Sovereignty Rules! Human Rights Regimes and State Sovereignty

Abstract

This article explores the relationship between Westphalian sovereignty, defined as the state’s domestic autonomy in relation to external actors, and international and regional human rights conventions. It disputes the dominant position in the scholarly literature, namely that the conventions compromise and constrain sovereignty. I argue that, on the contrary, the core international conventions have no effect on the autonomy of the state parties because they exclude enforcement and binding adjudication mechanisms. These conventions are quintessentially sovereignty-respecting institutions. The regional human rights systems in Africa, the Americas and Europe are different from the international conventions in that they have human rights courts with binding decision-making authority, thereby creating the potential for consensual compromises of sovereignty. From a global perspective, however, compliance with the courts’ decisions is exceptional and the dominant trend is to respect and protect sovereignty. In general, the norm of sovereignty takes precedence over the norm of human rights. This does not imply that sovereignty is ethically superior to human rights – rather, it is a consequence of the elemental fact that human rights regimes are constructed and overseen by states, whose paramount interests lie in preserving sovereignty.
Introduction

This article explores the relationship between state sovereignty and international and regional human rights regimes. It disputes the dominant position in the literature, held by scholars across the fields of international relations, international law, and international sociology, that human rights conventions compromise, contradict or constrain sovereignty.¹ One of the most distinctive and significant features of international human rights regimes is in fact precisely the opposite, namely that they are sovereignty-respecting institutions.

This issue is part of a wider debate on whether sovereignty is being challenged and eroded in the modern era and, if so, how. In addition to human rights treaties, the main sources of challenge and dilution are said to include globalization, technological progress and economic interdependence, which reduce the ability of states to control the movement of goods, people and capital across their borders; the growth in the number, functions and influence of international organizations; and the emergence of the norm of “humanitarian intervention”, and more recently the principle of Responsibility to Protect (R2P), as a basis for justifying military action contrary to the non-intervention rule of sovereignty.²

The debate concerning the evolution and dilution of sovereignty is complicated by the fact that the concept of sovereignty is understood differently by different disciplines and by different theoretical orientations within these disciplines.³ The result is not simply a range of perspectives on “sovereignty”: confusion arises because the term is used to depict phenomena that are intrinsically different from one another.⁴ Stephen Krasner has brought some order to the confusion by introducing a four-fold typology: “Westphalian sovereignty” refers to the state’s domestic autonomy, in terms of which external actors are excluded from domestic authority structures; “international legal sovereignty” encompasses states’ mutual recognition and the principle of sovereign equality; “interdependence sovereignty” refers to the state’s ability to control transborder movement of goods, people, ideas and capital; and “domestic

² For reviews of the literature, see Thomson 1995; Philpott 2001; Kurtulus 2004; and Bartelson 2006. For a conceptual and historical overview of sovereignty in international relations, see Jackson 1999.
⁴ Kurtulus 2004, 348.
sovereignty” refers to the political authority structures within a state and their level of effective control. These categories are distinct even though they overlap and are interlinked.

This article examines the relationship between human rights regimes and Westphalian sovereignty, defined by Krasner as the state’s domestic autonomy. This definition is not exceptional in the literature. It is similar to the well-established idea of sovereignty as “supreme authority within a territory”. It is also compatible with the view of Alan James and other scholars that the essence of state sovereignty is “constitutional independence”, meaning that “no other entity is customarily in the position of being formally able to take decisions regarding either the internal or the external affairs of the territory in question.” This view is echoed in one of the definitions of “sovereignty” in Black’s Law Dictionary: “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”

It follows from Krasner’s definition that Westphalian sovereignty is compromised when a state’s authority is subordinate to or replaced by that of an external actor. Transgressions of sovereignty can be consensual, where a state willingly cedes decision-making authority on certain matters to an external body (e.g. through membership of an international organization endowed with supranational authority). Transgressions of sovereignty can also be coercive, where external actors impose their authority on a state in order to change its conduct (e.g. through military intervention). There is no transgression of sovereignty where external influence or pressure leads to changes in domestic law and practice but does not affect the autonomy, supremacy or constitutional independence of the state.

The overarching question addressed by this article is whether human rights conventions are sovereignty-transgressing or sovereignty-respecting institutions. In the first part of the

7 Delbrück 1982, 567; Philpott 1999, 570; and Donnelly 2004, 2.
8 James 1999, 464. See also Rosas 1995, 65; and Sørensen 1999, 592.
10 For a typology of consensual and coercive transgressions of sovereignty, see Krasner 1999, 30–40.
11 On the question of whether human rights conventions make a difference, see Hathaway 2002; and Neumayer 2005.
article I consider this question in relation to the core international conventions. In the second part I examine the regional conventions, and the regional human rights courts in particular, in Africa, the Americas and Europe. These courts are mandated to make binding decisions, creating the impression that the state parties have agreed to compromise their sovereignty by accepting the authority of a supranational entity. The features of the courts and state responses to their judgments are consequently a fruitful arena for investigating the status of sovereignty. Since the number of human rights courts is small, and the number of regional organizations that have not instituted such courts is also small, it is possible to present a comprehensive global perspective that avoids the trap of selection bias.

In the course of the discussion I dispute three major claims in the literature: that human rights conventions constrain and compromise sovereignty, that Westphalian sovereignty is outdated and has been transformed by international human rights law, and that sovereignty can be characterized as “organized hypocrisy” on the grounds that states claim to uphold the norm of sovereignty but in reality often violate it, not least in the area of human rights. The evidence suggests that none of these claims is justified. On the contrary, I argue that the opposite of the claims appears to be true. This argument can be summarized as follows.

First, human rights conventions generally do not have a major impact on Westphalian sovereignty. Sovereignty is not compromised by virtue of a state ratifying a convention. This is because ratification does not in itself impinge on the state’s domestic autonomy. It is only when a state complies with the judgment of a human rights court that it bows to the authority of an external body, giving rise to a consensual compromise of sovereignty. We will see that such compliance is exceptional. A coercive transgression of sovereignty, on the other hand, occurs if external actors take enforcement measures against a state that violates its human rights obligations. This is extremely rare. In the absence of external enforcement, a state that violates human rights conventions is clearly not constrained by them in any practical

12 For the texts of the core conventions, also referred to as the UN conventions, see the website of the UN Office of the High Commissioner for Human Rights at www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

13 See footnote 1 above.

14 For example, Reisman 1990; Camilleri and Falk 1992; Sikkink 1993; Lyons and Mastanduno 1995; Rosas 1995; Jackson 2003; Stacy 2003; and Ku and Yoo 2013, 224.


16 Forsythe 2000, 56; and Donnelly 2004, 15–16.
sense. Where a state complies with such conventions, it is constrained but what is constrained is its domestic conduct vis-à-vis the inhabitants of its territory and not its autonomy in relation to external actors. The argument outlined here is encapsulated in Table 1 and substantiated in the first part of the article.

**TABLE 1.** Typology of effects of human rights regimes on Westphalian sovereignty

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Sovereignty compromised or constrained?</th>
</tr>
</thead>
<tbody>
<tr>
<td>State ratifies and ignores human rights</td>
<td>No</td>
</tr>
<tr>
<td>conventions</td>
<td></td>
</tr>
<tr>
<td>State ratifies and respects human rights</td>
<td>No (state’s domestic conduct is constrained but its autonomy in relation to</td>
</tr>
<tr>
<td>conventions</td>
<td>external actors is not affected)</td>
</tr>
<tr>
<td>State ignores judgments of regional human</td>
<td>No</td>
</tr>
<tr>
<td>rights court</td>
<td></td>
</tr>
<tr>
<td>State complies with judgments of regional</td>
<td>Yes (consensual transgression of sovereignty)</td>
</tr>
<tr>
<td>human rights court</td>
<td></td>
</tr>
<tr>
<td>External actors take enforcement action against state for non-compliance with</td>
<td>Yes (coercive transgression of sovereignty)</td>
</tr>
<tr>
<td>human rights conventions or judgments of</td>
<td></td>
</tr>
<tr>
<td>human rights court</td>
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</tbody>
</table>

Second, whereas human rights regimes do not have a big impact on sovereignty, sovereignty has a huge impact on these regimes, compromising and constraining protection of human rights. All the critical issues pertaining to the regimes – their establishment, content and scope; the incorporation or omission of enforcement and binding adjudication mechanisms; compliance with the conventions and the judgments of human rights courts; and enforcement action in response to non-compliance – are determined by states. In determining these issues, states have generally prioritized respect for sovereignty above respect for human rights. The predominant dynamic is one of protecting sovereignty. In relation to human rights courts, as discussed in the second part of this article, this dynamic manifests itself in various ways in different regions: states may oppose the formation of a court, decline to recognize the court’s jurisdiction, disregard the court’s decisions or refrain from enforcement action in the event of non-compliance; and the regional conventions may permit states to limit and suspend rights, exclude certain categories of rights from the court’s domain, deny individuals automatic access to the court, and refuse admissibility until domestic remedies have been exhausted. Far from being outdated and eroded, Westphalian sovereignty is intact and dominant. In global terms it is the rule, not the exception.
Third, state practice regarding human rights conventions does not support the idea of “organized hypocrisy”, in terms of which states claim to uphold the principle of sovereignty but often violate it. In fact, transgressions of sovereignty are infrequent and the principle of sovereignty is consistently defended and respected by states. Countries that adhere to the decisions of a regional human rights court are exceptions in this respect. Their consensual compromise of sovereignty is not hypocritical, however, as they are doing exactly what they pledged to do when ratifying the conventions. The hypocrisy applies rather to the behavior of those states and regional bodies that claim to respect human rights but in truth commit or tolerate abuses.

The conclusion of this article is that the norm of sovereignty is superior to the norm of human rights in the design and practice of international and regional human rights regimes. This has nothing to do with the respective ethical worth of these norms. It is a consequence of the elemental fact that the regimes are constructed by states, whose paramount interests lie in the preservation of sovereignty.

**Sovereignty and International Human Rights Conventions**

*The primacy of sovereignty*

Since the end of World War II a host of international human rights conventions have been adopted. The core conventions cover civil and political rights; economic, social and cultural (ESC) rights; the rights of children, migrant workers and disabled persons; protection from enforced disappearance; and the prohibition of torture, racial discrimination and discrimination against women. In the felicitous phrase of John Humphrey, “there has been no more radical development in the whole history of international law”, a momentous break from the law’s traditional preoccupation with relations between states to embrace the rights of individuals and relations between states and persons. The conventions have been ratified by the majority of countries, including many countries that are notorious abusers of human rights. While there are competing theories to explain ratification, a central part of the story

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17 Humphrey 1975, 208–9.
18 Hathaway 2002.
is that ratification does not entail prohibitive political costs. The radical expansion in the scope of international law has been accompanied by a conservative approach to implementation. The conventions do not have enforcement and binding adjudication mechanisms and, as a result, have no authority or capacity to ensure compliance.

In the absence of enforcement and binding adjudication mechanisms, the conventions pose no threat to sovereignty. They may enable external actors to monitor, review and criticize the human rights conduct of the state parties but they do not permit external actors to override the domestic authority of the state. Instead, they leave the question of compliance and enforcement to be settled at the national level. This deferential, state-centric approach to implementation stems from the primacy of sovereignty and the political sensitivity of human rights in the context of domestic governance. As Humphrey puts it, “most if not all [states] still consider themselves as supreme in all matters relating to their citizens”.

Jost Delbrück emphasizes the state-centric character of international human rights law by observing that the law is addressed primarily to states rather than to individuals, groups or other entities. In most human rights covenants it is the “state parties” that are obliged to respect the rights, enforce them and enact legislation to realize them. Where an international tribunal such as the European Court of Human Rights (ECtHR) rules in favor of an individual, it is the relevant state that must enforce that ruling. In short, international human rights law “mainly focuses on the sovereign states as the key enforcement agencies”. This orientation is largely due to sovereignty.

In light of the above, it is misleading when scholars refer to the “enforcement mechanisms” of the international human rights conventions. These mechanisms do not fit the ordinary definition of “enforcement”, namely “the act of compelling observance of or compliance with a law, rule, or obligation” (emphasis added). In the case of the International Covenant on Civil and Political Rights (ICCPR), for example, the relevant procedures include periodic

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19 For an overview of these theories, see Hathaway 2003.
20 Humphrey 1975, 213.
21 Delbrück 1982.
22 Delbrück 1982, 575.
24 For example, Moravcsik 2000, 217; Heyns and Viljoen 2001, 487–8; and Hathaway 2003, 1845–8.
25 This definition is taken from the Oxford Dictionaries website at www.oxforddictionaries.com/definition/english/enforcement.
submission of compliance reports by the state parties, study of the reports and comment thereon by a committee of experts and, under an optional protocol to the Covenant, the committee’s receipt of and comment on communications from individuals alleging that their rights have been violated by a state party.26 These so-called enforcement mechanisms do not entail compulsion and would more accurately be termed “review and complaints mechanisms”.

Only two international human rights instruments have an enforcement element and both are at pains to avoid undermining sovereignty. The first is the convention on genocide, which the state parties “undertake to prevent and punish”.27 The responsibility for prosecuting and punishing genocide offenders lies principally with the state parties, which must enact domestic legislation to give effect to the Convention.28 Persons charged with genocide must be tried either by a national tribunal in the territory in which the act was committed or by an international penal tribunal whose jurisdiction has been accepted by the state parties.29 The parties are not obliged to accept the jurisdiction of an international tribunal.

The second human rights treaty with an enforcement dimension is the Rome Statute of the International Criminal Court (ICC), which enables the Court to prosecute the perpetrators of genocide, crimes against humanity, war crimes and the crime of aggression. The Statute has four major sovereignty-protecting features. First, states are not subject to the ICC’s jurisdiction unless they have agreed thereto.30 Second, the state parties may opt out of the Court’s jurisdiction over war crimes for a period of seven years after the Statute’s entry into force.31 Third, the state parties do not have to submit to the ICC’s jurisdiction over the crime of aggression.32 Fourth, the Statute rests on the principle of complementarity, in terms of which the primary responsibility for investigating and prosecuting the designated crimes lies with national authorities; the ICC can step in only if these authorities are unwilling or unable

26 International Covenant on Civil and Political Rights 1966; and Optional Protocol to the International Covenant on Civil and Political Rights 1966.
31 Rome Statute, Art. 124.
32 Rome Statute, Art. 15 bis (4). Moreover, in terms of articles 15 bis (3) and 15 ter (3), the ICC cannot exercise its jurisdiction over the crime of aggression until and unless two-thirds of the state parties so decide after 1 January 2017.
to fulfil this responsibility. Preservation of sovereignty is thus integral to the Statute: states can prevent the ICC from violating their sovereignty either by declining to ratify the Statute or, if they have ratified it, by conducting the necessary prosecutions. The non-consensual exception is where the United Nations Security Council (UNSC) refers an alleged crime to the ICC Prosecutor.

As noted in the Introduction, my argument that the international human rights conventions are basically sovereignty-respecting institutions runs counter to the dominant scholarly position, which holds that the conventions constrain and compromise sovereignty. In the following two sections I identify the empirical, conceptual and logical flaws of this position.

**Empirical and conceptual flaws**

John Jackson is a prominent advocate of the idea that the development of human rights conventions has encroached so severely on “traditional sovereignty” as to render it outdated. He argues that only an “antiquated” notion of sovereignty regards the state as having “supreme absolute power and authority over its subjects and territory, unfettered by any higher law or rule” unless the state consents thereto. This version of sovereignty, says Jackson, could be characterized as the state’s power to chop off heads, arbitrarily confiscate property, torture citizens and engage in other excessive and inappropriate actions. He insists that “today, no sensible person would agree that this version of sovereignty exists. A multitude of treaties and customary international law norms impose international legal constraints (at the least) that circumscribe extreme forms of arbitrary actions even against a sovereign’s own citizens”.

This argument is flawed for four reasons. First, it is inaccurate. Statistical studies on state compliance with human rights treaties paint a depressing picture: countries with poor human rights ratings are sometimes more likely to ratify the treaties than countries with better ratings; ratification does not lead to improved human rights conduct and is frequently

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33 Rome Statute, Art. 17. For an analysis of the principle of complementarity, see Benzing 2003
34 For a review article on the relationship between the ICC and sovereignty, see Cryer 2005.
35 Rome Statute, Art. 13(b).
36 See note 1 above.
37 Jackson 2003.
38 Jackson 2003, 790.
39 Jackson 2003, 790.
associated with subsequent worse practices; ratifying countries are often less likely to conform to the treaties’ requirements than non-ratifying countries; and non-compliance by state parties is rampant. More specifically, by way of example, the state parties to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have only a marginally better record than non-ratifiers, and the signatories to regional treaties outlawing torture have worse torture records than non-signatory members of the relevant regional organization. By 2002 nearly 70 percent of the world’s extreme human rights abusers had signed the CAT. Many states evidently believe there are reputational benefits to signing human rights treaties they do not intend to honor. The non-compliant states have patently not been shackled by these treaties; neither their authority nor their conduct has been fettered, and the constraints are thus nominal, not substantive.

Second, Jackson’s argument fails to distinguish between internal and external constraints on the state. Where states comply with the treaties, the constraints are substantive rather than nominal but they do not transgress Westphalian sovereignty. They are manifestations of constitutionalism, the essence of which is that the coercive power of the state is restrained. Constitutionalism is entirely compatible with sovereignty. In democratic societies the state’s authority and power are constrained by parliament, the judiciary and the law, including international law. In non-democratic societies the executive may be restrained by the military, the ruling party or other entities. These internal constraints, democratic or otherwise, do not transgress sovereignty. Sovereignty is only transgressed when the state no longer enjoys autonomy and supremacy in relation to external actors. Put differently, there is a fundamental difference between a state’s constitutional arrangements, which invariably include domestic constraints, and its constitutional independence, which precludes external constraints.

Third, the argument that the conventions compromise sovereignty and have transformed it relies on a historically false conception of sovereignty. Jackson and other scholars who take this position view traditional sovereignty not as the state’s autonomous or supreme authority within its territory but rather as the state’s absolute power and authority in the sense that it

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40 Hathaway 2002. See also Hafner-Burton and Tsutsui 2007; and Hafner-Burton, Tsutsui, and Meyer 2008.
can do as it likes within its own jurisdiction. Yet historical surveys show that sovereignty has never entailed absolute power. The sovereign has always been restrained, whether by divine law, natural law, contracts with citizens, the balance of power or agreements between states. The 1648 Peace of Westphalia, which is generally considered to mark the start of the modern state system and concept of sovereignty, itself placed restrictions on the religious freedom of monarchs and afforded religious protection to their subjects. Hence if international human rights treaties do circumscribe the power of the sovereign, this would be consistent with, and not a departure from, traditional sovereignty.

And fourth, the argument ignores the sovereignty-respecting approach to enforcement of human rights. As noted above, the international conventions lack enforcement and binding adjudication mechanisms. The UNSC is the only global body authorized to take enforcement action against states and the UN Charter limits such action to circumstances that constitute “a threat to peace, breach of the peace, or act of aggression”.

A limited exception in this regard has been created by the new principle of R2P, endorsed by the UN General Assembly in 2005. This principle provides a basis for enforcement measures by the Council in response to war crimes, genocide, ethnic cleansing and crimes against humanity. It does not apply more generally to the core human rights conventions.

In practice, human rights concerns have occasionally been part of the UNSC’s motivation for coercive action. But despite the global prevalence of denial and abuse of human rights, such action has been exceptional. In 2013, according to Freedom House, 48 countries were “not free” and 59 countries were “partly free”, indicating extensive curtailment of civil and political rights in the majority of the world’s states. There are also countless violations of ESC rights and widespread discrimination against women. Yet the UNSC contemplates enforcement action only in the most extreme situations of violence and insecurity. The

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44 For example, Jackson 2003, 790; Petersen 2011, 179–80; and Ku and Yoo 2013, 224.
49 UN General Assembly 2005.
bottom line, to quote David Forsythe, is that “the global international community does not often frontally and flagrantly override state sovereignty in the name of human rights”.

**Logical flaws**

The argument that international human rights conventions or any other phenomena compromise sovereignty is the third step in a logical progression that entails first defining sovereignty (step 1) and then formulating a general specification of what constitutes a transgression of sovereignty (step 2). Step 3, the argument advanced by a scholar, is unlikely to be persuasive if it is incompatible with the way in which he or she has formulated steps 1 and 2. The three steps must be logically consistent with each other.

The problem of logical inconsistency looms large in Krasner’s approach to sovereignty and human rights conventions. He maintains that while these conventions do not affect sovereignty when they are ignored by rulers and civil society groups, there are two ways in which they have sometimes led to consensual transgressions of sovereignty. First, domestic autonomy has been conceded by “creating authoritative supranational institutions”. This pertains only to the regional human rights courts and will be discussed later in this article. Second, autonomy has been conceded “more obliquely, by altering conceptions of legitimate behavior among groups within civil society and the state”. This second type of transgression applies to the UN conventions, which Krasner says can compromise sovereignty by “providing external legitimation for certain domestic practices involving relations between rulers and ruled”.

Krasner’s claim that human rights conventions lead to a compromise of sovereignty by “altering conceptions of legitimate behavior” or “providing external legitimation for certain domestic practices” (step 3) is logically inconsistent with his definition of Westphalian sovereignty, namely the “exclusion of external actors from domestic authority structures” (step 1). As he puts it elsewhere, “autonomy means that no external actor enjoys authority within the borders of the state” (step 1). International human rights conventions may be

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52 Forsythe 2000, 56.
53 Krasner 1999, 118.
influential in a given country, prompting changes in domestic relations and practices, but they do not confer on external actors any authority over domestic affairs. External actors remain excluded from domestic authority structures.

The breakdown between steps 1 and 3 is linked to the lack of consistency in Krasner’s general specification of what constitutes a consensual transgression of Westphalian sovereignty (step 2). In some instances he sets a high threshold: such transgressions occur when “rulers agree to governance structures that are controlled by external actors”.58 In other instances he sets the threshold simultaneously low and high: “Westphalian sovereignty is violated when external actors influence or determine domestic authority structures”.59 This formulation is problematic. There is a significant difference between external actors controlling or determining domestic authority structures and external actors merely influencing these structures. The former is unquestionably a transgression of sovereignty; the latter is simply part of the normal business of foreign policy and world politics.

A similar logical incongruity is evident in Kathryn Sikkink’s claim that international human rights policies and practices are contributing to a significant transformation of traditional sovereignty.60 She bases this claim empirically on case studies showing that Argentina and Mexico improved their human rights performance as a result of international pressure in the 1970s and 1980s. The claim is consistent with her specification of what constitutes a transformation of sovereignty: sovereignty is transformed when states recognize the legitimacy of international human rights concerns, cooperate with international human rights groups, and change their conduct in response to international pressure.61 Yet the claim is at odds with her definition of sovereignty. Quoting a judgment of the World Court, she defines sovereignty to mean that the state “is subject to no other state, and has full and exclusive powers within its jurisdiction”.62 Her case studies do not reveal a transformation of sovereignty so defined. Argentina and Mexico did not become subject to another state and their “full and exclusive powers” were not diminished. The error in logic here is the mismatch between Sikkink’s strong notion of sovereignty as “full and exclusive powers”

60 Sikkink 1993.
61 Sikkink 1993, 415.
62 Sikkink 1993, 413.
(step 1) and the weak notion that “responsiveness to international pressure” amounts to a transformation of sovereignty (step 2).

Rather than indicating a transformation of sovereignty, Sikkink’s case studies can be read as a confirmation of traditional sovereignty. The international network of human rights groups treated Argentina and Mexico as sovereign states. It did not seek to dilute, subordinate or replace their domestic authority, it appealed instead to the governments of the two countries to exercise that authority differently, and the improvement in human rights was eventually effected by those governments. With respect to international human rights policies and pressure, sovereignty was dominant in these cases.

The dominance of sovereignty over international human rights law is not confined to any particular group of countries. As stressed by Jack Donnelly, it is a general phenomenon. In contrast to the breakdown of logic in the arguments of Krasner and Sikkink, Donnelly’s line of reasoning reflects consistent logic: the core idea of sovereignty is “supreme authority” (step 1); sovereignty is therefore lost only where states are constitutionally subordinated to another actor or their rights are transferred to a higher authority (step 2); and this has not happened in the area of universal human rights law since the law is embedded in a statist system of national implementation (step 3). According to Donnelly, the single thematic exception is genocide, which can lead to military action authorized by the UNSC, and the single geographic exception is Europe, which has a strong regional system of judicial enforcement of human rights.

In concluding this first part of the article it is worth commenting briefly on the way the conventions affect the three types of sovereignty that Krasner distinguishes from Westphalian sovereignty. First, ratification of the conventions does not transgress “international legal sovereignty”, which is exactly the attribute of states that enables them to ratify treaties. Second, the conventions do breach “interdependence sovereignty” if this category is defined to cover the state’s ability to control the movement of ideas, as well as persons and goods,

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63 Donnelly 2004.
64 Donnelly 2004, 12 and 14.
66 Krasner 1999, 118.
across its borders.  But it is questionable whether “interdependence sovereignty”, so defined, is a meaningful category. Since innumerable ideas from countless sources have crossed borders continuously for hundreds of years, interdependence sovereignty has never existed. Third, the conventions can have a major impact on “domestic sovereignty”, defined as the organization and exercise of political authority within a state, in cases where they strengthen constraints on the executive and state organs. This does not mean, however, that the conventions transgress or compromise domestic sovereignty. Whereas the sovereign entity in terms of Westphalian sovereignty is the state, supreme in relation to all external actors, the sovereign entity in terms of domestic sovereignty is typically the constitution, supreme in relation to all domestic and external actors. A state’s ratification of human rights conventions may affect the constitution’s content but it does not alter the constitution’s supremacy.

**Sovereignty and Regional Human Rights Courts**

Unlike the international human rights conventions, which do not have binding adjudication mechanisms, the three major regional human rights systems – in Africa, the Americas and Europe – have courts that are formally endowed with binding decision-making authority. Many states have ratified regional human rights conventions and pledged to accept the jurisdiction and rulings of these courts. On the face of it, these states appear to have thereby consented to compromise their sovereignty.

In this second part of the article I explore the matter more closely. I examine the ECtHR, formed by the Council of Europe in terms of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention); the Inter-American Court of Human Rights (IACtHR), set up by the Organization of American States (OAS) under the 1969 American Convention on Human Rights (American Convention); and the African Court on Human and Peoples’ Rights (ACtHPR), established by the Organisation of African Unity (OAU), now African Union (AU), under the 1998 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. These three courts have adjudicatory jurisdiction, enabling them to

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67 Krasner 1999, 12.
68 For an overview of the regional human rights systems, see Shelton and Carozza 2013.
rule on complaints that a state party has violated one of the relevant regional human rights instruments, and their rulings are binding on the state parties.69

The discussion that follows is driven by two questions: how do states compromise their sovereignty, and how do they protect it, in relation to regional human rights courts? From a global perspective the picture that emerges is one of concerted, widespread and multi-faceted protection of sovereignty. The eight sections below present the various ways in which this occurs in different regions: states choose not to establish a human rights court, decline to recognize the jurisdiction of a court, deny individuals automatic access to the court, refuse admissibility until local remedies have been exhausted, exclude ESC rights from the court’s jurisdiction, permit limitations and derogation of rights, decline to comply with the court’s decisions or refrain from taking enforcement action against non-compliant states. In the penultimate section I argue that states compromise their sovereignty not when they ratify the convention or protocol governing a regional court but rather when they implement the court’s decisions. In the final section I present a table that summarizes the global prevalence of sovereignty-protecting behavior over sovereignty-transgressing behavior.

The regional human rights courts can be distinguished from two other types of regional entity that are not covered in this article. The first are the regional courts of justice that are formed to facilitate regional integration and that in some instances have jurisdiction over human rights.70 The second are the human rights commissions created by regional organizations, such as the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, the Inter-American Commission on Human Rights (Inter-American Commission), the African Commission on Human and Peoples’ Rights (African Commission) and, until it was disbanded in 1998, the European Commission on Human Rights (European Commission). These commissions are not authorized to make binding decisions and hence do not transgress sovereignty.

Refrain from establishing a human rights court


70 Regional courts of justice exist in the Caribbean, Central America, East Africa, Europe, Southern Africa and elsewhere. See Alter 2012.
A large number of states have declined to set up a regional human rights court. This applies conspicuously to the Asia Pacific region, whose 50 states regard a communal mechanism to promote and protect human rights as an intolerable threat to sovereignty.\(^{71}\) None of the main regional bodies in Asia – ASEAN, the South Asian Association for Regional Cooperation (SAARC) and the Shanghai Cooperation Organization (SCO) – has a human rights court. This is true also of the League of Arab States (LAS), with 22 members spanning several regions, which adopted a new human rights charter in 2004 but does not have a human rights court.\(^{72}\)

**Decline to recognize the jurisdiction of a human rights court**

Where a regional organization has instituted a human rights court, its member states become subject to the court’s jurisdiction only when they ratify the relevant legal instrument. In Africa, state opposition to compromising sovereignty is evident in the slow rate of ratification of the ACtHPR protocol. In 2013, 15 years after the OAU approved the protocol, the number of ratifications was just 26 (48 percent of member states).\(^{73}\) The majority of African countries thus fell outside the Court’s domain. Moreover, in 2013 a mere five states had ratified the 2008 protocol merging the ACtHPR and the African Court of Justice into the new African Court of Justice and Human Rights (9 percent of member states).\(^{74}\) By contrast, 87 percent of African countries ratified the AU’s Constitutive Act within a year of its adoption in 2000.\(^{75}\) It is therefore clear that there is no general reluctance in Africa to ratify regional legal texts promptly. The impediment in the case of the court protocols is that they set up external human rights bodies authorized to make binding decisions.

The Inter-American system has a sovereignty-protecting arrangement that enables states to ratify the American Convention without recognizing the IACtHR’s jurisdiction; a further declaration to this effect is required.\(^{76}\) Recognition is proportionately higher than in Africa. In 2013, 20 of the 35 members of the OAS had signed the additional declaration (57 percent of

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\(^{71}\) Petersen 2011.

\(^{72}\) The LAS has decided to establish a human rights court but at the time of writing (August 2014) the draft statute for the court had not yet been approved.

\(^{73}\) These figures are based on African Union 2013a.

\(^{74}\) These figures are based on African Union 2013b. The new Court will replace the ACtHPR when its governing protocol has been ratified by 15 states.

\(^{75}\) This figure is based on African Union 2012.

\(^{76}\) American Convention, Art. 62(1).
The most controversial refusal to ratify the Convention and recognize the Court has been that of the United States, which is fiercely protective of its sovereignty. In 2012 Venezuela withdrew from the Convention and the Court’s jurisdiction, linking this move to the lack of reciprocity and mutuality arising from the United States’ position. The 1988 San Salvador Protocol to the American Convention, covering ESC rights, has fewer ratifications than the Convention, with 16 states having ratified the document by 2013 (47 percent).

The situation is different in the European human rights system. All 47 members of the Council of Europe have ratified the European Convention, thereby accepting the jurisdiction of the ECtHR.

*Deny individuals automatic access to the court*

Since 1998 the European Convention has given individuals license to approach the ECtHR directly if their rights have been violated by a state party. The African system, by contrast, denies individuals automatic access to the ACtHPR. Instead, states that ratify the Court protocol must make a further declaration permitting complaints to be brought against them by individuals and non-governmental organizations. In the absence of this declaration, complaints can be submitted to the Court only by state parties, the African Commission and African intergovernmental bodies. In 2013 a paltry seven of the AU’s 54 member states had signed such a declaration (13 percent).

The denial of automatic access to individuals has been severely criticized by African scholars and human rights activists. According to Makau Mutua, it has dealt “a terrible blow to the

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77 This statistic, which takes account of Venezuela’s denunciation of the American Convention in 2012, is based on the ratification data available on the OAS website at [www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (accessed 19 January 2014).
78 Juaristi 2012, 19.
79 Juaristi 2012, 19.
82 European Convention, Art. 34.
83 Protocol to the African Charter, Arts 5 and 34(6).
84 This figure is based on African Union 2013a, 3.
standing and reputation of the Court in the eyes of most Africans”; after all, as he put it, a human rights court is meant to be a forum not for protecting the state but for protecting the rights of citizens against the state.\(^8^6\) The implications of the restricted approach to access are evident in the recent experience of the ACtHPR, which heard its first case in 2008. In the period 2010–2012 the Court received 22 applications, three of which were rejected because they involved non-state parties and ten of which were dismissed because they involved state parties that had not consented to individual access.\(^8^7\)

The American Convention’s approach to the question of access is even more conservative than that of the African system. Individuals may not submit a complaint directly to the IACtHR and, unlike the African model, the Convention makes no provision for states to waive this restriction.\(^8^8\) An IACtHR judge has decried the restriction as a “repugnant matter” in the light of human rights principles.\(^8^9\) The complainant must instead petition the Inter-American Commission, which may conduct an investigation and must seek a “friendly settlement” on the basis of respect for the rights enshrined in the Convention.\(^9^0\) The Commission may refer the dispute to the Court if a friendly settlement is not reached\(^9^1\) or if a state that has accepted the IACtHR’s jurisdiction fails to comply with the Commission’s recommendations on reparations or preventive measures.\(^9^2\) In practice the Commission refers only a small number of cases to the IACtHR.\(^9^3\) James Cavallaro and Stephanie Brewer conclude that the Court is “an organ of extremely limited access for the vast majority of victims of human rights violations”.\(^9^4\)

\(^8^6\) Mutua 1999, 355.
\(^8^7\) Akuffo 2012.
\(^8^8\) American Convention, Art. 61(1). See further Vargas 1984.
\(^9^0\) American Convention, Art. 48.
\(^9^1\) American Convention, Art. 61 read with Arts 48 and 50.
\(^9^3\) Between 2003 and 2012 the American Commission submitted an average of 13.7 cases per annum to the IACtHR. See Inter-American Court of Human Rights 2012, 12.
\(^9^4\) Cavallaro and Brewer 2008, 781.
**Deny admissibility until domestic remedies have been exhausted**

The European Convention stipulates that cases are not admissible before the ECtHR unless domestic remedies in respect of the alleged human rights violations have been exhausted. The same stipulation applies to the ACtHPR and the Inter-American Commission. The rule of “prior exhaustion of local remedies” is well-established in general international law, the rationale being that “a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question”. The motivation for incorporating the rule into human rights instruments includes the imperative of respecting sovereignty and avoiding the replacement of domestic courts by international courts.

**Exclude ESC rights from the court’s jurisdiction**

The American Convention treats the justiciability of ESC rights differently from that of civil and political rights. The latter are presented individually and their content is formulated precisely. The ESC rights, on the other hand, are grouped together in a single article that does not specify their individual content and provides simply that the state parties pledge to take measures for the progressive realization of these rights. The implication is that ESC rights fall outside the IACtHR’s adjudicatory remit. Both the Court and the Inter-American Commission hold this view. The San Salvador Protocol to the American Convention, which elaborates the content of ESC rights, gives the IACtHR jurisdiction over just two of these rights – the right to education and the right to organize and join trade unions.

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95 European Convention, Art. 35(1).
96 Protocol to the African Charter, Art. 6(2), read with African Charter on Human and Peoples’ Rights 1981, Art. 56(5). The stipulation is subject to the proviso that the process of exhausting local remedies is not unduly prolonged.
97 American Convention, Art. 46(1)(a). Art. 46(2) notes that the stipulation does not apply if domestic law fails to afford due process, if the claimant has been denied access to domestic remedies or has been prevented from exhausting them, or there has been unwarranted delay in rendering a final judgment under these remedies.
100 American Convention, Art. 26.
101 Cavallaro and Schaffer 2006. For a contrary view, see Melish 2006.
103 Additional Protocol to the American Convention, Art. 19(6).
The European Convention is concerned almost exclusively with civil and political rights. The two exceptions are the rights to education and protection of property. Over time the ECtHR has incrementally interpreted some of the civil and political provisions, such as the prohibition of discrimination, in a manner that addresses the socio-economic needs of vulnerable individuals and marginalized communities. This has been done cautiously, however, and mainly in extreme circumstances, with the Court generally maintaining a sovereignty-respecting posture of deference to national authorities on socio-economic policy and allocation of resources. The ECtHR does not have jurisdiction over the European Social Charter, adopted by the Council of Europe in 1961, which caters for social and economic rights.

The African Charter on Human and People’s Rights (African Charter) has a broader scope than the American and European conventions. It covers ESC rights as well as collective rights (such as the right to self-determination). Nevertheless, as shown in the following section, the Charter’s formulation of rights has a strong sovereignty-respecting orientation.

*Permit limitations and derogation of rights*

The European Convention permits the state parties to interpret and circumscribe rights according to their respective historical, political and cultural circumstances. The parties are granted considerable latitude to limit freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to respect for private and family life. For example, freedom of expression may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals… or for maintaining the authority and impartiality of the judiciary”. On similar grounds the American Convention allows states to limit freedom of conscience and religion, freedom of thought and expression, the right of assembly, freedom of association and freedom of movement and residence. Moreover, the state parties to the

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105 Palmer 2009.
106 Palmer 2009.
108 European Convention, Art. 10.
109 For example, American Convention, Art. 22(3).
American and European conventions may, subject to certain safeguards, derogate rights in time of war or public emergency.\(^\text{110}\)

The African Charter has a general limitations article, which stipulates that rights and freedoms shall be exercised “with due regard to the rights of others, collective security, morality and common interest”.\(^\text{111}\) It also has several so-called “clawback” clauses that give states the green light to restrict political and civil rights through legislation. For example, it declares that every person has the right to “express and disseminate his opinions within the law”\(^\text{112}\) and the right to free association and freedom of movement “provided that he abides by the law”.\(^\text{113}\) The implication is that the Charter rights are constrained by domestic law rather than domestic law being constrained by the Charter. For reasons that are not clear, the document does not contain a derogation provision.\(^\text{114}\)

The practical effect of the derogation and limitation provisions referred to above depends on four factors: how the provisions are applied by governments, how they are interpreted by domestic courts, how they are understood by the regional human rights courts and commissions, and whether states heed the regional bodies’ decisions. The topic of the jurisprudence of the regional bodies is beyond the scope of the present article.\(^\text{115}\) It is a fascinating subject, especially with respect to the varied approaches that the supranational entities have taken to sovereignty. By way of brief illustration, the African Commission has interpreted the clawback clauses to favor human rights rather than sovereignty,\(^\text{116}\) and it has ruled that the absence of a derogation provision in the African Charter prevents states from limiting Charter rights on the basis of emergencies.\(^\text{117}\) On the other hand, the European Court’s treatment of the derogation provision has been extremely deferential to states, giving them wide discretion in terms of both the justification for declaring an emergency and the

\(^{110}\) European Convention, Art. 15; and American Convention, Art. 27.

\(^{111}\) African Charter, Art. 27(2).

\(^{112}\) African Charter, Art. 9(2).

\(^{113}\) African Charter, Arts 10(1) and 12(1). Similar qualifications apply to the liberty and security of the person, freedom of conscience and religion, freedom of assembly and freedom to participate in the government.

\(^{114}\) See Sermet 2007.

\(^{115}\) The academic literature on this jurisprudence can be found in, among other sources, the African Human Rights Law Journal, the American Journal of International Law, the European Journal of International Law and Human Rights Quarterly.

\(^{116}\) Heyns 2004, 689.

\(^{117}\) Cited in Sermet 2007, 152.
measures taken thereunder.\textsuperscript{118} This controversial stance is a manifestation of the more general “margin of appreciation” doctrine developed by the European Court, which affords the authorities of each state party a measure of discretion in meeting their country’s obligations under the European Convention. The doctrine is motivated by the ECtHR’s sovereignty-respecting appreciation of cultural diversity among states, democratic processes within states and the principle that the responsibility for implementing the Convention lies primarily with the state parties and not the Court.\textsuperscript{119}

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\textit{Decline to comply with the court’s decisions}

The ACTHPR heard its first case in 2008, no cases in 2009–2010 and 26 cases in 2011–2013.\textsuperscript{120} It dismissed the majority of the complaints on the grounds that they fell outside its jurisdiction.\textsuperscript{121} Accordingly, there is not yet a sufficient basis for assessing state compliance with the Court’s decisions.

The IACtHR is experiencing an implementation crisis.\textsuperscript{122} In 2012 it reported that full compliance was outstanding in 138 cases, which amounts to 74 percent of the 186 cases submitted since the first case in 1986.\textsuperscript{123} In a study of the IACtHR’s decisions between 2001 and 2006, the Asociación por los Derechos Civiles (Association for Civil Rights) found a 29 percent rate of total implementation, a 12 percent rate of partial implementation and a 59 percent rate of non-implementation.\textsuperscript{124} The phenomenon of partial compliance arises because the Court often issues a range of orders when it rules that a state has violated human rights. The state parties generally comply with the orders on reparations but are much less inclined to prosecute the perpetrators of the violations and change laws and practices so as to prevent similar violations in future.\textsuperscript{125} On several occasions OAS states have been openly defiant of the IACtHR but “even more commonly”, according to Cavallaro and Brewer, “they assert that they will comply or are in the process of complying, yet fail to take the steps necessary to

\begin{itemize}
  \item \textsuperscript{118} See Gross and Aoláin 2001.
  \item \textsuperscript{119} See for example Brauch 2005; and Gross and Aoláin 2001.
  \item \textsuperscript{120} Information drawn from the ACTHPR website at www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1 (accessed 7 January 2014).
  \item \textsuperscript{121} Akuffo 2012.
  \item \textsuperscript{122} See Open Society Justice Initiative (OSJI) 2010, 63–92.
  \item \textsuperscript{123} Data derived from Inter-American Court of Human Rights 2012, 12–17.
  \item \textsuperscript{124} Cited in OSJI 2010, 65.
  \item \textsuperscript{125} Cavallaro and Brewer 2008, 785.
\end{itemize}
bring their practices into line with the requirements of the Court’s judgment.”

The ECtHR, for its part, has been influential in bringing members of the Council of Europe into alignment with the European Convention rights. Numerous judgments have been accepted by state parties, leading to changes in domestic laws and practices in matters such as policing, detention, trials, child welfare and expropriation of property. Nonetheless, non-compliance is a major problem. The full extent of this is discernible because the Council’s Committee of Ministers monitors the execution of Court judgments and publishes information on the measures taken by states, and the measures deemed outstanding by the Committee, in relation to each judgment. The cases remain open until the Committee is satisfied with implementation. In 2005, 63 percent of the ECtHR rulings were awaiting satisfactory execution. In 2013 there were 1,508 open “leading cases”, these being judgments that reveal structural human rights deficiencies and thus require general preventive measures; of these cases, 38 percent had been open for two to five years and 32 percent had been open for over five years. The problem of non-compliance is not confined to a mere handful of countries. In 2013, 73 percent of the open cases were attributable to thirteen states (28 percent of the Council’s membership).

The European pattern of partial compliance is similar to that of the Inter-American system, with states being most willing to pay reparations and least willing to take action that is politically sensitive or threatens sovereignty. Drawing on 2008 data covering 519 open cases and 2,604 distinct obligations arising therefrom, Courtney Hillebrecht calculated the following compliance statistics: 82 percent compliance on reparations; 56 percent on symbolic measures (e.g. public apologies and commemorative monuments); 31 percent on trials and other means of holding perpetrators accountable; 38 percent on preventive measures (i.e. change laws, procedures and administrative practices); 44 percent on individual measures (e.g. recover bodily remains, provide healthcare, etc.); and 48 percent overall compliance with the total set of obligations.

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126 Cavallaro and Brewer 2008, 785.
127 OSJI 2010, 41, [Better reference required].
128 Committee of Ministers of the Council of Europe 2013.
129 OSJI 2010, 36.
130 These statistics are based on the data in Committee of Ministers 2013, 60.
131 Committee of Ministers 2013, 61.
The main determinant of compliance and non-compliance with the decisions of the human rights courts and commissions in Africa, the Americas and Europe is the political character of the state: comparative research shows, unsurprisingly, that countries with a poor domestic record of upholding human rights and the rule of law also have a poor record of implementing regional decisions.\textsuperscript{133} A cross-regional study conducted by the Open Society Justice Initiative reveals a number of other salient factors: compliance is negatively correlated with the magnitude, gravity and systemic nature of the human rights violation; it is negatively associated with the political sensitivity and costs of the required remedial actions; it is positively affected by the rigor with which the regional organization monitors implementation and applies diplomatic pressure on non-compliant states; and it is more likely where domestic legislation mandates a national entity, typically a parliamentary committee or human rights office, to oversee adherence to regional judgments.\textsuperscript{134}

Refrain from taking enforcement action against non-compliant states

Coercive transgressions of sovereignty would occur if the regional organizations associated with the human rights courts resorted to enforcement action in order to compel states to comply with court judgments. The human rights systems in Africa, the Americas and Europe are not designed for this. In all three systems the authority and capacity for enforcing court judgments lie at the national rather than regional level.

The Council of Europe has a rigorous monitoring system overseen by the Committee of Ministers, which publicizes instances of non-compliance in its annual reports and on its website.\textsuperscript{135} The Committee can exert further pressure on a non-compliant state by adopting a resolution expressing concern or by asking the ECtHR to confirm that the state has failed to meet its obligations.\textsuperscript{136} These “naming and shaming” measures do not transgress sovereignty as they do not override or dilute the domestic authority of the targeted state. The Council can suspend or expel a member country that has seriously violated human rights,\textsuperscript{137} but it does not have enforcement powers. The European Convention rests on the sovereignty-respecting

\textsuperscript{132} OSJI 2010.
\textsuperscript{133} OSJI 2010.
\textsuperscript{134} See the Council of Europe’s website at www.coe.int/t/dghl/monitoring/execution/default_en.asp.
\textsuperscript{135} OSJI 2010, 45–9.
\textsuperscript{136} Statute of the Council of Europe 1949, Art. 8.
principle of subsidiarity, in terms of which the regional system is “subsidiary to the safeguarding of rights at national level”.  

The IACtHR must submit an annual report to the OAS General Assembly, specifying the cases where a country has not complied with the Court’s judgments. Nothing has come of this process. The members of the OAS have avoided denouncing each other for non-compliance, convinced that questioning a state’s implementation record would infringe its sovereignty.

The ACtHPR must report annually to the AU Assembly and highlight non-compliance. Given the relative newness of the Court, this process has not yet been put to the test. If the African Commission’s experience serves as a precedent, it is relevant that, as at the beginning of 2008, the Assembly had never taken steps to compel a state to adhere to the Commission’s decisions. The AU’s Constitutive Act mandates the organization to “intervene” in a member country but this is limited to the “grave circumstances” of war crimes, genocide and crimes against humanity. The AU can also impose sanctions on states that fail to comply with its decisions and policies. The grounds for imposing sanctions, as enumerated in the African Charter on Democracy, Elections and Governance, do not include human rights violations.

Compliance as the indicator of compromised sovereignty

Having explored the various ways in which states protect their sovereignty in relation to regional human rights regimes, I turn now to consider the question of when sovereignty is compromised by these regimes.

As noted earlier, Donnelly and Krasner disagree on whether international human rights conventions compromise sovereignty. Yet their views converge with respect to the European

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139 American Convention, Art. 65.
140 Centre for Justice and International Law, cited in Cavallaro and Brewer 2008, note 58.
142 Danish Institute for Human Rights 2008, 47.
144 Constitutive Act, Art. 23(2).
system. According to Donnelly, the “strong system of regional judicial enforcement in Europe” is an exception to the tendency of international human rights law to leave implementation and enforcement to states in their own territory.\textsuperscript{146} Krasner likewise regards the European system as having “by far the most wide ranging enforcement provisions” of all the human rights conventions.\textsuperscript{147} He maintains that the European Convention is “the most compelling example of a convention that violates Westphalian sovereignty”.\textsuperscript{148}

There are two flaws in this perspective. First, as I pointed out above, the European system does not in fact have a regional enforcement mandate. The responsibility and authority for enforcing the European Convention rights and the ECtHR judgments lie not with any regional entity but with the state parties. As Laurence Helfer and Anne-Marie Slaughter observe, the ECtHR is a supranational court with no direct means of enforcing its judgments and is thus dependent on the goodwill of national governmental institutions.\textsuperscript{149}

Second, the view that ratification of the European Convention per se entails a transgression of Westphalian sovereignty ignores the vital distinction between compliance and non-compliance with the ECtHR’s rulings. In this view, the state parties have compromised their sovereignty regardless of whether they implement or ignore these rulings. This does not make sense. The compliant and non-compliant states have not similarly compromised their sovereignty. On the contrary, the former have accepted, and the latter have rejected, an external body’s decision-making authority over domestic affairs. In certain instances a state’s failure to implement the ECtHR’s judgments is an express assertion of sovereignty, as when the Russian government obstructs and flouts the Court,\textsuperscript{150} and in all instances it is a manifestation of sovereignty, a confirmation of the state’s autonomy.

In general, whether Westphalian sovereignty is defined as “domestic autonomy”\textsuperscript{151} or “supreme authority within a territory”\textsuperscript{152} (step 1), a consensual transgression of sovereignty

\textsuperscript{146} Donnelly 2004, 12.
\textsuperscript{147} Krasner 1999, 31.
\textsuperscript{148} Krasner 1999, 30.
\textsuperscript{149} Helfer and Slaughter 1997, 297. Krasner notes that “actual enforcement” of ECtHR decisions rests with the police and courts of national states (1999, 119) but he refers repeatedly to the European system’s “enforcement” procedures (1999, 31, 114, 119 and 126).
\textsuperscript{150} Hillebrecht 2012, 287–92.
\textsuperscript{151} Krasner 1999, 20–5.
\textsuperscript{152} Donnelly 2004, 2.
can be said to occur where a state accepts the decision-making authority of an external body (step 2). This does not happen when a state ratifies a convention and pledges to abide by the judgments of a regional court because, as we have seen, this pledge may or may not be honored. In reality, the state’s autonomy and supremacy are compromised only when it complies with the court’s judgments (step 3). The record of mixed compliance in the American and European human rights systems indicates that states may consent to implement the judgments all of the time, some of the time or none of the time and they may consent to implement some but not all of the orders in a given judgment.

*The global preponderance of sovereignty-protecting behavior*

Table 2 summarizes the preceding discussion. It shows the prevalence of sovereignty-protecting measures and the rarity of sovereignty-transgressing conduct in relation to regional organizations and human rights courts. In order to provide a global overview, the selection of regional organizations covers, as far as possible, every country in the world. The table thus includes ASEAN, the AU, the Council of Europe, the LAS, the OAS, SAARC and the SCO. The European Union and sub-regional bodies like the East African Community have been omitted so as to avoid taking account of the same country more than once. The only notable overlap occurs with the LAS, some of whose member states are also members of other organizations listed in the table.

In different parts of the world sovereignty-protecting behavior, depicted in dark grey, takes one or more of the eight forms described above: states refrain from setting up a regional court, decline to accept the court’s jurisdiction, deny individuals direct access to the court, block admissibility prior to the exhaustion of domestic remedies, exclude ESC rights from the court’s remit, permit limitation and derogation of rights, fail to adhere to the court’s rulings and avoid enforcement action against non-compliant states. The potential for sovereignty to be compromised, depicted in light grey, arises where states set up a regional court that is mandated to issue binding decisions. Actual compromises of sovereignty, depicted in white, occur when states implement the court’s rulings. Such compromised sovereignty is confined to the American and European human rights systems, both of which suffer from significant levels of non-compliance. The extent of adherence to the African Court’s decisions will become apparent only in a few years. Other regions have not established human rights courts. The global picture is overwhelmingly one of respect for sovereignty.
TABLE 2. Global perspective on sovereignty-protecting and sovereignty-transgressing mechanisms and behavior regarding regional organizations and human rights courts

<table>
<thead>
<tr>
<th>Include a human rights court</th>
<th>SCO</th>
<th>SAARC</th>
<th>ASEAN</th>
<th>LAS</th>
<th>AU</th>
<th>OAS</th>
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</table>

**Color key**

Dark grey denotes protection of sovereignty.
Light grey denotes potential for consensual compromise of sovereignty.
White denotes actual compromise of sovereignty.

**Regional organizations**

SCO (Shanghai Cooperation Organization); SAARC (South Asian Association for Regional Cooperation); ASEAN (Association of Southeast Asian Nations); LAS (League of Arab States); AU (African Union); OAS (Organization of American States); CoE (Council of Europe).
Conclusion

Many scholars believe that sovereignty is being transformed or eroded in the modern era and that it is constrained and compromised by human rights conventions. Krasner’s argument is distinctive in that he insists that the principles of Westphalian sovereignty “have always been violated”, both by coercion and by consensual means that include human rights conventions. His explanation for this pervasive dynamic is that rulers’ decisions are based more on “logics of consequences”, where actions are intended to maximize interests, than on “logics of appropriateness”, where actions are the product of rules, roles and identities that stipulate appropriate behavior. In the international system, logics of consequences dominate logics of appropriateness. This is due to power asymmetries between states, the existence of conflicting rules (e.g. non-intervention versus protection of human rights), the lack of an authority structure to adjudicate such conflicts and the tendency of rulers to be more receptive to domestic incentives and audiences than international ones. In short, the logics of appropriateness of Westphalian sovereignty have been broken often because rulers have found this to be in their interests. Krasner’s overarching thesis, then, is that the sovereignty model is characterized by “organized hypocrisy”, widely recognized over a long period of time but frequently violated.

In this article I have argued that human rights regimes do not provide empirical support for Krasner’s thesis. On the contrary, the core international conventions are essentially sovereignty-respecting institutions. In the absence of enforcement and binding adjudication mechanisms, they present no challenge to the autonomy of states. The regional human rights systems of the AU, the Council of Europe and the OAS are different from the international conventions in that they create the potential for consensual transgressions of sovereignty through human rights courts empowered to make binding decisions. The member states of these organizations have nevertheless resisted and minimized encroachments on their sovereignty by excluding enforcement mechanisms from the systems and in many instances by refusing to accept the court’s jurisdiction or declining to implement its decisions. Actual compromises of sovereignty are restricted to cases where states abide by the court’s

153 See notes 1 and 13 above.
155 Krasner 1999, 5–6 and 40–2.
judgments. These cases are politically and legally significant but in global terms they are the exception, not the rule. In general, sovereignty is strongly protected and respected by states, without any hypocrisy. There is no hypocrisy when states do compromise their sovereignty by adhering to court judgments since this is consistent with their promises. The notion of “organized hypocrisy” applies more accurately to human rights principles than to sovereignty, capturing the conduct of states that ratify human rights treaties and then violate them.

Nor does the overall picture endorse Krasner’s assertion that logics of consequences driven by power and interests trump logics of appropriateness dictated by the rules of sovereignty. This assertion suggests that state interests and the rules of sovereignty are in conflict. In reality, though, Westphalian sovereignty serves the interests of the state in ways that are familiar yet profound. It upholds the state’s domestic authority and independence against external actors and consequently enables the state to forge its own identity and values, develop its own laws and policies and implement these on its own terms. The maxim of non-intervention has the further virtue of laying the basis for international stability and peaceful interaction. At a deeper level, sovereignty serves state interests because it is a constitutive rule of the modern international system, which is to say that it is a rule that defines the system. This rule establishes states, as opposed to tribes, baronies, empires or churches, as the legitimate polities in the system. It is by this rule that the state is an autonomous political entity imbued with a set of rights and prerogatives that are not held by other actors.

Human rights principles, on the other hand, can pose a severe threat to the interests of states and rulers: they may challenge traditional values and practices, run counter to the constitutional system, stimulate and legitimate popular agitation against the state and provide a normative platform for external criticism of the state and interference in its domestic affairs. These scenarios are most likely to occur, and to occur in an extreme fashion, in illiberal countries but they could arise in any country. Whether democratic or authoritarian, states are generally loath to empower international regimes to intrude on domestic governance.

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158 Constitutive rules, which define a system, can be distinguished from regulative rules, which emanate from a system. Hence changes to regulative rules transform the dynamics of the system but changing a constitutive rule generates a different system. On the distinction between constitutive and regulative rules, see Searle 1995. On sovereignty as a constitutive rule of the international system, see Sørensen 1999; and Philpott 2001.

159 Philpott 2001, 309.
Furthermore, human rights conventions do not offer any tangible gains to states. Whereas a state that joins a multilateral trade regime derives material benefits therefrom, this does not happen in the case of human rights treaties, the principal beneficiaries of which are individuals. If indeed logics of consequences prevail over logics of appropriateness in the international system, we should expect states to treat sovereignty as the primary consideration and human rights norms as a secondary concern. This is exactly what the present article has found.

In conclusion, Westphalian sovereignty, understood as the autonomy or supremacy of the state’s domestic authority in relation to external actors, has not been constrained, transformed or rendered obsolete by human rights regimes. There are two reasons for this, the first general and the second specific to human rights. The general reason lies in the resilience, durability and conservative character of sovereignty as a constitutive rule. As Daniel Philpott puts it, “the sovereign state has proven a remarkably robust form of authority, enjoying over 350 years of staying power”.\footnote{Philpott 2001, 310.} States are determined to preserve the sovereignty model because it upholds and fosters prized political values, foremost among these being state autonomy and international order and stability.\footnote{See Jackson 1999, 434.} The specific reason is that in an international system whose authority structure is based on states rather than on higher entities or non-state actors, it is states that design the human rights conventions. Acting in their perceived best interests, they subordinate the protection of human rights to the greater imperative of protecting sovereignty.
References


