

Cosmopolitan Interventions and the Global Rule of Law

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After the Cold War the United Nations (UN) Security Council (SC) debated and authorized a number of interventions aimed at protecting civilians from abuse, starvation, and tyranny.¹ By 1999, the Security Council was bypassed by the North Atlantic Treaty Organization (NATO), whose members decided to forcibly stop the Yugoslav government's abuse of human rights in Kosovo. Neither the SC nor many of NATO's key members could be persuaded to support the United States' policy of forcible regime change in Iraq in 2003. This despite the fact that the policy promised *inter alia* an end to a totalitarian regime that systematically violated human rights. After Iraq, the post-Cold War enthusiasm and support for so-called humanitarian intervention has diminished (Wheeler *et al.* 2006). Yet the debate on such intervention continues especially because of the ongoing crisis in the Darfur (Bellamy 2005).

Intervention of course is normally illegal and immoral. The UN Charter outlaws the threat or use of force in Article 2(4) and intervention in domestic jurisdiction in Article 2(7). States have a right to be free from aggression and to self-determination. Only the SC possesses the legal authority to suspend the normal prohibitions on force and intervention. During the 1990s the SC asserted, primarily through practice, that certain violations of human rights are threats to international peace and security, warranting intervention. This departed from SC practice during the Cold War (Chesterman 2002). Nonetheless, an apparently emerging consensus on intervention for humane purposes evaporated eventually and individual, powerful states invoked the humanitarian principle to legitimize force in the absence of a SC *imprimatur*. NATO in Kosovo and the United States' "coalition of the willing" against Iraq each substituted their own judgments for that of the SC's. In both cases, moral legitimacy was seemingly placed above legal proceduralism.²

According to some, the political morality of cosmopolitanism is a serious threat to the international rule of law (Chandler 2003; Cohen 2004, 2006). Elevating the legal and political status of individuals in international relations has come at the expense of sovereign states. The lateral constraints among juridically equal actors are being challenged by a hierarchical, even imperial order in which powerful states use ethics to free themselves from legal restrictions on the use of force. Cosmopolitanism allegedly enables this retreat from legalism because it eviscerates the protective nature of sovereignty and subordinates legality to morality, thus making power rather than authoritative right the ultimate arbiter of interstate relations. Thus construed, cosmopolitanism is a regressive doctrinal basis for world law and order—it encourages a return to a pre-Charter order with few legal limits on force by the Great Powers against the rest (see Branch 2005; also Chesterman 2002). This occurs because cosmopolitanism denies legitimacy to state equality and, moreover, provides moral cover for the use and abuse of military power by liberal states.

¹ As Adam Roberts notes, "During the period 1991-2000 the question of whether external institutions should, on partly or wholly humanitarian grounds, organize or authorize military action within a state arose frequently" (Roberts 2004, 81). Examples include northern Iraq, Bosnia and Herzegovina, Somalia, Rwanda, Haiti, Sierra Leone, Kosovo, and East Timor.

² It should be noted that the interveners deny any *legal* wrong doing. With Kosovo, NATO states point to extant elements of international law that justify intervention in spite of the absence of an authorizing Security Council resolution. With Iraq, the US-led "coalition of the willing" made a legal case for intervention on the basis of earlier Security Council resolutions. A not insignificant difference between these two cases is that the legal arguments justifying war in Iraq did not explicitly include human rights. Famously, Saddam Hussein's human rights record became a moral pretext much *after* the intervention was launched.

Focusing on the issue of intervention, this paper contests the argument that a cosmopolitan critique of traditional sovereignty is necessarily implicated in a diminished or subverted international rule of law. The lateral constraints of the sovereign equality principle, not just as a legal principle but also a moral norm to prevent states from abuse, are not subverted by making human rights a condition of international legitimacy. In exceptional cases of human rights abuse that warrant forcible intervention, such lateral constraints are not rejected in principle, they simply do not apply in a particular instance. In such cases, intervention becomes an act of protection or enforcement by the international community.³ That some states invoke cosmopolitan rhetoric to justify unwarranted and illegal interventions is not surprising; however, this is the eternal problem of the political moralist (who, in Immanuel Kant's words, "fashions his morality to suit his own advantage as a statesman"⁴) rather than of political morality *per se*.

Cosmopolitan political morality does not support bypassing the question of legality and proper authority in judging and executing warranted enforcement, contrary to the claims of some critics. Rather, cosmopolitanism typically supports a strengthening of legalism and international law, instead of expanding the exceptional prerogatives already claimed by powerful states. Indeed, such prerogatives have been claimed by powers in spite of, rather than because of, a cosmopolitan critique of traditional sovereignty in international law. Also, I suggest that many recent critics of cosmopolitanism exaggerate the protective benefits of retaining an international legal regime on sovereignty that is essentially indifferent or neutral on the question of serious human rights abuses. Changing the legal understanding of sovereignty in a cosmopolitan direction—as is arguably occurring today—is compatible with the normative ideal of global legalism and, moreover, supports needed changes to the way in which international law is currently and poorly enforced (or, as in so many cases, *not* enforced) in the face of massive human rights violations.

This argument is elaborated in two parts: First, I show the fundamental compatibility with international legalism in the Charter and the cosmopolitan account of state sovereignty. Critics who claim that cosmopolitanism erodes the doctrine of sovereign equality make a number of faulty assumptions. Sovereign equality does not equate absolute sovereignty – both the UN (and many subsequent developments in international law) *and* cosmopolitan political morality support the former and reject the latter. Second, I claim that the rejection of absolute sovereignty does not entail a settled position on the question of authority and political judgment in international law and politics. Although some liberal cosmopolitan thinkers have suggested that Western states and societies are, by virtue of their liberal democratic credentials, competent judges and juries with regard to legitimate intervention, this is simply *a* (and not *the*) cosmopolitan account on legitimate and lawful intervention. That some cosmopolitans hold such (arguably mistaken) views on the issue of legal authority does not carry over to all cosmopolitans.⁵ As well, I suggest that the problem of power abuses in humanitarian intervention, while important, mischaracterizes the problem today with intervention and law. As Thomas G. Weiss states, "Critics and champions of humanitarian intervention, with or without the 'cosmopolitan' adjective, should be less preoccupied that military action will be taken too often for insufficient

³ As Terry Nardin suggests, protection and enforcement are distinct but related concepts: protection may occur without proper legal authority, enforcement presupposes such authority. With regard to humanitarian intervention, however, he claims they are two sides of the same coin: protection from abuse of basic human rights is also an act of *enforcing* those rights by outside actors in situations where the default authority is unable or unwilling to do so (Nardin 2005, 19).

⁴ See (Kant 1991, 118).

⁵ See my critique of Fernando Tesón and Anne-Marie Slaughter on liberal interventionism (Franceschet 2006).

humanitarian reasons or that we lack guidelines. The real issue is that it will be taken too rarely for the right ones when existing norms are more than adequate" (in Farer *et al.* 2005; see also Pogge 2005).

Cosmopolitanism versus International Law?

Since the end of the Cold War there have been a number of efforts to promote concepts of "human security" and a "responsibility to protect" at the UN. These are significant moves in cosmopolitanizing the international institutional and legal order. However, critics argue that these initiatives serve only to eviscerate the rule of law of the Charter era. For instance, David Chandler writes of "a danger that the cosmopolitan framework can legitimize the abrogation of the existing rights of democracy and self-government preserved in the UN Charter" (Chandler 2003, 323). Critics argue that redefining sovereignty as an obligation to safeguard and protect individual rights erodes sovereign equality in favour of global hierarchy. As Jean L. Cohen states, an "instrumentalist conception of sovereignty...[is] a denigration of the principle of sovereign equality that has been the foundation of international law." She adds that it "undermines the universalistic features" of the Charter and plays "into the hands of those seeking to undermine international law" (Cohen 2006, 486). Redefining sovereignty as responsibility or capacity to uphold human rights becomes "an ideology for bypassing the UN" (Cohen 2006, 498). Worst of all, American empire is "aided and abetted by cosmopolitan rhetoric" (Cohen 2006, 497; see also Chandler 2006, 33).

Rejecting absolute sovereignty does not jettison sovereign equality or subvert the quest for a universal, inclusive international legal system. Indeed, the framers of the UN Charter asserted that state equality before the law does not entitle particular states the right to violate laws. They also recognized, in nascent form, that the meaning of state sovereignty is tied to respect for human rights. In this section, contrary to the critics above, I show how the Charter's legal order reflects many of the core concerns of cosmopolitan political morality. As well, attempting to build further on the cosmopolitan norms of the Charter does not necessarily mean a return to the pre-Charter order of less powerful states in a legally unprotected position.

There is no single source or expression of cosmopolitan political morality. However, the dominant version today is rooted in enlightenment thought, particularly with the example of Immanuel Kant's writings. Kant argued that the sovereign state and the states system must be reformed to safeguard and respect universal individual rights (Kant 1991; see Franceschet 2002). Subjecting international relations to legal restraints, if not an outright ban, on the use of force is a foundation for human rights. Kant's well known arguments for non-intervention and sovereign equality should not be misinterpreted: he gave states a wide latitude to enjoy self-government in order that they develop, eventually, a liberal domestic order that safeguards and maximizes human rights. He did not, however, suggest that a right to non-intervention means that no state can or ought to be judged publicly and internationally in how well it respects fundamental rights. His rejection of world government and of a formal legal hierarchy among states does not mean an acceptance of a doctrine of sovereignty as total irresponsibility.⁶

Cosmopolitans like Kant anticipated and laid some of the intellectual foundations for the Charter. The Charter outlaws non-defensive force and intervention against any sovereign state (see Articles 2[4] and 2[7]). All states are entitled to the protection of this legal rule without exception. Of course, the Charter also stipulates that respect for human rights is a fundamental

⁶ On the notion that traditional sovereignty has meant "irresponsibility," see Inis Claude (Claude 1971).

value that states have an obligation to advance separately and jointly (Article 55). Commitment to sovereignty and human rights creates tensions but not a contradiction (neither in Kant's thinking nor in the Charter). To be contradictory, sovereign equality would have to be defined as an absolute value that frees governments from any external responsibility to respect and uphold the rights of subjects. Although many states have argued for this version of absolute sovereignty, it has been explicitly and repeatedly rejected by the wider community of states, even more so in the post-Cold War era. Nonetheless, the Charter does not explicitly authorize the UN or its member states, even the Security Council, to forcibly protect human rights (but only threats to international peace and security). This issue is addressed in section two below.

A core premise of cosmopolitan political morality is that neither sovereign states nor interstate boundaries should limit the enjoyment of human rights. But this does not entail a *rejection* of sovereignty – from Kant to the present, cosmopolitans rarely support the notion of a global state supplanting independent political units. But what legal and moral status ought sovereign states enjoy, then? Do they have absolute or derivative standing in international order? Here it is possible to see a difference between Kant and more recent cosmopolitans, one that has relevance for contemporary issues like intervention.

For Kant, states have an absolute sovereignty to the degree that they cannot be violently resisted (on moral or legal grounds) by their populations. Also, sovereign states have an absolute right of freedom from coercion by other states *unless* they pose a violent threat to others (which—like the Charter—makes it, paradoxically, a *conditional absolute* right). Despite this, however, as Georg Cavallar argues persuasively, popular sovereignty *precedes* absolute sovereignty for Kant (Cavallar 1999). Kant grounds absolute sovereignty on the *potential* states have for producing consistent domains of individual freedom (see Pogge 1988). Sovereign states overcome the state of nature and provide the basis for lawfulness, thus resisting them from within, or illegitimately coercing them from without, is a moral and legal reversal (back to the "state of nature" domestically and internationally). Kant gives tremendous latitude to sovereign states with regard to achieving domestic legal and political reform supportive of human rights. All states are free and equal in their autonomous journeys to becoming rights-respecting entities. However, he argues there are decided limits to sovereign discretion – states are not free to destroy and make impossible the conditions for gradual reform and perfection to the state's domestic constitution (just as they are not free to make the conditions for peace among states impossible). Again, although it sounds paradoxical, Kant holds absolute sovereignty to be *provisional* and contingent upon reform in relation to a universal standard of justice (the "original contract").

Cohen accuses contemporary cosmopolitan thinkers of departing from Kant's legacy (Cohen 2006). Kant, she claims, is a moral "dualist" as regards international order – he sees value in both states and individual rights, and does not subordinate the vital role of the former to the "abstract" imperatives of the latter. Sovereign states concretize individual rights. Cohen claims that contemporary cosmopolitans betray and reject Kant's dualism and make sovereignty an entirely instrumental value, i.e., valid only to the degree that states function to fulfill externally defined criteria for individual rights. If states' sovereign equality is made conditional upon an imposed and amorphous notion of absolute individual rights, a perversity results: powerful yet unaccountable outside actors are free to intrude upon and deny states the right to the self-government required to produce the legal-political conditions for actual individual rights. Cosmopolitanism today, then, unlike Kant's version and unlike the UN Charter, (perhaps

unwittingly) support an imperial global legal order in which the powerful have the ability to diminish state sovereignty under the pretext of a concern for individual rights.

Contemporary cosmopolitans depart from Kant's conception of sovereignty, and from an extremely narrow reading of the Charter, but not in the radically dangerous, imperialist manner that Cohen suggests. Like Kant, cosmopolitan thinkers today suggest that we can evaluate public policy and authority in relation to universal principles. For instance, Thomas W. Pogge outlines the following core cosmopolitan principles in this regard:

- *Individualism*: the ultimate units of concern are individual persons (rather than groups or institutions, which have status only indirectly as they serve individuals);
- *Universality*: the "status of ultimate concern attaches to *every* human being *equally* – not merely to some subset";
- *Generality*: the "special status [attributed to individuals] has global force. Persons are ultimate units of concern *for everyone* – not only for their compatriots, fellow religionists, or suchlike..." (Pogge 2002, 169).

Crucially, neither Kant nor most contemporary cosmopolitans argue these principles must *supplant* international legality and the authority of states. They are a basis for evaluating and judging the legitimacy of state institutions, policies and decisions. Kant, however, gives sovereign states a considerably higher degree of latitude to evaluate and judge when and how it is appropriate to reform in light of the above moral principles (Franceschet 2002, chap. 2). Moreover, his conception of authority is thoroughly statist and territorialist. By contrast, today's cosmopolitans like Pogge argue *pace* Kant, that a secure public authority can exist without investing all judgment in the sovereign (the questionable decisionism in Kant's doctrine of sovereignty is thus rejected) (Pogge 1988, 2002, chap. 7). Also, today's cosmopolitans, such as David Held, argue that many of the functional attributes of sovereignty can be redefined and relocated in ways that depart from Kant's territorialist framework:

[T]he idea of rightful authority, which has been so often connected to the state and particular geographical domains, has to be reconceived and recast. Rightful authority or sovereignty can be stripped away from the idea of fixed borders and territories and thought of as, in principle, an attribute of basic cosmopolitan democratic law which can be drawn upon and enacted in diverse realms, from local associations and cities to states and wider global networks (Held 2005, 26).

Crucially, reform to actual sovereigns—for both Kant and contemporary cosmopolitans like Held—must take place within the procedural constraints of international law and, more particularly, the Charter framework, rather than imperial imposition (see Held 2002).

Those who hold cosmopolitanism to necessarily erode and threaten the rule of law make at least the following three related errors and problematic arguments:

First, there is a *conflation of political morality with political moralism*. As alluded to the introduction, morality and politics have a complex interrelation as interests, norms and values intersect in various ways. It is too simplistic to assert that any set of actors, such as liberal states or Great Powers, deploy moral rhetoric solely as "window dressing" to cover selfish and imperialist motives (see Jackson 2000; and Reus-Smit 2004). Nevertheless, any political morality is subject to attempted *political moralism*, i.e., the shaping of norms to benefit narrow

objectives. However, that states cynically use cosmopolitan rhetoric does not invalidate or warrant the rejection of this political morality. Even if we accept for a moment the dichotomous interpretation that critics like Chandler and Cohen ascribe to cosmopolitanism and the principle of sovereign equality, these critics seem to overlook the reality of abuse of state sovereignty as a moral and legal norm. As Pogge notes, Western governments have abused the principle of absolute sovereign equality as moral cover to enter into commercial and resource extraction deals with corrupt officials in developing states in ways that undermine the moral rights of local citizens (Pogge 2002). Clearly, the critics would not want to argue that the *principle* of sovereign equality is reducible to simply moral covering for abuse.

Second, the critics noted above *overstate the protective benefits of the traditional sovereignty regime in international law*. The cosmopolitan reconstruction of sovereignty in ways that highlight global duties to respect the moral worth of individuals does not have a zero-sum relationship with sovereign rights to freedom from aggression. Again, critics are selecting the wrong target – it is particular sovereign states engaging in particular acts, not cosmopolitan ideals, that pose threats to the legal constraints on aggression. Remarkably, critics have suggested that it is *after* the Cold War, with the rise of Western values and unrivalled American military power, that legal restraints have been challenged most. Patently and regrettably, however, the UN Charter's prohibition on unauthorized force was not accorded greater respect during the Cold War (see Arend *et al.* 1993). There is a danger of romanticizing the protections that the Charter afforded weaker states during the Cold War. Equally, the suggestion that cosmopolitan moralizing has suddenly enabled great power imperialism only after the Cold War overlooks the extent to which both superpowers would cast *realpolitik* in universalist-cum-cosmopolitan terms. As Daniele Archibugi writes,

[T]he ability of the old sovereignty dogma to provide a satisfactory alternative to US hegemony, or any hegemony for that matter...[is questionable]....Barricading ourselves behind the notion of sovereignty merely for the sake of counterbalancing American hegemony may cause us to forget the millions of people who are subjected ever day to the oppression of their own governments (Archibugi 2004, 455).

Additionally, intrastate violence and aggression is as great, if not more salient, concern in the post-Cold War era. The benefits of external sovereignty, while certainly not negligible, do little for the victims of today's civil conflicts (Weiss 2007, chap. 3). Sadly, traditional international law does all too little to protect the rights of these people, although significant developments are being made with the creation of institutions like the International Criminal Court.

Third, *contesting absolute and illimitable sovereignty does not mean eroding sovereign equality*. Critics of cosmopolitanism suggest that viewing state rights as derivative and contingent on responsibilities and obligations regarding the moral rights of subjects erodes sovereign equality. This is a curious understanding of legalism that seems to contradict the spirit of the UN Charter that critics claim to defend. Certainly equality *before* the law (or sovereign equality) is not equivalent to *immunity from* the laws of human rights. The critics would appear to assert the view that human rights and state sovereignty are contradictory, thus overlooking the changing nature of sovereignty in international law since 1945. Now, perhaps the greater concern of critics is that the human rights imperialism of liberal powers creates a different form of sovereign inequality: that weaker states are subject to the law while great powers are

essentially immune to or above from or above its requirements (Chandler 2006, 36; cf. Franceschet 2004). Again, however, this is not a cosmopolitan position and the two previous points essentially address that concern.

Cosmopolitan Imperialism or Global Indifference?

Cosmopolitans accept the decentralized political and legal order. As Jürgen Habermas writes, "The institutionalization of cosmopolitan law does not require the establishment of a world government based on a monopoly of the means of legitimate violence held by a global state" (Habermas 1999, 451).⁷ However, in keeping with the Charter, cosmopolitans also envisage the responsibility of an international community enforcing international law against (would-be) violators that abuse their sovereign prerogatives. As with the principle of collective security, then, massive violations of human rights permit if not oblige the international community and its delegated agents to use military forces to counter and stop violations. As Weiss puts it, "Cosmopolitan force in favour of humanitarian intervention fights fire with fire" (in Farer *et al.* 2005, 233). As with collective security, the potential for (1) abuse of force; (2) for unwillingness on the part of the international community to defend rights; and for (3) weak, disorganized and politicized efforts to enforce the law all remain significant problems. While the critics of cosmopolitanism noted above focus exclusively on (1) they have done so without due attention to the negative effects of (2) and (3) to the global rule of law.

Developments after the Cold War have generally supported a more robust impulse to defend collective security for states and human security for individuals; but this impulse has been exercised selectively and in ways that have generated immense controversy.⁸ The impulse for collective enforcement has been selective in large part because neither the UN nor the vast majority of member states possess the military power to successfully deploy and employ the military forces for international enforcement. The Bosnian and Rwandan tragedies in the early to mid-1990s attest to the fact that those with the capacity to "fight fire with fire" may not wish to assume the risks or properly empower and equip the UN. Additionally, the impulse to intervene been selective and controversial because not all states agree on whether and what type of enforcement is warranted. Russia and China's disagreement with NATO member states over the gravity of Kosovo and the conflicting perspectives on the SC today over Darfur illustrate this problem (Bellamy 2005). As noted in the introduction, the decisions by select "coalitions of the willing" to bypass the SC in Kosovo and then Iraq have only exacerbated the controversy.

A serious problem is that innocent civilians are dying in part because states are embroiled in controversies over international law and the politics of lawful enforcement. These controversies contribute to, but do not by themselves constitute, the larger problem of lack of willingness by those with the power to use it for humanitarian purposes. Recognizing this, former UN Secretary General Kofi Annan called on the international community to reach a new consensus on humanitarian intervention to prevent further Srebrenicas and Rwandas and to address the issues raised by the Kosovo intervention's widely perceived illegality. Responding,

⁷ Historically, as Pauline Kleingold notes, most forms of Enlightenment cosmopolitanism have presupposed "the continued existence of a plurality of states" (Kleingold 1999, 510).

⁸ Here I follow Weiss in suggesting that, in practice, states have exhibited an "impulse" rather than an "obligation" to intervene for humanitarian protection purposes (Weiss 2004). In moral terms, humanitarian intervention is conventionally an "imperfect duty" which means that it is a contractually unenforceable obligation on those who have the power to intervene (see Nardin 2005).

the Canadian government initiated and funded an International Commission on Intervention and State Sovereignty (ICISS). The result was a set of proposals framed around the title of the ICISS's report, *The Responsibility to Protect*. The intent of the Commission was to persuade the international community to come to a consensus on humanitarian enforcement in ways that will protect innocents.

The responsibility to protect doctrine is premised on a cosmopolitan conception of state sovereignty but also on a commitment to the international rule of law. The report states that membership in the UN implies viewing "*sovereignty as responsibility* in both internal functions and external duties" rather than simply "*sovereignty as control*" (Evans *et al.* 2001, 13). Only when a state "is unwilling or unable" to halt or avert serious harm to civilians does "the principle of non-intervention yields to the international responsibility to protect" (Evans and Sahnoun 2001, xi). The Commission's effort to identify exceptional cases warranting military force ("the just cause threshold") is firmly anchored in a concern for legality ("right authority"):

- A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
- B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out (Evans and Sahnoun 2001, xii).

As the Commission notes, however, although the Charter is reasonably clear on the legality of using force, it makes no explicit comment on human protection as a "just cause," thus giving the Security Council near unlimited legal latitude in deciding on a case by case basis (Evans and Sahnoun 2001, 50). Thus, although the ethical norm of legality ought to guide action, it is not exaggeration to suggest that the status quo arrangement is at best a *semi-judicial* condition in which political judgment and decisionism dominate (see Roach 2005).

Remarkably, recent critics of the cosmopolitanism *within* the ICISS's responsibility to protect framework see the report as part of a wider assault on legalism. Redefining sovereignty as a responsibility to protect rather than simply an equal juridical entitlement to rule is said to be a threat to "equality before the law." Cohen, for example, argues that sovereignty cannot "be reduced to any one of the main functions of a state (protection)" (Cohen 2006, 493). Taking a functional view of sovereignty allegedly reinforces the dominance of the great powers in the system. As Chandler asserts, "By associating sovereignty with a sliding scale of capacities, rather than political and legal rights of equality, not only is a new international hierarchy legitimised but intervention is framed as supporting sovereignty at the same time as it is undermining the rights of self-government" (Chandler 2006; see Chandler 2004; also Cohen 2006, 495; and Ayoob 2002). Recasting the meaning of sovereignty in terms of protection and respect for human rights is "a licence for undermining (limited but nevertheless important) existing rights, such as those of democracy and self-government" (Chandler 2003, 341). Notwithstanding the awful moral tragedies of human rights violations, such critics see the ICISS's report as creating a "gray zone of ambiguity between an extension of international law and a proposal for an international moral consensus...this gray zone goes beyond strict ideas of *legality* to incorporate more flexible views of *legitimacy*" (Chandler 2003, 343). These criticisms seem to be overstated not least in light of the actions of the UN's member states. They did not see the mere idea of sovereignty as responsibility as antithetical to state equality and

legality – at the September 2005 summit on UN reform they endorsed the concept, which perhaps points to an entirely different set of problems (see Bellamy 2006).

Tragically, moral ideals in international politics often mask (and paper over) significant political differences (see Hoffmann 1981). Clearly no state, not even the Sudan today, wishes to be viewed as hostile to the concept of humanitarian protection. Many would simply prefer to deny they are the perpetrators of abuse much less that they are simply "unwilling and unable" to protect. That states are, despite significant differences of interests and perspectives on this issue, supportive of the ideal raises the troubling prospect that the critics are terribly wrong, but in the worst way: The responsibility to protect ideal simply does not actually erode sovereign equality and legality (such as it is at the UN). To the contrary, the ideal is perhaps so timid and unthreatening that states feel assured they can, for now, deflect from its requirements. Indeed, as Alex Bellamy notes in the case of Darfur, opponents of humanitarian intervention, including the government in Khartoum, have, perversely, used the responsibility to protect discourse to argue that the state bears the first responsibility to protect and that outsiders have no right to intervene as long as they have a say in the matter (Bellamy 2005). This suggests that the critics have mischaracterized the problem of humanitarian intervention and the rule of law in today's world order.

Casting humanitarian intervention as a duty of protection, borne by the state or the international community, does not pose a radical and moralistic challenge to law and legality. Critics distort the legal effect of the responsibility to protect doctrine, arguing that it opens the door to all sorts of interventions by diminishing sovereignty to simply one functional property, i.e., protection. It is quite clear however that the protective function becomes a fundamental and existential attribute of sovereignty in certain extraordinary situations. The ICISS report states that a right and duty to intervene exists only when massive violations are at stake. In order to achieve a wide political consensus (both in and outside the Commission), the threshold for the violation is set extremely high:

[T]here must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- A. **large scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state institution; or
- B. **large scale 'ethnic cleansing'**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape (Evans and Sahnoun 2001, xii).

As Weiss states, "The notion is not to throw out the principles of sovereignty, and non-intervention that sustain 'international society', but rather to add respect for human rights to the characteristic of a sovereign" (in Farer *et al.* 2005, 233). This is consistent with international law's view of sovereignty in countless human rights treaties; moreover, the notion of sovereignty as a conditional immunity is built right into the Charter (Farer *et al.* 2005, 213). The cosmopolitan notion that states' rights and freedoms are conditional on a minimal floor of humane governance has gradually become a fundamental part of international law and legalism over an extended period of time. Violations of humanity of the scale and kind identified by the ICISS are long since being considered as simply "moral" violations. "Rather," as Held claims, "they become a breach of a legal code, a breach that may call forth the means to challenge,

prosecute and rectify it. To this end, a bridge is created between morality and law where, at best, only stepping stones existed before in the era of classic sovereignty" (Held 2003, 189).

There is a serious worry that the Western powers are reacting to humanitarian issues in ways that resemble and reproduce the hegemonic legal dynamics of earlier eras (see Simpson 2004). But this worry should be put into perspective. In the pre-Charter era, unilateral enforcement of international law was typical and needed no special defence. The Charter made law enforcement a collective responsibility vested ultimately in the SC. Critics argue that cosmopolitan interventions are used by Western states to claim a moral right to unilaterally bypass the SC (as evidenced by Kosovo and Iraq). This is primarily a problem of the foreign policies of states, however, rather than a programmatic reason to doubt the occasional necessity of authorized humanitarian enforcement and protection. Although some cosmopolitans, such as Fernando Tesón (Tesón 1998) and Anne-Marie Slaughter (Slaughter 1992a; Slaughter 1992b), argue that liberal democracies, by virtue of their internal governing principles, have a right to authorize enforcement that stands above the rest of the international community, this position has been widely and soundly rejected by others. Western states have often treated the SC as, to quote Richard Falk, a "law laundering service" for their particular and selective concerns, rather than as a body with a responsibility for international deliberation and action on human rights (quoted in Chesterman 2002, 303). Critics are correct to lament this situation of unrealized potential in the SC (Branch 2005); but they would be wrong to imply that a right and duty of cosmopolitan interventions necessarily undermines the collective aspect of legality in the Charter era.

In any political community, whether domestic or international, the law and the quest for enhanced legalism have limits (see Shklar 1964). The need for cosmopolitan interventions point to grave difficulties and failures in the global legal order, failures that include and implicate all actors in the global system.⁹ Repairing, improving, and thickening the global legal system and legality are obvious goals and the controversy over particular interventions, such as in Darfur today, only serve to dramatize the urgency of this project. Clearly, cosmopolitan interventions deal with the worst symptoms rather than the underlying causes, of the pathologies of states and the states system. The ICISS recognized this by urging states to view the responsibility to protect not just in terms of *reacting* but also *preventing* and *rebuilding*. Pursuing an improved global rule of law *and* exercising a responsibility to protect should not be viewed as opposing activities, as critics have depicted the choice of the current situation.

The biggest threat to legalism posed by humanitarian interventions is arguably not abuse of the prerogative but failure and insufficiency of response and resolve. Critics argue that the responsibility to protect concept and a cosmopolitan notion of conditional sovereignty will create global disorder because powerful states become free to intervene essentially whenever they wish. This interpretation is an unlikely one in light of the dynamics at play in world order today. Rather than too much there is too little intervention where it is needed. The ICISS aimed to build a political framework for states to begin discussing and acting upon their extant legal duties, duties under international law that they can only enforce upon themselves, voluntarily. The Genocide Convention and other treaty based and customary obligations, part and parcel of international legality today, are disregarded, most shockingly in the case of Rwanda. As Chris Brown states, the setting of legal limits to conducting intervention is in many ways beside the point:

⁹ See Neta Crawford's remarks in (Farer *et al.* 2005).

[There is] no sign that the advanced industrial nations, which are the only ones that have the capacity to act...[to defend massive human rights violations], have the slightest intention of doing so, except in very unusual circumstances...setting up a system of rules designed to prevent them from acting seems a pointless activity. Instead, we ought to be thinking of ways of encouraging states to intervene more often (in Farer *et al.* 2005, 227).

At this point, rather than eroding juridical sovereignty in ways that invite aggression, the responsibility to protect has at best had a rhetorical effect on state actions. As Bellamy suggests, states are still deflecting and resisting responsibility—changing the moral language has not changed the underlying politics (Bellamy 2005, 52, 2006, 149). As the ICISS worried, allowing more Rwandas, as is surely happening, though in “slower motion,” in Darfur, can be a greater cumulative threat to legalism in world order than a single intervention (as occurred in Kosovo).

Finally, on the question of American and/or Western hegemony, critics of cosmopolitanism also mischaracterize the problem of humanitarian intervention. Clearly, post-Cold War hegemony has led to abuses of power and challenges to international legalism, each exacerbated profoundly after the war in Iraq. Although some suggest that enhanced legalism will require a restored multilateral balance of power (Cohen 2006, 502), there is little evidence that reducing the relative military power of the West or the US will benefit the victims of massive human rights abuses. This is especially so if, as Farer notes, “humanitarian intervention will remain what it has always been, a conditional license for the powerful to intervene in the weak for the sake of the defenceless” (Farer *et al.* 2005, 218). With cosmopolitan norms only marginally and selectively internalized by liberal great powers, humanitarian intervention is presently an all too occasional symptom of American hegemony rather than the ideological fuel used to enhance its global predominance. Moreover, without an external power over the US and West, cosmopolitanism remains one of the few viable doctrines that could pressure the militarily strong not just to act on behalf of the weak, but also, eventually, to empower global institutions like the UN to act in a more impartial and consistent way.

The traditional, absolutist sovereignty regime that critics of cosmopolitanism seem to romanticize tends to empower another form of hegemony. The power to abuse international norms does not just rest with Western states – weaker states and non-state actors are also responsible. Although the responsibility to protect doctrine has received a surprisingly wide diplomatic endorsement from states, in practice it has been countered by a global and transnational elite that wishes “to delegitimize all interventions that do not fall under the heading of self-defence” (Farer *et al.* 2005, 214, 216). As Weiss remarks, “The slippery slope that supposedly permits humanitarian intervention to serve as cover for big power intervention is analytically vacuous but remains politically potent in the South” (in Farer *et al.* 2005, 235). Here the United States’ and United Kingdom’s misadventures in Iraq, and, moreover, abuse of cosmopolitan rhetoric to justify it, have fed into the interests of counter-hegemonic powers who wish to protect the right of states’ to abuse rights with impunity. The US and UK have been unable to build a diplomatic coalition to protect civilians in the Darfur – they have squandered any capacity, moral, legal, or military, to counter the Khartoum government and its supporters (Bellamy 2005, 32, 51). Great power irresponsibility comes in many forms, all of them non-cosmopolitan.

In conclusion, cosmopolitan political morality is consistent with the principles of sovereign equality and global legality in the UN Charter. However, sovereign equality and legality are to be evaluated in and reformed in light of fundamental respect for human rights. The gradual transformation of sovereignty in international law does nothing to deny sovereign equality or to promote imperialism and hegemony. Critics of cosmopolitanism have romanticized the traditional conception of absolute sovereignty for the wrong reasons – such a doctrine has never been an entirely effective bulwark against outside interference or dominance, and it has been abused for the sake of tyrants and cynical, powerful states time and again. Any coherent notion of legality is in fact perverted by a return to a traditional international law that is indifferent to the moral rights of individuals in and across states and societies.

Intervention for the sake of human rights is an ongoing and unsettled issue in international law. There is currently a period of transition: from a selective right to intervene that can be authorized only with SC approval to the idea that the international community has a duty to intervene in certain grave situations and, possibly, without SC approval if this body itself proves unwilling or unable to act. This is less a less desirable alternative to developing an enhanced responsibility for enforcing legalism in the UN. Critics of the cosmopolitanism *within* the responsibility to protect doctrine have mischaracterized the danger of humanitarian intervention in today's world order. It is all too unlikely to be a doctrine that simply covers abusive intervention by great powers. Although cynical manipulation of moral norms is an enduring reality, it rarely creates a new basis for law and order because the rest of the international community will reject and condemn such machinations, as in the case of Iraq today. In fact, rather than becoming the ideological banner for imperialism, as critics have suggested, the responsibility to protect ideal has been weakened by the manipulative foreign policies of the invading governments in Iraq. Too little support for intervention where it is needed, such as the Darfur, exists today in large part because of the poisoned multilateral diplomacy at the UN and the short sighted behaviour of powerful states. Conflating such realities with cosmopolitan political morality is poor reasoning that does little to help improve a legal and political framework that is presently ill equipped to deal with humanitarian emergencies.

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