

NATIONAL SOVEREIGNTY: WHY IT IS WORTH DEFENDING

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THE TERM "SOVEREIGNTY" strikes many people as abstract and legalistic—and therefore nothing to care about. For others, it is outdated, a relic of earlier times, now thankfully past. I believe these views are quite mistaken. Sovereignty is the legal expression of national independence. Sovereignty is to a nation what liberty is to an individual. It is no guarantee of happiness, and legal scholars might argue about its precise definition or applications. But few people say that liberty is meaningless or unimportant, because there remain important disputes about what it means or what it requires.

Sovereignty is no different. Do most people really think national independence is unimportant? Around the world, people celebrate the military victories or political declarations that assure their national independence. People who are not yet sovereign or independent risk their lives in struggles to achieve that status. We should be very careful before we dismiss sovereignty as a concept of no great interest or importance.

For five related reasons, recognition of sovereignty seems to me an essential element of a decent world.

Sovereignty is the Prerequisite of Peace

Sovereignty became a theme in legal and philosophic writings only in the seventeenth century—that is, at the outset of the modern era, after nearly a century of devastating religious conflict in Europe. It was especially attractive as a formula for achieving peace. Catholic countries could follow one policy at home. Protestant countries—in their several versions—could follow another. And sovereignty was the boundary: each independent state determines its domestic policy for itself and none has the right to impose its domestic views on another.

Previous speculations about international harmony, at least among Europeans, had stressed the unity of Christendom or of the medieval Germanic empire, which claimed to be the heir to the Roman Empire. An understanding of international law built on sovereignty—and therefore dealing only with external relations between independent states—made it possible to think of an international order that included, by the nineteenth century, both the Islamic Empire of the Ottoman Turks and then Japan and other non-Christian states in Asia.

Sovereignty is a way of agreeing to disagree. Of course, war has continued. But the worst conflicts of the twentieth century have been launched by aggressive powers which had no regard for sovereignty. No law, by itself, can deal with out-

laws—that will always require force. The point of constructing international law on the basis of respect for sovereignty is to limit occasions for war, to limit misunderstandings and avoidable tensions that may lead to war.

All of this is simply common sense, but many people now think the world has passed beyond such common sense. The British government thought itself entitled to seize the former dictator of Chile, Augusto Pinochet, in the summer of 1998 for abuses committed by Pinochet's internationally recognized government in Chile, on Chilean soil, against Chilean citizens. The British courts ultimately determined that it would be legally proper to extradite Pinochet to Spain, where he was wanted by a magistrate seeking to hold him accountable for these past abuses. It was held to be irrelevant that the democratic government of Chile, itself, did not want Pinochet to be tried, and certainly not by a foreign court. British courts held that any country may impose criminal liability on officials of another country for severe human rights abuses, and this liability may extend to former heads of state or even—on the House of Lords' reading of international law—to current heads of state.

Everyone understood that Chile could not declare war on Britain or Spain for this affront to its sovereignty. Does everyone understand which countries *would* use warlike measures to resist such affronts to their sovereignty? In the United States, the FBI has already warned former American officials about traveling to certain countries in Europe lest they be there held for trial in the manner of Pinochet. Would the United States use force to rescue Henry Kissinger from a country that seized him for such a trial? Maybe not—but maybe it would. Arab advocacy groups have already urged that certain Israeli officials be held for trial in third countries. Would Israel use force to liberate a captured Israeli official? Maybe not—but maybe it would. Other states might unleash terrorist campaigns in reprisal for the holding of one of their own government leaders. It is all too easy to imagine how such maneuvers could lead to real war.

There is certainly a compelling moral argument for outside intervention when a government is committing mass murder. The sad fact is that no government did intervene to stop mass murder in Cambodia during the 1970s or in Rwanda in the 1990s. What should be done about such cases deserves serious debate. But these cases are, and should be, very rare. For anything less than mass murder, outside intervention by force carries very serious costs, not least because

outside powers will have mixed motives and may not be very careful what they do in third countries when they claim to be acting on higher motives.

We will not secure a more peaceful world if outside powers think they have the right to intervene in any country which is badly or unfairly governed. We certainly will generate risks of misunderstanding when we don't agree about the rules or standards for such interventions—and there seems no prospect that we will agree on such rules or standards. In the meantime, respect for territorial sovereignty is a relatively easy rule that can avoid much unnecessary conflict.

Sovereignty is a Prerequisite for Definite Law

Sovereignty means a final authority on internal matters. A government might be sovereign and lawless, as is true in many dictatorships. But it is not possible to have definite law without sovereignty, that is, a set of norms that define who has the last word.

Most countries today have some form of constitution which determines the procedures that must be followed to make a binding law within that country. Many countries have constitutional courts which can enforce limitations on the law-making power. There are often ambiguities and reasonable disputes about what the law is on particular issues. But the point of such systems is to build clarity and definiteness into the law over time.

Historically, international law dealt with a limited range of issues concerning the direct interactions of sovereign states and had little impact on domestic law. Now, international conventions seek to reach into the internal affairs of sovereign states. This introduces a degree of ambiguity into domestic law which is not simply a difference in degree but a difference in kind. Where domestic constitutions strive to clarify legal authority, international conventions deliberately cultivate ambiguity in order to gain agreement where countries do not actually agree. Human rights conventions are a prime example.

For fifty years, the UN has spun out a web of human rights treaties purporting to set international standards for the ways countries treat their own citizens. There is no court to enforce these standards, and, consequently, no definitive interpretation of these standards. What we have instead are committees composed of delegates of signatory states who make investigations and issue recommendations. Are these binding law? Not really, which is only appropriate, since the committees do not follow any sort of formal, judicial procedure. Are they therefore on the same level as private publications by private advocacy groups? Not really, because they are voted upon by delegates of governments, giving them a certain kind of authority. The same is true for resolutions of the UN General Assembly—like those following successive “population” conferences and the Beijing +5 declaration on women's rights. These are not even treaties, let alone binding

domestic law. Yet they claim to be something more than private opinion.

Such documents have been described as “soft law”—something that is in between public law and private opinion. Yet advocates claim that this soft law can achieve the status of binding law in the passage of time, becoming customary law that is binding on all nations and which national courts must uphold and enforce. Governments might be bound, could be bound, perhaps already are bound, as an amorphous group of international law experts sort through an amorphous body of supposed precedents from other countries. This is a system designed to evade the normal constitutional process of law-making in any normal country. And it is bound, by its very nature, to generate ongoing confusion about what is law and what is merely opinion.

This very new way of making law is an attractive political tactic for those advocacy groups who exert the most influence at international conferences. It makes it possible to insinuate norms into the domestic law of countries even when they do not have enough support to be enacted by national legislatures. But it is more than a tactic. It reflects the fundamental premise of “global governance,” which is that we can have an elaborate body of global “law” without a powerful global authority to enforce it. The traditional idea was that every sovereign state is free to make its own law because only a sovereign state has the actual authority to enforce law. The new idea is that law can simply permeate a country's borders from the global atmosphere. What backs up the law, then? Not UN troops. Not organized international boycotts. Simply words. Perhaps they are intimidating or persuasive to some governments in some circumstances. But where and how much they will be observed in any particular place must remain very uncertain. A “law” which means something quite different from one place to the next is not much of a law. But that is the kind of “law” we create when we talk of an “international law of human rights.”

Sovereignty is a Prerequisite for Reliable Rights

Rights have most value when they are recognized by law—by real law which can be successfully invoked in courts. Soft law secures only soft rights. International conventions, purporting to guarantee basic rights, have been signed by some of the most repressive regimes in the world—and then readily disregarded. But in the meantime, soft law can undermine respect for real rights and real law.

In the first place, international law becomes an excuse for governments to get around the limits in their own constitutions. In Australia, for example, the constitution divides power between the federal government and the states. The federal government has responsibility for implementing international treaties, while the states retain responsibility for ordinary governmental concerns, such as defining and enforcing criminal law. In 1995, the UN's human rights com-

mittee declared that the law against homosexual practices in Tasmania (one of Australia's states) was in violation of the Covenant on Civil and Political Rights (though that 1966 treaty says nothing at all about sexual morals or sexual freedom). The Australian federal government seized the occasion to impose federal legislation, overruling the law of Tasmania, although everyone agreed that the federal government would not have had jurisdiction over this subject if not for the UN's interpretation of an international treaty. In similar ways, the Australian federal government has extended its authority over labor regulation—otherwise reserved to state governments under the Australian constitution—by invoking recommendations of the International Labor Organization, another UN body.

Many people may regard such practices as expanding rights rather than contracting them. But what they do, in fact, is to twist and distort domestic constitutions. Down the road, this can undermine guarantees for individual rights in domestic constitutions. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for example, holds that governments must assure the "elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education" (Art. 10(c)). This seems to imply that government must control the texts used in all schools, even private schools, if they do not follow feminist notions about family life. Many countries have constitutional guarantees of free speech which might seem to limit the reach of government in such efforts. But will international standards trump domestic constitutions in this area? We don't know, but it is reasonable to worry about tendencies in this direction.

In the United States, the Supreme Court has said that the Bill of Rights in the U.S. Constitution must take precedence over any treaty obligations (*Reid v. Covert* 1957). But on the face of it, the treaty establishing the new International Criminal Court seems to violate the Bill of Rights, since (among other things) it does not provide for trial by jury as guaranteed in the 7th Amendment. Many American legal scholars insist this is no problem, however, because the Bill of Rights applies only to trials conducted by the U.S. government itself and the International Criminal Court will, after all, be international.

So the U.S. government is not restricted from handing over an American for trial before the ICC—because the ICC is a separate authority? If this sort of argument is acceptable, then it may be easy to evade many other guarantees by delegating them to international authorities—to do what the domestic government, itself, cannot do under its constitution.

At a deeper level, the very idea of individual rights supposes that individuals stand on their own. The whole notion of private property, for example, is that the owner really does have the right to decide what should be done with his own

property. The idea of sovereignty was, in classical treatises, linked with property and individual rights, indeed modeled on these conceptions. A sovereign state was said to "own" its territory in the sense that it belonged to that state in exclusion of other states. The idea behind international governance and international human rights protection is, on the contrary, that we are all linked, all part of one family, all responsible for and to each other.

This notion not only undermines claims to sovereignty, starting with the primal claim that it is our own country, so we can decide for ourselves, but beyond that, is bound to undermine parallel notions regarding individual rights. International human rights doctrine has an inherently socialistic as well as internationalist tendency. Not by chance, when the UN drew up an international covenant on economic, social, and cultural rights, it contained long lists of welfare measures that governments were obliged to provide to their peoples. It did not guarantee private property.

There are certainly situations in which property rights need to be limited for the good of society. Are they the same in every country? Who ought to decide? There is something very strange about saying this ought to be determined by international authority.

Sovereignty is the Prerequisite for Meaningful Responsibility

At the heart of sovereignty is the notion that power and responsibility must be linked. Definite law implies a definite lawmaker. When the law is bad or proves to have unforeseen consequences, it is important to know whom to blame—or whom to address when seeking reform. Again, the idea of international governance points in exactly the opposite direction. Standards are set by distant authorities who may know little about the countries where they will be applied. And they don't really need to know because they are not responsible for the consequences.

The International Criminal Court empowers an independent prosecutor to overturn national amnesty laws. Perhaps Russia would be better off if former communists were punished. Perhaps South Africa would be better off if former officials of the white supremacist government were punished. Perhaps Chile, Argentina, and other Latin countries would be better off if officials of previous dictatorships were punished. But these countries all decided it was more important to achieve a quick transition to democracy and strive for reconciliation between former enemies, even if that meant letting many guilty people go free. This was a decision that people in these countries had to make. Is it really better to have such decisions made by a distant bureaucrat? If prosecutions stir new upheavals, and plunge a country into civil war, then who will restore order? Not the international bureaucrats. They have no authority to quell civil unrest, nor do they have troops with which to do

so. They are set up to intervene from the outside but not to take any real responsibility on the inside.

It is easy to say that this is undemocratic—which of course it is. But that is missing the deeper point. Every modern country makes various compromises with democracy for the sake of order and stability. But whatever the version of government, the question is how it serves the people of that country. The idea of international human rights points in the opposite direction—that it is not all that important whether particular policies are agreeable to the country that must live with them. Yes, people within countries often disagree about particular policies. A sovereign state must sort out these disagreements among its own people to achieve the most satisfactory policy that it can, given the circumstances. Will this task really be better accomplished by letting outsiders make the decisions?

Sovereignty is the Last Safeguard for the Highest Authority

No serious person would say that everything which a sovereign state does is right. Sovereign states have sometimes done terrible wrongs to their own people. But because any one state may be wrong, it does not follow that some consensus or coordinated policy of all states must be right.

Historically, claims for national sovereignty were advanced by countries in Europe, rebelling against some higher, purportedly universal authority—whether the Pope in Rome or the Emperor in Germany, claiming to speak with divine authority. Those who rejected these universal authorities did not reject God’s authority. They rejected the notion that God spoke only through these particular, anointed authorities.

Religious freedom began to gain support in the same century that saw the rise of national sovereignty claims against these universal empires. By the end of the seventeenth century, the same advocates who championed religious freedom were also strong advocates of national sovereignty (not least because countries which had some measure of religious freedom were anxious to protect it from external enemies of religious freedom). In the modern world, few people regard religious freedom as a rejection of God’s law or of some higher authority than human will. Most of us understand that religious freedom helps to assure that more people can seek God’s will—even if they seek it in different ways.

Many people criticize national sovereignty as implying that there is no appeal beyond the sovereign state. But there is always some appeal, because there are always other states offering competing examples and places of refuge for those fleeing the most onerous policies of particular states. The idea of national sovereignty is inseparable from the idea of a multitude of sovereignties, hence there is some possibility for choice, which implies the possibility of mistakes or wrong

choices which others may avoid. Where there is least chance for appeal is from a world that is governed by one and only one set of world standards.

The Hebrew Bible illustrates the point with the tower of Babel. When all men spoke the same language, they were, in effect, one nation and put themselves under one tyrant—Nimrod, “a mighty hunter.” And they chose to build a tower to reach the heavens, “to make us a name” and to challenge God’s authority. So God confused their languages—dividing them into separate nations to derail such dangerous ambitions (Genesis 11: 1–9).

The Bible tells us, as all history does, that men continue to sin, whether divided into separate nations or not. But surely the harm that can be done by sinful rulers is less when their territorial reach is less. If pride is sinful, if overweening ambition is temptation to greater sinfulness, there can hardly be a more dangerous ambition than trying to lay down rules for the whole world. It is fine to preach ideals to the world, but each country must decide how it will accept them. That is the fundamental point of national sovereignty.