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Aspects of Sovereignty

Sino-Swedish Reflections

Edited by Per Sevastik

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the History of International Law, 2011); *International Energy Law: Has It Emerged as a New Discipline of International Law?* (3 *AALCO Quarterly Bulletin*, 2007); *On Legal System of Clean Development Mechanism in China and Its Perfection* (9 *Oil, Gas & Energy Law Intelligence*, 2011); *China and International Protection of Copyright* (3 *Journal of World Intellectual Property*, 2000).

List of Abbreviations

ACDDI	Action Committee for Defending the Diaoyu Islands
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AU	African Union
BITs	Bilateral Investment Treaties
CAF	Confederation of African Football
CAFTA	Central America Free Trade Agreement
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CECAFA	Council for East and Central Africa Football Associations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CREC	China Railway Engineering Corporation
CRPD	Convention on the Rights of Persons with Disabilities
DRC	Democratic Republic of Congo
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
EURATOM	European Atomic Energy Community

FCN	Friendship, Commerce and Navigation Agreements
FET	fair and equitable treatment
GA	General Assembly
GATT	General Agreement on Trade and Tariffs
HKSARG	Hong Kong Special Administrative Region Government
HRCee	Human Rights Committee
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
ITU	International Telecommunications Union
MAI	Multilateral Agreement on Investment
MERCOSUR	The Southern Cone Common Market
MFN	most-favoured-nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of the Islamic Conference
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
OSCE	Organization for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRC	Peoples' Republic of China
SIIS	Shanghai Institute for International Studies
TRIMS	Trade-Related Investment Measures
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	United Nations Security Council
UPR	Universal Periodic Review
US	United States
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WWI	World War One
WWII	World War Two

Introduction

Per Sevastik

This is probably the first book in English on a topic concerning aspects of sovereignty involving Chinese and Swedish academics. Why a study on this topic may be an appropriate question to ask. Having had the opportunity of being a visiting professor at Peking University Law School for a number of years and also having had the opportunity to lecture at numerous other universities in China in the areas of public international law and international human rights law, I came to realise that the starting point for a Chinese scholar on the issue of sovereignty is not necessarily the 1648 Peace of Westphalia, which it is for most Western scholars. This might be a truism, but it is hardly ever discussed, at least not from a Western perspective: it is just being taken for granted that this is the case. Chinese and Western scholars have simply different starting points and different cultural-historical trajectories that we have to take into consideration and understand when we talk about issues relating to sovereignty. We all base our views on the historical and cultural background we have as our conscious or sub-conscious starting point for reflections on any topic. Only when we understand each other's views can we create a common ground and take a possible second step, whatever that may be. This book can therefore be seen as a first step that discusses different aspects of sovereignty by Chinese and Swedish scholars.

We can state already here – even without having to refer to the philosophy concerning the concept of sovereignty – that the concept generally has been in a state of flux, changing its features continuously. Overall

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the greatest impact on it has, however, been the effects of globalisation. The essence of globalisation as it is commonly described is the free movement of people, goods, services and capital across traditional national borders. Globalisation expanded dramatically because of the economic success of the free-market economies of the West, states that traded and invested heavily, at first only among themselves but later more and more also with other states. Other countries that saw this success decided to follow the Western path. China, other countries in the East and Southeast Asia, India, Latin America, and former communist Europe all entered the globalised economy, which can be seen as the driving force that has blurred the traditional boundaries of sovereignty. It is against this world situation that different scholars from different backgrounds examine the meaning of sovereignty.

The current concept of *sovereignty* and the formation of the notion nation state are often traced back to the 1648 Peace of Westphalia when the foundation of a new system was recorded, based on a plurality of independent states, recognising no superior authority over them. This became the basis upon which the right to solve domestic or international legal problems was founded upon – differently put, it created the foundation for jurisdiction as we understand it, having absolute power within their territory. State sovereignty was based on territorial jurisdiction, the principle of non-intervention and state consent and customary international law as the sole sources of international law. Sovereign equality between states as well as the principle of non-interference in any other state's domestic jurisdiction were also later inserted into the United Nations (UN) Charter 1945 as one of the fundamental principles of international law and have since then been echoed by governments as being one of the cornerstones of the international community.[1]

However, the modern concept of sovereignty was introduced in China as late as in the 19th century. It is with the unequal treaties that the Western concept of sovereignty was forcefully presented to the Chinese in 1842.[2] From the outset it was not a question of introducing principles

1 UN Charter, Articles 2(1) and 2(7).

2 The Treaty of Nanking, 29 August 1842, Peace Treaty between the Queen of Great Britain and the Emperor of China. *See also* A. Peters, 'Unequal Treaties', in *Max Plank Encyclopedia of Public International Law*, <www.mpepil.com>.

and rules of international law between equal and sovereign states but rather based on inequality, between on the one hand a rising superior military power on its way to rule the world, the British Empire, and on the other hand an increasingly weakened Chinese empire in decline, the Middle Kingdom (Chinese: *Zhongguo*), where its traditional Sino-centric world order was the tribute system.[3] The tribute system cannot either be said to be constructed on equality between states, because China considered itself to be a superior "heavenly" empire where all other states were subordinate, based on a Confucian father-son relationship. However, a significant difference between the Chinese system and the Western lay in that the Chinese view was purely a ceremonial and ritual one, lacking any sign of hegemonic aspiration. While the Western system on the other hand was explicitly said to be based on sovereign equality, equality between non-European states was disregarded from the outset. This was seen and exemplified in their relations to their colonies, which were exploitative and where the overall approach was hegemonic.[4] All colonised countries' sovereignty was partially or totally disregarded by the Western countries. In the wake of launching the Western model of sovereign equality, a series of events followed where racial discrimination, economic exploitation, apartheid, territorial dispossession and cultural subordination can be seen as natural parts of the Western expansion.

The idea of sovereignty and territorial jurisdiction did not exist in traditional China. Treaties, as they were imposed on China, came to represent a system of restrictions on a state's sovereignty based on a state being militarily superior and having the power to forcefully impose such treaties on a militarily inferior state. The main characteristics of the unequal treaties regime were simply based on coercive force and the total ignorance of sovereign equality between states.[5] China ended up being degraded as a nation and annexed by the foreign powers giving it "semi-colonial" status.[6] The export of opium, as a way of opening up China, and

3 *See* I. C. Y. Hsü, *China's Entrance into the Family of Nations* (Harvard University Press, 1960) pp. 4 *et seq.*

4 *Ibid.*, p .5.

5 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) pp. 72–74.

6 Peters, *supra* note 2; M. Shaw, *International Law*, 5th edition (Cambridge University Press, 2003) pp. 37–38.

the socioeconomic effects it had on the Chinese society, combined with an overall period of 'humiliation', characterised an era that lasted for more than 100 years. During this period China had no other choice than to be forced into five wars, and after each war that China lost it was forced to conclude unequal treaties.[7] The unequal treaties made China pay indemnities; introduced the system of extraterritoriality including the foreign courts and the mixed court in Shanghai; fixed low tariffs provided by treaties, foreign controlled settlements and concessions at the trade ports; leased territories as disguised territorial secession; foreign controlled Legation Quarters and legation guards at Beijing; foreign troops at Tianjin and at points along the railway from Beijing to the sea; foreign gunboats and naval vessels at coastal ports and on the Yangzi River; the right to issue currencies and the right of missionaries to settle, acquire real property and proselytise throughout the country.[8] At the same time, by including most-favoured-nation clauses, which were unilateral, unconditional and broad in scope, all the above special rights and privileges were extended to all countries which were in a treaty relation with China. Swedish extraterritoriality in China was conceived in 1847.

Both when the Republic of China in 1911 was established and when the People's Republic of China (PRC) was created in 1949, initially sovereignty was used as a political tool to restore "national strength" and safeguard political independence, rather than a concept that had any legal connotations. In its views on international law, learned from translating Vattel and Wheaton, the Chinese perspective naturally focused on the topic of sovereignty.[9] Ultimately it was used as a shield to defend China against Western intervention in their domestic affairs.[10] The concept was, and is still today, composed of a number of elements where patriotism and nationalism are essential components together with political ideology stemming from communist party rhetoric and anti-Western propa-

7 *See* Wang Tieya, *International Law in China: Historical and Contemporary Perspectives, extracts from the Recueil des cours, Volume 221 (1990-II)* (Martinus Nijhoff Publishers, London) pp. 250–262.

8 *Ibid.*, p. 253.

9 Hsü, *supra* note 3, pp. 125–127.

10 Zhou Qi, 'Conflicts over Human Rights between China and the US', 27:1 *Human Rights Quarterly* (2005) pp. 105–124.

ganda.[11] However, today, many scholars are trying to detach themselves from the rigid dogma of sovereignty. The question still remains: how effective has this detachment been and how much of historical attachment and dogmas still exist or are maintained? Today China has regained economic wealth as well as power and with China's entrance into the World Trade Organization (WTO) in 2001 international law has started to play a more important role.[12]

With constant developments and the effects of globalisation, the last decades have witnessed an infringement on sovereignty in a number of different areas and ways, affecting the whole world. For example, in the area of international mobility of capital, goods and services, there has been an emergence and growth of global, regional and transnational technical cooperation in politics and a number of other institutional areas. From first having had borders as national boundaries for states, borders are no longer evident. In the wake of globalisation, state regulatory activities have transcended nations' borders. This has also had implications on the traditional view of sovereignty. States are no longer sole rule makers; international organisations, regional organisations and other non-state actors have increasingly become influential players in the formation of norms. The individual has also, doubtless, a stronger voice today than in the 20th century. Thus, the effects of human rights on international law are essential in the overall effects of globalisation and the impact it has had on sovereignty is also very visible. In this respect, too, it is interesting to see what effect the international community's response to the so called Arab Awakening has had on the domestic jurisdiction of states.[13] In relation to the Arab Awakening, China has in essence taken a restrictive approach on sovereignty and has in principle upheld a strict textual interpretation of the purposes and principles of the UN Charter.[14] Likewise, newspapers reiterate that China is firm in safeguarding sovereignty, security and territorial integrity.

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11 S. S. Kim, 'Sovereignty in the Chinese Image of World Order', in R. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht, 1994) p. 425

12 Zhou Qi, *supra* note 10.

13 UNSC Res 1973, 17 March 2011.

14 UNSC Res 2059, 20 July 2012; Sc/10714, 19 July 2012.

The overall objective of this book is to understand what effects globalisation has had on the traditional views of sovereignty, seen from a Chinese and European, primarily Swedish, perspective. As this introduction shows, there is a need to ask questions such as: Whether the cultural-historical approach has any value in China today or is it only seen as political reminiscence with very little real effects in the wake of globalisation? What are the differences between different understandings of sovereignty in different parts of the world? How has the concept changed generally because of a different international structure, with for example regional integration gaining in importance not least in Europe? These are some of the underlying questions being addressed in this anthology.

In this book the authors adopt a variety of perspectives and approaches. The contributions in this book are mainly from legal scholars but also two with backgrounds in political science. Reflections coming from legal philosophy, public international law, international human rights law, economic law and international relations are presented in this book.

Chapter Synopses

This volume begins by situating the topic by looking at how the Chinese view on sovereignty has been perceived since it was first "imported" to China as a consequence of the first Opium War in 1840. In Chapter 1 Junwu Pan delves into the topic and explains the traditional Chinese stance, often heard as being the official Chinese understanding on the topic of sovereignty. He explains how China in relation to the foreign invasion in the 19th century lacked awareness of being a political state and how it in reality saw itself as being a cultural entity. China was a suzerain government being in control of other governments but providing them with considerable autonomy. The Chinese defeat during the first Opium War is a painful reminder of how Chinese "culturism" was not respected by the Western powers. The unequal treaties which China was forced to sign and the establishment of extraterritorial rights for Western powers was proof of blatant interference in the internal affairs of China. Naturally after this forceful encounter with the West, it is explained that nationalism was the first connotation embodied to sovereignty. It was when China started studying international law that the concept of sovereignty was understood and became a territorial concept and at the

same time "culturism", which was an outgrowth of Confucianism, was replaced by nationalism. It is pointed out that nationalism was aligned with xenophobia and as a result expelled any third party intervention. Still today it is concluded in this chapter that whenever sovereignty is mentioned Chinese nationalism is immediately stirred up and unifies the public. Sovereignty and nationalism are used interchangeably by the Chinese government as a political instrument. But, as pointed out, the shield of sovereignty has been perforated and the absolute line of sovereignty never strictly kept. Nevertheless, China prefers walking a balancing line between absolute and relative sovereignty, giving it the advantage of flexibility in practice and featuring some "Chinese characteristics" that bear remnants from the colonial past.

In Chapter 2 Per Sevastik systematically goes through the effects that international human rights law has had on international law. Rightly, as many other scholars also conclude, the insertion of the words human rights into the UN Charter has had an enormous impact on the developments of international law that few at the time of the insertion could foresee. No one had actually imagined that it would create such landslide reactions. As his article takes us step-by-step through the trajectory of human rights developments, it makes clear that the overall purpose of human rights is to create a structure based on normativity, as it is coined in the preamble of the UN Charter. The preamble makes clear that the reaffirmation of human rights shall be established through treaties and other sources of international law. It is interesting to see the tension that existed from the outset between human rights and sovereignty when the UN General Assembly unanimously adopted the Universal Declaration of Human Rights in 1948 and how this tension progressively has diminished. All areas of international law discussed in this chapter have felt the impact of human rights law on sovereignty, and rightly, as also explained in his chapter, some areas have had a greater impact on eroding sovereignty than others. Disregarding the fact that the International Court of Justice's advisory ruling in the *Genocide* case had an initial effect on state sovereignty, the effects of reservations have had a lesser impact on sovereignty as compared to other areas examined in this chapter. Apparently, there is still room for a *de lege ferenda* approach in relations to human rights and sovereignty, at least for someone seeing international law as being in a state of continuous development.

In Chapter 3 Pär Hallström reflects over the impact that transnational companies have had on the Westphalian model of sovereignty. A phenomenon that is known and explained here is that international law may develop independently of the immediate expression of the state. The power that enables this expansion is the developments of customary international law, case law and the practice of international organisations. Transnational companies endowed with some subjectivity are the main focus area in this chapter and it is explained here that international investment law has contributed to the formation of an administrative international law that started developing in the early 1970s. Investment law is one such field described in this chapter, where customary international law and decisions of tribunals have reduced the discretionary powers of states. Another contributor is the WTO, and in these cases international obligations for states were granted by concluding investment treaties with other states. The obligation of the WTO with regard to the protection of intellectual property leads to demands on its members that their courts and administrations live up to basic standards of the principle of good administration. In particular the WTO's Appellate Body has effectively resulted in the formulation of internationally binding principles of good administration. Looking at this principle within the framework of international investment law, the basis of the principle were the obligations that states should respect in connection with expropriation, *i.e.*, the formulation of the international minimum standard. Those standards were further enhanced with the increase of Bilateral Investment Treaties (BITs) and their wide scope. A further impact on the standards came from the interpretation of arbitral tribunals of the clause of fair and equitable treatment. That clause contains obligations of the state parties to respect principles included in the Principles of Good Administration. The chapter concludes that the international minimum standards are binding on states as part of international customary international law, but it is questioned here to what extent the interpretation given to the "fair and equitable treatment" clause has reached that quality as well. Even if that is the case with regard to the other principles referred to in the chapter, Hallström concludes that more consistency of international economic law is desirable and ends his chapter by suggesting some specific measures that would have the ultimate effect of increasing the rule of law in all countries.

In Chapter 4 Katrin Nyman-Metcalf examines the potential new situation for sovereignty in relation to regional integration. What primarily is being studied here is the European Union (EU), but the chapter also looks at functional organisations as potential holders of sovereignty. The role of states as sovereign subjects of international law is not challenged in the chapter, only that they are not the sole subjects of international law. The ideas presented here presuppose a functional content of the notion of sovereignty. This implies that it is not only a characteristic of a state, describing the nature of states as components of the international legal system, but sovereignty is a functional notion indicating that the supreme power in a specific circumstance is held by a determined body. This body may be a state, or something else than a state, an entity although established by a state which has developed to such an extent that it has created its own sovereignty, which is explained to be more than the aggregate of that given to it by the members. Using the EU as a primary reference point, the chapter convincingly explains that sovereignty which is delegated takes on such an importance that it becomes something different and more powerful than what was originally given away. The question raised here is whether this development should not be seen in a new light where subjects other than states can hold sovereignty: not only the parts of sovereignty that states have delegated, but also what the outcome of this delegation has created. The discussion whether an organisation can have its own *Kompetenz-Kompetenz* or if it is only the holder of the transferred sovereignty may be overly theoretical, but on the other hand it is explained that such a discussion helps understand the character of regional integration and other forms of integration with other international organisations.

In Chapter 5 Simon Shen looks at Hong Kong's sub-sovereign status and its external relations. This topic is timely because it is only 15 years (1997) since Hong Kong was returned back to China by Great Britain, which is an event that has attracted much attention in Chinese media and where much of the colonial past was reopened. The official terminology used by the PRC to describe the status of both Hong Kong and Macau is "special administrative region" and here "one country, two systems" is practiced. As a Special Administrative Region of the PRC Hong Kong enjoys many international privileges which other Chinese cities do not. Albeit only with authorisation from Beijing, it can participate in international organisations and events. The term used to describe these affairs

are referred to as Hong Kong's "external affairs" differentiating them from "diplomatic relations" which is the preferred term used by sovereign states. As Shen clearly explains in his chapter the line which divides the two terms is not clearly defined, and it creates a grey area. The emergence of the social constructivist view on sovereignty has opened up a new interpretation of sovereignty beyond the Westphalian model. Today contemporary political entities that are not sovereign states but that operate in a middle ground relate to sovereignty, and it is here that the term "sub-sovereignty" is being referred to. Implying powers held by some parts of nation states, giving them a degree of autonomy both in relation to domestic and external affairs. As is also explained, Hong Kong's sub-sovereignty is not unique in the world today and the term is also divided into two further identifiable sub-categories. The one that relates to Hong Kong is labelled "delegative sub-sovereign entities" compared to "federal sub-sovereign entities". Even though sub-sovereign models are applied by the West, the world community reacted when China came up with the "one country, two systems" formula, considering China's rigid stance on sovereignty. This resulted in reactions from the Chinese government in an often heard complaint about foreign governments infringing Chinese sovereignty and "intervening in Chinese internal affairs". What is less heard about is that Beijing is reforming its understanding of the concept of sovereignty by allowing a certain degree of flexibility for reasons of pragmatism. This latter connotation is explained to be related to China's need to strike a balance between protecting the integrity of their hard-earned sovereignty and compromising its authority with the advance of globalisation for further economic development. This also explains why there is no need to actually clarify the boundaries of the grey area that still exists in Hong Kong's sub-sovereignty because it gives Beijing a degree of political flexibility. Nevertheless, the chapter concludes by suggesting some improvements in order to tackle the grey area that still exists between the terms "external affairs" and "diplomatic relations".

In Chapter 6 Sverker Gustavsson writes about intertwined sovereignties and the problem of legitimate opposition in the European Union. He concludes that from a Westphalian point of view Europe's 20th century was an age of political failure based on continuous conflicts between states that – with two devastating World Wars – created a new regional insight that sovereignties ought to be intertwined if the cycle of war and vengeance is to be ended. A new system was thus established based on

cooperation rather than conflict, and on free trade rather than protectionism. A constitutional outcome is that such a system requires a less stringent application of the concept of self-determination. It is around this problem and in particular the issue of legitimate opposition that the author is elaborating. After a historical *tour d'horizon* it is explained how the sovereign power has shifted from a conceived hereditary *royal* sovereignty in the 17th century to a sovereignty of the people. The French and the American revolutions in the 18th century contributed to the long-term shift resulting in a conceptualisation of sovereignty. New notions in combination – stemming from Greek ancient thinking – were spread in Europe in the 19th century which ultimately led to a conceived sovereignty of the people. In the wake of this shift followed elections based on universal suffrage and political freedom became the norm. New methods of regulating changes in government emerged and became the rule all over Western Europe during the latter part of the 19th century and the first part of the 20th century. Democratic, legitimate opposition, resulting in a shift in power, became possible without having to make any necessary constitutional changes first. But with the EU and the member states intertwined constitutions, there is a waning of opposition and the question here is whether this decline is acceptable. Gustavsson pinpoints the dilemma that has arisen, where a subsequent constitutional shift in the *reverse* has taken place in the last decades of the 20th century. From the standpoint of legitimate opposition, the intertwining of sovereignties *rolled back* what previously had been achieved, namely to criticise prevailing legislative, executive, adjudicative and administrative public decision making within separate states. Academics in the area are faced with a dilemma where the one horn is the need for a legitimate opposition and the other is the need for intertwined sovereignties.

In this Chapter 7 Bo Wennström discusses how one theoretically can understand the complex hierarchies which today's world creates, where cooperation is more pronounced than the clear-cut boundaries between, for example, states. Even though the notion nation state is structured around a vertical thinking, with equal and sovereign states, it is generally recognised today that we have broadened the concept of statehood. Diffusion of power caused by internal phenomena, such as privatisation and deregulation, and by external phenomena, such as globalization, is mentioned in his chapter. What we have are new configurations relating to law and governance in a world with fewer boundaries but with more

cooperation than before. This means, it is pointed out in the chapter, that sovereignty is often divided. An important question which this raises is how responsibility should be anchored, demands on responsibility, rule of law, *etc.* in a system that is multidimensional. Wennström does not claim to give answers to questions regarding how complex hierarchies and divided sovereignty should be handled. Instead, a proposal is made as to how one theoretically can shift focus in connection with theoretical studies, from a reductionistic standpoint to a connectionistic. The basic idea of reductionism is to understand the nature of complex things by reducing them to their parts. Connectionism stresses networks as a factor in complex systems. It is concluded that the connectionistic standpoint coincides much better with the problems which are discussed in this chapter and the change that has occurred from distinct hierarchies to a world where boundaries to a certain degree have been erased. Wennström does not claim to provide a final solution to questions about complex hierarchies, but describes a search for a new way to tackle this complex issue in order to replace the old approach which is challenged in this chapter.

In Chapter 8, the final chapter of the book, Zewei Yang poses the question if the concept of state sovereignty has come to an end. He elaborates on the topic by giving us his own Chinese perspective on the issue. In his article, as many other scholars also discuss, he concludes that state sovereignty has suffered from a great deal of attacks since it was first introduced by Bodin in the 16th century. A doctrinal overview follows on different views of critique on the topic. From having had a continuous strong foundation before the First World War the concept progressively has been broken down. Nihilistic views, like for instance claiming that the concept of sovereignty has done "more harm than good" or that it is "groundless in an interdependent world", are highlighted in this chapter. Also the structural changes that occurred in the international community after the end of the Cold War in the early 1990s and in the advent of globalisation with increased subsequent intervention created a trend for Euro-American theorists to weaken and even deny state sovereignty. But, it is obviously wrong to deny state sovereignty, because as the basis of international law state sovereignty has permeated into all areas of international law as well as into a number of international legal documents. Sovereignty is thus still an objective existence in the international community today. One of the aspects highlighted here is the number of

UN documents that followed after the adoption of the UN Charter; these have also confirmed the principle of state sovereignty, particularly after the era of decolonisation. In addition, also some regional international organisations and a number of regional conferences, such as the Charter of the Organisation of American States and the Final Communiqué of the Asian-African Conference, are mentioned, which have confirmed the principle of state sovereignty. The chapter explains that state sovereignty runs through all fields of international law and that it functions on each normative level of international law, where state consent is the core manifestation of state sovereignty. It is also explained that developing countries still value state sovereignty highly as a cornerstone in their international relations and that they take it as a last resort in order to protect their national interests and traditional cultures. A careful conclusion that is drawn here is that globalisation is not the force that *per se* erodes sovereignty, but that rather sovereignty is a tool that is used by states to achieve their national interests.

Conclusion

Is it possible to say something decisive after this assessment or have we only been able to scrape the surface of a rather complicated issue that would need a much more thorough discussion, at least seen from the list of Chinese contributors to this publication? It is seen from the Chinese scholars who have contributed with chapters in this anthology that they appear to have a strong resentment about past exploitation which is real and not imagined.[15] An unavoidable fact is thus that anyone writing on the topic of sovereignty in China today has to deal with events relating to the colonial past. As unavoidable is also the fact "that the structure of sovereignty, the identity of sovereignty, no less than the identity of an individual or people, is formed by its history, its origins in and engagement with the colonial encounter".[16] But the sovereignty doctrine, seen from a Western perspective, is "formidably ingenious on concealing this intimate relationship".[17] In relation to the Chinese perspective on globali-

15 M. Akehurst, *A Modern Introduction to International Law*, 4th edition (London, 1982) p. 21.

16 Anghie, *supra* note 5, p. 312.

17 *Ibid.*, p. 312.

sation, there is naturally cautiousness regarding its power to transcend hard-won sovereign boundaries.

On the other hand, the European perspective, and in a much smaller sense, the Swedish approach, is distant from its origins in and engagement with the colonial past. In this respect the notion state and sovereignty takes different forms and globalisation is therefore seen as a force that ultimately transcends boundaries and creates cooperation and opportunities. There is therefore a much greater thrust to find ways to understand the complicated physiognomy of globalisation and a belief that by doing so will enhance relations between states. It is not a coincidence that many chapters deal with international cooperation, regional integration and other related matters.

It can thus be concluded that there are challenges to sovereignty, both due to events currently taking place and due to different understandings of the concept. The notion is in flux and it will not mean the same in a few years' time as it does today – just as it does not mean today what it meant earlier. Globalisation may result in that the future interpretation of the concept will be more coherent in different parts of the world.

1. Sovereignty's Implications for China: Then and Now

Junwu Pan[1]

1. Introduction

The concept of sovereignty contains many implications ever since it was imported into China from the West. Some implications have vanished with time, whereas others are emerging. This chapter analyses the changing implications of sovereignty for China at different stages so that people may better understand China's past and present behaviours on the global plane.

Sovereignty, in the Chinese view, is the central point of all international legal principles and norms[2] and serves as the cornerstone of settlement of disputes, observance of treaties, special privileges and immunities in foreign relations. The concept of sovereignty has not remained the same since it was imported into China from the West. As an importer as well as a learner, China has been watching the world attentively to see what the West is doing with this concept. The process of learning is accompanied by China's tentative contribution to the discovery of sovereignty's implications at both national and international level.

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1 I wish to thank Professor Rein Müllerson for supervising my research work.

2 W. Levi, *Contemporary International Law* (Westview Press, Boulder/San Francisco/Oxford, 1991) p. 81.

Per Sevastik (ed.), Aspects of Sovereignty Sino-Swedish Reflections
Copyright 2013 Koninklijke Brill nv. Printed in The Netherlands. isbn 978-90-04-23266-2 pp. 15-31

2. The First Impression

2.1. Foreign Intervention

Before 1840, the year the British Empire launched the Opium War against China, China did not recognise the concept of sovereignty, defined as the exclusive right to complete control over an area of governance or people. It lacked an awareness of herself as a political state, considering itself as a cultural entity.[3] It indulged itself in the Empire's tributary system that is more akin to what is known in the Western world as suzerainty: a government that controls other governments but allows them considerable autonomy over their domestic affairs. China's disastrous defeat by the British troops in the 1840–1842 Opium War led to the eventual disintegration of the Chinese imperial system and the word sovereignty popped up as a painful reminder of the loss of its former power and independence. Then sovereignty was embodied with the implications of foreign invention and interference. In other words, sovereignty was firstly regarded as a kind of trouble rather than protection. This first impression has deeply influenced China's attitude towards international law.

The "unequal treaties" which China was forced to sign with the Western powers between 1842 and 1911, in the view of the Chinese, are the instruments favourable for the so-called "civilised" nations to establish extraterritorial rights in China. Whatever is claimed by the "civilised" nations was automatically regarded as a lie, which practically served the West's evil purpose of intervening in China's internal affairs and damaging China's independence. Respect for sovereignty and territorial integrity was not an issue because China was not considered a sovereign entity. The concept of sovereignty seemed to function as a justification for the foreign powers to bully China. Whenever the word of sovereignty was mentioned, the Chinese were reminded of the fact that they were lacking sovereignty and that they were humiliated. Naturally, nationalism was the first embodiment of sovereignty at the very beginning.

3 S. Ogden, 'Sovereignty and International Law: The Perspective of the People's Republic of China', 7 *N.Y.U. Journal of International Law and Politics* (1974) p. 3.

2.2. Chinese Nationalism

It would not be for another two to three decades after the Opium War that China realised the danger posed by the Europeans; it was only when the Chinese first began studying international law that they understood the implications of sovereignty and it was this realisation that fostered Chinese nationalism. This was China's "century of humiliation" but also the beginning of a new era in Chinese history. By looking at the work of one of the chief reformers in particular, it will be shown that the notion of sovereignty was both assimilated into existing Chinese intellectual traditions and became the ideological platform for charting a new course for Chinese foreign relations.

Chinese nationalism, now as one of the most effective instruments available for the Chinese government to deal with its domestic and foreign affairs, has its profound origin in its first experience with the concept of sovereignty. Before the 19th century, Chinese nationalism did not exist in the Chinese Empire. Instead, Chinese culturism, which represented a "non-territorial concept", held the place of today's nationalism. Chinese culturism, which was the outgrowth of Confucianism, perceived China as the only true civilisation and embodied a universal set of values. Its cultural superiority was believed to be unchallenged.[4] During the Opium War, the Chinese culture, which used to be the main instrument of the Empire's expansion, lost its function and became meaningless in front of the powerful sovereign independent states. After its experience of being reduced from the "Central Kingdom" of the universe to a semi-colony at the hands of foreign imperialism, China saw its culturism vanishing and nationalism thriving. Ultimately, Chinese nationalism replaced Chinese culturism to confront those Western sovereign countries.

Chinese nationalism is largely aligned with xenophobia, which, as a result, expelled any third party from intervention. It reached its peak

4 J. R. Levenson, *Liang Ch'i-ch'ao and the Mind of Modern China* (University of California Press, Berkeley, 1967) p. 108; B. I. Schwartz, 'Culture, Modernity, and Nationalism – Further Reflections', in T. Weiming (ed.), *China in Transformation* (Harvard University Press, Cambridge, MA, 1993) p. 247; J. Harrison, *Modern Chinese Nationalism* (Hunter College of the City of New York, Research Institute on Modern Asia, New York, 1969) p. 2.

in the May Fourth Movement in 1919[5] during which xenophobia was the main theme. Nowadays, the myth of Chinese nationalism is deeply implanted in Chinese minds.[6] Chinese people still share a deeply rooted, historical sense of injustice of having suffered at the hands of foreign countries.[7] Whenever sovereignty is mentioned, Chinese nationalism is immediately stirred up and controls the public. The hot blood of Chinese nationalism has been injected into the body of sovereignty at the very beginning

3. The Later Impression: A Shield

3.1. Defending Against the West

When the Chinese realised that the definition of state sovereignty refers to the state's absolute supremacy over its internal affairs and external affairs, which was exactly what they wanted, they immediately enshrined sovereignty as their saviour and became its most staunch defender. They believed that if China would be treated as an equal party, they would regain its independence and dignity by claiming sovereignty. In other words, sovereignty could become a dependable shield for national interests. China's faithful adherence to declaring the principle of inviolability of state sovereignty has become a distinctive feature of the Chinese attitude towards international law.[8]

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5 The May Fourth Movement was an anti-imperialist, cultural and political movement in early modern China. Taking place on 4 May 1919, it marked the upsurge of Chinese nationalism, and a re-evaluation of Chinese cultural institutions, such as Confucianism. The movement grew out of dissatisfaction with the Treaty of Versailles settlement and the effect of the New Cultural Movement.

6 C. H. Lu, *The Sino-Indian Border Dispute: A Legal Study* (Greenwood Press, Connecticut, 1986) p. 6.

7 S. Zhao. 'China's Pragmatic Nationalism: Is It Manageable?', *The Washington Quarterly* (Winter 2005–2006) p. 135.

8 Z. Li, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order', 5 *Singapore Journal of International & Comparative Law* (2001) p. 318. *See also* S. S. Kim, 'Sovereignty in the Chinese Image of World Order', in R. S. J. Macdonald

The Chinese attitude towards sovereignty obviously has its own historical origin. As late as the 1920s, China was not treated as a fully sovereign state by the Western powers.[9] The powers that participated in the Washington Conference (1921–1922) refused to renegotiate the tariff provisions of earlier treaties on the grounds that China lacked the essential characteristics of a modern state, and were reluctant to accord China the rights of a fully sovereign state.[10] It was not until the early 1930s that the nationalist government succeeded in gaining tariff autonomy, and another decade passed before the treaties of 1943 brought a formal end to extra-territoriality in China and promised recognition of the Chinese government's sovereignty. Even after the Communists took power in October 1949, the Western powers still challenged some of China's sovereign rights by refusing to recognise the People's Republic of China (PRC).[11] To China, sovereignty is really a hard-won shield in the struggle to get rid of foreign domination and to protect itself from foreign expansion and aggression.[12] During the Cold War, China treated sovereignty as its shield for maintaining its independence and was reckless enough to ignore the cost of being isolated from the international community. This experience enhanced China's positive attitude towards sovereignty while rejecting the notion of "world law" and keeping its territorial integrity.

(ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht/Boston, 1994) p. 428.

9 K. U. Meng, 'A Criticism of the Theories of Capitalist International Law on International Entities and the Recognition of States', 2 *Study of International Affairs* (3 February 1960) p. 45.

10 2 *Foreign Rel. U.S.* (1930) pp. 538, 539.

11 The majority of the members of the United Nations held that the question of which government should represent China in the UN should be considered an "important question" requiring a 2/3 majority voter under Article 18 of the UN Charter. From the Chinese Communists' viewpoint, such actions were related to American policy of support for the Chiang Kai-shek government, and were intended to challenge the Communists' right to rule the Chinese people and to further isolate them from participation in international organisations and affairs. The People's Republic of China did not assume its legal seat in the United Nations until 1971.

12 T. Wang, 'International Law in China: Historical and Contemporary Perspectives', *The Chinese Yearbook of International Law* (1991) pp.1–115.

3.2. Defending Against "World Law"

In the view of China, "world law" implies or serves to justify a number of objectionable principles, including: the denial or deprecation of state sovereignty, supremacy of international law over domestic law, giving individuals the status of subjects of international law, legalisation of collective intervention, compulsory jurisdiction of the International Court of Justice (ICJ), and the abolition or limitation of the immunity of foreign states.[13] "World law" would go beyond the concept of the universality of international law and advocate the expansion of the scope, content and subjects of international law at the expense of state sovereignty. It may also restrict the sovereignty of the state by making individuals subjects of international law, by sanctioning supra-state organisations responsible for the functioning of "the common community", and by guaranteeing community protection of individual's rights. China is especially concerned that "world law" would place the collective will above the individual wills of the sovereign states. Consequently, China will not surrender any sovereignty.

In order to defend against "world law", the People's Republic of China developed the concept of sovereignty by advocating the *Pancha Shila*, or "Five Principles of Peaceful Co-existence", which take a hard line notion of sovereignty.[14] Chinese public statements unremittingly defend absolute sovereignty and an unwillingness to compromise. The Chinese government has more than once claimed that China never gives in to any outside pressure on principles related to China's state sovereignty and territorial integrity. Frequently this hard line is justified with reference to China's century of humiliation by Western powers, who devised the present system and intend to create a prospective "world law".

13 Ogden, *supra* note 3, p. 10.

14 The Five Principles of Peaceful Co-existence were first articulated in their current form in the Sino-Indian Treaty of 29 April 1954, and consist of: mutual respect for each other's territorial sovereignty and integrity, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, peaceful co-existence.

4. Present Impression: A Perforated Shield

4.1. The Holes Drilled in the Shield

In 1992, when UN Secretary-General Boutros Boutros-Ghali issued a report stating that "the time of absolute and exclusive sovereignty … has passed; its theory was never matched by reality", China took the most sceptical stance of all states toward the report.[15] China gave this public opposition because Ghali's report contained too many sovereignty-diluting features.[16] But there are many proponents of a more limited interpretation of sovereignty who argue that a system that worked well for several hundred years after it was enshrined in the Treaty of Westphalia in 1648 is increasingly inadequate to regulate relations among states in a world where the number of states has risen to nearly 200 and in which interdependence is fast knitting states together across national borders.

In practice, China has never strictly kept in line with the theory of "absolute sovereignty". Although China shows an ambiguous attitude to the established customary law, it accepts the principle that state sovereignty is subject to the limitation of treaty obligations.[17] It even negotiated the border agreements with Burma, Russia, Kazakhstan and Kyrgyzstan based on the so-called "unequal treaties". (In the Chinese official documents, China declares all the "unequal treaties" null and void because those treaties violate China's sovereignty.) On 14 December 1981, China for the first time voted for the extension of the UN peacekeeping force staying in Cyprus. From then on, China has actively supported the UN peacekeeping activities.[18] These involvements also speak against China's theory about absolute sovereignty and non-intervention.

From the late 1980s, in the economic and trading fields, China has accepted the third party settlement of its international disputes. On 1 July 1992, the Chinese government ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

15 S. S. Kim, 'China and the United Nations', in E. Economy and M. Oksenberg (eds.), *China Joins the World: Progress and Prospects* (Council on Foreign Relations Press, New York, 1999) p. 52.

16 *Ibid*.

17 Wang, *supra* note 12, pp. 69–70.

18 Kim, *supra* note 15, pp. 53–54.

That meant that China accepted the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). On 15 July 1993 the then Chinese Foreign Minister Qian Qichen sent an official letter to the Secretary-General of the Permanent Court of Arbitration (PCA) informing him of the Chinese decision of resuming all its activities in the PCA and sequentially nominated four renowned Chinese law experts as arbitrators of the PCA. Later in the same year he sent another letter to the Foreign Minister of the Netherlands declaring that China accepts all the Hague Conventions for peaceful settlement of international disputes.[19] Today, four Chinese law experts are still on the list of members of the PCA.[20]

This tendency has become even more noticeable since China's entry into the World Trade Organization (WTO) in 2001. On its entry, China without reservation accepted the WTO's dispute resolution mechanisms, which include various compulsory jurisdictions. Such practice marks a sharp contrast with China's traditional practice of reserving all the provisions related to submitting disputes to a third party for settlement. The recent cases concerning the disputes between China and some other WTO members over the measures affecting imports of automobile parts exemplify China's will to settle the disputes under the WTO dispute settlement system.

In 1989, the Chinese government declared that it would abandon the practice of making blanket reservations on all the provisions concerning the jurisdiction of the ICJ. In the same year, China began to participate in the discussions between the five permanent members of the Security Council on how to strengthen the function of the ICJ.

In 1994, the year Shi Jiuyong, a renowned Chinese international law expert, was elected to be a judge at the ICJ, the Chinese government made another political declaration that except for the cases concerning essential national interests where negotiation and consultation are adhered to

19 J. Zhao, *Zhongguo Heping Jiejue Guoji Zhengduan Wenti Chutan* (A Tentative Discussion about the Chinese Peaceful Settlement of International Disputes) (2006) p. 100.

20 Tianren Shao, Guangjian Xu, Hanqin Xue and Nanlai Liu are arbitrators at the PCA. *See 109th Report of the Permanent Court of Arbitration 2009*, Annex 6: Members of the Permanent Court of Arbitration, online at < www.pca-cpa.org/upload/files/21%20Annex%206%2067-109.pdf>.

for settlement, China, in general, shall not make any reservation when it signs, ratifies or accedes to international conventions related to economy, trade, science, technology, aviation, environment, transportation, culture, and other technical fields. After Shi Jiuyong's retirement, Xue Hanqin, another famous Chinese international law expert, was elected to be judge at the ICJ in July 2010.

The fact that the shield of sovereignty has been perforated has made China become more pragmatic.

4.2. Chinese Pragmatism

Theoretically, China accepts the "absolute sovereignty" to defend itself against the unfettered expansionism of super powers. Practically, China oscillates between "absolute sovereignty" and "relative sovereignty". China knows that the theory of "absolute sovereignty" might encourage states to disrespect each other's sovereignty. Therefore, the choice of the words "mutual respect for sovereignty" in the Five Principles is the Chinese technique to avoid a definite stance on either of the two basic theories.

China believes that because states create international law when they exercise their sovereignty, the validity and effectiveness of international law cannot forgo the continuing consent and support of nation states.[21] State sovereignty is the very foundation upon which international law rests. State sovereignty should be treated as a whole and cannot be cut down to pieces and treated in complete isolation. State sovereignty implies at least the following corollaries: (1) sovereign equality; (2) political independence; (3) territorial integrity; (4) exclusive jurisdiction over a territory and the permanent population therein; (5) freedom from external intervention and the corresponding duty of non-intervention in areas of exclusive domestic jurisdiction of other states; (6) freedom to choose political, economic, social and cultural systems; and (7) dependence of obligations arising from international law and treaties on the consent of states.[22]

21 J. Shen. 'National Sovereignty and Human Rights in a Positive Law Context', 26 *Brook. J. Int' I L.* (2000–2001) p. 419.

22 *Ibid.*, pp. 419–420.

Among these corollaries, China regards the prohibition of interference and intervention as the most important one.[23] When Professor Zhou Gengsheng gave his authoritative analysis about state sovereignty, he particularly emphasised that absolute independence from any external interference is the core of sovereignty.[24] China holds the view that every state inherently enjoys an absolute, indivisible and perpetual sovereignty, and that its state sovereignty can only be limited by international law, and that international law should be created by all independent states, including both the developed and developing states. Obviously, China stresses what international law should be instead of what it is.

The "Five Principles of Peaceful Co-existence" advocated consistently by China emphasise that states should show mutual respect for each other's sovereignty. Whether the words "mutual respect" imply a theory of absolute sovereignty or of relative sovereignty is not clear.

In its official documents, China has repeatedly emphasised that its sovereignty is absolute, indivisible and perpetual and that it will never tolerate any violation of its sovereignty. These words are a reminder of the "absolute sovereignty" theory. Such an attitude was also reflected in the case of *Jackson* v. *the People's Republic of China* (the *Huguang Railway Bonds*).[25] An American citizen named Russell Jackson, the holder of the bonds, instituted a case against China based on the fact the Railway bonds issued in the early 20th century by the previous Chinese government were not honoured by the then present one. The case was first decided in 1982 by an American court. The court issued notice to the Chinese government through its embassy in the USA. The Chinese government refused to appear before the court based on the principle of absolute state immunity. The brief filed by China's American counsel

23 *Ibid*., p. 420.

24 G. Zhou, *International Law*, vol. 1 (The Commercial Press, Beijing, 1976) p. 75.

25 T. Cheng, 'Huguang Bond Case and the Question of State Sovereign Immunity', 6 *World Knowledge* (Shijie zhishi) (1983) p. 2; F. Zhu, 'U.S. Court Violates International Law', *Beijing Review* (14 March 1983) pp. 24–30; D. Liu, 'The Odious Nature of the Huguang Railway Loans', 1 *Study of International Problems* (Guji wenti yanjiu) (1984) p. 57; Q. Zhu, 'Criticizing the Huguang Bond Case', 11 *Democracy and Legal System* (Minzhu yu fazhi) (1984) p. 12.

suggests that China regards the principle of absolute sovereign immunity as fundamental to its sovereignty. From the Chinese government's point of view, the absolute immunity theory derived from the principle of the international law of state sovereignty.[26]

China's ambiguous attitude to sovereignty gives China the advantage of flexibility in practice. Sovereignty, based on the Westphalian system, is one of the inherent fundamental rights of independent states, similar to a person's right to live, and is thus different from the rights entitled by authority or law. Therefore, sovereignty falls into a policy-ruled area rather than a law-ruled area. States are entitled to use whatever instruments they have, such as force, to defend their sovereignty. Territory has a natural connection with the concept of sovereignty. All the disputes concerning China's territorial interests involve state sovereignty and sovereignty integrity. As far as settlement of territorial and boundary disputes is concerned, the adoption of the "absolute sovereignty" theory is quite appealing. It is necessary for China to hold the traditional interpretation of sovereignty when confronted with the issues of Tiaoyu Dao Islands, South China Sea, Taiwan, Tibet and Xinjiang, because sovereignty is the most effective weapon for China to keep its territorial integrity. For example, more frequently, China invokes the sacrosanct principle of sovereignty in its efforts to stop Taiwan from breaking away.

4.3. Adherence to Negotiations

China has not yet given up its adherence to negotiations and consultations, which prevent the third party from intervention and are in line with sovereignty, in its settlement of territorial and boundary disputes. Since the founding of the PRC, China has doggedly adhered to face-to-face talks for settlement of its territorial and boundary disputes. In 1955, at the Afro-Asian conference, which was held at Bandung, Indonesia, the Chinese premier Zhou Enlai issued an outline of how Beijing resolved its border disputes: 1) before negotiating a settlement, the disputing parties should maintain the status quo and recognise the undefined boundary lines as lines yet to be defined; 2) if one round of negotiations cannot pro-

26 G. Wang, 'China's Attitude towards State Immunity – An Eastern Approach', in N. Ando (ed.), *Japan and International Law: Past, Present and Future* (Kluwer Academic Publishers Group, 1999) p. 163.

duce any results, further negotiations should be held, and these further negotiations should be comprehensive, *i.e.* cover an entire border; 3) the disputing parties are supposed to negotiate a new border treaty at last.[27] Obviously, adherence to negotiations is the most prominent feature.

Nowadays, adherence to negotiations continues to be a typical feature of China's framework for the settlement of its territorial and boundary disputes, which are closely associated with China's sovereignty. The PRC had been negotiating with the former Soviet Union (since December 1991 Russia) on the territorial and boundary issues for 40 years before the final settlement in 2004.[28] The Code of Conduct in the South China Sea signed by China and the Association of Southeast Asian Nations (ASEAN) in 2002 states that "the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, … through friendly consultations and negotiations by sovereign states directly concerned …".[29] The Agreement on Political Guiding Principles for Resolving the Boundary Issue signed by China and India in 2005 also emphasises that "the two sides will resolve the boundary question through peaceful and friendly consultation".[30] To resolve the dispute concerning the continental shelf/exclusive economic zone delimitation in the East China Sea, China has endeavoured to negotiate a provisional arrangement with Japan pending final settlement. Since October 2004, nine rounds of talks have been held between the two countries and a tenth round is expected. During the second round of talks, which took place in May 2005, China and Japan reached a consensus, agreeing that their disputes shall be resolved through equal negotiations and consultations.[31] In August 2005, the principles declared by the Chinese government as the guidelines for settlement of its territorial and boundary dis-

27 N. Maxwell, 'Settlements and Disputes: China's Approach to Territorial Issues', *Economic and Political Weekly* (9 September 2006).

28 The first round of talks was held in 1964. The second round was from 1969 to 1978. The third one commenced in 1987 and ended in 2004.

29 Article 4, at <www.aseansec.org/13163.htm>.

30 R. Walker and K. Renfrew, 'China and India Sign Deal to Settle 40-Year Territorial Dispute' (12 April 2005), at <www.radionetherlands.nl/currentaffairs/region/southasia/CHI050412>.

31 *Xinhua News*, at <news.xinhuanet.com/newscenter/2005-05/31/content_3027099.htm>.

putes also confirmed its principle that any resolution shall be achieved through friendly negotiations and consultations.[32]

China's adherence to negotiations and consultations has its cultural roots in Chinese culture, establishing a relationship between the parties is always a top priority. However, "relation", which is often replaced by the word "connection", connotes a negative attitude to adjudication. Connection, in Chinese called "*guanxi*", particularly emphasises the informal way to deal with all the issues including disputes between the individuals or groups. *Guanxi* is governed largely by objective, rather than subjective, considerations, and is more about private than public matters. Once a relationship has been acknowledged, a special connection is understood as having been established. Consequently some special rules would be privately applied to the parties who have connections. Today China endeavours to build up some special connections with neighbouring countries in order to employ these special connections to help resolve the territorial and boundary disputes without third party involvement.

China's adherence to negotiations and consultations also connects with China's long history of "rule of man" rather than "rule of law". The impression of rule of man leads to the general conception that courts are liable to make biased discretions. In court, judges may consider the specific facts of the case and tailor a result that is appropriate for the particular parties. Judges may also resolve disputes in ways that serve their own economic or relational interests. More often than not, judges may interpret legal principles in ways that are consistent with their political ideology.[33] All the biased discretions have a crucial influence on judicial decisions. Such a distrust of courts extends to the Chinese attitude to the ICJ, which, from the Chinese viewpoint, is controlled by the West and might give judgments based on biased discretions.[34]

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32 *See* the statement made by the Chinese Ministry of Foreign Affairs on 31 August 2005, at <politics.people.com.cn/GB/1027/3657271.html>.

33 P. K. Chew, 'The Rule of Law: China's Skepticism and the Rule of People', 20 *Ohio St. J. on Disp. Resol.* (2005) p. 63. *See* also M. Y. K. Woo, 'Law and Discretion in Contemporary Chinese Courts', in K. G. Turner (ed.), *The Limits of the Rule of Law in China* (2000) pp. 163–172.

34 Z. Li, 'Teaching, Research, and the Dissemination of International Law in China: The Contribution of Wang Tieya', 31 *Can. Y. B. Int'l L.* (1993) p. 197.

In the 1960s and 1970s, the composition of the ICJ with judges from Western countries and the practice of these judges to perpetuate vested interests of the Western states really intensified China's scepticism about the ICJ. The Court was even viewed as a Western institution designed to serve Western interests. China felt that the composition of the Court did not reflect "the main forms of civilization and of the principal legal systems of the world". Although its attitude to the composition of the Court has improved since the 1980s, its distrust is not gone, especially in the cases concerning China's territorial interests.[35]

As a result, the PRC has never signed any *ad hoc* agreement to submit its disputes to the ICJ and continuously makes reservations to any provisions concerning the compulsory jurisdiction of the ICJ upon its signing, ratifying or acceding to international treaties.

In China's practice, the terms "negotiation" and "consultation" are often used interchangeably. In fact, there is no clear distinction between them. Nevertheless, the Chinese government often refers to negotiation and consultation as "friendly" negotiation and consultation.[36] It seems that in the Chinese understanding negotiation and consultation can and should be friendly, otherwise it would be difficult for the disputing states

35 Since the 1980s, there has been an increase in numbers of judges from the developing counties in the composition of the Court. This change, to some extent, has alleviated the scepticism of the Court from the developing countries including China. The nomination of two Chinese international lawyers – Ni Zhengyu and Shi Jiuyong – as judges of the ICJ respectively in the 1980s and 1990s encouraged China to have the intention to use the ICJ to resolve her disputes concerning international economy, trade, technology, aviation, environment, transportation and culture. This indicates the beginning of change in China's attitude to the ICJ. Nevertheless, up to now, China has not submitted a single dispute to the ICJ. *See generally* F. Liu, 'A Discussion about Strengthening the Function of The International Court of Justice against the Background of Economic Globalization', *Jianghan Forum* (August 2004) pp. 109-112. *See also* H. Wang, 'China's Theory and Practice of Peaceful Settlement of International Disputes', *Journal of Henan Normal University* (April 2002), at <www.studa.net/guojifa/061025/15293537-2.html>.

36 P. Chew-LaFitte, 'The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide for U.S. Practitioners', 8 *Yale J. World Pub. Ord.* (1982) p. 267.

to keep up their friendly relationship. It also implies China's reluctance to use other dispute settlement methods. A direct submission of a dispute by one party to arbitration or adjudication without any effort to settle the issue by negotiations is regarded as unfriendly. The Chinese have always considered formal methods of dispute resolution, especially adjudication, as a last resort where friendly relationship between the parties is hardly possible.[37]

The practice of adhering to the negotiations in its settlement of its territory-related disputes implies that firm control of a dispute's result should be an important component in the concept of sovereignty.

4.4. Human Rights Seen Through the Lens of Sovereignty

Human rights, which are also dominated by China's unique pragmatism, are constantly seen through the lens of sovereignty by China. China insisted on the central importance of sovereignty: "there should be no interference in any country's internal affairs" and nations have the right to "choose their own paths" on human rights.[38] Through the lens of sovereignty, human rights may have two opposite implications: intervention or integration. If human rights are viewed as a scheme to destabilise China and thwart its peaceful rise and thus to weaken or infringe China's sovereignty, China would hold up the shield of sovereignty to resist the intervention under the guise of promoting human rights. On the contrary, if human rights are viewed as a positive integration to safeguard its sovereignty, it would lay down the shield of sovereignty and welcome human rights and join in. Thus, what matters to China is not the human rights themselves but the implications of human rights.

China is not so confident about sorting out all the implications of human rights at the international level that it tries to interpret them by stressing the collective human rights, which are equal to national sovereignty in most cases, instead of individual human rights. The implications

37 J. P. Brady, *Justice and Politics in People's China: Legal Order or Continuing Resolution* (Academic Press, New York, 1982). *See also* R. Nafziger and R. Jiafang, 'Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes', 23 *Willamette L. Rev.* (1987) p. 624.

38 *See* U.S.-China Joint Statement, 19 January 2011, at <www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>.

of the collective human rights lie in the possibility of changing human rights into another shield to protect China from any intervention from outside. In other words, human rights are integrated with sovereignty, which particularly refers to internal stability, in this spectrum. As matter of fact, China's major concern concentrates on what effect human rights may have upon its internal stability. In China's view, the roles that human rights are allowed to play should be limited to the stage where China's domestic stability and development should be guaranteed. Consequently, China is always testing whether human rights and internal stability are at the two ends of the spectrum or not.

China has acknowledged the differences existing between China and Western countries on the issue of human rights. China worries about the possibility of the Western countries turning human rights into a sharp political spear against China's sovereignty. It seems that some Western countries do have such an intention in their dealings with the issue of China's human rights.[39]

Human rights are like a big basket that may contain whatever someone wishes to put in. Thus, China is very sensitive about what is put in the basket. In the view of China, pragmatism serves as a kind of defensive weapon rather than a kind of belief. It is one of the Chinese fundamental principles that human rights should be placed at the same end of the spectrum as sovereignty. Otherwise, human rights would be unacceptable and even criticised as a political weapon of the West.

5. Conclusion

Traditionally China did not recognise the concept of sovereignty, defined as the exclusive right to complete control over an area of governance or people. With its door broken by the Western powers, sovereignty was integrated into nationalism to serve as a shield to defend against the West and "world law". The ambiguous meaning of sovereignty permits states to interpret the concept expediently to serve their various purposes while simultaneously catering for their nationalism.[40] Although the shield has been perforated in many respects, it is still held firm by China to protect

39 For example, the US and UK try to associate human rights with the issue of Tibet in many cases.

40 Levi, *supra* note 2, p. 81.

its national interests. No matter to what extent globalisation has developed and what an impact it has on state sovereignty, the People's Republic of China never gives in to any outside pressure on principles related to China's state sovereignty and territorial integrity. Actually, the Chinese leaders are very likely to claim again and again that they would rather lose thousands of troops than give up one inch of their land and that they would sacrifice and bleed to protect China's territory. That sovereignty is the key component of Chinese nationalism is still evident today. On issues relating to territorial integrity, sovereignty remains at the top of China's domestic and foreign agenda. The Chinese pragmatism has also influenced China's attitude toward human rights, which may challenge China's sovereignty. Consequently, China refuses to accept the so-called human rights that are at the different end of the spectrum from sovereignty.

2. Some Aspects on the Effects of Human Rights Law and Its Implications on International Law

Per Sevastik[1]

1. Introduction

Prior to World War II the concept of sovereignty was absolute and what happened within the borders of a state was the concern of that state only. No other state could interfere in any other state's internal affairs. There was an absolute polarisation between human rights and sovereignty. The introduction of human rights to international law is considered to be a rather recent phenomenon.[2] By introducing human rights into the world community, a trajectory that spans over 60 years back to present time, has made it possible for the international community to make gross violations of human rights, genocide, crimes against humanity the business of the international community. But how is this possible when the United Nations (UN) Charter makes clear that one of its goals is to promote and protect human rights, and yet at the same time its correlate principle Article 2(7) stresses non-intervention in other states' domestic affairs? The so often described phenomenon of the erosion of state sovereignty has been discussed at length the last decade by academics, in interna-

1 I thank Katrin Nyman-Metcalf and Fernand de Varennes for valuable comments on earlier drafts of this article.

2 M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84:4 *American Journal of International Law* (October 1990) pp. 866–876; E. Bates, 'History', in D. Moecklin, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (OUP, 2010) pp. 17–37.

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tional law, in areas of political science and in international relations, as well as among politicians.[3]

The pathway of human rights development is marked out by a number of landmark UN declarations, starting with the 1948 Universal Declaration of Human Rights (UDHR) followed by the two international covenants from 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), with its two Optional Protocols. These conventions together constitute the International Bill of Human Rights, and when endorsed by states represent a view that human rights are universal, indivisible and interdependent and interrelated. A number of other specialised conventions stemming from the UDHR exist today and new ones are currently being developed.[4] A majority of states have signed and ratified these conventions, and by ratifying these conventions imply that they are willing to implement them into the national jurisdiction of their countries, making them the law of the land. How states comply with these conventions is of no concern to international law, as long as they comply with the provisions.[5]

The main focus of this chapter is to examine what the mechanisms are that permit the development of international human rights when it apparently at first sight contravenes with the UN principles of non-intervention in the domestic affairs of other states.

To arrive at an adequate assessment, the concept of sovereignty, non-intervention in other states' domestic affairs, international human rights treaty implementation, the sources of international law, reservations to human rights instruments and other related issues of international law

3 D. Held, 'The Changing Structure of International Law: Sovereignty Transformed?', in D. Held and A. McGrew (eds.), *The Global Transformation reader: an introduction to the globalization debate* (Policy Press, Cambridge 2003); J. Stromberg, 'Sovereignty, International Law, and the Triumph of Anglo-American Cunning', 18:4 *Journal of Liberation Studies* (2004) pp. 29–93; A. Peters, 'Membership in the Global Constitutional Community', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalisation of International Law* (Oxford, 2009) pp. 153–351.

4 There are currently nine core human rights conventions, *see* <www.ohchr.org>.

5 *See* Article 27, VCLT.

will be examined before any explanation can be given that highlights the relationship between sovereignty and the development of international human rights law.

2. Sovereignty

In order to understand the development of human rights in international law today, it is appropriate to start with the concept of sovereignty.[6] From a historical point of view, the Peace of Westphalia 1648 coins the notion nation state and starts the development of what is considered to be the era of modern international law. The Peace of Westphalia concluded the 30 years of religious wars between Catholic and Protestant entities in Europe, ended feudal ruling and created a horizontal system of equal and sovereign states. State sovereignty was based on territorial jurisdiction, the principle of non-intervention and state consent as the only valid source of international law. Formal equality was seen as a direct consequence of the horizontal structure of the international society descending from the Westphalian system and without any responsible authority for the regulation and the maintenance of the system. Since there was no hierarchical authority between states, they were permitted to conduct business on equal terms with each other. International law thus appears as the result of voluntary action taken by states, on the basis of consent, through treaties or through customary international law, the belief that a norm is accepted as law.[7]

The Westphalian model thus recognised the state as the supreme sovereign entity within its national boundaries based on territorial jurisdiction. The territoriality criteria implied that each government within each state was supreme within its territorial jurisdiction. No external authority could interfere with government's exercise of its governmental powers on domestic affairs. Any interference would undermine the very ground of it being sovereign. Thus, the principle of non-intervention fol-

6 *See* G. H. Sabine and T. L. Thorson, *A History of Political Theory*, 4th edition (1973) Part III: The Theory of the National State.

7 D. Kennedy, 'International Law and the Nineteenth Century: History on an Illusion', 65 *Nordic Journal of International Law* (1996) pp. 385–420.

lows as a consequence from the principle of territorial sovereignty and equality of states.[8]

It has taken time for the concept to mature. It was in principal disregarded partially or totally during the colonial era, but reinforced as a fundamental principle in the UN Charter 1945.Today it is generally accepted that the term "sovereignty" is synonymous to independence and that the terms can be used interchangeably. Furthermore it can be concluded that the term is not a legal term but rather built on a dogma that has created much controversy in international law.[9] What can be concluded is that the state is supreme but it has to abide by the norms set forth by the international community as a whole.[10]

3. The UN Charter and Human Rights

The traditional treatment of individuals in international law before World War II was restricted and most often individuals were treated as either aliens or nationals, but not as individuals. Some protection was, however, granted to individuals as aliens but the treatment of individuals was considered to be part of national jurisdiction and not a matter of international law. An offence against an alien was considered to be an offensive act against the alien's native state. This assumption was based on the fact that only states were considered as subjects of and had legal rights under international law. However the progressive development of international human rights law has put the individual in focus and international human rights provisions grant individuals rights today in a way that was not possible to foresee before the adoption of the UN Charter.

The development of human rights law that dates back some 60 years clearly illustrates that today there is less tension between national sovereignty and international human rights protection. Before World War II, it was in principle unthinkable to interfere in relations between states or in their national affairs. The big paradigm shift in human rights thinking came with the Nazi Holocaust and the deed by the German state

8 *See* Reisman, *supra* note 2, pp. 866–876.

9 L. Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', 68:1 *Fordham L. Rev.* (1999).

10 PCIJ, Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco*, Series B, No. 4, p. 24, ICJ Reports 1949, p. 180

that systematically discriminated and exterminated six million Jews and other people such as Gypsies (Roma people), the disabled, homosexuals and political dissidents). Therefore the protection of human rights has been one of the prioritised areas of the United Nations ever since. Human right today focuses on the protection of individuals from the excess of violence exerted from states.

The preamble of the UN Charter, in its second paragraph, makes this clear by reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Furthermore it is made clear in the third paragraph that this reaffirmation has to be achieved through a normative process by establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The individual is not explicitly mentioned in the UN Charter because at the time the horizontal system of international law only recognised states as subjects of international law. However, in Article 55, it is said that the United Nations is committed among other things to "promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". The word "promote" is used rather than the more evident use of the word "protect" and this is so because protection of human rights at the time would have been considered as an infringement on national sovereignty. What was permitted at the time was only promotional measures upon a request from states or measures agreed upon by the state concerned. Furthermore, in Article 56, it is said that all members of the organisation "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purpose set forth in Article 55". So, both provisions represent a strong expression of intent, and it may also be that Article 56 put states under a legal obligation to take practical steps for the protection human rights. These provisions together can be seen as the starting point from where the normative incentive is created to develop human rights further.

4. UN Charter Principles

The principle of sovereign equality is found in Article 2(1) and is one of the core principles of the UN Charter. Sovereignty signifies the capacity to make authoritative decisions for the state that has an effect on the peo-

ple and the territory of that state. Generally, however, the authority of the state is not absolute and is limited by constitutional and other power sharing limitations. There is also another corresponding obligation enshrined in Article 2(7) of the UN Charter for a state to respect other states' sovereignty and to not intervene in matters which are essentially within the domestic jurisdiction of any state. If that duty is violated the injured state has a corresponding right according to Article 2(4) of the UN Charter to defend its territorial integrity and political independence. All principles found in the first Chapter of the UN Charter are interrelated.

If a state which has the primary responsibility for protecting human rights within its borders cannot effectively protect them a reversed reading of Article 2(4) has emerged.[11] The interpretation that is being made when the concept of humanitarian intervention is being discussed implies the following. The non-intervention principle found in Article 2(4) is directed towards actions that are taken against the territorial integrity or political independence of any state or in any other manner may be incompatible with the object and purpose of the UN Charter. Inversely, this implies that if a situation includes the threat or use of force, but which is not directed towards the territorial integrity or political independence of any state and which is not incompatible with the object and purpose of the UN Charter, such action is not explicitly perceived to be forbidden. An intervention in a foreign state that is being made with the purpose to safeguard fundamental human rights can in exceptional cases legitimise the UN, under its mandatory Chapter VII,[12] to use force, as long as the action is sanctioned by the UN Security Council.[13] The most recent example is when the UN Security Council authorised the use of force in Libya to protect civilians from attacks from government troops.[14] This principle is

11 *See* R. Rosenstock, 'The Declaration on Friendly Relations', 65 *American Journal of International Law* (1971) p. 713, at p. 732.

12 UN Charter, Chapter VII: Actions with respect to threat to peace, beaches of the peace, and acts of aggression.

13 *See e.g.* UNSC Res 794, 3 December 1992 (Somalia); UNSC Res 788, 19 November 1992 (Liberia).

14 Humanitarian intervention and the Responsibility to Protect (R2P) will not be discussed within the limited confines of this paper. For further discussion *see* K. Annan, 'Two concepts of sovereignty', *The Economist*, 18 September 1999; C. Gray, *International Law and the Use of Force* (Oxford,

triggered by the fact that there is a perception of collective responsibility of the whole community to deal with a state which has committed an internationally wrongful act.

5. Individuals as Subjects of International Law?

The issue whether individuals should be seen as subjects of international law is closely related to the protection of international human rights developments.[15] After World War II, international military tribunals were set up at Nuremberg and Tokyo. The judgments of these tribunals affirmed the criminal responsibility of individuals under international law. The judgment reads: "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced …"[16]

The trial and judgments of the International Military Tribunal at Nuremberg can be seen as a major step in furthering international human rights law. Extending individual liability under international law to war crimes and "crimes against humanity" can be seen as a paradigm shift in this area. It was no longer the sole responsibility of nations; the individual was made liable for crimes against humanity and war crimes and was sentenced accordingly. At that time, the UN was a new international organisation using the loosely defined references to human rights found in the Charter. The International Court of Justice, in its 1949 *Reparations of Injuries Advisory Opinion*, made clear that other entities than states could be subjects of international law. Though it made clear that while sovereign states possess all the rights and duties on the inter-

2004); F. Harhoff, 'Unauthorized Humanitarian Intervention – Armed Violence in the Name of Humanity?', 70 *Nordic Journal of International Law* (2001) pp. 65–119; O. Spierman, 'Humanitarian Intervention as a Necessity and the Threat of Use of Jus Cogens', 72 *Nordic Journal of International Law* (2002) pp. 523–543; D. Amneus, *Responsibility to Protect by Military Means; Emerging Norms of Humanitarian Intervention* (Stockholm, 2008); *see also* UNSC Res 10200, 17 March 2011, approving a "No-fly-zone over Libya".

15 R. Higgins, *Problems & Process; International Law and How We Use It* (Oxford, 1994) pp. 48–55.

16 *Judgment of the International Military Tribunal for the Trail of German Major War Criminals*, Judgment 30 September 1946–1 October 1946.

national plane, other entities – such as inter-governmental organisations as well as individuals and multi-national corporations – might possess rights and duties which states would ascribe to them.

Today, in line with this development, we also have the international criminal tribunals (International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), as well as the International Criminal Court. Furthermore, with the extended rights of individuals, particularly in cases where states have ratified Optional Protocols (see *infra*) and where states accept individual petitions which are made against the state party, those extended rights have been given to individuals as subjects of international law and subsequently such rights have also affected states' sovereignty.[17]

6. The Universal Declaration of Human Rights

On 10 December 1948, at its third session, the General Assembly adopted the Universal Declaration of Human Rights.[18] The Declaration was unanimously adopted by 48 votes to nil, with eight abstentions (the communist countries, Saudi Arabia and South Africa).[19] The reason for abstaining was primarily because of the uncertain standing of human rights in international law and what implications such obligations could have on state sovereignty.[20] The Declaration was not meant to create any binding legal force among states in international law, but rather to urge them to take measures for the future protection of human rights. Most of the states which voted in favour of the Universal Declaration regarded it as a statement of relatively distant value, which did not involve any legal obligations. However, the Declaration clearly shows that there was a consensus to promote human rights and that the rights confined in the Declaration should be protected. Today the Declaration has over and over again been referred to in resolutions of the General Assembly

17 *See e.g. Miha* v. *Equatorial Guinea*, CCPR/C/51/D/414/1990, 10 August 1994, HRCee, para. 63.

18 GA Res 217A(III) of 10 December 1948

19 M. Akehurst, *A Modern Introduction to International Law*, 7th revised edition, edited by P. Malanczuk (Routledge, 1997) p. 212.

20 M. Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers, 2003) p. 27.

and in resolutions of international conferences,[21] and there is a strong perception that the Universal Declaration is part of customary law and therefore binding on all states.[22] In connection with the 60th anniversary of the Declaration, Secretary-General Ban Ki-moon remarked that the Declaration is the world's most translated document. Many countries have today also incorporated the Universal Declaration into their own constitutions.

7. The UDHR and Emerging Human Rights Conventions

The Universal Declaration of Human Rights created the foundation for a number of comprehensive treaty regimes, universal and regional, that were to follow, and provided the possibility for the development of customary law. The UDHR in 1948 was followed by the adoption of two UN conventions in 1966, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols that together form the "International Bill of Human Rights".[23] An Optional Protocol to the ICESCR was also unanimously adopted by the General Assembly as late as 10 December 2008, and has as of yet not entered into force.[24]

There has since then been a number of specialised international conventions that have been adopted by the UN that complement the International Bill of Human Rights. In chronological order these conventions are: the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) and its Optional Protocol 1999; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 (CAT) and its Optional Protocol 2002; the Convention on the Rights of the Child 1989 (CRC)

21 C. Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, 2008) p. 74.

22 B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', 12 *Australian Year Book of International Law* (1992) p. 82, at p. 91.

23 M. Nowak, *U.N. Covenant on Civil and Political Rights; CCPR Commentary*, 2nd revised edition (N.P. Engel, Publisher, 2005) pp. xix–xxiv.

24 GA Res A/RES/63/117 of 10 December 2008.

with its two Optional Protocols 2000, on the Involvement of Children in Armed Conflict (OP-CRC-AC) and on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC);[25] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (ICRMW); the Convention on the Rights of Persons with Disabilities 2006 (CRPD) and its Optional Protocol 2006; and the International Convention for the Protection of All Persons from Enforced Disappearance 2006 (ICPED).[26] These nine conventions together are labelled the UN Core Human Rights Treaties and constitute the pillar of modern international human rights law.[27]

These conventions when ratified imply that the state party is legally bound by them. This implies too that human rights treaties are strongly tied to the state's political, economic and cultural system and when implemented will bring changes in its constitutional system. This will have a direct impact on the legal and political system of that state, particularly if the state in question lacks democracy and rule of law and if it relates to the ratification of the International Covenant on Civil and Political Rights and its first Optional Protocol.

In addition to the introduction of binding core international human rights treaties, treaty bodies (committees) were established to monitor the implementation of these conventions in accordance with their terms. Each treaty body, whose members serve in their personal capacity, monitors the implementation of the respective treaty. There are currently eight such treaty bodies and their work can be seen as central to the development of international human rights law.

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25 GA Res 11198 of 19 December 2011, adoption of a third Optional Protocol to the CRC on a communications procedure which allows the Committee overseeing the Convention's implementation to receive and examine individual complaints from children and to organise country visits to investigate cases of grave and systematic violations of children's rights. The Protocol is open for ratification and will enter into force following its tenth ratification.

26 <www.ohchr.org> – the Core International Human Rights Instruments and their monitoring bodies.

27 Ratification data is available at <www.ohchr.org/english/countries/ratification/index.htm> and <www.ohchr.org/english/bodies/docs/status/pdf>.

A number of other international treaties have been developed by the General Assembly since 1948 that include human rights obligations for the state parties, but do not have any treaty bodies attached to them. Some of these multilateral treaties mentioned here are the Convention on the Prevention and Punishment of the Crime of Genocide1948 (Genocide Convention); the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973; and the Convention relating to the Status of Refugees 1951 and its 1967 Protocol. There are also a number of other important conventions that have been adopted by UN specialist bodies, most notably the International Labour Organization with respect to workers' rights and the UN Educational, Scientific and Cultural Organization (UNESCO) focusing on rights to education and information.[28]

No one could ever imagine that the human rights seeds that were planted in the UN Charter 1945 and then reinforced in the UDHR 1948 would create a human rights architecture that would have such an overwhelming impact on international law as it has had today.[29]

8. Sources of International Law

As discussed above, the UN Charter foresees in its preamble that the international community shall "reaffirm faith in fundamental human rights" by "establish[ing] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Charter makes clear that it is aiming for a normative structure when it referrers to the sources of international law. A source of law indicates what the law is and where it can be found. In a national legal system with a hierarchical structure – described as vertical –that is composed of a legislative system (equivalent to a national parliament), an executive (a national government) and a general court of compulsory jurisdiction, finding out what the sources of law are is not difficult. Laws and regulations, *etc.* are normally referred to as the sources of law. However, international law, which does not have a constitutional

28 *E.g.* ILO Convention No. 100, Equal Remuneration Convention, 1951; UNESCO Convention Against Discrimination in Education, 1960.

29 H. Lauterpacht, *An International Bill of Rights of Man* (Columbia University Press, 1945) pp. 9–10

structure, is described as horizontal in comparison to a national legal system. International law does not have the same norm creating structure as a national legal system.[30]

This is why international law, including international human rights law, must derive from other sources. In this case the term source of international law is used to denote the processes or means by which rules of law are created or determined.[31] An authoritative interpretation where to find the sources of international law is found in Article 38(1) of the Statute of the International Court of Justice (ICJ Statute). The Article indicates that the Court shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. International custom as evidence of a general practice accepted as law;
c. The general principles of law recognized by civilized nations;
d. Subjects to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

8.1. Treaties

Treaties – or international conventions – are the most accessible sources of international law. They are also the most efficient and modern way of creating international law. Article 38(1)(a) refers to international conventions, but other synonymous terms describing the creation of a written agreement whereby state parties bind themselves legally to act in accordance to the provisions are also used.[32] The term treaty is therefore being used interchangeably, and one often sees terms such as: international agreements, conventions, covenants, optional protocols, statutes, and declarations, but their legal effects are the same. The Vienna Convention on the Law of Treaties (VCLT) makes reference to states as the only en-

30 I. Brownlie, *Principles of Public International Law*, 6th edition (OUP, 2003) pp. 3–4; H. Hart, *The Concept of Law* (Oxford, 1961) pp. 225–226; M. Koskenniemi (ed.), *Sources of International Law* (Ashgate, 2000).

31 Report of the Sixty-Ninth Conference (London, 2000) p. 723 (hereinafter London ILA Report 2000); *see also* Higgins, *supra* note 15, pp. 17–18.

32 *See* Article 2(1)(a), VCLT.

tity under international law that can be parties to treaties. However, in exceptional cases other entities than states may be authorised to become parties, such as in the case of the Convention of the Rights of Persons with Disabilities, where Article 43 provide that regional integration organisations can become parties to the Convention. A state establishes its consent to be bound by an international treaty by ratification[33] or accession. This is done by the constitutionally responsible state organ that deposits an instrument of ratification to the designated body provided for by the treaty. More than 50,000 treaties have since 1945 been registered at the UN.[34] An important part of these treaties are human rights treaties. A large number of other treaties are deposited with governments and other entities. In the case of UN human rights treaties, most instruments of ratification are deposited with the UN Secretary-General.[35] International human rights treaties contain characteristics that are not found in other treaties of international law in that they do not provide for any reciprocal exchange of rights and duties between state parties. Accepting the provisions and terms in a human rights treaty, state parties accept the legal constraints upon their treatment of individuals within their territory and jurisdiction. Accepting the human rights regime has a direct consequence on state sovereignty. It becomes even more evident, as referred to above, in the case of optional protocols to the core UN conventions, where states accept the rights of individual petitions under international procedures, and thereby accept interference in their own national sovereignty and jurisdiction.[36]

8.2. International Custom

The second source of international law, enumerated after international conventions, in Article 38(1)(b) of the ICJ Statute, is customary international law. While some treaties can be binding only between parties to

33 "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty, Article 2(1)(b), VCLT.

34 <treaties.un.org/Home.aspx>.

35 Articles 76–77, VCLT.

36 *See e.g. Miha* v. *Equatorial Guinea*, CCPR/C/51/D/414/1990, 10 August 1994, Human Rights Committee, para. 63.

the treaty, customary international law can be binding on all states, with only one exception, that is, if a state acts as a persistent objector. This gives the state a possibility to maintain its sovereignty and protect itself from having a new emerging norm imposed on them by majority rule.[37] Customary law is considered to be informal and unwritten – *lex non scripta* – and can be special, regional or general.[38]

It is generally acknowledged that a rule of customary international law is composed of two elements. State practice (*usus*) which has to be extensive, virtually uniform and consistent[39] followed by a belief that such practice is required, forbidden or permitted, depending on what kind of rule that is emerging as a matter of law, *opinio juris sive necessitates* (*opinio juris* for short).[40] This was declared by the International Court of Justice in the *Continental Shelf* case where the Court said: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[41] This view has been referred to by the International Court of Justice in a number of cases.[42]

If we only have practice but cannot determine any *opinio juris* we are not dealing with legally binding rules but rather with principles of morality or social usage – *comitas gentium*.[43]

The two elements of custom are not always easy to determine because they are full of practical and theoretical controversies and this is also why treaties are enumerated as the first source in Article 38. It is evident that the Court in order to determine what the law is first looks

37 S*ee* London ILA Report 2000, *supra* note 31, section 15; *see also* M. Villiger, *Customary International Law and Treaties* (Kluwer Law, 1977) pp. 33–37.

38 Villiger, *ibid*., pp. 56–57.

39 Also known as the "objective" element.

40 Also known as the "subjective" element.

41 ICJ, *Continental Shelf Case (Libyan Arab Jamahiriya* v. *Malta)*, ICJ Reports 1985, pp. 29–30, para. 27.

42 *See e.g.* the "Lotus" case, PCIJ Ser. A, no. 10, at p. 28; *North Sea Continental Shelf Cases (FRG* v. *Denmark)*, [1969] ICJ Reports 266, para. 77; *Nicaragua* case (Merits) 1986, p. 14, at pp. 97–98, paras. 183–185.

43 London ILA Report 2000, *supra* note 31, p. 12; M. Shaw, *International Law* (CUP, 2008) p. 75.

at treaties before it goes to the more cumbersome process of assessing customary international law.

In order to make an assessment of what constitutes state practice or what *evidence* there is of customary law we may look at numerous places. They can be found in diplomatic correspondence (including protests), policy statements, press releases, official manuals (*e.g.* on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions by national courts and executive authorities, pleadings before international tribunals, statements in international organisations and resolutions these bodies make and adopt – all of which are areas often cited as state practice.[44] Treaties are also part of what constitutes evidence of customary law because they can help us understand how states perceive some rules of international law. Therefore ratification, interpretation and implementation of a treaty, including reservations made by a state, can be used in assessing customary international law.[45]

In this regard the human rights development is also interesting because it has extended the places to look for evidence of customary international law. So evidence can also be found in state reports to the UN treaty bodies, information assembled from the Human Rights Council's Universal Periodic Review process, and also documented materials that are produced by national human rights institutions.[46] State reports to human rights committees are therefore a valuable resource for determining state's legislation, practices and government policies. State reports –periodic reports – submitted to the treaty bodies therefore compose evidence of customary law because they disclose both how states have complied with treaty obligations as well as how states are planning to comply with the treaty obligations. Treaty bodies' general comments on the interpretation of particular provisions of conventions, even though not legally

44 J. M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Law, Vol. 1. Rules* (ICRC, Cambridge 2005) p. xxxii; London ILA Report 2000, *supra* note 31, section 4, p. 14; I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford, 2003) p. 6.

45 ICJ, *Continental Shelf Case (Libya Arab Jamahiriya* v. *Malta)*, Judgment of 3 June 1985, ICJ Reports 1985, pp. 29–30, para. 27.

46 C. Chinkin, 'Sources', in D. Moeckli *et al.* (eds.), *International Human Rights Law* (OUP, 2010) p. 111.

binding, may also contribute to the development of customary international law.[47]

Both physical and verbal acts of states constitute practice. This implies that both what states say (verbal acts – speeches, statements, etc.) and, in contrast, what states do (physical acts – such as arresting people or seizing property) are relevant in order to assess the customary relevance of the practice. This becomes evident in the example that most states would deny the fact that they violate basic human rights (*e.g.*, the use of torture) and go so far in their statements that they would comply with a customary rule prohibiting such violations. In this case the customary assessment would be made based on what states say and not what they do in reality.[48] Likewise, General Assembly resolutions are formally non-binding but statements can in certain circumstances nevertheless be used to assess evidence of *opinio juris*, overriding inconsistent practice (see *infra*).[49]

Since there is no hierarchy among the sources of international law, a treaty or a treaty provision can come to an end through *desuetude* – where the provision or the treaty in whole is consistently ignored by the parties.[50] Desuetude often takes the form of the emergence of a new rule of customary law conflicting with a treaty or a provision found in a treaty.[51] Treaties and custom can also be legally binding at the same time, so a claim under customary law can be made against a state that is not party

47 *See* International Law Association, Berlin Conference (2004), International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, p. 5.

48 London ILA Report 2000, *supra* note 31, p. 14; *see also* Chinkin, *supra* note 46, p. 112; *see also* Higgins, *supra* note 15, pp. 20–22.

49 London ILA Report 2000, *supra* note 31, pp. 57–59; *see Filartega* v. *Pena-Irala*, 630 F.2d 876, 1980 U.S. App; *R* v. *Jones*, [2006] U.K.H.L. 16; A. Cassese, 'On Some Problematic Aspects of the Crime of Aggression', 20 *Leiden Journal of International Law* (2007) pp. 841–849; *see also* Higgins, *supra* note 15, p. 22.

50 Akehurst, *supra* note 19, pp. 56–57.

51 N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, Oxford, 1994).

to a human rights treaty or which has made a reservation against a norm being considered as a *jus cogens* rule.[52]

8.3. General Principles

General principles of law as referred to in Article 38(1)(c) of the ICJ Statute are a controversial subsidiary source.[53] They were inserted into the ICJ Statute in order to enable the Court to decide disputes in cases in which neither treaties or custom provided guidance or solution in a specific claim. This was to avoid the case in which the Court would be forced to declare a case inadmissible because there was no applicable law, *i.e. non liquet*. There is no coherent view as to the nature of the principle. Two possible views exist among scholars. One that general principles are found in all, or almost all, major legal systems in the world. Examples are certain principles of good faith and the principles of *res judicata*, *etc.* Principles that can be said to have existed in municipal law and that have been taken to be used in international legal fora. Another view also includes general principles applicable directly to the international plane, found as derived from customary international law, such as the principle *pacta sunt servanda*, that treaties are binding upon state parties.[54] Human rights seem to be able to be applied in both cases, deriving from national law as well as from customary law. Some scholars possibly view a third alternative, which is to try and give general principles greater usage in international law today. They argue that general principles can be brought to the fore in a more "direct way" and that they therefore should be used so that they have an effect on domestic fora, instead of having them being used the other way around and by way of analogy.[55] Today general principles are derived from statements that are consensual, especially found in resolutions from UN organs. Using general principles as a law-making method through international acceptance would be a new method that would

52 Chinkin, *supra* note 46, p. 112.

53 *See* Permanent Court of International Justice, Advisory Committee of Jurists, Proces-verbaux of the Proceedings of the Committee, June 16th-July 24th, The Hague, 1920.

54 H. Thirlway, 'The Sources of International Law', in M. D. Evans (ed.), *International Law* (OUP, 2006) p. 128.

55 Simma and Alston, *supra* note 22, p. 102.

overcome the cumbersome process of detecting the elements of customary international law.[56] However, the assessment that has been done here does not suggest that this new way of perceiving general principles with a law-making character has won international recognition.

8.4. Judicial Decisions

Article 38(1)(d) of the Statute of the ICJ provides that judicial decisions are referred to as subsidiary means for the determination of rules of law. The Article makes reference to Article 59 which indicates that the decisions of the Court have no binding force except between the parties and in respect of that particular case. As compared to the vertical legal system of national law, in the horizontal structure of international law, courts are not obliged to follow previous decisions; however, in reality they almost always take previous decisions into consideration.[57] The judicial decision referred to in the Article includes the decision of the ICJ as being the most authoritative court. However, the scope of the Article does not only include international courts, but also decisions from municipal courts. Even though decisions of international courts are perceived as subsidiary sources, they do not constitute state practice. Compared to national courts which are state organs international courts are not. International courts' decisions have, nevertheless, been included because if an international court concludes that a rule of international custom has emerged that decision constitutes persuasive evidence to that effect. Furthermore, because of their precedential character, they can also contribute to the formation of customary international law, by influencing the "subsequent practice"[58] of states and international organisations.[59]

Also at the national and regional level courts play an important role in order to interpret and further develop human rights law.

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56 *Ibid*., p. 107-108; Chinkin, *supra* note 46, p. 115.

57 *See Anglo-Norwegian Fisheries* case, ICJ Reports 1951, p. 116; *Reparation of Injuries* case, ICJ Reports 1949, p. 174.

58 Article 31(3), VCLT.

59 Henckaerts and Doswald-Beck, *supra* note 44, p. xxxiv.

8.5. International and Regional Human Rights Tribunals

There is also abundant practice from regional human rights tribunals (the European Court of Human Rights, the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, and the African Commission of Human and Peoples' Rights), the international criminal tribunals (International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), as well as from the International Court of Justice.[60] Like decisions from international courts, decisions from regional human rights tribunals have also been included, because decisions from municipal courts that conclude that a customary norm has emerged constitute persuasive evidence to that effect. Likewise, because of their precedential character, they can also contribute to the formation of customary international law, by influencing the "subsequent practice".

8.6. Teachings of Publicists

The second source referred to in Article 38(1)(d) includes teachings of the most "highly qualified publicists". In the *Filartega* case, the Court asked for the views of publicists as one of the sources to determine whether torture was an offence against international law.[61] This has been the case throughout the history of international law where textbooks and authors have been cited. While international tribunals often refer to textbooks and authors, the International Court of Justice does not quote teachings, and rarely refers to arbitral decisions.[62]

From this point of view there is within the international human rights system abundant information coming from expert bodies and publicists that elucidate issues that need to be explained within the area of human rights. Foremost, the UN Human Rights Council's special rapporteurs and representatives, independent experts and working groups, known as the "Special Procedures", are among the most frequently referred works. As in old times, when some areas of international law needed clarifica-

60 *Ibid*., p. 3.

61 *See Filartega* v. *Pena-Irala*, *supra* note 49.

62 Akehurst, *supra* note 19, p. 52.

tion from publicists,[63] today they appear to fill the same important functions and role as before.[64]

9. *Jus Cogens*

A *jus cogens* rule is perceived as a peremptory norm which is accepted and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[65] International law can thus bind all states regardless of whether they have ratified a treaty or not, if a norm found in a treaty is perceived to be a peremptory norm from which no derogation by agreement is permitted.[66] International law is therefore both dispositive and can at the same time also be indispositive. Which norms should be attributed such status in international law may still be controversial, but many norms belong to the domain of human rights. Often cited examples refer to the prohibition of genocide, slavery and slave trade, or gross violations of peoples' right to self-determination, and racial discrimination.[67] In this respect certain norms have been recognised by international, regional and national courts as constituting *jus cogens*. For instance the International Criminal Tribunal for the former Yugoslavia in *Prosecutor* v. *Furundzija* stated that the prohibition of torture[68] was a norm of *jus cogens*. Also in the case *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda* the ICJ gave express recognition to genocide as a *jus cogens* rule. Also in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ was of the opinion that the threat or use of nuclear weapons would be against the

63 *See* Thirlway, *supra* note 54, p. 129.

64 *See* Chinkin, *supra* note 46, p. 118.

65 Article 53, VCLT.

66 Higgins, *supra* note 15, pp. 21–22

67 *See* Restatement (Third), The Foreign Relations Law of the United States, American Law Institute (1987), Vol. 2, 161; *see also* General Comment No. 24, para. 8.

68 *Prosecutor* v. *Furundzija*, IT-95-17/1-T (10 December 1988).

fundamental rules of humanitarian law.[69] So states are bound by *jus cogens* norms whether they have consented to them or whether they want it or not. In reality states that have not ratified the CAT (currently 47 states) are bound by the provisions found in the Convention and they cannot derogate from it by concluding any international treaty whatsoever. The threshold is set high in order to derogate from such a norm in international law, which in principle only can be done by a subsequent norm of general international law having the same character, and accepted and recognised by the international community as a whole.[70] There is a very strong jurisprudential perception today that that there is almost an intrinsic relationship between norms that are recognised as *jus cogens* and international human rights.[71]

10. Other Sources of International Law

10.1. Human Rights Treaty Body Findings

The jurisprudence of the treaty bodies has become a frequent reference standard in much political and legal analysis in many countries. Treaty body findings are also important to analyses at the international level, in non-governmental organisations and advocacy groups as well as academics and others.

The treaty bodies carry out three main tasks to discharge their functions: they formulate concluding observations on state reports, develop general comments, and adopt views on individual communications.[72]

In the Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (Berlin Conference 2004) the International Law Association's (ILA's) focus was to assess the extent to which the work of the treaty bodies had begun to have an impact on the work of national

69 *Legality of the Threat or Use of Nuclear Weapons*, 1966, ICJ Reports, 257, para. 79.

70 *Prosecutor* v. *Furundzija*, *supra* note 68, para. 133; *see also* Higgins, *supra* note 15, p. 22.

71 A. Bianchi, 'Human Rights and the Magic of Jus Cogens', 19:3 *EJIL* (2008) p. 491.

72 *The United Nations Treaty System: An introduction to the core human rights treaties and the treaty bodies*, Fact Sheet No. 30.

courts and tribunals. Furthermore it was also to identify factors that contribute to the use by courts and tribunals of treaty body materials and to encourage further use of the international sources by courts, tribunals and advocates by disseminating information about how they were already being used.[73]

Overall, the Report concludes that the treaty body findings have become an interpretative source for many national courts in the interpretation of constitutional and statutory guarantees of human rights, as well as in interpreting provisions which form part of domestic law, as well as for international tribunals.[74] Many statements and references can be found where courts have noted treaty body findings (decisions in individual cases, and general comments or recommendations) as relevant, disregarding the fact that they are not courts and only attributed quasi-judicial character. The courts' views have, nevertheless, been that they have been obliged to follow the treaty bodies' interpretations. Cases decided under individual communications procedures and general comments or recommendations are the most cited ones. As the Norwegian Foreign Affairs Ministry stated:

> While the recommendations and criticism of the monitoring committees are not legally binding, the Norwegian authorities attach great importance to them and they constitute important guidelines in the continuous effort to ensure the conscientious implementation of the human rights conventions.[75]

States parties' reports and other materials are noted to have been referred to in a "relatively small number of occasions".[76] Furthermore the Report notes that the Human Rights Committee (HRCee) has received the majority of references, both as regards cases and general comments. A reasonable expectation is said to be that as time lapses advocates and judges will become more familiar with the increasing jurisprudence coming

73 International Law Association, Berlin Conference (2004), International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies.

74 *Ibid*., p. 43.

75 *Ibid*., p. 4, note 19.

76 *Ibid*., p. 43.

from the treaty bodies. It is noted that the mode of citation of treaty body materials varies widely, from both inconsequential references to more substantive references, to detailed analysis that may be decisive in a given case. It is also noted that the number of cases in which a treaty body finding is a significant factor in influencing the outcome of a decision is a small minority of the cases referred.[77] Some factors that appear to influence the extent of use made of treaty body findings is the limitations of data collection and analysis found in states' systems, and where more systematic analysis of data would lead to greater use of treaty body output.

But the report refers to some factors which at least in individual cases appear to have been conductive to the use of treaty body findings. The "one critical factor" that is singled out to influence the extent of use made of treaty body findings by national courts is that some of the courts are more inclined to use international law (including international human rights law). This may be so because in some countries' constitutions international law forms part of the country's constitution. Although, there appears to be many countries (where international law does not form part of the country's constitution) where courts have made use of treaty body findings.[78]

Another factor which is said to contribute to the use of treaty body output is direct incorporation of provisions of a treaty in domestic statutes or constitutions. A number of common law jurisdictions have adopted International Bills of Human Rights which are an enactment of terms found in one or both Covenants. By doing so this has increased the frequency of reference to the output of the HRCee and the Committee on Economic, Social and Cultural Rights. Also mentioned in the Report is the general awareness in the country concerning treaty bodies. In this respect, public awareness is mentioned as well as engagement in treaty reporting procedures before the courts and other national institutions. Also the availability of relevant treaty body findings in the local language also appears to be a factor.[79]

77 *Ibid*., p. 44.

78 *Ibid*., p. 44.

79 *Ibid*., p. 44.

10.2. Resolutions

It is generally agreed that an important omission from the enumeration of sources found in the authoritative Article 38(1) of ICJ Statute is resolutions taken by international organisations. Security Council resolutions under mandatory Chapter VII are binding on all states, implemented by secondary legislation, but have not been referred to as a source of international law even though they have in some cases widened the scope of human rights.[80] However, more often in this area General Assembly resolutions are mentioned as possible additional sources of international law. The non-binding Universal Declaration on Human Rights, discussed above, which was adopted unanimously in 1948, had an impact long before agreement was reached on the two international covenants, which were signed in 1966. The impact the Declaration had was that it from the outset was declaratory of customary international law and further on its substance was transformed into binding conventions. The UDHR remains one of the most influential examples of this kind. But there are a number of other such General Assembly resolutions that have had dynamic impact on the development of international human rights law.[81] Their effects are labelled "soft law" and are not perceived to be legally binding ("hard law") from the outset but are seen as a successive process leading to binding conventions.[82] A similar pattern, as found in the UDHR, can be seen in the formation of many other core human rights treaties. For instance the Declaration on Torture[83] eventually led to the adoption of CAT. ICERD was adopted pursuant to the General Assembly Declaration on the Elimination of All Forms of Racial Discrimination 1963.[84] In 1967, the General Assembly adopted a Declaration on the Elimination of Discrimination against Women and in 1979 CEDAW was

80 B. Simma, *The Charter of the United Nations: A Commentary*, 2nd edition, Vol. I (OUP, 2002) p. 15.

81 Friendly Relations Declaration, GA res 2625 (XXV) of October 1970 and the Declaration on the Establishment of a New International Economic Order, GA Res 3201 (S-VI) of May 1974.

82 A. Boyle, 'Soft Law in International Law-Making', in D. Moeckli *et al.* (eds.), *International Human Rights Law* (OUP, 2010) pp. 145–146.

83 GA Res 3452 (XXX) of 9 December 1975.

84 GA Res 1904, GA Doc. A/RES/1904 (XVIII), 21/11/63.

adopted. The same applies to a number of General Assembly resolutions on the rights of the child that eventually led to the adoption of the CRC. Finally, General Assembly resolutions on the rights of persons with disabilities led to the adoption of the CRPD.

Not only General Assembly resolutions may be characterised as having a soft law effect, but also a number of other resolutions such as resolutions from the Human Rights Council, guidelines, codes of conduct and standards of behaviour, and the final instruments concluded at global summits.[85] Global summits that are concluded under UN auspices have been seen as important contributions to the development of international law. They emerged in the 1990s and have focused on a number of important issues. As an example, the World Conference on Human Rights that took place in Vienna 1993, with 171 heads of state and 1,500 non-governmental organisations represented, concluded in heated debates that human rights should be seen as universal and indivisible and by identifying protection of human rights not only as a legitimate concern of the international community, but also a priority objective for the United Nation. By adopting the Vienna Declaration and Programme of Action the international community had renewed its commitment to the protection and promotion of human rights.[86]

11. Reservations

Reservations to international treaties have also had an impact on state sovereignty; however, in this area it is difficult to assess the impact that resolutions have had on state sovereignty.[87] A turning point in this area came, nevertheless, with the opinion of the International Court of Justice in the *Genocide* case.[88] Prior to the *Genocide* case the traditional rule was

85 Chinkin, *supra* note 46, p. 121.

86 *But see* Tomuschat, *supra* note 21, pp. 78–79.

87 A reservation is defined in Article 2 VCLT as a "unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State".

88 *Genocide case*, ICJ Reports 1951, p. 15, at p. 29; *see* E. Klein, 'Genocide Convention (Advisory Opinion)', *EPIL II* (1995) pp. 544–546.

that a state could not make a reservation to a treaty unless the reservation was accepted by all states. This created lengthy negotiation procedures and risked also the adoption of the convention. However, the traditional rule – the "unanimity rule" – was undermined by the advisory opinion in the *Genocide* case. The Court made clear that the unanimity rule was of undisputed value, but that it was not applicable to certain types of treaties. In this respect it was not applicable to the Genocide Convention, which had the aim to protect individuals, instead of conferring reciprocal rights on state parties. The Court's advice was that if a state had made a reservation which had been objected to by one or more of the parties to the Genocide Convention, but not by others, that state could be regarded as a party to the Convention, as long as the reservation was compatible with the object and purpose of the Convention.[89]

Since states may reach different conclusions regarding the compatibility of a reservation, the effect of the Court's opinion is that a state making a reservation is likely to be regarded as a party by some states, but not by others. Articles 19–21 of the Vienna Convention, dealing with reservations, follow the opinion of the Court in the *Genocide* case, but reverts to the supporters of the unanimity rule, making it clear that every reservation is incompatible with certain types of treaties if not accepted unanimously.

The question of reservations to human rights treaties has been one of the most controversial issues in contemporary international law. All major human rights covenants and conventions have received a great number of reservations, far more than any other international conventions. Many state parties have made reservations with the aim to ensure the prevailing effects of their domestic law or have made "sweeping" reservations that do not specify the provisions that are subject to reservations. Reservations, especially those made to substantive provisions, have as a consequence weakened the obligations of state parties or made their reservations difficult to grasp. Such reservations also create problems of legal certainty; making it difficult for individuals to know what kind of rights they have been ascertained.[90] The results of such reservations have

89 M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. D. Evans (ed.), *International Law* (OUP, 2003) pp. 173–201.

90 M. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in M. Kamminga and M. Scheinin

considerably undermined the effective implementation of human rights treaties.[91] Reservations are only permissible as long as they are not "incompatible with the purpose and object of the treaty".[92] A key question to ask is who has the competence to decide whether or not a reservation is compatible or not?[93] In this case there is no appropriate international body to rule on this issue.

The issue of reservations was addressed by the UN HRCee in a controversial General Comment.[94] The HRCee, created in 1976, oversees the implementation by state parties of the 1966 ICCPR and its two Optional Protocols. In the General Comment the HRCee takes the view that the provisions found in the Vienna Convention relating to reservations on the role of state objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties that are not within the confines of a web of inter-state exchanges of human rights obligations since they are concerned with the endowment of individuals with rights. The HRCee was of the view that reservations that offended peremptory norms would not be compatible with the object and purpose of the Covenant. The HRCee also examined the question of whether reservations to non-derogable provisions of the Covenant were compatible to the object and purpose. The HRCee continued to argue that reservations to the First Optional Protocol established under the Covenant would not be compatible with the object and purpose. The HRCee also made clear that it was the Committee itself that would determine whether a specific reservation was within the confines of the object and purpose of the Covenant. This opinion created a strong reaction from state parties, including the UK and the US, who considered the VCLT Article 19(c)

(eds.), *The Impact of Human Rights Law on General International Law* (OUP, 2009) pp. 1–22.

91 Tomuschat, *supra* note 21, pp. 204–205.

92 Article 19(c), VCL.

93 *See generally* I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime; Conflict, Harmony or Reconciliation* (Martinus Nijhoff Publishers, 2004).

94 UN HRCee General Comment No. 24(52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 11 November 1994.

adequate and applicable to reservations to human rights treaties. [95]They were also of the view that states themselves could determine whether a reservation was compatible with the object and purpose rather than having the Committee making such determination. However, the HRCee reaffirmed its firm position stated in the General Comment in the *Kennedy* case.[96]

However, in his Second Report as ILC Special Rapporteur Alain Pellet rejected the view presented by the HRCee and reaffirmed that the system of the Vienna Convention dealing with reservations was adequate to address reservations in human rights treaties.[97]

When the Optional Protocol to CEDAW was drawn up the negotiating parties were aware of the complexity of the issue of reservations. However, the solution found, stipulated in Article 17, simply forbids reservations. In this case the possibilities to pick and choose among the provisions found in the Convention are restricted, although such choice may seem attractive, particularly in the case of this Convention. On the other hand Article 14 of the Optional Protocol to the CRPD makes clear that reservations incompatible with the object and purpose of the present Protocol "shall not be permitted".[98] Apparently, there appears still to be tension between the idea of human rights and state sovereignty in the area of reservations, because a state may still want to have the possibility to pick and choose the obligations to which it wishes to be bound as long as reservations are not forbidden. Reservations may weaken the content of the treaty and undermine the obligations for some of the parties to it. Subsequently, the question of universality is also at stake and the whole point of international human rights treaties is weakened if states do not agree to respect the same rights. Obviously the topic concerning reservations to human rights treaties is still controversial but there appears still to be room for progressive thinking and developments in this area.[99]

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95 Tomuschat, *supra* note 21, pp. 204–205.

96 *Rawle Kennedy* v. *Trinidad and Tobago*, Comm. No. 845/1999, Decision, 2 November 1999.

97 *See BYIL* (1997), vol. II, pp. 53–54, 57.

98 Tomuschat, *supra* note 21, pp. 204–205.

99 *See* F. Mégret, 'Nature of Obligations, in International Human Rights Law', D. Moeckli *et al.* (eds.), *International Human Rights Law* (OUP, 2010) pp. 124–149.

12. Concluding Remarks

It cannot be denied that something remarkable has happened with the introduction of human rights in international law. What the effect would be of putting the words "human rights" together, as found in the UN Charter 67 years ago, no one could actually foresee when the Charter was adopted in San Francisco in 1945. From the outset the UN Charter provides in its preamble the notion that human rights should establish normative conditions under which justice and respect for the obligations should develop. The Universal Declaration of Human Rights adopted in 1948 gave substance to human rights and the binding covenants and conventions deriving also from other General Assembly resolutions that followed created a normative structure that today binds the majority of the world's states. This is particularly true regarding the International Bill of Human Rights that more than two-thirds of the world's states have endorsed.

Naturally, as discussed in this chapter, these normative mechanisms have had implications on national sovereignty, a fact that today is difficult to deny. The tensions that once were visible between human rights and sovereignty have apparently diminished. Today it is appropriate to claim that the normative development of international human rights law has eroded the concept of sovereignty. Erosion is a process in itself and develops as time goes by. In our case, with the developments of international law, which is a dynamic process, the erosion of sovereignty by international human rights developments are still in progress.

For states that persistently stick to traditional views of international law where "sovereignty" is claimed to have no nexus to human rights, such states appear to misunderstand that international human rights law has developed to such an extent that human rights today permeates all areas of international law.[100]

100 *See* Reisman, *supra* note 2.

3. Sovereignty and Transnational Investments

Pär Hallström

1. State Sovereignty Challenged by Transnational Companies

The concept of sovereignty has many faces. To non-lawyers it refers to the supreme body or to the head of a state or more abstractly to supreme power in general. Mostly it points at some discretionary power of the highest body of the state to take decisions, but in common language it also refers to the situation when the state is in full control of matters. In this latter sense we may for example talk of economic sovereignty of a state. In the mid-20th century economic sovereignty, in the form of autarky and state control of major companies, was even an ideal for many political economists believing that full political power equalled full economic power. At least since the early 1970s this ideal of economic state sovereignty became illusionary because of the technological and economic success of major transnational companies,[1] not only operating in the extraction sector, overshadowing state efforts and resulting in the fact that decisions of major economic importance for many countries were taken by the boards of such companies.

Also, when making a strictly legal analysis of recent development of the concept of sovereignty, we cannot avoid taking notice of transnational companies. They challenge to a limited, but to some degree, the

1 In this article corporations operating in more than one country are called transnational companies and not multinational companies.

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traditional Westphalian concept of sovereignty that makes the states the fundamental and only building blocks of the international society. This concept excludes sharing supreme state powers within the borders of the state with other, national or foreign, actors. This idea is at the basis of the doctrine of sovereignty and equality of states, reflected in the United Nations (UN) Charter. As explained by Brownlie the principal corollaries of the doctrine are: (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligator.[2]

The third corollary mentioned by Brownlie implies that sovereign and discretionary powers may be limited by consent of the state. In fact, in the modern real world, powers have been curtailed in at least four ways, and not all of them have depended on the consent of the obligator: states have consented to enter into treaties with each other; some of these treaties have established international organisations that have developed law binding on the members; states have consented to have their disputes solved by international courts or tribunals that autonomously render binding decisions; and, finally, general customary international law binding on all states has developed as a result of state practice, as well as of the activities of international organisations of global membership, and of convincing reasoning of decisions of international courts and tribunals. In principle the obligatory nature of customary law depends on consent, but in reality it is very difficult for an individual state to avoid being bound by general customary law.[3]

Having noted that consent of the state, or the will of the state, is at the basis of international obligations and of international law as such, we have also noted that international law may in fact develop independently of the immediate expression of the state, and that this happens in the form of customary law, case law and practice of international organisa-

2 I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford, 2003) p. 287.

3 A. Cassese, *International Law*, 2nd edition (Oxford, 2005) pp. 162, 163; M. N. Shaw, *International Law*, 6th edition (Cambridge, 2008) p. 91; N. Q. Dinh, P. Daillier and A. Pellet, *Droit International Public*, 4th edition (LGDJ, Paris, 1992) pp. 218 *et seq*.

tions.[4] In this sense the exclusive sovereign power of each state to autonomously decide about what rules it wants to be bound by have been reduced. As we shall see further on, investment law is one such field where customary law and decisions of tribunals have reduced the discretionary powers of states.

Adding to that situation, states are no longer sole actors on the international scene. They are the original and primary subjects of law, but, apart from some special subjects like the Holy See or insurgents, international organisations are also considered subjects of international law, although secondary subjects as they are based on a treaty between states and only have the competence that that founding treaty grants to them.

Recognition of international subjectivity to individuals and juridical persons, companies, would noticeably reduce state sovereignty, as they would no longer have full jurisdiction over their citizens or juridical persons operating on their territory. However, today, legal doctrine generally affirms that individuals have some limited international subjectivity based on the developments in the area of international human rights law. International subjectivity entails the capacities to create international law by making treaties or by expressing its will orally and/or through its conduct; to posses international rights and duties obtained through treaty law or through general international law; to maintain such rights by bringing international claims; and to commit and be the object of international crimes and breaches. Via the development of human rights law, since the Second World War, individuals are in possession of the last categories of those capacities. International customary law imposes duties on individuals as far as humanitarian law is concerned (crimes related to warfare) and not to commit certain very grave crimes, such as crimes against humanity, in particular genocide, aggression, terrorism and torture. Those obligations are incumbent on individuals independently of rank or citizenship and in case of such a crime an individual can be summoned before a foreign or international court without the consent of his home state as well as before his national court. As far as the right of a citizen to bring an international claim is concerned, this right depends on whether the state in question has made a commitment to that effect in

4 Case law and practice of international organisations may in particular create the necessary *opinio juris* needed to prove the existence of customary law.

an international agreement. Most states have permitted their citizens to make individual petitions to various United Nations quasi-judicial committees supervising human right treaties. Treaties in Europe and Latin America have established efficient courts and commissions of human rights to which individuals may file complaints as well.

The question of international legal subjectivity of transnational companies has been much less observed in doctrine than that of individuals, and yet their characteristics endow them with some subjectivity as well, and their importance in everyday economic life makes investigation of their position particularly interesting. Some circumstances are of special importance for evaluating this position. The role of customary law is the first one. States are obliged to treat them according to international standards set by customary law. Gradually, international customary law rules also become directly binding for transnational companies. These customary law rules relevant for transnational companies are not only developed through *e.g.* environment or human rights treaties, but mainly by similar wordings of various international investment treaties and by the interpretations of them by arbitral tribunals. Most international investment treaties, and many regional trade agreements containing clauses on investments, also give the right to transnational companies to have their disputes with host states tried through arbitration, *i.e.* they grant direct access to an international tribunal. With special regard to the Energy Charter Treaty (ECT), Article 26, containing compulsory arbitration against governments at the option of foreign investors, an International Centre for Settlement of Investment Disputes (ICSID)[5] decision reads:

> By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.[6]

5 Established within the framework of the World Bank on the basis of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States.

6 *Plama Consortium Ltd.* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 141.

2. Four Phases of Investment Law

While there is no international obligation for states to let investments into their territories, states have to treat them according to international customary law once they are there. If they want to grant them better treatment than that, they can do so by concluding investment treaties with other states, and /or granting supplementary protection to investments in the investment contract with the investor. Over time states have had to strike a balance between attracting foreign capital and knowledge by granting favourable treatment in investment treaties or giving priority to their sovereign and discretionary decisional power over their economies. Four periods or phases can be distinguished when analysing the development of this balance over time.

2.1. The First Phase – Quarrel Over the Right to Reparation and Diplomatic Protection in Case of Expropriation

Peaceful settlement of disputes on reparation for injuries to foreign property through impartial arbitral commissions was established already by the Jay Treaty in 1794, but until the time between the two world wars such disputes were regularly settled by diplomatic means, as well as, sometimes, as late as in the 1910s, by gun boat diplomacy. During this period, lasting until the early 1960s, large scale expropriations were made, particularly by states adopting communist ideology and by states in the southern hemisphere, the first being Latin American states.

The major questions concerned whether natural resource concessions were to be respected and to what extent they were to be compensated in case of expropriation. Two ideas confronted each other. One was based on state sovereignty and the other one on the right to property and on unjust enrichment and that compensation was to cover losses. The first one was most skilfully formulated by the Argentinean jurist Carlos Calvo and is based on three elements: foreign nationals are entitled to no better treatment than host state nationals; the rights of foreign nationals are governed by host state law; and host state courts have exclusive jurisdiction over disputes involving foreign nationals.[7] The second one relied

7 A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (Wolters Kluwer, 2009) p. 13.

on the conviction that international customary law on foreign nationals contained a minimum standard of treatment giving right to prompt and adequate compensation in case of expropriation and that foreigners should not be treated by public administration and the judiciary manifestly inferior to "civilised" standards.[8] Breach of that minimum standard caused international responsibility of the host state in relation to the home state of the foreign national.

2.2. *The Second Phase – The New Economic World Order Meeting the Minimum Standard of Treatment and the Right of Foreign Companies to Directly Bring a Suit to International Arbitration*

The 1960s and 1970s were characterised by the decolonisation process and ideologies characterised by hopes that economic independence, sovereignty over natural resources, planned economy and state ownership of companies would lead to successful economic development, and that economic and technology transfer from North to South would take place smoothly. Third world countries attained a majority in the General Assembly of the UN and they sought to develop public international law rules on economic sovereignty with the help of second world countries. In 1962 the General Assembly adopted the Resolution on Permanent Sovereignty of States over their Natural Resources,[9] and in 1972 third world countries made the General Assembly adopt the Declaration on a New International Economic Order,[10] and a Resolution containing a Programme of Action on its Implementation,[11] and in 1974 it adopted the Charter of Economic Rights and Duties of States.[12] The Charter does not

8 "[T]the treatment of an alien, in order to constitute an international delinquency, should not amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." *L.F.H. Neer & Pauline Neer* v.*United Mexican States*, 4 *RIAA* (1951) 60, at 61–62.

9 Ga Res 1803 (XVII), 14 December 1962.

10 Ga Res 3201 (S-VI), 1 May 1972.

11 Ga Res 3202 (S-VI), 1 May 1972.

12 Ga Res 3281 (XXIX), 12 December 1974.

recognise that international law would be applicable on investments. Its Article 2(a) reads:

> Each state has the right:
> (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment;

And its (c) affirms:

> … In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of sovereign equality of States …

Resolutions of the UN General Assembly do not, however, have any binding force and with the passage of time the importance of those declarations as programmatic statements or as elements of interpretation vanished. Most investments were also made by the rich Organisation for Economic Co-operation and Development (OECD) states, which were lukewarm to these resolutions, and their investments were made to a much larger extent between themselves than in the North-South direction. These states liberalised capital transfers and investment in major service industries through binding OECD codes on the liberalisation of capital movements and current invisible operations.[13] They authored a OECD Draft Convention on the Protection of Foreign Property in 1962,[14] comprising minimum standards such as "fair and equitable treatment", and "protection and security", an obligation of the host state not to impair the management, maintenance, use, enjoyment or disposal of property by unreasonable or discriminatory measures, and of paying compensation in case of expropriation without undue delay and representing the genuine value of property affected.

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13 <www.oecd/org/dataoecd/41/21/2030182>; Newcombe and Pradell, *supra* note 7, p. 23.

14 Approved by the OECD Council in 1967.

They also favoured depoliticisation of investment settlement by making it less of a confrontation between governments and more of a legal issue between the investor and the host state; this was to be attained by letting disputes be solved by an impartial arbitral tribunal. In 1959 the director of Deutsche Bank, Hermann Joseph Abs, and the director of Shell, Lord Shawcross, worked out a Draft Convention on Investment Abroad providing for direct investor-state arbitration. In 1966 the International Centre for Settlement of Investment Disputes was established within the framework of the World Bank, assuring a mechanism for investor/host state arbitration. It soon had members from the northern as well as from the southern hemisphere.[15] As Dolzer and Schreuer have pointed out, its creation was a bold step because it meant that (a) foreign companies and individuals can directly bring a suit against their host state; (b) state immunity is severely restricted; (c) international law can be applied to the relationship between the host state and the investor; (d) the local remedies rule is excluded in principle; and (e) ICSID awards are directly enforceable within the territories of all states parties to ICSID.[16] ICSID offers standard clauses for the use of the parties, detailed rules of procedure and institutional support including the selection of arbitrators. In order to have jurisdiction both the two parties to the conflict (the host state and the investor) must have given their consent.[17] Such consent can *e.g.* be expressed in the investment contract or in an investment treaty already before any dispute has arisen.

In order to protect their transnational companies, mainly from undue expropriation, capital exporting countries started concluding bilateral investment treaties (BITs) with mainly capital importing countries. That was a third remarkable event during this phase. Today there are more than 2,500 of them. The first BIT to be signed was between Germany and Pakistan in 1959, but other European states, Canada and Japan followed suit. The US had continued its tradition since 1919 to negotiate Friendship, Commerce and Navigation Agreements (FCN), but gradually the trade part in them disappeared while the investment part

15 147 states have ratified the ICSID Convention, <icsid.worldbank.org>, visited 8 June 2011.

16 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, 2008) p. 20.

17 *Ibid.*

remained, and from 1977 they turned to BITs as well. During this phase the protection against expropriation was the main purpose of the BITs, although they contained other provisions as well, having the OECD Draft Convention as their model.

2.3. The Third Phase – Neo-Liberalism, Expansion of International Investment Agreements, More Questions Covered in Them, and Development of Arbitration Case Law

From the early 1980s the investment climate changed together with the failure of orthodox socialism to provide welfare for citizens, in the West as well as in the East and South. Neo-liberalism broke through. There was a general consensus that the world should open up to international commerce as well as to international investments. The Uruguay Round was launched in 1986 resulting in the establishment of the World Trade Organization (WTO) in 1994, assuring more liberal trade in goods, rules for liberalising services, extending intellectual property protection to all the 153 members of the WTO, and including an agreement on Trade-Related Investment Measures (TRIMS), of modest content, however.

At regional level trade organisations were created or extended their activities. Only to mention a few of them: the single market project of the European Union (EU) was launched in 1985, the Association of Southeast Asian Nations (ASEAN), created in 1967, was given a new impetus,[18] the Asia-Pacific Economic Cooperation (APEC) initiated in 1989 would stimulate investments, The Southern Cone Common Market (MERCOSUR) was established in 1991, Central America Free Trade Agreement (CAFTA)[19] in 2003, and the North American Free Trade Agreement (NAFTA) was signed in 1994, both of the latter containing important provisions on investments and investor/state arbitration. Often multilateral and bilateral free trade agreements negotiated during the 1990s included provisions on investments as well.

18 The ASEAN Comprehensive Investment Agreement (ASEAN CIA) was established later in 2009, and the ASEAN-China Investment Agreement in 2009 as well.

19 The US and the Dominican Republic are members as well as Central American states.

At the global level OECD took the initiative in 1998 of preparing a Multilateral Agreement on Investment (MAI) aiming to ensure that the liberalisation obligations of states were complemented by provisions on investment protection and reinforced by effective dispute settlement procedures.[20] MAI met resistance for being too investor friendly and was not adopted. Other multilateral initiatives worth mentioning are the creation of the Multilateral Investment Guarantee Agency (MIGA)[21] in order to encourage the flow of investments in particular to developing countries by issuing guarantees, including coinsurance and reinsurance against non-commercial risks, as well as the conclusion of the Energy Charter Treaty (ECT) in 1994. The latter Treaty covers many issues related to trade in energy but also to investments, and in that respect it contains provisions assuring advanced protection and copying contents of bilateral investment treaties. Not the least it contains the right of the investor to arbitration by ICSID, or by an arbitral tribunal established under the UNCITRAL arbitration rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce, or before the courts or arbitral tribunals of the respondent state.

The development of bilateral investment treaties was very spectacular during this period, both in numbers and in the increase of protection covered.[22] Their purpose was, and still is, to stimulate economic development, to guarantee the rights of the investor and to promote investments. It is noticeable that their numbers increased at the same time as privatisation in Eastern and Southern countries was considered a remedy to their economies. Most countries have defined model BITs,[23] which they follow when negotiating investment treaties, but the contents of those models are quite similar.

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20 S. P. Subedi, *International Investment Law Reconciling Policy and Principle* (Hart, 2008) pp. 39–41.

21 <www.MIGA.org>.

22 Only the 27 member states of the European Union have concluded more than 1,000 BITs with third countries and they have concluded 191 BITs with each other.

23 Chinese BITs nowadays have substantive and procedural protections generally similar to OECD exporting state BITs, although they contain an exception for existing non-conforming legislation and investors have to exhaust domestic administrative review before submission of the claim.

They generally start with initial provisions defining the scope of the treaty and who are to be considered "investors"[24] and what an "investment" is. The nationality of the investor can be decided according to criteria of "constitution in accordance with the law of the Contracting Party", of direct or indirect control, of the seat of the investor and of where it carries out its business. The term "investment" may refer to movable or immovable property, to shares, and stock, bonds, *etc*. establishing participation in a company, to claims in money, to intellectual property rights and to rights to undertake a commercial activity.

Those initial provisions are followed by clauses establishing the substantive protections accorded to the investor and/or to the investment. The first one of those is on "most-favoured-nation" (MFN) treatment. It means that a state shall automatically extend all benefits that it grants to a third state to the state benefitting from the MFN clause. A second one is on "national treatment", meaning that the investor and investments should be accorded treatment no less favourable than that which the host state accords to its own investors. Some investment treaties extend this clause to the pre-entry stage including a right to access to a national market on the basis of national treatment. A third clause is on "fair and equitable treatment" (FET). It has a broad meaning and encompasses such fundamental standards as good faith, due process, non-discrimination and proportionality.[25] A fourth clause is on "full protection and security". Its meaning coincides partially with FET, but includes protection of the investor from physical violence on the premises of the investment as well as an obligation to provide a judicial system where private rights can be vindicated.[26] A fifth clause is on "expropriation". It does not prohibit expropriation but lays down the conditions of legal expropriations. They should be for a public purpose, in accordance with due process of law,

24 In this connection Sovereign Wealth Funds should be observed. As they are making portfolio investments most international investment agreements do not consider them investors, but due to their size, non-transparency as far as economy and aims are concerned, investment goals, source, and lack of institutional checks and balances, they are forceful actors on the economic and political scene. <www.swfinstitute.org>.

25 Dolzer and Schreuer, *supra* note 16, p. 131, quoting Judge Schwebel in *MTD* v. *Chile*, ICSID Case No. ARB/01/7 Award, 25 May 2004, 12 *ICSID Reports* 6, para. 113.

26 *Ibid*., p.152; Newcombe and Paradell, *supra* note 7, p. 311.

non-discriminatory and accompanied by prompt, adequate and effective compensation.[27] BITs do not only consider regular expropriations where the investor loses the title to its investment, but they also contain clauses on indirect expropriation, where the owner, investor, is still in title but the laws or other activities of the host state have made its investment purposeless. For example the German Model BIT, Article 4(2), reads: "Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization …"[28]

Some international investment agreements contain a sixth clause, referred to as an "umbrella clause". Via an umbrella clause a breach of a business contract between the foreign company and a host state, normally only governed by domestic law and under the jurisdiction of a domestic court, becomes a breach of a BIT and is protected by international investment law and under the jurisdiction of international arbitration. The Energy Charter Treaty also contains such a clause. Article 10(1) reads: "… Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." This clause should be read in connection with Article 26(3) containing an unconditional consent to submit disputes to international arbitration.

Some international investment agreements also contain a seventh clause, a "stabilisation clause". Investments often run for a period of up to some 20 years, and the investor calculates that time is needed to recover its costs and to make a profit. Changes of legislation on *e.g.* taxation, wages or environment could frustrate such calculations. A stabilisation clause freezes legislation applicable on the investment as it was at the time of making it. By such a clause a state has of course limited its sovereignty. Such a clause is often completed with a clause saying that subsequent more favourable legislation would be applied. Mostly such guarantees of predictability are covered by the FET clause as well and only substantial alteration of conditions may be compensated for.

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27 *Ibid*., p. 369; Dolzer and Schreuer, *supra* note 16, p.91.

28 Many international investment agreements can be found at <ita.law.uvic.ca>.

BITs generally also contain an eighth type of clause, which are exceptions to the treaties, protecting host state prerogatives. These are clauses permitting measures by the state concerning its essential security interests, or its public order or protection of human, animal or plant life or health, or even government grants or subsidies, or that non-conforming existing legislation should be exempted from the applicability of the BIT.

Finally, BITs and other international investment treaties contain rules on how disputes should be settled. They regulate both disputes between the two state parties to the treaty and between an investor and a state party. International investment treaties today invariably give the investors a direct right to resort to arbitration with regard to any disputes arising from alleged treaty breaches or more generally with regard to investments.[29] Many international investment treaties offer the investor a choice between various arbitration facilities, like ICSID or Stockholm Chamber of Commerce or the International Chamber of Commerce (ICC), in Paris, or to go to a host state court.

The consent of states to let an international arbitral tribunal and not its domestic courts decide on disputes concerning affairs resulting from decisions of their administrative authorities or even legislature is an act limiting state sovereignty; and so is the fact that international law will be applied by the tribunal when the investor claims that the international investment agreement has been breached, for example because treatment has not been fair and equitable or that the investor has been discriminated against.

Since the 1990s the number of disputes submitted to arbitration and arbitration awards have increased dramatically. Most of them concern BITs but some are within NAFTA, CAFTA and ECT.[30] Many are decided confidentially, but in 2010 known cases totalled about 320. ICSID decisions amounted to 200, 80 using UNCITRAL, 17 by the Stockholm Chamber of Commerce, five by the ICC in Paris and five *ad hoc*.[31] In particular the ICSID awards are open and published, and there is no

29 Newcombe and Paradell, *supra* note 7, p. 70.

30 C. Tietje, *Internationales Investitionsschutzrecht im Spannungsverhältnins von staatlicher Regelungsfreiheitund Schutz wirtschaftlicher Individualinteressen*, Institut für Wirtschaftrecht, Martin-Luther-Universität Halle-Wittenberg, Heft 93, 2009, p. 9.

31 *Ibid*., p. 8.

doubt that because of the persuasive authority of their arguments, arbitral tribunal case law, to a larger extent than the simple wording of the agreements themselves and the comprehensive literature in the field, has developed international investment law as a distinctive branch of international law. The case law is, however, not uniform and there is constant discussion about creating a permanent instance of appeal.

It is true that domestic law is considered by the tribunal when examining the private commercial contracts and law relevant for the investments *e.g.* on expropriation, but the BIT and international law are the sources applied by the arbitral tribunal. Apart from the international investment agreement relevant for the dispute, the tribunal may apply international customary law and principles. Such latter law includes principles such as *estoppel*, legitimate expectations and good faith, predictability and acquired rights, access to justice and fair procedure or denial of justice, and customary law may be relevant for issues such as environment, labour and human rights. Customary law related to investment issues has widened the scope of the minimum standard of treatment compared to the situation during the first phase of investment law development. The content of that standard has been influenced by case law and is not the same today as it was in the 1920s.[32]

Via case law the obligations of the clauses common to international investment agreements referred to above have become better clear-cut. Case law has made clear that international customary law is an integrated part of them. It is *e.g.* beyond doubt that principles included in the concept of good governance are part of the concept of fair and equitable treatment. The broad scope of FET, that it, among other things, includes questions of creeping expropriation and discrimination, has also been made clear by case law as well as questions such as the concept and nationality of investor or the consequences of corruption.

This case law has resulted from issues put to the tribunals such as 1) scope of the most-favoured-nation clause, does it include provisions on settlement of disputes? 2) nationality of companies, does the control criteria permit more than one nationality? 3) national treatment and discrimination of local companies (investments) in host states, can they be excluded from tax incentives granted domestic companies?, what situa-

32 *Mondev Int'l Ltd* v. *United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 116, 125 (11 October 2002).

tions does "like circumstances" cover? 4) indirect expropriation, if the clause on expropriation is not applicable is the FET applicable 5) corruption, is it a substantive question or a matter of jurisdiction implying that the one that corrupts loses its right to base itself on the BIT? 6) national security, how far does that clause reach, and what about high tech goods of dual use? 7) economic policy exception, is it always discriminatory to grant subsidies to domestic producers? 8) pre-establishment, how is one to understand the difference of the modes of market access in US and EU BIT provisions?

2.4. *Fourth Phase – Recent Reactions Favouring Limitations to Investor Prerogatives*

Since the early 2000s there has been a slow shift in the opinion of many OECD capital exporting states on international investment law. Political economy has changed. Developing country transnational corporations now account for a quarter of global foreign direct investment outflows.[33] As has been the case with capital importing countries the OECD countries too have realised that standards generous to foreign investors may prevent them from fully carrying out important economic and social policy goals. Another reason is to be found in diplomacy and ideology. Capital exporting countries do not want to be associated with and lend support to investors that unreasonably rely on an investment treaty to protect investments detrimental to host states' infrastructure and public opinion. A final reason is that former poor economies, like China and India, are capital exporters today, but they still want to protect state prerogatives. In particular it is the interpretation and scope given to the FET clause, freezing the obligations of the investor from applying new and more costly laws than what it expected at the time of the initial contract, that many states try to reduce. They have chosen two avenues to achieve respect of social, labour, environmental and regional development purposes: either via non-compulsory corporate economic and social responsibility guidelines or via changes of the international investment agreements.

33 S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13:4 *Journal of International Economic Law* (2010) p. 1043, note 22.

The United Nations decided already in 1974 to establish a Commission on Transnational Corporations with the mission to prepare a code of conduct for transnational corporations, but it took until 1990 for it to present a draft, which did not add very much to existing investment law and the project was dropped. The issue was taken up again with the launching of the UN Global Compact in 2000, which is still open for participation by organisations.[34] The question of responsibilities of transnational companies was of current interest in the early 2000s and the UN appointed a Special Representative for human rights and transnational corporations in 2005. In 2009 he reported to the UN Human Rights Council:

> [R]ecent experience suggests that some [investment] treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.[35]

Regulation through non-binding norms was normal to OECD, and it issued a Declaration on International Investment and Multinational Enterprises and adopted Guidelines for Multinational Corporations in 1978, which was revised in 2000.[36] They cover areas such as employment, human rights, environment, fighting bribery, science and technology, competition, taxation, information disclosure and consumer interests. In 2003 a group of international banks laid down principles on social and environmental assessment procedures applicable to financing of major projects.[37]

The other avenue used is to make changes to the investment agreements. One way of attaining such change is to include investment issues in new free trade agreements having broader aims than increasing trade such as promoting social, environment, labour and human rights condi-

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34 P. R. Waagstein, *Corporate Human Rights Responsibility* (Uppsala University, 2009) p. 206.

35 Quoted by Spears, *supra* note 33, p. 1039.

36 <www.oecd.org/daf/investments/guidelines>.

37 Dolzer and Schreuer, *supra* note 16, pp. 24–25.

tions. Many EU free trade agreements are of such a nature. Another way is to renegotiate or define new Model Bilateral Investment Treaties. Such agreements would reserve the rights of the host state to take necessary measures in fields such as taxation, labour- and social law and environment. Canada created a new model BIT in 2003, USA in 2004, China in 2006 and India in 2006.

These treaties contain interpretative annexes giving strict meaning to clauses. Claims of indirect expropriation *e.g.* should be subject to a case-by-case, fact-specific inquiry that requires the balancing of three factors: the economic impact of the government measure; the extent to which the measure interferes with distinct, reasonable investment-backed expectations; and the character of the government measure.

These treaties as well as the draft BIT of Norway (2007)[38] and some other new BITs emphasise in their preambles that other objectives are on an equal footing with those of traditional investment treaties. Its second and third preambular read:

> *Desiring* to encourage, create and maintain stable, equitable, favourable and transparent conditions for investors of one Party and their investments in the territory of the other Party on the basis of equality and mutual benefit;
> *Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights;

A third way of assuring consideration to state interests in recent BITs is by including "general exceptions" clauses to ensure that investors' rights are balanced against the regulatory concerns of host states.[39] Exception clauses on security or taxes have existed before, but Spears makes a distinction between three new types of exception clauses. The first type is borrowed from WTO law and concerns protection of human, animal or plant life or health. The second is complementary to the first one and concerns the same reasons but seems to give more room for taking measures provided that some procedure is observed concerning information. The

38 Available at <ita.law.uvic.ca>. Not yet adopted because of its social ambitions.

39 Spears, *supra* note 33, p. 1059.

third type concerns the same reasons as well, but its use is conditional on stringent necessity and proportionality criteria.

3. Conclusion

A conclusion to be drawn from this investigation is that international investment law has contributed to the establishment of an administrative international law. The other contributor to that law is the World Trade Organization. That organisation, and not the least its obligations on the protection of intellectual property, demands from its members that their courts and administration live up to basic standards of the principle of good administration. Except for the fact that WTO provisions imply that the members of the Organization live up to that principle, the interpretation of those provisions, elaborated within its dispute settlement system, and in particular by its Appellate Body, has effectively resulted in the formulation of internationally binding principles of good administration.

Within the framework of international investment law the basis of the development of the principle was the obligations that states should respect in connection with expropriation, *i.e.* the formulation of the international minimum standard. That basis was further developed with the increase of BITs and their wide scope. In particular it was further elaborated by the interpretation given by arbitral tribunals to the clause of fair and equitable treatment. That clause contain obligations of the state parties to respect principles included in the Principles of Good Administration such as the obligation of the host state to transparency of its decision making when administrating investments, to due process, not to take arbitrary or discriminatory measures, not to exercise coercion, and to assure predictability as far as introduction of new laws and regulations are concerned.[40]

It is recognised that the international minimum standard is binding on states as part of international customary law, but it is disputed to what extent the interpretation given to the FET has reached that quality as well. It can be argued that it rests on principles such as due process and acquired rights, which are binding principles of law, but the interpretation of FET has been made in a casual way, and that makes it difficult

40 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178.

to affirm that other obligations of FET would constitute binding general international law as well.

While we may establish that we can refer to an administrative international law as a result of the WTO and international investment agreements, we must, however, also establish that it lacks consistency. It is true that arbitral tribunals rely to a large extent on previous case law. It is obvious in the case of ICSID, for example. It is also true that they take consideration to WTO practice when it comes to interpretation of similar provisions, of for example the like situation criteria of the most-favoured-nation clause and the national treatment provisions. Voices have argued that more predictability and more consistency in investment matters would be attained if a court of appeal was created.

In my opinion, more consistency of international economic law generally is desirable. A better definition of an international administrative law common to the WTO, to international investment law and to financial law would be an asset both for states, for economic actors and for citizens. One way of achieving that would be to extend the scope of activity of the legal secretariat of the WTO to such other fields as well. It would be of benefit for citizens as it would increase the rule of law in all countries. The definition of the composing parts of such an international administrative law would successively be recognised as customary international law, and applicable in the domestic systems of law, as customary law does not have to be transformed in order to have that effect.[41]

41 Cassese, *supra* note 3, p. 224.

4. Regional Integration and Sovereignty: The Sum Is More Than Its Parts?

Katrin Nyman-Metcalf

1. Introduction

Given that academics as well as political thinkers for quite a long time have stated that sovereignty in its traditional sense is no longer an appropriate description of the international situation in a globalised world, the concept is surprisingly tenacious. One reason is that there is no other good way to describe what makes international law different from national law: that there is no supreme law-maker, no body that can make binding rules for all states, but that states (that in theory are all equal) make the law that they themselves have to follow. Different ways in which international law can be created have in common that some agreement of the states is needed (whether through a treaty or by actions giving rise to customary law)[1] so the core content of sovereignty lives on.

The older name for public international law, the law of nations, clearly indicates the pre-eminence of states. Although there is a discussion on what sovereignty really is and what it means in an interdependent world, explicit challenges to the pre-eminence of states is rare. Rather it is discussed (not least in the European Union, EU, context) what amount of sovereignty states have given away and how it can be taken back.

This chapter uses the stubborn existence of the concept of sovereignty to examine whether there are new forms of sovereignty that can be held

1 P. Sevastik *et al.*, *En bok i folkrätt* (Norstedts Juridik, Stockholm, 2009) at pp. 31–32.

Per Sevastik (ed.), Aspects of Sovereignty Sino-Swedish Reflections
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by other subjects than states. Instead of just saying that the situation for states has changed with a high degree of interdependence, it is possible to evaluate if it is the idea of sovereignty as a characteristic of *states* that should be re-evaluated. More specifically, it is examined if sovereignty may be held by an international organisation, which consequently would be not just the sum of its parts but something more than that. This would also entail a new understanding of subjects of international law, where states are still by most authors seen as the only original subjects, albeit that at least since the Second World War it is generally accepted that international organisations have a limited subjectivity, derived from that of their member states. The chapter mainly looks upon the potential new situation for sovereignty in relation to regional integration and primarily the EU but also looks at functional organisations (like the International Telecommunications Union, ITU) as potential holders of sovereignty. This author does not mean to challenge the role of states as sovereign subjects in international law – only the understanding that they are the *only possible* such subjects and that they hold sovereignty in all situations.

The ideas set out in this chapter presuppose a functional content of the notion of sovereignty. With such an understanding it is not just a characteristic of a state, indicating the nature of states as components of the international legal system, but sovereignty is a functional notion indicating that the supreme power in a specific circumstance is held by a determined body, which may be a state or something else – something that although established by states has developed to such an extent that it has created its own sovereignty, which is more than an aggregate of that given to it by the members. Authors have in a similar manner discussed the idea of relative sovereignty of the EU.[2] Perhaps this can be seen as a modern application of the ideas of John Locke on relative sovereignty. What he meant with this was such sovereignty that other subjects than God could possess – sovereignty thus being something that is not just one undivided and absolute notion.[3] Another angle of the academic debate is how sovereignty is a bundle of rights and responsibilities, some of

2 T. Lock, 'Why the European Union is not a State: Some critical remarks', 5:3 *European Constitutional Law Review* (2009) pp. 407–420.

3 B. Gencer, 'Sovereignty and the Separation of Powers in John Locke', 15:3 *The European Legacy* (2010) pp. 323–339.

which may be shared, transferred or confiscated.[4] This chapter is a contribution to the discussion on if and how sovereignty can be given a more dynamic content.

2. Sovereignty, Legal Personality and Different Subjects of International Law

2.1. Historical Development of International Cooperation and Sovereignty

The discussion about the meaning of sovereignty and whether such a concept can exist in any meaningful way in a globalised world is not new. Indeed, it is interesting to trace this discussion through writings of international and constitutional lawyers for more than 100 years at least. After both the World Wars the discussion was particularly active, with the creation of the League of Nations and the United Nations (UN) respectively. From this time, several examples can be found of commentators reaching very similar conclusions some years apart: that sovereignty in its original meaning is not viable and the future lies in international cooperation and multilateral decisions. The irony of such statements even after they were proven disastrously wrong the first time is exacerbated by their very similarity.[5] That the ideas of a united world proved illusory did however not mean that the organs of international cooperation that were created were irrelevant or that the discussion on what sovereignty really meant when seen against a new kind of world order was uninteresting. When the UN was established after World War II attempts were made to learn from earlier mistakes regarding institutional structure, decision-making procedure and competence of organs of international cooperation. Conceptually the debate included both the issue of a greater inter-

4 S. C. St. J. Anstis and M. W. Zacher, 'The Normative Bases of the Global Territorial Order', 21:2 *Diplomacy & Statecraft* (2010) pp. 306–323, at p. 319.

5 H. Kalmo and M. Luts-Sootak, 'Suveräänsus: iganenud või igavene?', in H. Kalmo and M. Luts-Sootak (eds.), *Iganenud või igavene? Tekste kaasaegsest suveräänsusest* (Tartu Ülikooli Kirjastus, Tartu, 2010) pp. 9–37, at pp. 12–20.

relationship of states and hence loss of elements of sovereignty and the importance of sovereignty to build international cooperation.[6]

Organisations such as the League of Nations and the UN did not aim to replace states or the decision-making power of states, but to make states cooperate. Elements that the drafters of the UN Charter tried to rectify compared to the earlier League of Nations included the unanimity requirement and the ease with which states could leave the organisation if they did not like what it did.[7] This indicates that if international cooperation is to have any effect, it has to be coercive at least to a limited extent. There was however never any question of the UN cooperation being anything else than cooperation between states in their role as sovereign states – even if sovereignty may have meant something less all-encompassing for the drafters of the UN Charter than it did for those elaborating on the subject even only half a century before.

As the German Constitutional Court pointed out in its 2009 ruling on the EU Lisbon Treaty, the German Constitution is one example of how the understanding of sovereignty progresses and changes with time. The Court states that the German Basic Law has abandoned what they called a self-serving, self-glorifying and rigid concept of sovereignty, which until the beginning of the 20th century included a right to wage war as a right that states held as part of sovereignty. The new idea of sovereignty is that it is a freedom given by and committed to international law.[8]

2.2. *International Organisations as Subjects of International Law*

Since World War II the world has in reality moved toward an increased importance of international organisations, first intergovernmental or-

6 This is shown for example by Article 2 of the UN Charter (1945) that refers to the sovereign equality of all states (San Francisco, 26 June 1945, 1 UNTS XVI). *See* P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition (Routledge, London, 1997) at pp. 26–27.

7 D. W. Bowett, *The Law of International Institutions*, 4th edition (Stevens & Sons, London, 1982) at pp. 20–23.

8 Bundesverfassungsgericht (Germany) 30 June 2009, para. 223, available (also in English) at <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

ganisations and later also more and more non-governmental organisations (NGOs). From the viewpoint of international law, the *Reparation of Injuries* case[9] in the International Court of Justice in 1949 was a milestone as this was the first time that the Court (or any court of international significance) had pronounced that something else than a state could have legal personality in international law. In some instances an international, inter-governmental organisation could have a personality of its own and be an actor in international affairs. The subjects of a legal system are not constant and not of identical value, but it depends on the needs of the particular case.[10] The Court, while recognising the importance of international organisations and how these should have an independent role in international relations, showed that states were still the only subjects in international law that had original subjectivity and that had the subjectivity in all cases. Other subjects like international organisations derived their subjectivity from that of states.[11]

In the period since this case there has been confirmation in international courts and in other contexts of the possibility for international organisations to have a limited subjectivity in international law. Such confirmation has built upon the same basic premise: notwithstanding a great and growing importance of various organisations in international law and for international relations in a wider sense, the international system is still construed around states. The sovereignty rests with states. They can do various things with it, including giving some of it away, but they ultimately control sovereignty. In practice, if looking at specific issues as well as at some regional organisations (mainly the EU), it, however, looks less evident that this is reality and not just theory.

2.3. *Global Organisations as the Main International Actors: The International Telecommunications Union*

If the activity of promoting peace and security (the main task of the UN) was clearly an activity for states regarding which they could del-

9 *Reparation for Injuries Suffered in the Service of the United Nation*s, ICJ Reports 1949, p. 174.

10 Sevastik *et. al.*, *supra* note 1, at p. 85.

11 M. Shaw, *International Law*, 5th edition (Cambridge University Press, 2003) at p. 241.

egate some responsibility to an organisation but regarding which no state shortly after a World War was willing to give up its ultimate decision-making power, in other areas the idea that organisations actually could act "on their own" and not just as a mouthpiece for states was established. This occurred in areas of technical cooperation for a specific aim. Such cooperation developed without much ideological debate, which presumably facilitated finding pragmatic solutions. The International Telecommunications Union is an example of an organisation that (in different guises) from the early days of use of radio frequencies has had control over the spectrum.[12] As spectrum use increased, so too did the role of the organisation, later to include also satellite orbits to its competence. Although the organisation consists of states,[13] its work is not dependent on a constant control by the states. It is not far-fetched to say that the ITU has sovereignty over the frequency spectrum. Although the organisation does not possess any specific tools to enforce its decisions, its central role in allocating frequencies and satellite orbits is generally recognised and not often challenged. The organisation has global reach and it tends to be accepted by its member states as the main responsible organ for the issues within its competence. This includes a possibility to take some decisions without unanimity.[14]

3. Regional Integration

3.1. The EU as a State?

For the changes affecting the concept of sovereignty, the ever more powerful bodies of regional integration – primarily the EU – are of particular interest. The EU undoubtedly has brought change to the traditional structure of international law, as the integration in the EU goes much further than any other regional integration system or international or-

12 K. Nyman-Metcalf, *Activities in Space – Appropriation or Use?* (Iustus, Uppsala, 1999) at pp. 333–337.

13 Although, in more recent times, there is also a different category of membership for companies.

14 Nyman-Metcalf, *supra* note 12, at pp. 225–226. *See also* <www.itu.int>.

ganisation.[15] Joining the EU is a voluntary act and in that respect is no different than traditional international law, but member states within the EU have delegated so much sovereignty[16] that the EU in some respects may itself have come to resemble a state.[17] If the EU were just a new state in the making, it would not mean any theoretical change to the concept of sovereignty – just a new way in which a state (consisting of many sub-states, just like any federal state) is created. However, for two reasons this is not the situation we are faced with today. First, the EU treaties point to a respect for the sovereignty of member states[18] and there are currently no signs that member states would be willing to give up their statehood to make the EU a state. Secondly, in many ways the EU is more powerful than not only any one individual member state but than all the states together – the delegated sovereignty has grown into being more than that which was actually given away. If the EU would cease to exist, certain powers would not revert back to member states but would disappear altogether. This includes actions in the area of competition law, infrastructure matters and other joint projects that only exist because of the EU rather than as competences handed over. Regional integration organs not only take over some of the sovereignty of their members but use and develop this so that the end result is actually "more sovereignty": the joint body has powers which the states as such could not have. This gives a different angle to the discussion on whether the EU is or soon will become a state, a popular debate for (populist) politicians as well as academics.

15 One popular expression for what the EU is is "pooling of sovereignties". *For example* W. Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes', 35:2 *Journal of Common Market Studies* (June 1997) pp. 267–299, at p. 274.

16 B. De Witte, 'International Law as a Tool for the European Union', 5 *European Constitutional Law Review* (2009) pp. 265–283, at pp. 282–283.

17 Weiler calls it a massive transfer of competencies and an unprecedented empowerment of Community institutions leading to a new architecture of power. J. H. H. Weiler, 'European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order', XLIV *Political Studies* (1996) pp. 517–533, at p. 520.

18 Article 4 of the Treaty of the European Union. Note, however, that the Treaty does not use the word sovereigntgy but states how competences not given the EU remain with member states and how the EU shall respect various elements of the member state.

At least the academic debate could perhaps instead be about whether the state must be the ultimate holder of sovereignty.

In the early stages of the creation of what later became the EU, the process as such was a traditional public international law process by which a number of states came together to create an international organisation. The first such body to be created was the European Coal and Steel Community (ECSC) in 1952. Even if the process of creation was not unique, the powers given to the body differentiated it from other organs of European integration established in the same period such as the Council of Europe, in that the ECSC was given the power to adopt binding rules and its institutions had a great deal of independence from the member states.[19] This process is generally described as a regular process of public international law but one resulting in an organisation that differed from regular international organisations, a *sui generis* organisation. What made it special was for example the fact that legal acts of the organisation (which later came to be complemented with the European Economic Community, EEC, and the European Atomic Energy Community, EURATOM, in 1957; all three organisations later to be commonly called the European Community, EC, and finally from 2009 replaced by the EU) were binding not only for the member states but also for their citizens[20] and had supremacy over member state law in case of discrepancies.[21]

The predecessor of the EU, the EEC (later EC), was explicitly given legal personality but when the EU was first created (through the Treaty of Maastricht in 1992, in force 1993) it did not have such personality. This was only given with the Lisbon Treaty that entered into force in December 2009. Until this Treaty entered into force, there was a complex procedure used for treaties by the EU with member states (sometimes together with the EC) formally signing the treaties, although for all accounts and purposes the EU conducted the negotiations. It was like pretending the member states had all the power while in reality it was the EU acting. This gave rise to commentators claiming that the express giving of legal personality is actually less important than the structure and style

19 P. Craig and G. De Burca, *EU Law*, 2nd edition (Oxford University Press, Oxford, 1998) at p. 9.

20 Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.

21 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

of the organisation, which implicitly may entail legal personality: the EU was so powerful it should have legal personality, regardless of whether the member states had explicitly said so or not. This issue was discussed academically but in practice member states and EU institutions avoided it through the mentioned legal construct.

3.2. Development of EU Law and the Giving Up of Sovereignty by Member States

The importance and the interpretation of notions of EU law were predominantly set out by the European Court of Justice (ECJ) in its case law. The ECJ in the famous *Costa* v. *ENEL* case[22] stated clearly that the member states had given up sovereignty albeit in limited fields. The principles set out in this ruling have later been repeated in various words in many contexts and the idea of a certain limitation of sovereignty in favour of pooling it in the shape of the EU is not questioned. The extent of the sovereignty given up and the exact division of competences between the EU and its member states on the other hand are the subject of more or less constant debate.[23] What characterises this debate is that it is mainly held in a piece-meal fashion rather than as a profound and fundamental debate: the division of competences and the extent to which sovereignty has been transferred is rather discussed in relation to specific topics than at a more philosophical level. One can presume that an important reason for this is political. The member states have quite different views on what the EU should look like, different political movements in countries have different views, and all of this also changes over time. There are many examples from the history of the EU on set-backs when reforms have run into opposition in member states. A profound philosophical debate on sovereignty may not be the best way to get acceptance and understanding for the EU and what it does, whereas people are more ready to accept

22 Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.

23 For example, *see* R. Bieber, 'The Lissbon-Urteil: An Association of Sovereign States', 5:3 *European Constitutional Law Review* (2009) pp. 391–406 and T. Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer, Alphen and den Rijn, 2009).

individual aspects of the transfer of sovereignty of which they can see the results in their daily life.

As the EU in the past decade has grown significantly not only geographically but also as far as competence is concerned, the need for a more coherent legal basis has been highlighted and was behind the attempts to adopt a Constitutional Treaty[24] for the EU. The draft treaty was defeated in several national referenda and was replaced by the Lisbon Treaty[25] that entered into force in December 2009 and is the current legal basis for the EU. This Treaty includes some of the same elements as the Constitutional Treaty but without reference to a constitution or any other symbolic, state-like features. Again, this development can be seen more as a pragmatic and political issue than one of profound debate: the different style of the Lisbon Treaty as compared with the Constitutional Treaty does not necessarily indicate that the Union has fewer powers or is less likely to have a sovereignty of its own based on how autonomous the organisation is in practice.

The sovereignty of member states and the fear that the EU encroaches upon it is a constant backdrop to the development of the EU. Several national constitutional courts of different member states examined the Lisbon Treaty to ensure that it was not against national constitutions. This includes as the most famous case that of the German Constitutional Court.[26] All courts that examined the Treaty found it in line with national constitutions although various points were brought up where national implementing legislation needed to be amended. The courts in different ways stressed similar issues that can be very briefly summarised with words used by the German Constitutional Court in relation to EU (the EC) law already in the 1970s and 1980s:[27] the EU does not have *Kompetenz-Kompetenz*, *i.e.* the competence to determine its own competence. It receives this competence from the member states as derived competence,

24 The Treaty Establishing a European Constitution, signed on 29 October 2004, has not entered into force.

25 Treaty on European Union and the Treaty on the Functioning of the European Union, Lisbon, 13 December 2007, entered into force 9 December 2009.

26 Bundesverfassungsgericht, *supra* note 8.

27 *Solange I, Common Market Law Review* 1974/2, p. 540 and *Solange II, Common Market Law Review* 1987/3, p. 225.

the member states are "masters of the Treaties"[28] and thus the sovereignty still lies with member states albeit that they have selected to delegate some of it.[29] The principle is set out in the Treaty of the European Union (the Lisbon Treaty) as the principle of conferral in Article 5.

3.3. A New Look on Sovereignty in the EU

Even if advocating a new look on sovereignty, this does not mean that all aspects of the interpretation of the German Constitutional Court stressing the role of member states as masters of the treaties need to be challenged. This author would, however, propose that such interpretation does not go far enough and lacks dynamism. Lock calls for a recognition that sovereignty is a relative concept.[30] It is true that the powers of the EU come from the sovereignty given to it by the member states, being the original primary subjects. At the same time, once the sovereignty thus delegated is so important that it plays a significant role and the body holding it is no longer in each detail dependent on the member states, such body has nevertheless acquired a "life of its own". To just see the powers, competence – and indeed, the sovereignty – of the EU as a combination of sovereignties of its member states is not sufficient. What is relevant is rather where the ultimate power lies in relation to specific matters.

Even without questioning the principle of conferral, the EU has not least through the ECJ case law shown that principles of EU law may have an impact on issues also outside of areas within the competence of the EU. There is thus a sneaking, secondary impact of the law that may be wider than the primary, explicit one. In the *Mangold* case[31] the ECJ found a common principle of prohibition of discrimination based on age, which it is not easy to establish from reading member state constitu-

28 Bundesverfassungsgericht, *supra* note 8, at para. 231.

29 This idea and the principle of member states being "masters of the Treaties" predates the Lisbon Treaty, but is now differently formulated. N. Reich, C. Goddard and K. Vasiljeva, *Understanding EU Law* (Intersentia, Antwerp, 2003) at p. 39.

30 Lock, *supra* note 2, especially at p. 413.

31 Case C-144/04 *Mangold* v. *Holm* (2005) ECRI-9981.

tions.[32] Such a principle, however, potentially restricted the behaviour of member states also in areas outside of EU competence. If a principle can be found even without it being clearly set out in member state law or any EU legal act, it does not appear too far-reaching to see this as a (modest) establishment of primary EU principles, based on the competence the EU has, even if it has not been explicitly given to it. It must be stressed here that this is the current author's interpretation, while the ECJ was more cautious and found the principle based on common principles of the member states without elaborating on how this principle was known in the absence of it being expressed in member state legislation. Eriksson sees the case as just interpretation of the law, albeit a wider and somewhat creative interpretation.[33] Lock draws the conclusion from recent cases of the ECJ that the principle of derived competence is not so important, as competence may equally be based on the sovereignty that the EU itself possesses.[34] It does indeed appear as if the discussion on who principally holds the competence (EU or the member states) and what mechanisms there are to transfer it to another level are less important if in any event principles can be found in EU law that impact on more or less any issue at least indirectly.

3.4. Regional Integration in Other Parts of the World

The EU is used as a model by other regional integration bodies in various parts of the world although none has been ready to go as far as the EU.[35] The African Union (AU) to some extent copies the EU as do various South- and Central American regional integration organisations.[36] In Asia regional integration is weak with the main organisation, the Association of South East Asian Nations (ASEAN), mainly lacking any

32 A. Eriksson, 'European Court of Justice: Broadening the Scope of European Non-Discrimination Law', 7:4 *International Journal of Constitutional Law* (2009) pp. 731–753, at p. 736.

33 *Ibid.*

34 Lock, *supra* note 2, at p. 419.

35 K. Nyman-Metcalf and I. F. Papageorgiou, *Regional Integration and Courts of Justice* (Intersentia, Antwerpen-Oxford, 2005) especially at pp. 17 and 21.

36 Like the Andean Pact, Mercosur and the System of Integration of Central America (SICA).

elements of supra-nationalism. Generally, it is the delegation of sovereignty that states are unwilling to commit to – they are ready to copy EU institutions or market mechanisms but without the most unique factor, the extensive delegation of sovereign powers to the organisation and its organs that to a large extent do not depend directly on member states. Hong Tan thinks that it is against the psyche of the political establishment in several ASEAN states to give up of sovereignty to take supra-national decisions. At the same time this is needed in order to create a strong regional integration organisation. The idea of ASEAN is that regional integration should instead be built on common norms and consensus, without much emphasis on institutional structures or a strong organisation with its own sphere of competence. Showing a common identity and supporting other member states in global contexts is another aim of the ASEAN integration, still without any powerful supra-national institutions.[37]

Although most regional integration organisations to some extent are modelled on the EU or at least use some of the same features as the EU, none of the other regional integration organisations go as far in integration as the EU or even have that as a goal. It can be questioned (and it must remain an open question) to which extent states are actually willing to go, if the interest in regional integration is mainly for trade and matters closely related to trade or if the trend toward integration also has an ideological and cultural driver. Regional integration organisations like to communicate with one another, so a certain momentum has been created globally. The continued development of the EU acts as a model to be followed – or not, as the case may be. Its influence in showing what can be done is unquestionable even if sometimes this also means pointing to problems or highlighting developments that other states are not prepared to accept. This chapter will not discuss the likelihood of other regions copying the far-reaching integration in Europe, but regardless of if, how and when there is such a diffusion of integration, what the EU highlights by way of new interpretations of sovereignty will be a relevant factor when analysing any regional integration systems. It shows what can be done – it is then up to a complex set of factors if others also do it or not.

37 L. Hong Tan, 'Will ASEAN Economic Integration progress beyond a Free Trade Area?', 53 *International and Comparative Law Quarterly* (October 2004) pp. 935–967, especially at pp. 946 and 948–949.

4. The State Does Not Hold the Sovereign Power

4.1. The EU and Its Own Powers

The EU is by far the most far-reaching regional integration body in the world. Recent developments appear to indicate that member states are weary of too much integration and of the EU becoming too much like a state, thus eroding the sovereignty of the member states. The failure of the Constitutional Treaty, replaced with the Treaty of Lisbon, was by many interpreted as a desire by states (and the populations in states) to make a clear distinction between the role of the EU and the role of a state, underlining that the EU is not a state. What there is less discussion on is whether this discussion if a state or not state is the most relevant or if there is something that is not quite a state but still more than an international organisation. The EU is called an organisation *sui generis*. This term was coined quite early on in the development of the EU and was a convenient way to say that the organisation may not fit into established models of international organisations.[38] A new legal order has been created, which Williams likens in some respects to the *Grundnorm* of Kelsen and in relation to which a certain giving up of sovereignty by the member states is presupposed.[39] The new legal order has been created in all the various ways in which public international law is made – through customary law, treaties and general principles – but what is special is that it has led to a legal order with its own *Grundnorm*. Everyone can put their own meaning into the term *sui generis*. Sometimes this is done in a considered manner, to help explain special powers and ways of working (like direct effect of EU legislation or the instrument of preliminary references from the ECJ). Sometimes it appears as more a way to just avoid the explanation of what the EU really is – it is something of its own kind and that is enough of an answer. There is much less debate on what being of its own kind actually means from a sovereignty viewpoint. It is clear that the EU already a long time ago took the sovereignties from its member states that were handed to it, and ran with them. But how far has it run? Could they even be given back?

38 A. T. Williams, 'Taking Values Seriously: Toward a Philosophy of EU Law', 29:3 *Oxford Journal of Legal Studies* (2009) pp. 549–577, at p. 556.

39 *Ibid*., at p. 570.

In the EU there are examples of areas where the organisation has significant powers, powers that the member states have not given away and that they would otherwise exercise but new powers that have been created. If member states would take the powers away from the EU or if even the EU ceased to exist, the powers would not revert to the member states but they would disappear. Competition law provides such examples, where the actions of the EU have been created not just as reflections of what is in member state laws.

4.2. Functional Organisations and Their Own Powers: Communications Related Issues

Regional integration is not the only setting in which it can be questioned whether sovereignty always rests with the state. The communications sector provides many examples of how traditional sovereignty does not have any real meaning, as the borders of states can only with difficulty be given any significance in the communications environment. The frequency spectrum is a clear example of this, as mentioned above. The ITU has the role as well as the power to handle frequency spectrum issues and has not met with many challenges during its long existence. Modern communications have challenged the state-centred international legal environment. The internet has from its creation been international in the sense that it lacked firm regulation construed around states. The rise of the internet just like the exploration of outer space lead to many statements on how an entirely new frontier had been crossed and how new ways of cooperating would take over from traditional international law. This did not happen in either case in the sense that a new legal order that ignored nation states would have been created. But what did happen was that traditional international legal and other relations were put to the test as they did not fit the new environment.

For outer space this lead to a set of international treaties much in the traditional international law manner,[40] but modern and intense space use has highlighted gaps in the legal regulation and difficulties in filling these with the traditional legal way of acting.[41] For the internet the situation is

40 Nyman-Metcalf, *supra* note 12, at pp. 125–139.

41 C. B. Halstead, 'Hybrid Hops on (and over) the Horizon: The Future has Arrived and Requires a New Look at Air and Space Law', XXXIV *Annals of*

that few (if any) states are willing to accept that they have no jurisdiction over the internet, while in practice it is almost impossible for anyone to implement any laws over the internet (apart from measures like closing connections that aim at the transmission rather than the internet as such). For there to be proper legal control over such international environments, a new idea of where the ultimate decision-making power lies would be needed.

5. Concluding Remarks: How Can a Change in Sovereignty Come About?

At the same time as the state as holder of sovereignty is still the basic premise, practice in the modern world does not necessarily illustrate this supremacy of states. We see many areas where the main player is an organisation. The content of public international law changes if the understanding held by states about its content changes (the *opinio juris* of customary law). Such change does not (normally) happen quickly and it is difficult at any one point to say exactly what is the exact content of customary law or the prevalent interpretation of international law generally.[42] The change in the understanding of where sovereignty can lie can be a change of international law or a new interpretation – in public international law borders between how concepts and understandings change are rarely very clear.

In the traditional interpretation of sovereignty as per Jean Bodin in the 16th century, the essence was that even if a sovereign might limit the sovereignty through agreements or other actions, he still held the ultimate sovereignty and could get it back. Power was eternal and unlimited, even if in a particular circumstance and at a certain time it may actually have been limited. When looking at where certain powers and capacities to take decisions lie today, the interpretation that sovereignty has moved away from states to other organs is not far-fetched. Indeed, power may be clearly given to an organisation for an unlimited time, without any reason to think it would move to another level – such as back to member states. If the power was moved, it may disappear – *i.e.* the sovereignty only can exist when it is exercised by an organisation other

Air and Space Law (2009) pp. 777–807, at pp. 781–784.

42 Sevastik *et al.*, *supra* note 1, at pp. 37–40.

than the nation state. This may be related to the frequency spectrum and the preeminent role of the ITU or to issues handled by the EU within its policy areas. If no international organisation exercises control over the spectrum it may quickly be rendered useless. If the EU did not undertake certain activities, not just the common market but many principles on issues such as competition, consumer protection or non-discrimination would be left hanging in the air. There would be no other body at state level or any level that could take over from the EU. Most likely some matters would just not be dealt with at all.

If in reality the sovereignty that is given away takes on such an importance that it becomes something entirely new and more powerful than that which was given, it is possible to ask whether the concept should not be seen in a new light where subjects other than states can hold sovereignty – not just the parts of it that states have given them, but also what they have created. A new sovereignty is built that is "owned" by other subjects than a state, even if it ultimately was given to such subjects by the state.

If the EU states are seen as the building blocks with which the EU has been built, the building of the EU actually consists of more than just these building blocks. In the course of the construction, more material was created that does not directly derive from any one of the member states and that in case of de-mantling of the building would not revert to any member but would simply disappear. There are areas where the EU can act in a manner which could not be done even by member states together, without the framework of the organisation – new law and legal instruments have been created and have taken on an autonomous life.

The discussion on whether an organisation can have its own sovereignty or if it is just the holder of the transferred sovereignty of member states may appear as an overly theoretical discussion. Its practical importance lies in the fact that it helps understand the general situation of regional integration and other forms of international organisations. If organisations to a greater extent can start taking on "a life of their own" rather than just acting as executors of decisions of the member states, the dynamics of international relations may also change. This could have an important effect on for example democratisation where regional organisations would play an important part in promoting certain values in different regions. The role of individual states in promoting certain values of changes in other countries is sensitive, as there are so many reasons such

interference is in fact not for altruistic reasons but rather in the self interest of the promoting states. The UN as a global body specifically charged with peace and security maintains an important role when it comes to for example condoning use of force in certain circumstances. The mandate of the UN is specific however and it is not an organisation that has a mandate to integrate its members. If instead an integration body has a strong role, its decisions and actions can shape developments in different parts of the world in a decisive manner. If the organisation is more than a conduit for the member states, its role can be even more powerful.

The significance of this development is that it adds another level of importance that can grow with the kind of snow-ball effect that was built into the EU from the start. After trade rules and free movements, various issues have been included, even fundamental rights. If regional integration organisations take on a sovereignty of their own, they may have a competence that is not only derived but unique. States would still be important building blocks of the world but maybe not the only ones.

5. Hong Kong's Sub-Sovereign Status and Its External Relations[1]

Simon Shen

1. Introduction

As a Special Administrative Region of the People's Republic of China (PRC), Hong Kong enjoys many international privileges which other Chinese cities do not have, notably in its ability to participate in international organisations and events independent of Beijing – albeit only with authorisation. These affairs are referred to as Hong Kong's "external relations", the term being used to differentiate them from "diplomatic relations", which only sovereign states like China itself can exercise. However, the line which divides the two terms is not clearly defined, and indeed is impossible to define clearly. In other words, whether certain gestures made by the Hong Kong Special Administrative Region Government (HKSARG) have encroached upon the issue of sovereignty is an area fraught with ambiguity, and it is one which deserves greater academic attention. This issue is not relevant only to Hong Kong and China, but also finds resonance in other parts of the world. If the issue is properly managed, not only can harm be avoided to maternal sovereignty, but benefit conferred on the "motherland" in the global arena from the addition of a subsidiary voice. The outline of the chapter is as follows: in

1 This chapter derives from a short article by the author published in the *Hong Kong Journal* in 2011. The author acknowledges research assistant Mr. Wang-leung Ting for his assistance in data collection for this extended version.

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section 2, the special status of Hong Kong is theorised under the concept of "sub-sovereignty"; in section 3, other comparable cases are discussed; section 4 looks at the recent trend in China towards a flexibility in facing sovereignty issues; and section 5 offers case studies highlighting the grey area of the supposedly non-sovereign status of Hong Kong in its external relations. A brief description of Hong Kong's potential role in Chinese diplomacy is given as a conclusion.

2. The Concept of Sub-Sovereignty

The grey area between Hong Kong's "external relations" and "diplomatic relations" largely derives from Hong Kong's position after 1997. The official terminology used by the PRC to describe the status of both Hong Kong and Macau is a "special administrative region", one which practices "one country, two systems". However, when foreigners ask to have the difference in status between Hong Kong and other ordinary Chinese cities explained, no universal term can be employed to make the distinction clear. The following chapter would then introduce the concept of sub-sovereignty to illustrate the differences between Hong Kong and sovereign states, as well as other ordinary cities.

In the discipline of modern international relations, the concept of sovereignty is attributed to the Treaty of Westphalia. After the Thirty Years' War, fought almost 400 years ago, which devastated continental Europe, the great powers reached a consensus recognising that each signatory to the Treaty was in possession of unrestrained power in its domestic affairs and external diplomacy. Although the original intent of the treaty was purely to establish the independence of Protestant German states from the Holy Roman Empire, it nevertheless had an unintended consequence with enormous implications: it enshrined the Westphalian concept of sovereignty and sovereign states, which include a state's unrestrained power of self-determination, geographic territorial boundaries and mutual recognition between sovereign states.[2] The concept of sovereignty had, however, existed long before the signing of the Treaty in 1648. For instance, the use of the term "sovereignty" by French Philosopher Jean Bodin to conceptualise the absolute and perpetual power of the

2 T. Dunne and B. Schmidt, 'Realism', in J. Baylis *et al.* (eds.), *The Globalization of World Politics*, 3rd edition (2005) p. 162.

monarch derived from God is one of the classic studies used to cite sovereignty's absolutism by regimes like the PRC.[3] Classical liberal philosophers such as Thomas Hobbes and John Locke have also spoken of the sovereign power of the state as necessary for the protection of people's liberty. Hobbes, in his work *Leviathan*, for instance, argued that only when people invest absolute political power in a sovereign can society avoid the state of nature.[4] The realist perspective on international relations is the direct descendent of this Westphalian understanding of sovereignty, which sees the world system as the struggle between states in advancing their respective interests. As argued by Krasner and Buzan, for instance, realism is in essence statism, and thus the concept of sovereignty lies at the heart of realism since it is the only concept that can distinguish what constitutes a state, and thus the unit of consideration under realist world view.[5]

Yet, the signing of the Treaty of Westphalia was by no means the end to the development of the concept of sovereignty. In recent decades, sovereignty's indivisibility and absolutism have faced several challenges. The first came from the development in international law in the 20th century. International law scholars like Lassa Francis Lawrence Oppenheim have pointed out that it is necessary for sovereign states to give up part of their sovereignty to an international legislative and judicial body in order to maintain international peace.[6] In reality, this seems to be the case in the post-WWII world where supra-national and trans-national organisations are growing in what has become an integrated world. The emergence of global issues such as environmental protection, cross-border crime and human rights violations have also made international efforts to tackle

3 J. Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, edited and translated by J. H. Franklin (Cambridge University Press, Cambridge, 1992).

4 T. Hobbes, *Leviathan*, edited by T. R. Tuck (Cambridge University Press, Cambridge, 1996).

5 S. D. Krasner, 'Rethinking the sovereign state model', 27 *Review of International Studies* (2001) pp. 17–42; B. Buzan, *The Arms Dynamic in World Politics* (Lynne Rienner Publisher, London, 1998).

6 L. F. L. Oppenheim, *Oppenheims International Law*, edited by H. Lauterpacht, translated by T. Y. Wang and T. Q. Chen (Shangwu Yinshuguan, Beijing, 1981) p. 101.

these problems necessary; this in turn has caused the proliferation of an array of international treaties and covenants that govern the behaviour of sovereign states. In this sense, Westphalian sovereignty, which was once possessed by nation states, has become mere domestic sovereignty, as nation states' external behaviour is restrained by international institutions.[7]

Another challenge to the Westphalian concept of sovereignty came from the rise of neo-liberalism and globalisation in the late 20th century. A term that is usually problematic – neo-liberalism – was defined by leftists like Noam Chomsky as an ideology that stemmed from the principle of classical economic liberalism and belief in free international trade, market solution over government solution to economic problems and the resultant privatisation of state-owned enterprises.[8] Krasner also saw the increasing flow of capital, migration and cultural integration as causes of erosion of sovereignty under globalisation.[9] The result of the rise of neoliberalism has been that the authority of sovereign nation states has been slowly superseded by the power of moving capital in the international market, non-state actors, non-profit organisations and multinational corporations. The emergence of supra-national currencies like the Euro has delivered one of the greatest blows to sovereign states.

The challenge to sovereignty also has some less tangible roots, which can be theorised by social constructivism; this sees sovereignty as a concept constructed by the international community, specifically the Western international community. According to Alexander Wendt, one of the founders of constructivism in international relations, man only determines his pattern of action in accordance with the meaning of things and other participants to them; thus social reality is not a predetermined fact, but a result of people's interaction.[10] As a consequence of these theories, constructivists like Robert Jackson argue that the concept of sovereignty is artificial and historical, and see sovereignty as a product of

7 S. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, Princeton, 1999).

8 Z. W. Wang, *Jingjixue LiLun Ji Xianshi Wenti Di Sikao* (Economic Theory and Thoughts in Practical Problems) (Peking University Press, Beijing, 2005) p. 139.

9 Krasner, *supra* note 7.

10 A. Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', 46:2 *International Organization* (1992) pp. 391–425.

construction.[11] Weber then pointed out that international interventions and arbitrations in the domestic or diplomatic affairs of sovereign states are much more common than might be thought; the matter of legality of these interventions in the domain of other sovereign states is merely dependent on the objective judgment of the international community.[12] The emergence of the social constructivist view on sovereignty has opened up the possibility of a new interpretation of sovereignty beyond the boundary of the Treaty of Westphalia.

In line with this, contemporary political entities which are not sovereign states but which occupy a middle ground in the spectrum of political units related to sovereignty are here divided into four categories: supra-sovereignty, sub-sovereignty, quasi-sovereignty and unilateral sovereignty. "Supra-sovereignty" refers to the power owned by institutions above the state level, such as the European Union, which can be called a "supra-state". "Unilateral sovereignty" refers to the power possessed by self-declared independent nation states which are not recognised by the majority of the international community, even though these "unilateral states" are in *de facto* control of their proclaimed territories, such as Somaliland. "Quasi-sovereignty" refers to the substances that are normally shared by sovereign states but are not owned by states, such as the extra-jurisdiction rights once owned by the East India Company. Finally, "sub-sovereignty" refers to the power held by some parts of nation-states which normally belong exclusively to sovereign states, such as the issuing of postage stamps, membership of international organisations, the ability to negotiate and enter into treaties with foreign governments, and the like. Although these new global actors are not sovereign states in the traditional sense, they nevertheless possess a certain degree of autonomy in both domestic and external affairs.

3. Instances of Sub-Sovereignty in the World

Hong Kong's sub-sovereignty is not a unique situation in the contemporary world order as the following section will demonstrate. Included

11 R. Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', XLVII *Political Studies* (1999) pp. 432–456.

12 C. Wever, *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (Cambridge University Press, Cambridge, 1995).

under the sub-sovereign umbrella are two further identifiable sub-categories: delegative sub-sovereign entities, which are set up by the central government of their maternal states (like Hong Kong), and federal sub-sovereign entities, which voluntarily join the maternal nation states (like Zanzibar).

3.1. Delegative Sub-Sovereign Entities

As the term implies, delegative sub-sovereign entities derive their sub-sovereign power through delegation or devolution of domestic and external authority from the central government of a nevertheless unitary sovereign state. In other words, the full sovereignty of these sub-sovereign entities rests with their central governments, which in principle can delist these entities at any time. For instance, Åland is a particularly powerful delegative sub-sovereign entity that can be compared with Hong Kong.

The Swedish-speaking Åland Islands, just off the coast of their maternal Finland, were lost to the Russian Empire by the Swedes in the Napoleonic Wars and became part of Russian Finland. After Russia was defeated in WWI and Finland subsequently gained independence, the Swedish-speaking Åland petitioned the League of Nations for secession from Finland when the Finns gained independence. The League eventually decided that Åland should remain under Finnish sovereignty but be made an autonomous neutral region. In other words, on one hand Helsinki could theoretically withdraw Åland's autonomous status, but on the other Åland's autonomy – or sub-sovereignty – was to some extent guaranteed by the international community. Ever since then, not only have the Åland Islands enjoyed a high degree of autonomy over domestic issues, but also possessed an autonomous identity in the global arena.

At present, the conduct of the government of Åland is in accordance with the Åland Act that was adopted in 1991; this stipulates that the parliamentary government be directly elected by the Ålandish people. Under the Åland Act, the authority in a wide range of areas, such as health care, education, economic development, transport, policing, postal services and communications, were devolved from the Finnish government to the Ålanders. The Ålandish government has since issued its own stamps, established its own police force and set up its own airline company. The Åland Act also excused the Ålandish population from military duties de-

manded of ordinary Finnish citizens[13] and stipulated the fiscal relations between the Ålandish and central governments.[14]

In terms of external relations, should Helsinki enter into any foreign treaties that affect the policy areas devolved to the Ålandish government, such as adopting a national position in the European Union, the Finnish government is obliged to obtain Åland's consent and allow Ålandish participation in negotiations should these be necessary. This gives the Ålandish government much power in helping shape Finnish foreign policy. In addition, Åland also possesses the ability to conduct certain external relations activities with a degree of independence from Finland, because Section 58 of the Åland Act empowered the Ålandish government to initiate negotiation of international treaties. For instance, Åland is a member of the Nordic Council: although it is only designated as a "territory" instead of member state, and has its own delegate in the Nordic Council of Ministers, *i.e.* with the same representation as other member states.

3.2. Federal Sub-Sovereign Entities

Federal sub-sovereign entities, which are the other sub-sovereign category, historically formed part of a federation with a certain degree of independent identity. Zanzibar, as a constituent part of the United Republic of Tanzania, can be regarded as an example of such and affords a useful contrast with Hong Kong.

Zanzibar is an island on an archipelago just off the coast of the East African mainland. It was once an integral part of the Sultanate of Oman, but when the Sultanate was split into two Zanzibar became a *de facto* independent sultanate. In the late 19th century, Zanzibar became a British protectorate. After WWI, Britain also seized Tanganyika, the territory opposite Zanzibar, from Germany, and plans to integrate the two started to take shape. This was despite the significant difference between the inhabitants of the two places; there was a majority Christian population in Tanganyika and a Muslim population in Zanzibar. In 1961, Tanganyika gained independence from Britain, and Zanzibar's followed in 1963. The African population, however, was not satisfied with the Arabian elitist

13 Section 12, Act on the Autonomy of Åland, 2004.

14 Chapter 7, *ibid.*

class in the sultanate and quickly staged a revolution, resulting in the overthrow of the sultan. Led by left-leaning Africans on the island, Zanzibar soon decided to merge with Tanganyika and formed the United Republic of Tanzania.

Under Tanzania's current Constitution, Zanzibar is subject to the authority of the Zanzibar revolutionary government, which retains all power, executive and legislative, except for certain union matters stipulated by the first schedule of the Constitution, such as citizenship, defence and foreign affairs, which are vested in the government of the United Republic.[15] The Zanzibar revolutionary government is led by the president and the House of Representatives of Zanzibar, both directly elected by the people of Zanzibar through universal suffrage.

In terms of external affairs, Zanzibar also enjoys greater extensive power than the typical federated units in other federal states. For example, Zanzibar has signed various cooperation agreements with foreign governments over matters within Zanzibar's competence, such as the several developmental agreements entered into with the Norwegian government.[16] In the area of international sporting events, the Zanzibar Football Association is a full member of the Council for East and Central Africa Football Associations (CECAFA), and is one of the few non-sovereign members in the association. The Zanzibar national football team competes in the CECAFA Senior Challenge Cup and won the tournament in 1995. Additionally, the team which wins the Zanzibar football league is also allowed to participate in the Confederation of African Football (CAF) Champions League, as a separate presence from the Tanzanian winner.

The increasing international presence of Zanzibar has, however, occasionally alarmed the federal government of Tanzania. For instance, in 1992, with its largely Muslim population, Zanzibar applied and was accepted as a member of the Organisation of the Islamic Conference (OIC). This was soon revoked by the federal government in largely Christian Tanzania as a breach of the Constitution. However, the current vice-president of Zanzibar, Seif Shariff Hamad, stated during his latest run for the presidency that he would reintroduce the issue of Zanzibar's member-

15 First schedule, The Constitution of the United Republic of Tanzania.

16 Website of Norwegian embassy in Tanzania, <www.norway.go.tz/News_and_events/agreements_and_contracts/> (retrieved 15 May 2011).

ship of the OIC should he be elected.[17] This shows precisely the difference between the two types of sub-sovereign entities; the federal type can, theoretically, propose adjusting their external space or even revising the constitution, whereas the delegative type, like Hong Kong, has to leave the final judgment to the central government.

4. China's Growing Flexibility Toward Sovereignty Absolutism?

These cases show that sub-sovereign entities are not a rarity, but are conveniently used constitutional tools in the era of globalisation. It is of little surprise to see the West apply sub-sovereignty, but when China came up with the "one country, two systems" formula, it was somewhat unusual considering Beijing's strong stance on sovereignty absolutism. China's frequent comments about foreign governments infringing Chinese sovereignty and "intervening in Chinese internal affairs" are well publicised.[18] What the outside world hears less about is that Beijing is reforming its understanding of the concept of sovereignty by allowing a certain degree of flexibility for reasons of pragmatism. As mainland Chinese scholars like Renwai Huang explain, developing countries such as China need to strike a balance between protecting the integrity of their hard-earned sovereignty and compromising its authority with the advance of globalisation for further economic development.[19]

One such flexibility is the so-called "putting aside controversies, develop together" (*gezhi zhengyi, gongtong kaifa*) principle proposed by Deng Xiaoping when he visited Japan in 1978. Deng's principle was originally meant to apply to some disputed areas between China and Japan, but was later also applied to negotiations with the Philippine government over the sovereignty of the Spratly Islands. The essence of this principle was that while the Chinese would not compromise over their claim to sovereignty, Beijing nevertheless was willing to put the controversy aside and develop the disputed areas with other nation states for mutual ben-

17 *The Citizen*, 16 October 2010.

18 Website of the Ministry of Foreign Affairs of the People's Republic of China, <www.fmprc.gov.cn/chn/gxh/tyb/fyrbt/dhdw/t759532.htm>.

19 R. W. Huang and J. Liu, *Guojia Zhuquan Xinlun* (New Theory of National Sovereignty) (Shishe Chubanshe, Beijing, 2004) p. 101.

efit, such that the areas concerned would operate under *de facto* shared sovereignty.[20]

Flexibilities such as these have also been hinted at in comments made by top Chinese leaders in recent years. For instance, during the London G20 summit in 2009, Zhou Xiaochuan, the governor of the People's Bank of China, in a speech entitled *Reform the International Monetary System*, argued that the reason for the latest financial crisis was the conflict of interest faced by the responsible central banks when the world was using the national currency of a sovereign state (in this case the US dollar) as the global reserve currency. Zhou then suggested that the summit should explore the possibility of adopting a new global currency unit that "transcends" the sovereignty of any particular country and becomes genuinely global.[21] In other words, if China were to join the scheme that Zhou proposed, its traditional sovereign hold of total control over its currency would be put to an end.

Another case occurred when then-Foreign Minister Li Zhaoxing on behalf of China signed the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2005.[22] Traditionally, China has always granted absolute immunity to other sovereign states when entering into international legal disputes, but it now started to acknowledge the fact that certain behaviours of sovereign states are not to be protected; this means that the level of protection sovereignty enjoys is limited, and is in direct contrast to the principles of inviolability and indivisibility in the dogmatic interpretation of sovereignty. These incidences show that despite the Chinese continuing to insist on the absoluteness of sovereignty, their government is nevertheless willing to make compromises on pragmatic grounds should a more flexible understanding of sovereignty suit its interests.

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20 J. L. Xiao, *Guojia Zhuquan Lu* (A Study on National Sovereignty) (Shishe Chubanshe, Beijing, 2003) p. 231.

21 X. C. Zhou, 'Guanyu Gaige Guoki Kebi Ti Xide Cilao' (Reforing the International Monetary System), Xinhuanet.com, 24 March 2009.

22 Q. X. Zhao, 'Lianheguo Guojia Jiqi Caichan Guanxia Huomian Gongyue Shuping' (Comments on *The United Nations Convention on Jurisdictional Immunities of States and Their Property*), *Renmin Fayuan Bao*, 10 April 2006.

So how does this reflect on Hong Kong? Hong Kong is governed under the Basic Law which replaced the Letters Patent and the Royal Instruction of the British colonial era as Hong Kong's "mini-constitution" after 1997. As the HKSAR was established by authorisation of the Chinese National People's Congress, it is understood that there shall be no nullifying power held by Hong Kong under this arrangement. Article 13 of the Basic Law clearly states that "the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region [and] the Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs".[23] This prevents Hong Kong from conducting diplomatic affairs with other states because its sovereignty lies with China. However, the same Article also states that "the Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law".[24] In Article 151 of the Basic Law, the areas where Hong Kong may participate in the name of external relations are specifically indicated: "the Hong Kong Special Administrative Region may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields".[25] As a result, Hong Kong is an independent "member economy" of the World Trade Organization and the Asia-Pacific Economic Cooperation forum, and enters as an independent entity as "Hong Kong, China" when participating in the World Cup and Olympic Games.

5. Hong Kong's Grey Areas in External Relations

While there are no international laws which clearly distinguish between "foreign" or "diplomatic" relations and "external" relations, the former

23 Article 13, The Basic Law of Hong Kong Special Administrative Region, 1990.

24 *Ibid.*

25 Article 151, *ibid.*

terms are conventionally interpreted as activities which can only be conducted by sovereign states, such as joining the United Nations or declaring war; the latter are understood to mean activities which do not necessarily involve the concept of sovereignty. However, the difficulties involved in drawing boundaries between the two within Hong Kong's delegated sub-sovereignty have been repeatedly illustrated. These several cases deserve greater attention as there are many instances where Article 151 fails to offer precise guidance.

5.1. Defending the Diaoyutai Islands

One example is the difficulty of defining those civil activities which seek diplomatic results. Even when it was still a British colony, activists in Hong Kong were one of the first groups to launch a nationalist campaign in defence of China's claim of sovereignty over the Diaoyutai Islands (known as the Senkoku Islands in Japan). To date, the Action Committee for Defending the Diaoyu Islands (ACDDI), made up primarily of pan-democrat activists, is still actively involved in the cause. Its most prominent action has been to acquire ships and attempt to sail to these islands as a demonstration of China's sovereignty over them. However, on each occasion the ships have been stopped by the Hong Kong government for various technical reasons. For instance, in 2010, after a Chinese captain had been taken into custody by Japan near the islands, the Hong Kong activists were prevented from continuing because of allegations that "there are complaints of mice being found on their ship", and "their fishery enforcement ship is suspected of carrying out non-fishery activities". At the same time, concerned that nationalism might get out of hand, mainland activists were also persuaded to avoid the region so as to prevent unnecessary conflict with Japan. Within Hong Kong, it is widely believed that local activists failed to undertake their planned voyage for the same reason.[26] However, under the "one country, two systems" concept, they could only be legally stopped for technical reasons.

If we examine the case in greater detail, the arguments given by Hong Kong have profound implications. If the real problem was that "the fishery enforcement ship is suspected of carrying out non-fishery activities", then holders of tourist visas carrying out non-tourist activities –

26 *Ming Pao Daily News*, 16 September 2010.

such as shouting in front of the Japanese Diet in Tokyo – would also be a problem. After all, activists have the right to fish outside Hong Kong as an external activity, but if such an activity is interpreted as being contrary to China's diplomatic interests, whether it still falls under the realm of "external relations" is doubtful. Indeed, Tokyo seems to interpret things in this way, as its Ministry of Foreign Affairs tends to identify any activities by Chinese people as official and governmental, given the fact that it is difficult to undertake unauthorised attempts to claim sovereignty over the Islands.[27] The current practice of the Hong Kong government seems to be to make best use of the grey area by exploiting technical rules. But in the long term, if more groups of activists with diplomatic motivations establish themselves in Hong Kong, the grey area might become very foggy indeed and no longer serviceable when needed to handle future crises.

5.2. *Communicating with Taiwan*

The relationship between Hong Kong and Taiwan also involves the same grey area. While Beijing never considers cross-strait relations "diplomatic" in nature, Hong Kong-Taiwan relations clearly go beyond mere external relations for many taboos can be found. From 1997 to 2002, during Chief Executive Tung Chee-hwa's administration, Paul Kwok-wah Yip was appointed as his special advisor for Hong Kong-Taiwan relations. Subsequently, this task was institutionalised as part of the duties of the Constitutional and Mainland Affairs Bureau. What remains the same, however, is that Taiwanese representatives in Hong Kong cannot do anything not considered part of their official functions. Although they are formally appointed by their government, they are registered nominally in Hong Kong as representatives of a "tourist agency" named Chung Hwa. When several Taiwanese politicians attempted to enter Hong Kong as ordinary civilians, their entries were denied without specific reasons being given. The Taiwanese often criticise Stephen Lam, secretary of the Mainland Affairs Bureau, over this even though they realise he is only a scapegoat. On the other hand, whether the "tourist agency" should receive diplomatic protection is another grey area; in this connection, a

27 S. Shen, 'Diaoyudao Zhuangchuan Yu Riben Neibu Fansi' (The Diaoyu Collision Incident and Reflection within Japanese Administration), *Yazhou Zhoukan*, 26 December 2010.

court case was once brought demanding that the "tourist agency" disclose full reasons for denying Hong Kong citizens entry visas to Taiwan.[28]

If diplomatic versus external relations represents the only dichotomy authorised by the Basic Law, Taiwan is then deliberately left as a special case. At present, due largely to the improved cross-strait relations under Taiwanese President Ma Ying-jeou, Hong Kong and Taiwan are enjoying the closest *de facto* official relations since 1997. Most notably, a Hong Kong Trade Development Council office was established in Taipei in 2008. Likewise, the Hong Kong-Taiwan Economic and Cultural Cooperation and Promotion Council were created as the official counterpart of the Taiwan-Hong Kong Economic and Cultural Cooperation Council, which had been formally set up by the Taipei government. However, these agencies are unlikely to make independent decisions over areas of so-called "external relations". If the pro-independence Democratic Progressive Party were to resume power after the next election in Taiwan, whether these agencies would even survive is questionable. While Hong Kong's economic relations with other external economies can be comfortably governed by its external relations regulations, there are sufficient reasons to worry whether pure economic cooperation between Hong Kong and Taiwan can be similarly sustained.

5.3. Hong Kong's Global Security Role

Article 151 lists eight macro areas of explicit "authorised" external relations. Although the one obvious area not included in this list is security, Hong Kong in fact enjoys global recognition for the role it plays in anti-terrorism. For instance, it is a member of the international Financial Action Task Force, and has served as the rotating chair of the organisation. Hong Kong is also a signatory to the US-proposed Container Security Initiative, making it the only participating port on Chinese soil that authorises the US to inspect suspicious freight containers. In the annual US-Hong Kong Policy Act Reports to Congress, Hong Kong often has been praised for its contributions to the global anti-terror campaign.[29]

28 *Hong Kong Economic Times*, 27 May 2000.

29 S. Shen, 'Hong Kong-US Relations and the Response to Counter-terrorism', 6:2 *The Journal of Comparative Asian Development* (2007) pp. 311–336.

Does anti-terrorism come under diplomacy and defence? The US federal government would seem to consider that it includes both diplomatic and external relations, to borrow the terminology used by Hong Kong. Interviews undertaken by the author suggest that in practice Hong Kong has to obtain prior approval from Beijing to join these anti-terror campaigns, even though the granting of such approval is not made public.[30] The problem is that while Hong Kong's external relations-related security role has been given the green light on the anti-terror front, it would be difficult to obtain a green light on other fronts, particularly when the US is involved. Indeed, Article 23 of the Basic Law, which is yet to be enacted, explicitly targets potential foreign intervention in Hong Kong that could include external relations-related security issues. For instance, pro-Beijing commentators have criticised the Washington-based non-governmental organisation the National Democratic Institute for its involvement with pan-democratic political parties in Hong Kong on the grounds that this could affect China's national security.[31] Applying the same logic, by allowing the US to investigate cargo in Hong Kong, in the name of anti-terrorism, could affect China's national security. Interpretation of the grey area could be made more complicated when and if Article 23 is enacted.

5.4. The Manila Hostage Crisis: Calling a Family Friend

Another recent example which illustrates the overlap of external and diplomatic relations concerns the Manila Hostage Crisis of August 2010. During the crisis, which resulted in the deaths of eight Hong Kong tourists after a Philippine gunman hijacked their bus, Hong Kong acted in ways that some pro-Beijing critics consider to be stretching the limits of external relations. The most notable was Chief Executive Donald Tsang's repeated attempts to make direct phone calls to President Benigno Aquino III of the Philippines. At first, the Philippine government suggested that the president's lack of response was due to technical reasons, but Aquino himself later explained that diplomatic protocol had dictated his decision not to accept the calls. When the crisis ended in bloodshed,

30 Interview with anonymous officials of the Liaison Office of the Central Government to Hong Kong, September 2010.

31 *China Review News*, 22 October 2007.

the Hong Kong government sent a letter to the Philippine government requesting a thorough investigation; Aquino also interpreted this as diplomatically insulting.[32]

Tsang rationalised his calls with two arguments: first, he is a family friend of Aquino and, second, he had Aquino's contacts through the Asia-Pacific Economic Cooperation platform, in which Hong Kong, the Philippines and China are all "member economies".[33] As a matter of fact, to be diplomatically correct, a chief executive of a Special Administrative Region of China is not, of course, on an equal footing with the president of the Philippines. However, if the chief executive addresses the highest executive of a fellow signatory of an organisation that Hong Kong has joined based on its enjoyed external relations status, on a matter relevant to the organisation's realm, it would be highly debatable to call that diplomatically wrong. That is why, when pro-Beijing critics were complaining about Tsang's conduct during the crisis, public popularity of his administration rose by a remarkable 10 per cent, one of the few times he could claim increased public support in recent years.[34]

Many academics normally critical of Tsang's policies defended his actions and launched a series of debates with pro-Beijing critics in newspapers and magazines. The author, for example, wrote a series of articles about the theory of sub-sovereignty as devised from Western international relations terminology and Hong Kong's external relations, which were criticised by Beijing supporters for "usurping China's sovereignty".[35] In the end, Beijing ruled that Tsang's calls required "special treatment as a special case", implying that the grey area between external and diplomatic relations should not be explicitly defined, and that neither side was completely right or wrong. This ruling might be politically wise, but the impact of the Manila hostage crisis is far-reaching because the grey area has been brought to the attention of ordinary citizens due to the traumatic affect the crisis had on them.

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32 *Hong Kong Economic Journal*, 10 September 2010.

33 *Ming Pao Daily News*, 25 August 2010.

34 *Wen Wei Po*, 31 August 2010.

35 N. Lau, '*Xianggang Meiyou Ci Zhuquan*' (Hong Kong Does Not Have Sub-Sovereignty), *Hong Kong Economic Journal* (31 August 2010).

5.5. The Congo Trial: Sovereign Immunity?

The final case that is worth attention took place in 2010–2011 when a US vulture fund sued the government of the Democratic Republic of Congo (DRC) via the court in Hong Kong. Dating back to the 1980s, the DRC, then Zaire, government had signed a developmental contract with a Yugoslavian firm, and the two agreed to enter into arbitration to settle the former's claim over the latter's debt in 2003. The arbitration ruled that the DRC government was USD 100 million in debt, a debt which was eventually sold to the vulture fund. In 2008, the China Railway Engineering Corporation (CREC) won a mining contract in the DRC in which, in exchange for the mining right in the Congo, the CREC agreed to pay over USD 200 million for infrastructure development in the DRC. The vulture fund's lawsuit argued that part of the fund being transferred by CREC to the DRC government should be used to pay off the debt the DRC was obliged to pay. Since CREC is a listed company in Hong Kong, the lawsuit was then brought to the HKSARG. The Americans have based their case in Hong Kong on the argument that the concept of restricted immunity of sovereign states – instead of absolute immunity – should be applied in this case in the Hong Kong court system. Generally speaking, absolute immunity sees that sovereign states are immune to lawsuits under any circumstances, while restricted immunity sees that a sovereign state should only be immune when it is acting in its sovereign capacity. The Americans argued that according to the Basic Law, Hong Kong should continue honouring the common law precedent as Britain was practicing limited immunity. Being ruled against unfavourably at first, the vulture fund won in the Court of Appeal.[36]

The Ministry of Foreign Affairs of China's central government, realising that this case would have huge implications, decided to step in by issuing a series of letters to the Hong Kong court which demanded the latter adhere to absolute sovereign immunity as advocated by the central government, suggesting that the case was beyond the scope of Hong Kong to handle. This presented a real dilemma: on one hand, if its view on sovereignty-related issues is different from Beijing, the Hong Kong court system can be regarded as a loophole of Chinese diplomacy; on the other hand, relying on Beijing to reinterpret the Basic Law in every single

36 *Hong Kong Economic Journal*, 22 March 2011.

grey area case would also jeopardise the integrity of the Hong Kong court system. The final outcome of the case is still uncertain, especially as the adherence to absolute sovereignty by Beijing is in something of a state of flux as previously discussed. Nonetheless, the trial further shows the ambiguities inherent in "external affairs" since an ordinary lawsuit might easily have diplomatic implications.

6. Conclusion: Using Hong Kong's Sub-Sovereignty in Chinese Diplomacy

Perhaps it is simply not necessary to clarify the boundaries of this grey area in Hong Kong's sub-sovereignty. Technically it is nearly impossible to draw a rigid line and have the rules more clearly defined, and politically losing the current flexibility could work against Beijing's own interests. However, much could be improved within this grey area. The key is to have stakeholders within the Hong Kong government who can assume responsibility for designing Hong Kong's external relations strategy, and then coordinate with Beijing on relevant issues. Beijing should also implement a clearer diplomatic policy to make use of Hong Kong's external relations for its own benefit. Otherwise, if both Beijing and Hong Kong fail to designate officials responsible for handling such delicate matters, Hong Kong's huge potential in external relations will only be exploited by technocrats. This would create a lose-lose situation for both Hong Kong's special status and China's diplomacy.

Referring to a speech made by Lu Xinhua, the commissioner of the Chinese Foreign Ministry in Hong Kong, the potential Hong Kong has in assisting Chinese diplomacy includes "demonstrating the successful implementation of 'one country, two systems' for Taiwan", "assisting China's global economic cooperation through financial, trading and transportation networks", "assisting China's outreach efforts around the globe, and its energy diplomacy", "supporting China's multilateral diplomacy by hosting international conferences and exhibitions" and "supporting China's public diplomacy and cultural diplomacy by mobilizing public involvement in foreign affairs".[37] Responding to an internally circulated consultancy report commissioned by the Hong Kong's Central Policy Unit, drafters from the Shanghai Institute for International

37 'Zhongda Yanjiang' (Talk at CUHK), *Wenweipo*, 23 September 2006.

Studies (SIIS) – a leading international relations think tank headed by the brother of Foreign Minister Yang Jiechi – also explicitly advised Hong Kong to serve as an experimental pioneer by using its external relations capacity to perform public tasks that Beijing finds difficult.[38] If this can be achieved, Hong Kong's external relations, however ill-defined, would not only help maintain the unique status of Hong Kong compared with other Chinese cities, but also grant China a valuable diplomatic tool that other states do not possess.

The prerequisite for achieving this strategy, however, is that the tendency of dogmatic nationalists to politicise everything related to sovereignty must be effectively checked. Putting all theories aside, we are left with the most fundamental question about Beijing-Hong Kong relations: the level of trust that Beijing places in Hong Kong.

38 *China's Foreign Policy and Hong Kong's Position in Regional Development*, Report for Central Policy Unit of Hong Kong, Shanghai Institute of International Studies, Shanghai, December 2009.

6. Intertwined Sovereignties and the Problem of Legitimate Opposition in the European Union[1]

Sverker Gustavsson

1. Introduction

Every member state of the European Union (EU) must be a democracy, or it will not be allowed to join in the first place. In a democracy, an alternative government with alternative policies is seen as a *legitimate* option. Parties currently in opposition must have a chance to defeat the incumbent government in the next election. Such a shift in power must be possible, moreover, without it being necessary to change the constitution first.

In the case of the European Union, however, the member states and their sovereignties are *intertwined*. As a consequence, the idea of legitimate opposition is waning.[2] At the level of the Union, there is no practical alternative to the broad coalition made up by the governments of the member states. Furthermore, the core institutions of the European Union,

1 This is a slightly revised version of my chapter 'European transnational constitutionalism: end of history, or a role for legitimate opposition?', in E. Özdalga and S. Persson (eds.), *Contested sovereignties – forms of government and democracy in Eastern and European perspectives* (Tauris, London, 2010) pp. 211–222.

2 Seminal references are O. Kirchheimer, 'The waning of opposition in parliamentary regimes', 24 *Social Research* (1957) pp. 127–156 and P. Mair, 'Political opposition in the European Union', 42:1 *Government and Opposition* (2007) pp. 1–17.

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like the European Commission and the European Court of Justice, are supposed to continue their operations untouched by any changes in the composition of the majority in the European Parliament.

Political scientists are accordingly debating[3] whether the waning of opposition at the European level is acceptable. Can there be a different and better combination of member-state and European constitutionalism?

My own argument in this debate proceeds in three steps. I start by describing the actual living constitution of the European Union, in light of the difference between member state and European constitutionalism. I then proceed to clarify three major recommendations offered by political scientists on how to address the current constitutional predicament. Finally, I pose what I consider to be the core normative question of legitimate opposition as an alternative to accountability avoidance and end by restating my argument.

2. Member State and European Constitutionalism – What Is the Difference?

Historically, constitutionalism was a politically neutral affair, and it only pertained at the level of the member state. "We the people" organised ourselves in such a way that the *procedure* was plain by which "we" could acquire a new parliament, an alternative government and a different head of state. In addition, the constitution laid down rules safeguarding civil rights: *e.g.*, freedom of association, freedom of religion and freedom of speech. In some countries, there were also constitutional provisions for the protection of ethnic and cultural minorities.

But in the transnational context of the European Union, as it manifested itself from the 1950s, the concept of constitutionalism took on a further meaning. Now it came to mean that the member state governments – as a consequence of their Union membership – imposed a collec-

3 Helpful overviews can be found in: J. H. H. Weiler, 'The political and legal culture of European integration – an exploratory essay', 9:3–4 *International Journal of Constitutional Law* (2011) pp. 678–694; P. Anderson, *The new old world* (Verso, London, 2011), and a symposium on that book with interventions by P. Schmitter, A. Supiot, J.-W. Müller, P. Anderson and W. Streeck, 73 *New Left Review* (2012) pp. 19–71.

tive straitjacket on themselves as to the *content* of public policy. The effect of this collective straitjacket is to hamper the pursuit of social and economic policies which are not in accordance with the general European Union clause prescribing freedom of movement for capital, goods, services and labour.

The governments of the member states did not, however, change their national constitutions so as to accord with the general clause on freedom of movement. As a result, the EU is only able to implement European law sporadically, and in spheres where national resistance is moderate or non-existent. Hence, the impact of the living constitution of the Union is less foreseeable than it ought to be according to the principle of predictability. Indeed, it is notoriously difficult to know whether European law is applicable in a given case or not.

What we got, in practice, was a constitutional system which is transnational *and* biased in favour of market liberalism. Before EU membership, member state constitutions were considered to be politically neutral rules of the game. In the case of European transnational constitutionalism, however, neutrality does not apply. Political content and constitutional procedure are looked upon as two sides of the same coin. Or, to put it differently, the distinction between *ordinary* politics and *constitutional* politics is blurred.

Without simplifying too much, we can say that there is fundamental agreement about how to describe and explain the actual workings of the present-day European constitutional system. The debate is not so much on the empirical as on the normative side. Is the present order to be preferred to its alternatives? Or do the best available arguments rather point in the direction of constitutional reform? And if the latter is the case, in what way and in what direction should the intertwining be changed?

Most political scientists are in basic agreement about how the European Union actually works, and about what factors give life and history to the real (as opposed to the formal) European constitution. The empirical aspect is certainly worth discussing. However, it is far less controversial than the normative issue. By contrast, researchers are very far apart on what to recommend when it comes to constitutional reform.

Empirically, there are two sorts of tension at work here. We might refer to the first as the *horizontal* one: *i.e.*, the tension between left and right. The second is the *vertical* one, *i.e.*, the tension between Union precedence and member state self-determination.

As to the horizontal aspect, all member states consider themselves to be mixed economies or welfare states. Within each member state, moreover, the fundamental pattern is the same. As voters, citizens decide who is to represent them in parliament and exercise legislative and executive power on their behalf. As consumers of goods and services (including media services), they decide for themselves. As investors and trade union members, they decide the distribution of market powers – a distribution that functions in a countervailing fashion *vis-à-vis* the preferences expressed in general elections based on universal suffrage and freedom of information.

The optimal mix between left and right is not written into the formal constitution. It is the concrete result of the continuous struggle between political forces. The real constitution is "living" in the sense that citizens are never entirely satisfied in any of their respective roles: not as voters, not as consumers, not as investors. They accept the actual policy outcome as something second-best – as the result of a striking of an acceptable balance.

Citizens on the left do not find all of their preferences fulfilled. Nor do citizens on the right. Irrespective of where they stand on the spectrum, however, they feel they can live for the time being with the temporary equilibrium which has emerged. They accept the constitution as something given, and continue pushing for a different balance – by lobbying persons in power, by seeking to influence public opinion, and by working for a different result in the next election.

As to the vertical tension between the suprastatist principle of freedom of movement for capital, goods, services and labour on the one hand, and the principle of national self-determination and democracy on the other, the political predicament is of another kind. In theory, the suprastatist principle has precedence: it could be used to trump every conceivable piece of national legislation, and every single instance of fiscal redistribution. In practice, however, the European Union does not work that way.

It is true that most markets for capital and goods have been made European, in the sense set out in the formal Union treaties. The markets for services and labour, however, have not been treated in the same way. In practice, the suprastatist principle is applied to them only partially. This is because the markets for services and labour are much closer to the individual needs and preferences of citizens and families.

The legislation promulgated by the member states is based on universal suffrage; accordingly, freedom of information and freedom of organisation cannot be suppressed by the free trade doctrine as easily as the various regimes for capital and goods can be. In obvious defiance of the suprastatist free trade regime, member states have license-financed public service media, tax-subsidised public housing, tax-subsidised public and private hospitals, public selling of liquor and pharmaceuticals, public control of rents, and national policies for the production of nuclear energy. The four freedoms have only been adopted up to a point. In areas where European law is unable to reproduce its own legitimacy, they yield to other considerations.

In other words, what we have is a living European constitution in two dimensions. Within that two-dimensional construct, the many different actors continuously strike a reasonable balance. That balance is struck between left and right, on the one hand, and between national self-determination and a constitutionalised free trade regime for capital, goods, services and labour on the other.

Individuals, firms, politicians, trade unions and administrators act and argue in terms of what jurists call *proportionality*: *i.e.*, the question is whether a certain piece of national legislation – when it is contrary to the general European Union clause on freedom of movement – stands in reasonable proportion to what is to be achieved in terms of social protection and citizenship.

In its vertical dimension, the living constitution of the European Union is ruled by what we might call "a constitutional balance of terror".[4] The European Court of Justice, and the EU's legislators too, realise perfectly well that they can destroy the trust of citizens in the Union by applying too rigorously the precedence of freedom of movement for capital, goods, services and labour. The electorates and governments of the member states can only be expected to acquiesce to the precedence of European law if the suprastatist regime respects the principle of national self-determination in areas which are politically sensitive – such as foreign policy, labour legislation and welfare provision.

4 S. Gustavsson, 'The living constitution of the EU', in B. Kohler-Koch and F. Larat (eds.), *Efficient and democratic governance in the European Union* (Mannheim Centre for European Social Research, 2008) p. 332.

The practical and everyday import of the constitutional balance of terror is that much of ordinary politics is handled in terms of proportionality. A wide range of political issues – whether central laws or secondary legislation – are discussed in terms of what is to count as a reasonable and proportionate national interest capable of balancing the general clause on freedom of movement formally stipulated in the Union treaties. In practice, it is this kind of semi-political and semi-juridical contestation that gives life and history to the actual constitution of the European Union.

According to this standard interpretation, the European Union general clause on freedom of movement is not to be implemented within a larger sphere than that within which it can reproduce its own legitimacy.[5] Its application is restricted by an informal pact of mutual confidence, or, put differently, by a constitutional balance of terror. One cannot predict European law simply by studying treaties and constitutions. In practice, namely, the interpretation given it depends on a delicate and shifting political balance. Loyalty towards the Union on the one hand, and respect for national autonomy and democracy on the other, work as countervailing powers in a way which tends to be detrimental to the need for clarity and predictability.

To sum up my argument so far, what distinguishes the national from the transnational living constitution is how *ordinary* politics is related to *constitutional* politics. At the national level, left and right agree on procedure and disagree on policy substance. The European living constitution, by contrast, is a system where the horizontal issue of left and right is not kept separate from the vertical issue of where European rather than national law should apply.

At the European level, the procedural and substantive aspects are blurred. Consequently, the living constitution of the Union – as compared with those of its member states – tends to make public decision-making less predictable. Intertwining sovereignties makes it more unclear who governs what, when, how and for what purpose.

5 S. Gustavsson, 'Putting limits on accountability avoidance', in S. Gustavsson, C. Karlsson and T. Persson (eds.), *The illusion of accountability in the European Union* (Routledge, London, 2009) pp. 41–45.

3. Three Normative Recommendations

Within the broad menu of conceivable *normative* recommendations regarding this loss of predictability, there are two theoretically pure – and in a pragmatic sense extreme – positions. The first is federalism; the second is confederalism. According to both, the fundamental structure of the Union is unstable, and in the long run unsustainable.

The proponents of these two pure positions are highly critical of the constitutional balance of terror that characterises the living constitution. They take particular aim at what we may call the *double* asymmetry of the Union. The first asymmetry is the procedural democratic deficit: *i.e.*, the fact that the power to legislate is centralised while electoral accountability is not (at least not to the same extent). The second asymmetry, which is intertwined with the first, relates to political content: policies for the market and the currency are centralised, while those for positive integration are not. Positive policies are those aimed at mitigating the social consequences arising from the free movement of capital, goods, services and labour. The four freedoms form part of the basic treaties; social policies do not. The latter are much more difficult to handle at the European level than are regulatory policies for a negative integration marked by deregulation and the creation of a single market.

In the view of full-fledged federalists, social and fiscal policies should be made suprastatist too, and the European Parliament should be given the same constitutional status as the German *Bundestag*. Consistent confederalists, for their part, make the same analysis, and stake out an equally pure position. The suprastatist parts of the living constitution, as they see it, must be re-nationalised, thus making the Union symmetrical through movement in the opposite direction. In other words, full-fledged federalists and consistent confederalists are in full agreement that democratic accountability and actual decision-making ought to take place on the *same* constitutional tier – either at the national level or at the federal level. One might call this the either/or criterion.

As judged by the either/or criterion, EU decision-makers are not held to account on the appropriate level. Exponents of the two purist critiques take aim, from both ends, at defenders of the constitutional *status quo* in the middle. These defenders make a wide variety of policy recommendations. However, they have one thing in common. In practice, that is, they favour retaining the established asymmetrical solution to the problem of

how national self-determination is to be combined with partial federalism.

Within this broad area between federalism and confederalism, three schools of thought can be fruitfully distinguished. All of them refuse federalism as well as confederalism. From a less radical point of view, they are all concerned with what to do about today's living constitution – with its double asymmetry, monetary union without fiscal union, and constitutional balance of terror. In a compressed and stylised way, the core assumptions of these three schools may be described as follows:

3.1. This Is the End of History!

According to this first of these three intermediary views, the founding fathers of the Union created something admirable, and there is nothing to be worried about. Such is the basic attitude of end of history champions of the living transnational constitution of today. The tension built into the constitution does not cause these scholars to lose any sleep. On the contrary, they consider it to be a real hit, historically and globally speaking.

According to Giandomenico Majone[6] and Andrew Moravcsik,[7] namely, we should emphasise the fact that, historically speaking, Europe has been highly innovative. In the course of one hundred years, Europe has produced two political innovations of great historical importance. The first is the mixed economy, in the horizontal dimension; the second is the mixed polity, in the vertical one.

The mixed economy enabled us to avoid totalitarianism, and the mixed polity made it possible to combine a truly free market with democratic arrangements in respect of social legislation and fiscal redistribution within each member state. The mixed economy, furthermore, works

6 G. Majone, *Dilemmas of European integration – the ambiguities and pitfalls of integration by stealth* (Oxford University Press, 2005); G. Majone, *Europe as the would-be world power – the EU at fifty* (Cambridge University Press, 2009).

7 A. Moravcsik, 'The European constitutional settlement', 3:1 *The World Economy* (2008) pp. 157–182; A. Moravcsik, 'The myth of Europe's "democratic deficit"', 6 *Intereconomics* (2008) pp. 331–340; A. Moravcsik, 'Europe after the crisis', 91:3 *Foreign Affairs* (2012) pp. 55–68.

best when it is paired with a mixed polity; while the mixed polity finds supreme expression within the doubly asymmetrical living constitution of the EU today – with its Europe-wide constitutionalisation of the free market. From the standpoint of market liberalism, namely, the protections afforded the free market by the Union offer a much better solution than does the risky business of a mixed economy country by country.

In other words, double asymmetry, monetary union without fiscal union, and a constitutional balance of terror are not to be considered problematic. Instead, we should be happy to have found such a well-functioning constitutional settlement. The only risk over the long run is the one posed by the tendency of European intellectuals and politicians to discuss the issue in terms of a democratic "deficit". The underlying criterion of that idea is basically out of touch with today's political realities in the Western world.

By global and historical standards, the *status quo* works well. It should not be disturbed by theoretical and philosophical considerations pointing in another direction. We should rather concentrate on understanding the Union the way it has been constructed, with an eye to making it work even better and to demonstrating its advantages to the rest of the world. In practice, this means that we should not believe in the possibility of transferring the welfare state to the European level. That is a "mirage"[8] to be avoided.

If the Union "ain't broke, don't fix it". That is the basic notion behind the end of history position. There is simply no other need for reform than the continuous small improvements which are needed in order to bring about a better public understanding.

3.2. *We Must Politicise!*

Alternatively, the founding fathers of the Union made a historic mistake. Two distinct positions can be found among political scientists who do not buy the notion that present constitutional arrangements represent the end of history.

According to the first of these two critical positions, the solution to a wide range of social, economic and cultural tensions is *politicisation*. Cleavages based on religion, class, culture and ethnicity can only be over-

8 Majone, *Europe as the would-be world power*, *supra* note 6, pp. 128–150.

come by recognising them as legitimate, and by allowing the intellectual and political differences associated with them to be fought out in terms of a basic and clear-cut left and right controversy.

Due to the weak political contours of European institutions, however, it is far from obvious where European law applies; nor is it obvious in what areas the member states can decide for themselves. Unless European legislation is adopted after a regular confrontation along party lines at the European level – in the same way as it currently takes place nationally – citizens will be unable to trust it. Thinking and acting in terms of basic left and right controversy is suppressed at present, but under the political surface it does indeed exist. It should be brought out into the open.[9]

In his book, *What's wrong with the European Union and how to fix it*, Simon Hix presents a programme for encouraging a "limited democratic politics" at the Union level. His main points include a "winner-takes-more" model in the European Parliament, with the president of the Parliament being chosen on a full-time basis for five years, and the purely proportional system for the allocation of committee chairs being replaced by a system giving larger political groups a greater number of chairs.

Similarly, the European Council should be transformed into a proper and fully transparent legislature. There should also be an open contest for the Commission presidency, with candidates having declared their political affiliation in terms of left and right. Taken together, Hix argues, such changes would have a dynamic effect, and be followed by a trend over the long run towards a totally politicised European Union. If the "life" component of its living constitution came to resemble that of national level politics more closely, the system as a whole would work much better.

9 J. Habermas, *Zur Verfassung Europas – ein Essay* (Suhrkamp, Berlin, 2011); S. Hix, *What's wrong with the European Union and how to fix it* (Polity Press, Cambridge, 2008).

3.3. *Take Every Conceivable Precaution in Order to Avoid a Constitutional Meltdown!*

According to proponents of this second type of critique against the end of history hypothesis, the assertion that the founding fathers of the Union made a historic mistake is also a reasonable value judgment.

The appropriate response, however, is neither enthusiasm nor democratic activism, but rather *extreme constitutional caution*. Such an attitude is necessary if devastating outbreaks of right-wing nationalism and populism are to be avoided. This is the second main position among researchers who are critical of the end of history hypothesis. Unlike Jürgen Habermas and Simon Hix, however, they do not think that politicisation is the way to go. Experiences with fascism and right-wing populism in Italy and Germany form the especial historical backdrop for some of the most prominent representatives of this school.[10]

When Stefano Bartolini and Fritz Scharpf defend the constitutional *status quo*, they do so on the basis of an analysis diametrically opposed to that of the market liberals and the democratic activists. The combination of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror does not fill their heart with joy. However, they see no feasible alternative to this unstable constitutional equilibrium. Nothing else is available which is better or as good. One could say that these scholars argue in a way well-known from environmental policy. That is, they plead a *precautionary* principle designed for the vertical aspect of the transnational living constitution. We should not think only in terms of costs and benefits, they argue. We must also keep a worst-case scenario in mind.

10 S. Bartolini, *Restructuring Europe – centre formation, system building, and political structuring between the nation and the European Union* (Oxford University Press, 2005); S. Bartolini, *Should the Union be 'politicised'? – prospects and risks*, Notre Europe, Paris, Policy Papers 19, 2006; S. Bartolini, 'Taking "constitutionalism" and "legitimacy" seriously', in A. Glencross and A. H. Trechsel (eds.), *EU federalism and constitutionalism – the legacy of Altiero Spinelli* (Lexington Books, Lanham, MD, 2010) pp. 11–31; F. W. Scharpf, *Governing in Europe* (Oxford University Press, 1999); S. Bartolini, *Community and autonomy – institutions, policies and legitimacy in multilevel Europe* (Campus Verlag, Frankfurt am Main, 2010) pp. 317–391.

In the national-level living constitution, to be sure, left and right vie for the mastery. In practice, however, both sides benefit from an element of mutual trust which – within the historically given borders and the commonly accepted rules of the game – is self-reinforcing. But, Bartolini and Scharpf caution us, a politicisation of the vertical dimension will probably not work that way. The chances are that as soon as a common European solution to a problem cannot be presented as Pareto-optimal citizens will start asking a politically sensitive and potentially explosive question: why, and on what grounds, are people living in "other" countries entitled to legislate on "our" behalf?

Democratically accountable politicians will find it hard to give a good answer to that question. It is for this reason, Bartolini and Scharpf argue, that European legislation and adjudication should remain apolitical. Horizontally (*i.e.*, within each member state) citizens are prepared to accept majority rule, because the minority took part in the preceding legislative preparations, and their parties can imagine becoming a majority after the next coming election. Vertically, however, citizens cannot be active in the preparation of legislation in the same way.

Since the most important legislative issues – especially the trumping principle of freedom of movement – are constitutional ones, citizens will not so readily consider majority decisions to be legitimate. This is why Bartolini and Scharpf are so afraid that a system of European majority rule will provoke outbreaks of devastating right-wing populism in the electorate.

Such tendencies will arise, in their view, if the suprastate goes too far towards legislating and adjudicating in a way that is detrimental to feelings of national self-respect. It is therefore critical, in connection with vertical European legislation and adjudication, that we never lose contact with the underlying informal principle that vertical loyalty upwards is bought at the price of respect for national self-determination downwards.[11]

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11 F. W. Scharpf, 'Autonomieschonend und gemeinschaftsverträglich – zur Logik einer europäischen Mehrebenenpolitik', in F. W. Scharpf, *Optionen des Föderalismus in Deutschland und Europa* (Campus Verlag, Frankfurt am Main, 1994) pp. 131–155.

4. Why Is Legitimate Opposition Preferable to Accountability Avoidance?

The end of history position is under double attack. On the one hand we have those who advocate politicisation as a way of making the precedence of European law more accepted. On the other hand we have those who advocate an extreme caution in order not to provoke a constitutional melt-down.

There are basically two lessons to be drawn from comparing these three positions in the debate on the future of the European living constitution. One first lesson is that our understanding of the living constitution of the European Union is enhanced if we interpret the question as a *two dimensional* issue. Considering the elements of life and history in the constitution *both* vertically and horizontally enables us to see the main options in the debate more clearly. It is not to be taken for granted that the juxtaposition of European law and national self-determination is of the same kind as the traditional confrontation between left and right within each member state.

The horizontal dimension bears on the tension between capitalism and democracy – a matter over which a balance can be struck without the losers becoming negative to the overall constitution. The vertical power struggle, on the other hand, refers to the tension between national self-determination and the suprastatist regime of free movement for capital, goods, services and labour. The losers in this conflict might easily, as Bartolini and Scharpf argue, turn their opposition to particular outcomes into opposition to the system as such.

A second and equally important lesson is that the concept of *opposition* has a different meaning in the living transnational constitution of the EU than it has within the established democratic context of the member states. Vertically, opposition does not have the same within-the-system confrontational meaning as it has within a national living constitution. At the national level, the confrontation between left and right proceeds without undermining support for the constitution. Opposition is regarded as legitimate.

By contrast, the suprastatist principle of free movement (which is only partially applied) leaves citizens with an unclear perception of who is ultimately in charge. This is why there are greater obstacles to institut-

ing democratic accountability in the vertical dimension than there are to instituting it horizontally, *i.e.*, within each member state.

Horizontally and within each country, opposition takes a classical form, in the sense identified by Otto Kirchheimer: as expressive of the *legitimate* "right of the defeated group to publicly maintain its principles after they were rejected by the majority to be the foundation of the opposition's functioning", provided that "the participants in the political game consist of moderate elements".[12] Vertically, the debate between Hix on the one hand and Bartolini and Scharpf on the other – about the legitimacy of federal rulings by the institutions of the European Union – calls into question the classical premises that Hix takes for granted. Instead, Bartolini and Scharpf warn us that politicisation in the vertical dimension will bring about Kirchheimer's two alternative types of opposition: at first an "opposition of principle", which then calls "cartel" arrangements into being, aimed at the "waning" of opposition.[13]

Majone and Moravcsik, for their part, see no difference between controversy in the vertical dimension and what takes place in the horizontal dimension within each country. A mixed polity, in their view, is basically the same thing as a mixed economy. Hix, by contrast, concedes there is a difference between the dimensions. He believes, however, that it can be overcome by European party politics. If left/right controversies are let loose in the vertical dimension as well, he argues, confrontatory activities of a moderate kind will flourish.

Bartolini and Scharpf take an entirely different view. Instead of pointing to the possibility of ignoring or overcoming the difference, they *emphasise* it. They see a fundamental difference between, on the one hand, classical debate, opposition and power struggles in the horizontal dimension within each country, and, on the other, what the result is likely to be if the vertical dimension is politicised. Within each country, they argue, parties and people can fight each other in a moderate way because their mutual opposition is considered legitimate. It takes place within the same borders, and in accordance with the same national constitution.

Vertically, in the view of Bartolini and Scharpf, it is a question not just of politics but of *constitutional* politics. People of various views have to answer a more difficult question here: namely, "why should people liv-

12 Kirchheimer, *supra* note 2, pp. 128 *et seq.*

13 *Ibid.*, pp. 134–136.

ing in 'other' countries be entitled to legislate in 'our' country?" When the living constitution is flexible and unclear (as it is in the vertical dimension), striking a reasonable balance is likely to be trickier and more explosive than it is when the task is to balance political forces within a single mixed economy or welfare state circumscribed by a nation-state constitution of the historically given democratic kind.

This leaves us with the puzzling question that Peter Mair confronted us with in his well-known article on political opposition in the European Union.[14] Why are EU affairs outsourced from national politics into special referenda and elections to the European Parliament? Why is it that these matters are not part – as ideally they should be – of the regular public debate and regular national election campaigns in any of the member states?

The explanation, as Mair sees it, is that national politicians think intuitively along the same lines as Bartolini and Scharpf. It is too explosive to let constitutional politics loose in national political affairs.

Majone and Moravcsik, for their part, would say there is no need for outsourcing. There is nothing to fear, they would likely argue, from mixing regular politics with constitutional politics. Hix would probably give a similar answer. He believes very strongly in the ability of European political parties not only to overcome the tension between left and right, but also to overcome the tension between national self-determination and the precedence of European law. Indeed, he seems to believe that such tensions can be overcome even when the policy is implemented top down, and no room is left for legitimate opposition or disobedience.

This brings us to the core issue. After all, *why* is legitimate opposition more desirable than constitutionally guaranteed accountability avoidance?

As to the general question of accountability avoidance versus accountability promotion, we take the side of those who stress the importance of legitimising opposition and holding power to account. Politics shorn of disagreement will undermine our belief in democracy, which is a system for choosing between different policies and office-holders.

From this point of view, the two positions at the extremes of the spectrum – full-fledged federalism and consistent confederalism – are both unproblematic. By definition, their proponents solve the problem

14 Mair, *supra* note 3, pp. 1–17.

through symmetry. In the case of federalism, power and accountability both are situated at the European level; in the case of confederalism both are lodged at the national level.

One could say, however, that the federalists and confederalists are only successful because the situation addressed by their arguments is not the one found when the European "ship" is on "the open sea", but rather the one that presents itself when it is in a "dry dock"[15]. In the latter case, nothing unforeseen can happen, because the ideal union is being modelled from scratch, and according to principles that are theoretically sound by definition.

The problem in the real world is usually of a different kind. Politicians have no choice but to rebuild their "ship" on "the open sea". The founding fathers of the Union made their "mistakes" long ago. Their followers have refrained for generations from adopting a stringently federal or confederal point of view. On account of this lack of clear principles, the Union is marked today by the above-mentioned combination of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror. This particular status quo is seen positively by the end of history theorists; it is viewed as a potential powder-keg by informal pact of confidence theorists; and it is regarded by democratic activists with a rather hopeful eye.

Preferred by the author of this chapter is the informal pact of confidence approach. For one thing, we consider that the approach taken by the end of history theorists is too cynical, and will have the effect of undermining popular belief in democracy. For another, we believe that the democratic activists underestimate the potential negative consequences of dynamically mixing up the politicisation of left/right issues within the member states, on the one hand, with the constitutional issue of why the Union should be entitled to legislate and adjudicate in controversial matters, on the other.

Only the proponents of the informal pact of confidence position are sufficiently sensitive to the obvious risk of letting aggressive nationalism loose in Europe. They are realists who do *not* – and we consider this the heart of the matter – lose sight of the element of deliberate choice and

15 S. Gustavsson, 'Designing European federalism', 13:1 *Swedish Economic Policy Review* (2006) pp. 163–183.

democratic accountability. In our view, their specific combination of realism and normative sensitivity is exemplary.

The Union's institutional set-up today – with its mixture of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror – does not fill the heart of an informal pact of confidence theorist with joy. However, there is no feasible alternative in the short term. There is nothing else immediately at hand which is better. The argument here is familiar from the field of environmental policy. In that other context it is referred to as the *precautionary* principle. We should not just consider what would be ideal; the worst-case scenario must be kept in mind as well. Constitutionalism and legitimacy must indeed be taken seriously.[16] But accountability and opposition deserve serious consideration too.

As informal pact of confidence theorists, we need to clarify why legitimate opposition is preferable to accountability avoidance. Why should the basic freedoms of religion, speech and organisation be defended? Why must equal rights to take part in elections be upheld?

Why do we consider it to be a mistaken policy to let opposition *wane* and to allow it to become an *opposition of principle*, as Otto Kirchheimer would have said? This is done continuously in the European transnational context by ostracising opposition through naming and shaming it under the heading of "Euroscepticism". It is done in order to defend the long-term political stability and sustainability of the transnational constitution defended by end of history theorists. Nevertheless, we see this as a mistaken policy. Based on what rational argument can we *simultaneously* defend the precautionary principle and that of legitimate opposition?

In the comparative-government literature more broadly defined – *i.e.*, the literature not dealing specifically with the problem of European transnational constitutionalism – there are mainly two arguments in favour of *not* letting loose legitimate opposition, majority rule and democratic accountability.

One of these arguments is referring to the widely recognised need to facilitate *cleavage management*. Political procedure is the key, according to this reasoning. That idea applies not just to the EU but to every conceivable political system. It is founded in the notion that the fundamental

16 Bartolini, 'Taking "constitutionalism" and "legitimacy" seriously', *supra* note 10, pp. 26–29.

purpose of political institutions is to achieve cleavage management and internal pacification.

From the viewpoint of cleavage management, the avoidance of democratic accountability and legitimate opposition offers a solution to the problem of deep-seated cleavages arising from class, religion and ethnicity. Social fissures of that kind get politicised in a too easy and risky way. If "we" fear too much politics in a political system, "we" can use consociational, limited-government, devolutionary and arbitral mechanisms in order "to resist decisions demanded by political majorities that would oppress minority rights, especially if [such mechanisms] enjoy widespread legitimacy".[17]

The other basic argument for avoiding democratic accountability and legitimate opposition emphasises what procedure means in terms of political content. This argument takes its point of departure in the widely recognised need for policies which accord more closely with the *public interest* than do those which tend to result from systems characterised by political majoritarianism. The idea is that policies should be in the real and long-term interest of those affected. Voters do not always have the capacity to judge what is best for them.

Therefore, a broad and ill-informed popular majority should not be allowed – at least not in any effective way – to affect the functioning of the executive, legislative, judicial or monetary authorities. As the end of history theorists see it, the public interest is better served by a market-preserving and asymmetrical order than by one in which a parliamentary majority is held to account in symmetrical fashion – whether at the national *or* the European level.

As democracy undergoes its historically necessary transformation, a market-preserving federalism based on transnational constitutionalism serves as a necessary straitjacket. The substantive policies thereby promoted accord with the precepts of market liberalism, which seems to be synonymous with the public interest in today's end of history discourse.[18]

Both of these arguments – cleavage management and public good – for not letting democratic accountability and legitimate opposition loose

17 R. K. Weaver, 'Political institutions and Canada's constitutional crisis', in R. K Weaver (ed.), *The collapse of Canada?* (The Brookings Institution, Washington DC, 1992) p. 15.

18 Gustavsson, *supra* note 5, pp. 41–45.

have to be taken seriously. In practice, moreover, both of them – whether singly or in combination – are highly influential notions. That is not to say, however, that the reasons adduced for their tenability are convincing. From an intellectual point of view, it should not be taken for granted that a thesis is true just because it is widely embraced in the real world of power politics.

If we inspect the literature more closely, we can easily turn up impressive counter-arguments. These focus on the same major points as their counterparts. What they have to say about effective cleavage management and the promotion of the public interest, therefore, deserves to be taken just as seriously.

In relation to the public interest argument, it can and should be said that what history has taught us is the impossibility of knowing in advance what will happen. The idea of *trial and error*, as well as the need to be open to future intellectual improvements, would seem rather to enjoin us from positing any other substantive public interest than that upon which a political majority can agree on the basis of democratic accountability.

In other words, it is one thing to say that we should seek out the best available expertise for advice and implementation. It is quite another to think that it advisable to institutionalise the ultimate decision-making of judges, economists and other experts as ultimately built-in elements of a "mixed polity".[19]

A trial and error theorist finds this latter idea dubious. We have great need, to be sure, of administrative and juridical expertise. Guardianship, however, is quite another thing. It cannot and should not be taken for granted that the rule of law – as opposed to that of force, caprice, fancy or whim – is best implemented in a system based on the rule of jurists, economists and generals. It should remain an *open* question – to be settled by empirical experience – whether predictability is best achieved in a system founded basically on guardianship, or in one based essentially on universal suffrage and political freedom.[20]

If there are deep cleavages – and indeed there are in most political systems – there is a vast literature in favour of not trusting the idea of an *a priori* conception of the public interest. According to that alternative

19 Majone, *Dilemmas of European integration*, *supra* note 6, pp. 46–49.

20 R. Bellamy, *Political constitutionalism – a republican defence of the constitutionality of democracy* (Cambridge University Press, 2007) pp. 143–263.

argument it is majoritarianism, legitimate opposition and accountability promotion (rather than accountability avoidance) which are more effective in fostering tolerance and moderation. An approach of this alternative kind is not only functional for avoiding stalemate; it also helps to ensure unity because it gives politicians "incentives to make appeals to voters across cleavage lines in order to build a majority or plurality of support".[21]

In systems based on universal suffrage and political freedom, and within which many different cleavages are found in terms of religion, class, region and ethnicity, politicisation serves to *promote* the emergence and maintenance of cross-cutting cleavages.[22] In such a society, parties cannot get a majority by appealing to their own group only. They need to become "*Allerweltparteien*", the pregnant German word for the important 20th century phenomenon of "catch-all parties".[23] Such parties must appeal to many different groups. They accordingly create an institutionalised system of self-reinforcing cleavage management – a system which, be it noted, is opposite of and contrary to the idea of *not* making opposition legitimate.

Also from an exclusively utilitarian point of view, the arguments *for* legitimising opposition are at least as strong as those *against* the idea of letting politics loose. In addition, however, we should not forget that there is an issue of elementary historical identity at the very core of the matter. Two World Wars and a Cold War were fought to protect values that most citizens see as fundamental: the right to vote, the right to express oneself publicly and the right of free association. The right to disagree without being considered disloyal is an integral part thereof.

5. Conclusion

From a Westphalian point of view, Europe's 20th century was an age of political failure. The system of national self-determination broke down. Yet the dreadful conflicts and confrontations of the era – two World Wars

21 Weaver, *supra* note 17, p. 11.

22 S. Rokkan, *State formation, nation-building and mass politics in Europe* (Oxford University Press, 1999) pp. 275–302.

23 O. Kirchheimer, 'Der Wandel des westeuropäischen Parteiensystems', 6:1 *Politische Vierteljahresschrift* (1965) pp. 27–33.

and a Cold War – resulted in a new insight at last. Politicians and concerned citizens concluded that sovereignties must be *intertwined* if the cycle of war and vengeance is to be ended. A new system was accordingly established – based on cooperation rather than conflict, and on free trade rather than protectionism. Constitutionally, such a system requires a less stringent application of the concept of national self-determination.[24]

Thus arose the problem discussed in this chapter. It is best understood in a historical perspective. When the notion of sovereignty was established in the 17th century, it was conceived of as *royal* sovereignty. It was the hereditary prince of each country – not the population therein – who was the *principal*. Nor was there any mechanism for a peaceful change of government, save for that arising from the operation of inheritance within the royal family.

The French and American revolutions in the late 18th century led to a long-term shift in the conceptualisation of sovereignty. In whom, namely, does sovereignty reside? Who is the principal? Europeans started thinking in terms of the sovereignty of the *people*, rather than the sovereignty of the *king*. Elections based on universal suffrage and political freedom became the norm. In addition, a new method for regularising changes in government – by other means than through inheritance – emerged and became the rule.[25]

These new notions spread all over Europe during the 19th century. The focus on the sovereignty of the people rather than the king raised the question of *legitimate opposition*. Then, upon the conclusion of the First World War, most European nation-states instituted freedom of information and freedom of association, and carried out free and fair elections on the basis of universal and equal suffrage. Practicing the new principles made it natural to suppose that elections can result in a different government with an alternative set of policies.

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24 For overviews, *see* E. Hobsbawn, *The age of extremes – the short twentieth century* (Michael Joseph, London, 1994); T. Judt, *Postwar – a history of Europe since 1945* (Heinemann, London, 2005); J.-W. Müller, *Contesting democracy – political ideas in twentieth century Europe* (Yale University Press, New Haven, CT, 2011).

25 For this fundamental shift in the notion of sovereignty, *see* R. Bendix, *Kings or people – power and the mandate to rule* (University of California Press, Berkeley, CA, 1978) pp. 247–430.

As I have stressed in this chapter, however, a subsequent constitutional shift – in the reverse direction – took place in the last decades of the 20th century. From the standpoint of legitimate opposition, the intertwining of sovereignties *rolled back* what had been achieved earlier within the separate nation-states. Public intellectuals then started asking why they should accept a progressive downsizing of the democratic sphere. Prior to the intertwining of sovereignties, after all, citizens had enjoyed broader opportunities to criticise prevailing policy, to oppose the government of the day, and to hold leaders to account. Is a reduction of the democratic space a necessary price to pay for ending the cycle of war and revenge? And, if not, by what means can effective democratic choice be restored?

In view of the arguments made in the ongoing debate, it seems obvious that public intellectuals in this area are faced with a dilemma. The one horn of the dilemma is the need for legitimate opposition; the other is the need for intertwined sovereignties, so as to stabilise the system of nation-states. Unless we mean to abandon the European Union to market-liberal authoritarianism,[26] we must grasp this dilemma by the horns and make a fundamental choice. We can take the *big leap* into a symmetrically organised United States of Europe, as Jürgen Habermas[27] urges us to do, or we can stick to the *informal pact of confidence*, as proposed by Stefano Bartolini[28] and Fritz Scharpf.[29] There is no third option, in my view.

26 A. Gat, 'The return of authoritarian great powers', 86:4 *Foreign affairs* (2007) pp. 59–69.

27 Habermas, *supra* note 9.

28 Bartolini, *Restructuring Europe*, *supra* note 10.

29 Scharpf, *supra* note 10.

7. The Horizontal State – States and Agencies in a World Without Boundaries

Bo Wennström

1. Introduction

Although nation states are modelled around vertical thinking, one can today speak of a broadening of the statehood concept.[1] This is reflected in the states partly by a diffusion of power caused by internal phenomena such as privatisation and deregulation, and partly by external phenomena such as globalisation.[2] To begin with, it is important to understand what is meant by globalisation in this context. Foremost, it refers here to such things as the international mobility of capital, businesses and goods; the emergence and growth of global, regional and transnational political institutions; the new types of social networks created by information technology, and finally, the presence, accessibility and assimilation of other cultures.[3] The consequences of this globalisation include, among

1 N. Walker 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders', 6:3–4 *International Journal of Constitutional Law* (2008) pp. 373–396.

2 L. Hooge and G. Marks 'Unraveling the Central State, but How? Types of Multi-level Governance', 97:2 *American Political Science Review* (2003) pp. 233–243.

3 *See for example* L. Freidman and M. Frontiers, 'National and Transnational Order', in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Ashgate, Aldershot, 2004) pp. 25–50.

Per Sevastik (ed.), Aspects of Sovereignty Sino-Swedish Reflections
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other things, new problems regarding the drawing of boundaries.[4] States are participants in other activities than purely national ones and are, together with other actors, embedded and limited by these. This applies to everything from the subnational and regional levels to the international level. As a consequence, national agencies today are constantly involved in negotiations and cooperation with, for example: organisations, other states' agencies, international organisations, standardisation organisations and private companies. This is also true for agency cooperation inside nation states: it is extensive and radiates in all directions. One way of framing the area has been to talk about multilevel governance.

Particularly in Europe it has been possible to discern a movement away from national central control, which has expressed itself in a number of different ways, among other things, in the distribution of decision-making power. From the 1980s onwards, this movement has gone in three distinct directions, which in part have been touched upon above: upwards, to institutions such as the United Nations (UN) and the European Union (EU); sideways, in connection with, for example, the creation of new government institutions; and downwards, in the form of decentralised power to regional, municipal and other levels. In addition, as mentioned above, privatisations and deregulations have created a new landscape and have contributed to a diffusion of power.

The "network society" is a fact today in the Western world.[5] For example, many of the public tasks that used to be managed by one single agency are today managed in cooperation with several authorities, or in cooperation with other actors. This cooperation tends to create *complex hierarchies*. Understanding how these new configurations work is a fundamental challenge for research today.

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4 E. Cohen, 'Globalization and the Boundaries of the State: A Framework for Analyzing the Changing Practice of Sovereignty', 14:1 *Governance* (2001) p. 75, and H. Dittgen, 'World without Borders? Reflections on the Future of the Nation-State', in S. Nagel (ed.) *Policymaking and Democracy* (Lexington Books, Lanham, 2003) pp. 221–241.

5 M. Castells, *The information age: economy, society and culture*, *vol. I, The rise of the Network society* (Blackwell, Cambridge, MA, 2000); J. van Dijk, *The network society: social aspects of new media* (SAGDE, London, 2006).

1.1. Aim

The aim of this chapter is to provide basis for a theoretical understanding of horizontal cooperation between agencies and the complex hierarchies that this cooperation creates.

1.2. Problem

We have a tendency to, as Walker puts it, "*view and interpret the new configurations of global law through an old lens*".[6] This could be said about all new configurations relating to law and governance in a world with fewer boundaries but more cooperation than before. This chapter will describe a search for a new "lens" to replace the old one which Walker talks about. Let us start with the old lens and by way of that formulate the problem.

Hobbes is in this case a good point of departure. For him it was out of the question that there could be two sovereigns and that sovereignty could be divided.[7] Hobbes' image of the ideal society's organisation was that it was arranged like a pyramid. I will below call this image of society for "Hobbes' pyramid".[8] Society was, in this idealisation, a hierarchy with one sovereign at the top. The organisation was, strictly speaking, "top down".

The problem today is that society, as mentioned above, is organised not only along a single, "top down" axis. We can illustrate by using the organisation for crime-fighting as an example. Crime-fighting today involves many actors, and because of this "top down" is only one direction in the organisation. We have to add a "bottom up" direction to the "top down" if we are to include the sub-national level in the fight against crime, with community policing, crime victim groups, volunteers, *etc*. It is also necessary to add a "horizontal" axis since, as was mentioned

6 Walker, *supra* note 1.

7 T. Hobbes, *Leviathan*, p. 129, <www.forgottenbooks.org>. *Cf.* G. W. Brown, 'State Sovereignty, Federation and Kantian Cosmopolitanism', 11 *European Journal of International Relations* (2005) p. 496, and N. MacCormick *Questioning Sovereignty* (Oxford University Press, Oxford, 1999) p. 123.

8 A. von Bogdany, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law', 6:3–4 *International Journal of Constitutional Law* (2008) p. 397.

before, there is internally, within nations, much cooperation between agencies. But the picture becomes even more complicated if we also include a dimension representing regional and international cooperation. The horizontal axis then becomes tiered. Crime-fighting is, in this sense, a multileveled system with the directions "top down", "bottom up" and "horizontal", which as a whole forms a complex hierarchy.

The problem we discuss here can also be formulated as the problem of the "whole" in relation to its "parts", first touched upon by Aristotle in his *Metaphysics*: "The whole is something over and above its parts, and not just the sum of them all …"[9] The condition of the "whole" as being something more than just the sum of its parts is evident in all more complex systems. Implementing Corning's thinking, we can say that the main question is not "how" a complex system works but "why" it works.[10] To answer this question, Corning maintains that a broad, multileveled paradigm is necessary. Instead of a "reductionist" approach, he advocates a more "holistic" approach to the questions with a combination of "how" and "why".

In the case of a simple hierarchy organised like Hobbes' pyramid, the answer to the why-question is evident. Why it functions and performs is because of the compliance of the lower "parts" in the pyramid with the sovereign at the top. In a complex hierarchy the why-question is more difficult to answer. Take the EU as an example. It consists, if we simplify, of a multileveled, complex hierarchy where each of the "parts", so to speak, shows a high degree of independence. All three directions are present at the same time: the "top down", "bottom up" and "horizontal". The question of "why" becomes very important here.

2. Two Ways of Dealing With the Problem Theoretically

When faced with the problem of complex hierarchies in law, what options do we have for tackling the problem? Roughly speaking, there are two options: on the one side "reductionist" approaches, and on the other side "connectionist" approaches. The basic idea of reductionism is to un-

9 Aristotle, *Aristotle's metaphysics* (Indiana University Press, Bloomington, IN, 1996).

10 P. A. Corning, 'The re-emergence of emergence', in *Synthese* (Springer, published online 27 February 2010).

derstand the nature of complex things by reducing them to the interactions of their parts. Connectionism stresses networks as a factor in complex systems. Let us start with reductionism.

2.1. Reductionism

Reductionism outside of the natural sciences can in its most extreme form be represented by logical positivism, which assumes the existence, so to speak, of a physical "basic theory" which all science may be traced back to.[11] If one does not support radical reductionism as represented by logical positivism, then the advocacy of reduction within science can be seen as a form of method selection, for example, a precondition for the verification or refutation of theories.[12] But the choice of reduction need not in these cases stem from some reductionist basic theory. It is in these instances, as Popper says, a question of conventions.[13] The problem with reductionism and complex systems in relation to physics has been described by Ellis. Physics, he says, is built on a successful recipe for science which has been copied by almost all other sciences. This recipe is reductionism, the view that physics is based on the idea of isolated systems, which can be separated by the scientist and whose construction can be deduced from their smallest, most fundamental building-blocks. However, actual physical or biological systems do not in this sense exist in isolation. Rather, as Ellis points out, they are extremely complex and changeable:

> The problem is that no real physical or biological system is truly isolated, physically or historically. Consequently, reductionism tends to ignore the kinds of interactions that can trigger the emergence of order, patterns, or properties that do not preexist in the underlying physical substratum. Biological complexity and consciousness – as products of evolutionary adaptation – are just two examples. Physics might provide the necessary con-

11 W. V. O. Quine, 'Two Dogmas of Empiricism', in *From a Logical Point of View* (Harvard University Press, Cambridge, MA, 1953).

12 *Cf.* K. Popper, *The logic of scientific discovery* (Hutchinson, London, 1959) p. 13 regarding the occurrence of an "organized structure" in physics, and p. 49 regarding methodology.

13 *Ibid.*, p. 53.

> ditions for such phenomena to exist, but not the sufficient conditions for specifying the behaviors that emerge at those higher levels of complexity. Indeed, the laws of behavior in complex systems emerge from, but are to a large degree independent of, the underlying low-level physics. That independence explains why biologists don't need to study quantum field theory or the standard model of particle physics to do their jobs.[14]

Kelsen's pure theory of law is without doubt the clearest example of a strong reductionistic theory of law. He says of this pure theory of law that "its exclusive purpose is to know and to describe its object".[15] It is pure because it "only describes the law and attempts to eliminate from the object of this description everything that is not strictly law". It is unfortunate, he says, that legal science has blended itself with psychology, biology, ethics and theology. He then makes an analysis, similar to the one described above, which is expressed in the form of a classification into levels between surface structure and deep structure. The object of legal science, so to speak its atom, lies for Kelsen in the legal norms which are said to have purpose. Legal science is thereby reduced to be the knowledge of these norms.

What Kelsen's jurisprudence produces is a clearly monistic view on law, which is mirrored, among other things, in his view on the relationship between international and national law.[16] He saw international law as a form of incomplete law whose norms must be implemented in national law. Kelsen rejected expressly the thought of a pluralistic view on the relationship between national and international law:

> The most important consequence of the theory which assumes the primacy of national law is that the national legal order which is the starting point

14 G. Ellis, *Physics and the Real World*, <www.physicstoday.org/resource/1/phtoad/v58/i7/p49_s1>, visited on 27 May 2012.

15 H. Kelsen, *Pure theory of Law* (University of California Press, Berkeley, 1967) p. 1.

16 H. Kelsen, *Principles of International Law*, 2nd edition (Holt, Rinehart and Winston, New York, 1966) p. 553. For a concentrated presentation of Kelsen's view on sovereignty, *see* H. Suganami, 'Understanding sovereignty through Kelsen/Schmidtt', 33 *Review of International Studies* (2007) pp. 511–530.

> of the whole construction can be considered as the supreme authority and hence as sovereign in the original sense of the term "sovereignty".[17]

Kelsen's sovereignty concept is therefore monistic, hierarchic and in opposition to all forms of dualism including even pluralism.[18] But as we saw above, the judicial environment in which today's states live is characterised by competition and conflict between judicial systems, which has lead to that interaction and cooperation have largely replaced hierarchy and subordination.

Reductionist features within legal science can be traced to a number of theorists. These include Hart and Raz in the Anglo-American world, and Eckhoff, among others, in Nordic legal science.

2.2. *Connectionism*

If we now proceed to "connectionism", we can begin by noting that it is not a term used often in social science and legal science. Originally, connectionism referred to a movement in cognitive science with focus on neural networks. These networks are said to consist of a large number of units connected together in systematic arrangements, for example, as in the brain. It is very interesting to compare what connectionists and reductionists say regarding pluralism in humanities and social science. As we saw above, Ellis held that reductionist knowledge does not give a realistic picture of causal relationships in complex hierarchic structures. If we should try to find similar perspectives within the humanities and the social sciences, then, to begin with, Luhmann can be interesting to study. He takes up social systems and means that these are *autopoietic*, and as such closed. That is, at one and the same time they are dependent on

17 Kelsen, *ibid*., p. 581.

18 The relationship is however not so simple in Kelsen's entire system as may perhaps be assumed from the above. Kelsen considers namely the highest norm to be the *pacta sund servanda* rule in international law, which has consequences for the understanding of the relationship between the national norms' ranking. *See* M. Rosenfeld, 'Rethinking, Constitutional Ordering in an Era of Legal and Ideological Pluralism', 6:3–4 *International Journal of Constitutional Law* (2008) p. 418, for a short formulation of this hierarchical system.

and make use of resources from their environment, but these resources or preconditions are not a part of the system in question.[19] According to Luhmann, a social *autopoietic* system, for example a legal one, is directly dependent on a number of completely objective circumstances in the same way that thought and the digestion of food are important for communication, although they are not a part of communication. It is possible to direct much criticism towards Luhmann's theory,[20] but of most interest here is not the correctness of Luhmann's theories, but the similarity of the issues with connectionist thinking. Both perspectives try to solve the problem of how we should understand complex structures: they observe how different complex systems in spite of that their "parts" show some kind of autonomy but still constitute functional wholes.[21] Luhmann can, furthermore, be said to express views similar to those conveyed by theorists who refer to semi-autonomous social fields, for example, Moore and Griffiths.[22]

I did not intend to continue with *autopoiesis*, but to proceed with a perspective which also tangents a similar way of thinking, namely, that of discursive theories. If we simplify very much, and take Foucault as an example, we can say that for Foucault the discourse is the "part" which builds up the system. Discourse is originally for Foucault a "system of thought", a way of thinking, discussing and analysing, which differs from other ways of doing the same. Freud's psychoanalysis can serve as an

19 N. Luhmann, *Social Systems* (Stanford University Press, Stanford, CA, 1995) p. 1 and p. 176.

20 *See for example* J. Habermas, 'Excursus on Luhmannn's Appropriation of the Philosophy of the Subject through Systems Theory', in J. Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (MIT Press, Cambridge, MA, 1998) pp. 368–385.

21 *Cf.* Z. Bauman, *Postmodern Ethics* (Blackwell, Oxford, 1993) p. 17, who incorporates the issue of "functioning" into a much darker view of the whole. For example, he appears to mean that many actions of individual persons today have consequences which are difficult, if not impossible, to predict for the actor just due to the complexity. "Responsibility for the outcome, is so to speak, floating, nowhere finding its natural haven."

22 S. F. Moore, 'Law and Social Changes: The Semi-Autonomous Social-Fields as an Appropriate Subject of Study', in S. F. Moore (ed.), *Law as Process* (Routledge, London, 1978), and J. Griffiths, 'What is legal pluralism?', 24 *Journal of Legal Pluralism* (1986) pp. 1–55.

example of discourse. With psychoanalysis Freud created neither psychiatry nor psychology, but, according to Foucault's point of view, psychoanalysis has become a "structure" of concepts and theories which, so to speak, has opened up a new room within disciplines such as psychiatry and psychology. This system of theories, concepts and attitudes is supported, according to Foucault, by the differences between it relative to other "discourses" within the same discipline. Here Foucault extends classical structuralism, especially Saussure's ideas regarding symbols and symbol systems, that is, differences are what create and maintain symbols.[23]

What is interesting in this context is Foucault's approach to the "part" (the discourse) in relation to the "whole" (other discourses). The "part" has a special relation to the "whole": a difference between the inner system of each part in relation to the inner system of the whole, containing other discourses. Once again, a form of semi-autonomous functioning.

We can compare this with law. Neil MacCormick was one of the first who reacted to the changes described above that resulted in, for example, competing judicial systems. MacCormick came from the positivist tradition and held a rather reductionistic view, which developed to a more "connectionistic" one. One may briefly describe the development which he underwent as follows. Initially, when confronted with pluralistic phenomena in law, he adopted a form of radical pluralism; this later developed into what he referred to as "pluralism under international law".[24] For MacCormick and others, the so-called *Brunner* case in Germany was of decisive importance for understanding this concept. In the verdict, which came in 1993, the German Federal Constitutional Court declared that neither the European Community Court nor any other European body could have competence over its own competence.[25] MacCormick pointed out, with reference to, among other things, this verdict, that what we see today in Europe are parallel systems. The EU system builds on interpretations made, for example, by the EU Court on the basis of the EU treaties regarding such features as direct effect. Furthermore, the sys-

23 F. de Saussure, *Course in General Linguistics* (Open Court Publishing, Peru, IL, 1983).

24 MacCormick, *supra* note 7, pp. 97–121.

25 BvR 89/155.

tem also builds on the opinion that the EU Court is a new judicial system within international law. The national courts, by contrast, owe their competence to their constitutions, which are democratic expressions of the common will. This was straightforwardly expressed by the German Constitutional Court in the *Brunner* case as that the Court, but no EU body, could have competence over its own competence (*Kompetenz-Kompetenz*). MacCormick refers to different, but interconnected, judicial systems:

> This interlocking of legal systems, with mutual recognition of each other's validity, but with different grounds for that recognition, poses a profound challenge to our understanding of law and legal systems.[26]

Here we have the actual core and problem of international law today: while there is mutual recognition between the existing systems – nationally, regionally and internationally – there are different grounds for this recognition. Thereby MacCormick also criticises, for example, the Kelsenian idea that the starting point for judicial systems is national legislation, or as Kelsen expresses it "the starting point of the whole construction".[27] The bases for the EU Court, for example, are different in that the "EU" is a new judicial system within international law which receives its authority from the treaties which the EU was founded on. All of this leads to a form of self-referring system in the way that Luhmann, Foucault and others try to deal with in different ways.

What I will advocate here is a form of "connectionist" view. It will be applied to questions about horizontal cooperation between agencies and the complex hierarchies that such cooperation creates.

3. The Example of Horizontal Agency Cooperation

The need for multi-agency cooperation is evident today and a call for horizontal cooperation has become a reoccurring phenomenon in every debate about government, governance, public service, *etc.* Let us limit the discussion here to one area, and again choose crime fighting. Especially in the fields of security and crime fighting, the call for horizontal co-

26 MacCormick, *supra* note 7, p. 102.

27 *Cf. supra* with note 16.

operation has become ever-present. It can even be said that there exists a kind of naïve "horizontal ideology",[28] which presupposes that what is done in the name of horizontal collaboration is always good in itself, because it is done with a good purpose in mind, for example, to increase safety, reduce violence, *etc.* But put in another way, the formula "agency+agency+agency" is not automatically equivalent with "high quality", and the well-meaning ideology can carry with it something else. First of all, formal and institutional problems can arise when, for example, social services, police, medical care, emergency services and others collaborate. Legal frameworks differ, as do mandates, governance arrangements, strategies, tactical choices, *etc.* Add to that the diversity of cultures that meet in a horizontal collaboration and the magnitude of the possible sources of problems can easily be imagined.

Agency cooperation in the field of fighting crime creates networks. However, networks in the field of policing, for example, are not a new phenomenon, as Fleming and Wood point out: "The use of networks in policing has been the focus of public police organizations in most western democracies for the last two decades."[29] But from a European perspective, two recent events have lead to changes in these networks. Firstly, the events of 9/11 created shock waves which resulted in a global phenomenon. The collapse of the Twin Towers also signified the end of "a system designed for a past era",[30] and instead there emerged, for example, "nodes" and networks of security which many times defied sovereign boundaries. Secondly, cooperation between agencies in the EU was stressed both in the Lisbon Treaty and in the new policy area for Justice, Freedom and Security, and was further developed in the so-called Stockholm programme.

As stated in the introduction above, the organisation involved in crime-fighting is a multi-directional structure, which forms a complex "top down", "bottom up" and "horizontal" hierarchy. Therefore, it is

28 M. Valverde and J. Wood, 'In the Name of Security', *University of Toronto Bulletin* (2001), and B. Hoggenboom, 'Bring the police back in', *Stichting Maatschappij, Veilighet en Politie* (Dordrech, 2009).

29 J. Fleming and J. Wood, 'Introduction', in J. Fleming and J. Wood (eds.), *Fighting Crime Together: The Challenges of Policing and Security Networks* (UNSW Press, Sydney, 2006) p. 1.

30 *Ibid.*

nearly meaningless to separately discuss only one of the directions, the horizontal one.

A system may be complex in many different ways. What we usually think of is that it is complicated in one way or another. But the complexity may also lie in that the layers of order are, so to speak, stacked upon each other. Additionally, these layers may be modular, *i.e.*, with each layer having its own special structure, separate from the other "layers" in the hierarchy.

Describing a hierarchy in a structure as complex means, therefore, as indicated above, that the parts in the system display a high degree of independence. This aspect is also very important when we discuss police assistance, cooperation and coproduction, which involve coordination. Regarding coordination, the view in the international debate, expressed by, for example Brooks and Grint, places an emphasis on the importance of "shared vision based on shared aims and values", as opposed to old-fashioned command and control.[31] Rhodes, who discusses the difference between the bureaucratic state, the contract state and the network state, stresses the importance of diplomacy and mutual adjustment in the network state, instead of, for example, rules and commands.[32] What all of this indicates is that systems based on complex hierarchies need new ways of dealing with problems. One example of a question which needs to be dealt with is responsibility: Who is actually responsible and should be held accountable in a complex hierarchal system when things go wrong? Other questions are whether our legal systems are capable of adequately handling the respect for privacy, or the fundamental issues regarding rule of law, in the new forms of network structures which these hierarchical systems create.

31 S. Brookes and K. Grint, *The New Public Leadership Challenge* (Palgrave MacMillan, Basingstoke Hampshire, 2001)

32 R. A. W. Rhodes, 'The sour laws of network governance', in Fleming and Wood, *supra* note 29, pp. 15–34.

4. A Theoretical Understanding of Horizontal Cooperation Between Agencies and the Complex Hierarchies That This Cooperation Creates

A step towards solving the problems that complex hierarchies create is to properly understand how these hierarchies function. Hobbes' pyramid can here again represent the old structure. Two features are important in such a system: unity and subordination. This leads to that "command and control" are its most important tools. In contrast, in a complex hierarchy factors such as mutual understanding, mutual adjustment and diplomacy are, as described above, emphasised. Therefore, the connectionist view is relevant.

We now have to go deeper into questions about modularity in order to construct a connectionist view. That a hierarchy within a structure is modular means, as stated above, that the parts in the system display a high degree of independence. Furthermore, it also means that one "module" in a hierarchy may be influenced in different ways. Finally, in a modular system dependence may be not only vertical and horizontal, but encompass other directions as well. Modules in a complex hierarchy are therefore semi-autonomous.

Because of this, our connectionist approach must simultaneously incorporate three concepts: independence, influence and dependence. It is also exactly this kind of complexity that we see today in "governance". Marks, for example, describes it in the following way: "a system of continuous negotiation among nested governments at several, territorial tiers".[33] Consequently, this model implies divided sovereignty.

5. Discussion About Complex Hierarchies and Divided Sovereignty

Firstly, we have to deal with the difficult question of "responsibility" in a system with divided or shared sovereignty. One approach can be to implement the principle of subsidiarity because it sets out how responsibilities should be separated. If someone has exclusive competence in a

33 G. Marks, 'Structural Policy and Multilevel Governance in the EC', in A. Cafruny and G. Rosenthal (eds.), *The State of the European Community*, vol. 2 (Lynne Rienner, Boulder, 1993) pp. 391–411.

field, the principle of subsidiarity is not applied. But if the opposite is the case – there is shared competence – the principal should be used. In this context, subsidiarity is understood to mean that a problem should be resolved as close as possible to the source of the problem. This makes it possible to connect subsidiarity to autonomy and at the same time solve the problem of responsibility. As Pacheco Amaral puts it, it "becomes a conjugation of self-government with shared government…".[34] His conclusion is:

> Accordingly, while instruments for the articulation of the state through the recognition of the real complexity of the society, or, better yet, of the societies, that lie at its foundation, far from representing a threat, autonomy and subsidiarity constitute mechanisms that assure the unity and the safeguard ...[35]

Secondly, we have to deal with and solve problems about questions of privacy, rule of law, *etc.* in the new forms of network structures discussed here. However, one can say that the protection of fundamental human rights has already changed in the increasingly transnational law system that we have today.[36] What has happened is that there is now a trend toward multidimensional constitutional protection as a phenomenon comprising several levels: the global with *i.e.* the UN; the regional with *i.e.* EU; and the national. With respect to Europe within the EU, this implies that there are now three jurisdictions which all have responsibility for protecting these rights: the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and the national courts, especially in the form of constitutional courts in many member countries. In Europe one can therefore talk about a "triangle" of cooperation on human rights, a triangle whose corners correspond to: the highest national constitutional courts, the European Court of Justice, and the

34 C. E. P Amaral, 'Autonomy and Subsidiarity in the Emergence of a New Paradigm: The European Regional State of the Autonomies', in Nagel, *supra* note 4, pp. 133–165.

35 *Ibid.*

36 *See for example* L. Garlicki, 'Cooperation of courts: The role of supranational jurisdiction in Europe', 6:3–4 *International Journal of Constitutional Law* (2008) pp. 509–530.

European Court of Human Rights. The problem is that the system based on cooperation functions well only as long as nobody raises the difficult *Kompetenz-Kompetenz* question mentioned above.[37] Kumm has a solution.[38] He wants us to stop asking the questions that cause the disputes regarding jurisdiction, for example, the question "who has the ultimate say" in a multidimensional system. Because of what has been described here, concerns such as privacy and rule of law do not need to be larger problems for us in the world of new configurations than they have been in the old world based on state law.

6. Closing Remarks

The aim of this chapter has been to provide a basis for a theoretical understanding of horizontal cooperation between agencies and the complex hierarchies that this cooperation creates. This has been done by adopting a connectionist approach. In doing so, we also addressed the question of the connection of "the whole" with regard to "its parts" in complex hierarchies, by introducing the concept of "modularity". The parts of such a system, we also noted, display a high degree of independence. But in order to understand why this does not need to be a problem, we concluded that two other concepts were important, namely, influence and dependence. It was also stated that one way of dealing with problems arising from this approach was to use the principal of subsidiarity and to embrace the phenomenon of multidimensional constitutional protection.

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37 *Cf. also* with the case *Bosphorus Hava Yollari Turism* v. *Ireland*, ECHR No. 45036/98, 2005.

38 M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice', 36:2 *Common Market Law Review* (1999) pp. 351–386. He also had a model consisting of four components when solving "border" conflicts based on: "the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable", M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15:5 *The European Journal of International Law* (2004) pp. 907–931.

A last point needs to be made here. This chapter does not claim to provide a final solution to questions about complex hierarchies. Legal solutions are institutional solutions.[39] As a result of this they change. Institutional changes can occur in several ways. When northern Italy's bankers during the 1100s and 1200s issued bills of exchange, *literae cambii*, they created not only an effective means of payment, but also transformed the prospects for commerce in that, among other things, the expensive and dangerous transportation of money was avoided. One can speak of an institutional change which took place through the creation of the draft and similar means of payment. It is a dramatic example of institutional change without the interference of any state. Globalisation has also resulted in *de facto* changes in many fields outside nation states which have had profound influences on all levels, from the subnational ones to the international. Because of this, state legal orders have now joined the global trend of becoming part of "the new legal system" consisting of several "actors": subnational ones; regional, supranational ones; global, functionally specific, transnational ones; private, or hybrid private-public ones. To claim that it is possible to provide a single approach as to how to view and deal with all these changes and new configurations is naïve.

But for legal theory and jurisprudence the above described development is a major challenge. It creates a need for "translation" of fundamental concepts of law and jurisprudence that have received their meaning in the context of the nation state to the transnational contexts.[40] One way

39 North's definition of institutions is: "the rules of the game of a society composed of the formal rules (constitutions, statute and common law, regulations) the informal constraints (norms, conventions and internally devised codes of conduct) and the enforcement characteristics of each. Together they define the way the game is played." D. North, 'The Process of Economic Change', No. 128 *UNU/WIDER Working papers* (1997), and D. North, *Institutionerna, tillväxten och välståndet* (SNS, Stockholm, 1993).

40 K. Tuori, 'The Failure of the EU's Constitutional Project', *NoFo* (2007) pp. 37–48, <www.helsinki.fi/nofo/>, and M.-L. Djelic and K. Sahlin-Andersson, 'A world of governance: The rise of transnational regulation', in M.-L. Djelic and K. Sahlin-Andersson (eds.), *Transnational Governance* (Cambridge University Press, Cambridge, 2005) p. 3, they say: "We propose that a contemporary frontier for social scientific research is to extend and reinvent our analytical tools in order to approach regulation as a complex

of going about this, which cannot be explored here, would be through an eclectic "borrowing" of ideas, solutions, *etc.* from the deep sources of legal history and the history of ideas of law.[41] Even if my fingers itch to begin this project here and now, I will refrain and instead possibly return to it in future research.

compound of activities bridging the global and the local and taking place at the same time within, between and across national boundaries."

41 B. Wennström, 'Romersk rätt och juridikens produktiva sida', *JT* 2009/10 no. 1, pp. 63–90.

8. The End of State Sovereignty? – From a Chinese Perspective

Zewei Yang

1. Introduction

State sovereignty refers to a country's inherent power of independently dealing with its internal and external affairs. Sovereignty is a state's inherent trait, which shows its basic status in international law. However, the concept of sovereignty has been controversial since its birth. Especially after the end of the Cold War, it has become an important trend among Euro-American theorists to weaken state sovereignty or even deny its very existence, hence leading to various nihilist views on state sovereignty.[1] This chapter is devoted to a thorough exploration of the question whether state sovereignty has really come to an end or not. It is divided into three parts: the first part focuses on various nihilist views on state sovereignty; the second part clarifies that state sovereignty is still the core of modern international law, given the fact that the principle of state sovereignty is not only recognised by international law but is also reflected in the entire international legal system; the third part points out that state sovereignty is not a mythology, instead state sovereignty theory is a reflection of the objective reality of international relations and that the view on state sovereignty will develop as time goes on.

1 In 1994, the topic discussed by the fourth group at the American Society of International Law's 88th annual meeting was "The End of Sovereignty?". *See* Theme of Panel IV, 88th Annual Meeting, 1994 ASIL Proceedings, p. 71.

Per Sevastik (ed.), Aspects of Sovereignty Sino-Swedish Reflections
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2. Nihilist Views on State Sovereignty

The concept of sovereignty has suffered from all sorts of attacks, criticism and distortion since its first formal introduction by Jean Bodin. Sovereignty has been denounced as an "archaic, useless, misleading and dangerous"[2] political dogma. Harold Joseph Laski, a British political scientist, claimed that since sovereignty does more harm than good, we should establish a "world without sovereign states", and that the rational life among states will be impossible if state sovereignty is not eliminated.[3] Philip Kerr, a British international political theorist, also said that "'[t]he fundamental cause of war' was the division of humanity into separate sovereign states, while sovereignty was groundless in an interdependent world".[4]

Before World War I, no international lawyer theoretically had denied the concept of state sovereignty. After World War I, French scholar Leon Duguit applied his "doctrine of social solidarity" in international relations, and criticised the concept of sovereignty by asserting its incompatibility with international law.[5] But, according to British scholar C. Howard-Ellis, sovereignty is nothing "but a mystic sentiment expressed

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2 R. P. Anand, 'Sovereignty of States in International Law', in R. P. Anand (ed.), *Confrontation or Co-operation? International Law and the Developing Countries* (Banyan Publications, New Delhi, 1987) p. 72.

3 *See* H. J. Laski, *Grammar of Politics* (George Allan, London, 1941) p. 44. *See also* J. Maritan, 'The Concept of Sovereignty', in W. J. Stankiewicz, *In Defence of Sovereignty* (Oxford University Press, New York, 1969) pp. 42–43.

4 *See* H. Shinoda, *Re-examining Sovereignty: From Classical Theory to the Global Age* (Macmillan Press Ltd, London, 2000) p. 89.

5 According to Leon Duguit, sovereignty means a state's absolute authority, which allows the state to act without any restraints, except those accepted by itself voluntarily, in its foreign relations. However, as a matter of fact, with the development of international law state acts are still under restraints; this phenomenon is increasingly hard to explain because if a state's will was sovereign, it should not be restrained by any compulsory rules. Therefore, a choice between state sovereignty and international law must be made, either to give up sovereignty or to deny the binding force of international law. *See* Zhou Gensheng, *International Law* (Vol. I) (The Commercial Press, Beijing, 1981) pp. 178–179.

in abstruse legal doctrines".[6] Hugh Dalton once predicted: "The national myth must fade and national sovereignty, in its old rigid form, must gradually wither away."[7] Philip J. N. Baker asserted that "one and indivisible sovereignty was 'the aged fallacy'".[8] And L. P. Mair believed that the concept of sovereignty was "an illusion" of the 19th century.[9]

After World War II, the famous international lawyer Jenks also pointed out that the traits of sovereignty are "sanctified lawlessness, a juristic monstrosity and a moral enormity". In his opinion, sovereignty was a concept entirely devoid of any merit and was the root of all evil. Accordingly, he believed that

> [s]overeignty holds no promise of peace. It affords no prospect of defense. It provides no assurance of justice. It gives no guarantee of freedom. It offers no hope of prosperity. It furnishes no perception for welfare. It hardens the opposition to orderly and peaceful social change. It disrupts the discipline without which scientific and technological innovation becomes the Frankenstein of our society (but a remorseless Frankenstein perpetually making new monsters). It is a mockery, not a fulfillment, of the deepest aspirations of humanity. The most eloquent refutation of the concept of sovereignty in the sphere of international relations is its futility, as tested by the professed purposes of contemporary politics.[10]

Professor Lillich also held that the concept of sovereignty had come to be outdated. He claimed that the time for the concept of sovereignty in international law had come and gone.[11]

In addition, many scholars criticised the ambiguity and controversy caused by the concept of sovereignty in international law and advocated

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6 *See* Shinoda, *supra* note 4, p. 89.

7 *Ibid.*

8 *Ibid.*, p. 90.

9 *Ibid.*, p. 89.

10 C. W. Jenks, *A New World of Law?* (Longmans, London, 1969) p. 134. *See also* C. W. Jenks, *Law in the World Community* (D. McKay Co., New York, 1967) p. 34.

11 *See* R. B. Lillich, 'Sovereignty and Humanity: Can They Converge?', in A. Grahl Madsen and J. Toman (eds.), *The Spirit of Uppsala* (W. de Gruyter, West Berlin, 1984) pp. 406–407.

other concepts to replace sovereignty. For example, Akehurst once put forward that "it would be far better if the word 'sovereignty' were replaced by the word 'independence'".[12] British international law scholar McNair also pointed out that sovereignty was not the right word, because it belongs to a political category rather than a legal category; independence is a preferable term because it is more descriptive, more factual.[13]

It should be noted that since the end of the Cold War, due to the structural changes in the international community, the advent of the globalisation theory and increasing international intervention, it has become a trend for Euro-American theorists to weaken and even deny state sovereignty.

For example, Louis Henkin pointed out that "sovereignty is a bad word", and therefore should be abandoned, not only because domestically "it has served terrible national mythologies", but also because internationally "it is often a catchword, a substitute for thinking and precision".[14] Later on, in his article "The Mythology of Sovereignty", Henkin further elaborated his query about the concept of sovereignty. He said that

> sovereignty has also spun a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worth in it … a mythology that is often empty and sometimes destructive of human values … Even more often, sovereignty is invoked as the ground for resisting 'intrusive' measures to monitor compliance with international obligations, notably human rights commitments and arms control treaties … It is time to bring sovereignty down to earth, cut it down to size, discard its overblown rhetoric; to examine, analyse, reconceive the concept and break out its normative content.[15]

12 P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (Routledge, London, 1997) p. 17.

13 A. D. McNair, *Law of Treaties* (Oxford University Press, Oxford, 1961) p. 757.

14 L. Henkin, 'International Law: Politics, Values and Functions', *Recueil des Cours*, 1989-IV, pp. 24–25.

15 L. Henkin, 'The Mythology of Sovereignty', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers, Dordrecht,1994) pp. 351–352.

In addition, many scholars also claimed that the concept of sovereignty is gradually losing its traditional basis even if it has not completely vanished.[16]

The Club of Rome also clearly proposed, in the report "The First Global Revolution", that the sacred and inviolable sovereignty is being challenged, not only resulting from the development of regional economic alliances, but also resulting from many small countries losing control over their internal affairs caused by extraterritorial factors, such as the control of price and interest rates, or their adjustment of domestic policy in order to obtain International Monetary Fund loans. For many countries, the decline of state sovereignty is beneficial for them to integrate into the global system; consequently the role of the nation state is much less important in the new system.[17]

What is more, in recent years, some political leaders and politicians in Euro-American countries claimed that since state sovereignty has been unable to adapt to the new realities of international relations in the 21st century, the international community should change the traditional norms of international relations and abandon the "obsolete" concept of state sovereignty. In order to deny state sovereignty, they proposed new theories such as "sovereignty is obsolete", "human rights are above sovereignty" and so on as their theoretical basis for "the New Interventionism".[18]

But, it is obviously wrong to deny state sovereignty because as the basis of international law state sovereignty has permeated into each field

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16 *See* Shinoda, *supra* note 4, p. 1; K. Nordenstreng and H. I. Schiller (eds.), *Beyond National Sovereignty: International Communication in the 1990s* (Ablex Publishing Corporation, Norwood, 1993); D. J. Elkins, *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century* (University of Toronto Press, Toronto, 1995); G. M. Lyons and M. Mastanduno (eds.), *Beyond Westphalia? State Sovereignty and International Intervention* (Johns Hopkins University Press, Baltimore, 1995); D. A. Smith, D. J. Solinger and S. C. Topik (eds.), *States and Sovereignty in the Global Economy* (Routledge, London, 1999); G. Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002).

17 *See* A. King and B. Schneider, *The First Global Revolution: A Report by the Council of the Club of Rome* (Orient Longman, 1991) p. 29.

18 *See* Yang Zewei, *On Sovereignty: Sovereignty and Its Development Tendency in International Law* (Peking University Press, Beijing, 2006) p. 265.

of international law as well as various international legal documents. Without the concept of state sovereignty, the entire international legal system will collapse. In fact, the progress of international law has not developed to the extent that it completely denies state sovereignty's role or its very existence in international law and international relations.

It is particularly noteworthy that in recent years scepticisms about nihilist views on state sovereignty have arisen among some Euro-American scholars as well. In sum, their major viewpoints include: Firstly, they disagree that state sovereignty has been fundamentally weakened in the process of globalisation, and claim that it is a matter of fact that none of the non-state entities can effectively challenge the authority and legitimacy of sovereign states. Secondly, they hold that the current globalisation of law reflects the choice of sovereign states, in other words, international law reflects the interests of sovereign states. Thirdly, they insist that the weakening of sovereignty is not a new phenomenon of contemporary history, and that the principle of sovereignty has been always restrained by the interplay of state interests in modern international relations, and often suffered from it.[19]

In addition, Krasner expressly points out that "those who proclaim the death of sovereignty misread history"; "The sovereign state is just about dead. Very wrong. Sovereignty was never quite as vibrant as many contemporary observers suggest."[20] In sum, sovereignty has not died, and these nihilist views on sovereignty cannot be justified.

19 *See* H. G. Gelber, S*overeignty through Interdependence* (Kluwer Law International, London, 1997); J. C. Hsiung, *Anarchy and Order: The Interplay of Politics and Law in International Relations* (Lynne Rienner, Boulder, CO, 1997); J. A. Camilleri and J. Falk, *The End of Sovereignty: The Politics of a Shrinking and Fragmenting World* (Edward Elgar Publishing Limited, Hants, England, 1992).

20 S. D. Krasner, 'Sovereignty', *Foreign Policy* (January/February 2001) p. 20.

3. State Sovereignty Is the Core of Modern International Law

3.1. State Sovereignty as an Objective Existence

State sovereignty is still an objective existence in the international community today, which is mainly embodied in the following aspects:

1. Most of the scholars who hold a nihilist view on sovereignty only take the doctrine of absolute sovereignty as the object of criticism, and they neither deny the objectivity of sovereignty nor advocate abandoning the concept. For example, Jessup took a critical attitude towards state sovereignty, as he pointed out that sovereignty "in its meaning of an absolute, uncontrolled State will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built". However, he also acknowledged that "the world is today organized on the basis of the coexistence of States". Therefore, "sovereignty in the sense of exclusiveness of jurisdiction in certain domains, and subject to overriding precepts of constitutional force, will remain a usable and useful concept".[21]

In addition, Professor Hoffmann also pointed out that although the purpose to impose the only safety net to the dangerous international system that lacks common values, and the development of economy and welfare, requires to limit state sovereignty, thus leading to the weakening tendency of state sovereignty, state sovereignty is far from being replaced.

Japanese scholar Masamulakimihilo believed that state sovereignty still has an irreplaceable value in the process of economic internationalisation. He said that "internationalization has not weakened state's economic sovereignty, instead, it has rather strengthened state's responsibility to exercise its economic sovereignty properly on the basis of fully understanding the international impact of its domestic economic policies".[22]

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21 *See* P. Jessup, *A Modern Law of Nations*: *An Introduction* (Macmillan, New York, 1948) pp. 12–17.

22 *See* Xiao Jianing, *A Study on National Sovereignty* (Shishi Press, Beijing, 2003) p. 177.

Obviously, sovereignty "implies no menace to peace, no obstacle to the development and the dignity of State, no infringement of juridical logic, no conflict with international reality".[23]

2. The practice of modern international relations has proved that the world supports the principle of sovereignty. Firstly, sovereignty is the integral component of each state. States, regardless of size, strength or political and economic system, have without exception taken sovereignty as the backbone of the state and safeguarded their rights and interests with the principle of sovereignty in practice.

For example, the United States of America made a reservation in 1946 when accepting the "Compulsory Jurisdiction of International Court of Justice" to exclude "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States" from the jurisdiction of the International Court of Justice. Another example is that, at the 46th session of the UN General Assembly, Saudi Arabia expressed that the new international order is an international order that secures state borderlines recognised by the international community, tolerates no interference of a state's internal affairs, and as well recognises and respects its self-determination and resource sovereignty.

Secondly, although there are different understandings and ideas about sovereignty in the international community, in practice no country agrees to give up their sovereignty. For example, when talking about the new international order former US President George W. Bush pointed out that it does entail giving up America's state sovereignty or losing its national interests, instead it refers to new ways of joint efforts with other countries to prevent aggression and strive for stability, prosperity, and especially peace.[24] This shows that the United States pays special attention to its own sovereignty.

Russia also insists on the principle of state sovereignty. During the North Atlantic Treaty Organization's (NATO) military strike against Yugoslavia in 1999, Russia clearly opposed NATO's violation of

23 R. J. Alfaro, 'The Rights and Duties of States', *Recueil Des Cours*, 1959-II, p. 115.

24 *See* Huang Renwei and Liu Jie, *New Theories of National Sovereignty* (Shishi Press, Beijing, 2004) p. 40.

Yugoslavian sovereignty in the Security Council. Also on the issue of combating Chechen illegal armed forces, Russia took a firm stance and opposed intervention from other countries.

Lastly, the concept of sovereignty is also emerging in international judicial decisions, conventions and other international and domestic legal documents.[25]

In conclusion, no one can deny the objective existence of state sovereignty. The concept of state sovereignty is not a brain child of scholars, but an outcome of state practice throughout international history.

3.2. *The Principle of State Sovereignty as Recognised by International Legal Documents*

Since the beginning of modern international law, the principle of state sovereignty has been raised and won international approval and affirmation. The Peace of Westphalia in 1648, marking the formation of modern international law, has explicitly recognised the principle of state sovereignty.

After World War II, the Charter of the United Nations and other important international legal documents have all included the principle of state sovereignty. For example, Article 2(1) of the UN Charter stipulates that "the Organization is based on the principle of the sovereign equality of all its Members". Article 2(3) and (4) are also closely interrelated with the principle of the sovereign equality as well. As Article 2(3) provides, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". Article 2(4) stipulates that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". It can be said that the principles of "peaceful settlement of international disputes" and "no threat or use of force" proposed by the Charter are extended from "the principle of sovereign equality", meanwhile serving as the premises of safeguarding the principle of state sovereignty and sovereign equality.

Under the UN auspices, a number of other sovereignty-related conventions and declarations have also been adopted, such as the Universal

25 *See* Yang Zewei, *supra* note 18, pp. 267–268.

Declaration of Human Rights (1948); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); Declaration on Permanent Sovereignty over Natural Resources (1962); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965); International Convention on the Elimination of All Forms of Racial Discrimination (1966); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970); Declaration on the Establishment of a New International Economic Order (1974); Programme of Action on the Establishment of a New International Economic Order (1974); Charter of Economic Rights and Duties of States (1974); United Nations Convention on the Law of the Sea (1982); *etc.* These international documents have developed and enriched the principle of state sovereignty.

In addition, some regional international organisations and some regional conferences have also confirmed the principle of state sovereignty, such as Charter of the Organization of American States, Final Communiqué of the Asian-African Conference, and so on.

In other words, the UN Charter and other important international legal documents have established the important position of the principle of state sovereignty in the international legal system. Therefore it can be said that the principle of state sovereignty is the foundation and core of international legal principles.

3.3. The Principle of State Sovereignty in the International Legal System

The two interrelated dimensions of sovereignty – internal supremacy and external independence – have produced the coexistence of sovereign states in the international community. "The coexistence of independent sovereign states and the international community they formed are the most important social foundation for the formation and development of

international law."[26] Therefore, state sovereignty is the basis of the emergence and existence of international law.

The principle of state sovereignty not only runs through all fields of international law, but also functions in each normative level of international law, such as the basic international legal principles, its sources and subjects, state recognition, state territory, law of the sea, international environmental law, international disputes law, and so on.

Article 38 of the Statute of the International Court of Justice provides an authoritative interpretation of the sources of international law, which includes international conventions, international custom, general principles of law, judicial decisions, and the teachings of the most highly qualified publicists. However, the signing of international conventions, the formation of international custom as well as the application of general principles of law all require the consent or recognition of sovereign states. Hence, this consent or recognition itself is a manifestation of states exercising their sovereignty. [27]

States, as the basic subjects of international law, are considered to be the principal subjects that form the modern international community. Recognition in international law refers to the unilateral act undertaken by an existing state to a new state or government, including state recognition, recognition of a government and recognition of a rebel group, *etc.* Whether the existing state recognises the new state or the new government, and when and how to recognise it, are entirely determined on the basis of its own discretion, without the need of the consent of the other party. Therefore, a state's recognition is regarded as a manifestation of exercising sovereignty.

State territory refers to a certain portion of the globe that is under the exclusive jurisdiction of a state, and it has a closely interrelated relationship with sovereignty. State territorial sovereignty refers to a state's highest and exclusive power over its territory, which includes territorial ownership and territorial jurisdiction. Territorial sovereignty and territorial integrity – two important symbols of a state's political independ-

26 Liang Xi (ed.), *International Law* (Wuhan University Press, Wuhan, 2000) p. 8.

27 *See* Wang Zhiwen, 'On Sovereignty in International Law', 29 *Hwa Kang Law Review* (2003) p. 24.

ence – are well-recognised fundamental norms for international relations and the most important basic principles of international law.

The principle of sovereignty has also been well-embodied in the 1982 United Nations Convention on the Law of the Sea. For example, Article 2 stipulates: "1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."

International environmental law, although a new branch of international law, has established two basic principles, namely, the principle of permanent sovereignty over national resources and the obligation not to cause trans-boundary environmental damage. The first principle means that states have the sovereign right to exploit their own natural resources according to their policies on environment and development; the second entails that states bear the responsibility to ensure that activities within their jurisdiction or under their control cause no damage to the environment of other states or the areas beyond any state's jurisdiction.

As for laws on the settlement of international disputes, because of the customary principle "*par in parem non habet jurisdictionem*", there is no supranational authority to exercise legislative and judicial power or to enforce dispute settlement decisions. Therefore, the settlement of international disputes is special in the sense that, either by resorting to diplomatic methods or legal methods, relevant parties always have the freedom to make a choice based on their sovereignty.[28]

In addition, international laws and practices on diplomatic privileges and immunities, the principle of consent in the law of treaties, and a state's accession to or withdrawal from an international organisation are without exception based upon the principle of state sovereignty.

In sum, since the making, implementation and enforcement of international law depend on sovereign states, and all areas of international law are closely interrelated with the principle of state sovereignty, state sovereignty is still the foundation and core of modern international law.[29]

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28 UN Security Council resolutions on enforcement measures taken under Chapter VII are exceptions.

29 *See* G. Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood', in G. Kreijen (ed.), *State, Sovereignty, and*

4. State Sovereignty Is Not a Mythology

4.1. State Sovereignty Theories as a Reflection of International Relations

Karl Marx once said that historical materialism illustrated all the historical events and ideas, all the politics, philosophy and religion with the particular material and economic conditions in a particular historical period.[30] State sovereignty is a historical category, and theories on state sovereignty are products of certain social and economic conditions. Therefore, we cannot understand sovereignty without exploring the specific time and space from which it has grown.[31]

Centuries of historical evolution of sovereignty indicate that the meaning of "sovereignty" itself has been in a process of evolution, and the changes essentially reflect the development of international relations.

For example, the concept of state sovereignty at the beginning stressed a state's internal sovereignty (the highest territorial superiority) and not its external sovereignty (its independence), which conformed to the practical need of national unity and the establishment of the supreme bourgeois authority in Western Europe. It provided a theoretical basis to fight against separationists and the feudal aristocracy in order to establish a unified, centralised state. After World War I, nihilist views on sovereignty among some Euro-American scholars were also closely related to great changes in international relations of that time.[32]

Take another example, colonial states and dependent states, since their independence after World War II, were concerned to a great extent with their political sovereignty in the 1960s, and they were more concerned with their economic sovereignty in the 1970s. Since the 1980s, theories on state sovereignty in international society have been focused on the right to peace, development and environment as well as international protection of human rights, *etc.* Since the 1990s, accelerated economic

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International Governance (Oxford University Press, Oxford, 2002) p. 107.

30 *See Selected Works of Marx and Engels*, Vol. 3 (Remin Press, Beijing, 1995) p. 209.

31 *See* Camilleri and Falk, *supra* note 19, p. 12.

32 *See* Sir R. Jennings, 'Sovereignty and International Law', in Kreijen, *supra* note 29, p. 29.

globalisation, cultural sovereignty and information sovereignty have also drawn international attention.

In addition, after the end of the Cold War, the differences between the developed states and the developing states on the relationship between state sovereignty and a wide range of issues, such as international protection of human rights, international intervention, national self-determination, environmental protection, economic globalisation and the international order, not only reflect their own interests and needs but also show the difference of the comprehensive national strength.

It is obvious that theories on state sovereignty have been evolving in accordance with the changing reality of international relations over time. Thus, the principle of state sovereignty with its constant development and evolution has been internationally acknowledged as the basic norm for international relations.

4.2. State Sovereignty as a Tool to Achieve National Interests

In the article "Sovereignty and Interdependence: British's Place in the World", British scholar Jaffery Howe once pointed out that sovereignty is something like "a bundle of sticks, and the subject of a never-ending series of transactions between nation-states, handing over some things and taking back others".[33]

In fact, many countries in international practice also use sovereignty as a tool to implement national policy. Resorting to state sovereignty is a natural defensive response of states in the minority when confronting the hostile majority.[34] Developing countries still value the principle of state sovereignty highly as a cornerstone of international relations, and take it as the last legal defence to protect their national interests and traditional cultures.[35] For instance, at the 1999 General Assembly, President

33 *See* Shinoda, *supra* note 4, p. 211.

34 *See* M. Akehurst, *A Modern Introduction to International Law* (George Allen & Unwin Ltd., London, 1978) p. 23.

35 *See* L. Wildhaber, 'Sovereignty and International Law', in Macdonald and Johnston, *supra* note 15, pp. 425–452.

Abdelaziz Bouteflika of Algeria called sovereignty "our final defense against the rules of an unjust world".[36]

As another example, the former Soviet Union believed in "quasi-absolute sovereignty" and took it as "a reliable method to protect small countries". The Soviet Union international law scholar Korovin once put forward that "the sovereignty, conceived by Soviet Union jurists, is a weapon for the progressive democratic forces to struggle against the reactionary imperialist forces".[37] However, the Soviet Union's concept of sovereignty can be compared to a distorting mirror: an obvious aggression has been claimed by the Soviet Union to be a defensive altruistic action based on the principle of respecting other's sovereignty.

After the former Soviet Union's invasion of Czechoslovakia, Soviet President Brezhnev issued a statement immediately: "The socialist states support and respect the sovereignty of every state in the world. We oppose any interference of any other state's affairs and violation of its sovereignty."[38] But, according to Tunkin, the Soviet's concept of sovereignty includes "the obligation to render assistance for states to enjoy their rights, as well as jointly defend them against the infringement of imperialist states, and this is in conformity with the principle of socialist internationalism".[39] Of course, the Soviet's distortion of the concept of state sovereignty to pursue its own national interests should be condemned.

As seen above, "all states regard national interests as the axis of sovereignty, it is not the national interests that revolve around sovereignty, but sovereignty revolves around national interests. Whatever choice a country has made is primarily driven by the maximization of its national interests. It is the changing national interests that have produced the richness and variety of the concept of state sovereignty." [40]

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36 S. Tharoor and S. Daws, 'Humanitarian Intervention: Getting Past the Reefs', 18:2 *World Policy Journal* (2001) p. 25.

37 *See* Shinoda, *supra* note 4, p. 118.

38 Programmnye dokumenty bor'by za mir, p. 11.

39 G. I. Tunkin, *Theory of International Law* (George Allen & Unwin Ltd., London, 1974) p. 440.

40 Xiao Jialing, *A Study on National Sovereignty* (Shishi Press, Beijing, 2003) p. 497.

4.3. The Evolving View on State Sovereignty

There is a well-known George Washington statue in Virginia State Capitol, with fasces by his side – a bundle of rods with a projecting axe blade – the classic symbol representing sovereignty with each rod representing a trait of sovereignty. History has witnessed changes of the rods and its meaning. Some rods have been taken out and some have been added in. In consequence, the axe and the bundle of rods have been endowed a new meaning which is totally different from that in the past.[41]

This indicates that the concept of sovereignty is not fixed but evolves as time goes on.[42] The evolution of the concept of sovereignty has reflected the values of the international community and legal system in different times.[43]

As Akehurst said,

> [t]he theory of sovereignty began as an attempt to analyze the internal structure of a state. Political philosophers taught that there must be, within each state, some entity which possessed supreme legislative power and/or supreme political power. It was easy to argue, as a corollary to this theory, that the sovereignty, possessing supreme power, was not himself bound by the laws which he made. Then, by a shift of meaning, the word came to be used to describe, not only the relationship of a superior to his inferiors within a state (internal sovereignty), but also the relationship of the ruler or of the state itself towards other states (external sovereignty).[44]

Former United Nations Secretary-General Boutros Boutros-Ghali also pointed out that

> [w]hile respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so abso-

41 *See* G. Shultz, 'Challenges and Response of State Sovereignty', *Reference News*, 17 June 2004.

42 *See* A. van Staden and H. Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Kreijen , *supra* note 29, p. 182.

43 *See* Yang Zewei, *supra* note 18, p. 273.

44 Malanczuk, *supra* note 12, p. 17.

> lute as it was conceived to be in theory. A major intellectual requirement of our time is to rethink the question of sovereignty – not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function.[45]

Hence, some scholars believe that "along with the global market and global circuits of production has emerged a global order, a new logic and structure of rule – in short, a new form of sovereignty"; "the decline in sovereignty of nation states, however, does not mean that sovereignty as such has declined"; "throughout the contemporary transformation, political controls, state functions, and regulatory mechanisms have continued to rule the realm of economic and social production and exchange. Our basic hypothesis is that sovereignty has taken a new form, composed of a series of national and supranational organisms united under a single logic of rule. This new global form of sovereignty is what we call Empire."[46]

In sum, sovereignty is not a mythology, which with its enormous power motivates states and their people to take action in international affairs, but a real necessity. As some scholars have said, "it should also be noted, however, that problems of ambiguity and inaccuracies cannot be surmounted by avoiding or discarding concepts that still reflect an aspect of empirical reality within the confines of that discipline. To do so would be academically irresponsible and a sign of mental fatigue."[47]

Therefore, the evolutionary process of the sovereignty theory and the basic structure of the contemporary international community have proved that the main challenge before sovereign states and state sovereignty theory nowadays is how to adapt to the new changes in international relations. "It is not possible to wish away sovereignty from the realm of international law."[48]

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45 B. Boutros-Ghali, 'Empowering the United Nations', 72:5 *Foreign Affairs* (1992/1993) pp. 98–99.

46 M. Hardt and A. Negri, *Empire* (Harvard University Press, Cambridge, 2000) pp. 2–3.

47 J. D. van der Vyver, 'Sovereignty and Human Rights in Constitutional and International Law', 5 *Emory International Law Review* (1991) p. 322.

48 Anand, *supra* note 2, p. 89.

5. Conclusion

In conclusion, although the concept of sovereignty has suffered from all sorts of attacks, criticisms and distortions since its first formal introduction by Jean Bodin, and there are also nihilist views on state sovereignty in the international community today, state sovereignty is still the core of modern international law. The principle of state sovereignty is not only recognised by international legal documents, but also embodied in the international legal system. However, state sovereignty is not a mythology; instead, it is a tool to achieve national interests. Theories on state sovereignty are a reflection of international relations and the views on state sovereignty will continue to evolve over time.

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