

Humanitarian implications of a re-assertion of State sovereignty

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Whilst there is indeed a trend towards the strengthening of State sovereignty, this concept is more multifaceted and ambivalent than it might appear. The author invites us to take stock of its developments, its complexity and the implications for humanitarian work.

As a relatively inexperienced head of mission for *Médecins Sans Frontières* in the early 2000s, I had an unremarkable encounter with the Chadian governmental body responsible for registering and supervising humanitarian organisations. The subject was registration renewal, formalities were completed within twenty minutes. Polite but limited interest was expressed in the details of surgical activities, intended for both displaced Chadians and Darfuri refugees in the east of the country. The meeting concluded with the exchange of a minor fee and a scrap of paper, the latter serving as a receipt for the official's time and good services.

Fifteen years on, a repetition of these events is difficult to imagine. Whether driven by economic and political interests or more assertive bureaucracies, the monitoring and control of humanitarian activities in crisis-hit countries have increased dramatically. Certainly, in MSF's experience "we are facing a surge of contexts where States are asserting their sovereignty that is hampering our access or complicating our operations and, in some cases, limiting our medical impact."¹ In practice this has often translated into "greater administrative control" along with "complex negotiations for MSF to access populations."²

Although "we shouldn't be shocked that States are actually behaving like States"³, the concept of sovereignty is neither ahistorical nor static. A multitude of factors have influenced the projection of State sovereignty and its interaction with humanitarian prerogatives. This paper will attempt to dissect claims of a resurgence in State sovereignty along with the implications for humanitarian action.

Historical vantage points

Determining whether there has indeed been a resurgence of State sovereignty, insofar as humanitarianism is concerned, depends in large part on the historical vantage point. If analysis is limited to the recent past the simple answer would be yes; optimism that humanitarian needs were being prioritised over the intransigence of State boundaries and prerogatives has indeed been tempered over the past decade. Stepping back further, the trends that emerge become more complex and at times contradictory. The State has historically been the most effective protector of population's well-being and the primary instigator of their suffering. Dealing with this duality has long been at the heart of debates over State limits and responsibilities.

¹ MSF internal correspondence, 25 June 2018.

² MSF internal document, February 2018.

³ Interview : MSF staff, Brussels, 31 May 2018.

Taking the 1648 treaties of Westphalia as a commonly recognised, if somewhat artificial, starting point for an international system of nation-States, scholars have argued that “one way or another sovereignty has always been violated through history”⁴. Changes can be seen not so much in whether interventions that would be termed today as humanitarian were justified but rather who deserved protection, eventually expanding from co-religionists to broader humanity. Rationales have likewise shifted from combatting “tyranny and religious persecution”⁵ to modern conceptions of international law, along with “the rhetoric used both at home and abroad to justify the use of force to protect foreign peoples”⁶.

Of course, these arguments were used when convenient for sovereign powers at the time, whether for strategic or ostensibly noble objectives. The 19th century abolition of the Slave Trade being a classic example. After benefiting enormously from the spread of African forced labour, claims of wide-ranging British sovereignty were integral to facilitating its demise⁷. Nevertheless, it was during the same period that the sovereign right of non-intervention gradually came to be acknowledged within a limited circle of European and nominally independent States.

The United Nations Charter in 1945 left little room for ambiguity as this “sovereign right to freedom from external intervention and interference”⁸ was formally enshrined in international law. This did not absolve States of human rights abuses but rather emphasised the “internal supremacy and external independence of sovereigns”⁹. Consequently, during the Cold War, sovereignty was unconditional, at least as far as the treatment of populations within national borders was concerned. A position that was particularly attractive to post-colonial States, who had obvious reasons to resist attempts at infringing on their newly won independence¹⁰.

With limited room to manoeuvre in the internal affairs of State, the Cold War was marked by humanitarian action shunted to the periphery of conflicts. Access to refugee populations was comparatively easier, as was the propaganda value for geopolitical rivals that likewise maintained a rigid understanding of national sovereignty. The Biafra crisis of the late 1960s, so central to the birth of the *sans frontières* movement, was an obvious exception to the rule and arguably a “prototype” for future interventions and pitfalls¹¹. Highly televised, many of the dilemmas over which aid agencies would later grapple emerged, including the role of aid in prolonging conflicts, instrumentalisation by belligerents and early strands of political humanitarianism.

A brave new world: sovereignty in decline

The end of East-West confrontation was accompanied by high expectations that Cold War interpretations of sovereignty would be challenged by greater accountability of States *vis-à-vis* their own populations. State jurisdiction in a wide range of contexts, including the “Balkans, East

⁴ D.J.B. Trim, “Conclusion: Humanitarian intervention in historical perspective”, in Brendan Simms and D.J.B. Trim (eds.), *Humanitarian Intervention: A History*, Cambridge University Press, 2011, p.381-387.

⁵ *Idem*.

⁶ *Idem*.

⁷ By projecting its sovereignty over large parts of the Atlantic Ocean, the British crown was boarding suspected slave ships irrespective of the flag being flown.

⁸ Luke Glanville, “Sovereignty”, in Alex Bellamy and Tim Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, 2016, p.151-166.

⁹ *Idem*.

¹⁰ *Idem*.

¹¹ Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War*, Verso, 2010, p.17-18.

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Timor, Haiti and large parts of Africa¹²”, seemed to bear this out, altering the debate on “national sovereignty, human rights and international law”¹³. Dramatic increases in peace-keeping operations and new international norms such as the nascent International Criminal Court likewise reflected these changes.

Meanwhile trends in assistance in the 1990s amplified the importance of humanitarian organisations at the expense of bilateral aid and national institutions, correspondingly increasing the number of the former. Poor service delivery in some States encouraged liberal models of development by the IMF and the World Bank that favoured private actors. This was reinforced by international donors bypassing crisis-stricken governments perceived as too weak or corrupt to handle assistance effectively, further increasing the role of UN agencies and humanitarian organisations¹⁴.

In this brief overview of the early post-Cold War assault on State sovereignty a final element should be highlighted. In framing debates around “sovereignty versus human rights” the UN Security Council essentially replaced the “paralysis that accompanied bipolarity” with a seemingly untenable tension between strict non-interference and relief to the victims of conflict. A direct consequence of these debates was initiatives around the protection of IDPs in the late 1990s and an eventual re-packaging of sovereignty as a concept that included specific responsibilities¹⁵.

Sovereignty as responsibility was eventually endorsed at the 2005 UN World Summit as the “Responsibility to Protect” (R2P). Limited parallels with more flexible pre-Cold War interpretations of State legitimacy can be found, although in this case the language and implications were far clearer. Sovereignty was not so much discarded as nuanced to include limits and responsibilities, particularly to displaced populations within State borders. Full sovereignty would remain a fundamental component of the international system but was now conditional “in the form of compliance with international human rights and humanitarian agreements”. In the event of transgression, external action, including coercion, would be theoretically legitimate¹⁶.

Sovereignty in ascendance: an exaggerated demise

None of these described changes occurred in a vacuum. Despite pressure to conform to new international norms on sovereignty, States have also resisted watering down the right of non-intervention and the concept has been “rejected as much as embraced in the 21st century”¹⁷. It has remained tricky to reconcile the centrality of sovereignty with humanitarian imperatives and there is “no international consensus on how to apply R2P”¹⁸.

State hostility to relinquishing prerogatives of non-intervention is not always malign. Given the history of Western aid policy, intertwined with “a liberal vision of desirable political and economic change in recipient countries”, perceptions of interference by the powerful over the

¹² *Ibid*, p.220-221.

¹³ *Idem*.

¹⁴ MSF Internal Evaluation, 2016.

¹⁵ Luke Glanville, “Sovereignty...”, art. cit., p.151-166.

¹⁶ Roberta Cohen, “Humanitarian Imperatives are Transforming Sovereignty”, *Brookings*, 1 January 2008.

¹⁷ D. J. B. Trim, “Conclusion: Humanitarian intervention...”, art. cit., p.397-398.

¹⁸ Roberta Cohen, “Humanitarian Imperatives...”, art. cit.

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weak are not unreasonable¹⁹. Taken to the extreme, humanitarian intervention can also be seen as another form of violence, opening the door to “aggressive interventions such as in Iraq or Somalia”²⁰.

Nor should historical precedent be underestimated. The problem of unequal application resembles humanitarian interventions of the 19th century. Scepticism over R2P, for example, is hardly helped by “language remarkably similar” to that used to justify colonial rule, including responsibilities towards the less fortunate that in the past led to “political and legal exclusion or even exploitation of ‘uncivilized’ peoples”²¹. And much like 19th century missionaries unwittingly paving the way for European hegemony, today’s humanitarians, often irrespective of their typology, are on the frontline of perceived attempts at interference.

It is not only historical baggage that has revived more rigid manifestations of State sovereignty. In addition to the described protection criteria, the “obligation to maintain security” that emerged after the 11 September attacks, aid has partially reverted to its role as “an important geopolitical tool”²². And if unilateral military actions have weakened aspects of national sovereignty, the labelling of most armed opposition as “terrorists” has provided a ready-made excuse to limit humanitarian access to certain populations and provoked suspicion of civil society actors.

Financial shifts in the world of international aid have also contributed to a reassertion of sovereign control by crisis-affected States. From the 1990s’ emphasis on direct support to beneficiaries through private actors, the past decade has seen the pendulum of donor policy swing back to bilateral budget support, particularly during the recovery phase. A “post-Washington Consensus” emphasising the importance of local ownership and good governance has been reinforced by national authorities understandably attempting to respond directly to their own crises²³. Such trends cannot but have a detrimental effect on the habitual operating practices of aid agencies used to acting autonomously with few restrictions.

Inherent risks

In attempting to untangle developments in State sovereignty none of the described elements, be they resentment over imposed protection obligations or changes in international security and financial norms, are satisfactory when taken in isolation. Indeed, tension between State and humanitarian prerogatives would have been inevitable given the nature of post-Cold War crises. The massive growth in numbers of IDPs shifted the focus of aid to refugees outside conflict zones to those within the borders of their own countries. Criticism was now being directed at the “very governments that hosted them”²⁴.

This also raises an inherent weakness that all humanitarian organisations must manage, irrespective of their proximity or lack thereof to the host State. If, as has been optimistically

¹⁹ William Brown, “Sovereignty Matters: Africa, Donors, and the Aid Relationship”, *African Affairs*, 112/447, 11 February 2013, p.262-282.

²⁰ “Désastres, droit d’ingérence et souveraineté des États”, *Le Monde*, 21 May 2008.

²¹ Luke Glanville, “Sovereignty...”, art. cit., p.151-166.

²² Clea Kahn and Andrew Cunningham, “Introduction to the issue of State sovereignty and humanitarian action”, *Disasters*, vol.37, 22 July 2013.

²³ MSF Internal Evaluation, 2016.

²⁴ Clea Kahn and Andrew Cunningham, “Introduction to the issue of State sovereignty...”, art. cit.

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suggested, humanitarian actors have been “effective in helping place conditions on the exercise of State sovereignty”, their mere presence is an embarrassing reminder that a State’s legitimacy is being actively questioned²⁵. And “few States relish being perceived as incapable of managing their own internal affairs”²⁶.

The related dangers are not anodyne. For example, advocating for those suffering at the hands of their own national authorities potentially exposes key government stakeholders to international criminal law. Yet the risks can also be inversed. Humanitarian organisations make convenient targets, especially when the language of sovereignty is used to shore up “bases of domestic political support for recipient regimes”²⁷. Local actors with international partners are particularly exposed to accusations of meddling as governments “divert attention away from the skeletons in their own cupboards”²⁸. And given the tendency to use humanitarianism as an alibi for political inaction, protests at the occasional expulsion or worse are likely to remain muted and short-lived²⁹.

Internal contradictions

A resurgence of State sovereignty is not limited to broader contextual changes, or the inherent criticism associated with the presence of humanitarian organisations. The humanitarian world has also engendered its own confusion. A longstanding and well-commented trend includes the rapprochement of human rights and humanitarian organisations, sometimes described as “political humanitarianism.” And if the former tends to “err on the side of caution” when reporting abuses and the latter are unlikely to downplay an emergency, the distinction is not always relevant to governments³⁰. Certainly at MSF “we like to think we are unique in terms of speaking out” but are in fact submerged with other actors³¹.

More broadly, as the list of criteria that constitute legitimate sovereign authority has expanded, the scope of activities undertaken under the banner of humanitarianism has likewise grown. Humanitarians often engage in activities beyond immediate life-saving activities, including “root causes of crisis” such as “food and livelihoods, access to justice, and human rights”, issues traditionally viewed as the “exclusive preserve” of States³².

The old debate delineating humanitarian and development approaches remains nevertheless as relevant today as it was half a century ago, albeit for different reasons. Short-term support in acute crises, essentially substitution, can reasonably justify stream-lined access and administrative measures for life-saving activities. But while emergency situations might fluctuate in intensity

²⁵ Daniel C. Thomas, “International NGOs, State Sovereignty, and Democratic Values”, *Chicago Journal of International Law*, Vol.2, No.2, Article 11, Fall 2001.

²⁶ Clea Kahn and Andrew Cunningham, “Introduction to the issue of State sovereignty...”, art. cit.

²⁷ William Brown, “Sovereignty Matters...”, art. cit., p.262-282.

²⁸ “Israel : ‘Some NGOs are seen as the enemy from the inside’”, *The Guardian*, 11 May 2016.

²⁹ Ian Smillie, “The Emperor’s Old Clothes : The Self-Created Siege of Humanitarian Action”, in Antonio Donini (ed.), *The Golden Fleece : Manipulation and Independence in Humanitarian Action*, Kumarian Press, 2012, p.25, 38-39.

³⁰ Conor Foley, *The Thin Blue Line...*, op. cit., p.4-5, 231.

³¹ Interview : MSF staff, Geneva, 14 September 2018.

³² Clea Kahn and Andrew Cunningham, “Introduction to the issue of State sovereignty...”, art. cit. It should also be noted that critiques of INGOs are not limited to recipient countries and can also be heard in liberal democracies. An obvious example is the US government’s attempt to muzzle those funded by USAID especially over Afghanistan and Iraq. Their critical outspokenness is seen as having the potential to “undermine the sovereignty of constitutional democracies.” See “Now Bush wants to buy the complicity of aid workers”, *The Guardian*, 23 June 2003.

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there is a clear trend for crises becoming protracted. This was recognised at the 2016 World Humanitarian Summit where the “need to strengthen the humanitarian-development nexus” was highlighted and a “New Way of Working” was endorsed by participants³³.

There are, however, obvious dangers for humanitarian organisations. Working closely with national governments that are a party to a conflict will compromise basic principles of impartiality, independence and neutrality. More so when “State-building” or “peace-building” are integrated into the objectives³⁴. And in practical terms, focusing on the “legal nature” of an aid agency instead of the “specificities of their mandate” removes humanitarian privileges that had been taken for granted, limiting their effectiveness³⁵.

A final point concerns the use of humanitarian actors to actively burnish a State’s compromised sovereignty. It is a basic truism of humanitarian aid that it is only possible to operate on a given territory with the consent of those in control³⁶. That consent may be available providing aid can be tightly controlled, essentially the State using humanitarian agencies to “furnish itself with legitimacy, both domestically and internationally”. Syria is a case in point, where Damascus’ claim to sovereignty has facilitated control over humanitarian aid in government-held territory, while simultaneously projecting that same authority – generating “tangible benefits and resources” in its attempt to survive³⁷.

Implications for the future of humanitarian action

Reference to emerging “strong States” has been expressly avoided throughout this paper. This is partly because of the limited explanatory value the term holds but also because, at least in MSF’s experience, a reassertion of State sovereignty is applicable in the majority of contexts in which we operate. Fragmenting or imploding States are rather the exception to the rule, even if the poorest crisis-hit States always attempt to impose a degree of control over humanitarian action in their territory. Protection and security aspects attached to national sovereignty, the implied criticism of humanitarian assistance and contradictions within the aid industry itself have all contributed in varying degrees.

Of course, the motivations of State authorities still vary widely, and it is worth determining whether systematic and coercive measures are being taken or whether requests are simply opportunistic, much as described in the brief introductory anecdote. It is also important not to assume that inefficient bureaucracy is always a malicious attempt at blocking assistance. Nevertheless, it is difficult to avoid concluding that over the past decade, States have accelerated the development of policies and restrictions that govern how aid agencies operate³⁸.

Given the operational demands and security-related challenges faced in the field, bureaucratic hurdles as an expression of State sovereignty might not always seem the most pressing concern.

³³ “New Way of Working”, *United Nations Office for the Coordination of Humanitarian Affairs (OCHA)*, 2017. It should also be noted that MSF chose not to participate in the summit and did not endorse the NWOW.

³⁴ Conor Foley, *The Thin Blue Line... op. cit.*, p.233.

³⁵ MSF Internal Evaluation, 2016.

³⁶ Although the dynamics are slightly different the same can be said for “cross-border” aid to territories under opposition control that are in search of their own legitimacy.

³⁷ Reinoud Leenders and Kholoud Mansour, “Humanitarianism, State Sovereignty and Authoritarian Regime Maintenance in the Syrian War”, *Political Science Quarterly*, Vol33, No2, June 2018.

³⁸ Arguably the proliferation of “NGO laws” also indicates that they take inspiration from each other.

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But in practice the implications are vast and bode poorly for the future of independent humanitarian action. These include increased tension with national authorities; more compromises on basic humanitarian principles to ensure access; greater silence in the face of abuses so as not to jeopardise an operational presence; and time and money wasted. In MSF's case, the regulatory environment has a direct impact on our ability to reach populations in distress and on the quality of care provided, "decreasing capacity to rapidly deploy material and personnel"³⁹. And these concerns are unlikely to be assuaged any time soon.

Biography • Duncan Mclean

He has managed operations for MSF in both the field and headquarters beginning in 2002 (Chad, Ethiopia, Haiti, Myanmar, Nepal, Nigeria, Pakistan, Occupied Palestinian Territories, Somalia, Sudan, Thailand and Uganda). Since leaving operations in 2013 Duncan has maintained links with MSF, following several research dossiers including critical incident reviews and context analyses in Syria and the Democratic Republic of Congo. He also contributed to MSF book publications *Saving Lives and Staying Alive* and *The Politics of Fear*. Duncan holds a Master's degree in Political Science and a PhD in history. He has also written for the *International Crisis Group* and *History Today*, and lectured at several universities in Prague (epidemiological and colonial history and conflict studies). He currently holds the post of senior researcher for MSF and is based in Geneva.

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³⁹ MSF Internal Evaluation, 2016.