

CHALLENGE TO THE NATION-STATE'S SOVEREIGNTY: THE INFLUENCE OF INTERNATIONAL AND EUROPEAN LAW IN TODAY'S GLOBALIZED WORLD

Cristian Talesco

The Hong Kong Polytechnic University

This essay aims to investigate the relationship between nation-state sovereignty and law in today's globalized world. It will do so by bringing about two specific examples: the influence of international and human rights law on national legal order in Libya and Syria and secondly, the European Union (EU) and its new legal order which prevails over the national law of the member states. The first part will be addressed by bringing about examples from Libya and Syria. In Libya, international law has prevailed in breaking the right of Khadafi to use force against civilians. On the other hand, in Syria, international law has failed to protect civilians because of the deadlock at the UN Security Council. Moreover, international law did not prevent Syria from enacting emergency laws which resulted in the arbitrary arrest or detention of people.

Scholars have extensively argued both in favor of and against the concept of the nation-state sovereignty, especially in today's globalized world.¹ It is now widely accepted that globalization has influenced and changed the conventional notion and structure of sovereignty.² Sovereignty is an expression of power within the territory of the state, as defined during the 1648 Peace of Westphalia. This essay aims to investigate the relationship

1 Eric J.Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1992); Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* (1993): 22-49; Ali Khan, "The Extinction of Nation-States," *Am. UJ Int'l L. & Pol'y* 7 (1991): 197.

2 Kanishka Jayasuriya, "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance," *Indiana Journal of Global Legal Studies* (1999): 425.

between nation-state sovereignty and law in today's globalized world. It will do so by bringing about two specific examples: the influence of international and human rights law on national legal order in Libya and Syria and secondly, the European Union (EU) and its new legal order which prevails over the national law of the member states.

The scope is to prove that although states are still the main players in the international arena, globalization has changed their notion of sovereignty, especially in light of the existing body of international and European law.

Background: Globalization, the Nation-state and the Law

Amongst the many definitions of globalization, the one that serves the purpose of this essay is given by Ulrich Beck. He depicts globalization as "the processes through which sovereign national states are crisscrossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks."³

Although the term transnational actors commonly refers to multinational corporations, media, and non-governmental organizations (NGOs) for the purpose of this essay I also include intergovernmental organizations (IGOs), as argued by Kegley.⁴ IGOs, such as the UN and the EU, have been provided with the capacity to make laws, and in this essay I wish to address the body of law created by those organizations.

Globalization has facilitated the flux of goods, services, capital and knowledge, and to some extent- the exchange of people; overall enabling the interlaced nature of today's markets.⁵ Nevertheless globalization has also increased problems: the global spread of HIV/AIDS, environmental pollution, human rights abuses, drugs, arms, human trafficking and the spread of terrorism. These problems require an international solution, one which a sovereign state cannot find alone. They require regulations which will be binding upon the actors. To date, these problems have given rise to hundreds of treaties, mostly driven by transnational actors. International regulations have shifted the rights of the individual to the global arena. Human rights, for example, are today internationally established and not

3 Ulrich Beck, *What is Globalization?* (Cambridge: Polity Press, 2000), 11.

4 Charles Kegley and Shannon Blanton, *World Politics: Trend and Transformation, 2012-2013 Edition* (Cengage Learning, 2012): 148-149.

5 Joseph Stiglitz, "Globalization and Development," in *Taming Globalization: Frontiers of Governance*, ed. David Held and Matthias Koenig-Archibugi (Cambridge: Polity Press, 2003): 47.

rooted within the state.

According to Max Weber, the state is “a human community that claims the monopoly of the legitimate use of physical force within a given territory.”⁶ Such a definition accepts the unilateral use of force by the leadership of every state. However, Stanley Hoffmann explains that the state is a form of social organization and a factor of international non-integration.⁷ The latter point is an interesting one because even though the state might be a form of non-integration, in today’s globalized world, leaders are bound in their choices by the extensive body of international law.

Therefore, the law has an important role in the fate of state’s sovereignty. Michael Kirby said that “law represents the ultimate authority and expression of power of the nation-state.”⁸ Yet, states are not the only sources of law. In fact, today more than ever, there are numerous legal systems, which are influencing the sovereignty of the nation-states.

Challenges to Sovereignty: International and Human Rights Law

Breaking the Territorial Sovereignty of the Nation-State

International law prohibits the free use of force, and it is only justifiable by the UN in instances of self-defense.⁹ Even when this occurs, it “shall be immediately reported to the Security Council.”¹⁰ The power to use force or to authorize the use of force under Article 42, UN Charter, by the UN Security Council (UNSC) is “the heart of the collective security system,”¹¹ hence the power of states to use force within their territories is very limited, and consequentially, it also undermines the core findings of Weber’s definition of the state.

In the case of Libya, the UN Human Rights Council determined that Khadafy and his entourage had breached not only human rights but also civil and political rights.¹² The UNSC, in the first instance, adopted

6 Daniel Warner, *An Ethic of Responsibility in International Relations* (Lynne Rienner Publishers, 1991): 9.

7 Stanley Hoffmann, “Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe,” *Daedalus* 95, (1966): 862.

8 Michael Kirby, “Globalizing the Rule of Law? Global Challenges to the Traditional Idea of the Rule of Law,” in *Globalisation and the Rule of Law*, ed. Spencer Zifcak (Routledge, 2005): 65.

9 Charter of the United Nations Article 51.

10 *Ibid.*

11 Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2007): 330.

12 HRC, *Report of the Human Rights Council on its Fifteenth Special Session*, February 25, 2011, A/

Resolution 1970 (2011) demanding the immediate end of the violence via peaceful means. It also invited the authority of Libya to respect human rights and humanitarian law, to permit the entrance of foreign observers, and to “lift restrictions on all forms of media.”¹³ However, the Libyan authority did not comply with the resolution, and the UNSC was obliged to take further measures under Article 42 authorizing all necessary measures - hence the use of force - to protect civilians.¹⁴

In terms of human rights obligations, in 1989, the Libyan government ratified the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).¹⁵ Therefore, any individual who suffered a violation of their rights by the Libyan authority may bring a case before the Human Rights Committee (HRC) established by the covenant.

By becoming a party to the ICCPR, Libya has bound itself and is required to present regular reports to the HRC on the measures adopted to implement the covenant.¹⁶ Additionally, the Libyan government must comply with any external legal obligations under the covenant. Since the ICCPR entered into force, “individual complaints under the Optional Protocol (ICCPR) have helped people obtain passports, seek asylum, be released from detention and exercise their internationally recognized human rights.”¹⁷

Limits of the Globalized Legal Order

States accept international and human rights law on a voluntary basis. This is the weakness of international law, which only binds those states that have ratified international treaties and conventions. Only a few gave their approval to be judicially bound in human rights disputes.¹⁸ In the case of Syria, its government did not ratify the Optional Protocol (ICCPR), and thus it does not recognize the jurisdiction of the HRC. Therefore, it would be difficult for an individual to make a claim against Syria regarding their right to freedom

HRC/S-15/1 (2011).

13 UN Security Council, Security Council Resolution 1970, February 26, 2011, S/RES/1970 (2011).

14 UN Security Council, Security Council resolution 1973 [on the situation in the Libyan Arab Jamahiriya], March 17 2011, S/RES/1973 (2011).

15 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2013), 671-676.

16 International Covenant on Civil and Political Rights, opened for signature December 16, 1966, 999 UNTS 171, art 40 (entered into force 23 March 1976).

17 Siân Lewis-Anthony, *Treaty Based Procedures for Making Human Rights Complaints Within the UN System* (Brill Transnational Publishers inc., 2004), 57.

18 Richard Bilder, “An Overview of International Human Rights Law,” in *Guide to International Human Rights Practice*, ed., Hurst Hannum (Boston: Transnational Publisher: 2004), 3, 12.

of expression, for example. Syria lacks integration in the global society, and since 1963 has established a form of social organization based on emergency law, which gives the security forces freedom to arbitrarily arrest and detain people, therefore suspending any constitutional rights for Syrian citizens.¹⁹ Although this may be contentious from a Western perspective, it is the right of the sovereign nation to enforce such a law.

Unfortunately, states' individual perceptions of human rights can be very different. Society has a very broad mixture of cultural, political, social, and religious systems, adding to the unity dilemma regarding which rights should be protected through international law. Priorities are indefinitely different. Although, this apparently seems to undermine the point in support of the dismantlement of the nation-state's sovereignty, by signing most international treaties many countries have committed themselves to finding a point of convergence on the importance of implementing human rights.

Challenges for the Global Role of the UN Security Council

Although the UNSC resolutions have a crucial role in limiting the sovereignty of nation-states, the Security Council has been highly criticized for appearing to be the "play thing of a few Western Powers."²⁰ Geoffrey Granville-Wood came about with such a statement after the UNSC issued sanctions on Libya in 1992 for the Lockerbie bombing, while the same treatment was not reserved for France following the bombing of Greenpeace's "Rainbow Warrior" in New Zealand.²¹ The double standards of the UNSC put into question its accountability to establish a global rule of law. The two cases are unquestionably terrorist attacks, although the Lockerbie bomb caused hundreds of deaths, while in the Rainbow Warrior case, French secret agents "only" destroyed a ship.

Unfortunately, within the UNSC, clashes between the two ideals of respect for territorial sovereignty and human rights may arise in many international disputes. The UNSC deadlock has been a problem, especially in the case of Syria where the economic interests of China and Russia have prevented the implementation of a resolution to stop human rights abuses.

19 "Syria," Freedom House, <http://www.freedomhouse.org/report/freedom-world/2009/syria?page=22&year=2009&country=7713> (accessed October 5, 2012).

20 Geoffrey Grenville-Wood, "Sanctions against Libya Set a Questionable Precedent," *Bulletin of the UN Association of Canada* (1993), <http://plane-truth.com/Aoude/geocities/grenwood.html> (accessed October 6, 2014).

21 Ibid.

However, even though this seems to point out the unilateralism of the five permanent members of the UNSC, “countries like-minded should continue to work for an international system and put in place the fabric and structures that are needed.”²² Clearly, unilateralism within the UNSC is not helping the process of creating an accountable body of international and human rights law. However, although the relationship between states is still the founding stone of the current international system, “without an accepted and binding international order with the United Nations at its center we are destined to a future where the powerful nations of the world make the rules but are not necessarily bound by them.”²³

Reshaping the Notion of Sovereignty: the New European legal Order

European integration is a successful example of regional globalization. It arose as a consequence of the incapacity of the European nation-states to solve two basic problems: to avoid expensive, devastating wars, and to manage economic competition.²⁴

Since 1951, the European Community of Defence, the predecessor of the European Union (EU), has stunningly evolved. Today, the EU has legal personality, and the awarded Nobel Prize for Peace is recognition that “the EU is a unique project that works for the benefit of its citizens; the project that allowed us to unite in peace after devastating wars.”²⁵

European integration is therefore the result of a technical supranational institution, which has gradually taken charge over some competencies of the single nation-states.²⁶ The supranational approach puts forward the idea that sovereignty should shift outside the boundaries of the nation-state.²⁷ This somewhat limits the nation-states’ capacities to

22 Malcolm Fraser, “Sovereignty, International Law and Global Cooperation,” in *Globalisation and the Rule of Law*, ed. Spencer Zifcak (Routledge, 2005), 163-182.

23 Ibid.

24 Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Structuring Between the Nation-State and the European Union* (Oxford University Press, 2005).

25 “Nobel Peace Prize for the EU is also recognition of our work outside the EU (2012),” Blog of Commissioner Andris Piebalgs, <http://blogs.ec.europa.eu/piebalgs/nobel-peace-prize-for-the-eu-is-a-also-a-recognition-of-our-work-outside-the-eu/print> (accessed October 15, 2014).

26 Sergio Pistone, *L'integrazione Europea* (1999), 17-19. See, “The EU, therefore, is based on a pact between sovereign nations that have resolved to share a common destiny and to transfer an increasing share of their sovereignty to the Community” from “Europe in 12 Lessons,” Official Publications of the European Communities, http://ec.europa.eu/publications/booklets/eu_glance/60/en.doc (accessed March 12, 2015).

27 Richard Bellamy and Dario Castiglione, “Building the Union: The Nature of Sovereignty in the Political Architecture of Europe,” *Law and Philosophy* 16, (1997): 421.

act unilaterally, and can undoubtedly be seen today with the supremacy of EU law over national law.

Although some scholars²⁸ have supported the view of an inter-governmental EU where the decision-making process is still in the power of the member states, they seem to underestimate the achievements of the European Court of Justice (ECJ), which established by means of court judgments the incorporation of the EU law within the national law of the states and its supremacy.²⁹

Supremacy of European Law over Domestic Law

Three specific legal cases brought before the ECJ formally established the supremacy of European Law over national law: Case 26/62 Van Genden Loos, Case 6/64 Costa v ENEL and Case 106/77 Simmenthal. Since then any clash of national law with European law has obliged the member state to change their legal system or disregard the national law in lieu of EU law. In Case 26/62, a Dutch company imported a chemical from West Germany to the Netherlands. The Dutch authorities charged a tariff on imports. The company then brought a case before the national court claiming that such tariffs were against Article 12 of the Treaty of Rome (the founding treaty of the European Economic Community). The national court referred the question to the ECJ for a preliminary ruling. The national court asked whether Article 12 granted rights to the citizens of a member state that could be implemented in national courts.

The court upheld that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, and the subjects of which comprise not only member states, but also their nationals.”³⁰ The judgment is innovative because it recognizes that a new legal order has been established within the Community, and this influences the national legal order of member states who have limited their sovereignty. This completely reshapes the relation between law and the nation-state’s power proposed by Kirby.

The notion of the new legal order set-out in Case 26/62, has been further developed by Case 6/64, Mr. Costa refused to pay a bill of €1 imposed

28 See Alan Milward, *The European Rescue of the Nation State* (1992); Michael Mann, “Nation-States in Europe and Other Countries: Diversifying, Developing, Not Dying,” *Daedalus* 122 (1993): 127.

29 Neil MacCormick, “Beyond the Sovereign State,” *The Modern Law Review* 56(1993): 8.

30 NV. Algemene Transporten Expeditie Onderneming van Genden Loos v. Nederlandse Administratie der Belastingen (C-26/62) [1963] ECR 1.

by ENEL, the newly nationalized Italian energy company. Costa claimed that such action by the Italian government was against Article 37 of the Treaty of Rome concerning state monopolies.³¹ The case raised the question of whether a national court should refer to the ECJ when a provision of EU law could be directly applied, even when such provision was precedent to a national law. The court ruled that “the Treaty makes it impossible for the states...to accord precedence to a unilateral and subsequent measure over a legal system accepted by them... Such a measure cannot therefore be inconsistent with that legal system.”³² The court further affirmed that the law of the treaty is an independent source of law that could not be overridden by domestic legal provisions. From this follows that a provision of EU law would be fairly pointless if a state could unilaterally quash it by means of national legislation, even when provisions are precedents.

The court once again, as in Case 26/62, observed that the Treaty of Rome has created an independent legal order within a community of “unlimited duration, with its own institutions, its own personality and legal capacity on the international plane.”³³ Such legal order is strictly binding on states and their nationals.

Case 106/77 completes the picture of the supremacy of the EU law. It is a case of illegal application of duties within the community in which the ECJ upheld that any national court has to set aside any national law which may conflict with the EU law, whether prior or subsequent to the Community rule. Furthermore, national courts are under a duty to give full effect to those provisions, applying them directly without requesting or awaiting the prior setting aside of conflicting provisions.³⁴ This means that the European legal order so created is a monist legal order. According to monism, European law and national law form one single system of law, hence states, by accepting EU law, do not require its formal incorporation by legislative transformation. Any treaty would be self-executing upon ratification, and so directly applicable within the state.³⁵

By and large, any provision of EU law is directly applicable to the member states and when a conflict arises, such provision always supersedes a provision of national law, even when the former was introduced before the latter. Although the supremacy of EU law is not clearly stated within

31 Nigel Foster, *EU Law Directions* (Oxford: Oxford University Press, 2012), 120.

32 *Flaminio Costa v ENEL* (C-6/64) [1964] ECR 585.

33 *Ibid.*

34 *Amministrazione delle Finanze dello Stato v Simmenthal* (C-106/77) [1978] ECR 629.

35 Foster, 124.

any treaty, the ECJ, through these three rulings, declared the principle of supremacy which is now widely accepted by the member states.³⁶ The EU, therefore, through its institutions, is a successful transnational actor that reshaped the old notion of sovereignty - strictly related to the legal power of the state within its territory - in favor of a collective form of sovereignty. It did so by establishing a supranational court, and a new European legal order that binds all member states.

Conclusion

In conclusion, the notion of state, as created by the Peace of Westphalia, is not a stagnant concept. However, it does need to be updated alongside the challenges of globalization. The old idea of the rule of law, where a state controls the use of force within its territory, has been thoroughly challenged by transnational actors. Also, the most powerful states, including the US, cannot avoid assisting in finding global solutions to global problems.³⁷ In the specific case of international and human rights law, we have seen the whole international legal body strongly influence the sovereignty of the state, which is no longer the holder of the physical use of force within its territory. Moreover, economics, trade, climate change, migration are strongly intertwined with the international context. Although most of the jurisdiction of international treaties and conventions on human rights is on a voluntary basis, hundreds of states have committed themselves to a global civil society where law-making functions are at the international level, rather than based at the domestic.

The presence of multiple legal systems, the rise of transnational actors, and all the international bodies constituted to defend human rights are progressively more challenging on the nation-states' sovereignty. States cannot impede such external influences in today's globalized world. "Lawmakers of the nation-state are no longer fully able to control the legal destiny affecting the persons living, within the borders of the nation-state," said Kirby.³⁸ Furthermore, in today's world some challenges cannot be faced individually by one state. Human rights abuses require a collective solution.

36 Bruno De Witte, "Direct Effect, Primacy, and the Nature of the Legal Order," in *The Evolution of EU Law*, ed. Graig Paul and Grainne De Burca (Oxford: Oxford University Press, 2011), 323.

37 Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* (2004): 43-44.

38 Kirby, "Globalizing the Rule of Law? Global Challenges to the Traditional Idea of the Rule of Law," :66-67.

Therefore, the way in which sovereignty is understood today is much different than at the time of Westphalia. Territorial jurisdiction is not anymore one of the characteristics of national sovereignty, and since the UN Charter was introduced, the Weberian notion of a state holding the monopoly of the use of force, is not acceptable. As the case of Libya has shown, international law provides the basis to counteract Khadafy's illegitimate choice to use force against Libya's population. In the other contexts, international law has failed, such as in Syria, where the economic interests of a few members of the UNSC prevented a resolution to stop the use of force against civilians. Overall, what can be said is that globalization has definitely changed the way states make and perceive the law.

The EU, a successful example of regional globalization, has prepared its member states to share the burden of legislation, which can also have a contrary impact on their national interests, hence, their sovereignty. They know that overall the supranational system created a whole array of rewards for its members, peace and stability first, but also free trade, free movements of goods and services, labor mobility, and legal guarantees. This has been achieved by establishing a supranational court for the EU. The ECJ, by having authority over the whole EU, had a crucial role in harnessing the acceptance by member states of the supremacy of EU law. European states, by giving away some of their national sovereignty to the EU, have contributed to establish a common legal order, respected and acclaimed by the whole community. Y