Sovereignty as Responsibility?

by Georg Nolte[*]

Sovereignty has always been a contested concept. It invites projections by its interpreters of their respective *Weltanschauung*, their world vision. Thus in the past, sovereignty has been described both as the locus of absolute power and of the right to go to war, as well as being the basis for the rule of law in interstate relations and the prohibition on going to war.

Today, it is mainly the relationship between sovereignty and globalization which is being discussed. Should growing interdependence, which goes hand in hand with a disaggregation of the state and the rise of other international actors, in particular human beings, be reflected in the concept of sovereignty, as Anne-Marie Slaughter and Helen Stacy suggest? Or should more traditional conceptions of sovereignty be retained, considering the need for the protection of diversity and/or democratic self-rule, as Brad Roth argues?

My answer is rather dry, formal, and old-fashioned. Reacting to a nineteenth-century concept of sovereignty being a power above the law, the Permanent Court of International Justice, in the 1923 case of *The Wimbledon*, conceived sovereignty simply as the liberty of a state within the limits of international law.[1] This formal juridical concept of sovereignty has significant advantages: it goes with the times without depending on a resolution of the *Weltanschauung* controversies of the times.

Sovereignty as the liberty of states within the limits of international law is open for the development of international law in the process of globalization. This formal concept of sovereignty not only enables states to restrict their liberty in exchange for advantages, but it can also tolerate international law conceiving of rules which bind states without their consent. It precludes the use of sovereignty as a trump card against the law; it prevents the mistaking of sovereignty for raw power; and it protects states by requiring that restrictions of their liberty must be based on a more or less specific legal rule and not on the interpretation of a vague concept driven by particular world visions.

These advantages alone may not yet convince everybody. In my opinion, a decisive test for any contemporary concept of sovereignty is whether it fulfils and distinguishes the following two functions:

1) Sovereignty must leave enough room for the requirements of globalization.

2) Sovereignty must, on the other hand, protect against undue interference by equals.

Visually expressed, the concept of sovereignty should be vertically largely open and horizontally largely closed. Thus in legal terms: while the liberty of states may have to be restricted in the general interest, their status as equals should be preserved. These two functions of sovereignty should be distinguished from one another as clearly as possible. If not, the concept can become an instrument of hegemonic or even imperial designs. What do I mean?

The Liberty Function of Sovereignty

The vertical openness of the concept of sovereignty concerns the degree to which the liberty of states can be restricted and governmental functions internationalized, without the

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[1] *S.S. Wimbledon*, 1923 PCIJ (ser. A) No. 1, at 15.

state and its people losing a minimum of independent decision-making power or their democratic character. In Europe, this question was debated with respect to the Treaty of Maastricht, and today it is discussed with respect to the Constitutional Treaty. On the global level, the question is debated, for example, with respect to the so-called legislative powers of the UN Security Council. A determination of the appropriate relationship between the liberty of states and necessary international rules and mechanisms will always remain subject to debate and will always need readjustment. On the global level, this debate is carried out with reference to the term *sovereignty*. Those who believe that they should avoid the word "sovereignty" must discuss the same problems by using even more contentious terms, such as the "right to self-determination," "democratic deficit," or "subsidiarity." All in all, as far as its liberty function is concerned, the term *sovereignty* has lost its bite. From the point of view of international law there is not, nor should there be, a large core of inalienable sovereign rights. Instead, there are mainly procedural requirements of how renunciations of sovereign rights can be brought about.

The Equality Function of Sovereignty

I do think, however, that the weak liberty function of sovereignty needs to be clearly distinguished from its stronger equality function. It is one thing to be ordered by the police not to cross the street; it is another to be so ordered by a fellow citizen. Some efforts to develop a contemporary concept of sovereignty tend to level off this basic distinction. Perhaps the most important example of a reinterpretation of sovereignty tending to lead in this direction is now being propagated in the United Nations and it has already gained widespread acceptance. In its recent report, the Secretary-General's High-Level Panel on Threats, Challenges, and Change has expressed the view: "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community."[2]

This concept of "sovereignty as responsibility" has been expressed before by the International Commission on Intervention and State Sovereignty (ICISS).[3] ICISS, a Canadian-sponsored panel of experts, had the task to reflect on the implications of the Kosovo intervention for international law. In this context, sovereignty as responsibility serves to explain and justify the legitimacy in principle of humanitarian intervention by force. The commission did, of course, propose certain conditions under which humanitarian interventions could and should legally be exercised. The question whether the UN Security Council must always authorize a humanitarian intervention was left open by the commission.[4] But the general point on sovereignty as responsibility was made.

This general point has a larger significance. Sovereignty as responsibility is not only important in the context of humanitarian intervention, but also for terrorism, human rights, and other areas. Sovereignty as responsibility goes to the heart of both the historical reason for sovereignty and today's situation. Hobbes postulated sovereignty so that the Leviathan could effectively exercise its responsibility to protect. In today's interdependent world,

[2] *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, U.N. GAOR, 59th Sess., at 21–22, ¶ 29, U.N. Doc. A/59/565 (2005) [hereinafter High-Level Panel], *available at* <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/pdf/N0460231.pdf?OpenElement>.

[3] Int'l Comm'n on Intervention and State Sovereignty, The Responsibility to Protect (2001), *available at* <http://www.iciss.ca/pdf/commission-report.pdf>.

[4] *Id.* at 47–53.

sovereignty would seem to risk serving antisocial and antihuman purposes if it were not tied to the responsibility to respect international law. Thus, filling the term *sovereignty* not only with rights, but also with obligations, appears to make an important point. States are indeed obligated to control their territory, to respect human rights, and, to a certain degree, to exercise good governance.

Nevertheless, I think that "sovereignty as responsibility" is a highly ambiguous concept, and dubious if used as a legal term. The problem is, in short, that sovereignty as responsibility invites states not to recognize the sovereignty of a particular state as far as that state, in the opinion of the other states, has not properly exercised its responsibilities derived from sovereignty. Why should this be a problem? It becomes a problem in particular when it leads to the assertion of enforcement mechanisms beyond what international law provides. The Kosovo intervention is a case in point: under the rules of the Charter, it is the Security Council that determines whether human rights violations constitute a threat to the peace, and only the Security Council can authorize remedial measures. If, however, Yugoslavia has indeed failed its sovereignty as responsibility, it becomes easier to argue that Yugoslavia is no longer entitled to rely on its sovereignty as against other states as far as it is necessary to remedy the failure. This was precisely the ambiguity which was left open by ICISS.

In the same vein, if sovereignty is a responsibility to control one's own territory, then other states can more easily justify their right to use force preemptively on this territory for the purpose of fighting terrorism. If sovereignty is an obligation of good governance, then third states can more easily see themselves justified in dictating economic and social policies for the protection of another state's population. Human rights violations are indeed no longer internal affairs, but they should not immediately give rise to enforcement competencies of third states. It is true that emergency competencies for third states need to be considered. Therefore, we will continue to debate the appropriate limits of the right to self-defense and the recognition of a right to unilateral humanitarian intervention. However, if such competencies are derived from a concept of sovereignty as responsibility the exception will tend to become the rule. This in turn weakens international institutions, such as the United Nations, and inhibits the necessary impulse to create or to reform them.

It is true that ICISS was not the first to speak of sovereignty as responsibility. Max Huber, for example, said in the *Island of Palmas* arbitration, "Territorial sovereignty ... has as corollary a duty: the obligation to protect within the territory the rights of other states ... ."[5] Huber thereby wanted to explain the existence of a comparatively precise set of rules and remedies for a limited area. The now proposed general concept of sovereignty as responsibility, on the other hand, risks breaking down distinctions, in particular the one between rules and remedies.

It is today almost undisputed that the UN Security Council can authorize humanitarian interventions, preventive counterterrorism measures, and many other military measures. This follows from a legal concept of sovereignty which is permissive toward restrictions on the liberty of states. This concept is not permissive, however, when NATO states intervene militarily without authorization in Kosovo or when the United States attacks Iraq leading a coalition of the willing. Unauthorized military interventions may be justified due to an emergency power. However, proper legal authorization by the competent international organisation must remain the rule. Such a rule can, however, only remain the rule if there is no

[5] Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

legal passepartout (or carte blanche) enabling any state to justify its intervention if its government thinks that another state is not fulfilling the responsibilities under its sovereignty.

The Continuing Relevance of the *Wimbledon* Concept of Sovereignty

In his recent report *In Larger Freedom*, UN Secretary-General Kofi Annan stated that "no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering."[6] In this document he also refers to both the ICISS and the High-Level Panel reports as endorsing an "'emerging norm that there is a collective [!] responsibility to protect.'"[7] Kofi Annan has not, however, himself linked sovereignty with responsibility, as these bodies have done. I think that his caution is appropriate. The concept of "sovereignty as responsibility" risks cutting off the branch on which the UN sits. It is one thing to explain that the political and moral purpose of sovereignty is not a license to kill but a responsibility to protect. It is quite another to translate this insight into a legal concept which risks facilitating the circumvention of established legal procedures by powerful states.

The background of our discussion is that new challenges have arisen which most sovereign states cannot solve on their own. The development of efficient international institutions is lagging behind. International terrorism and its countermeasures are the best example. As long as international regimes seem unable to handle such new tasks efficiently, the temptation remains for strong states, or groups of states, to try to solve these problems on their own and to justify their actions by accusing other states of not fulfilling their responsibilities as they derive from sovereignty. Those powerful states and their leadership who succumb to this temptation will not only raise questions of equality and bias. They also will raise expectations which cannot be met, i.e., the provision of security and wealth for all by a few. Instead, I think, we should build on the not so outdated legal concept of sovereignty, as it has been expressed in the *Wimbledon* case, and reform international institutions and regimes on that basis.

Sovereign Equality and "Bounded Pluralism" in the International Legal Order

*by Brad R. Roth**

The principle of "sovereign equality," as embodied in the United Nations Charter and elaborated in the General Assembly's 1970 Friendly Relations Declaration,[1] has long drawn moral and political criticism, whether from liberal cosmopolitans, conservative realists, neoconservative unilateralists, or advocates for groups marginalized by the international system. The changed material and ideational conditions of the early twenty-first century have further

[6] *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. GAOR, 59th Sess., ¶ 129, UN Doc. A/59/2005 (2005), *available at* <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/270/78/pdf/N0527078.pdf?OpenElement>.

[7] *Id.* ¶ 135 (quoting High-Level Panel, *supra* note 2, ¶ 203).

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[1] G.A. Res. 2625, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (1970).