Human inequality puts sovereign equality to the test

Janne E. Nijman | March 27, 2013

How well or how poorly citizens fare within the borders of their state used to be a no-go area for others to interfere with. But the notion of sovereign equality as the foundation of the international legal order is showing ever more creaks and squeaks. This is a direct result of the increasing polical and legal value attributed to human equality across the globe.

Inequalities of income and livelihood between people living within the same national borders are on the rise. And so is the policy and scholarly attention for this troubling phenomenon, including in the legal field. Experts in international law in particular are grappling with new questions due to the growing tension between sovereign equality and human inequality. Sovereign equality – the principle that all states are equal before the law and domestic behaviour towards citizens and residents is of no business to other states – has long been the sacrosanct foundation of international law. The development of international human rights law is however increasingly challenging the formal equality of states. The international community is facing a dilemma: how to deal with its responsibilities to protect the integrity of the state, on the one hand, and human dignity, on the other. Human equality thus means the equal dignity and equal moral value of all human beings around the globe. The principles of sovereign equality and human equality have both functioned to protect the weaker from their stronger peers. However, how do they relate to each other? More concretely, if the international community is serious about human equality this puts strain on the principle of legal equality of states as a grounding principle of the international community.

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International Rule of Law

This tension is played out quite clearly in the context of the debate on the advancement of the international rule of law. What does the ‘rule of law’ as an ideal and value for the international society mean? In the domestic context, the beneficiaries of the rule of law are clearly defined. The rule of law means protecting citizens against arbitrary use of power by the legislative and executive branches of government. At international level, the body of law is made by states to regulate their relations with each other. They are themselves the beneficiaries of the formal values of the rule of international law, such as the independence of the judiciary, the non-retroactivity of the law, certainty of law and equality before the law. Legal equality as a value of the rule of law ideal at the international level thus traditionally purports to the equality of sovereign states: states are equal subjects to international law.

And so we see the tension emerge: with the development of human rights law and the responsibility of the international community to protect these rights for all citizens globally, treating individuals as equals challenges sovereign equality and thereby the international legal order to its core. Founded on the principle of sovereign equality, the international legal order is traditionally a legal order of equals; a society of Hobbesian Leviathans who live without a higher authority to decide what is right and wrong or to judge the lawlessness of the internal conduct of the state. Inevitably, international human rights law requires states to assess and criticise each other's domestic affairs. This could all too easily threaten international peace and order.

Anarchical society of states or *societas humana*

The legal equality of states emerged as an early-modern analogy to the natural equality of individual members of humanity with the emergence of European states. Historically, the meaning and force of sovereign equality have depended on deeper-lying conceptions of the nature of the world community and the position of states within it.

Sovereign equality

Sovereign equality as a concept that grounds the rights of states is a product of the modern natural rights tradition. The late 18th century Swiss scholar Emer de Vattel explained the legal principle in clear terms: 'A Nation is … free to act as it pleases,' [1] there is no higher authority, no world legislator, to determine what is right. All states are equal and determine the law for themselves. Sovereign equality has come to underpin the 'anarchical society of states', [2] the legal and moral status of the main global actors and the international relations that come with it. It underpins what many have called the Westphalian order. Anthony Anghie has argued that sovereignty and sovereign equality were developed and adopted as fundamental legal principles to support colonialism in the nineteenth century. [3] At the same time, with decolonisation, many new states invoked sovereign equality to protect their societies from foreign post-colonial interferences. As a legal principle, today, sovereign equality is codified in article 2(1) of the UN Charter (1945): 'The Organization is based on the principle of the sovereign equality of all its Members.' In practice, many would acknowledge equality of states to be a legal fiction, states are not equal in fact. The legal principle of sovereign equality is moreover not always respected by strong and weak states to the same extent.

With the modern state, sovereign equality became the legal principle on which the international legal order was founded. A society that functions on the basis of this principle thus is a largely anarchical society. The UN Charter reaffirmed this classic paradigm of sovereign equality [see box].

Others scholars and international lawyers, however, understand and argue that at the basis of the law of the international community is the *societas humana.* In the same UN Charter, the first article enumerates the Purposes of the Organisation. Paragraph 3 thus states: '[t]o achieve international co-operation in … promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' This idea of human equality was thus laid down at the basis of the UN Organisation and consequently of the international legal order. The idea that the *societas humana* is organised through states that serve international peace and order and that are under an obligation to promote global justice and to respect human rights has stimulated the creation of international human rights law since 1945. The universal human community is currently made up of some 7 billion individuals. The rights and wellbeing of these individuals has gained in moral and legal importance over the last half century and certainly since the adoption of the Universal Declaration of Human Rights (1948). [4]

But what if a person's country of nationality or residence does not guarantee those rights and freedoms in practice - or worse, grossly violates them? Increasingly, under influence of the burgeoning field of human rights law, the rights of the individual – and this includes human equality – have gained in legal importance to the extent that not only states, but also individuals have become the beneficiaries of international law. [5] In fact, human rights law, which is the pre-eminent instrument to address human inequality and (social) injustices regardless of where they take place, has fundamentally challenged the formal principle of sovereignty and sovereign equality.

Or in the words of International law Professor Michael Glennon: '*Treating states as equals prevents treating individuals as equals*: if Yugoslavia truly enjoyed a right to non-intervention equal to that of every other state, its citizens would have been denied human rights equal to those of individuals in other states, because their human rights could be vindicated only by intervention.' [6]

Breakthrough?

A clear breakthrough for sovereign equality on the basis of human equality was forced with the first resolution adopted by the UN Security Council that mentions the Responsibility to Protect (R2P) in 2006. The emerging R2P doctrine challenges not only the principle, but also the practice, of sovereign equality and the legal sovereignty of states. The doctrine states that, if a national government is unable or fails to guarantee the safety and human rights of its citizens, the international community can – and in the case of genocide should – step in and intervene. Sovereignty can no longer be the impenetrable shield behind which gross human rights violations and human suffering take place

with impunity. The R2P principle is a reaction by the international community – invited at the time by Kofi Annan – to its impotence vis-à-vis human rights violations or war crimes that happen in internal conflicts. It is a ground-breaking resolution because it endorses the prioritizing of human equality over sovereign equality. The fact that it was adopted by the Security Council is all the more remarkable given the stipulations of the UN Charter just mentioned.

Consequently, human rights law is reshaping the international legal order. The value of human equality as codified in this body of law is the basis of claims before human rights courts that invade the sovereignty of states. Arguably, human equality is actually redefining the legal principle of state sovereignty from a principle of supreme authority and control - and thus of non-interference by its equals - into a principle rooted in the state's responsibility for its people, their well-being and human rights. If states fail to promote and respect the human rights of their citizens, some argue that qualification of the traditionally absolute principle of sovereign equality is valid.

International criminal justice

Developments in international criminal law have similarly been instrumental in posing a challenge to sovereign equality in favour of human equality. International criminal law is understood as another way to respond to gross violations of human rights law. The international community has established the permanent International Criminal Court to prosecute individuals who would otherwise enjoy impunity for war crimes, crimes against humanity, genocide, and the crime of aggression due to duty – based on sovereign equality – not to interfere in affairs falling within another state's domestic jurisdiction. To what extent the ICC really redefines sovereign equality is debatable as ultimately its jurisdiction is based on the consent of sovereign states. On the other hand, China, Russia, and the United States (with their special position as permanent members of the UN Security Council) justify their refusal to join the ICC ultimately on the sovereign equality principle. This means that inequality is sustained as these dominant world powers duck out of the rule of international law.

International cooperation

In addition to the considerable body of human rights and international criminal law that has been developed in the past few decades to protect and improve human dignity, international cooperation has also played its part. Many of the efforts of donors and aid organisations have focussed on reducing human inequality – in particular in terms of standards of living – at a global level. This has fed into the discussion how international human rights law can contribute to global equality, or at least to the eradication of global poverty on the basis of human equality. One could throw open the question what to do with governments that sustain poverty and corruption rather than serve and promote the well-being of their people. Are these governments legitimate? Or in terms of sovereign equality, do states that consciously impoverish society deserve the protection that comes from the principle of the legal equality of states? Is Glennon's remark also valid in this context? In the case of the humanitarian disaster caused by the cyclone Nargis, Jan Engeland, former UN Under Secretary of Humanitarian Affairs, called for non-military intervention in the form of immediate humanitarian assistance in Burma on the basis of the emerging norm of the international community's 'responsibility to protect'; in other words, immediate deployment of international humanitarian aid workers against the will of the state of Burma, which called for their sovereign right to non-interference to be upheld.

Global poverty and global justice

Political philosopher Thomas Pogge touches on global poverty and global income inequality in *World Poverty and Human Rights.* [7] Pogge goes further and argues basically for the complicity of the Western world in the global poverty problem. In his view, it is not true that developed states do not harm the human rights of people in the developing world. On the contrary, Western states shape and dominate international institutional structures to their advantage rather than to the benefit of the global poor. As such, they fail in their duty not to cause or contribute to (severe) poverty. They benefit from the way impoverished states are governed (e.g. through the loans they provide). Pogge shows how global poverty is a systemic problem. His cosmopolitan argument puts severe pressure on the sanctity of the sovereignty of states as the organising principle of global society. There is moreover an increasingly shared conviction that human inequality violates some of the core values of human rights and global justice as expressed most recently in the Millennium Development Goals.

Arguably, an international human rights law approach to global poverty entails not only the obligation not to harm the condition of human rights in other states, it also includes the obligation to confront states with their own responsibility to promote human dignity and to fight the poverty of their people (hence, an obligation to fight corruption and promote a minimum fair distribution of food, water and other basis services). Subsequently, it entails an obligation for those involved in international cooperation to assist in this fight against (extreme) poverty and in the gradual realisation of (socioeconomic) human rights as recognised in international human rights treaties. An emerging redefinition of sovereignty under the influence of international human rights law into 'sovereignty as responsibility' affects the traditional paradigm of sovereign equality and may help the international legal order tilt towards human equality. If it is true that globalisation is increasing human inequality across the globe, the fight against poverty and the promotion of human equality with the help of human rights law should define international cooperation and contribute to the definition of global economic justice.

Opening Pandora's box?

The way in which states deal with their citizens and all forms of human inequality has thus become relevant to international politics to a greater extent than before. Be this as it may, sovereign equality should not be discarded too easily. It is also a very valuable principle of international law as it helps counter hegemonic acts by the great powers vis-à-vis other states. As such, international lawyers would warn that qualifying the principle of sovereign equality too easily would not risk opening Pandora's box. Brad Roth for example defends the

principle of the legal equality of states in his recent book *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order*. [8] In his view, the principle is the best way to secure peace and order in a pluralist world. Since there is no global agreement on what is a legitimate and just national political order, the international society has founded the UN on the sovereign equality principle so as to ensure that this disagreement does not spill over into the international order and contribute to conflict that would harm the peoples of the world. Too often, Roth reminds us, arguments based on global justice have enabled strong states to invade or interfere otherwise in weaker states. To protect the latter, it is important to defend sovereign equality against moral universalism. This means we should accept 'the right of territorial populations to be ruled by their own thugs and to fight their civil wars in peace'. In *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, [9] Gerry Simpson challenges the idea that sovereign equality rules. He argues that the international legal order grounded on sovereign equality accommodates the great powers through legalized hierarchy; the latter has different forms in different historical times but today is a legalized - largely charter-based - hegemony. With the interventions in Kosovo, Afghanistan and Iraq, Simpson sees liberal anti-pluralism as dominating the anarchical society of states. It must be noted that international law has long known a tradition of so called 'anti-pluralism', which "denies certain states the right to participate fully in international legal life because of some moral or political incapacity, such as lack of civilization, absence of democracy or aggressive tendencies." [10] Hegemonic tendencies qualify the legal principle of sovereign equality and betray the egalitarian/pluralist aspiration of international law. In short, with the qualification of a foundational principle of international order – sovereign equality - the world could become a very messy place. Then again, to what extent should the sovereignty of failed states or outlaw states be protected?

The principle of legal equality in international law is not up for grabs, but is certainly contested more than ever before. There are developments that entail a move away from the sacrosanct principle of sovereign equality as the foundation of the international legal order, to the idea of sovereignty as responsibility – all as a result of the increasing importance attached to human equality. The notion of sovereignty as responsibility sounds attractive. It creates the space to hold states accountable for the injustices that take place within their borders, including inequality and exclusion of individuals from a decent and dignified life. However, we have to be careful. International law has a history of imperialism under the guise of moral language and ideals, e.g. bringing 'civilization' or 'democracy.' Is it, moreover, at all possible to intervene successfully in any other state to protect the people against gross human rights violations? The huge risk of destroying the social tissue of a society altogether, when intervening militarily in another state, has to be taken into account. The call that sovereignty is rightly undermined has to be nuanced by the expansionist tendencies of major sovereign powers, as Iraq has shown us once more, which affirm that some sovereigns are more equal than others. The value of order, to which sovereign equality is directed, should not be discarded too easily. Without it, global justice is very hard to attain.

The Future of International Organisation

Almost fifty years ago, the recently deceased Pieter Hendrik Kooijmans already hinted at the tension between sovereign equality and human equality. [11] The latter would put the former to the test. [12] Kooijmans related the gradual depreciation of state sovereignty to the rule of law ideal: 'the institutionalization of the international society [has] contributed towards the birth of the idea of a universal legal order, wherein the states no longer decide for themselves what is law and therefore are superior to law, but wherein they are subjected to law.' [13] Today, the subjection to the rule of international law includes a subjection to well-developed international human rights law. In other words, sovereign equality is no longer the sole basis of international organisation. On the other hand, nor is human equality. Moreover, both principles are used by the powerful to legitimize imperialist behaviour.

Scholars will continue to debate sovereign equality mostly in the context of putting forward their views on the international community, i.e. in sketchy terms: those who conceive of the international community as an anarchical society of pluriform, autonomous states and those who in one way or another conceive of it as a cosmopolitan society of humanity as a whole. Both streams have a variety of versions. This debate will continue to ground many, more technical arguments in international law practice.

The contrast between these conceptions is not new, on the contrary. It is inherent in international organisation. The principle of the legal equality of states appeals to the values of order as well as to the values of justice. Today, these values relate to individuals as much as to states. The international rule of law, after all, 'refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards…' [14] The tensions between sovereign equality and human equality have become inherent in international law, they will continue to shape and reshape international organisation. The qualification of sovereign equality will surely continue by the pressures of human inequality; international law and organisation will have to advance however in a way that reconciles the dual foundations and their inherent tensions. The values of order and justice both have to be served globally as well as domestically, (international) law cannot escape this dual function.

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Footnotes

- 1. E de Vattel, *Le Droit des Gens* (1758), in transl. *The Law of Nations*, J. Brown Scott (Ed.) Classics of International law Series, Carnegie Institute Washington 1916, Introduction para. 18-20, p. 7.
- 2. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977).
- 3. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).
- 4. Article 1 of the UDHR stipulates that 'All human beings are born free and equal in dignity and rights'. No distinctions shall be made on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The rights and freedoms set forth in the UDHR apply to every individual, regardless of the nationality he or she happened to be born with. Human equality is thus uncontested in international human rights law.
- 5. Peter Kooijmans already predicted this in his 1964 publication *The doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*, p.246.
- 6. Emphasis added. Michael J. Glennon, Why the Security Council Failed, *Foreign Affairs* May/June 2003, 16-35.
- 7. Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002).
- 8. Brad Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (2011).
- 9. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).
- 10. Ibid, at 232.
- 11. "It is … incorrect to think that equality in international law coincides with the equality of states. Equality is a legal principle which requires 'positivization' in every field of law. Since the states are no longer the only subjects of international law there is also a need for realization of equality elsewhere. And since the individual in particular will play an increasingly important role in international law, a closer study of the demands of justice and equality is not superfluous here." Kooijmans 1964, at 246.
- 12. "[T]he value of the principle of the legal equality of states is now put to the test. While in the past, in the unorganized society of states it may have been possible to explain certain encroachments upon equality through the factual conditions of power politics etc., now that the first steps have been taken towards an international legal order, the principle of equality shall either have to prove its value or be radically discarded." Kooijmans 1964, at 4.
- 13. Kooijmans 1964, at 192.
- 14. UN Doc. S/2004/616, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, 23 August 2004, p. 4, para. 6.

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