# SOME REFLECTIONS ON "THE ROLE OF SOVEREIGNTY IN THE NEW INTERNATIONAL ORDER"

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I would like first to thank our Chair and the organizing committee for the invitation to join you here in Ottawa. The more I have thought about our panel's topic, the less sure I am that I have much useful to offer beyond the identification of some enduring puzzles signalled for our discipline by the term "sovereignty," puzzles pressing most insistently, it seems, at moments of disciplinary uncertainty like the present. Let me begin with a news story which caught my attention earlier this fall.

This past September 16, the New York Times framed its front page story on the opening of this year's General Assembly session as a "reprise of Rio ... pitting the United States and its European allies against developing countries." The "industrial powers," it was reported, (and I can only suppose here in Ottawa that this signified the U.S. more than its "European allies") intended to push for creation of a new international agency to "hear and assess criticism of the way governments treat the environment" which would involve "advocacy groups" as complainants and force governments to report on efforts to meet environmental goals. "Developing countries," the article continued, "are expected to insulate themselves against outside criticism, which they regard as interference in their internal affairs."

The story is so familiar --- another supposedly pragmatic issue framed as a conceptual debate between two camps about the degree of appropriate international interference with sovereignty. We might share some immediate and easy reflections:

-- The enduring power and presence of this frame despite recent claims to a renewal or transformation in international legal affairs.

-- North/South displacing East/West as the central axis in the post-Cold War world for deployment of familiar international legal polarities --- and as the site for familiar international legal mediations. I foresee factors to be weighed by shrewdly balanced institutions and accommodated in delicately negotiated multilateral instruments.

-- A legal issue about "interference in internal affairs" whose development in legal argument seems exhaustingly predictable, and which will bleed easily into political cliche:

-- Cliches like: "The South just wants to blackmail us for money;" "The North just wants us to pay for

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their sins;" "Protecting the South's `internal affairs' means a license for comprador polluters;" "The North never takes the South's sovereign claims seriously;" and so forth.

-- Finally, perhaps, a familiar progressive history: as a new problem begets a new solution, international law expands against a recalcitrant commitment to (here terms fuse) nationalism/formalism/sovereignty.

And what then about "sovereignty" in the "new international order?" Perhaps it has simply continued --- a conceptual frame for new problems, new players, new institutions. A thousand calls for its elimination over the last hundred years, its death announced a thousand times in speeches and articles about the "new" interdependence, still it continues to structure our legal positions, our political alliances, our discipline's imagination. And perhaps not by accident, for sovereignty remains the rallying call of the new, the avant-garde, the outsider. At once anachronism and aspiration, dead form and living project.

So the New York Times presents us with two puzzles with which we might begin. The first we might call the puzzle of sovereignty's two faces. Sovereignty has appeared in our discipline since the first as both the central problem --- conceptual and political --- to be overcome by international law, and as the central aspirational project to be completed, affirmed, achieved.

The second puzzle is the relationship between these faces, or, simply put, who is for which when? The relationship is not as simple as our progress narrative --- we had sovereignty, now we're getting rid of it, remaining troubled only by peripheral and sporadic recidivism --- might suggest. It's not that simple in part because North and South, center and periphery, have moved through sovereignty's faces in an apparent pas de deux. A simple story of disciplinary progress against sovereignty forgets sovereignty's continual appeal as a project for active liberation and aspiration. At the same time, it seems a puzzle that the "South" should want to be sovereign just when sovereignty has been pragmatically unpacked, diversified, deconstructed, rearranged, set aside, transcended, in the North. It is puzzling that those asserting their difference should so often sound simply out of date, that the South should cling to ideas undone in the North by, among other things, awareness of colonial excess and cultural relativism.

We might begin to unravel these contemporary puzzles by looking more carefully at sovereignty's role in our discipline over the past century. There is no doubt that sovereignty appears in our literature --- and especially in our theoretical and academic literature --- as an archaic nemesis for international law.

However we may disagree on other matters, as internationalists we are against sovereignty's association with nationalism, as lawyers we are against sovereignty as the politics of power and discretion, as pragmatists and modernists



we oppose sovereignty's association with conceptualism and formalism, as functionalists, sociological jurisprudes, realists, we oppose sovereignty for its connections to positivism. From the turn of the century, each generation of international lawyers has railed against the formalism of its predecessor in favor of an approach more attuned to the "facts." The old-timers, (like the outsiders), we are told, were too rigid, too formal, too committed to a sovereignty of abstractions. But however much we love to hate sovereignty, it reappears in our dreams as desire.

Let us look at another moment of disciplinary renewal --- that following the first world war. Rallying against what seemed an earlier international law wed to sovereignty, to positivism, to abstraction, to moralism, to an old and discredited order of empire and power politics, the most energetic renewalists launched a campaign for a new international law of technocratic government. My favorite manifesto for this new international order was delivered to the Grotius Society by Prof. Alvarez --- a middle aged Alvarez, established in Chile, but not yet the eminence grise of the PCIJ --- on April 16, 1929 under the title "The New International Law."

His diagnosis:

> As a result of the separation of the law of nations from politics, and particularly on account of the defective method of studying the former and the strictly juridical character given to it, it underwent a crisis at the end of the nineteenth century and fell into a certain discredit.

He mocks his predecessors in the Hague:

> [u]p to the present day, International Law has been considered an exclusively juridical science, ... its object was to establish the body of rules which nations must follow in their reciprocal relationships. As a consequence ... [a]ll that the publicists did was to clarify juridical rules by means of the history of diplomacy, and by practical applications usually jurisprudential in nature.

His cure is complex --- it will combine "critique" ("to show what is") and "reconstruction" ("to indicate what must be"). It's method will be "codification" --- and here we can begin to doubt. How might codification reduce law's abstraction? Through establishment of what Alvarez terms the "science of international law." And now we see the turn --- he is calling forth, not rejecting, positivism.

> This reconstruction must be accomplished with the aid of factors that are essentially scientific and positive.

And he does so in the name of a new voice, a third voice in international affairs, a voice which syntheses the differences between the anglo-saxon and continental approaches --- a voice of "American" international law: "In this work we must, above all, Americanise..."

What are we to make of this Chilean radical? His paper prompted strong, if extremely mixed, comment. One discussant suggested that "the tenor of the Paper was rather subversive of law than likely to establish it." For the discipline, it was a strong intervention, the new world asserting itself against the old in the language of method, positive science against juridical form, both faces of sovereignty mobilized by the margin against the center.

We might think for a moment more about sovereignty's aspirational project. It is a project we might trace historically --- if not since 1648, at least over the past couple of centuries. Beyond, or beneath the progressive development of pragmatic modern pluralism, recall the rise and fall of classical positivism. It's a familiar story with three phases --- traditional, modern, contemporary --- each registered in the language of sovereignty.

Recall the cozy nineteenth century doctrinal world of the Paquette Habana, of Wheaton and the Schooner Exchange, abruptly giving way to the scorched earth positivism of the Lotus case and the codifications of the nineteen twenties. And this substantively empty, if procedurally sophisticated frame in turn slowly dismantled by a more contemporary institutional pragmatism, moving towards the careful balancing of the North Sea Continental Shelf or Western Sahara cases. We might say that "sovereignty" carried the aspirations of each age --- great projects of order, peace, security, liberation, peaceful change.

For the traditional period the elements remain completely familiar. Sovereignty would formalize the boundary between international and municipal law --- allowing Marshall to resolve the conflict between French and American power in the Schooner Exchange legally, by reference to a stable boundary of public and private policed by sovereign consent and judicial deference. Sovereignty would stabilize the barrier between law and morality --- we might think again of Marshall, in The Antelope, distinguishing his own distaste for the slave trade from the legal requirements of an inter-sovereign order. In this world, sovereignty, elaborated legally, could stabilize the boundary between law and politics, contenting itself to police the boundaries of authorities absolute within their spheres.

This was the vision --- fragments still with us --- which was rejected by renewalists across the turn of the century. Sovereignty was to play a more modern role. Again, the elements are familiar: sovereignty as anti-clericalism, as the positive face for national renewal and consolidation in Europe and elsewhere. Think of the elaborate deferences of the Mexican-American claims of the twenties. Sovereignty permitting standardisation of international law's unit of account --- all states, objective territoriality, monopolies of force, localisations of force. And sovereignty as a leveler, expressing an aspiration to equality --- in the example become famous for its improbability, Russia and Geneva, sovereigns equal in the eyes of the law.

For the modern international lawyer of the twenties, sovereignty would permit the triumph of form over substance



--- an aspirational liberalism, cosmopolitan heritage of the Austo-Hungarian Empire. This would be the sovereignty of surfaces common to Kelsen and Freud. And on this basis would be built an international order of interchangeable parts --- sovereignty as standardisation, familiarization --- for which international law could become universal. One sovereignty/one international law. Gone is Wheaton's contentment that there should be more than one international law --- whether liberal or colonial, the modern international lawyer rejected Montesquieu's famous dicta that

> every nation has a law of nations --- even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace: the evil is, that their law of nations is not founded upon true principles.

Sovereignty was no longer the enemy of order, of system, of law, but its foundation. On sovereignty could be constructed a legislative method and a practice of codification --- through the doctrinal project of "sources," and nothing so preoccupied the PCIJ as the elaboration of sources doctrine. On sovereignty could be constructed a procedural public order, a neutral jurisdictional grid to replace the aspiration for substantive norms. This would be the enduring contribution of the Lotus case. It would structure the extreme deference to foreign sovereignty which, somewhat ironically, sociological jurisprudence would bring to the judicial solution of inter-sovereign conflicts in Holmes' American Banana or Pound's Salimoff. And finally, the moderns would tease from sovereignty a lexicon of substantive principles --- territoriality, good faith, and perhaps most spectacularly, a law of force, refining the efficiency of force, cabining it within the boundaries of sovereignty --- not to harm neutrals, respectful of private civilians, efficient to sovereign objectives.

Like the traditional order, this modern system has left us a residue of concepts, doctrines, practices --- some codified in the U.N. Charter (2.7), some reinterpreted in case law and multilateral treaty. But it was an order which began to erode as soon as it was erected. For modernism also brought a different sovereignty --- a sovereignty more open, the sovereignty of French sociological jurisprudence, later of British pragmatism, American realism. Perhaps also of socialism, national and otherwise. Sovereignty, like property, would become a "bundle of rights," demystified, available to be parcelled out, rearranged by law, managed by lawyers, technocrats, social engineers.

We might remember here one of our discipline's earliest modernists, Sir Geoffrey Butler, Fellow, Librarian and Lecturer of Corpus Christi College, Cambridge, writing in the British Yearbook of International Law in 1920 under the title "Sovereignty and The League of Nations." The topic was hardly novel --- more traditional international lawyers, also of Butler's generation, were struggling to relate this new, progressive invention to the traditions of the discipline.

Sir Geoffrey's contribution contrasts sharply with the more perplexed essay by a Mr. Corbett of All Souls College, Oxford,

writing four years later in the British Yearbook under the title "What is the League of Nations?" Corbett wants to be modern, hopes, almost pleads that modern international developments might be brought within the frame of international law. He begins with the observation that "the State is, by definition, the person par excellence in international law," and asks in contemplating the League "must we, like Oppenheim, despair of bringing it within the existing category or categories of international persons and accept the surrender of his sui generis?" Acknowledging a diversity of views on the singularity of state sovereignty as recently as the late 1800s, Corbett announces a twentieth century consensus that "men, sovereigns, and diplomatic agents are generally conceded to be objects rather than subjects of international law[.]"

Nevertheless, the League is a fact of life. Corbett will neither blink nor hesitate, for "no study of the international life of the present which does not establish and adhere to a definition of that institution, can be complete or clear, and no attempt at a legal definition can evade the question of personality." But how to think of personality? Unlike Oppenheim, he will not begin by affirming personality and then enumerate the League's rights and powers. He will look first to the rights and powers to see whether they amount to sovereignty and personality. And the League, he demonstrates, has many of the rights of sovereigns.

Still, something bothers him at every turn. For one thing, the League's quiver is not full, and there is no category of "partial sovereign." For another, something about each of the League's legal powers and rights seems likewise incomplete. The League has a "right of legation," but it is only a right --- it must be exercised in accordance with its delegation and legal object. The sovereign "right of legation" by contrast is a "fundamental right" ... which "may therefore be exercised for as many objects as may be attained by contract." In the Saar, the League seems to have been given the "rights of sovereignty." But, Corbett asks, "Do the rights, duties and powers attributed to the Governing Commission, the agent of the League, and to the League itself amount to sovereignty?"

> They do not. What Germany renounces is not the sovereignty, but the government of the Saar territory, and though government is indeed the chief attribute of sovereignty, there is a difference. Germany retains, at the minimum, the nuda proprietas of sovereignty as she retains the nuda proprietas of all her domanial property, except the mines, in the Saar.

Somehow the sovereign's right is more complete, more mysterious, expresses a residual discretion which cannot be fully captured by legal enumeration. The League is just a legal creation, at best a trustee of sovereignty, the state precedes the law and will outlive it. "The League ... takes the government in trust, presumably for the inhabitants; and that trust is terminable..." Corbett struggles to be hip, to assimilate the inventions of his time. Yet Butler's essay, to which he makes no reference, leaves him seeming positively square.



> Butler begins by leaving Austinian sovereignty behind him. For some years before the war it had become apparent that Englishmen were no longer content with a definition of sovereignty which shared with various other nineteenth century conceptions a simplicity the usefulness of which had been exhausted. The Austinian conception of sovereignty was essentially a product of its generation.

A product, Butler explains, of the effort to justify passage of the Reform bill. Legal conceptions, like political form "was adjusting itself to coincide with actual power." Butler proposes to begin elsewhere, with the insights of Gierke, Maitland and Duguit concerning corporate personality. Personality, he explains, is a matter of inherent rights, in the face of which the sovereign must, as any other entity, yield.

> The truth indeed would seem to be that in defining sovereignty we should be prepared to reconsider the connection which is now usually held to exist between sovereignty and fundamental rights. In a word, that we should be prepared to find in the pre-existence of lawful rights reason for the existence of sovereignty.

Butler, like Corbett, would analyze the rights of the League, but not as derivations from State sovereignty, leaving a residual outside the scope of law, but as expressions of the League's actual powers and prerogatives --- which comprise the League's personality. This is a vastly different sovereignty, one built upon the law as fact rather than the reverse. Butler recognizes the "anarchic" potential for this approach, eroding the stability of a single State sovereignty placed before the law, whose name would restrain the law.

> The promoters of this theory are careful to safeguard it from an anarchic implication. They profess to enrich the state by equating with obligations to the sovereign other loyalties, but they tie them all together by differentiating between the scope of each. ... It is not, therefore, an anarchic theory, but rather, constitutional in its intentions.

The result for international law would be a sovereignty of management, suited for social engineers and administrators. The result would be an asymmetric world of multiple voices and authorities. This sovereignty, re-arrangeable, fragmented, would provide the basis for functionalism, for institution building, for international administration and management, ultimately for referendums, devolution, integration, autonomy, multiple speeds, dozens of overlapping regimes.

For Butler, the aspirations for this new order are frankly political --- to open the possibility of a political order coming after the law rather than a legal order coming after political accord. He illustrates with a "metaphor."

> We have heard much in recent times from the psychologists as to the existence of a subconscious sphere whence flow into the consciousness of the

> individual motives and promptings, which in certain circumstances dominate his action.

The same, he contends, may be said of the international order of nation states.

> We may compare its political life to consciousness in which at different times different values and interests have played a dominating part.

In this conscious political sphere, government may act for good, for "self-development" and peace. There remain dangers --- religion, "racial promptings," and imperialism. But they will remain in the "unconscious" so long as the political order remains vigilant and committed to peace. His rethinking of sovereignty opens the way for a new form of international political activity.

So sovereignty has recorded the aspirations and constructive projects of several epochs --- traditional, modern, contemporary. And I'm sure we can expect a sovereignty of the post-modern, new aspirations for dialog or identity which will reject a sovereignty of management for a sovereignty perhaps of "difference." For sovereignty is a master narrative, but also the master narrator of difference, a past master of tolerance, openness, neutrality.

Nemesis and aspiration, archaic and utopian, what can now be said about the second puzzle? Why the feeling or myth of sovereignty as a negative force, suitable to primitives and peripherals? At the least we should perhaps acknowledge that when the first world invokes sovereignty, returns from contemporary narratives of management to insistence on more traditional sovereign prerogatives, we call it "realism." The same gesture in peripheral hands sounds formal, primitive.

Perhaps we can't go too far here, perhaps simply a hypothesis. Perhaps sovereignty, in the "new international order" as before, in each renewal, is simply that point where our aspiration to the real intersects with our aspiration for form, abstraction and control --- sovereignty as the name for two vanishing points, two ambitions which fold into one another, to be real and to map the real. And therefore sovereignty as a vocabulary of castigation and aspiration --- rooted in ambivalence, ambiguity, anxiety.

We could call it a shrewd balance, a recurring contradiction, an enduring problem at the core of the discipline, updated in each era. Between international law and international institutions, between the doctrines of statehood and the process of recognition, between the law of the state and the management of self-determination. Each generation telling the last (and the next) that they have strayed too far to forms and facts, and must renew the disciplinary ambivalence. Indeed, it is typical for the center to seize the avant-garde, to think others think simpler, unmediated thoughts. The old live in a world of forms, the young in a world of passion, the periphery in the past, the center in apology.



Sovereignty in this vision is a puzzle, name for an absent power, authority, origin, for resolution of a disciplinary ambivalence, that we might somehow be both with and against history. For us, sophisticates at the discipline's core, sovereignty remains in this moment of international uncertainty what it has been in others, a rhetorical toolkit, a glimmering and shifting style of presentation and address, at once fashionable and passe, fighting words and cliche.

Thank you.