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## 1 Introduction

Anne Peters presents a compelling argument that in a world which increasingly recognizes government obligations to respect, protect, and fulfil the rights of those within their territorial borders, sovereignty now requires justification. Sovereignty is conceived of as a normative status consisting of both legal

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rights (to non-intervention) and obligations (to protect rights internally, as well as to refrain from aggression). Peters disaggregates the normative status of sovereignty from the definition of a state.

Consent, rather than simply non-intervention, can be seen as constitutive of the international legal order; treaties and even customary international law are based on norms of state consent, whether explicit or tacit. Peters raises the fascinating and valid idea of replacing a system of a state's right to consent with the right to self-determination – a people's right to consent. This shift will create a discourse based on humanity.

The conception of individuals and peoples as *agents* in international law, rather than simply the beneficiaries of actions by states, is becoming visible in realms such as international criminal law. The question is whether the individual as actor can also feature prominently in the project of redefining sovereignty as a function of the individuals and peoples within the state's borders. If sovereignty is fundamentally concerned with state consent, the redefinition of sovereignty should be fundamentally concerned with the consent of peoples.

Below, this comment will first discuss the shift in the concept of sovereignty and whether state consent is equated with sovereignty under international law. Section 3 will then discuss how the notion of consent is tied to the definition of a state, and whether the disaggregation of the consequences of sovereignty from the normative status of being a state makes sense in light of Peters' definition. Section 4 discusses whether individuals or peoples are at

the forefront of Peters' theory. Section 5 concludes that basing sovereignty on a more robust notion of consent and self-determination would give the international community as international judge a firmer philosophical basis for action.

## 2 Consent as the Foremost Concern in Discussion of Sovereignty and as the Constitutive Component of International Law

There is a growing consensus that the traditional notion of sovereignty, which gave states inviolable territorial boundaries except for diplomatic protection claims and self-defence, is now outdated. Sovereignty is a powerful form of rhetoric at the international level; it is often used to rebut external demands placed on the state. But there is an increasing rise in the use of 'humanity'-based rhetoric to justify governmental action.<sup>1</sup> Moreover, functions traditionally filled by national governments are being increasingly shifted to international institutions. Kal Raustiala has discussed this as an expansion of sovereignty; international institutions help nation states continue to fulfil their traditional functions and

<sup>1</sup> Ruti Teitel has documented this shift in rhetoric, which she sees as some of the most powerful evidence of the declining value of traditional sovereignty: Ruti Teitel, panelist, American Society of International Law Panel on Changing Concepts of State Sovereignty (28 Mar. 2009).

assert their power in an increasingly globalized world.<sup>2</sup> Recent commentators have also discussed the shifting concepts of sovereignty in terms of the responsibility to protect and what Michael Chertoff has called the 'responsibility to contain'.<sup>3</sup> Chertoff takes a similar position to Raustiala, insisting that the use of a responsibility-based international law framework 'would not amount to abandoning consent-based international law; rather, it would enhance it'.<sup>4</sup>

Chertoff's equation of sovereignty with 'consent-based international law' highlights a definition of sovereignty which Peters does not discuss: sovereignty simply as the necessity of state consent. At a recent American Society of International Law panel on Changing Concepts of State Sovereignty, Rosa Brooks made the point that the responsibility to protect within state borders and the responsibility to protect outside state borders are two sides of the same coin: the redefinition of sovereignty from a right to a privilege.<sup>5</sup> Loss of

sovereignty can be conceptualized as the loss of a state's ability to grant or withhold consent.

The equation of sovereignty with the right to consent is supported by state practice. In a recent *EJIL* article, Tullio Treves discussed the way in which new initiatives against piracy, such as Security Council Resolutions 1816, 1846, and 1851, emphasize state consent even in situations like Somalia, where the transitional government cannot exercise effective control.<sup>6</sup> In protecting state sovereignty, states at the international level focus on protecting even failed states' right to consent.

Consent may so often be recognized as sovereignty because it is considered constitutive of international law; under both treaty-based and customary international law, the key question is what principles and rules the state has consented to. As Peters discusses, sovereignty is traditionally viewed as the basis for international law; part of states' sovereign powers is their ability to precommit themselves and to consent to be bound at the international level. The basic philosophical justification for limiting states' rights in international law has been states' international legal capacity to join agreements as a function of sovereignty. One interesting example of this debate over consent is the example of the Montreal Protocol: in theory, adjustments to that Protocol can be binding on all the parties without unanimous consent if a two-thirds

<sup>2</sup> See Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *J Int'l Econ L* (2003) 841.

<sup>3</sup> Chertoff, 'The Responsibility to Contain: Protecting Sovereignty Under International Law', 88 *Foreign Affairs* (2009) 130; see also Kamanda, 'An Analysis of Responsibility to Contain', *Real Clear World*, 8 Apr. 2009, available at: [www.realclearworld.com/articles/2009/04/an\\_analysis\\_of\\_responsibility.html](http://www.realclearworld.com/articles/2009/04/an_analysis_of_responsibility.html) (arguing that any measures sanctioning states or intervening to contain threats must take place under a defined and codified international framework based on the UN Charter).

<sup>4</sup> Chertoff, *supra* note 3.

<sup>5</sup> Rosa Brooks, panelist, American Society of International Law Panel on Changing Concepts of State Sovereignty, 28 Mar. 2009.

<sup>6</sup> Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', 20 *EJIL* (2009) 399.

majority approves the adjustment at the Conference of the Parties. This reduction in state consent is acceptable because it is a precommitment measure; states have consented to the procedure, so it does not violate their sovereign rights.<sup>7</sup> Similarly, the Security Council can legislate at the international level without the need for the consent of every state; this legislation can be based on a theory of states' consent due to their acquiescence to the UN Charter.

The consent which only sovereigns can give seems to be the key factor which makes sovereignty constitutive in international law; although non-intervention makes law possible by creating the possibility of a society of states, it is the consent of the states themselves that forms the society. This theory is consistent with Peters' use of social contract theory; in the social contract, it is the fundamental consent of individuals (the states) to the social contract that is the basis for the power of the sovereign (the international community).

### 3 Is the Definition of Sovereignty Tied to the Definition of a State?

Whether sovereignty is defined as the need for the consent of the government

or as a normative legal status, Peters successfully separates the idea of sovereignty from the definition of the state. Peters retains Weber's idea that the state consists of political control exerted via the monopoly of force.<sup>8</sup> Yet a state does not simply have sovereignty by virtue of having political control and a monopoly on the use of force. Peters equates internal and external sovereignty. In so doing, she moves towards allocating the right to grant or withhold consent to peoples instead of to states.

Peters argues that legal consequences such as territorial integrity, self-determination, non-intervention, and jurisdiction over people and territory are only consequences of the legal status and do not 'constitute the legal status itself'. But these consequences are inherent in her definition of the state. If a state no longer has jurisdiction over people and territory, it can scarcely be said to have *Kompetenz-Kompetenz*. Similarly, without territorial integrity and non-intervention, how can a state be said to have a monopoly over the use of force within its territory?

It is possible to imagine a state existing that was not accorded juridical equality, legal personality, or diplomatic immunity by other states. But if other states do not respect the state's territorial integrity, right to self-determination, legal independence, or right to non-intervention, it is hard to imagine an independent state existing under those circumstances. Internal and external sovereignty are, as Peters points out, aligned. If that is the case, then the consent of the people, necessary for internal sovereignty, may also be seen as the key factor for awarding

<sup>7</sup> Lohl, 'Conferences of Parties and the Modification of Obligations', in M. Craven and M. Fitzmaurice (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (2005), at 103, 104, and 106–107; see also Brunée, 'Reweaving the Fabric of International Law?: Patterns of Consent in Environmental Framework Agreements', in *ibid.*, at 118, 122–128 (discussing different types of 'lawmaking' by Conferences of Parties).

<sup>8</sup> See particularly n. 4 of Peters' article.

external sovereignty. At stake is the very existence of the state.

Peter's key move is to pierce the veil of sovereignty to see whether the state is fulfilling its obligation to its people. Peters does recognize the importance of the state as the locus of 'democratic processes'. She also notes the views of the International Court of Justice in *Nicaragua*, which state that sovereignty respects the freedom of choice of a political system of the state. Through the monopoly on the use of force, the state protects human rights and ensures political functions. However, Peters sees this as a justification based on 'output-legitimacy', not necessarily the definition of the state itself. Peters refrains from rewriting the definition of the state as the unit held responsible for basic human rights within a given territory, or the unit constituted by the consent of the people within a given territory. The definition of the state is still based on power, rather than on consent.

Crucial to the disaggregation of the 'consequences of sovereignty' from the state is the separation of the notion of the state from the notion of its people. As discussed below, Peters holds the state responsible to its people, at least insofar as grave violations of human rights are involved. Self-determination becomes no longer a right of the state, but a right held by peoples within the state.

#### 4 Peters' Theory is Based on Rights of Peoples, Not Individuals

Peters' ultimate prescription which allows for 'a presumption in favour of humanity' and 'state responsibility'

does not challenge the idea that states as territorial units should be the locus of protection of human rights norms, with corresponding power to define those norms insofar as they uphold a minimal level of rights (corresponding to a fulfilment of 'human needs' or 'the most basic human rights'). Although cosmopolitans focus on individuals, Peters' argument need not necessarily recognize the individual as the centre of moral concern. Under her theory, sovereignty (or the need for state consent) is only undermined when there are grave and widespread violations of human rights, and it is based on the right to self-determination, which is a right of peoples.

Peters also differs from cosmopolitans in that she does not give political or rights-based agency to individuals or minority social groups. She explicitly says that democratic states and individual political participation are not part of the necessary elements for sovereignty. The classic debate of rights as opposed to needs emphasizes that rights are more easily limited in concrete ways and more easily invoked by the individuals concerned, while needs invoke an ethic of care on the part of the outside intervener, whether a judge or an international political body such as the Security Council.<sup>9</sup> In this context, however, the focus on 'basic rights' implies an externally evaluated standard where

<sup>9</sup> For a discussion of how needs rhetoric can be used also to deprive people of agency see P. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (1991) (discussing how rights discourse allows people to argue for themselves in a way that needs discourse does not).

only the most egregious rights violations reduce levels of sovereignty. This standard must have legal limits and degrees in order to provide a meaningful check on behaviour if the ethic of non-intervention is to be preserved.

Under the international legal structure which she details, only *massive* or *grave* violations of human rights or humanitarian law lead to individual accountability and reductions in sovereignty. Limiting sovereignty in the case only of widespread attacks seems to accord with the rights of peoples, rather than individuals. The question then becomes what exactly outside forces may invoke as a violation of the principles of ‘humanity’ on which the state is founded. Peters says only that a consensus must be formed around the issue.

The international community thus far appears to be using a ‘shocks the conscience’ standard for when it is valid to intervene. Yet such intervention does not seem necessarily principled or legal, and can be affected by national biases, thus spawning years of debate over what principles can and should be used for humanitarian intervention. A ‘shocks the conscience’ standard, as Peters points out, looks at basic human needs; but some needs, particularly economic and social ones, are still neglected. Only where the state is complicit in violence or mass atrocities may sovereignty be impaired. Humanity here operates as the recipient of international concern; the focus is not on humanity as agent.

## 5 Judging States and Allocating Sovereignty

As Peters notes, one of the key problems with articulating a principle of limita-

tions on sovereignty is that other sovereigns or international institutions will become the judge of when sovereignty can be breached. Peters addresses this problem through two separate prongs: a limitation on juridical equality as a specific corollary to sovereignty, and a call for a consensus-based framework at the international level.

What does the limitation on juridical equality mean for consent? Juridical equality, in Peters’ framework, can operate as an incentive. If states do not meet their basic human rights obligations, they may face limitations on their voting rights or membership of international institutions. Such limitations would be judged by the international community as a whole, using a *proportional equality* test. Peters urges international institutions to judge whether states are entitled to formally equal treatment.

Would a theory of limited sovereignty based on consent of the people look like Ely’s theory of representation-reinforcing adjudication? Ely justified the judicial elaboration of rights as helping to remedy democratic failures.<sup>10</sup> At the international level, Peters appropriately notes that the international legal principle of self-determination is not the same as democratic self-rule; following Walzer, she notes that individuals are free to ‘choose’ to live in an illiberal and authoritarian regime if that is the outcome of their cultural and historical heritage. Nonetheless, ‘mass atrocities’ can be theorized as a lack of consent by the people within the state to the political actions (or inaction) of their state; when crimes such as apartheid or genocide

<sup>10</sup> J.H. Ely, *Democracy and Distrust* (1980), at 1–11.

occur, a minority in that country is not being appropriately represented by that state.

Ely found the role of policing representation to be 'peculiarly suited to the abilities of the courts; which will not likely be performed elsewhere if the courts do not assume it'.<sup>11</sup> In this case, however, the role of neutral actor able to adjudicate on rights is played by the international community, not national judges. To some extent, this line of thinking implicates the Security Council as world judge. Yet it will be political actors who make political decisions about the rights of peoples, rather than independent judges, particularly in the area of military intervention. The need for a defined legal framework, rather than a 'shocks the conscience' standard, becomes even more salient when action is taken for political reasons. Unfortunately, a framework of needs, exercised by political actors, may lead to biased determinations of when to intervene. Articulation of a standard based on the types of government action to which the people of that country can and cannot consent under international law may ameliorate but not obliterate that concern.

## 6 Conclusion

This article has focused on the right to self-determination as a basis for state consent, rather than on the human rights that Peters also suggests could form an alternative to sovereignty. The problem with using human rights as a basis for sovereignty is that sovereignty will often be interrogated in response to a breach

of human rights. The level of vagueness in human rights treaties would raise the concerns about empire that she addresses in the middle of the article. In the human rights realm in particular, there is a desire to use a margin of appreciation or subsidiarity in localizing universal norms.<sup>12</sup> The right to self-determination provides the best counterpoint to universal demands, and thus the best substitute for the notions of sovereignty.

Responsibility to protect, if it includes the responsibility to contain, is not only targeted at the basic needs of people within the territory of the sovereign. In some cases, the responsibility to protect does not even apply to the most basic needs, as in the example of the Burmese crisis. It does not go so far as to articulate a theory of sovereignty-based on consent, as basing the theory of sovereignty on a right to self-determination would ideally do. Judging the consent of peoples raises difficult questions about false consciousness and the motivation of political actors. However, one can reconceptualize what breaches of rights impair sovereignty by evaluating to which breaches of rights it is impossible for any population to consent (the *jus cogens* norms being the most salient examples). Evaluating the ability of the people to consent to the specific government violation as the metric for granting state sovereignty accords with a shift to the right to self-determination away from traditional forms of power-based sovereignty.

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<sup>11</sup> *Ibid.*, at 103 (quoting A. Bickel, *The Least Dangerous Branch* (1962), at 24).

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