WHAT USE FOR SOVEREIGNTY TODAY?

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To suggest that there might be good use for State sovereignty sounds counter-intuitive. After all, since the outset of our profession, we international lawyers have been critical of sovereignty. We have thought it a narrow, ethnocentric way to think about the relations of human beings. We have rehearsed a *moral* case against it. Sovereignty, we say, upholds egoistic interests of limited communities against the world at large, providing unlimited opportunities for oppression at home. It is, we sometimes say, "organized hypocrisy".[1] If a country claims that a matter is under its "domestic jurisdiction", and refers to Article 2(7) of the UN Charter, we are inclined to think this as an effort by its leaders to hide from well-founded international criticism. From a *sociological* perspective, we have attacked it because it fails to articulate the economic, environmental, technological and ideological interdependencies that link humans all across the globe, giving a mistaken description of the reality of human relationships across the world. And from a *functional* perspective, we have observed its failure to deal with global threats such as climate change, criminality, or terrorism, while obstructing such beneficial projects such as furthering free trade and protecting human rights. Therefore, we have wanted to replace it with *international* or *global* approaches, work across "artificial" national boundaries.

For this purpose, we have tamed down sovereignty. Already in a famous case from 1923, the Permanent Court of International Justice defined sovereignty as a "relative matter", dependent on the state of international relations.[2] The Court suggested – or at least we read it that way – that what a country's "sovereignty" means is its negative freedom, the freedom of action left to public officials by its international obligations, or a shorthand for the "bundle of rights, powers and privileges" that a State has at any moment, and each traceable to a distinct legislative source.[3] And those rights, powers and privileges, we have tended to hope, are constantly diminishing. After all, everywhere States are bound to networks of norms and institutions – from the way they treat their citizens to the way their competition or intellectual property laws are formulated, from the way their law-enforcement officials behave to how they plan their industrial projects. At our most eloquent, we have taken up Immanuel Kant's project for perpetual peace to

[1] Stephen D. Krasner, *Sovereignty. Organized Hypocrisy* (1999).

[2] PCIJ, *Nationality Decrees* case, Ser. B 4 (23-24). See further Martti Koskenniemi, *From Apology to Utopia. The Structure of International legal Argument. Reissue with a New Epilogue* (Cambridge University Press, 2005), especially 258-272.

[3] This is typically the view by liberal legal theorists such as Hans Kelsen or H.L.A Hart.

point to the philosophical weight of our assumption that "universal history" has a "cosmopolitan purpose" and that the direction is towards some form of world unity beyond formal statehood.[4]

In practice, we have used sovereignty to limit sovereignty. For example, in a series of recent arbitrations, we learn that the Argentinean government had violated the private rights of foreign companies under the bilateral investment treaties it has concluded as it devaluated the peso during the financial crisis of 1999-2002. This follows the jurisprudence on "permanent sovereignty over natural resources" from the 1970's. States are bound by the agreements they have made not as a *derogation* of their sovereignty but an *effect* of it. They had been able to bind themselves *because they were sovereigns*.[5] If they were not able to bind themselves - and thus receive the benefits they were looking for – well, then they could not really be sovereigns, could they?

As a result, "sovereignty" has lost any normative or descriptive meaning. All over the world, states are bound by an increasing network of formal and informal rules and regimes. As Europeans know, formal sovereignty may today co-exist even with a situation where state organs have almost fully given up their decision-making powers in some area – economic or energy policy for example – to an international organisation. The pattern of influence and decision-making that rules the world has an increasingly marginal connection with sovereignty. Networks of experts whose expertise is in no way dependent on formal statehood rule an expanding sector of our lives, sometimes with the assent of the state, more often in complete independence. Corporate executives and hedge fund managers determine the fate of populations. Where national governments intervene, they do this on the basis of advice from essentially non-national networks of financial, military or environmental expertise. Even the domestic government may be a coalition not so much of domestic parties but of local representatives of intrinsically global financial, environmental, or security interests – a forum within which human rights and security experts, say, or representatives of trade and health interests conclude bargains about the allocation of social resources. This is global governance: rule by preferences and norms, regimes and practices that have no localizeable centre or ethos and constantly penetrate and define what the "sovereignty" of our states is allowed to mean, what room for action there is for public power. To this extent, international lawyers seem to have won.

And is the world the better for it? Many will not think so. So where is the problem? And what ought international lawyers do with it?

I

To start with an analysis. We no longer see any magic in sovereignty. It is merely a functional power to rule a population for its own good. Already the *Island of Palmas* case from 1928 Max Huber linked sovereignty with exercise of effective power because this enabled the protection

[4] See Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' in *Political Writings* (2nd ed., Hans Reiss ed, Cambridge University Press, 1991)

[5] See further *Case of the SS Wimbledon*, PCIJ, Ser A/1. p. 25

the rights of the inhabitants and the interests of the other States.[6] The development has since peaked in the debates after 2001 on the "Responsibility to Protect" – the initiative to redefine sovereignty as responsibility to the population. It is now a commonplace to say that sovereignty ought not to shield tyrannical governments. We respect it if it brings us valuable objectives - security, welfare, human rights, "good governance" and the "rule of law".[7] If sovereignty were to endanger these, then as Western interveners in Kosovo in 1999 argued, why respect it?[8] Wars – especially Western wars – are no longer for annexation but for protecting human rights, saving failed States and undertaking "regime change" – the cases of Afghanistan and Iraq *par excellence*.[9] Under this view, sovereignty may be set aside as the de facto occupant imagines itself as a trustee of the population, transforming the constitutional order in view of the common good. Or think of territorial authority set up by the UN or other international organizations, such as the European Union, in order to oversee the orderly management of a territory, the cases of the UN Special Representative in Kosovo and in East Timor. The authorizing by the Security Council does not, of course, refer to taking over "sovereignty" but to (mere) temporary exercise of certain sovereign "functions".[10] But the ideological implications are huge. As a recent study of the international administration of territory from Versailles to Irak and beyond puts it, there now is a "pool of international governance obligations" that are neutral of their origin and thus, wiping away the difference between "sovereignty" and "governance", works so as to justify "cosmopolitan governance" by whomsoever is in a position to exercise it.[11]

Such a "functional" notion of sovereignty is nowhere more visible than in the application of human rights under military occupation. In a series of recent judgments the Israeli Supreme Court, for example, has defined the military authority as in part a trustee of the local (Arab) population, highlighting the need to balance the security of Israeli forces with the rights of Palestinian civilians. [12] The same approach has been taken also by the International Court of Justice and the European Court of Human Rights (ECHR) recently affirmed that the Convention

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[6] *Island of Palmas* case, II UNRIAA, p. 869-870.

[7] Fior recent analysis, see Pekka Niemela,, *The Politics of Responsibility to Protect – Legal, Conceptual, Institutional and Practical Considerations* (Helsinki, Erik Castren institute Research reports 2008).

[8] See further my 'The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law', 65 The Modern Law Review (2002), 159-175.

[9] For two useful but assessments on completely opposing sides, see Grant T. Harris, 'The Era of Multilateral Occupation', 24 Berkeley J. IL (2006), 1-78 and Nehal Bhuta, 'The Antinomies of Transformative Occupation' 16 EJIL (2005), 721-740.

[10] See UNSCR 1244 (1999) on Kosovo and 1272 (1999) for East Timor. See also Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003), especially 126-143.

[11] Carsten Stahn, *The Law and Practice of International territorial Administration. Versailles to Iraq and Beyond* (Cambridge University Press, 2008), 760-762.

[12] See Martti Koskenniemi, 'Occupied Zone – a Zone of Reasonableness', *Israeli Law Review* (2008), forthcoming.

will apply to military activities"...where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area outside its national territory..."[13] Through this means, the distinction between "military occupation" and formal sovereignty is being erased. Whatever the origin of the power, the main thing is that it is exercised in the *interests of the population*.

One need not be a militarist to think in this way. Functional interventionism underlies all human rights law, trade law, and environmental law so that lawyers in all of these fields are in the business of lifting the veil of sovereignty so as to grasp international problems by the skin.[14] All of this receives its plausibility from the critique of sovereignty, the sense that for populations to live happily, the process of ruling them must now take place by global systems of management that do not respect the old and "artificial" boundaries that exist between States. Hence there has emerged a complex managerial vocabulary that speaks neither about sovereignty nor about formal rules but about "regimes", "objectives", "and values", replacing questions of "law" with questions about "legitimacy", binding force with empirical "compliance". It has taken seriously the critiques of sovereignty and has transferred the power of ruling from the hands of states to global systems of knowledge and expertise. Only the optimal functioning of these systems may produce happiness and safety to global populations. The role of the law is to facilitate their operation, not to protect formal sovereignty. And if these systems point in differ ring directions – as the systems of trade and environment, or those of security and human rights do – then one should simply bargain to balance the stakes, to compromise and to allocate jurisdiction in the most effective manner. Figure out the costs and benefits. Streamline, balance, optimize, calculate. When the social is fluid, a social concept of law – that is, a "realist", or "pragmatic" concept – must become fluid as well. Everything must become negotiable, revisable in view of attaining the right outcome.

Global law today is anti-formalist. It tells us "Never mind status. All that counts is the existence of de facto power, whatever its origin or objectives. Only such power can bring about the common good of all." This is no postmodern extravaganza but respectful of the Western political tradition since Jean Bodin and the rise of natural jurisprudence, the Hobbesian dialectic of protection and obedience. Sovereignty did not arise as a philosophical invention but out of Europe's exhaustion from religious conflict. It was meant to serve the practical purpose of pacifying European societies and to do away with papal and imperial power. One need not go further than Samuel Pufendorf's *On the Law of Nations and of Nature* of 1672 to find the unexceptional statement "The general law for supreme sovereigns is this: 'Let the people's

[13] ECHR, *Issa v. Turkey* (31821/96) (30 March 2005), para. 69. But see also *R. (on the application of Al-Skeini) v. Secretary of State for Defence* (2004) EWHC 2911: [2005] 2. W.L.R. (QBD) Admin. See also *Legality of the Threat and Use of Nuclear Weapons*, I.C.J. Reports 1996 (I), p. 239 (para. 24); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, para 106 and *Armed Activities (Congo v. Uganda)*, I.C.J. Reports 2005, paras 215-221.

[14] For the argument in environmental law, see Franz Xaver Perrez, *Cooperative Sovereignty. From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, 2000).

welfare be the supreme law'". [15] Sovereignty did not seem valuable because of some transcendental ideal embodied in it. On the contrary, its point was to look *away* from anything transcendental, into the power of the secular ruler that was to be harnessed for the benefit of the population. Without power, neither security nor welfare could exist. Without power, the bond between protection and obedience is broken and "anarchy" will re-emerge.

From this perspective, sovereignty appears only as a glorified form of power, a power that has begun to seem stable and natural so that we have forgotten how it consolidated itself. Yet, analytical thought insists, why take for granted something for the sole reason that it has become habitual? Even the most stable sovereignty must have its dark side: which sovereignty did not begin its career in blood? In a time of calling for accountability for past wrongs, why would sovereignty be shielded? Surely there is reason to judge the sovereign by the merits of its rule instead of being enchanted by its myths.

Once we part with the formal mystique of sovereignty there is no reason not to judge any use of power by its merits. This is what the practice of transformative occupation – Irak and Afghanistan – claim for their justification. Why should sovereign power not be put at the same level as its contenders, occupying forces, power wielded by an imperial capital, power exercised by a transnational corporation, a local warlord or an international body of environmental or human rights experts? What other criterion is there to judge them than how they can provide protection to the people, or look after their welfare?

II

These arguments emerge from what could be called "reduction to purpose", the view according to which the criterion whereby political authority ought to be judged lies in how well it fulfills its purpose. That purpose, again, is understood to reside in the fulfillment of the wishes, desires, or preferences of the people. From such perspective, the conventional international law distinction between sovereignty and other forms of power would appear as a kind of ideological smokescreen, capitulation to a single word – a myth, a taboo. This, I suppose, is the heart of the critiques of sovereignty.

But what if the reduction to purpose is itself an ideology that relies on a myth – namely the myth of the transparency of the "purpose"? It assumes that we have a more or less unproblematic access to what it "really" is that territorial rule ought to achieve and that once we know this, realizing that stated purpose is a relatively straight-forward matter, best carried out by technical experts. I cannot here go into a fundamental critique of what I have elsewhere called the "managerial mindset".[16] Let me just sketch two sets of difficulties that highlight the political instead of technical nature of territorial rule.

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[15] Samuel Pufendorf, 'On The Law of Nature and of Nations', Bk VII, Ch 9 § 3, in Political Writings (Carr & Seidl ed. Oxford University Press, 1994), 242.

[16] I have begun such critique for example, in my 'Constitutionalism, Managerialism and the Ethos of Legal Education' 1 *European Journal of Legal Studies* (2007), 1-18.

A first relates to the difficulty of clearly seeing what the "purpose" of a particular regime of territorial authority might be. Even if we agree that it ought to be formulated in terms of the provision of "security and welfare", this leaves it open what we mean by those expressions. They have no automatic meaning. What they signify in particular situations refers back to assessments that are bound to differ between individuals and social groups. Some might think of "security" in terms of security of ownership rights, the stability of a country's investment system, while for others it may mean guarantees for the maintenance of basic social welfare services. That "security" is a contested concept has, of course, become evident in the assessment of the tightening security controls that are part of the "fight against terrorism". Is "security" better described as protection against terrorism, or the undisturbed exercise of individual rights and freedoms? That the "welfare" or "security" of one may be attainable only by encroaching on the "welfare" or "security" of another is a simply a truism. But it is one that fundamentally complicates the assessment of any regime: whose "security" and whose "welfare" do we have on mind?

But even if there were no problem in determining what the right purpose of territorial government were, this in itself provides no clue as to how to attain it and what, out a number of alternative policies might lead there. Eradication of poverty is undoubtedly a widely agreed objective and a criterion to judge a regime. But how should this be translated into particular measures? Is a restructuring operation under the World Bank the right way to go about it? Or should we instead regulate the economy, nationalize key industries and limit foreign trade in view of domestic concerns? Does democracy further a stable economic environment or does it, instead, provoke attacks on economic structures and operators? [17] Should one integrate in a global economy or refrain from integration and create industries for import substitution? Even if we agree on the need of social peace, we remain completely divided on whether that should be attained - by tightening social controls or by increasing political freedoms?

My point is not that such questions are impossible to solve. Their resolution is part of everyday political debate and action. The point is that it is not "simply" about the use of technical expertise. It involves political assessment, typically assessment that would seek to put to order the various conflicting purposes that exist in community, and conflicting ways in which scarce resources ought to be allocated. This again, is about the use of imagination without guarantee that everybody would agree in the end. Such decision-making cannot be oblivious to the conditions under which it takes place: Who is entitled to participate and how, under what rules and what regime of accountability? In the ideal world of the global managerialist, reserves of the world's best technical experts would be available to be always called upon to address problems irrespectively of when and where they arise. In this world, standard solutions and universal criteria of measurement would apply. In the real world, however, problems are "political" in the specific sense that there is no technical, scientific, juridical or other language in which they would have "already" been resolved so that the only questions would be limited to those of technical application. Hence it is far from irrelevant *who* the decision-makers are and how can their decisions be contested.

[17] Cf. Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (New York, Doubleday 2003).

III

So what use is there for "sovereignty" today? I wish to point to the way in which the informal management of an increasing number of problem-areas outside the structures of formal statehood undermines the ability of human groups to constitute themselves as "political communities". When questions of economic distribution, environmental protection, security or human rights are conceived of as essentially global, best dealt with the best forms of functional expertise, no room is left for human communities to decide on their priorities or preferences. Globalization means the increasing authority of technical vocabularies for which human beings appear as objects of "protection" or charity but rarely as rulers of their own lives. It foregrounds new types of value and preference that accompany the rise of new professional classes. What is needed of international law today is the politicization of this process - the creation of platforms and vocabularies that highlight the contested, political nature of the choices that globalization poses. Instead of becoming one more technical vocabulary of global governance, international law should provide a language for criticising the global expert systems, a platform to enhance the transparency of global decision-making and the accountability of the professional classes to the communities affected by their (contentious) choices. But it should also enable the realisation of alternative preferences. In a word, it should contribute to the re-imaging of what political sovereignty could mean today.

Imagine that a global corporation called "Supernova" developed the highest quality technologies of security- and welfare-production in the world (whatever that might mean) and that anything produced in national universities or think-tanks could come nowhere near those technologies. Imagine then that Supernova agreed to raise the standard of life and security in, say Africa, or Japan, to levels that could not even be imagined if they were left under the status quo, but only on condition of attaining "sovereignty" over Africa and Japan. Would this be sufficient to draw the ultimate conclusion of the critiques of sovereignty – if you were measurably better off under "Supernova" than under your quarreling governments, then why should you not choose that option? What should the law say? Should it just take the bargain offered by Supernova as the only *rational* solution and apply it over the heads of the Africans and the Japanese for their own good?

I suppose most of us would agree to think this a nightmare solution. Why? Because there is a way of social life that cannot be reduced to the aggregate of the individual purposes that people want to attain, a way in which the exercise of authority over a territory should be evaluated irrespectively of its outcomes. For authority is not simply about outcomes. It is also about selfhood and relationship to others. There is an ideal of human selfhood that takes the perspective of every person's growing up and becoming part of a community that one has reason to think as one's "own" not only because that is where one has lived but because one has been a participant in its collective self-formation. This ideal of selfhood looks upon social life not just as a platform for carrying out objectives such as security and welfare, or obeying those in power - which is usually the same thing - but as participation in decision-making about matters such as what "security" and "welfare" might mean and which of their alternative forms of realization might be appropriate, with the knowledge and resources that one is ready to think authoritative in the community of one's interlocutors, irrespective of what others might think of them.

This ideal has had many names in the history of politics: republicanism, *virtù*, self-government, citizenship, "positive freedom", autonomy, "Roman liberty", and so on. Such expressions highlight the character of collective life as a *project* – a set of institutions or practices through which the forms of collective life are constantly imagined, debated, criticized and reformed, over and again. The wish to participate in such a project is defeated and lost in the replacement of sovereignty by management. The "reduction to purpose" cannot give an articulation collective self-formation in which one's preferences and "purposes" are formed and re-formed in collective decision-making processes and in which *they are not expected to remain stable over time*. The reduction assumes humans born ready-made, with stable and unchanging preferences, always acting in view of maximisation of utility. This is a familiar image, of course, and powerful interests have a stake in our adopting that image of ourselves. But it is a limited, passive and ultimately sad image.

"Sovereignty" is just a word, of course. Its meaning varies by reference to the conceptual scheme in which it is used. As such, it is no more or no less worthy of defence than any other word. But one of its meanings is the one it receives in polemical confrontations over the sense and direction of "globalisation" and "empire", over the emergence of transnational networks of private interest and the occupation of the spheres of politics by economic and technical vocabularies with their expert systems and embedded preferences. In such contexts sovereignty expresses frustration and anger about the diminishing spaces of collective re-imagining, creation and transformation of individual and group identities by what present themselves as the unavoidable necessities of a global modernity. Against those, sovereignty articulates the hope of experiencing the thrill of having one's life is in one's own hands. This is what sovereignty meant for those who struggled against theocratic rule in early modern Europe or invoked it to support de-colonization in the 20th century. Today, it stands as an obscure representative of an ideal against disillusionment with global power and expert rule. In the context of war, economic collapse and environmental destruction, in spite of all the managerial technologies, sovereignty points to the possibility, however limited or idealistic, that whatever comes to happen, one is not just a pawn in other people's games but, for better or for worse, the master of one's life.