

- 4. Vote by correspondence
- 5. Alteration of votes cast
- E. Conditional Voting
- Chapter Seven. *Financing*
- ...
- Chapter Eight. *Legal Order*
- ...
- II. Constitution
- ...
- C. Amendment of the Constitution
- ...
- III. Decisions of the Organizations
- A. Internal Rules
 - 1. Rules on the functioning of the organization
- ...
- B. External Rules
 - 1. Recommendations
 - ...
 - 2. Declarations
 - ...
 - 3. Conventions
- ...
- Chapter Ten. *Enforcement*
- ...
- II. Supervision of the Implementation of Rules
 - A. Supervision by Other Members Acting on their Own Account
 - B. Supervision by or on behalf of the Organization
- ...
- III. Official Recognition of Violations
- ...
- V. Sanctions
 - A. Sanctions by the Organizations
 - ...
 - 3. Suspension of representation
 - ...
 - 7. Expulsion from the organization
 - 8. Sanctions through other organizations
 - 9. Military enforcement
 - ...
 - B. Sanctions by the Other Members
 - C. Sanctions against Individuals
 - D. Enforcement within the National Legal Order
 - ...

NOTE

Schermers has set forth formal distinctions between two categories of international organizations that figure in the following chapters.²

Non-Governmental Organizations: By far the largest number of international organizations is established and governed by individual people. . . . In order to obtain legal personality such organizations must be established under the law of a State. . . . Legally, their position is not different from other organizations under that law. . . . Under international law all organizations established by individual citizens are classified as non-governmental, even if they perform important governmental tasks. [Schermers cites the International Committee of the Red Cross as an example of performing governmental tasks.] There is no generally recognized definition of non-governmental organizations. In a sense, international companies . . . are international organizations.

Governmental Organizations: An international organization is characterized as a governmental organization, or as a public international organization, when it is established by an interstate agreement. With very few exceptions. . . . the required interstate agreement is expressed in a treaty. This treaty is usually called the constitution of the organization. . . . We noted above that some non-governmental organizations perform governmental tasks. It is equally possible that a governmental organization is established for a commercial purposes, e.g. the launching and exploitation of a satellite. . . .

Most international organizations are no more than fora where States cooperate. . . . [But] factually many international organizations have some governmental power of their own. . . . Though [such organizations'] autonomous tasks are still limited in number, they have led to a general recognition that international organizations have their own legal personality under international law. Together with the States they form the subjects which create the international legal order.

COMMENT ON RELATIONS BETWEEN NORMS AND INSTITUTIONS

Imagine a human rights system consisting solely of the rules or principles growing out of declarations, treaties and customary law. That is, we 'assume away' the UN organs dealing with human rights issues, the organs under treaties like the ICCPR, and regional human rights organs. We do away entirely with the 'institutionalization' of norms in these different entities.

Simply imagining a human rights system shorn of its intergovernmental institutions and processes makes clear how profoundly different the human rights movement would be. Only state governments and state institutions would be available to meet the need for standard-setting; for the development, monitoring, implementation and enforcement of norms; and for dispute resolution. Of course one hopes that most states would take their obligations seriously, acting consist-

² 'The International Organizations', in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) at 67.

ently with their treaty obligations through their own equivalent constitutional norms or through specific internalization of treaty norms (see Chapter 12). One also knows, however, that no state will so act all the time, that many states will be persistent and serious violators, and that a number among them will engage in brutal and systematic abuses. From the international perspective, human rights norms would be freely floating rather than anchored in any international regime, dependent for their effectiveness on the willingness of one or many treaty parties to apply pressures to delinquent states. Whatever the inadequacies of existing international human rights institutions, in such imagined circumstances a state party to the basic treaties that commits serious violations would have much less to fear.

The problem is compounded in the light of a distinctive feature of the enforcement of international human rights norms. States parties to a human rights treaty lack the usual material incentives (as exist in, say, a trade or establishment treaty) to act against violator state Y. The violation consists in Y's abuse of *its own* citizens. Why should state X invest its energies in trying to persuade state Y to stop such conduct? It would generally be foolish to assume that sustained inquiry into Y's abuses, let alone serious pressures and sanctions against Y, would originate in X or other states parties, which at most might suspend economic or military aid to the delinquent state (see Chapter 13). The inquiries, debates, threats and pressures of international organizations may persuade Y to more serious thought.

It should then be no surprise that the traditional defences by states of sovereignty and domestic jurisdiction are asserted today more strongly against the powers or actions of international institutions that involve implementation, enforcement, or dispute resolution—that may indeed involve physical intervention—than against standard-setting as such. Through its collective acts and decisions—ranging from the holding of a debate, investigative missions and resolutions, or the imposition of sanctions to physical intervention—the institution can inflict serious costs on the delinquent state. It becomes the bridge between states (the very creators of international norms) and the norms themselves. It can make those norms 'real'.

All the intergovernmental institutions and organs examined in Part C reflect this tension or contradiction. States create institutions that, to one or another degree, are meant to influence their behaviour or discipline them. Much depends on the institution's architecture—its constitution and processes, its modes of decision-making such as majority vote or consensus, its powers. In states' decisions about architecture lie some of the most acerbic fights and deepest divisions in the human rights movement.

The following readings raise basic questions about international institutions that recur in specific institutional contexts in the later specialized chapters.

INIS CLAUDE, SWORDS INTO PLOWSHARES

(4th edn., 1984), at 6

... To understand that international agencies are products not of the aspirations of idealists standing outside of and above international politics, but of the necessities felt by statesmen operating within the arena of international politics, is to sense the fact that international organization is a functional response to the complexities of the modern state system, an organic development rooted in the realities of the system rather than an optional experiment fastened upon it. For one who grasps this fact, the issue of whether we should have international organization is no more meaningful than the issue of whether urbanization should result in the provision of more extensive public services and the imposition of more elaborate governmental regulations. One recognizes international organization as a distinctive modern aspect of world politics, a relatively recent growth, but an established trend. Particular organizations may come and go, but international organization as a generic phenomenon is here to stay. The collapse of the League of Nations led almost automatically to consideration of the nature of its replacement, and similar failure by the United Nations might be expected to produce the same reaction. A sense of history provides the basis for the understanding that international organization has become a necessary part of the system for dealing with international problems, and that 'to organize or not to organize' is no longer an open question for statesmen or a useful one for students of international relations.

... The problems confronted by international organizations may be divided into two categories: constitutional problems—the problems *of* international organizations, and substantive problems—the problems *with which* the organizations are designed to grapple. The first group consists of internal matters, related to the management and functioning of the organizations, while the second includes external issues requiring solution. Constitutional problems are occasioned *by* the establishment of international organizations; substantive problems are the occasions *for* the establishment of such agencies.

However definite the dividing line between these two classes of problems may be in logic, it is not so in practice. The nature and intensity of world problems determine the nature and scope of organizational efforts, and thereby define the constitutional problems which emerge. Decisions concerning the internal development of international agencies are inevitably influenced by external political considerations, and, conversely, the solution of substantive political problems is affected by the degree of constitutional development achieved by international organizations. The two problem areas cannot be divorced.

One of the major tasks of twentieth-century statesmanship is to strike a balance between obsessive concern with institutional problems—which makes international organization an end in itself, and exclusive concentration upon substantive issues of current world politics—which neglects the building of an adequate institutional apparatus for international relations. ...

... It is useful for statesmen to be reminded that they cannot expect

international organizations to serve them well, now or in the future, if their urge to exploit these institutions for immediate political advantage overrides all consideration of the requirements of sound constitutional development. International organizations cannot become effective means to the ends that states envisage unless they are treated, to some degree, as ends in themselves.

...

NOTE

The excerpts from Ernst Haas stress the issue of control by one or a few states of the processes and powers of an international organization. That issue permeates Chapter 8's materials on the UN General Assembly and Commission on Human Rights.

ERNST HAAS, WHEN KNOWLEDGE IS POWER

(1990), at 57

All international organizations have a heterogeneous membership. Their members differ in size, military power, population, resource endowment, and degree of industrialization. The members also differ greatly from one another in the extent to which they are permeable—that is, subject to being 'penetrated' economically, culturally, and politically by their stronger neighbors.

Most organizations have their own 'superpower' capable of playing a hegemonic role if it chose to do so. All organizations (except those of Eastern and Western Europe) count democratic, totalitarian, and authoritarian governments among their members. Even organizations that consist almost entirely of economically less developed countries display significant differences in the degree of development among their members. All universal organizations include members with capitalist, socialist, and mixed economies.

All organizations are characterized by major inequalities in power, however defined, among their members. Consequently, they are subject to rule by hegemonic states or hegemonic coalitions of states. The hegemony need not be expressed in the direct imposition of the preferences of the stronger on the weaker. It usually takes the form of higher financial contributions and disproportionate roles for the nationals of the stronger members in organizational secretariats. At the extreme, this kind of hegemony is illustrated by the role of the United States in U.N. agencies. On the one hand, a decision to reduce American financial contributions from 25 percent of the budget to 20 percent threatened to ruin organizational programs. On the other hand, the United States had been signally unsuccessful in translating its superpower status into consistent influence over the content of programs, having lost many programmatic battles for almost two decades except in organizations in which greater power is recognized in the form of weighted voting.

In addition to disproportionate influence due to financial prowess or voting

privilege, the principle of sovereign equality is also contradicted in practice by the tendency of the more powerful states to constitute themselves into an inner elite that is consulted far more consistently by the formal heads of secretariats, commissions, and councils than are representatives of less important states. Membership in this elite differs with topic and issue. It almost always includes the delegates of the superpowers and of Japan, Britain, France, West Germany, India, and, increasingly, Brazil in organizations to which these states belong. But it may also include the delegates of smaller states if the country in question happens to be salient to the issue at stake. Sweden, Singapore, and Tanzania have played inner-elite roles on some occasions in the United Nations.

...

International organizations share a certain marginality with respect to the core activities in international politics. Few foreign policy initiatives depend on international organizations for their success. States risk little by investing symbolically in the programs of such organizations; the core of one's foreign policy remains intact even if little concrete help is provided by the organizations. In most instances, any result from a symbolic investment in organizational action will not be experienced until much later. Foreign policy relies on nonorganizational means to a far greater extent than on institutionalized multi-lateral efforts. There are, of course, exceptions for large and small states. Immediate benefits can accrue from a successful peacekeeping operation for the losing side in a war; ambitious economic development and technical assistance projects are sources of prestige and employment for one's nationals; a country beset with refugees benefits immediately from multilateral aid; even the superpowers may benefit from a successful mediation to prevent crisis escalation. The great lines of foreign policy, however, are only marginally and gradually influenced by what goes on in international organizations.

NOTE

The following article by David Kennedy talks of the 'move' toward institutions as key to the understanding of modern international law. These excerpts stress the complex, dual, even contradictory positions of states with respect to institutions. States parties make the treaty that creates the institution in which they become members. They lead lives 'within and without the institution'. They form part of its internal processes, participating in decisions about its external action. At the same time they remain sovereign, autonomous states that can become the objects of such action. Through his discussion of different voting arrangements, Kennedy illustrates some of these dilemmas.

HENRY STEINER, INDIVIDUAL CLAIMS IN A WORLD OF MASSIVE VIOLATIONS: WHAT ROLE FOR THE HUMAN RIGHTS COMMITTEE?

in Philip Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* 15 (2000), at 19

[This article examines the significance of individual complaints before the Human Rights Committee under the Optional Protocol to the ICCPR, examined in Chapter 9. The following excerpts address international human rights institutions generally.]

[The structure of the Human Rights Committee], like that of many of the new human rights institutions, was problematic from the start. The burst of energies, the idealism and imagination that generated treaties and created their implementing organs necessarily pushed the architecture of international institutions in novel directions. The architects could have found no adequate and convincing models to realize the novel goals of the young human rights regimes. The institutions had no *necessary* character, no *traditional* form or functions. Their structure could not be derived from some self-evident or reigning theory of international law or institutions—in the way, for example, that the institutions of a state newly become democratic might naturally reflect tried and valued notions such as the separation of powers.

The architecture was rather invented to fit the moment, to express the compromises between divergent viewpoints and draw into the treaties as many states as possible. Hence the different treaty institutions, as well as the UN organs provided for in the UN Charter, had a contingent character that distinguished them from most norms of the treaties. As times changed and new situations developed, there was little reason to reconsider the rules against torture, discrimination, or censorship, but much reason to reconsider the adequacy of institutions.

The structure and powers of these institutions were serious matters, for the treaty organs could readily be understood to threaten states more than the norms themselves. Ratification of a treaty that declared human rights norms could be advantageous to a state unlikely to honour its commitments. That state now formally participated on the side of the angels in a developing international discourse, and in a relatively costless way. A profound cynicism, a contempt directed not only to the content of the norms but also to their inefficacy, informed many such ratifications. Anchoring norms in institutions, however, raises the cost of joining. Institutions make rights more effective by threatening or taking actions that may lead a state to comply. Institutions with real power cut to the bone of sovereignty. No wonder that intense fights over the provisions creating the new institutions became the rule.

...

... International law has long stated many norms that grow out of state conduct and correspond closely with most states' interests and behaviour (diplomatic immunities, exclusive territorial control, rules of navigation). But human rights instruments, together with related international law developments such as peace-

keeping norms and the contemporary humanitarian law of armed conflict, shatter that correspondence. For most states, these treaties represent more aspiration than achievement. Their ideals are not embedded in but, to the contrary, tower above state behaviour. Their stance is deeply critical, their aim transformative.

International [human rights organs] are inevitably sensitive to this gap, and to the tensions that it generates. Relative to, say, [government institutions] in states within the liberal and democratic traditions, they often enjoy only precarious political support. Their room for bold decision-making is correspondingly limited, at least for decision-making that criticizes and regulates state conduct. Moreover, to a far greater degree than in national contexts, international human rights organs confront formidable differences in culture and tradition that have given rise to arguments between the proponents of universalism and of cultural relativism. . . .

B. SOVEREIGNTY AND DOMESTIC JURISDICTION

At its very threshold and to this day, the human rights movement has inevitably confronted antagonistic claims based on conceptions of sovereignty. How could its premises coexist with the then-reigning conceptions of state sovereignty? Or have the nature of the state, and the content of that protean concept as well as of allied concepts like domestic jurisdiction and autonomy, themselves undergone substantial change over the half century of this movement?

For reasons suggested in Part A of this Chapter, international organizations with powers of elaboration, implementation, application and enforcement pose issues of state sovereignty in the most acute form. They can indeed 'cut to the bone', whether their ultimate power be to order military intervention or to impose conditions on needed loans that restructure parts of a local economy. Hence Part B offers an appropriate context in which to consider the issues more broadly.

Nonetheless, the basic ideas in Part B will be familiar from earlier chapters examining the normative content (and disputes thereover) of the human rights movement. Indeed, those chapters could not have avoided them. In one or another of its meanings or incarnations, the notion of sovereignty inserts itself into many of the diverse topics in this coursebook. The introduction in Chapter 2 to international law inevitably considered the clash between international regulation and state governments' internal control of their polity—cases like *Chattin* or *Minority Schools in Albania*, for example. States' arguments based on sovereignty provided counterpoint in Chapter 3 to the description of the growth of the human rights movement. States' claims based on notions of cultural relativism in Chapters 5 and 6 often spoke the language of autonomy and sovereign independence. The broad theme of sovereignty in its modern dress(es) continues to inform discussion in the following chapters: topics including actions of the UN Security Council under Chapter VII of the Charter (Chapter 8); supranational regional organizations as in Europe that appropriate former economic, political and human rights prerogatives

of the state (Chapter 10); claims of internal ethnic autonomy and self-determination (Chapter 15); and changing notions of internal sovereignty and independence or interdependence in an era of globalization, free trade and deregulated markets (Chapter 16).

Consider at the outset brief comments of several scholars about the meaning of this notion in contemporary international law and argument.

Malanczuk³ notes that the origin of the modern theory lies in internal analyses of state structure, analyses that reach to writings of theorists like Machiavelli, Bodin and Hobbes. Originally used to describe the commands of a sovereign within a state (internal sovereignty), sovereignty later came to be used to describe as well the relationship of the ruler towards other rulers or states (external sovereignty, a continuing deep concern of international law). He suggests that the word 'sovereignty' should be replaced by 'independence'. 'In so far as 'sovereignty' means anything in addition to 'independence', it is not a legal term with any fixed meaning but a wholly emotive term. Everyone knows that states are powerful, but the emphasis on sovereignty exaggerates their power and encourages them to abuse it . . . '.

Brownlie⁴ states that:

sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.

He describes the principal corollaries of states' sovereignty and equality as

- (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 obligor.

Koskenniemi⁵ observes that it is 'notoriously difficult to pin down the meaning of sovereignty', but that nonetheless the literature characteristically starts with a definition. Usually the concept is connected with ideas of independence (external sovereignty) and self-determination (internal sovereignty). He quotes a classic definition in an arbitral decision to the effect that sovereignty 'in the relations between States signifies independence: independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of a State'. Sovereignty thus implies freedom of action by a state.

If, argues Koskenniemi, this or any agreed-on definition of sovereignty had a clear, ascertainable meaning, then 'whether an act falls within the State's legitimate

³ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn., 1997), 17-18.

⁴ Ian Brownlie, *Principles of Public International Law* (4th edn. 1990), Ch. XIII, 287.

⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), Ch. 4.

sphere of action could always be solved by simply applying [that definition] to the case'. But '[t]here simply is no fixed meaning, no natural extent to sovereignty at all'. Thus in disputes between two states, each may base its argument on its own sovereignty. Assuming that 'sovereignty had a fixed content would entail accepting that there is an antecedent material rule which determines the boundaries of State liberty regardless of the subjective will or interest of any particular State'. Such material boundaries not stemming from the free choice of the state 'will appear as unjustified coercion'. It is indeed 'impossible to define "sovereignty" in such a manner as to contain our present perception of the State's full subjective freedom and that of its objective submission to restraints to such freedom'.

STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY

(1999), at 9

[Krasner identifies four different ways in which the term sovereignty is commonly used: domestic, interdependence, international legal, and Westphalian sovereignty.]

Domestic sovereignty

The intellectual history of the term sovereignty is most closely associated with domestic sovereignty.

. . . Domestic sovereignty, the organization and effectiveness of political authority, is the single most important question for political analysis, but the organization of authority within a state and the level of control enjoyed by the state are not necessarily related to international legal or Westphalian sovereignty.

Interdependence sovereignty

In contemporary discourse it has become commonplace for observers to note that state sovereignty is being eroded by globalization. Such analysts are concerned fundamentally with questions of control, not authority. The inability to regulate the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries has been described as a loss of sovereignty.

. . . Interdependence sovereignty, or the lack thereof, is not practically or logically related to international legal or Westphalian sovereignty. A state can be recognized as a juridical equal by other states and still be unable to control movements across its own borders. Unregulated transborder movements do not imply that a state is subject to external structures of authority, which would be a violation of Westphalian sovereignty. Rulers can lose control of transborder flows and still be recognized and be able to exclude external actors.

These reflections . . . do not require an unreserved commitment to statehood . . . [It] remains a second best—defensible but only to the extent that there can be no general agreement about the authentic purpose of social life. . . .⁷

Is the human rights movement one which has a 'commitment to substantive values involving an inherent 'totalitarianism'? Has the movement moved toward 'general agreement about the authentic purposes of social life', thereby legitimating its erosion of state sovereignty?

NOTE

The following readings highlight key elements in ongoing political debate about state sovereignty within the United Nations in connection with UN peacekeeping and other activities, and in connection with the NATO military intervention in Yugoslavia (examined at pp. 653–62, *infra*).

VIEWS OF GOVERNMENT LEADERS

Each year the UN General Assembly holds a 'general debate', in the course of which world leaders reflect on the major issues of current concern. During the 1999 debate questions of sovereignty, intervention and interference in domestic affairs were extremely prominent. The following excerpts, descriptions (rather than direct quotations) of the comments at the debate, are taken from UN press releases.⁸

• Kofi Annan, United Nations Secretary-General:

State sovereignty was being redefined by the forces of globalization and internal cooperation . . . The State was now widely understood to be the servant of the people and not vice versa. At the same time, individual sovereignty had been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny. Those parallel developments did not lend themselves to simple conclusions. They did, however, 'demand of us a willingness to think anew' about how the United Nations responded to the political, human rights and humanitarian crises affecting so much of the world . . .

Abdelaziz Bouteflika, President of Algeria:

He did not deny the right of the public opinion of the northern hemisphere to denounce the breaches of human rights where they existed, and the United

⁷ 'The Future of Statehood', 32 Harvard Int'l L. J. 397, 404 (1991).

⁸ Taken from UN Press Releases GA/9595 (20 September 1999), GA/9606 (24 September 1999), and GA/9608 (25 September 1999).

Nations had the right and the duty to help suffering humanity. However, the countries of the OAU remained extremely sensitive to any undermining of their sovereignty—not only because it was their final defence against the rules of an unequal world, but also because they were not taking part either in the decision-making process by the Security Council, or in the monitoring of their implementation.

He said that the debate on the concept of interference in internal matters seemed far from finished, as several questions required exact answers. Among those were the questions of where aid stopped and interference began; what lines were to be drawn between the humanitarian, the political and the economic; and if interference was valid only for weak or weakened States. In any case, interference in internal affairs could only take place with the consent of the State in question.

S. Jayakumar, Foreign Minister of Singapore:

[T]he United Nations must work within the framework of the state system. . . . It could do nothing its Members did not expressly allow. Its basis was the principle of sovereign equality of all its Members. It also stressed the concomitant principle of non-interference in internal affairs.

However, those premises were now under assault, he continued. Two forces—the pressures of a truly integrated world economy and the end of the Cold War—were impelling change. Neither force was adequately understood. Globalization affected the very notion of statehood and government as they had so far been perceived. The essential function of any government was to govern and provide public goods and services to its citizens within its borders. But in a globalized economy, national borders no longer encompassed sufficient territory to function as self-contained economic units. Financial geography and economic geography no longer coincided with political geography. The challenge facing sovereign states was no longer one of interaction with other states. The real challenge was now within each state, forcing a reconceptualization of the very idea of government and statehood, and requiring a change of mindset that would be difficult and painful to achieve. What was required was an unprecedented and qualitatively new kind of international cooperation calling for redefinition of what constituted 'states' and 'national interests'. For that kind of international cooperation to take root, it must be shown to be superior to any other political alternative.

It was here . . . that the interplay of globalization and the post-Cold War international order complicated matters. The Cold War had imposed identities that transcended nationalism. Its end provided an opportunity to seek reassurance and a new identity in real or imagined ethnic nationalisms. The resulting proliferation of states and the lack of a clear organizing principle had made international cooperation problematic. Unfortunately, the reaction to this mismatch between economic and political geography had been a new protectionism and xenophobic nationalisms—or, where a country felt strong and confident enough, a new kind of extraterritoriality in which strong states tried to project their national laws and standards beyond their boundaries. There had, of course, been regional responses

to this need for a new kind of cooperation. But relying on regionalism as more than a stopgap in a globalized world created latent instability.

Surin Pitsuwan, Minister for Foreign Affairs for Thailand:

[T]raditional concepts of security were woefully inadequate to meet the new challenges faced by humankind. 'More and more, we in the international community are being faced with the conflicts within States', he said 'not between or among States as in the past'. Rather than State rights, State interests, State sovereignty, the international community now had to grapple with the defence of the 'common good', the protection of 'rights beyond borders' and intervention to promote and safeguard humanitarian ideals and objectives. To that end he proposed a transfer of the traditional preoccupation with the security and sovereignty of the State to serious consideration on the emerging concept of 'human security'.

QUESTION

The UN Secretary-General calls for a willingness to think anew, while the Singaporean Foreign Minister proposes a redefinition of the terms 'state' and 'national interests'. What type of alternative approaches might enable the international system to respond more effectively to the challenges identified by various commentators? Is this in fact a debate which can only move forward incrementally on the basis of successive *ad hoc* innovations?

JUDITH MILLER, CHECKERED FLAGS: SOVEREIGNTY ISN'T SO SACRED ANYMORE

New York Times, April 18, 1999, p. 4WK

At the century's last session of the Commission on Human Rights, Secretary General Kofi Annan of the United Nations unveiled a doctrine with profound implications for international relations in the new millennium. The air strikes against Yugoslavia, he said on April 7, showed that the world would no longer permit nations intent on committing genocide to 'hide' behind the United Nations charter, which has traditionally safeguarded national sovereignty.

The protection of human rights, he said, must 'take precedence over concerns of state sovereignty'. 'As long as I am Secretary General', said Mr. Annan, the United Nations 'will always place human beings at the center of everything we do'. This was not the Secretary General acting alone. He was, he acknowledged, only embracing an 'evolving' international norm. He also acknowledged that using force to protect human rights poses 'fundamental challenges' to the United Nations.

In fact, an erosion of sovereignty when it conflicts with human rights standards

is reflected in many events of the last decade. . . . [References to such events included the International Criminal Tribunals for Yugoslavia and Rwanda and the U.K. litigation concerning the extradition of Pinochet].

To a certain extent, analysts agree, Mr. Annan's own stance is a reaction to his own searing experience as the head of peacekeeping in Rwanda, when more than half a million people were slaughtered as the Security Council withdrew United Nations forces.

Some argue that Mr. Annan has merely blessed a 'given' of the political climate today: the growing importance of human rights to the United Nations and many of its 185 members. This was most evident in the Security Council's overwhelming rejection two weeks ago of a resolution condemning NATO's air strikes as illegal on grounds that the Security Council had not authorized them. Only Namibia joined Russia and China, the co-sponsors of the motion, in arguing that Serbia's treatment of its Albanian minority was essentially an internal matter.

Mr. Annan's doctrine, predictably, has won praise from the burgeoning human rights community. But others argue that though well-intentioned, it is naive, dangerous and likely to increase tensions and paralysis within the Security Council.

And at least one close adviser to Mr. Annan worries that intervening to save white Europeans (albeit Muslims) in Kosovo, after having ignored even worse massacres in Rwanda and elsewhere, leaves the United Nations open to charges of selective morality and double standards. Others argue that in a world with some 40 million refugees and displaced people, Mr. Annan's stance risks stretching United Nations resources to unbearable limits.

... In speeches and articles last year, Mr. Annan . . . signaled his growing anxiety about the violations of rights occurring in Kosovo. Nation-states are not going to disappear, he wrote in the journal 'Humanitarian Intervention'. Respect for the 'fundamental sovereignty, territorial integrity, and political independence of states' will remain a 'cornerstone of the international system'. Nevertheless, he said last summer in Rome, the principle of sovereignty cannot provide 'excuses for the inexcusable'. The United Nations charter, he reminded people in England last June, 'was issued in the name of "the peoples", not the governments, of the United Nations'.

... And for Europe, the question of appearing indifferent to repression and brutality was especially evocative. Even Germany, which since World War II has resisted the use of force to solve political problems, did not want to end the century by appearing cold toward an echo of the atrocities it caused 60 years ago. Paraphrasing Foreign Minister Joschka Fischer of Germany, the diplomat said the decision for Germany was between 'no more wars' and 'no more Auschwitzes'. It, like the rest of NATO, chose to go to war this time.

NOTE

Consider the following comparison between Kosovo and Chechnya:⁹

... So the question arises: What is the world to make of the new doctrine it thought was emerging—a doctrine that seemed, after Bosnia and Kosovo and East Timor, to be empowering the bulk of the world to intervene in countries that abused their own citizens. Large parts of the world, it seemed, were embracing the idea that universal standards of human rights were putting at least some limits on sovereignty.

But now comes the harshest test of that doctrine: Russia, a humbled super-power desperate to hold together its very territory, not to mention its national pride, in the face of international condemnation of its methods. 'Human rights are no reason to interfere in the internal affairs of a state', Russia's Foreign Minister, Igor Ivanov, protested last week, offering the same argument that Russia and President Slobodan Milosevic of Yugoslavia made during last spring's NATO air war against the Serbian attempt at 'ethnic cleansing' in Kosovo. The difference, of course, is that some countries are more sovereign than others. Sheer power still counts.

... With Russia (and China) having a veto in the Security Council, consensus on outside intervention to protect civilians in Chechnya is as unlikely as it would be in Tibet, but that does not mean Western nations are hypocritical in refraining from an intervention that could prove suicidal, so long as they urge Russia to stop and think again.

...

COMMENT ON DOMESTIC JURISDICTION

In the human rights context, especially within the United Nations, the many perspectives on sovereignty have been brought into debate primarily in the context of two issues: (1) the interplay between Article 2(7), on the one hand, and Articles 55–56 of the Charter and provisions of human rights treaties, on the other; and (2) proposed action by the Security Council in response to a threat to international peace and security or in cases of humanitarian intervention, such as in Kosovo in 1999. Article 2(7) reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . , but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Although this provision does not sit easily with the undertakings in Articles 55–56 to cooperate with the UN in promoting respect for human rights, nor with the explicit duties of states set forth in the human rights treaties, the tensions were left

⁹ Craig Whitney, 'Hands Off, The No Man's Land in the Fight for Human Rights', *New York Times*, December 12, 1999, p. WK1.

to be dealt with over time through the developing practice of UN organs. Apart from mandating the creation of a Commission on Human Rights, the Charter did not spell out the measures that it envisaged might be taken to give effect to one of the UN's principal purposes, listed in Article 1(3), of promoting and encouraging respect for human rights. The General Assembly was empowered to 'discuss any questions or any matters within the scope of the . . . Charter' (Article 10) and to 'initiate studies and make recommendations for the purpose of . . . [inter alia] assisting in the realization of human rights' (Article 13). Neither the type of studies nor the ways in which they might be prepared were spelled out. Nor was it clear what, if any, limits applied to the type of recommendations that might be made. So the task remained of working out the relationship between the traditional themes of state sovereignty in paragraphs (1) and (7) of Article 2 with the internationalist spirit of Article 1 and the later human rights provisions.

Some critics have stressed that the Charter did not give the Assembly or other UN organs the power to make authoritative interpretations of these or any other provisions. In Watson's view, 'as a result, the power of autointerpretation still remains with individual states'.¹⁰ Each state, when addressed by a UN organ (other than the Security Council acting under explicit powers), would then decide for itself whether or not the matter raised was part of its *domaine réservé* (domestic jurisdiction) and thus off limits to the UN under Article 2(7). The overwhelming majority of commentators have rejected this analysis, and have instead argued that (1) the General Assembly must have the power to interpret its own mandate, including the implications of Article 2(7); (2) a teleological approach should be applied in interpreting Article 2(7) in the light of the (developing) purposes of the Organization (Article 1); (3) the resolutions of the UN and other bodies have made clear that a narrow interpretation is to be given to Article 2(7); and (4) as legitimate matters of international concern, human rights cannot reasonably be characterized as being exclusively an internal matter.

Over the course of more than half a century, UN organs have systematically reduced the scope claimed for the domestic jurisdiction 'defence'. The early case of South Africa was critical. Although Article 2(7) was invoked in many diplomatic exchanges and public statements by a variety of states in the late 1940s and early 1950s, apartheid led to a major breakthrough. A special Commission on the Racial Situation in the Union of South Africa appointed by the General Assembly in 1952 concluded that Article 2(7) prohibited only 'dictatorial interference', a phrase interpreted as implying 'a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involves a threat of or recourse to compulsion . . .'. Article 2(7) referred 'only to direct intervention in the domestic economy, social structure, or cultural arrangements of the State concerned but does not in any way preclude recommendations, or even inquiries conducted outside the territory of such State'.¹¹ The Commission's report gave rise to extensive debate, in which South Africa took the position that the General Assembly could not even discuss the subject of race relations in that country. Only

¹⁰ James Shand Watson, *Theory and Reality in the International Protection of Human Rights* (1999), at 205.

¹¹ UN Doc. A/2505 (1953), 16–22.

rarely today does one hear even distant echoes of that extreme position. (Later developments with respect to South Africa are described at p. 649, *infra*.)

Although regularly invoked, the domestic jurisdiction defence proved equally unsuccessful in relation to debate and recommendations about other cases such as those of Vietnam in the early 1960s, Israel since the late 1960s, Chile in the 1970s and countries such as Iran and Afghanistan in the 1980s.¹² It has been difficult to assemble a wide range of governments to advance a strong defensive interpretation (that is, a broad interpretation) of Article 2(7) that is consistent, because states arguing for such an interpretation in their own defence have nonetheless occasionally or frequently insisted that measures be taken against other violator states.

The only significant exception in this regard has been the People's Republic of China, which has abstained in the UN from condemning human rights violations in other states of which it clearly did not approve. But even China supported resolutions condemning human rights violations in Afghanistan, southern Africa and the Israeli Occupied Territories, and has expressed its concern about human rights violations in countries such as Indonesia in the late 1990s. Recall China's contemporary views about human rights, domestic jurisdiction and intervention that appear in the excerpts from the 1991 White Paper on Human Rights in China, at p. 547, *supra*.

The end of the Cold War brought a dramatic change of policy by many states and within the UN with respect to domestic jurisdiction. For example, Poland had insisted in 1983, when its own declaration of martial law was under scrutiny, that UN organs could even consider human rights questions in a particular state only 'if the following criteria were met: firstly, that a particular situation represented a gross, massive and flagrant violation of human rights and fundamental freedoms; secondly, that the situation represented a consistent pattern of such violations; thirdly, that the situation endangered international peace and security; and lastly, that consideration of the situation was without prejudice to the functions and powers of organs already in existence'.¹³ But by October 1991 Poland endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (the CSCE, or Helsinki process, described at p. 791, *infra*):

The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.¹⁴

Today the issue of domestic jurisdiction is rarely raised in other than a perfunc-

¹² Menno Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992).

¹³ UN Doc. E/CN.4/1983/SR.40/Add.1.

¹⁴ 30 Int. Leg. Mat. 1670, 1672 (1991).

tory manner in UN fora. Even when raised by a state like China whose human rights record is under criticism, a substantive debate about a resolution or other aspects of the criticism usually takes place and the outcome (a resolution, say, passed or defeated) reflects a variety of legal and political considerations among which Article 2(7) as such is not a substantial factor.

ADDITIONAL READING

Classic works on sovereignty include: Bertrand de Jouvenel, *Sovereignty: An Inquiry into the Political Good* (1957); F.H. Hinsley, *Sovereignty* (2nd edn., 1986); A. Milward, *The European Rescue of the Nation-State* (1992); and L. Gross, 'The Peace of Westphalia 1648-1948', 42 Am. J. Int. L. 20 (1948). More recent collections focusing on globalization, etc., and its implications are: T.J. Biersteker and C. Weber (eds.), *State Sovereignty as a Social Construct* (1996); G. Lyons and M. Mastanduno (eds.), *Beyond Westphalia: State Sovereignty and International Intervention* (1995); R. Jackson and A. James (eds.), *States in a Changing World* (1993); Gunther Teubner (ed.), *Global Law without a State* (1997). See also: Oscar Schachter, 'The Decline of the Nation State and its Implications for International Law', 36 Colum. J. Trans. L. 7 (1997); J. Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux', 3 Austrian Rev. Int. & Eur. L. 345 (1998); Hendrik Spruyt, *The Sovereign State and its Competitors* (1994); Jens Bartelson, *A Genealogy of Sovereignty* (1995). Sovereignty is also dealt with in much of the recent literature on civil society, NGOs, and humanitarian intervention. On domestic jurisdiction, see H. Lauterpacht, *International Law and Human Rights* (1950); R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963); L. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', 32 Am. U. L. Rev. 1 (1982).