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THE DIMENSIONS OF SOVEREIGNTY - A U.S. APPROACH

*Douglas E. Rosenthal**

Henry King is sly. With knowledge aforethought, he picked a Canadian and an American who have worked together for twenty years, influencing each other along the way, to offer contrasting views of national sovereign jurisdiction. There is no substantial difference between our two approaches. There is nothing in Jon's presentation with which I take issue. I suspect Henry anticipated more congruence than contrast, and thereby intended to make a point: Canada and the United States are probably closer today in their perspectives on national sovereignty, notwithstanding a few continuing differences, than at almost any time in their joint history. Most informed citizens in both countries would today accept the minority view in the 1931 Permanent Court of International Justice case with which Jon begins.¹ A nation-state retains significant sovereignty when it chooses to participate in norm-grounded institutions and formal legal relationships. Participation may reflect some reduction in autonomy, but only to achieve expanded rights and opportunities for its citizens in the international community.

Powerful nation-states have lost some unilateral control over events as the world has become more interdependent during the past fifty years. Less powerful nation-states have not had substantial unilateral control in many aspects of economic and sometimes political life at any time in this century. I strongly endorse Jon's view that the nation-state is and must remain the central organizing political institution in which international institutions are grounded. This is essential if international institutions are to be responsive to democratic decision-making and the peaceful reconciliation of national interests with larger international community interests.

I would like to say a little more about another aspect of what remains indispensable to the nation-state – the need for the lay public to get the best from specialized, often technical experts – the best of their expertise – without ceding democratic control over public affairs. If international political and legal institutions are to exercise greater degrees of responsible leadership in the world community in place of the nation-state, they must be account-

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¹ Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41.

able to national publics. If nation-states, their leaders, and citizens are to support the shared values of the international community and the knowledge base of international civil servants and organizations, they must develop national institutions of public education and debate so that they negotiate responsibly to protect important local interests without descending into parochial and ethnocentric isolation. I will also add a concluding word about the obligations of nation-states to respect international law.

The problem of international expert accountability to responsible nation-states is reflected in the current Asian economic crisis. The International Monetary Fund has come to exercise increasing authority as a supernational crisis manager – providing drawing rights and, if necessary, hard currency loans to nations with bankrupt financial institutions. The goal is to restore confidence in local currencies and permit existing short-term debt to be rolled over and new loans to be available to fund viable businesses which would otherwise fail for lack of working capital. IMF critics suggest it is also to protect the loan portfolios of international lenders.

IMF economists pride themselves on their professionalism and their disinterested expertise which can provide stability and reform not easily undermined by national crony capitalism, economic mismanagement, and parochial partisan politics. The "solution" of disinterested IMF expertise raises problems, however. The following are some examples. There is no consensus among leading mainstream economists on what the correct steps should be to stabilize and renew, for example, the Indonesian economy. There is no single technical solution that can command a technical, let alone broader political consensus. The circumstances are new, the economic indicators are crude, and markets behave in ways that defy expert expectations. The steps the IMF is taking are not transparent and do not reflect the useful views of other interested persons with differing expert perspectives; and highhandedness by the IMF can actually provoke parochial national backlashes which make future reforms more difficult, and even jeopardize the legitimacy of the IMF as an international institution, notwithstanding a history of fifty years of significant accomplishment in stabilizing shocks to the international economy.

In this century alone we have had ample opportunity to recognize the limitations of disinterested experts. The U.S. Progressive Movement, at the turn of the century, was weary with selfish, partisan politics. Its proposed solution was to create independent expert regulatory agencies – such as the Interstate Commerce Commission and the Federal Power Commission. Unfortunately, the solution has not succeeded. These agencies became dominated by those they were to regulate, and their expertise in promoting consumer welfare in, for example, railroad and electrical utility regulation was, in retrospect, wasteful and mediocre.

The professional British, French, and German Army Commands of World War I are the most monstrously tragic example – no one on either side of the battle line, at the time, could question his own military's expertise without being branded a traitor. The twenty million young men massacred for no good reason, facilitating the success of Soviet Communism and further calamities later in our bloody century, are staggering consequences of misguided, self-righteous, unaccountable professional expertise.

International expert institutions have their limits. They cannot replace the nation-state. They must retain the support of the nation-states they serve. The World Trade Organization, to be effective, must have its legitimacy accepted so that states remove market access barriers not only after an adverse judgment, but before legal challenges are brought. The fall of Communism has surprised some of us, as to the continuing intensity and depth of nationalism throughout the world. Will nations withdraw from the international community in response to this erosion of power and a renewal of ethnocentric nationalism? I think not – although there may be the occasional Myanmar or Serbia. Consider China's strong desire to join the WTO. Look at the worldwide consensus that hierarchic structures of government regulation are dismal failures in allocating resources. Nation-states remain linchpins of the international community.

At this moment, the Internet (if we can keep it largely interoperable and unregulated), and worldwide satellite-based communication links seem likely to assure the increasing openness and increasing globalization of markets. International consolidation of enterprises should continue. In the foreseeable future, more goods and services will be sold, more efficiently, over greater distances on the Internet than through traditional retail outlets. I have seen the estimate that in 1996, revenues from advertising on the Internet were \$100 million. It is projected that by this year's end, they will be \$1 billion, and that by 2002, they will be \$10 billion. GE says it expects to save more than \$500 million in the next two years by competitive procurement of supply components entirely through bids solicited on the Internet.²

Markets promote consumer choice. One lesson of the downfall of Soviet Communism was that denial of consumer choice was perhaps as important in undermining the Soviet regime as the denial of political expression. Open political and economic expression and choice, and the efficiencies resulting from free markets, are intertwined in healthy democracies. Markets do not solve all problems of resource allocation – efficient health care for everyone, improved education for children in their formative years, effective social security for the elderly, these are all policies that would likely promote

² See generally Alan Thwaites, *Special Report: The Internet, Exploring Answers*, FIN. POST, Mar. 7, 1998, at N4.

greater economic growth, as well as greater social justice. None, however, are in prominent evidence in most market-based democracies, or in states with other forms of government. While imperfect, markets do promote interdependence and make it more difficult for individual nations to withdraw or regress from commitment to the important values of international community. Those who decry the erosion of national sovereignty often fail to appreciate the extent to which efficiently operating international markets, and not the machinations of other nations or international organizations, limit the control of national officials. That is another way of viewing the important connection between promoting open international markets and the weakening of authoritarian institutions.

In a recent article, published in *Foreign Affairs*, Harvard Law Professor Anne-Marie Slaughter suggested that a "new world order is emerging . . . [with the nation] state . . . not disappearing, [but] . . . desegregating into its separate, functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new transgovernmental order."³ That perception concerns me. "Desegregating" government officials into low-visibility technical experts, lacking transparency, public accountability, and a broader perspective informed by a broader base of affected persons, will neither promote the public interest nor balance often conflicting local, national, and international interests. These can best be balanced, compromised, and resolved at the nation-state and sub-national level.

There remains too much segmentation of policy, too much reliance on governmental experts with narrow technical specialties and with too limited perspectives. Intellectual property law in the United States, Europe, and Japan is made by people hostile to competition law, and both of these fields, intellectual property and competition, are largely walled off from experts who make national and international trade policy. This is a mistake. I understand that a bold experiment is underway in Peru, where all three fields are supervised by one government agency, INDECOPIC – The National Institute Defending Competition and Protecting Intellectual Property. It seeks to explore and articulate policy choices and trade-offs among the three fields. That could be a big improvement over the sectarian separation in the developed world.

We cannot try to create expert international regulators to overrule the Jesse Helms' of nation-states. We must engage the Helms' and find allies who will confront them, and persuade them, or neutralize their influence with the public. Otherwise, they will just continue to withhold dues from the

³ Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183-85 (1997). Professor Slaughter shows awareness of this issue in her article.

United Nations, undermining common values of the international community. Senator Helms is more complex than you might think. He is, for example, a strong supporter of an important effort funded by the U.S. State Department to promote the formation of non-profit enterprises in former authoritarian states, institutions of pluralism which can aid the growth of democracy there. Strengthening the WTO, and replenishing IMF funds, in return for more IMF accountability, should become matters of public attention at the national level, debated and supported by the broader non-specialized public.

Jon Fried draws the conclusion in his article, with the sobering thought, that both the United States and Canada can significantly improve the incorporation of widely shared international values, and long-standing standards of international law, into their respective legislative, executive, and judicial acts. I do not know about Canada; however, I am concerned that all three branches of the U.S. federal government too quickly and easily ignore considerations of international law in making, executing, and interpreting our national laws. It is true that U.S. courts must enforce U.S. national law in direct conflict with international legal obligations. Unfortunately, this truth is increasingly used to justify legislation and judicial decisions which undermine U.S. adherence to international community legal standards. It has, for example, been asserted by a former Assistant Secretary of State for International Organization Affairs in the Bush Administration that, "...treaties are 'law' only for U.S. domestic purposes. In their international operation, treaties are simply 'political' obligations."⁴ This is an extraordinarily cynical, if refreshingly candid, expression of extreme real politick. It profoundly misunderstands the nature of law and legal obligation. Unfortunately, it is a view too widely held by "practical" politicians and officials in the United States.

Shortly after his retirement from the U.S. Supreme Court, Justice Harry Blackmun published an article in the *Yale Law Journal* discussing four recent decisions of the U.S. Supreme Court and how they undermine or ignore international law.⁵ His article indicates that this view is also widely held in the U.S. judiciary, including the Supreme Court. It should not surprise us that a superpower exhibits a tendency to mistrust and undervalue international standards and institutions perceived to limit its freedom of action. In their superpower days, Spain, France, and England exhibited the same phenomenon. The final position of the United States at the Rome Conference in July

⁴ John R. Bolton, *U.S. Isn't Legally Obligated To Pay The U.N.*, WALL ST. J., Nov. 17, 1997, at A27. The clear implication is that these "political" obligations need not be taken very seriously.

⁵ See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994).

to establish an international criminal court is the most recent manifestation of this tendency.

We must do better than our predecessors. It is in our practical national self-interest to support and adhere to established international law standards. International law provides an anchor against storms, and a powerful engine to catch the current. No nation in isolation is unsinkable.