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Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint

Donat Pharand

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Law alone is sovereign. Every subject of law who claims to be sovereign immediately rises up against the law and denies it.[1]

In spite of the abhorrence one might have for the concept of sovereignty, it is still with us. State sovereignty remains basically the corner-stone of international law, in spite of certain important limitations which have come to restrict its scope. This should become evident as the present Conference unfolds.

After an overview of the historical and contemporary meaning of sovereignty, this paper will examine briefly the main corollaries of that concept: the equality of states, their territorial integrity and political independence, and the non-intervention in their internal affairs. It will then review two areas of international law where certain limitations to sovereignty have been developed: the immunity of jurisdiction in foreign courts and intervention for humanitarian purposes. The paper will not touch upon the role which sovereignty plays in numerous other areas such as the settlement of disputes, the protection of the environment, the law of the sea, international organizations, the protection of human rights, taxation laws and international trade. Most of these will be dealt with during the course of the Conference. The paper will conclude by a tentative prognosis as to the future of sovereignty.

I. Sovereignty: an Overview

A. Historical Meaning

Georges Scelle, a French jurist and philosopher, defined sovereignty as "the competence of competence." He meant, by that, the power for a subject of law (in this case, the state) to determine for itself, in complete freedom, the extent of its rights and duties.[2]

This kind of definition of state sovereignty is based on the notion of absolute sovereignty developed by Jean Bodin, who seems to have been the first to provide a comprehensive definition. For Bodin, the republic represented a sovereign power. Sovereignty, he wrote, "is the

* Emeritus Professor of Law, University of Ottawa, Ottawa, Canada.

[1] Georges Scelle, Tome I, Précis de Droit des gens 13 (1932), *cited in* Hubert Thierry, 1 Eur. J. Int'l Law 198 (1990).

[2] *See* 1 Introduction à l'étude du droit 76 (1953).

absolute and perpetual power of a Republic."[3] However, Bodin was careful to specify that absolute power did not mean without limitation by any law. Referring to the sovereignty of the Prince, he affirmed: "[i]f we say that he has absolute power, is not subject to laws, there would not be a sovereign Prince in the world: since all the Princes of the earth are subject to the laws of God, and of nature, and *to many human laws common to all peoples.*"[4] It is, therefore, evident that Bodin's definition of sovereignty did not exclude limitations imposed by international law. Indeed he seemed to have envisaged such limitations. Nevertheless, Jean Bodin appears to be looked upon generally as the father of the doctrine of absolute sovereignty, in the radical sense used by Hobbes and Spinoza.[5]

Be that as it may, state sovereignty came to be accepted as a principle of international law at the Peace of Westphalia, ending the Thirty Years' War, in 1648. In those peace treaties, the German territorial princes were recognized as being absolute sovereigns over the defined limits of their territory. This doctrine of absolute sovereignty has loomed large in the background of writings of publicists and the practice of states ever since.

B. Contemporary Meaning

For analytical purposes, it is convenient to distinguish internal sovereignty from external sovereignty.

Internal sovereignty is the power of a state to decide for itself, and without any outside interference, what system of government and related institutions it will have and the extent to which it will exercise that sovereign power within its territorial boundaries. Professor Charles Rousseau finds that the jurisdiction of a sovereign state has three characteristics: it is *exclusive*, meaning that there is only one central authority; it is *autonomous*, indicating that the state authority is not subject to any outside control and has complete discretion; and it is *plenary*, giving an independent state full power to determine the extent of its own competence over its territory.[6] It should be remembered, of course, that this complete jurisdiction on the part of a sovereign state to do as it pleases within its own territory will be limited considerably by the rule of law in countries where it exists. There, the sovereignty of

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[3] LES SIX LIVRES DE LA RÉPUBLIQUE 122 (1576), *quoted in* Luzius Wildhaber, *Sovereignty and International Law, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 452, 445, n.15 (R.St.J. Macdonald & D.M. Johnston eds., 1983) (my translation from French).

[4] *Id.* at 428 (my translation from French and emphasis added).

[5] *See* Helmut Steinberger, *Sovereignty, in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 401-403 (1987).

[6] *See* Charles Rousseau, *Les sujets de Droit, in* Tome II DROIT INTERNATIONAL PUBLIC 472 (1974) (The French term "competence," used by Rousseau is equivalent to "jurisdiction" in English.).

the state will be subject to the internal democratic processess and institutions. For example, the population, through its elective representatives, might well exercise an appreciable control over the state apparatus.

External Sovereignty is that part of a state's power which is subject to the limits imposed by international law, but is accountable to no other state. In his separate concurring opinion in the *Austro-German Customs Regime Case*, Judge Azilotti stated that independence could be described as "sovereignty (suprema potestas), or external sovereignty, by which is meant that the state has over it no other authority than that of international law."[7] He added that "[i]ndependence as thus understood is really no more than the normal condition of states. . .".[8] He explained that the abnormal condition was that of dependent states, which were still numerous at that time.[9] Today, independence or sovereignty is virtually the universal rule and it is the external aspect of sovereignty which give us the complete picture of the concept.

Those two aspects of sovereignty may now be found in the Draft Declaration on Rights and Duties of States, adopted by the International Law Commission, in 1949. The first, internal sovereignty, is expressed in the form of a right, as follows: "Every state has the right to independence and hence to exercise freely, without dictation by any other state, all its legal powers, including the choice of its own form of government."[10] This is basically what we have described as internal sovereignty. The second aspect, external sovereignty, is formulated in the form of a duty: "Every state has the duty to conduct its relations with other states in accordance with international law and with the principle that the sovereignty of each state *is subject to the supremacy of international law*."[11]

It is obvious from the above that state sovereignty is a relative and not an absolute concept. Otherwise, it would constitute a denial of international law itself. As Professor Scelle put it, "a state cannot at the same time be competent to determine its own competence and be a subject of international law."[12]

The difficulty is in determining, in precise terms, the limitations imposed by international law. As Sir Robert Jennings has written, "[n]obody can doubt the subjection of the sovereign state to international law; but the problem of the effective institutionalization of that subjection is in many ways the most difficult and the most crucial one

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[7] 1931 P.C.I.J. REP. (ser. A/B) No. 41, at 57.

[8] *Id.*

[9] *Id.*

[10] 1949 I.L.C. Y.B. 286, at 287.

[11] *Id.* at art. 14 (emphasis added).

[12] Scelle, *supra* note 1, at 102 (my translation).

of modern international relations."[13]

II. Sovereign Equality of States

A. *Meaning of Equality of States*

The doctrine of the equality of sovereign states stems from the democratic concept of the equality of individuals before the law. It is considered a fundamental right of states to be treated in complete equality under international law, regardless of their degree of political power or influence. For instance, in legal theory, the consent of small states to be bound by international treaties is as necessary as that of the powerful ones. Of course, it is obvious that legal equality does not equate political equality. The less influential states are sometimes forced to recognize special rights to Great Powers, because of the latter's special responsibilities.

B. *Diplomatic Conferences, the Covenant and the UN Charter*

The principle of equality of states has been recognized in the representation at diplomatic conferences ever since the Peace of Westphalia. Subsequently, with the Berlin West Africa Conference of 1885 and the Hague Peace Conferences of 1899 and 1907, the principle was translated into one state one vote and in the adoption of the rule of unanimity on substantive questions. In the Covenant of the League of Nations, the equal representation was maintained in the Assembly, as was the unanimity rule for resolutions on substantive matters. However, an exception was made to the principle of state equality in the membership of the Council where the Great Powers were allowed permanent seats.

In 1945, the principle of the equality of states was given the most prominent place in Article 2 of the U.N. Charter, which contains the seven basic principles of the Organization. That article provides that "the Organization is based on the principle of the sovereign equality of all its Members."[14] The principle is reflected in the voting procedure of the General Assembly where all member states are represented and each member has one vote.[15] The question of weighted-voting was briefly discussed at the San Francisco Conference and has often been suggested since, but the state equality principle has remained intact in so far as the General Assembly is concerned.

As for the Security Council, a limitation to the principle is reflected in its composition where only the Big Powers enjoy a permanent representation. An additional and most important limitation is that of

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[13] 10 Encyclopedia of Public International Law 278, 289 (1984).

[14] *Id.* at U.N. Charter art. 2, ¶ 1.

[15] *Id.* at art. 18.

the special voting power of the permanent members on substantive matters, commonly referred to as the veto.[16] This special voting power had been agreed upon at Yalta by Churchill, Roosevelt and Stalin, in February 1945. It was then presented to the San Francisco Conference in June of the same year, in a joint declaration by the four inviting powers. They stated that, because of their special responsibility for the maintenance of international peace and security, the special voting power was an essential condition for the creation of the Organization. This most important limitation is still in the Charter today and it is bound to remain, since its removal would require an amendment to the Charter to which the Big Powers would have to consent.

C. Confirmation as a Principle of International Law

Aside from the special voting right of the Big Powers in the Security Council, the principle of state equality has been reiterated on countless occasions at the United Nations, in particular, on the occasion of the commemorative session of the United Nations' twenty-fifth anniversary in 1970. The General Assembly adopted a resolution entitled "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations," (Declaration) in which the principle of sovereign equality of states is fully spelled out. The Declaration stipulates that "[a]ll states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."[17]

The Declaration goes on to particularize the elements of the principle, such as legal equality, respect of state personality, freedom of choice as to the internal regime, territorial integrity and political independence.

Sovereign equality appears also as the first of the ten principles agreed upon in the Helsinki Final Act (the Helsinki Accord) of 1975. The principle states that

> [t]he participating states will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence.[18]

Linked with sovereign equality, is the territorial integrity and political

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[16] *Id.* at art. 27.

[17] Declaration on Principles, Resolution 2625 (XXV), *reproduced in* 9 I.L.M. 1292, 1296-7 (1970).

[18] Conference on Security and Co-operation in Europe: Final Act [hereinafter referred to as Helsinki Accord], *reproduced in* 14 I.L.M. 1292, 1293 (1975) (emphasis added).

independence of a state.

III. Territorial Integrity and Political Independence

A. *Acceptance as a Principle of Law*

The expression "territorial integrity and political independence" first appeared in the Covenant which provided that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[19] In 1945, this protection against an act of aggression was extended in the U.N. Charter to cover "any threat or use of force against territorial integrity or political independence of any State."[20]

The twin principle was also incorporated in the Charter of the OAS in 1948,[21] as well as in the Helsinki Accord of 1975. In the latter case, these two aspects of sovereignty are mentioned under three principles: sovereign equality, abstention from the threat or use of force, and territorial integrity of states.[22] The expressions also appear in numerous U.N. documents.

B. *The Legal Content of the Principle*

This twin principle has remained rather imprecise, but its basic elements are contained in a number of instruments, particulary the Declaration on Principles of International Law of 1970 and the Helsinki Accord of 1975.

Territorial Integrity means that a state is entitled to exercise complete control and possession of its territory, that it should not be subject to the threat or use of force by another state and that its existing international boundaries should not be violated. Also, the territory of a State should not be the object of military occupation, resulting from the use of force. In addition, it is expressly provided in both the 1970 Declaration and the 1975 Accord that the exercise of the right of self-determination of peoples should not dismember or impair the territorial integrity or political unity of a state.[23] Territorial integrity was also emphasized throughout the Lusaka Declaration adopted in 1970 by 53 non-aligned countries.[24]

Political independence means basically that a state is free to

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[19] League of Nations Covenant art. 10.

[20] U.N. Charter art. 2, ¶ 4.

[21] OAS Charter art. 28.

[22] *See* Helsinki Accord, *supra* note 18, at 1293-4.

[23] *See* Declaration on Principles, *supra* note 17, at 1296, and Helsinki Accord, *supra* note 18, at 1295.

[24] Lusaka Declaration on Peace, Independence, Development, Cooperation and Democratisation of International Relations, 10 (1970), *reproduced in* 10 I.L.M. 215 (1971).

"choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations."[25] This freedom of choice is also considered as one of the components of non-intervention.

IV. NON-INTERVENTION IN INTERNAL AFFAIRS

A. Acceptance as a Principle of Law

Although the principle of non-intervention contained in the U.N. Charter applies only to the Organization as such,[26] it has long been the practice of states to respect that principle among themselves and it is now unquestionably part of customary international law. A number of U.N. resolutions and international instruments have confirmed this.

As far back as 1965, the General Assembly adopted a resolution stating that "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[27] In 1970, the same principle was included in the Declaration On Principles, where the prohibition was enlarged to include "a group of States."[28] This broad prohibition is also found in the Charter of the OAS[29] and in Principle VI of the Helsinki Accord.[30]

B. Application of the Principle by the International Court

The principle of non-intervention, as part of customary international law, was confirmed by the International Court of Justice in the Nicaragua case of 1986. The Court stated clearly that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."[31] The Court went on to make an important pronouncement as to what constitutes a prohibited intervention, in the following terms:

> . . .the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such

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[25] Principle I, Helsinki Accord, *supra* note 18, at 1293.
[26] U.N. CHARTER art. 2, ¶ 7.
[27] G.A. Res. 2131, U.N. Doc. (1965).
[28] *See* Declaration on Principles, *supra* note 17, at 1295.
[29] OAS CHARTER art. 18.
[30] *See* Helsinki Accord, *supra* note 18, at 1294-5.
[31] 1987 I.C.J. REP., para. 202.

choices, which must remain free ones.[32]

As a general prohibition, it contains three elements: first, it applies to groups of states as well as to individual ones; second, it encompassess both indirect and direct interventions; and third, those interventions may relate not only to the internal but also the external affairs of a state. With respect to the subject matters on which a prohibited intervention may bear, they are all those upon which a sovereign state may decide freely. This freedom includes the choice of a state's own system: political, economic, social and cultural.

V. Sovereign Immunity in Foreign Courts

A. The Doctrine of Absolute Immunity

The traditional principle, at least in common law jurisdictions, was that the sovereign could do no wrong, neither at home nor abroad. The sovereign enjoyed absolute immunity before the domestic courts and, because of the equality of states, the same absolute immmunity applied before foreign courts. A sovereign state was not to be embarrassed before the courts of another state.[33]

After World War II, when states began to engage more extensively in commercial activities, the principle of sovereign immunity became limited to the performance of a public sovereign act of state called *jure imperii*. If the act of state was done in its private capacity and as a commercial activity, known as *jure gestionis*, the state immunity disappeared. This became known as the doctrine of restrictive immunity. The latter doctrine was adopted by the United States and the United Kingdom in the late 70's and by Canada, in 1982. Before then, the Supreme Court of Canada had been very reluctant to consider the doctrine of restrictive immunity as forming part of the law of Canada through customary international law.

In 1971, in a majority decision, the Court held that a contract made in Canada between the Congo Republic and a Montreal architect, for the construction of a national pavilion at an international exhibition, was a public rather than a private act.[34] In deciding as to the

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[32] *Id.* at para. 205.

[33] It is the same principle which is at the basis of the jurisdictional immunity enjoyed by diplomatic representatives. A diplomatic agent has complete immunity from the criminal jurisdiction of the receiving state and a considerable degree of immunity from its civil and adminsitrative jurisdiction. The latter applies only when the action relates to three matters: a private immovable property, a private succession and a professional or commercial activity. *See* Vienna Convention on Diplomatic Relations, art. 43. Under the Vienna Convention, the diplomatic agent is prohibited from practicing a profession for personal profit or engaging on a commercial activity. However, if he contravenes this prohibition, he is subject to the jurisdiction of the civil and administrative tribunals of the receiving State. *Id.* at art. 49.

[34] Congo v. Venne, 1971 S.C.R. 997.

nature of the act, Richie J., writing for the majority, seemed to have applied the purpose test, when he stated that the question to be answered was whether the contract in question "was a public act done on behalf of the sovereign state for state *purposes*."[35] In a strong dissent in that case, Laskin J. observed that "neither the independence nor the dignity of states, nor international comity require vindication through a doctrine of absolute immunity."[36]

B. The Doctrine of Restrictive Immunity in Canadian Legislation (1982)

In 1982, Canada adopted the State Immunity Act which defined "commercial activity" by reference to the nature rather than the purpose of a particular transaction. The definition stipulates that commercial activity means "any particular transaction, act or conduct or any regular course of conduct that by reason of its *nature* is of a commercial character."[37] This definition is quite similar to the one found in the United States Foreign Sovereign Immunities Act of 1976 which provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, *rather than by reference to its purpose*."[38]

C. The Entire Context Approach in the Supreme Court of Canada (1992)

Since the Canadian definition does not expressly exclude the purpose of a particular transaction, the Supreme Court of Canada, in a 1992 decision, was able to examine both the purpose and nature of the act in question. The case concerned a group of about 60 Canadian civilian employees working for the U.S. navy at its base in Argentia, Newfoundland, established during World War II under a lend-lease agreement. The workers were paid in Canadian currency, paid Canadian income tax and contributed to the Canadian Pension Plan and Unemployment Insurance. The U.S. Navy agreed to collective bargaining under U.S. labor law, but when it was determined that relevant American legislation was not applicable, the Public Service Alliance of Canada applied to the Canada Labour Relations Board for certification of the employees as a bargaining unit. The Board held that it had jurisdiction over the civilian employees of the base, but stayed certification proceedings so that the question of state immunity could be referred to the Federal Court of Appeal.

The Federal Court held that the certification proceedings fell

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[35] *Id.* at 1003 (emphasis added).

[36] *Id.* at 1016.

[37] R.S.C., ch. 95, § 2 (emphasis added).

[38] Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. § 1603(d) (emphasis added).

within the commercial activity exception of the Act and that the United States could not claim state immunity.[39] In so deciding, the Federal Court found that the purpose test, which was explicitly excluded in the American definition of commercial activity, was implicitly excluded in the Canadian definition. Applying the nature test only, it held that a certification proceeding related to the employment of members of the proposed bargaining unit under a contract for services with the United States, and that its contract was of a commercial nature. The opinion of Chief Justice Iacobucci was that if the courts were permitted to look at the purpose, this would broaden the scope of immunity to make it as wide as under the traditional absolute theory.

On appeal to the Supreme Court of Canada, all of the five judges who heard the appeal were in agreement that the Canadian definition of commercial activity did not preclude the Court from considering the purpose of the activity in question.[40] The two minority judges, however, disagreed with the United States argument that, since the essential purpose of the base was national defense, the hiring of workers at the base fell within the scope of public acts of sovereign states. Corry J., who wrote the dissent, said that "[a] state may not rely on the ultimate purpose of an activity to qualify its acts."[41] He concluded that "[t]he act of hiring support service employees was one which a private person could undertake. It was in the nature of a commercial activity."[42]

In following a similar approach, the majority came to an opposite conclusion. La Forest J., writing the majority judgement, stated: "Nature and purpose are interrelated, and it is impossible to determine the former without considering the latter. I do not accept that the definition of "commercial activity" in the Act precludes consideration of its purpose."[43] He agreed with the statement of Lord Wilberforce in a 1983 decision that "the purpose is not decisive but it may throw some light upon the nature of what was done."[44] In examining the nature of the activity in question, he held that the employment contract at the naval base had sovereign, as well as commercial, attributes. He was of the opinion that "[w]hile bare employment contracts are primarily commercial in nature, the management and operation of a military base is undoubtedly a sovereign activity."[45] "In the result," he concluded, "the 'activity' at Argentia had a double aspect. It is at once sovereign and commercial."[46] He held that the employment contract

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[39] *See* 1 F.C. 332 (1990).

[40] *See* USA v. The Public Service Alliance of Canada, 2 S.C.R. 50 (1992).

[41] *Id.* at 108.

[42] *Id.* at 109.

[43] *Id.* at 70.

[44] *Id.* at 73.

[45] *Id.* at 80.

[46] *Id.*

could not be taken in isolation but that "the *entire context of the activity* at Argentia must be considered."[47] He agreed with the Attorney General of Canada that the objective of the Canada Labour Relations Board proceedings was the imposition of collective bargaining by the Canadian State and under the control of the Canadian Court. He, therefore, held that "the nexus between this objective and the management of the base constitutes an unacceptable interference with American sovereignty.[48] Since the Board could impose terms in a collective agreement, reinstate employees and rescind disciplinary actions taken by the Base commander, "these would be unacceptable intrusions into the sovereign realm of the Argentia base."[49]

This decision, as already pointed out by one commentator, must not be interpreted as a return to the absolute immunity doctrine.[50] In this case, the sovereign aspect of the activity in question predominated over the commercial one, taking all relevant circumstances into account. It will remain a matter for determination in each case, when applying the doctrine of restrictive immunity, which of the two aspects of the activity is predominant.

It is evident that the restrictive doctrine is now on the point of becoming a general rule of international law. This is evident from the Draft Convention prepared by a Commitee of the International Law Association in 1982 and from its Report in 1990.[51] This process is even more evident in the Third Report of the International Law Commission on Jurisdictional Immunity of States and Their Property."[52] The restrictions and exceptions to the traditional principle of absolute immunity are becoming more and more important and numerous.

VI. Sovereignty and Humanitarian Intervention

A. Humanitarian Intervention by the Red Cross and Other NGO's

Intervention by the Red Cross and other humanitarian organizations, to come to the rescue of victims of armed conflicts, is specifically provided for in one of the Geneva Conventions of 1949 and the two Optional Protocols of 1977. These are part and parcel of international humanitarian law. The legal basis for what are called "relief actions" is found in the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, as well as in Protocol I applicable to interna-

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[47] *Id.* (emphasis added).

[48] *Id.* at 81.

[49] *Id.* at 83.

[50] Ross Hornby, *State Immunity Re Canada Labour Code: A Common Sense Solution to the Commercial Activity Exception*, 30 CYIL 301, 315 (1992).

[51] *See Draft Articles for a Convention on State Immunity*, I.L.A. Report, Montreal Conference (1982) and I.L.A. Report, Queensland Conference (1990).

[52] II I.L.C. Y.B. 3 (1990).

tional armed conflicts and in Protocol II on non-international armed conflicts. Under the 1949 Convention, the Contracting Parties have an obligation to allow the free passage of all consignments of medical and hospital stores intended only for civilians, even if those are nationals of an adversary.[53] This provision is completed by Protocol I, applicable to international armed conflicts, which provides for relief actions, when food, medical supplies, clothing or shelter are inadequate for the survival of the civilian population. In such cases, "relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, *subject to the agreement* of the Parties concerned in such relief actions."[54] It must be noted that the relief actions must be not only humanitarian and impartial, but also agreed upon by the Parties. In addition, the personnel participating in relief actions, in particular for the transportation and distribution of relief consignments, must obtain the "approval" of the Party in whose territory the relief action is being carried out.[55] The Parties to the conflict undertake to grant to the International Committee of the Red Cross all the necessary facilities to carry out its humanitarian assistance to the victims of conflicts. However, this is always "subject to the consent of the Parties to the conflict concerned."[56]

As for relief actions in cases of non-international armed conflicts, the sovereignty of the state becomes even more paramount and the non-intervention principle is specifically incorporated into Protocol II. It provides that nothing in the Protocol may be invoked "for the purpose of affecting the sovereignty of a state or the responsibility of the government" or "as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."[57] With respect to the authorization of relief actions, the Red Cross and other relief societies are free to offer their services to come to the rescue of the victims of an armed conflict but such actions are "*subject to the consent* of the High Contracting Party concerned."[58]

As for the NGO's other than the Red Cross, such as the Doctors Without Borders, they find a legal basis for their assistance in Protocol I, although in a more limited way than for the Red Cross. Article 81 provides that the Parties to the conflict must, "as far as possible, make facilities . . . available to other *humanitarian organizations* . . . which are, *duly authorized* by the respective Parties to the conflict," to carry

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[53] Geneva Convention for the Protection of Civilian Persons in Time of War, 1949, art. 23.
[54] Protocol I on International Conflicts, art. 70 (emphasis added).
[55] *Id.* at art. 71, para. 1.
[56] *Id.* at art. 81, para. 1.
[57] Protocol II, on Non-International Armed Conflicts, art. 3.
[58] *Id.* at art. 18 (emphasis added).

out their humanitarian functions.[59] In the case of internal conflicts, Protocol II does not specifically mention "other humanitarian organizations" but it does provide for "relief societies . . . such as Red Cross . . . organizations" to offer their services and for consent to be obtained.[60]

In brief, relief actions by the Red Cross and other humanitarian organizations are provided for in both types of armed conflicts, but they are always subject to the consent of the Parties or Party.

B. Humanitarian Intervention by States

1. Intervention by an individual State

The question arises whether an individual State may be permitted to provide humanitarian assistance to victims of an armed conflict, particularly if it is an internal one. The International Court of Justice addressed this question briefly in the Nicaragua case, when examining the nature of the assistance which the United States had been authorized by Congress to bring to the contras. The Court stated:

> . . .There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.[61]

After quoting from the fundamental principles enunciated by the Red Cross at its Twentieth International Conference, the Court formulated the conditions under which humanitarian assistance could not be considered as an unlawful intervention:

> In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering," and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.[62]

It follows from this statement by the Court that, for humanitarian intervention to be lawful, the assistance provided must meet two basic conditions: first, it must be limited to alleviating suffering and protecting health and second, it must be given without discrimination to all in need. These are the same conditions which are found in both Protocols and which are applicable to the Red Cross and other humanitarian

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[59] Protocol I, art. 81, para. 4.
[60] Protocol II, art. 18.
[61] 1986 ICJ REP. para. 242.
[62] *Id.* at para. 243.

organizations.[63]

It goes without saying that such unilateral humanitarian assistance would have to be carried out without any use of force, unless such use could can be justified under the extended doctrine of "self defense," which is most unlikely. It has been shown on a number of occasions that the use of force for the protection of civilian populations, be they nationals or non nationals, have met with general condemnation. A few examples are: India's intervention in East Pakistan in 1971, Tanzania's intervention in Uganda in 1978, and the U.S. interventions in the Dominican Republic (1965), Grenada (1982), Panama (1989) and Nicaragua (1982).

2. Intervention by a Group of States

The limitations applicable to a single state to justify humanitarian assistance apply essentially to a group of states, unless the latter can be considered as acting under U.N. authorization. As for the U.N. itself, a police action for humanitarian reasons may be justified, even in a case of a non-international conflict, if the situation is considered serious enough to constitute a threat to international peace and security and thus within the purview of Chapter VII of the Charter. This was done in 1991, when the United Nations decided to come to the rescue of the Kurds in Iraq.

On April 5 of 1991, the Security Council adopted Resolution 688 in which it referred specifically to its responsibility for the maintenance of international peace and security and insisted "that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."[64] Since the resolution was adopted under Chapter VII, the operation was without Iraq's consent and in spite of its protest that it was a breach of its sovereingty. Subsequent to that resolution, a group of states consisting of Britain, France, the Netherlands and the United States, sent troops in northern Iraq to establish a humanitarian enclave for the protection of the Kurds. This, too, was done without the consent of Iraq, but the group of states in question acted under the general authorization, at least by implication, of the United Nations. Such humanitarian actions were possible because of the unanimous and world-wide condemnation of the government of Iraq. When the condemnation is not as unanimous and the interests of potential intervening countries do not sufficiently coincide, such as in the armed conflicts of Ethiopia, Sudan, Bosnia, Burundi and Rwanda, sovereignty continues to constitute a considerable obstacle.

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[63] *See* Protocol I, art. 70 and Protocol II, art. 18.

[64] U.N. Doc. S/RES/688 (1991), *reproduced in* 30 I.L.M. 858 (1991).

VII. The Future of Sovereignty: a Tentative Prognosis

All social institutions must evolve with changes in society. This evolution is an inevitable social phenomenon which, in the international community, states are not escaping. The principle of state sovereignty has evolved along with international law and the meaning of state sovereignty has undergone changes.

Traditionally, a sovereign state had the right to use force, resort to war, attack other states, conquer new territories, etc. Gradually, states had to accept certain limitations on their sovereignty such as contained in the Covenant of the League of Nations (1919), the Briand-Kellogg Pact (1928) and the United Nations Charter (1945). States can no longer resort to war, not even to the use of force except in self-defense; and, even then, only as a temporary measure or as part of an enforcement action by the United Nations. In addition, states have accepted being legally bound by numerous law-making conventions imposing certain restrictions on their traditional discretionary power.

Now, with the globalization of international relations, the question may be asked whether the very principle of state sovereignty is still viable. Boundaries are becoming more and more artificial and some people hope for an eventual world federation. For the moment, such a hope is closer to a dream than reality.

The principle of state sovereignty, along with its corollaries, is still a fairly solid corner-stone of international law. The acceptance of limitations on that principle takes a long time to materialize, as we have seen in the areas of jurisdictional immunity and humanitarian intervention. A similar slow progress is evident in the other areas of international law where sovereignty plays an important role.

The fact remains that there is a need in the international community for the system of sovereign states to evolve in such a way that a greater degree of peace and security in the world becomes possible. After the two world wars, Europe has understood that need and has evolved accordingly. It began with economic integration and is gradually developing a regional political system which might eventually serve as a model for the rest of the world. States of the European Community have exchanged a lesser sovereignty for a greater security and prosperity. Even in the delicate field of human rights, the twenty-one member states of the Council of Europe are now parties to the most highly developed instrument in the world. Since 1991, an individual may take a complaint personally to the European Court on Human Rights, providing the petition has been declared receivable by the Human Rights Commission.

Can this kind of achievement be emulated on a world-wide basis? For the moment, unfortunately, it is not possible. The belief in certain basic norms and values would be a pre-requisite, and such a belief does not appear to exist. Certainly, there is yet no apparent erosion of the

concept of the sovereign state, in spite of certain limitations. State sovereignty will probably remain the best option for a long time, but we must all work without respite to accelerate its adaptation to the fundamental human needs of the international community.