

Editorial

# Re-visiting our understanding of sovereignty: An homage to the people

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A lot has happened in the international realm during the past couple of months. In Africa, mediators continue to advocate for the negotiation of a peace deal in South Sudan, pressing for a cease-fire as government troops fight for control over the last rebel-held town. In the Middle-East, the Friends of Syria alliance has been met with further difficulties in unifying rebel groups, despite the fact that the first direct talks between President Bashar Al-Assad's government and the opposition are scheduled to commence in Geneva on the 22<sup>nd</sup> January 2014. Closer to home, in Europe, human rights lawyers and campaigners alike have asked the International Criminal Court (ICC) to investigate allegations of torture in Iraq which are said to have constituted a 'systematic abuse' of Iraqi detainees by British troops during their presence in the country, arguing that they meet the threshold requirements for war crimes.

The aforementioned cases are but a few examples of intervention by states and other non-state actors, despite such action (arguably) being contrary to the notion of state sovereignty. The sovereignty-intervention debate is one that is well-known in the field of International Law. However, the ambivalent (and often tumultuous) relations between certain states invite a re-examination of our contemporary understanding of sovereignty.

There is no denying that globalisation has led to an unprecedented movement of people, capital and knowledge throughout the world. As such, traditional distinctions based on borders are no longer effective in determining or containing the hegemonic influence of states. Now more than ever, it is clear that the rise of non-state actors in the form of multi-national organizations, corporations, foreign aid agencies, transparency agencies and human rights agencies has had both a facilitating and constricting effect on governments' ability to adopt certain policies and to participate in global dialogue.

It can be said that the concept of sovereignty has changed over time—from the traditional view that the state holds absolute authority, to the more contemporary view that the people, not states, are the prime consideration when it comes to political legitimacy. One of the most renowned advocates for the contemporary understanding of sovereignty as "peoples not states" is the political philosopher John Rawls.

Rawls's theory of sovereignty is based on the idea that the "highest authority is not a

rule of governmental institution, but the people from which the government or the ruler derives their authority.” That is to say, the people, not the state, are sovereign. By peoples, specifically liberal peoples, Rawls means a group of people that have three basic features that are institutional, cultural and indicative of a firm attachment to a political (moral) conception of what is right and what is just. In order to meet this criterion, it is argued that they must have a reasonably just, constitutional and democratic government that serves their interests. They also need what John Mill called “common sympathies”, which is serve as a unifying factor. Lastly, they must share a common moral nature.

In criticizing this view, interventionists argue that a sovereign state should be able to effect change within its territory at all times. This is particularly important for post-colonial thinkers, as the primary motivation for political independence was to attain control and direction of one’s life and the resources around them. Classical advocates argue that the concept of conditional sovereignty in the Rawlsian view— specifically, justified intervention in fallen or undemocratic states (such as the ones mentioned above)—is paradoxical and wrong. The concern is that countries may take advantage of conditional sovereignty for personal gains. This is a concern that history has proven to be legitimate. The Rawlsian reply to this concern is that such interventions are not undermining sovereignty and are justified to the extent that they are aimed at enabling the rights of people to self-determination and participation in political decisions. This reply is based on the idea that if the people cannot influence the government, then the state’s claim to sovereignty is illegitimate and therefore, the intervention is not illegal.

It can be said that sovereignty and governmental legitimacy must be judged by the political and social conditions of the people. The state was created for their benefit and no government can exist sustainably without the support of its people. They are the prime consideration for political legitimacy. With this in mind, sovereignty can be defined as the free, independent, and autonomous ability of the people to affect change in their own lives. Freedom can be viewed as control over one’s life, independence as the right to govern one’s own affairs; and autonomy as the freedom from unrequested external interference in the internal affairs of the state. Thus, a people can only be classified as sovereign if their freedom, independence, and autonomy are properly respected.

It follows that when states implement political sanctions or interventions, they are challenging or failing to recognise the sovereignty of another state. But what ramifications does this lack of state sovereignty have on the sovereignty of the peoples of these states, and how legitimate is that state?

In line with these questions on sovereignty and intervention, I am delighted to present the Amsterdam Law Forum (ALF) Winter Edition 2014. The first piece is a scientific article co-authored by Cristina Genovese and Dr. Harmen van der Wilt. In this paper, the authors explore the plausibility of employing regional initiatives as a means to address the increasingly problematic grey area of enforced disappearances that still persist in Europe, despite its well-developed human rights protection agenda. They begin by explaining the ambit of the crime of enforced disappearances in the context of international law, before delving into the *lacunae* in both the national and international criminal justice systems in adequately addressing this problem. The crux

of their argument is that introducing a regional criminal system for the prosecution of perpetrators would decrease the impunity gap between national and international criminal justice enforcement bodies by shifting the prosecutorial role to the body of a defined region as opposed to the individual states, thus creating a more effective, supranational institution. In order to make this model work, the authors suggest that states with common sympathies, as defined by Rawls, would be part of the same region and said commonalities would serve to strengthen the efficiency of the criminal justice system of those regions.

The next piece, by Andrew Szanajda, explores the reconstruction of the administration of justice in the American occupation zone of Germany after the end of the Second World War, and identifies this as an example of one of the first times in history when this process was attempted. He argues that the restoration of the administration of justice, following a change in regime, is influenced by a shift in ideology. To this extent, he takes the reader through the process through which Germany's administration of justice was achieved post-World War II. He highlights two factors that were fundamental in this process, namely: reconstructing judicial institutions and what he terms the 'de-nazification programme' during personnel reconstruction. He concludes that through this process, state judicial organisations were restored and they were able to regain independence as jurisdictional responsibility was transferred to them until the end of the American military occupation, leading to the establishment of the Federal Republic of Germany. In this article, Szanajda is able to capture the essence of a sovereign people. It is only when the people are truly free (in the Rawlsian sense) and empowered to take part in the institutions that govern them that the state can derive its political legitimacy.

The final submission by George Lucas focuses on the ethical concerns surrounding the use and development of new military technologies. He is of the view that the rhetoric on the law and ethics of new military technologies does not lend itself helpful to our understanding of the most effective means of dealing with the increasing proliferation of these technologies. Instead, he challenges the reader to shy away from the debates of law and morality in favour of the promotion of good governance and clear regulation in order to prevent harm. In line with Rawlsian sovereignty, it can be said that Lucas' article favours the engagement of the people (as defined above). Instead of being apprehensive of the 'unknown consequences' of emerging technologies, Lucas advocates for the empowerment of the people through transparency, reason and dialogue.

I hope that this edition of ALF is as informative and thought provoking to the reader as it was to the staff at ALF. Thank you to our contributors for their insightful articles and for their cooperation during the editorial process. A special thank you to the members of the ALF Board and the Editorial Team for all the hard work that they put into making this edition possible. Enjoy the read.