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Relative Sovereignty of the Twenty First Century

BY IVAN SIMONOVIC*

Introduction

The concept of state sovereignty, originally developed in constitutional law to define supreme authority and distribution of power within a state, has more recently been introduced into the area of international law to define the position and prerogatives of states in international relations. Therefore, for analytical purposes it is useful to distinguish between "internal" and "external" aspects of state sovereignty. To understand better the transformation of the external aspect of state sovereignty, which is the focus of our attention, it is very useful to note that it follows the same pattern already observed in researching the transformation of its internal aspect. Just as internal sovereignty historically evolved from monarchical sovereignty, based on monopoly, into popular sovereignty marked by power-sharing and a balance of power, sovereignty of the state in international relations is changing from a system of international relations based on concentration of power in states alone (and balance of power between them), into a system of power-sharing and balance of power between states and non-state actors. These non-state actors, whose influence is steadily increasing, include international organizations and associations of various types, multinational companies and international non-governmental organizations. Of course, we are addressing general trends: there are still states headed by monopolistic power-holders, or states, which, for various reasons, resist transformation of international relations towards power-sharing with non-state actors. However, in general,

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the quality of state sovereignty in the contemporary world, both in internal and external relations, has fundamentally changed: state sovereignty is no longer absolute.

Discussion

During the last six years that I have spent as the Permanent Representative of Croatia to the United Nations ("UN") in New York, there were few issues that provoked as much controversy and debate as the principle of state sovereignty and its corollaries. As a professor of jurisprudence in my previous life, it was interesting to compare how law schools dealt with the concept of state sovereignty with the various positions governments and non-governmental actors took on more practical issues of state sovereignty in the UN setting.

The UN is an arena where conflicting views on state sovereignty are not merely an academic issue, but an issue of the highest practical importance. When crisis situations arise, the interpretation of state sovereignty is often a decisive issue in determining whether international, UN or other intervention is warranted. The North Atlantic Treaty Organization ("NATO") intervention in Kossova serves as a good example. Regarded by some as a clear case of desperately needed humanitarian intervention, others view the Kossova intervention as an armed aggression and violation of *jus cogens* principles of state sovereignty, non-intervention, and non-use of force.[1] Other multinational interventions that aimed to protect civilians against intolerable persecution (in internal, or at least partially internal conflicts), such as in Iraq (the establishment of a no-flight zone to protect the Kurdish population from attacks), Haiti, Rwanda, Bosnia and Herzegovina and East Timor, have provoked similar opposition from critics of such actions by multinational forces. As the debate between state sovereignty and the protection of human rights continues, the UN struggles with defining state sovereignty in the context of the above crisis situations.

The principle of non-interference in the "internal affairs of a state," a historical corollary of state sovereignty, is being challenged

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1. For a list of articles arguing that NATO intervention violated *jus cogens*, see Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 418 n.2 (2000). It is interesting to note that the Federal Republic of Yugoslavia ("FRY") did not withdraw its application submitted to the International Court of Justice against NATO countries that participated in the intervention, not even after the fall of Milosevic and formal announcement of the new government that they would like to join NATO's Partnership for Peace.

by the international community's belief in its "responsibility to protect."[2] Humanitarian interventions are by definition intrusive. These actions utilize military force and other coercive means to intervene in conflicts without the consent of the state that is either participating in or too weak to prevent persecutions, large-scale grave human rights abuses, and other sufferings.[3] The posited justification for humanitarian intervention is that people matter most, and that states, as well as the rest of international community, have some obligation to protect them. Therefore, if the state fails to perform its duty, it is the duty of other actors to help the victims.[4]

Some authors attribute this change in the object of protection from states to people to the evolution of state sovereignty towards popular sovereignty. This theory implies that in the contemporary world the principle of sovereignty can no longer be used as a shield against the actual suppression of popular sovereignty.[5] According to this point of view, a third-party state's intervention to restore the power of a democratically-elected government, or to restore democracy and the respect of basic human rights in another state, can be considered legitimate. Yet there are also opposing views, of course, which label the tendency toward international interventionism as a remnant of the colonial attitude, an attempt to create a world order based on values and interests particular to the most powerful states, or as simply dangerous.[6]

While humanitarian intervention may be the most drastic example, there are many other dilemmas regarding the transformation and limits of state sovereignty.

During the last fifty years human rights have steadily evolved from the "internal affairs" of individual states to a globally

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2. "Responsibility to protect" sounds better than "right to intervene." On the concept of "responsibility to protect," see INTERNATIONAL DEVELOPMENT RESEARCH CENTRE, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

3. *See* T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1 (2002).

4. *See* Shunji Kobayashi, *State Sovereignty in the 21st Century: Political and Strategic Implications*, STATE SOVEREIGNTY IN THE 21ST CENTURY, CONCEPT, RELEVANCE AND LIMITS, PROC. OF AN INT'L SEMINAR (July 23-24, 2001), *available at* http://www.stratmag.com/issue2Aug-15/page05.htm (last visited Oct. 10, 2002).

5. *See* W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 871-72 (1990).

6. *See* Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

guaranteed good, which is now protected through various mechanisms.[7] Besides the influence of the Universal Declaration of Human Rights on national legislation, they include multilateral treaties and the unusually fast development of customary international law in this area.[8] Treaty-related and other monitoring mechanisms include the UN High Commissioner for Human Rights and special *rapporteurs* for individual country situations.[9]

A number of assumptions derived from the traditional concept of sovereignty and relative to international law are increasingly being challenged.[10] The development of the above-mentioned mechanisms for protecting human rights directly confront the view that no one can interfere with the way states treat their own citizens. The establishment of ad hoc tribunals for the former Yugoslavia and Rwanda, and the adoption of their statutes containing relevant legal provisions by the Security Council of the UN, runs against the principle that states control the creation and implementation of international law.[11] When the Federal Republic of Yugoslavia ("FRY") was forced to respect the ad hoc tribunal's statute through the threat of international sanctions, where was the "consent of the state," which is traditionally regarded as a prerequisite for the emergence of new rules of international law? Also, provisions of the statute of the International Criminal Court ("ICC") in some cases extend jurisdiction to citizens of states unwilling to be bound by the statute. Notably, when the United States protested against the possibility that their citizens could be extradited to the ICC, they *de*

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7. *See* Johan van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321 (1991). *See also* Antony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 75-80 (1995-1996).

8. Long and universal acceptance no longer appears to be a prerequisite for the development of a custom in the field of human rights – general acceptance is considered sufficient. For evidence on the growing importance of customary international human rights law, see Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995-1996).

9. For an evaluation of the efficiency of human rights law in practice and an indication of weaknesses and inconsistencies in spite of the development of monitoring mechanisms, see Douglass Cassel, *International Human Rights Law in Practice: Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121 (2001).

10. For the list of corollaries of the principle of state sovereignty, see Shen, *supra* note 1, at 419-20.

11. *See* Ivan Šimonovic, *The Role of ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440 (1999).

facto opposed the trend they helped to develop, which favored international interventionism in the area of human rights protection and punishment of the gravest abuses thereof.

Another manifestation of this new approach to state sovereignty is the transformation of the UN peace-keeping operations. Since the end of the Cold War, the number of UN-mandated operations has increased and their character has changed. Traditionally, the peace-keeping function was to separate each side of the conflict and observe whether each side could respect the provisions of relevant agreements. Increasingly, peace-keeping also includes a number of post-conflict peace-building activities, including the organization of democratic elections, the establishment of rudimentary public administration and the creation of activities aimed at economic revitalization.[12] For example, in East Timor, this type of multi-dimensional peace-keeping role is not in dispute. Although under heavy international pressure, Indonesian authorities were ready to accept Timor's independence at the end of the process. Yet in Kossova, on the other hand, FRY authorities have systematically blamed the UN for the extent of its involvement, which allegedly included elements of state-building and encouraged secession.

The UN is, of course, at the epicenter of these debates. Globalization and increased mutual interdependence obviously require better coordination of various actors, but many states are reluctant to transfer their prerogatives to the international fora. Some states resist any limitation of sovereignty in order to continue domestic human rights abuses, while others resist because they genuinely fear that the misuse of international interventions can lead to foreign domination. Additionally, the United States, as the only contemporary super-power, often prefers unilateralism to multilateralism when handling sensitive matters. By not joining the Kyoto protocol,[13] the United States refused to be bound by international standards for environmental protection. Also, the United States has preserved the right to attack Iraq unilaterally if unable to mobilize the international community to take action against Iraq's alleged development and stockpiling of weapons of mass

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12. The scope of these activities falls outside the mandate of the Security Council as set forth in the UN Charter. *See* U.N. CHARTER art. 24, para. 2. In the future, the Economic and Social Council – if and when it proves capable of doing so – should be in charge of post-conflict peace-building.

13. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

destruction.

Coming from a small country with a short history of statehood, I sympathize with countries that fear for loss of independence, who are small or young and still fragile, or those traumatized by their history of foreign domination.[14] These countries often perceive sovereignty as a shield that protects their independence and preserves their equal footing with others.[15] However, I also was often outraged by violations of human rights and grave breaches of humanitarian law that persisted because key players in the international community lacked either the willingness or the instruments with which to protect the innocent victims of human rights abuses.

During the 1990s, conflicts between states killed approximately 220,000 people, which represented a decrease of nearly two-thirds the number of people killed during the 1980s. However, during the same period, approximately 3.6 million people died in internal conflicts within states. As a result, the number of refugees and internally displaced persons increased by fifty percent.[16] It has been estimated that during the twentieth century, governments killed 170 million of their own citizens.[17] This number is greater than the total number of people killed in wars between states, including the two "world wars." Faced with these realities, how can we afford to consider major contemporary humanitarian threats as something in which the international community cannot involve itself? After all, what is this precious sovereignty that makes us so cautious and hesitant?

The core issue of sovereignty – whether we speak about its internal or external aspect – is a question of distribution of power. The concept of sovereignty first developed in constitutional law as an attribute of the highest authority and power-holder within a state.

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14. It is a paradox that the concept of sovereignty, initially developed as a European concept to guide relations between European powers, and not always observed by them in their relations with non-European states, later turned into a "line of defense" for developing countries against foreign intervention. *See* Iyer Chokila, *Inaugural Address*, STATE SOVEREIGNTY IN THE 21ST CENTURY, CONCEPT, RELEVANCE AND LIMITS, PROC. OF AN INT'L SEMINAR (July 23-24, 2001), *available at* http://meadev.nic.in./speeches/fs-jul23.htm (last visited Oct. 10, 2002).

15. Qin Huasun, the Chinese Ambassador to the UN, has stated that sovereignty is the last "defense screen" of small and weak countries against foreign bullying, and that there would be no peace if that screen were broken. *See* Shen, *supra* note 1, at 436.

16. *See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 2 (2002).

17. *See id.* at 6.

Bodin's articulation of the concept of sovereignty reflects a specific historic situation: the desire to create the highest concentration of executive, legislative and judicial power in hands of a monarch.[18] This interpretation of sovereignty within a state embodies corresponding formulation of the structure of international relations as elaborated by Grotius, where states are the only actors possessing a monopoly of power in the international arena. Sovereign states are mutually equal, respect each other's monopoly in handling internal affairs, and enter into international obligations only on the basis of consensus.[19]

The transition from the sovereignty of monarchs to popular sovereignty is a shift from power concentrated and monopolized in the hands of a monarch to power distributed between citizens. On a technical level, the exercise of popular sovereignty through the division of power between the executive, legislative, and judicial branches reflects a tendency to replace concentrated power with distributed and balanced power.

While the preceding is nothing new, it is surprising how neglected the use of our knowledge is on the changes in power relations within a state and internal aspects of sovereignty; in the research of trends of transformation of international relations; and in examining external aspects of state sovereignty. In fact, international relations are experiencing a similar process of transformation: from an exclusively state-dominated system where states are the exclusive power-holders into a more complex system where states, international organizations, multinational corporations and non-governmental organizations ("NGOs") are sharing the balance of power.

This transformation is heavily influenced by the process of globalization. Global interdependence in security, trade, finance, crime, health and environmental issues limits the feasibility of state sovereignty as a viable solution to conflicts that arise. Consensual obligations, such as international treaties, are self-imposed limitations

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18. *See* JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M. Tooley trans. 1967).

19. It is questionable whether the described extreme form of concentration of power within the state, and on states in international relations, ever existed in practice at all. There were always certain limiting factors to the concentration of power within a state, or on states within the system of international relations, for example, the role of the church. Regarding the idea of distribution of certain sovereign rights to different social actors, the Dutch concept of *souvereiniteit in eigen sfeer* might be particularly helpful. *See* Johan D. van der Vyver, *supra* note 7, at 343.

on state sovereignty. However, these limitations are no longer sufficient.[20] International relations are increasingly influenced by the emergence of new actors that limit sovereignty of states and create a balance of power that ensures better protection of global interests.

Citizens, who have developed a feeling of global citizenship in addition to their state citizenship, are seeking new ways to protect their interests. They prefer to have some of their interests protected on the state (central or local) level, and others protected on the regional (such as the European Union or African Union) or global level. Also, on national, and especially international levels, states are no longer the only actors; civil societies, NGOs and business communities are gaining importance.

Just as executive, legislative and judicial organs were historically related to each other on a national level, states, international organizations and associations, multilateral corporations and NGOs are now also limiting each other's power on a global level. NGOs, often supported by the media, push states to do what administrations would never do on their own: for example, give up land mines or accept the jurisdiction of the ICC.[21] On the other hand, states and international organizations are cooperating with NGOs to prevent multinational corporations from exploiting child labor in developing countries.[22]

A new balance of power is being acknowledged and various actors in the international arena are learning to cooperate. During the preparatory process and through the work of the International Conference on Financing for Development (Monterrey 2002) and the World Summit on Sustainable Development (Johannesburg 2002),

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20. Interpreting treaties as self-imposed limitations of state sovereignty contradicts the view expressed by the Permanent Court of International Justice in S.S. Wimbledon that "the right of entering into international engagements is an attribute of State sovereignty." *S.S. Wimbledon*, 1922-1925 P.C.I.J. (ser. A) No. 1 at 25 (1923). However, the point is that treaties – however qualified – are simply not sufficient global coordinating tools anymore. More explicit limitations of state sovereignty and more efficient coordinating mechanisms are needed for practical purposes.

21. In 1914, there were 1083 international NGOs. By 2000, there were more than 37,000, of which 2150 have consultative status within the UN Economic and Social Council ("ECOSOC"). *See* U.N. DEVELOPMENT PROGRAMME, *supra* note 16, at 10.

22. *See* Jenness Duke, Note, *Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance*, 28 DENV. J. INT'L L. & POL'Y 339 (2000). For a useful case study, see Marc J. Monte, *Corporate Factory/Supplier Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions*, 26 BROOK. J. INT'L L. 1125 (2001).

both major UN events after the Millennium Summit, NGOs and business sector representatives were accorded equal status with states.[23] The UN Economic and Social Council ("ECOSOC") 2002 Spring Meeting with the Bretton Woods Institution followed the same procedure. Finally, in May 2002, the Forum on Indigenous Issues was established as a unique UN body, consisting of eight experts representing governments, and eight experts representing indigenous peoples.[24]

However rational, the process of increasing power sharing between states, international organizations, NGOs, and multinational corporations in international relations has met serious opposition. The problem is not simply a matter of the resistance of small and vulnerable states who are afraid of losing their sovereignty, but is also a problem of the ambition of the United States – as the only remaining superpower – to remain the sole sovereign state in the international system of limited state sovereignty. The United States can stubbornly insist on the primacy of U.S. domestic law over international law and can threaten to use force if a U.S. citizen is apprehended by the ICC because they are big enough, rich enough and strong enough. However, this policy is harmful for both the United States and the emerging world order.

Contemporary global challenges require global responses and the involvement of various social actors in addition to states. September 11, 2001 was an alarm bell in this respect. Even the most powerful states are vulnerable, and it does not pay to go alone. If the United States and other developed countries want a successful international coalition against terrorism, they must address its root causes and take part in a coalition for global development. Globalization and increased mutual dependence should be accompanied by the spread of global ethics, based on principles of tolerance, mutual respect, and above all, solidarity.

In my capacity as the President of the ECOSOC, I have witnessed many situations where the lack of elementary global

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23. This was not always easy. I participated in the work of the Bureau of the Preparatory Committee of the International Conference on Financing for Development as a vice-president and witnessed the passion with which some countries wanted certain NGOs or multinational corporations excluded from the list of participants.

24. I firmly believe that the unique composition of this body is a far-reaching precedent, and that we will witness new such "mixed bodies" and a broadening of their areas of competency in the future.

solidarity alongside efficient mechanisms to protect global interests has led to disastrous consequences. Every day more than 30,000 children around the world die of preventable diseases, and about 14,000 people per day are infected with HIV. The child immunization rate in Sub-Saharan Africa has fallen below fifty percent and it is easy to calculate how many lives have been lost as a result. It is possible to fight AIDS, tuberculosis and malaria; we know how to do it and we can afford it, but we lack the commitment.

The Millennium Summit was the greatest gathering of heads of states and governments. While the Millennium Development Goals were adopted by consensus, in reality they are not being implemented. A number of developed countries have not committed the resources they promised, and some elite individuals in developed countries would still rather practice corruption than good governance. Disparities in development are striking. About 2.8 billion people still live on less than $2 a day and the richest one percent of the world's people receive as much income each year as fifty-seven percent of the poorest. As I stated at the opening of the International Conference on Financing for Development, such a world is neither just, nor stable. To match global interdependence with global solidarity is the key for a brighter future.

Conclusion

When addressing the issue of sovereignty, we should think more about the future, than the past. It is predictable that the process of globalization will continue and will likely intensify. The world's economy, trade and financial flows will become even more integrated. As such, improved coordination and further development of international regulatory mechanisms, as well as the strengthening of multilateralism, seem to be the only rational choices. Collective efforts are essential in meeting the challenges that the world faces today, including environmental degradation, international crime, terrorism, AIDS and human rights violations.

The quality of state sovereignty in the contemporary world, both in internal and external relations, has fundamentally changed. Indeed, state sovereignty is not absolute any more. To speak about "relative" sovereignty might from the point of the original doctrine as defined by Bodin or Grotius, be considered as a *contradictio in adiecto*, but it is useful to confront traditional concept with new realities. Citizens all over the world are seeking to reclaim their

individual sovereign rights, and want some of those rights to be protected globally through international mechanisms which, besides states, include international organizations, independent experts and civil society. It is a serious challenge to reflect these changes in transforming old or creating new institutions.

This will probably be a long process, with its ups and downs. States that otherwise have very little in common will form some astonishing ad hoc coalitions to oppose the transfer of power from states to non-state actors. However, the trend is quite clear and predictable. If citizens want to transfer some powers from states to international organizations and NGOs, and since the power of international corporations is already a reality, how long can states resist these changes?

Finally, I firmly believe that this process will prove to be less dramatic than it may seem. Just as the sharing of power instead of its concentration on the national level was not a requiem for the state, but a part of its democratic evolution, so will be the corresponding transformation of international relations. In this respect, state sovereignty is merely a conceptual veil: we should redesign it to better fit the modern trends.