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Perspectives on Sovereignty in the Current Context: An American Viewpoint

Richard B. Bilder*

My assignment is to discuss sovereignty in its broadest aspects and beyond our particular North American context. Certainly, sovereignty is a very popular subject these days. Conferences and writings like our own, with titles such as *The Problem of Sovereignty, Challenges to Sovereignty, The Limits of Sovereignty*, and *The Waning of the Sovereign State* are burgeoning.¹ Professor Lou Henkin's 1992 address to the Canadian Council of International Law was on *The Mythology of Sovereignty*.² U.N. Secretary General Boutros-Ghali has recently said that: "A major intellectual requirement of our times is to rethink the question of sovereignty."³ And the just-completed 1994 meeting of the American Society of International Law, which some of you may have attended and I will here draw upon, had as its theme "The Transformation of Sovereignty."⁴

Clearly, something is happening to the old idea of sovereignty, but what it is and why people are now talking so much about it is not so

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¹ For recent discussions, see, e.g., *Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law*, 9 AM. U. J. INT'L. L. & POL'Y 1 (Fall 1993); J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and Rules of Sovereignty in International Relations*, 48 INT'L. ORG. 107 (1994); Christopher H. Schreuer, *The Waning of the Sovereign State: Towards and New Paradigm for International Law?*, 4 EJIL 447 (1993); Joseph A. Camilleri, *Rethinking Sovereignty in a Shrinking, Fragmented World*, in *CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY* (R.B.J. Walker and S.H. Mendlovitz, eds., 1990); Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L. L.J. 397 (1991); Oscar Schachter, *Sovereignty - Then and Now*, in *ESSAYS IN HONOUR OF WANG TIEYA* ch. 45 (R. St. J. Macdonald, ed., 1993); Richard Falk, *Evasions of Sovereignty*, in *CONTENDING SOVEREIGNTIES*, *supra* at 61; W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866 (1990).

² Louis Henkin, *The Mythology of Sovereignty* (notes from addresses delivered at the Annual Meeting of the Canadian Council on International Law, October 1992, and the International Law Weekend in New York, November 1992), *reprinted in Notes From the President*, ASIL NEWSLETTER, March-May 1993, at 1. For an earlier expression, see Louis Henkin, *International Law: Politics, Values and Functions*, 216 REC. DES COURS 24-28 (1989-IV).

³ Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 98-99 (Winter 1992/93).

⁴ See *The Transformation of Sovereignty*, AM. SOC'Y OF INT'L L. (April 6-9, 1994, Washington, D.C.) (particularly its panels on *Theoretical Perspectives on the Transformation of Sovereignty*, *International Law: The Rise of Nationalism and the Break-up of States*, *Multiple Tiers of Sovereignty: The Future of International Governance*, and *The End of Sovereignty?*) (forthcoming in 1993 ASIL PROCEEDINGS).

clear. What I will try to do here is:

- First, briefly indicate some of the ways scholars have defined sovereignty, as well as some possible other current meanings.
- Second, note some of the recent developments and changes in our world and ways of dealing with each other that may be stimulating this recent concern with sovereignty.
- And third, suggest some implications of these developments, both for the continued usefulness of the concept of sovereignty and for how we think about the structure and governance of our international society.

A. What does "sovereignty" mean?⁵

I think that the term sovereignty is very generally used to mean simply a state's right to do as it wishes, particularly within its own territory, free of external constraint or interference. But here are some more scholarly definitions:

- The *American Heritage Dictionary* defines sovereignty as "supremacy of authority or rule as exercised by a sovereign or sovereign state" or, alternatively, as "complete independence and self-government."⁶
- Max Huber, as Arbitrator in the 1926 *Island of Palmas* case, wrote that: "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise there, to the exclusion of any other states, the function of a state."⁷
- Judge Alvarez, in his individual opinion in the *Corfu Channel* case, wrote that: "By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states."⁸
- Helmut Steinberger, in the *Encyclopedia of Public International Law* says that: "Sovereignty . . . denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or territorial jurisdiction of a foreign state or to foreign law other than public international

⁵ For a selection of the literature on sovereignty, see 1 OPPENHEIM'S INTERNATIONAL LAW, PEACE 124 n.1 (Sir R. Jennings & Sir A. Watts eds., 9th ed. 1992); Helmut Steinberger, *Sovereignty*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 408 (1981) (with extensive bibliography); Bengt Broms, *States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 41 (M. Bedjaoui ed., 1991); Bernard R. Crick, *Sovereignty*, in THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 78 (D.L. Sills ed., 1968).

⁶ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1725 (3rd ed. 1992).

⁷ *Island of Palmas* case (U.S. v. Neth.), 2 R. Int'l. Arb. Awards 821, 838 (1928) (Huber, Arb.).

⁸ *Corfu Channel* case (UK v. Alb.), 1949 I.C.J. 39, 43.

law.”⁹

- Professor Lou Henkin, in *How Nations Behave*, writes that the principle holds that: “. . . except as limited by international law or treaty, each state is master of its own territory.”¹⁰
- And at the recent ASIL meeting, Professor Tom Franck suggested, interestingly and much more broadly, that a going definition of sovereignty is the loci of the formation of rights and duties generally recognized as establishing and implementing entitlements, distributions and obligations.¹¹

Certainly, whatever the precise definition of sovereignty, there is general agreement that it is a comparatively new and primarily western idea; that it emerged as a theory of the internal power and authority of the ruler of the state in connection with the consolidation of territorial authority and emergence of the state system in Europe in the late 17th century; and that its application to the role of the state in its international relations is controversial and problematic. In particular, there seems little disagreement that states, however “sovereign” they may be internally, remain bound as members of the international community by international law. Sir Robert Jennings and Arthur Watts, in their new 9th edition of *Oppenheim’s International Law*, emphatically make this last point as follows:

The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organisation. It is also inappropriate. Sovereignty as supreme legal power and authority is inapplicable to the position of states within the international community: no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality and independence and, in fact, by their interdependence. Although states are often referred to as ‘sovereign’ states, that is descriptive of their internal constitutional position rather than of their legal status on the international plane.

Despite the deficiencies in international law which at present make it an imperfect legal order — deficiencies which are in some respects gradually being overcome — the very notion of international law as a body of rules of conduct binding upon states irrespective of their internal law, implies the idea of their subjection to international

⁹ Steinberger, *supra* note 5, at 408.

¹⁰ LOUIS HENKIN, *HOW NATIONS BEHAVE* 18 (1968).

¹¹ See *The Transformation of Sovereignty*, *supra* note 4 (I have relied on my notes of the relevant panel, which may not reflect his exact words).

law.¹²

The recent discussion at the ASIL meeting suggested, however, that the term "sovereignty" is being used to convey a variety of other and wider ideas and concerns as well. It was pointed out that the word "sovereignty" often seemed to be used as a surrogate for what was really "statehood," and of various attributes ascribed to the traditional state, such as "independence," "equality," "autonomy," "domestic jurisdiction" and "reserved domain," "self-determination," or "non-intervention." And speakers there vied in explicating other meanings and suggesting adjectives and metaphors to describe what they saw as the complexity of the concept; for example, sovereignty was described as "multi-layered," "multi-faceted," and "many-tiered," and compared to an onion, a swiss-cheese, and even, rather remarkably, an overcooked potato and a chocolate. Indeed, the discussion at the ASIL meeting suggested to me that the current concern about sovereignty is not simply about the scope of the state's autonomous authority, but is rather a reflection of deeper uncertainties, concerns and tensions about the changing nature of our international order and, in particular, of the role of the state in that order.

We have, of course, traditionally viewed our international and political order as comprised of a plurality of coexisting sovereign, autonomous and coequal states, voluntarily joining together in community with each other and establishing cooperative rules, arrangements and institutions in order to deal with common problems. In essence, this classical model analogizes states to individuals with similar attributes, and sees them as establishing an international society and legal order — in effect, an "international club" — through social contract. Correspondingly, just as our Lockean political theory conceives the individuals who enter into a social contract to establish a state as deliberately reserving to themselves an area of private autonomy or liberty, the classical model of international relations views states as reserving to their own authority those matters which they have not voluntarily placed within the area of common governance and international law. These reserved matters, outside the normal reach of international regulation, are what we usually refer to as the area of "domestic jurisdiction." Of course, it is well-recognized that over time states, through treaty or the development of custom, may and do shift the accepted boundaries between what is regarded as matters of international concern and obligation, reflected by international law and governance, and matters of solely internal concern or "domestic jurisdiction."

What seems to now be occurring is that this entire classical model of international governance — for which the term "sovereignty" appears in one sense to have become a code-word or symbol — is under

¹² OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5, at 25.

challenge. People are questioning not only whether this classical model really reflects the way our current world and governance system now operates, but whether it reflects the way our international system *should* work.

B. What Has Been Happening to Cause Us to Reexamine Our International Order?

Everyone has his or her own list of what they consider the most relevant recent developments. Let me briefly mention several that I believe to be particularly significant.¹³

First, it is obvious that the morphology of the existing international system is changing and becoming more fluid. For one thing, the number of players in the game of nations is increasing; there are now close to 200 states, almost four times the number of states when the U.N. was founded almost 50 years ago. With the breakup of the Soviet Union, Yugoslavia, and other nations, the idea that states are permanent and basic has clearly become frayed. We are becoming more used to states appearing, disappearing and fragmenting and terms such as “failed-states” and “nation-building” no longer seem surprising. At the same time, intergovernmental international organizations are proliferating at a bewildering rate — a recent publication states that there are now almost 5000 global and regional intergovernmental organizations¹⁴ — and it has become commonplace that the U.N., EEC and many of the IGO’s are playing an ever-growing role in the governance of a vast range of transnational and international matters. In particular, the current trend towards economic integration — the EEC, our own NAFTA, ASEAN and other blocs — is rapidly reducing the number of significant actors in the world trading community. Finally, as often noted, a broad variety of other nonstate actors — transnational corporations, transnational nongovernmental organizations, ethnic and indigenous groups and even individuals — are either now participating, or pressing to participate in the international game.

Second, it is obvious that the extent and nature of transnational interactions are undergoing profound change, and that this change is moving us generally in the direction of both increasing international interdependence and globalization and a declining relevance of national identity and boundaries. As often noted, these developments include:

- the technological revolution in transportation, communication and information-technology, with its accompanying tendency to establish a globalization of markets, ideas, language, aspirations and culture.

¹³ My comments here draw in part on some previous remarks published as Bilder, *International Law in the 'New World Order': Some Preliminary Reflections*, 1 FLA. ST. U. J. TRANS-NAT'L L. & POL'Y 1 (1992).

¹⁴ [1989/1990] 3 I.B. OF INT'L ORGANIZATIONS 422 (7th ed. 1989).

- a growing freedom of world trade and capital movements from the traditional constraints of national boundaries, as reflected in the growth of transnational corporations, global sources of manufacturing, offshore banking, and even international narcotics and arms traffic.
- massive transnational flows of immigrants and refugees, often without regard to national boundaries.
- an increasing awareness of a variety of transcendent environmental and other threats, such as widespread pollution, atmospheric warming, depletion of the ozone layer, destruction of the rain forests, and even AIDs, which affect all humanity without regard to nationality or boundaries and which cannot be dealt with except by common action transcending national borders.
- With the end of the cold war and recent experience of the Gulf crisis, an apparent increased willingness to pursue through collective action and international institutions an increasing range of broadly-agreed-on-and-shared international community interests — such as the maintenance of international peace and security, human rights, and environmental preservation, even where this may to some extent intrude on matters traditionally considered as reserved to the sovereignty or “domestic jurisdiction” of states. Examples include the U.N.’s recent operations in Somalia, Bosnia and Cambodia as well as its current far-reaching claims to limit armaments and compel reparations by Iraq, to try war crimes in former Yugoslavia, and to require Libya to extradite to the U.S. and U.K. the alleged perpetrators of the Pan Am Lockerbie disaster.

One may well question whether we are yet on the brink of a “New World Order.” But there seems little question that collectively these developments are profoundly affecting how our international and national rules and decisions are being made and implemented. In areas such as trade, environment and human rights in particular, the clear lines between domestic and international politics and law are breaking down; domestic and international governance mechanisms are becoming increasingly interdependent, and jurisdictional limits and frameworks of authority are becoming more intertwined and blurred. And, of course, with the increasing proliferation and overlapping of regulatory authority, the work of lawyers dealing with transnational problems is becoming ever more complex and demanding.

C. What Do These Developments Imply for the Way We Think About States, Sovereignty and Our System of International Order?

Depending on their interests and perspectives, people draw different conclusions. Some claim that the traditional international system, based on the idea of autonomous and coequal sovereign states, has simply outlived its purpose or usefulness and needs to be replaced by a new

supranational or other system of governance. Others argue that the traditional system should be retained — “there’s life in the old thing yet!” — but with substantial modifications to permit a greater participation by nonstate actors, as well as a more flexible, nuanced and multi-layered approach to transnational governance. And still others — including states which have only recently begun to participate fully in the international system and are eager to partake of the privileges of sovereignty — remain ardent supporters of the traditional system, and indeed seem inclined to push the idea of exclusive state authority and freedom from external restraint as far as they can.

Certainly, it is time for us to take a hard look at the nature and appropriate functions of the state in our modern international legal order, and, as Professor Henkin advocates, to strip it of its mystique. After all, the state, like any system of political organization or governance, is just a tool — a social invention we have devised to help us to coexist and achieve our common purposes. As Brierly has noted:

The truth is that states are not persons, however convenient it may often be to personify them; they are merely institutions, that is to say organizations which men establish among themselves for certain objects, of which the most fundamental is a system of order within which the activities of their common life can be carried on.¹⁵

Whether in our U.S.-Canadian relations or in our broader international dealings, we have a broad field in which to experiment in building the governance arrangements and institutions we believe to be most useful and appropriate. Sovereignty need be no greater limit in this respect than we choose to make it.

Where are such a reexamination — and indeed the pressure and logic of the changes which are occurring — likely to take us? Most likely, it will be a somewhat different kind of international legal order, in which the traditional state, while still an important actor, plays a somewhat less dominant and more ambiguous role. As we have seen, it is likely to be a transnational order in which nationality and borders are less relevant, power and authority are more diffuse, and the processes of transnational regulation and governance are more multi-layered and complex. And among other things, we are certainly likely to see a continuation and strengthening of many of the developments currently occurring, including for example:

- an increasing trend towards seeking organized collective solutions to the growing number of problems we face which simply transcend the problem-solving capacity of individual states — problems of international security and arms control, human rights, environmental degradation, poverty, health and management of the international

¹⁵ J.L. BRIERLY, *THE LAW OF NATIONS* 54-55 (6th ed. Waldock 1963).

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- greater access to and participation in governance processes and institutions by non-state actors, such as ethnic and indigenous groups, transnational corporations, NGO's and other traditionally excluded groups, as well as greater transparency and openness of these processes and institutions to the concerned public.
- less deference by the international community and other participants in the international system to the mystique of state sovereignty and claims of domestic jurisdiction, and a greater willingness to assert and enforce broadly agreed international community policies, interests and values, such as those concerning human rights, even when this may impinge upon a state's traditionally exclusive internal authority.
- perhaps a greater willingness to question, or indeed challenge, the legitimacy of particular states' participation in the international community and global legal order where it has become clear that their governing elites are inherently unwilling to respect fundamental human rights, democratic values and the rule of law.

In his 1992 talk to the CCIL on *The Mythology of Sovereignty*, Professor Lou Henkin called for abandoning the term "sovereignty," arguing that it was all too often used for abusive purposes. He noted that:

Governments raise iron curtains of 'sovereignty' to resist international cooperation and frustrate international norms and institutions, to conceal atrocities behind state boundaries, to prevent their investigation and discovery, to preclude judgment and condemnation under international law and reaction by international institutions.¹⁶

While recognizing that "sovereignty" sometimes does subsume important values, Professor Henkin urged:

It is time to bring sovereignty down to earth; to examine, analyze, reconceive the concept, cut it down to size, break out its normative content, repackage it, perhaps even rename it. The quixotic among us might gird for a campaign to extirpate the term and forbid its uses in polite political or intellectual company or in international law.¹⁷

And he concluded: "Away with the 's' word!"

However, this may not be so easy. For, as Professor James Crawford pointed out at the recent ASIL meeting, even if we give up Professor Henkin's small "s" word — "sovereignty" — we are inevitably still left with the big "S" word — the State. And, as we have seen, it seems likely that the state and its attributes — many of which are indeed commonly described by the term "sovereignty" — will still be with us for some time to come.

¹⁶ Henkin, *The Mythology of Sovereignty*, *supra* note 2.

¹⁷ *Id.*

Moreover, perhaps sovereignty deserves at least a few words in its defense. Many people — and I include myself — believe it is important that every participant in a political community be regarded as entitled to some measure of autonomy or private space in which (s)he is free to seek to realize his or her own potential and work out his or her own destiny, as (s)he may choose, without interference by the outside community. However broadly or narrowly this zone of autonomy may be defined by different communities, the concept that good government requires that the subjects of any governance system have at least some protected area of freedom from overbearing authority is a cherished feature of all liberal and non-totalitarian societies. This idea seems embodied, for example, not only in our democratic tradition of personal liberty, but also in the structure of our American and Canadian federal systems, and, at the international level, in the concept of domestic jurisdiction entrenched in Article 2(7) of the U.N. Charter.

The idea of sovereignty seems to me, in at least one sense, to reflect this claim of a particular political community to the freedom to be left alone to do what it considers best — “its own thing” — at least so long as it is not causing harm to its own people or others. Certainly, Canadians have been sympathetic to the idea that states should be entitled to considerable freedom to retain and develop their own identity and policies without undue interference from more powerful neighbors! To this extent, at least, the concept of “sovereignty” may be worth preserving.

