

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Articles

Colorado Law Faculty Scholarship

---

2012

### Sovereignty and the Promotion of Peace in Non-International Armed Conflict

Anna Spain

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Dispute Resolution and Arbitration Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Military, War, and Peace Commons](#)

---

#### Citation Information

Anna Spain, *Sovereignty and the Promotion of Peace in Non-International Armed Conflict*, 106 AM. SOC'Y INT'L L. PROC. 78 (2012), available at <https://scholar.law.colorado.edu/articles/521>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [jane.thompson@colorado.edu](mailto:jane.thompson@colorado.edu).

# HEINONLINE

Citation: 106 Am. Soc'y Int'l L. Proc. 78 2012

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Thu May 18 12:37:28 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

occupancy, use, and control over land and natural resources, then they may bear a greater decisionmaking role regarding the direction of their own development. This strain in the human rights approach, while perhaps promising in its potential to lead to greater development gains for historically marginalized communities, is nevertheless nascent in its theoretical and doctrinal scope. Can human rights concepts of human dignity be broadly engaged as a justification and measuring tool for intrastate natural resource allocation? Can the human rights regime, through its recent evolution regarding the substantive land and resource rights of marginalized communities, serve as a terrain for incremental shifts in power and the distribution of wealth?

Ultimately, while international law may have only been originally concerned with the allocation of land and natural resources in an interstate context, it plays a role today in debates regarding proper intrastate allocation. An analysis and comparative evaluation of these three international law approaches to intrastate allocation sheds light on the potential means of alleviating the detrimental consequences of development projects for historically marginalized communities. In particular, as the emerging human rights approach to substantive land and resource rights continues to evolve, its theoretical justification, doctrinal contours, and practical impact must be further examined. This approach supports a peoples-based model of development potentially capable of more readily alleviating conditions of inequity and continued subordination for historically marginalized communities. As notions of absolute state sovereignty over land and natural resources continue to be challenged by the claims of historically marginalized communities seeking to exercise their human dignity, the international landscape has the potential to undergo further significant changes.

## SOVEREIGNTY AND THE PROMOTION OF PEACE IN NON-INTERNATIONAL ARMED CONFLICT

*By Anna Spain\**

As the title of this panel, *Humanizing Conflict*, suggests, there is an emerging normative discourse in international law that emphasizes the protection of individuals and the humanization of law.<sup>1</sup> One driver of this development is the changing nature of war, as non-international armed conflicts have replaced international wars as the main form of armed conflict in today's world.<sup>2</sup> This, as the tragic examples of the Arab Spring have shown, presents new challenges for international law.<sup>3</sup> Scholars have treated these challenges through the lens of

\* Associate Professor, University of Colorado Law School, [anna.spain@colorado.edu](mailto:anna.spain@colorado.edu).

<sup>1</sup> See, e.g., RUTI G. TEITEL, *HUMANITY'S LAW* (2011); PHILIP ALSTON, *NON-STATE ACTORS AND HUMAN RIGHTS* (2005); *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW* (Helen Durham & Timothy McCormack eds., 1999); *JUS POST BELLUM. TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* (C. Stahn & J.K. Kleffner eds., 2008); R. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad bellum and Jus in bello in the Contemporary Law of War*, 34 *YALE J. INT'L L.* 88 (2009); Ryan Goodman, *Controlling the Recourse to War by Modifying Jus in Bello*, *Y.B. INT'L LAW* (2010); and Eyal Benvenisti, *Rethinking the Divide Between Jus in Bello and Jus ad Bellum in Warfare Against Nonstate Actors*, 34 *YALE J. INT'L LAW* 541 (2009).

<sup>2</sup> See MEREDITH REID SARKEES & FRANK WHELON WAYMAN, *RESORT TO WAR 1816–2007*, at 562 (2010) (reporting the rise of intrastate wars since the mid-1960s); J. Joseph Hewitt, *Trends in Global Conflict, 1946–2007*, in *PEACE AND CONFLICT 2010*, at 27 (J. Joseph Hewitt et al. eds., 2010); N.P. GLEDITSCH ET AL., *ARMED CONFLICT 1946–2001: A NEW DATASET*, 39 *J. PEACE RESEARCH* 615 (2002). See also REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR, (Michael Bothe, Mary Ellen O'Connell, Natalino Ronzitti eds.) (defining non-international armed conflict).

<sup>3</sup> See RECUEIL DES COURS, *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 2008*, at 199 (2011); MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (1999).

various substructures of international law, such as human rights and international humanitarian law.

In my remarks, which are based on a forthcoming article, I argue that these challenges are symptomatic of a deeper and more fundamental problem. This can be understood as a norm conflict between two of international law's first principles: peace and sovereignty.<sup>4</sup> I describe the origins of both as first principles of international law, including their important interconnectivity during the creation of the Peace of Westphalia.<sup>5</sup> In modern international law, the UN's purpose is to 'maintain global peace and security ... and to that end: to take effective collective measures for the prevention and removal of threats to the peace ...'<sup>6</sup> At the same time, the doctrine of sovereignty provides states the right to territorial integrity and prohibits external intervention into a state's internal affairs.<sup>7</sup> The problem international law now faces is conceiving how to uphold both of these norms in the event of non-international armed conflict.

This problem unfolds in decisions about the legality of intervention into sovereign nations during times of armed conflict.<sup>8</sup> The norm of non-intervention exists to deter states from using force as a means for settling their disputes, and to prevent interstate war.<sup>9</sup> Such sovereign rights can be limited, for example, when the United Nations Security Council (UNSC) authorizes intervention to restore peace.<sup>10</sup> But the context of non-international armed conflict complicates the rules and UNSC practice with regard to intervention is inconsistent at best. As NATO's intervention into Kosovo illustrates, an illegal intervention can be deemed legitimate. The recent events in Libya and Syria illustrate further challenges about the relationship between promoting the integrity of statehood and taking action to restore peace. On the one hand, the right to sovereignty should not insulate those within a state who violate international law and threaten peace and security. On the other hand, the obligation to promote

<sup>4</sup> See, e.g., INT'L L. COMM'N, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, para. 24, U.N. DOC. A/CN.4/L.682 (Apr. 13, 2006) (describing variations of incompatibility in norm conflicts); Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395 (2006) (describing why norm conflicts also exist between competing obligations and rights); Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights* 20 DUKE J. COMP. & INT'L L. 69, 72-74 (2009) (describing norm conflicts in human rights law and presenting practical approaches for addressing them); C. Wilfred Jenks, *Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401 (1953); & JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 184-88 (2003) (identifying categories of norm conflict).

<sup>5</sup> See Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569, 570 (1999); Sir Francis H. Hinsley, *The Concept of Sovereignty and the Relations Between States*, in IN DEFENSE OF SOVEREIGNTY 275 (W. Stankiewicz ed., 1969); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 11-12 (2009) ("The animating vision behind the shift to territorial division was stability and peace.").

<sup>6</sup> Article 1 of the UN Charter defines this obligation as:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

<sup>7</sup> HERSCH LAUTERPAHT, FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 2 (1933).

<sup>8</sup> See LORI FISLER DAMROSCH, ENFORCING RESTRAINT: COLLECTIVE INTERVENTION INTO INTERNAL CONFLICTS 316-19 (1993); ANN VAN WYNEN THOMAS & A.J. THOMAS, NONINTERVENTION 67-74 (1965).

<sup>9</sup> U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.")

<sup>10</sup> U.N. Charter arts. 39-47; U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member State of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security.")

peace should not justify external intervention into a state's internal affairs in every case or under every circumstance. A balance of these two fundamental norms is required.

In response to these tensions, and in further detail in the paper, I suggest that the right approach to understanding and addressing norm conflicts between sovereignty and peace is through appropriate decisionmaking by the UNSC. Drawing from legal process theories, I discuss how to design a context-driven decisionmaking process capable of determining which norm should take precedence in a specific situation. At a minimum, the right process should include a formal assessment of the armed conflict at issue and a stakeholder analysis at three levels of interest: the individuals inside the state, the state itself and the international community.<sup>11</sup> This type of analysis allows for understanding the interests by type of actor as well as the complexity within each stakeholder group. In Syria, for example, some individuals seek external intervention and the end of Bashir al-Assad's regime while others are concerned that a new regime might prove more to be more harmful. Understanding such complexities is essential for making better decisions about why and how to intervene. It also supports peace promotion by involving people in the process at an early stage.

I further argue that, as a procedural rule, the UNSC should adopt a duty to decide that would require it to take up and explain decisions concerning intervention. Doing so increases procedural justice, accountability and ultimately the legitimacy of the Council as the one international body that has the legal and political authority to make such determinations. There will be challenges, such as determining what corresponding rights, if any, this duty creates. However, such a duty is necessary to ensure that no matter how costly or politically unattractive decisionmaking is for Council members, they do not have the option of inaction.

This inquiry into the relationship between sovereignty and peace challenges traditional assumptions and perceptions about international law's role in a changing world. The process approach recommended here does more than make a choice between the norms of peace and sovereignty. It seeks to integrate the important elements of each by informing decisions about what to do with the multiple perspectives and priorities of those involved. Understanding law as a problem-solving mechanism in this way is essential to understanding its value in today's complex world. It also prompts us to imagine how international law can evolve to meet new challenges while preserving old wisdoms, such as the continued importance of peace.

## **BEYOND THE DRONE DEBATE: AUTONOMY IN TOMORROW'S BATTLESPACE**

*By Markus Wagner\**

Over the last few years, the military landscape has undergone considerable modification. Not only are we witnessing changes with regard to the adversaries that fight one another (consider the rise of what has been labeled "asymmetric warfare"), but the means by which armed conflict is carried out has undergone significant modification with more—and potentially more transformative—changes yet to come.

The most obvious of these changes is already underway—and has come under some scrutiny. So-called unmanned aerial vehicles (UAVs) have conducted a vast and increasing number of reconnaissance missions. A smaller number of missions carry out armed attacks, with the operators of either type of mission connecting to their aircraft via satellite link from

<sup>11</sup> See Anna Spain, *The Duty to Decide* (unpublished manuscript on file with author).

\* Associate Professor, University of Miami School of Law.