights, however, rely heavily on treaties and on their widespread ratification as evidence of the custom. Directly or indirectly, virtually the entire edifice of international human-rights law is built on state sovereignty. Even the doctrine of jus cogens, by which certain norms—such as the ban on genocide—are so fundamental that they override conflicting treaties, is itself the creature of a treaty, the Vienna Convention on the Law of Treaties, signed in 1969.

In theory, states retain their sovereign rights to withdraw from treaties, but in practice they rarely do so.

Collectively, states have proven reluctant to deconstruct what they have built. State sovereignty, which has built international human-rights law, is unlikely to demolish it.

Righting Global Wrongs

Even if relatively few states possessed real or even formal sovereignty prior to the founding of the United Nations, those who had it guarded it jealously. Before World War II, with a few exceptions, no self-respecting sovereign state would brook outside interference with its treatment of its own citizens within its own territory.

The potential of such a doctrine to shelter inhumanity reached its extreme in the case of Nazi Germany. As early as 1933 a German Jew from Upper Silesia, invoking the minorities clauses of a German-Polish treaty, complained to the League of Nations that he had been fired because of his Jewish descent. Germany responded that the "Jewish question" fell exclusively within its domestic jurisdiction. Despite the treaty, no final action was taken before Germany withdrew from the League.

Even the Final Solution, Hermann Goering would later claim at Nuremberg, "...was our right! We were a sovereign State and that was strictly our business." Goering was wrong: the Holocaust was an international affair, since its death trains crossed national borders. But if Germany had slaughtered only German Jews within Germany, he would arguably have been right. This was tacitly confirmed at Nuremberg, where crimes against humanity were prosecuted only if committed after the war began, in connection with war crimes or crimes against peace.

The turning point came in 1945. Following the ghastly revelations of Nazi death camps, non-governmental organizations, working together with Latin American and Asian nations demanding self-determination and racial equality, succeeded in breaching the wall of state sovereignty. The UN Charter declares that the United Nations' purpose includes "achiev[ing] international cooperation.. in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." It provides that "the United Nations shall promote...universal respect for, and observance of, human rights and fundamental

freedoms..." and that "... all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement" of those purposes.

This language was vague on both the scope of rights protected and on the obligations of states and the United Nations. Moreover, the Charter left an escape clause, by stipulating that nothing in it "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

But this clause was weak from the start: it did not specify that human rights are matters "essentially within the domestic jurisdiction." And with human rights written all over the rest of the UN Charter, it was no longer possible to contend that human rights were essentially domestic. The Charter thus opened the door to the internationalization of rights. In the remainder of the 20th century, a parade of human-rights treaties marched through its portals. In legal terms, no longer could sovereignty shield states from the claims of international human-rights law.

Framework of Norms

The internationalization of rights proceeded in stages. First was the assertion of international jurisdiction over human rights, accomplished by the UN Charter. UN exercise of that jurisdiction, however, proceeded cautiously. It began in 1948 with the international articulation of norms in the form of the non-binding Universal Declaration of Human Rights. Next the Covenants of the 1960s and other treaties brought about the international codification of rights in legally binding form. And finally the United Nations and other international bodies developed a series of progressively more stringent enforcement measures.

By now, widely adopted humanrights treaties cover a broad range of social, political, and security issues. Among them are such sensitive topics as the relations between parents and children, husbands and wives, and employers and employees; freedom of the press and of religion; electoral systems; criminal justice procedures and punishments; and the conduct of war and national security emergencies. With respect to norms, most states have now conceded a significant measure of their sovereignty.

Legally Bound

But enforcement has developed at a far slower pace; one reason for the rapid acceptance of international norms has been that few governments expected to take them seriously. Until the 1970s, except for political debate, the United Nations had no generalized mechanisms of enforcement. In that decade the first modest mechanisms came into being: self-reporting requirements by states party to treaties, and the possibility of public condemnation of governments by UN political bodies.

The next stage brought more meaningful enforcement-independent of control by states, though still not binding. Among these enforcement regimes were optional, nonbinding individual complaint procedures that now exist under several major UN treaties, and special UN experts and working groups to provide public, ongoing oversight of human rights in particular countries or of particular human-rights problems worldwide.

The most recent stage-binding enforcement-began mainly after the Cold War. It assumes a diversity of forms. One is international criminal prosecution, at first through ad hoc international courts for the former Yugoslavia and Rwanda, and now through a permanent, global International Criminal Court, for which a treaty has been opened for ratification. Another is "universal jurisdiction," by which third-party states may prosecute human-rights crimes committed in other nations, as in the case of General Pinochet, arrested in London on a Spanish extradition warrant, for torture committed in Chile. Alternatively, damages may be awarded against human-rights violators by the courts of third-party states.

In addition to cases against individuals, binding enforcement may be undertaken through international litigation against governments. Suits brought by victims of rights violations have progressively taken root in the Council of Europe since the 1950s. They have had a foothold in the Inter-American Court of Human Rights since the late 1980s, and recently a new African Court of Human Rights has been agreed to and awaits ratification. Since the 1980s, governments have also occasionally sued other governments for human-rights violations in the International Court of Justice. Of course, the fact that the resulting judgments are legally binding does not mean

that governments necessarily comply with them.

Other forms of enforcement may be binding in law or in fact. The incorporation of international norms in national laws and enforcement by national courts is one form, but this is generally weakest in those countries which need it most. Another approach, multinational economic sanctions, are often ineffective. Denials of credit by international financial agencies are only occasional while armed intervention is politically selective and often occurs too late to be helpful.

In short, outside Europe, binding international enforcement remains the exception rather than the rule. In terms of effectively enforceable norms, state sovereignty has yielded only grudgingly and modestly. While non-binding enforcement by inter-governmental bodies, third-party governments, non-governmental organizations, the press, and public opinion can exert pressure on a regime, it is usually not enough to overcome vital political or security interests, or personal interests of government leaders. Even so, progress in the decade since the end of the Cold War has been remarkable.

Bargaining Sovereignty

After half a century of the internationalization of human rights, states have exercised their sovereign right to yield much to international norms, but little to international enforcement. States have lost exclusive jurisdiction over human rights; their powers are contracted by globalization and international enforcement is expanding. Even so, now and for the foreseeable future, states retain enough sovereign rights to use as bargaining chips in most cases and usually to prevail when the stakes are high for their governments or their leaders. Protection of rights thus depends on an ongoing process of negotiation between governments and domestic and international actors. The goal of human-rights enforcement should not be to vanquish state sovereignty but to strengthen international leverage while creating incentives for states to channel their sovereign powers toward greater respect for human rights.

AuthorAffiliation

DOUGLASS CASSEL is Director of the Center for International Human Rights at the Northwestern University School of Law.

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