

IS NEWS OF “SOVEREIGNTY’S DEATH” EXAGGERATED?

*By Itzhak Kornfeld**

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“[T]he proposition that a certain disorientation in American foreign policy derived from our having abandoned, for practical purposes, the concept that international relations can and should be governed by a regime of public international law.”¹

I. INTRODUCTION

Whether sovereignty is alive or dead may not be the appropriate question. Without a doubt, it is universally agreed that the long-standing “Westphalian”² notion of sovereignty *vis a vis* a State’s “right” to monopolize specific incidences of power, regarding its territory and citizens has in many ways been at least somewhat discredited.³ Nevertheless, as John Jackson has observed “[a]lthough much criticized, the concept of ‘sovereignty’ is still central to most thinking about international relations

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1. DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 1 (1991).

2. The concept of sovereignty changed in its definition, paradigm, and application throughout history, especially during the Age of Enlightenment. The current notion of state sovereignty is often traced back to the Peace of Westphalia (1648), which, in relation to states, codified the basic principles:

- 1) territorial integrity;
- 2) border inviolability; and
- 3) supremacy of the state (rather than the Church).

See generally, Malcolm N. Shaw, *INTERNATIONAL LAW* 276 (3rd ed. 1991); Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 *FORDHAM INT’L L.J.* 120, n. 1, n. 25 (1992). A sovereign or government is the supreme lawmaking authority within its jurisdiction. *See generally* PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 17–18 (7th ed. 1987); F. H. HINSLEY, *SOVEREIGNTY* (2nd ed. 1986).

3. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *AM. J. INT’L L.* 782, 782 (2003).

and particularly international law.”⁴ Indeed, “realists” still prize and harbor strong beliefs about sovereignty—and at times seek to prevent foreign or international powers from meddling “in a national government’s decisions and activities.”⁵

Surveying sovereignty across the four-corners of the globe, one is struck by the particular preoccupation with the concept in the United States (U.S.)—particularly calls that the American government is giving away its sovereignty and American exceptionalism. But what is truly striking is that in the post World War II period U.S. behavior has been to the contrary. Indeed, America has taken liberties with other States’ sovereignty. Grenada, Nicaragua, and Panama⁶ come to mind. Additionally, during the course of the Iraq war international lawyers⁷ and anti-war campaigners asserted that America’s invasion was illegal. More astonishing, however, is the fact that Richard Perle, one of the architects of that war, and one of the major proponents of American exceptionalism and preemptive war, has backtracked and called the 2003 attack on Iraq illegal.⁸

Furthermore, questions have been raised concerning the legality of the United State’s and NATO’s 2011 attacks on Libya in aid of bringing down

4. *Id.*

5. *Id.* On the realist proposition, see generally John Bolton, *The Coming War on Sovereignty*, COMMENTARY (Mar. 2009), <http://www.commentarymagazine.com/article/the-coming-war-on-sovereignty> (last visited Mar. 18, 2012). (While the term “sovereignty” has acquired many, often inconsistent, definitions, Americans have historically understood it to mean our collective right to govern ourselves within our Constitutional framework.)

6. See generally John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT’L L. 276 (1990); Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293 (1991).

7. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 173 (2004).

8. See, e.g., Oliver Burkeman & Julian Borger, *War Critics Astonished as U.S. Hawk Admits Invasion was Illegal*, GUARDIAN (U.K.) (Nov. 20, 2003, 03:29 EST), <http://www.guardian.co.uk/uk/2003/nov/20/usa.iraq1> (last visited Mar. 18, 2012).

[T]he influential Pentagon hawk Richard Perle conceded that the invasion of Iraq had been illegal. In a startling break with the official White House and Downing Street lines, Mr. Perle told an audience in London: ‘I think in this case international law stood in the way of doing the right thing.’

Id.; see also John McTernan, *Nick Clegg and the “Illegal Invasion of Iraq:” the Coalition Shows Arrogant Disregard for Parliament*, TELEGRAPH (U.K.) (July 22, 2010), <http://blogs.telegraph.co.uk/news/johnmcternan1/100048225/nick-clegg-and-the-illegal-invasion-of-iraq-the-coalition-shows-arrogant-disregard-for-parliament/> (last visited Mar. 18, 2012) (The United Kingdom’s Deputy Prime Minister, “Nick Clegg described the Iraq War as ‘an illegal invasion.’”).

Libyan strongman Muḥamar Gaddafi,⁹ while the brutality of Syria's Assad have only seen hand ringing.¹⁰ These exercises in the use of force, once again, raise the issue of the sanctity of sovereignty.

II. DECLINE, RISE, OR STATUS QUO

Over a decade ago Oscar Schachter observed that “the decline of the nation-State, goes to the heart of international law—its character as a system of discrete autonomous entities based on their defined territories, each exercising plenary authority over persons and things in that territory.”¹¹ Schachter's point bears repeating: sovereignty and international law are entwined. A more recent view which adopts Schachter's theory is that both sovereignty and international law are in their “death throes, and with [them] an outdated order will become extinct,

9. See e.g., [Congressman] Dennis Kucinich, *The U.S. Must End its Illegal war in Libya Now*, GUARDIAN (U.K.) (July 6, 2011, 09:00 ETD), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jul/06/libya-nato1?INTCMP=SRCH> (last visited Mar. 18, 2012). Congressman Dennis Kucinich states that:

This week, I am sponsoring legislation in the United States Congress that will end U.S. military involvement in Libya for the following reasons: First, the war is illegal under the United States Constitution and our War Powers Act, because only the U.S. Congress has the authority to declare war and the president has been unable to show that the US faced an imminent threat from Libya.

Id.; Patrick Wintour & Ewen MacAskill, *Gaddafi May Become Target of Air Strikes, Liam Fox Admits*, GUARDIAN (U.K.) (Mar. 20, 2011, 17:07 ETD), <http://www.guardian.co.uk/world/2011/mar/20/coalition-criticism-arab-league-libya?INTCMP=SRCH> (last visited Mar. 18, 2012).

America, France and Britain—the leaders of the coalition's air attacks on Libya—were struggling to maintain international support for their actions, as they faced stinging criticism about mission creep from the leader of the Arab League, as well as from China and Russia. Critics claimed that the coalition of the willing may have been acting disproportionately and had come perilously close to making Gaddafi's departure an explicit goal of U.N. policy.

Id.; see also, Scott Bobb, *Several African Leaders Criticize Air Attacks in Libya*, VOICE OF AMERICA (Mar. 22, 2011), <http://www.voanews.com/english/news/Several-African-Leaders-Criticize-Air-Attacks-in-Libya-118435599.html> (last visited Mar. 18, 2012) (“South African President Jacob Zuma has warned that the Western-led bombings of Libyan military installations must not target civilians. Zuma was one of several African leaders who criticized the bombings, which were conducted as part of the effort to establish a no-fly zone in Libyan air space.”).

10. On the legitimate use of force, see generally Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CH. L. REV. 113 (1986); MOYNIHAN, *supra* note 1, at 25; Phillip R. Trimble, *Daniel Patrick Moynihan's On the Law of Nations*, 85 NW. U. L. REV. 1041 (1991) (book review).

11. Oscar Schachter, *Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7 (1997).

giving way to a new paradigm—globalization. This much is certain.”¹² But, in today’s world this model appears much less certain than it was in Shachter’s day.

Nevertheless, what is clear is that the notion that nation-States are akin to separate islands, each standing guard over its internal affairs, has for the most part evaporated in the age of human rights and international trade. Indeed, although a somewhat imperfect analogy, modern sovereignty is akin to corporal punishment of children. Just as parents can no longer “do what they want” with or to their children, as public welfare officials keep a watchful eye on their actions and may remove a child from an abusive home, today, as a consequence of the United Nation’s Declaration on Human Rights¹³ and its progeny,¹⁴ governments are checked to some extent from *always* abusing their citizens. Regulation and the interactions of an increasingly extended, and in some ways closer human community, has provided new legal relationships, as well as questions of what is just and humane.

We—the members of the developed world—are trending, as I see it, towards an ethos of being our brother’s and sister’s keepers, *e.g.*, protecting the Dar and the Fur peoples from rape, hunger and other privation,¹⁵ and

12. Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT’L L. 1543, 1544 (2009).

13. United Nations Universal Declaration of Human Rights (Dec. 10, 1948) UN.ORG, <http://www.un.org/en/documents/udhr/> (last visited Mar. 18, 2012). *See, e.g.* Preamble providing:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. . . .

Id. at pmbl.

14. *See e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter the European Convention on Human Rights); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65 rev. 1 corr. 1 (entered into force July 18, 1978), 9 I.L.M. 673 (1970); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988).

15. *Darfur Liberation Front*, GLOBALSEcurity.ORG (July 11, 2011), <http://www.globalsecurity.org/military/world/para/darfur.htm> (last visited Mar. 18, 2012).

Human rights groups describe the situation in Darfur as a genocide. The United Nations says up to 300,000 people have died over six years of fighting between rebel groups and government forces. . . . The International Criminal Court has

assisting those afflicted by earthquakes¹⁶ and droughts.¹⁷ Although these efforts impinge on sovereignty, they are calculated towards helping people within their sovereign States, or in camps in other sovereign States. Protecting artificial borders has in some cases become anathema to civilized States.¹⁸

As one surveys the face of the globe, globalization is insecurely anchored. Nations, like South Sudan continue to form and flourish. Indeed, the Arab Spring demonstrates that leaders are being toppled, not the State entity. Tunisians, Egyptians, Libyans and now possibly Syrians are

issued an arrest warrant for Sudanese President Omar al-Bashir, whom it accuses of masterminding a campaign of rape, murder, and other crimes against Darfur civilians.

Id.

16. See, e.g., *Haiti*, N.Y. TIMES, Jan. 19, 2012, available at <http://topics.nytimes.com/top/news/international/countriesandterritories/haiti/index.html?scp=1&sq=The%20quake%20that%20struck%20on%20%22Jan.%2012,%202010%22,%20reduced%20much%20of%20the%20capital,%20Port-au-Prince,%20to%20rubble&st=cse> (last visited Mar. 18, 2012) (“The quake that struck on Jan. 12, 2010, reduced much of the capital, Port-au-Prince, to rubble. . . . An estimated 634,000 people live in displacement camps, according to the International Organization for Migration. International donors promised Haiti \$5.3 billion at a March 2010 donor’s conference.”).

17. Mike Pflanz, *East Africa Drought: Africa Must Do More to Help Itself*, TELEGRAPH (U.K.) (July 4, 2011, 10:11 PM), available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/8616965/East-Africa-drought-Africa-must-do-more-to-help-itself.html> (last visited Mar. 18, 2012)

The drought now blighting the vast, arid basin of land that stretches from northern Kenya through central Somalia and into eastern Ethiopia is among the worst anyone has seen . . . in some areas of northern Kenya, 37% of the population need emergency feeding. Across the Horn of Africa, levels of 20%, 25%, and 30% are being recorded regularly—double the 15% emergency threshold.

Id.

18. See, e.g., S.C. Res.1973, ¶ 1, U.N. Doc. S/RES/1973 (Mar. 17, 2011), which provides in pertinent part,

[. . .] Expressing grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties. . . . Further condemning acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and urging these authorities to comply with their obligations under international humanitarian law as outlined in resolution 1738 (2006). . . .

Id.; see also S.C. Res. 1244, ¶ 3, U.N. Doc. S/RES/1244 (June 10, 1999), which declares, that the U.N. Security Council:

Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized. . . .

Id.

definite about maintaining their countries' sovereignty and borders, and their previous international obligations.¹⁹ However, how does one reconcile the two competing views—the one that maintains that sovereignty remains muscular,²⁰ or the one that claims that it is in its “throes of death.”

One view of sovereignty expressed by Christopher Borgen, with which I agree, is that it may be likened to a deck of cards.²¹ A nation-State gives and takes cards as it needs them. If one accepts this analogy, it should be clear that sovereignty has not changed much over the millennia that States have existed. For example, in order to forge alliances, or to avoid wars, the rulers of nation-States from the dark ages through the Victorian era would marry members of the ruling class from other nation-States.²² Thus, cards were given by one State or taken by the other, as the case may be, to avert war and forge alliances in order to gain greater strength and to protect each State's sovereignty. In today's world, as opposed to the one during that earlier age, the alliances that States form are multilateral rather than bilateral, *e.g.*, the World Trade Organization, the European Community, or the North Atlantic Treaty Organization. Similarly, the exponential growth of Bilateral Investment Treaties (BITs)—there are currently some 3000 BITs²³—demonstrates that States continue to agree to “give up” sovereignty in order to gain benefits. This swapping is an incidence of sovereignty, and not an abrogation of it.

Consequently, under Borgen's theory, sovereignty is neither in the throes of death or omnipotent. Indeed, the complexity of today's globalized world means that States must give and/or take the “cards” of sovereignty more often. Where one State seeks to trade with others it must give up

19. *Egypt Islamists to Honour Peace Deal with Israel: Carter*, CONSULATE GEN. OF THE ARAB REPUBLIC OF EGYPT IN N.Y. (Jan. 13, 2012), <http://nyegyptionconsulate.com/en/?p=1830> (last visited Mar. 18, 2012) (“Former US president Jimmy Carter said on Friday that Islamist parties, who have taken political centre stage in Egypt's first post-revolution legislative polls, have vowed to honour the peace treaty with Israel.”).

20. On the muscular sovereignty, *see generally* Ruth Wedgwood, *Unilateral action in a Multilateral World*, in *MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT* 167 (Stewart Patrick & Shepard Forman eds., 2001).

21. Personal communication on October 20, 2011.

22. *See, e.g.*, the marriage of King Henry VI of England to Margaret of Anjou on April 23, 1455, when she just fifteen years old. Margaret's uncle, Charles VII, of France, agreed to the marriage of his niece to his rival Henry VI. Indeed, when the English nobility made the match between Margaret and Henry VI they perceived that the union between the two would yield a lasting solution to the Hundred Years war. *See generally*, Betty King, *Margaret of Anjou* (2000), available at http://books.google.com/books?id=6ZgHAAAACAAJ&dq=margaret+of+anjou&hl=en&ei=O3ZsT6GSJsfv0gHws8i-Bg&sa=X&oi=book_result&ct=book-thumbnail&resnum=4&ved=0CEkQ6wEwAw (last visited April 25, 2012).

23. Personal communication on October 20, 2011.

sovereignty, because it may need to allow in goods that its trading partner's workers produce, which will lead to loss of jobs in the importing State. Indeed, what would people in Australia or Canada do without their Chinese manufactured iPads or iPhones if there were no trade agreements, foreign exchange agreements, or international maritime treaties? We would probably have a mess on our hands. Nevertheless, the States that import these items do not give up their territorial integrity.

Moreover, in entering into those treaties, and others, States undertake a cost-benefit analysis of whether the agreement benefits their short or long-term interest, however the case may be. "[T]reaties, as opposed to customary law, are increasingly important as the embodiment of international legal norms."²⁴ For example, the European Community is one such example. In order to join the EU, States must give up certain incidences of sovereignty. These include being hailed into the European Court of Human Rights for their governments' human rights abuses.

Similarly, the States that rim the Mediterranean Sea, signed the 1976 Barcelona Convention for Protection against Pollution in the Mediterranean Sea, because in their estimation, entering into that convention had a higher benefit than the cost to their sovereignty.²⁵ Likewise, the analysis was the same for treaties such as the Law of the Sea, environmental treaties, including the Espoo Convention,²⁶ the Aarhus Convention,²⁷ and the Montreal Protocol on the Depletion of Ozone.²⁸ Unsurprisingly, States, like people, weigh both the upside and downside potential when they are confronted by a choice to enter into an agreement with another or multiple States, or to decline to do so. Governments then horse trade and/or compromise—or they do not.

24. Trimble, *supra* note 10, at 1044.

25. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 15 I.L.M. 285.

26. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309, available at <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf> (last visited Mar. 18, 2012).

27. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, available at <http://treaties.un.org/doc/publication/UNTS/Volume%202161/v2161.pdf> (last visited Mar. 18, 2012) (advocating the accessibility of public information with respect to projects potentially affecting the environment).

28. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1989 U.N.T.S. 28 (a protocol to the Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, 1988 U.N.T.S. 323).

III. CONCLUSION

How does one square the incongruence in the views of sovereignty with Article 2 of the United Nations Charter, which provides: “The Organization is *based on the principle of the sovereign equality of all its Members.*”²⁹ A careful reading of the foregoing provision clearly demonstrates that the operative term is “*sovereign equality*” of all member States. That is, sovereigns are on equal footing, suggesting that the notion of sovereignty is not the “holy grail” of international law. Accordingly, it is certainly alive and far from dead. Paraphrasing Mark Twain, “News of Sovereignty’s Death are Greatly Exaggerated.”

29. U.N. Charter art. 2.