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FILIPPO PALMISCIANO

FROM "SOVEREIGNTY AS CONTROL" TO "SOVEREIGNTY AS RESPONSIBILITY"

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Filippo Palmisciano

Contents

3

I. THE HISTORICAL EVOLUTION.

The notion of sovereignty in international law is almost identical to the full-scale history of international law itself. The Peace of Westphalia that brought the Thirty Years' War to an end in 1648 added a new chapter of State sovereignty to modern history of international law. Before the Thirty Years' War, which was partly a religious war, the European world of Christendom was largely a diarchic one of Pope and Emperor. The defeat of the Holy Roman Empire resulted in hundreds of relatively independent authorities with more or less equal sovereignty over their populations and territories, and theoretically, marked the birth of the modern *Nation-State* system. This meant the secular authorities taking over the religious power in the European political world, where a common European international public law or the "droit *public de l'Europe"* prevailed among the sovereign Christian European States. State sovereignty gradually grew stronger thereafter.

During the 17th and 18th centuries, the principle of exclusive territorial jurisdiction was developed. This eliminated the medieval medley of overlapping layers of jurisdiction in favour of linear territorial delimitations, for example, with regard to territorial waters, for which a three-mile zone was seen as a minimum standard. Thus State sovereignty meant a State's independence from and legal impermeability in relation to, foreign powers on the one hand and the State's exclusive jurisdiction and supremacy over its territory and inhabitants on the other. The legitimacy of the sovereign State was no longer considered to be religious but secular, its *ratio essendi* being self-assertion and survival.

As a corollary of such a notion of sovereignty, the principle of non-intervention in domestic affairs developed in parallel with it to preserve the State and jealously protect its' sovereignty. However, the idea of Hobbes (1588-1679) and Spinoza (1632-1677) that States were in a "state of nature" warring against each other under the circumstances of no superior authority existing above them led on to the subsequent theory of "absolute sovereignty". History shows us that this notion of absolute sovereignty was resorted to off and on during the 18th, 19th and 20th centuries

II. TRADITIONAL WESTPHALIAN SOVEREIGNTY CONCEPTS: OUTMODED AND DISCREDITED?

The traditional conceptions of sovereignity are under assault. The traditional nature of sovereignity is inevitably changing.

In our increasingly complex and interconnected world, problems emerge that cannot be solved by the actions of one nation. For those problems that exceed the scope and capability of individual governments, international law and international government become the only possible solution. If international law aligns with state interests, compliance is both expected and easy to explain. However, when a state is confronted with international law antithetical to their self-interest, nothing prevents the state from simply violating or withdrawing from the international law.

Global legalists believe that international law will solve complex global problems and that states will comply because a legalistic culture will establish faith in international law. American global legalists generally believe that "the very high value of international law creates a presumption against violating it that is so strong that, for all practical purposes, it may never be violated." European global legalists argue that "international law has value for its own sake ... and therefore it is wrong for states to evaluate potentially illegal conduct with a cost-benefit analysis that uses national interests as a metric."

Nevertheless, states do use self-interest as their standard when contemplating compliance. These interests are the result of a nation fulfilling its obligations to its citizens. "A state's interest is fixed - the product of the domestic political process, reflecting the values and preferences of the public in a democracy, and those of a narrower elite in an authoritarian system.

It's very important to underline that a state's ability to control its own territory without external interference is no longer sufficient to allow it to govern its people, provide security, economic stability and a measure of prosperity, clean air and water, and even minimum health standards. *States can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs.* The world has

5

indeed turned upside down; small wonder that the concept of sovereignty needs to be redefined!

III. DECOMPOSING THE CONCEPT OF SOVEREIGNTY AND INTRODUCING THE IDEA OF THE "EQUALITY OF NATIONS" THROUGH A CORPORATE RESPONSIBILITY.

Although much criticized, the concept of "sovereignty" is still central to most thinking about international relations and particularly international law. The old "Westphalian" concept in the context of a nation-state' s "right" to monopolize certain exercises of power with respect to its territory and citizens has been discredited in many ways (as discussed above), but it is still prized and harbored by those who maintain certain "realist" views or who otherwise wish to prevent (sometimes with justification) foreign or international powers and authorities from interfering in a national government's decisions and activities. Furthermore, when one begins to analyze and disaggregate the concept of sovereignty, it quickly becomes apparent that it has many dimensions. Often, however, the term "sovereignty" is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate's intent to fend off criticism or justifications for international "infringements" on the activities of a nation-state or its internal stakeholders and power operators.

In addition to the "power monopoly" function, sovereignty also plays other important roles. For example, the concept is central to the idea of "equality of nations," which can be abused and, at times, is dysfunctional and unrealistic, such as in inducing "consensus" as a way to avoid the "one nation, one vote" approach to decision making in international institutions. This approach can sometimes seriously misdirect actions of those institutions; but consensus, in turn, can often lead to paralysis, damaging appropriate coordination and other decision making at the international level.

The concept of equality of nations is linked to sovereignty concepts because

sovereignty has fostered the idea that there is no higher power than the nation-state, so its "sovereignty" negates the idea that there is a higher power, whether foreign or international (unless consented to by the nation-state). Sometimes the principle of noninterference on the nation-state level is closely linked to sovereignty, yet today's globalized world abounds in instances in which the actions of one nation (particularly an economically powerful nation) constrain and influence the internal affairs of other nations. For example, powerful nations have been known to influence the domestic elections of other nations and to link certain policies or advantages (such as aid) to domestic policies relating to subjects such as human rights. International organizations also partake in some of these linkages, as evidenced by the so-called conditionality of the International Monetary Fund (IMF). For these and other reasons, some scholars would like to do away with sovereignty entirely. Professor Henkin (widely considered one of the most influential contemporary scholars of international law and the foreign policy of the United States, was a former president of the American Society of International Law and of the American Society for Political and Legal Philosophy and University Professor emeritus at Columbia Law School) writes, "For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." But he continues his thought by saying, "To this end, it is necessary to analyse, 'decompose' the concept ....

"Sovereignty" implies a right against interference or intervention by any foreign (or international) power.

According to Abram and Antonia Chayes, "the new sovereignty" is the right and the capacity to participate in the international institutions that allow their members, working together, to accomplish the ends that individual governments could once accomplish alone.

As an example on how participate together in creating a common sense of a community, the Canadian government, together with a group of major foundations, established the International Commission on Intervention and State Sovereignty ("ICISS") composed of a distinguished global group of diplomats, politicians, scholars, and nongovernmental activists.

The main goal of the ICISS was to recognize the "state" as a responsible member of the community of nations.

Sovereignty is deeply interwoven into the fabric of international law, and to abandon,

wholesale, the concept of "sovereignty" requires very serious thought about a substitute that could efficiently fill the gaps left by its absence.

According to the ICISS, in signing the U.N. charter, there is no transfer or dilution of state sovereignty but there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.

The ICISS insists that an individual state has the primary responsibility to protect the individuals within it. However, where the state fails in that responsibility, a secondary responsibility falls on the international community acting through the United Nations.

International law has never existed in a vacuum (nothing comes from nothing). It reflects existing norms and mores, and illustrates the difficulty of constructing international order in a disordered world. The Westphalian system has provided the fundamental framework of order for over 3 centuries and has greatly influenced the development of international law. Over time sovereignty has ebbed and flowed, as prevailing practices and international politics shaped the behavior of the leading states. To the extent these practices and politics establish binding precedent, they help to define international law.

Although sovereignty has provided the dominant basis for international order, it has consistently adapted to accommodate evolving concepts of government, freedom, human rights, and the quest for predictability and stability, the historical attributes of international law.

There have been occasional claims for a fade-out of the Westphalian concept of State sovereignty, but the international community seems to continue to depend on it. The Marxist doctrine once predicted the fate of the concept of sovereign State, but those communist or socialist countries which adopted Marxist teachings and contemporary developing countries, while adopting Marxist teachings in their criticism of the traditional international legal institutions, have tended to reinforce their sense of sovereignty in their dealings with the established international order.

In the world of today, it is noticeable that Russia, in its post-Soviet era and especially under the current leadership, and China under its current leader are trending to be increasingly authoritarian in their oil/gas-motivated or military-geopolitical expansionist diplomatic offensives against their trading or neighbouring countries. Such authoritarian behaviour seems to be backed by a **strong sense of sovereignty**.

Similarly, we can take, for example, the case of an economically weak developing country. What such a country tries to do is to put up and keep its head above the strong economic waves of the world. In doing so, they are obliged to rely on their sovereignty, a sense of pride as a nation or something considered as equal to that of even the most powerful country. The idea of democracy is prevalent in the world of today, and a small or weak country is theoretically no less equal to the biggest or most powerful country. The theoretical basis for such an idea of democracy is the notion of sovereignty of the State in a world of juxtaposed large and small States.

Yet at the same time international law allows the State to stick to sovereignty in a variety of ways. It has allowed the State, for example, persistently to object to the formation of such a customary rule of international law as may run counter to its own vital interest. It does not, or cannot, effectively prohibit nuclear threat by Iran or North Korea in a world of general prohibition of the use of force under the United Nations Charter and customary international law. Above all, there is the unchanged concept of territorial sovereignty. When the UN Charter (Art. 2) says "territorial integrity" and "political independence" in connection with the prohibition of the use of force, these notions are not unrelated with territorial sovereignty. This is an integral part of the notion of the State as it is defined under the Montevideo Convention on Rights and Duties of States of 1933. The State defined therein is a sovereign entity. This is evidenced in the actual state of the international community: sovereign States generally refrain from interfering in the domestic affairs of the others. Whatever political regime and social institutions a State may have is a matter for it within its own territorial limits.

It does not follow, however, that sovereignty is absolute. Should it be absolute, it would deny the very idea of an international legal order of mankind. To rely on sovereignty as a fundamental attribute of the State does not necessarily entail exemption from international law either in the form of general international law or treaty obligations. Manifold legal obligations of States co-operating within a network of international instruments may restrain their freedom of action and consequently their exercise of sovereignty, but are in fact a form of exercising their sovereignty and may rather enhance the preservation of their legal status of sovereignty politically and economically. Such obligations neither deprive States of their sovereign status nor diminish it. It would be safe to conclude, as does Steinberger (Harvard

University Law School, Washington D.C. Lawyer) , that "Sovereignty in the sense of contemporary international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law."

IV. SOVEREIGNTY AMONG REGULATORY HARMONIZATION AND NETWORKED INFORMATION.

Writing in the mid-l990s, Chayes and Chayes saw the rise of what they called "the new sovereignty," which they defined as the *capacity to participate* in international institutions of all types. This is a positive conception of sovereignty, by which the principal attribute of statehood is the ability to join in collective efforts to address global and regional problems.

In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, "connection to the rest of the world and the political ability to be an actor within it." However paradoxical it may sound, the measure of-a state's capacity to act as an independent unit within the condition that "sovereignty" purports both to grant and describe-depends on the breadth and depth of its links to other states: This is what Kal Raustiala (Associate Vice Provost, Professor of Law, Director UCLA Ronald W. Burkle Center for International Relations) calls a "sovereignty-strengthening" theory.

Sovereignty itself refers to the "supreme authority and control over policy" within any delimited political space. To exercise such authority and control in a world that has become so interconnected that people, politics, and pathogens are virtually able to disregard borders requires institutionalized cooperation and intervention.

The best illustration of-the new sovereignty can be found in the operation of "government networks". Networked threats require networked responses.

At the same time, understanding the many different ways that government networks

exercise power, or, alternatively, the many different kinds of power that government networks exercise, opens the door to more imaginative thinking about how to design the institutions in which sovereign states have the right and should have the capacity to participate, subject to certain conditions.

According to Anne Marie Slaughter, Professor of Politics and International Affairs at Princeton University and formerly Dean of Princeton's Woodrow Wilson School of Public and International Affairs, these different networks should be divided into three broad categories: **harmonization networks**, **enforcement networks**, and **information networks**. Each type of network can solve different problems, although in practice their activities overlap considerably. All three types of networks exercise both hard and soft power.

As defined by Joseph Nye (an American political scientist and former Dean of the John F. Kennedy School of Government at Harvard University), hard power is "command power that can be used to induce others to change their position." Soft power, by contrast, flows from the ability to convince others that they want what you want. As Joseph s.Nye, Jr. said: "It Co-opts people rather than coerces them." Information, persuasion, socialization are the keys.

Kal Raustiala's study of government networks among securities, antitrust, and environmental regulators leads him to conclude that networks promote regulatory export from stronger to weaker states. This transfer of rules, practices, and whole institutional structures, in turn, "promotes policy convergence among states,"

Harmonization networks exist primarily to create compliance. Enforcement networks encourage convergence to the extent that they facilitate cooperative enforcement. Information networks promote convergence through technical assistance and training, depending on how they are created and who their most powerful members are. Raustiala, also, offers a number of examples of regulatory export in the securities, environmental, and antitrust areas.

According to one securities regulator he interviewed, a prime outcome of the U.S. antitrust authorities which have explicitly pushed a transgovernmental network approach to global antitrust regulation as an alternative to periodic efforts by other countries, is to push for a multilateral treaty regulating competition policy. These efforts have repeatedly stalled, although World Trade Organization members did agree at Doha in 2001 to begin

negotiations on a common framework for regulating competition. At the same time, a senior Bush Administration Official proposed the creation of an International Competition Network, a forum for countries to "formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement." The network "provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns." Its members, including regulatory authorities from more than sixty-five states, held its first conference in September 2002 in Naples, Italy, and its second in June 2003 in Merida, Mexico.

Initial topics of discussion included "merger review in a multi- jurisdictional context, the role of competition advocacy, and how to create effective capacity building programs for agencies in developing and transition economies.

The United States has historically favored the network approach precisely because it has differed substantially with many other countries, including some of its most important trading partners, on the need for and the substance of a vigorous antitrust policy, and thus had much to lose in multilateral negotiations.

Raustiala borrows from the economic theory of "network effects" to demonstrate that as with a network of telephones or computers, each participant in a regulatory network derives greater benefits from the network as the network expands. Both "powerful and weak jurisdictions" have an incentive to join regulatory networks and "engage in the export and import of regulatory frameworks."

Convergence through regulatory export assumes a deliberate effort to create convergence, whether successful or not. An even simpler way to understand the power of government networks in promoting convergence is their role as distillers and disseminators of credible information in a world of information overload. Too much information translates into what Keohane and Nye call **"the paradox of plenty. A plenitude of information leads to a poverty of attention."** The ability to provide credible information and an accompanying reputation for credibility becomes a source of power. Many NGO networks establish credibility by creating a community of like- minded professionals who can frame a particular issue, create knowledge around it, and set the agenda for how to pursue it. Government networks can do the same thing. It is also extremely true that when states diverge, either on regulatory standards, legislative prohibitions, or legal doctrines, they can do so fortuitously or

deliberately. Most divergence is a function of cultural, historical, or political differences, or means that one nation chose one kind of typewriter keyboard and another chose another and those choices then dictated different typewriters, computers, personal desk assistants, etc.   Divergence can also be deliberate and informed. When a nation has the option of harmonizing its rule, standard or decision to converge with other nations but *chooses not to,* it is making a statement about the uniqueness of its national tradition or the intensity of its political preferences.

Recalling Abram and Antonia Chayes, they have developed a "managerial theory" of compliance with international rules that locates problems of noncompliance as much in lack of capacity to comply as in lack of will. They reject a "criminal law" model of international order, based on the threat of external sanctions, insisting instead that actors in the international system have a "propensity to comply." Further, "by facilitating the export of ideas, technologies, and procedures," government networks must help spread "extra-legal cooperative forces" that convince states that it is in their best interests to comply with a particular legal regime. Overall, by harnessing hard power, building compliance capacity, and diffusing ideas and technologies around the world, government networks are likely to strengthen the rule of international law in ways long demanded and expected of traditional international institutions.

- **Regulation by Information**

Regulation by information is government soft power. By changing the information available to others, you convince them that they want what you want; the key is access to credible information.

In the international arena, where government must become governance precisely because of the absence of any centralized authority to exercise command and control power, regulation by information is very promising. It holds out the simultaneous prospect of the effective exercise of power without hierarchy and of maximum diversity within a basic framework of uniformity. If governments can provide information to help individuals regulate themselves, then government networks can collect and share not only the information provided but also the solutions adopted.

A principal reason that governments are experimenting with regulation by information

13

domestically, is their perception that problems and contexts are changing faster than centralized authorities could ever respond. They also seek to empower active citizen participation in addressing issues requiring regulation of some sort, although not necessarily formal legal rules. This system will lead to a "collective learning forum" in which different categories of individuals or states can access the available shared information that will inevitably generate several forms of dialogue.

The concept of regulation as a highly flexible process of collective learning through dialogue, is precisely what animates the United Nations' new effort to improve corporate behavior around the world through partnerships with U.N. agencies and officials. An impressive example of what already exists and what is aiming to ensure a deep cooperation between international agencies, public and private parties and the U.N, is the Global Compact.

The Global Compact brings companies together with U.N. organizations, international labor organizations, NGOs, and other parties to foster partnerships and to build "a more sustainable and inclusive global economy." It asks, in the words of U.N. Secretary General Ban Ki-moon, companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business." It also aims to contribute to the emergence of "shared values and principles, which give a human face to the global market." It represents an important occasion to establish an international dialogue among participants from all sectors, the UN, labor, and civil society organizations.

The dialogue, in turn, is supposed to generate broader, more consensus- based definitions of what constitutes good practices than any of the parties could achieve through unilateral declarations. The practices identified, along with illustrative case studies, are then made available both to members of the Global Compact and to the broader public through an "**on-line learning bank**."

If it works as designed, the Global Compact will be a model of collective learning in action. "The hope and expectation is that through the power of dialogue, transparency, advocacy and competition good practices will help drive out bad ones." The deep assumption here is that the simple provision of information will trigger a powerfully dynamic process. This is governance by dialogue.

Finally, it's important to underline that the concept of a "learning forum" abolishes hierarchy in the learning process. Regulation through information establishes a very different relationship between the regulator and the regulated, one less of command than of facilitation. Individuals can organize themselves in multiple networks or even communities to solve problems for themselves and for the larger society. These networks or problem solving groups are not directly connected to the "government" or the "state," but they can nevertheless compile and accumulate knowledge, develop their problem solving capacity, and work out norms to regulate their behavior. The importance of this activity is increasing, precisely because the traditional separation between the formulation and application of rules is being dissolved by technology, a development that is in turn undermining "a shared common knowledge basis of practical experience. Both domestic and transnational, face a continuous stream of problems and require a continuous stream of knowledge both about each other and about their counterparts in other networks. They are in "permanent, polyarchic dis-equilibrium," which they seek to overcome through solving problems and pooling information. The state's function is to manage these processes, rather than to regulate behavior directly. It must help empower individuals to solve their own problems within their own structures, to facilitate and enrich direct deliberative dialogue. It must also devise norms and enforcement mechanisms for assuring the widest possible participation within each network, consistent with its effectiveness. These ideas add up to a new conception of democracy, or self-government. It is a horizontal conception of government, resting on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by. It is a conception in which uncertainty and unintended consequences are facts of life, facts that individuals can face without relying on a higher authority. They have the necessary resources within themselves and with each other. They only need to be empowered to draw on them.

V. WHAT TO DO.

In such a world, government networks would not only produce convergence and

informed divergence, improve compliance with international rules, and enhance international cooperation through regulation by information. They would also regulate themselves in ways that would deliberately improve the governing performance of both actual and potential members; create fora for multilateral discussion and argument by all their members; and create opportunities to harness the positive rather than the negative power of conflict.

How can government networks regulate themselves in ways that will strengthen world order? They can constitute themselves not only as networks devoted to specific substantive activities, but also, and simultaneously, as professional associations of regulators, judges, legislators, and even heads of state and ministers dedicated to upholding the norms and ideals of their profession. They can cultivate the concept of governance as a profession, exercised through legislation, regulation, enforcement, provision of services, and dispute resolution. Like a bar association for lawyers or a medical association for doctors, a network of judges, legislators, or regulators can provide both a focus of substantive learning and information exchange and a source of education in and enforcement of professional ethics.

"Many international government networks have the descriptive characteristics identified as key to group solidarity: repeated, frequent interaction; shared values; small size; and opportunities for informal sanctions or rewards." They thus have the potential, in Timothy Wu (professor at Columbia Law School)'s phrase, to create "order without international law."

Government networks that are self-consciously constituted as mechanisms of global governance can inculcate habits of discussion as part of a collective decision making process. Networks that enforce network norms through the mechanisms just discussed will create favorable conditions for the emergence of a reasoned consensus to many problems. This process will produce better quality decisions than are likely to result from interest-based bargaining; adherence to prevailing political, economic, or social norms; or acquiescence to the will of the most powerful state or states. James Fearon (Professor of Political Science and Chair of the Department of Political Science at Stanford University) argues that any group of people can have at least six reasons to want "to discuss matters before making a collective decision."

A final important dimension of this kind of power is its dynamism. Harking back to the concept of embracing uncertainty by continually experimenting and assessing the results, it becomes apparent that the very tentativeness and informality of "rolling codes of best

practices" enhance their persuasiveness. Results are rarely fixed for long; they are instead presented and debated as the latest best answer. A network of policymakers or regulators or judges thus becomes a rolling forum for "communicative action," generating ideas and prototypes that persuade only until a better one comes along.

Government networks that encourage and even require multilateral discussion prior to all decisions taken are likely to produce more creative, more reasoned, and more legitimate solutions to many of the problems that members face. Many problems will not be suitable for resolution in these fora: problems involving vital national security interests, for instance, or touching on issues of high domestic political sensitivity. Yet others will: problems ranging from how best to balance the competing constitutional demands of liberty and order, how best to regulate online sales of securities over the Internet, how to mesh antiterrorism legislation to minimize loopholes while maximizing national autonomy. In many of these cases, no one solution may prove "the best" for all nations involved, but a set of preferred possibilities can likely be identified. And even in those cases where contending interests are too strong to allow a reasoned outcome, present conflict can be transformed into the "stuff" of future compromise.

If the new sovereignty is the "right way ahead" and the capacity to participate in international regimes, networks, and institutions, accompanied by a responsibility to fulfil1 certain minimum requirements of membership, then becoming or being a sovereign state would mean the participation of as many government officials as possible in plurilateral, regional, and global government networks.

This proposal may seem fanciful, or even frightening, if we think about sovereignity in the old way as, the power to be left alone, to exclude, to counter any external meddling or interference. Such sovereignty is best exercised by states acting as unitary actors. But if sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist, then its devolution onto ministers, legislators, and judges is not so difficult to imagine.

If sovereignty were still understood as exclusive and impermeable rather than relational, strengthening the state would mean building higher walls to protect its domestic autonomy. But in a world in which sovereignty means the capacity to participate in cooperative regimes in the collective interest of all states, expanding the formal capacity of

17

different state institutions to interact with their counterparts around the world means expanding state power. Even in the conditions of a very changed world, sovereignty would once again mean what it should mean most fundamentally: a state's right and duty to protect and provide for its people.

If I may revert to Steinberger again, the contemporary international society's "basic unit is still the sovereign State, in most cases more or less of the nation-State kind, strictly maintaining sovereignty as a principle of international law." "The concept of sovereignty reflects the fact that contemporary international law is a legal order predominantly between coordinated, juxtaposed States as its typical subjects. The basic instruments of international organizations, innumerable multilateral and bilateral treaties, as well as many State constitutions again and again refer to the external sovereignty of States."

What does "sovereignty," as practically used today, signify?

I offer a hypothesis: most (but not all) of the time "sovereignty" used in current policy debates, actually refers to questions about the allocation of power; normally "government decision-making power."

Another way to articulate this idea is to ask whether a certain governmental decision should be made in Milan, Rome, Naples, Palermo, Catania or even a smaller subnational unit of government. Or, when focusing on the entire planet, should a decision be taken in Geneva, Brussels, Berlin, New York, Washington D.C., Munich, Amsterdam, London, Madrid, Moscow, Tokyo or a smaller unit?

There are various other dimensions to the "power allocation" analysis. Those mentioned above could be designated as "vertical," whereas there are also "horizontal" allocations to consider, such as the separation of powers within a government entity (e.g., legislative, executive, judicial) and division of power among various international organizations (e.g., the WTO, the International Labour Organization, the IMF, the World Bank).

The answer to the question of where decisions should be made will differ for different subjects. One approach may be appropriate for fixing potholes in streets or requiring sidewalks, another for educational standards and budgets, yet another for food safety standards, and still another for the rules necessary for an integrated global market to work

efficiently in a way that creates more wealth for the whole world.

Many reasons could be given for preferring an international-level power allocation, including what economists call "coordination benefits," sometimes analyzed in game theory as the "Prisoners' Dilemma." In this situation, if governments each act in their own interest without any coordination, the result will be damaging to everyone; whereas matters would improve if states assumed certain, presumably minimal, constraints so as to avoid the dangers of separate action. Likewise, much has been said about the "race to the bottom" in relation to necessary government regulation and the worry that competition between nation-states could lead to a degradation of socially important economic regulation.

Advocates of subsidiarity (the principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It ensures that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at Union level is justified in light of the possibilities available at national, regional or local level), a concept much discussed in Europe, note the value of having government decisions made as far down the "power ladder" as possible. Historically, subsidiarity derives partly from Catholic philosophy of the nineteenth and early twentieth centuries. Among the various policy values that it involves, one of the basic ideas is that a government closer to the constituents can better reflect the subtleties, necessary complexity, and detail embodied in its decisions in a way that most benefits those constituents. As one politician has said, "Those who know your name are most likely to know your needs."

At times, the controversy over the level on which to place a government decision is truly a controversy over the substance of an issue. Thus, national leaders will use international norms to further policy what they feel is important to implement at their own level but is difficult to do because of the structure of their national constitution or political landscape. Likewise, other leaders may want to retain power over certain issues at the national or even the subnational level, because they feel they have more control at those levels in pursuing the policies that they favor. These issues do raise the question of attempts by power elites to bypass democratic procedures that annoy them. Another policy that can urge allocation both up and down the ladder is the policy of preventing a governmental institution from misusing power.

There are a series of factors that policymakers trying to develop an appropriate

19

allocation of power, must consider about international institutions:

(A) Treaty rigidity, namely, the problem of amending treaties and the tendency of treaties to be unchangeable, although actual circumstances (particularly in economics) are changing very rapidly.

(B) International organization governance questions, particularly with respect to choosing officials of the international organization. Governments tend to push favored candidates, to claim "slots," and to disregard the actual quality of the individuals concerned or the nature of the tasks they are to assume.

(C) International organization governance in the decision-making processes. What should the voting structure be? Should consensus be required? What are the dangers of paralysis because of the decision-making procedures? What are the dangers of decision making procedures that are likely to be considered illegitimate or out of touch with reality?

(D) International diplomacy techniques. To what extent is it appropriate or necessary that there be special privileges for diplomats, such as tax freedom and other immunities? Do such privileges in the context of international organizations' decisions tend to result in actions that are out of touch with citizen beneficiaries?

The detailed questions on power allocation leave open perhaps the most important question, Who (what entity) should decide the power allocation? It is possible (and probable) that today many will say that the nation-state will decide in each case, for itself, whether it is willing to allocate "its own sovereign power" either up the scale or downward. (In the latter case certain checks are likely to be retained in the hands of the sovereign.) After all, for any treaty-based rule, it is plausible to say that each nation will decide, and if it decides to accept the treaty obligations, its consent has legitimized its obligation.

The issue of customary international law is more ambiguous, of course, and thus, often more controversial. Certainly, rather extravagant claims are frequently made about what new customary norms have come into being, as compared with the traditional international

rules of such norm formation (e.g., practice plus opinio juris), which more strongly emphasize state consent. Questions arise in either case. Is the ultimate decision about allocation put in the hands of an international juridical or diplomatic institution? Does such an institution have certain biases or conflicts of interest?

In reflecting on the experience of many national or international human institutions, one finds there is nothing new in the examples mentioned above. What is new, however, is the degree to which these international institutional circumstances have an impact on nation-state governments trying to deliver the fruits of their important achievements to their constituents.

The other side of these considerations is that they may be outweighed by the "coordination" benefits realized through the cooperative action of international institutions. Indeed, in this context scholars and other observers have argued that the nation-states participating in such institutions have enhanced their sovereignty by leveraging it through joint action.

VI. CONCLUSION, PERCEPTIONS AND REFLECTIONS: CHANGING FUNDAMENTALS OF INTERNATIONAL LAW.

The proposition tentatively put forth in this thesis is that the "core sovereignty" concepts, which mostly involve the nation-state's monopoly of power and its logical derivative of state-consent requirements for new norms, the power allocation analysis, when explored more profoundly, can help overcome some of the "hypocrisy" and "thought-destructive mantras" surrounding these concepts so that policymakers can focus on real problems rather than myths.

Policymakers should always weigh and balance the various factors to reach better decisions on questions such as accepting treaty norms, dispute settlement mechanism and results, necessary interpretive evolution of otherwise rigid treaty norms, and in some cases new customary norms of international law.

Such an analysis recognizes that there are desiderata in sovereignty concepts other than the "core" power allocation issues, and that even as regards the core issues there are clearly cases that the world must resolve by explicit (or well-recognized implicit) departures from traditional sovereignty concepts. Taken together, these considerations can be labeled "sovereignty-modern" and suggest that further analysis and discussion would help build some new "handholds on the slippery slopes" looming just ahead of certain issues not resolved by traditional sovereignty, as the world faces major risks of uncertainty, miscalculations in diplomacy, and overreaching by certain nation-states.

The follow-up question becomes: What are some theories or principles that could reach beyond the traditional sovereignty parameters but offer some principled constraints to avoid the risks just listed? Several can be mentioned.

One possibility would be to recognize certain international institutions as the legitimate entities to decide on some of these parameters. This approach would require that such an institution seriously discuss these limits and modes of activity (without a tilt toward that institution's

"turf "), and that it develop these limits with enough precision to be useful to national and international decision makers. This seems to be more carefully done in juridical institutions, which might well be an argument for more reliance on such institutions. However, "checks and balances" are needed regarding those institutions, lest they go wrong through faulty analysis, lack of adequate empirical information, or their frequent remoteness from the real world activities that are relevant to reasoned and just opinions.

Another possibility is to follow a chain of reasoning, developed by some scholarly analysis, that traditional "sovereignty" concepts themselves must evolve and be redefined. This avenue might also be pursued by juridical institutions, with the same caveats as mentioned above and throughout this article. "Sovereignty of people," rather than governments, is sometimes mentioned in this context.

Another, and probably more heroic, possibility is to develop a general theory of sources of international law based on what some authors have called the "international community." To some this implies a sort of "acquis communautaire. " It could well imply participation by nongovernmental persons and entities, and it could embellish the more traditional concepts of "practice" under agreements or opinio juris , to stretch those frontiers. The risk and

problem is the imprecision, and thus the controversy, that can develop about the use of this approach in specific instances. It has been invoked in some situations, such as the Kosovo crisis, with the phrase "overwhelming humanitarian catastrophe." (United Nations Security Council Meeting 3988 of the 23rd March 1999)

Yet another approach is to use the concept of "interdependence," often most associated with economic policy and activity, to justify certain new norms. In many of these cases, this concept can probably be used in tandem with more traditional sovereignty and nation-stateconsent approaches to persuade nations to give such consent.

The approach of this paper has been to respond to the many extensive challenges and criticisms of the concept of "sovereignty" by urging a pause for reflection about the consequences of discarding that concept in broad measure. Since sovereignty is a concept fundamental to the logical foundations of traditional international law, discarding it risks undermining international law and certain other principles of the international relations system. Doing so could challenge the legitimacy and moral force of international law, in the sense of what Professor Thomas M. Franck (lawyer, law professor, and expert on international law, New York University) terms the "compliance pull" of norms backed by characteristics of legitimization. It seems clear that the international relations system (including, but not limited to, the international legal system) is being forced to reconsider certain sovereignty concepts. But this must be done carefully, because to bury these concepts without adequate replacements could lead to a situation in which pure power prevails; that, in turn, could foster chaos, misunderstanding, and conflict, like Hobbes's state of nature, where life is "nasty, brutish, and short." In the alternative, this vacuum of legitimization principles could lead to greater aggregations of hegemonic or monopolistic power, which might not always be handled with appropriate principles of good governance. Thus, one of the recommendations of this paper is to disaggregate and to analyze: breakdown the complex array of "sovereignty" concepts and examine particular aspects in detail and with precision to understand what is actually at play. A major part of this approach is to understand the pragmatic functionalism of the allocation of power as between different levels of governance entities in the world. To the extent feasible, this should be done in a manner not biased either in favor of or against international approaches. Indeed, as time moves on and the world continues to experience trends toward interdependence and the

need for cooperative institutions that can also enhance peace and security, the substitute for portions of nation-state sovereignty will probably be international institutions that embrace a series of legitimizing "good governance" characteristics, such as some of those recommended by Robert Keohane (Professor of Political Science at the Woodrow Wilson School at Princeton University) and other thinkers and philosophers. Among those characteristics one can expect a broader set of participants than just nation-states, but also nonstate and nongovernmental bodies and individuals, including economic (business) actors; moral, religious, and scholarly entities; and international organizations. Those characteristics will likely include elements of "democratic legitimization" and some notions of "democratic entitlement," not only for nation-states, but also for international institutions. Validating characteristics will also likely include elements of efficiency and the capacity to carry out appropriately developed institutional goals and to build in techniques for overcoming "treaty rigidity" so that the institutions can evolve to keep up with the changing world. It is ever more probable that a juridical institutional structure of some kind will be seen as a necessary part of any such international institution, and that the use of force or other concrete actions impinging on local societies will be constrained by the institutional and juridical structures. This is, in essence, a "constitutional" approach to international law. Thus, international lawyers must "morph" into constitutional lawyers.

To cope with the challenges of instant communication, and faster and cheaper transportation, combined with weapons of vast and/or mass destruction, the world will have to develop something considerably better than either the historical and discredited Westphalian concept of sovereignty, or the current, but highly criticized, versions of sovereignty still often articulated.

That something not yet well defined, can be called "sovereignty-modern," more an analytic and dynamic process of disaggregation and redefinition than a "frozen-in-time" concept or technique. It needs to be considered a valuable analytic tool, but not one that can always lead to an appropriate resolution to such problems. When used in tandem with other policy tools, including realistic appraisals of the political and legal feasibility of various policy options, it can be a valuable means to sort through elaborate and complex policy "landscapes." There is much thinking yet to do, and no one ever said it was going to be easy.

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