

Sovereignty and Jus Cogens Laws

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This paper attempts to address the conflict that arises from the simultaneous implementation of state sovereignty laws and universal Jus Cogens laws within the framework of the United Nations Security Council. As a multilateral platform with membership from 193 of 196 world nations, the rules of non-intervention and sovereign equality are paramount to within the framework of the UN Security Council. However, the Security Council also espouses the sovereignty limiting rules that give it the prerogative to prohibit human rights violations such as genocide and crimes against humanity. Using the 1994 UN Resolutions 929, 933 and 934, this paper attempts to establish how the interests of the permanent members of the Security Council played a role in the decision making process, due to the ambiguity arising from the simultaneous application of two fundamentally conflicting international laws.

The United Nations' Charter endorses human rights and non-intervention at the same time, despite the fact that the two concepts seem to inherently be at odds with one another¹. If a state cannot intervene in the affairs of another, then how can intervention based on human rights abuses be justified, considering that the prerogative to use force against citizens is within the jurisdiction of the state? International relations scholar Ian Hurd claims that by looking at different sources of international law, humanitarian intervention can be characterized as being both legal and illegal at the same time². As a multilateral body that boasts membership from every nation in the world, the United Nations acts as a platform for inter-state relations, where the ideals of non-intervention and sovereign equality coexist with the sovereignty-limiting rules that give the Security Council the prerogative to prohibit human right violations such as genocide and crimes against humanity³. As the United Nation's most influential body, the Security Council has the authority to make decisions that are binding for member states under the United Nations' Charter⁴. However, the Security Council's decisions are greatly influenced by its five permanent, veto holding members⁵. In this essay, I will look at some examples of the Security

¹ Stephen D. Krasner, "Think Again: Sovereignty," *Foreign Policy*, November 20, 2009.
<http://goo.gl/UoIkKh>

² As quoted in Carmen Pavel, *Divided Sovereignty: International Institutions and Limits of State Authority* (Oxford: Oxford University Press, 2014), 25.

³ Ibid.

⁴ "What is the Security Council?" *United Nations Security Council*, accessed November 15, 2015.
<http://www.un.org/en/sc/about/>

⁵ Ibid.

Council's decisions to intervene in internal state affairs in the name of humanitarian concerns, to show how the interests of the permanent members of the Security Council played a role in the decision making process. The United Nation's decision to allow the subversion of state sovereignty, through the actions of the Security Council, in favour of upholding *jus cogens* international laws opens the door for potential abuse by the powerful nations within the Council against less politically dominant nation states. The actions of the Security Council, taken under the guise of protection of human rights, is nothing more than an example of "organized hypocrisy"⁶. The Security Council chooses which violations to address at the international level based in part on the influence that any potential involvement might have on the national interests of its permanent members⁷. In order to justify infringement in the domestic affairs of a state for the sake of upholding humanitarian causes, unified action taken by an apolitical body is necessary – otherwise any claims at humanitarian intervention made by the United Nations are tainted by the personal national interests of the intervening states.

The concept of an international society of states, all of whom are procedurally equal, is founded in the idea of state sovereignty. Sovereignty acts as a barrier against dominance by powerful states in an international system that has an imbalance of power⁸. Sovereignty, defined in jurisdictional terms, refers to the extent to which a state can exert its control regarding its domestic activities and internal decision making⁹. Politically, sovereignty refers to the extent to which political assets constrain a state's actions¹⁰. Both of these definitions of sovereignty work in unity to explain the actions of nation states at the international level – states with substantial political assets can act out their own jurisdictional sovereignty within their territory more easily than less powerful states. While even the most powerful states might find their political sovereignty circumscribed in some circumstances, more often than not, it is the less powerful states that find themselves to be confined, either directly or indirectly, to the influence of the politically powerful states¹¹. Historically, few states have had almost complete autonomy and control over their domestic affairs, but the politics of weaker states are more likely to have been "persistently penetrated" not only through direct interference by other nation-states, but also by multilateral institutions such as the United Nations¹².

The increased concern over human rights violations and the frequent involvement of the United Nations in helping to protect citizens from governmental abuse has created many questions and concerns about the UN Security Council's methods. *Jus Cogens* laws are norms within international law that are accepted by the international community¹³. Rights, including human rights, are societal

⁶ Carmen Pavel, *Divided Sovereignty*, 26.

⁷ Ibid.

⁸ Mohammed Ayoub, "Humanitarian Intervention and State Sovereignty," *The International Journal of Human Rights* 6, no. 1 (2002): 82, DOI: 10.1080/714003751

⁹ Alan James, "The Practice of Sovereign Statehood in Contemporary International Society," *Political Studies* 47, no. 3 (1999): 457, DOI: 0.1111/1467-9248.00212

¹⁰ Ibid, 458.

¹¹ Ibid.

¹² Stephen D. Krasner, "Think Again: Sovereignty," *Foreign Policy*, November 20, 2009. <http://goo.gl/UoIkKh>

¹³ Reza Hasmath, "The Utility of Regional *Jus Cogens*" (presented at the American Political Science Association Annual Meeting, New Orleans, USA, August 30 – September 2, 2012), 2.

constructs that need to be legitimized by implementation within a legal system¹⁴. Human rights have always existed as *jus cogens* laws because the term ‘human rights’ invariably evokes “an extraordinary force of social attraction”¹⁵. The Vienna Convention of the Law of Treaties (1969) formalized the *jus cogens* status of human rights within Article 53, by allowing peremptory norms to become entrenched into the international legal system¹⁶. However, there is no universal agreement as to which laws have achieved the status of *jus cogens*¹⁷. Considering the vast divergence of values, beliefs and interests within the international community, universal agreement over what constitutes *jus cogens* laws is hard to come by – at a minimum there is agreement over the *jus cogens* status of murder, torture, genocide and slavery¹⁸. The official entrenchment of *jus cogens* norms into international law without specifications over which norms have achieved *jus cogens* status raises the question: who decides what these rights are? Who decides when a violation has occurred of these fundamental rights, and an intervention is necessary? Overall, there is a reluctance among world leaders to create a framework of institutionalized, universally binding limits on state autonomy, even if the limits would be in place to provide a semblance of protection for citizens¹⁹. This reluctance of world governments to be held responsible to a supranational entity is to be expected – every state tries to protect its sovereign authority. However, this creates an interesting situation in the global community, as violations of human rights are determined by powerful world states on an arbitrary, case-by-case basis that leads to “organized hypocrisy”²⁰. This leads into our second question of who decides when violations have occurred, and what action is to be taken. In the current global system, the United Nations’ Security Council is the only multilateral, international organization with the mandate to call for military intervention within states, as well as the authority to make decisions that are binding on member states²¹.

To understand the functioning of the United Nations, it is important to understand that this institution was created in the aftermath of World War Two and as such, it overwhelmingly reflects the norms and values of its founding members. An example of this can be seen in the current permanent members of the United Nations’ Security Council – France, the United Kingdom, the Russian Federation, China and the United States – the five great powers that were considered victorious in the aftermath of WWII²². These states use the power of their veto to push for decisions that will ultimately benefit them. The final decision of when a state has failed to fulfill its obligations to its citizens cannot pass through the Security Council without the approval of the five permanent members, who can

¹⁴ Mohammed Ayoob, “Humanitarian Intervention and State Sovereignty”, 81.

¹⁵ Andrea Bianchi, “Human Rights and the Magic of *Jus Cogens*,” *The European Journal of International Law* 19, no. 3 (2008): 491, DOI: 10.1093/ejil/chn026

¹⁶ Carmen Pavel, *Divided Sovereignty: International Institutions and Limits of State Authority* (Oxford: Oxford University Press, 2014), 30.

¹⁷ Ibid

¹⁸ Reza Hasmath, “The Utility of Regional *Jus Cogens*”, 3.

¹⁹ Carmen Pavel, *Divided Sovereignty: International Institutions and Limits of State Authority* (Oxford: Oxford University Press, 2014), 30.

²⁰ Ibid, 26.

²¹ “What is the Security Council?” *United Nations Security Council*, accessed November 15, 2015.

<http://www.un.org/en/sc/about/>

²² “Current Members.” *United Nations Security Council*. Accessed November 15, 2015.

<http://www.un.org/en/sc/members/>

choose to veto Resolutions that intrude on their national, political, military and economic interests. Intervention decisions by the Security Council are undertaken on a selective basis – even former Secretary General of the United Nation, Kofi Annan stated:

If the new commitment to intervention in the face of extreme suffering is to retain support of the world's peoples [...] it must be seen to be fairly and consistently applied, irrespective of region or nation²³.

The United Nations' Security Council decision to intervene is often "made on the basis of strategic and economic considerations that have little to do with humanitarian concerns even if they are justified with reference to such ideals"²⁴. A clear example of how humanitarian concerns do not play the primary role in the decision-making process within the UN Security Council can be seen in the Council's decisions to enact UN Resolution 929, Resolution 933 and Resolution 934²⁵. All of these Resolutions were voted on in 1994 – in a decade that saw increased global reception to humanitarian justifications for the subversion of state sovereignty²⁶. In 1994, at a time of various global conflicts, each of the five permanent members traded their veto votes in order to garner support for their own favoured interventions²⁷. The French wanted to expand their mandate in Rwanda, the Russian Federation was interested in taking on a larger role in the Georgian conflict and the United States was looking for international approval to get involved in Haiti. The Security Council chose to increasingly involve itself in world conflicts, especially during the 1990s, because of the *quid pro quo* system of bargaining between the five permanent Council members. Committing human and material resources in the long term is domestically unpopular, however, the Security Council's permanent members could justify intervention based on a cost-benefit calculus²⁸.

United Nations Resolution 940 led to the implementation of Operation Uphold Democracy, which was an operation led by the United States to get rid of the military regime of Raoul Cédras in Haiti²⁹. While there were innumerable human rights violations committed under the Cédras regime, those violations were not what primarily motivated the United States into action. In fact, US intelligence was involved in the training of PRAPH – a paramilitary wing of the Haitian government that was largely responsible for many flagrant violations of human rights³⁰. The United States was interested in deposing the Cédras regime largely due to the influx of Haitian refugees that were escaping to the United States. It was in the national interest of the United States to support a stable and democratic Haiti. The rhetoric promoted internationally was that the actions of the US, authorized by the UN, were being taken for the protection of the basic human rights of Haitians from their dictatorial government.

²³ As quoted in Mohammed Ayooob, "Humanitarian Intervention and State Sovereignty," *The International Journal of Human Rights* 6, no. 1 (2002): 86, DOI: 10.1080/714003751

²⁴ Ibid

²⁵ Mohammed Ayooob, "Humanitarian Intervention and State Sovereignty," *The International Journal of Human Rights* 6, no. 1 (2002): 87, DOI: 10.1080/714003751

²⁶ Ibid

²⁷ Neil Macfarlane and Thomas Weiss, "Political Interest and Humanitarian Action," *Security Studies* 10, no. 1 (2000): 127, DOI: 10.1080/09636410008429422

²⁸ Mohammed Ayooob, "Humanitarian Intervention and State Sovereignty," 85

²⁹ Ibid, 89

³⁰ Ibid

However, the influx of Rwandan refugees escaping genocide under the Hutu government was not a similar priority for the US. In fact, although the refugee flow from Rwanda was greater than Haiti, the United States was disinclined to intervene in Africa³¹. A report by the International Panel of Eminent Personalities from the Organization of African Unity reported in 1998:

The US repeatedly and deliberately undermined all attempts to strengthen UN military presence in Rwanda [...] the Security Council, ignoring the vigorous opposition of the OAU and African governments, chose to cut the UN forces in half at the exact moment they needed massive reinforcement. As the horrors accelerated, the Council did authorize a stronger mission, UNAMIR II, but once again the US did all in its power to undermine its effectiveness³².

The inaction of the Security Council, influenced by the United States, created a situation that allowed the Hutu government in Rwanda to carry out a genocide without any threat of international intervention. Exacerbating the problem was French interest in Rwanda³³. While the United States, the United Nations Security Council and other western nations allowed the genocide to happen by adopting a neutral stance on the issue, the French government explicitly supported the Hutu Rwandan government³⁴. The United Nations Resolution 929 allowed the French government to lead a mission for humanitarian purposes in Rwanda, called Operation Turquoise. This mission mandated the creation a safe zone in southwestern Rwanda which allowed many government and military leaders involved in the orchestration of the genocide to cross the border into Zaire and escape³⁵. To further its own foreign policy interests in the region, Mitterrand's French government provided arms to Rwanda as late as June 1994 – a month before they decided to send in troops due to “humanitarian concerns”³⁶. The genocide in Rwanda was allowed to happen because the main concern among the permanent members of the Security Council related to their own national interests, with humanitarian concerns coming in second. Similarly, the “humanitarian” intervention in Haiti was successful because it benefitted the national interests of the United States' government.

While humanitarian intervention for the protection of at risk populations is a moral obligation entrenched in the international system, its implementation means a direct subversion of state sovereignty. The ramifications of intervention are grave, and the decision should not be taken *ad hoc* by a political body to further national concerns over international concerns. In the current system,

³¹ Ibid

³² “Executive Summary: OAU International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events,” *Institute for Security Studies*, accessed November 15, 2015, <https://goo.gl/Fp2Ekc>.

³³ Critics of the French government's role in Rwanda claim that France was blindly supporting the Hutu government because they wanted to maintain French language and culture in Rwanda – the Tutsis rebel forces of Rwandan Patriotic Front spoke English. Chris McGeal, “France's shame?” *The Guardian*, January 11, 2007. <http://goo.gl/V8FO7o>

³⁴ “Executive Summary,” *Institute for Security Studies*, accessed November 15, 2015, <https://goo.gl/Fp2Ekc>.

³⁵ Ibid

³⁶ John Lichfield, “Rwanda mass killers armed by France,” *Independent*, October 22, 2011. <http://goo.gl/o3VJtl>

intervention based on humanitarian concerns is not implemented consistently and the decision making process is not transparent. To create a world system where intervention in internal state affairs in extenuating circumstances is acceptable, those circumstances need to be clearly outlined. While seemingly unfeasible in the current international political climate, an independent body of rotating membership with equal voting powers between world states would be an ideal replacement for the Security Council – it would reduce the chances of ulterior national motives. The criteria for involvement must be stringent, restrictive and non-discriminatory and the decision to intervene or not must be transparent and set within the constitution of an international intergovernmental institution. A transparent process, implemented by an apolitical body would allow world governments to respond appropriately to world crisis without concerns for national politics.

Bibliography

- Ayoob, Mohammed. "Humanitarian Intervention and State Sovereignty." *The International Journal of Human Rights* 6, no. 1 (2002): 81 – 102. DOI: 10.1080/714003751
- Bianchi, Andrea. "Human Rights and the Magic of *Jus Cogens*." *The European Journal of International Law* 19, no. 3 (2008): 491 – 508. DOI: 10.1093/ejil/chn026
- Hasmath, Reza. "The Utility of Regional *Jus Cogens*." Presented at the American Political Science Association Annual Meeting, New Orleans, USA, August 30 – September 2, 2012.
- James, Alan. "The Practice of Sovereign Statehood in Contemporary International Society." *Political Studies* 47, no. 3 (1999): 457 – 473. DOI: 0.1111/1467-9248.00212
- Krasner, Stephen D. "Think Again: Sovereignty." *Foreign Policy*, November 20, 2009. <http://goo.gl/Uolkkh>
- Lichfield, John. "Rwanda mass killers armed by France." *Independent*, October 22, 2011. <http://goo.gl/o3VJtl>
- Macfarlane, Neil and Thomas Weiss. "Political Interest and Humanitarian Action." *Security Studies* 10, no. 1 (2000): 112 – 142. DOI: 10.1080/09636410008429422
- McGeal, Chris. "France's shame?" *The Guardian*, January 11, 2007. <http://goo.gl/V8FO7o>
- Pavel, Carmen. *Divided Sovereignty: International Institutions and Limits of State Authority*. Oxford: Oxford University Press, 2014.
- "Current Members." *United Nations Security Council*. Accessed November 15, 2015. <http://www.un.org/en/sc/members/>
- "Executive Summary: OAU International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events." *Institute for Security Studies*. Accessed November 15, 2015. <https://goo.gl/Fp2Ekc>
- "What is the Security Council?" *United Nations Security Council*. Accessed November 15, 2015. <http://www.un.org/en/sc/about/>