

SOVEREIGN STATES: A COLLECTIVITY OR A COMMUNITY?

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Apparently sovereignty lies at the very root of the international system. Yet its exact importance remains uncertain. In fact, the very idea of sovereignty leaves many of commentators uneasy. No doubt, the time of apologetic support of the ideal of state sovereignty, as it was for instance defended by several Soviet scholars, is over. As a purely intellectual matter, sovereignty now gives rise to fundamentally more critical comments. That said, its normative existence in contemporary international affairs is basically unquestioned. Whatever be the reservations surrounding its concrete exercise, sovereignty is still advocated as one of the keystones of international relations, especially by the new states that came into existence as a result of decolonization or of the dismantling of the Soviet Union.

Soon after the World Wars, and especially after the First, the sovereignty of states was fiercely criticized. Sovereignty was held to be responsible for all the woes of humanity. Sovereignty was considered to be incompatible with the very idea of a legal order. International Law itself was consequently called into question. For instance, Sterling E. Edmunds wrote: "there is to be found in the whole realm of legal learning no more anomalous collection of fallacies, no more deceptive body of affirmations masquerading under the name of service, than that pseudo-branch of jurisprudence which, for nearly three centuries, successive historians have presented . . . under the title, The Law of Nations or International Law."¹ The responsibility for the failure of international law was clearly identified: ". . . the evil political genius of sovereignty which has misused and degraded (the free man) from the beginning of history," preventing him from "reaching those heights of knowledge and happiness which his creator has obviously marked out as the ultimate perfection of the human race."²

Needless to say, such a categorical sentencing was, and has remained, exceptional. Uneasy they might with the idea of sovereignty, most scholars abstain from denying any validity to the claim that states are or should be sovereign. Nobody, however, has a clear understanding of what is meant by being "sovereign." Many definitions have been given, but despite the various distinctions drawn between internal and external, legal and political, shared or exclusive, . . . sovereignty that are supposed to clarify its exact meaning, sovereignty itself has heretofore not been authoritatively defined. Without attempting the task

¹ *The Lawless Law of Nations*, 1925, p. 1.

² *Ibid.*, p. 13

that so many have failed—provide a complete definition of sovereignty—, several points should not be too difficult to accept.

To begin simply: sovereignty is directly concerned with states. It dates from the end of the Middle Ages, when governing authorities were claiming to put an end to the direct or indirect allegiance that until then had been due, to either or both the Pope and the Holy Roman Emperor. In other words sovereignty was intimately connected with the creation of modern states, which claimed to be equal to and independent from one another. Time was required to substitute these states for the ancient rulers of the mediaeval “City” ruled by kings, princes, abbots, bishops, . . . and so forth. It took a few centuries to set up the basic conditions of what is still the structure of international relations. The Treaty of Westphalia (1648) is commonly said to mark the end of the transition, “new” states having at that time definitely emerged from the Middle Ages to constitute a stabilized “family of Nations.” Although the number of its members is now considerably increased, the framework of their mutual relations has nevertheless not been substantially altered, except, perhaps, by the emergence of the UN, whose exact impact on the structure of the international legal order is still controversial.

Clearly, international relations existed prior to the modern state, in the sense that relations were established between autonomous groups or societies, no matter how they were called, long before the Treaty of Westphalia. Inevitably some intercourse existed between separate entities, occasioning the development of “external” relations. Autonomy was, however, the only prerequisite for such intercourse. “International” relations are indeed impossible if the intervening authorities have no possibilities whatsoever to decide their own organization and policy. But there was no claim to “sovereignty.” Autonomous action was long part of some complex and subtle—but inchoate—system of power and dependence.

The explicit claim to a legal quality, “Sovereignty,” is the hallmark of the modern State. The concept is said to have been created by Jean Bodin, in his celebrated study: “*De la République*” (1576). This is not to say that the word was coined by him. It already had a long past, but he gave the word new connotations by using it to characterise the new sort of ruler. Bodin’s meaning is partly unclear, but tends toward an idea of supreme power. The state cannot be subordinated, in its internal or external affairs, to any superior authority. This idea of sovereignty, and hence of the state, excludes any kind of legal, moral or political trusteeship over political affairs by either the Papacy or the Empire.

Many after Jean Bodin emphasized sovereignty in order to strengthen the authority of the State. Some, Hobbes foremost among them, went so far as maintaining that nothing could ever bind a sovereign. Such omnipotence has left others rather scared. Yet, sovereignty, be it absolute or not, is clearly the characteristic of the State, what differentiates the modern ruler from earlier governing authorities.

Whatever criticism may be addressed to the idea of sovereignty, the fact is that at the beginning of the XVIIth century the states then forming the “family of Nations” were generally equal and independent, i.e. sovereign. Independence meant that the happy few concluding the Westphalian Peace had succeeded in rejecting any superior authority, that might claim to issue orders binding them. Equality meant that they were powerful enough not to be swallowed or conquered by others. At the same time, these states were unable to swallow or conquer others, a fact which they confessed by concluding the treaty ending

the war. Obviously, this—at the origins of international law purely factual—situation is now substantially changed. The distribution of power, economic, military, and otherwise, is such that any idea of effective equality has vanished into thin air. (Super)powers and micro-states have in fact nothing in common, beyond some formal characteristics like the right to sit in the General Assembly of the United Nations. For those that are not “super” powers, independent is obviously pure illusion. Of course, there is the legitimate claim of each to deciding autonomously its own affairs; but it is just nonsense to maintain that states are entitled or empowered to refuse any “superior” authority.

By now, this is common and easy observation. One might have thought that consequently, the concept of “sovereignty” would have disappeared from at least international politics, if not from international legal literature. Strange as it may be, the situation is nevertheless quite the opposite. States claim indeed now more than ever to be sovereign. They resist any attempt to structure the form of international society on grounds inconsistent with their alleged equality and independence. They ignore that scholarly comments of equality and independence express serious disagreement with such claims. Possibly, the very fact that many new-born states, especially those produced by decolonization, are totally unviable by ordinary “classic” standards, explains their emotional attachment to formal sovereignty in a system that has not taken due account of the growing interdependence among the members of the “family of Nations.”

On the other hand, claiming to be sovereign might nowadays be mere posturing, calculated to secure a good position in the international organization of tomorrow. For whatever reason, sovereignty remains central in international affairs. The interesting fact, however, is that democracy is also frequently invoked by those asserting sovereignty in order to sustain their claim to nationhood. This is somewhat surprising because sovereignty has often been considered in opposition to the basic requirements of democracy. In other words, while originally resting on the effective power of a governing body irrespective of normative claims as to the worthiness of the government, sovereignty is becoming an ideological claim on the part of government authorities that are on the brink of being (totally) dominated by some super-power. Sovereignty thus has become an explicitly normative concept, and as such, if often coupled with that other normative political conceptions democracy. No doubt, this is a serious change! Though it means something new, sovereignty still “describes the normal condition of states” as posited by L. Wildhaber,³ despite the basic changes that have affected statehood. Even if the time of omnipotence is gone, at least for most of the members of international society, a conception of sovereignty is at the center of international relations.

Ideas of sovereignty are consequently more uncertain than ever, because the natural relation between sovereignty and the effective exercise of independent power is vanishing. My concern is, not, however, to find a definition on which everybody could or should agree. I hope only to explicate some of the main results of the concept for the structuring of contemporary international relations, in particular relations that arose with the end of the Cold War and the dismantling of the Soviet Union. My discussion of sovereignty is further oriented toward providing answers for elementary questions that any legal system must cope with:

³ Sovereignty and International Law in R. Macdonald and D. Johnston, *The Structures and Process of International Law*, 1983, p. 444.

—what are the members of the so-called international society;
 —what are the techniques used in order to develop binding rules in such a society;
 —how is this society (institutionally) structured in order to face its responsibilities.
 Each of these issues must be dealt with separately.

I. *Membership in the "Family of Nations"*

International law is still primarily a system intended to regulate the relations between states so that the system of equal states is preserved. This was the basic rule on which each of the contracting parties of the Treaty of Westphalia unequivocally agreed. Consequently sovereignty is clearly the only criteria of membership in the society of Nations, whatever meaning the word "society" has in such a perspective.

Such an assumption has clearly several implications.

i) *The first one is to exclude from the international scene any entities that cannot be said to be a State*, because the safeguarding of a sovereignty that is the exclusive prerogative of states is the only purpose of international law. For traditional international law, international relations are interstate relations. Once more, the claim was originally true: few international relations were developed outside the direct control of states. Needless to say, things have seriously changed. Intercourse between states is now only part of international relations, and not necessarily the most important part, notwithstanding the spectacular character of some state politics. Today, it is obvious that various international "actors" exist beside the state. No one of them, however, is provided with legal personality, i.e. is endowed with the right to speak, in the international legal order. The statement must be qualified somewhat by the emergence of international organizations, whose personality is now widely admitted. This emergence, however, remains without serious consequence on the basic structure of international relations, since these organizations are, at least in principle, serving state interests.

If they are not satisfied with being legally non-existent, these non-states actors are consequently forced to move into some sort of "transnational" law. True, many of them are not necessarily displeased by this kind of expulsion or exile. After all, it can be advantageous to be freed from any control or regulation in a "transnational" space that is beyond the command of State's authorities. And states usually understand the importance of activities carried out by "transnational" entities, who are not allowed to enter into the "international" framework. The existence of a transnational space helps in avoiding a direct conflict between rival states the result of which would usually be uncertain.

That said, the fact remains that restricting membership in the international legal community to "sovereign" states excludes from international law, except as a mere subject matter of regulations, numerous entities whose effective power in international relations is often much more important than that of many states. No doubt, this does not increase the credibility of international law.

ii) *Is the centrality of sovereignty in international law modified by the contemporary development of human rights and of the rights of peoples?*

Human rights are clearly opposed to many exercises of sovereignty. It is common knowledge that human rights were affirmed at international law in the aftermath of the Nazi regime in order to protect human beings against the abuses of sovereign power. Some scholars consequently maintain that men and women are now to be considered as members of international society. They argue from the (very limited in fact) access of individuals to some international bodies to demonstrate the international legal capacity of human beings.⁴ Does this really mean that membership is extended to private persons? The inference is extremely doubtful. Obviously, the sovereign states have agreed that mere sovereignty cannot legitimate any form or technique of government, and especially cannot justify the violation of elementary rights of individuals. Nevertheless, international law is still a sovereign game. Excepting hazardous doctrinal speculations, nothing indicates that—apart from being the concern of states—individuals are their partners within international society.

“Peoples” are apparently in a different situation at international law than individuals. Their rights, including the right to self-determination, are indeed recognized by the Charter of the United Nations and, at the occasion mainly of decolonization, they have been officially integrated in political discussion that has led most of them to independence. This should imply that peoples have now, as many times emphasized in the seventies, emerged as legal persons enjoying a specific status in international law. To some extent, the conclusion is indisputable, even if opportunities to demonstrate effectively such a personality were lacking, except in the context of (civil) wars or other conflicts that makes the distinction between law and politics particularly uncertain, if possible.

The real difficulty, however, is elsewhere. Whatever use peoples might have made of their legal personality, the fact is that “peoples” have tended to become states. Moreover, the status of being a “people” has been only to “colonial”—whatever be the exact meaning of that term—peoples. Apart from that, no people whatsoever has been associated since the Charter of San Francisco to any international activities. The decolonized states themselves oppose any attempt to decolonize the rights of peoples and to extend them to non-colonial groups or entities. Many “realist” arguments have been put forward in order to justify a restrictive construction of the rights of peoples. None provides decisive reasons to give the terms of the Charter of the United Nations a narrow interpretation. Apart from a particular historical context, there is up to now no place for peoples as real members of international society. It is worth noticing moreover that, even in these special circumstances, peoples have only been allowed to become states. In other words, the interesting point is that the birth of new states was somehow planned according to criteria fixed by the United Nations. Even in a purely transitory way, peoples have not enjoyed a specific existence in international law, but were considered embryonic states.

If there is a clear lesson to be drawn from the recent—and basic—changes in Europe, it is probably that the moment for rights of peoples, understood as the right of non-state groups to become independent states, or at least to express independent wishes at international law, is now over. States have nearly recovered all they appeared to have conceded

⁴ Comp. P. Menon, *Individuals as Subjects of International Law*, *Rev. dr. int.*, (Sottile), 1992, pp. 295 s.

at the time of decolonization. This does not prevent peoples from becoming independent states. In a given context, people acquire the power necessary to assert their autonomy, in the same way that states came into existence at the very beginning of international law. As clearly shown in the Yugoslavian crisis, there is, however, no question of relying any more on the alleged right of peoples for admittance into the charmed circle of states. The right to self-determination as an argument that any autonomous collectivity might become an independent state is no longer powerful. Today we fear the violent atomization that could result from the conjunction of the "self-determination of peoples" with nationalism. Consequently, Bosnia, Croatia or Macedonia were recognized, even prematurely, as States, without mention of any right of peoples.

In other words, sovereign states were clearly preferred to autonomous peoples. The crisis in the Soviet Union and in the former Socialist Europe finally resulted in a new "orgy of national sovereignty," to quote the term used by E. Friedmann in relation to decolonization, a time he thought would be the last such orgy.⁵

iii) *What are the criteria demonstrating who is sovereign and is consequently entitled to be a member of international society?*

Originally, no specific criteria for proving the possession of sovereignty existed. Because sovereignty was the possession of supreme power, the latter had to be demonstrated in order for the former to be established. Practically, this meant that sovereignty was mostly concerned with the capacity of an entity claiming to be a State to resist outside aggression; to be sovereign meant to be powerful enough not to be invaded or annexed by others.

It took more than a century to stabilize the composition of the original so-called "family of Nations." This "family" has remained unchanged for a long time, the only difficulty being to agree on the exact legal condition of non Western (European) States whose legal personality was not systematically denied by the founders of the law of nations. Once more, the capacity of resistance was probably the only criteria with which to conclusively demonstrate statehood, even though that was difficult during the colonial era, when many nations could not resist effectively the imperialism of European powers. This remained the case as secessionists succeeded in creating new states in former colonies of the United Kingdom, Spain or Portugal.

This elementary rule—you are entitled to supreme power if you get supreme power—probably remained in force up to the decolonization. With decolonization a major change occurred. Once statehood was understood as the logical result of the right of (colonial) peoples to self-determination, "supreme power" was for the first time the consequence, rather than the condition, of being a State.⁶ Entities were called States because they were members of the United Nations; their statehood would have had to be duly established in order for them to be admitted to the United Nations. This change has proven to be vital for many of the new states, because many of them, and not only the so-called micro-States, were—and are—totally unable to comply with the traditional requirements of statehood. The capacity to resist other states is consequently losing much of its importance.⁷

⁵ *The Changing Structure of International Law*, 1964, p. 36.

⁶ Cf. J. Verhoeven, *L'Etat et l'ordre juridique international. Remarques*, *R.G.D.I.P.*, 1978, p. 760.

⁷ Comp. J. Cranford, *Criteria for Statehood in International Law*, *B.Y.I.L.*, 1976-1977, pp. 93 ss.

Regarding existing states, it is largely useless because political independence and territorial integrity have to be strictly respected, and resort to war is categorically except in self-defence. Regarding new states it is largely irrelevant at least as long as their coming into existence is the result of some collective design.

If sovereignty still aims at excluding from international society non-state entities, it no longer expresses some feature common among the states claiming membership in international society. At least, this common feature cannot be some supreme power, some capacity in fact to resist outside orders and decisions. In other words, "external" sovereignty is progressively losing its traditional dominant role, a process easily understandable in a system that is starting to repudiate the virtual anarchy that long characterized international society. Sovereignty now aims mainly at some internal organization of those states that for a long time were only—or mostly—concerned with their external independence. If it is still "the organizing principle of inter-state relations,"⁸ sovereignty concerns mainly the organization of people and territory in a way specific to states. It is consequently acquiring a much more abstract meaning. This is not to say that external sovereignty was not legal. Sovereignty has always been legal, since it was from the beginning the keystone of international legal relations. While originally the legal expression of a factual power—the capacity to impose effectively its authority and to have it not basically changed by outsiders—, sovereignty is now defined by the legal forms that are used to exercise this power over territory and people. Sovereignty is thus now a legal expression of legal, rather than of military, capacity. "Constitutional independence" is the essence of contemporary sovereignty.⁹ The freedom of each state to make its own decisions is clearly guaranteed by the law of nations. As frequently emphasized in General Assembly resolutions, each state has the sovereign right to choose whatever political, economic or social system is its preference. And this right has not been called into question after recent changes even if "socialist" alternatives to "liberal" forms of government are apparently obsolete. Constitutional independence is now restricted, however by international law that fixes limits that should not be overstepped, especially regarding human rights. As "Sovereignty" becomes more formal, it also becomes more susceptible to legal regulations, such as the establishment of a constitutional framework within which "constitutional independence" must only be exercised.

Possibly, the recent widespread disavowal of communist techniques of socio-political organization could result in increasing the international legal provisions for domestic government. After all, there is no need any more to be satisfied by peaceful coexistence with the opposing regime. Apparently, everybody agrees on the basic requirements of the modern-state, if not western or liberal, democracy, and on the necessity to organise some international supervision of states. Yet whatever be their growing concern with democracy, states are still unlikely to accept a large measure of international control.¹⁰ The present difficulties encountered in preparing the Vienna conference on human rights clearly confirm that states will strictly oppose foreign interference, despite the contemporary enthusiasm for the so-called right or duty to interfere in the domestic affairs of foreign states in order to protect

⁸ H. James, *Sovereign Statehood*, 1986, p. 260.

⁹ *Ibid.*, p. 267.

¹⁰ Comp. O. Schachter, *International Law in Theory and Practice*, 1991, pp. 332 ss.

human rights. Sovereignty is still closely related to nationalism, and so states will resist any intervention in what are seen to be purely internal affairs, whatever be the general acceptance of some basic requirements of self-government. Sovereignty had no relation with any idea of nationalism at the beginning of an international law, a law that rested on states rather than on nations, despite its name. Clearly, the present situation is quite different. What is left of sovereignty is probably the free choice by states of the form of government that expresses how their people like to be organised, and with whom they intend or they accept the sharing of privileges and responsibility. Nationalism was said not be a serious danger any more at the end of the XXth century, especially in Europe where complex integrated structures were devised in order to face new responsibilities as regards welfare, unemployment, social security, environment, developing countries. . . . The European Communities were especially praised in this respect. Obviously, such a judgement was overly optimistic. Nationalism is as present as ever, and it still relies on sovereignty to achieve its endless task of fragmenting human collectivities.

II. *Binding Obligations?*

There is an old debate among scholars, especially heated at the end of last century, as to whether sovereignty should be above or within the law. The question is wrongly asked. If sovereignty has any implication in law, for instance in allowing a State to repudiate its apparent obligations, where could it be except "within" law, no matter what this law exactly provides?¹¹ The problem is only to ascertain how states can be bound in international law to respect any rules and how far they may legally deviate from or repudiate their obligations.

Sovereignty was never said to make international obligations totally dependent on states's discretionary will or intent. No legal state intercourse can take place if the fancy of each sovereign is really the governing principle of international relations. At the end of the day, should states be permitted to disregard all international rules sovereignty itself would be eviscerated. This is obviously going too far. Still, sovereignty implies that there should be no rule binding on states unless they have agreed to be bound. In other words, *pacta sunt servanda* is decisive in establishing the legal effectiveness of sovereignty.

The crucial role of covenant should not be misunderstood. Consent has always been the most natural way to bind people. It is not at all specific to international law to allow legal persons to control their own obligations. Individuals, corporations or subordinate elements of a state are also normally in a position to decide, to a large extent, their rights and duties. Still, this is not seriously to be compared with the freedom that States enjoy under international law. Under national law, consent exists indeed only as far as it is expressly admitted by the law, the basic rule being that legal subjects enjoy only what is recognized to them, including a legal faculty to agree or to disagree. Obviously, states are in a totally different position, the basic rule being that, unless they have agreed to be bound, they are not bound by any legal obligation. The basic structure of the international legal order is consequently totally different. Sure, as proven by history, it is often difficult for

¹¹ See. A. Larson and W. Jenks (Ed.), *Sovereignty within the Law*, 1965, p. 3.

one state to refuse its consent in given circumstances, and not only when it has to agree on the conditions of ending a war that it has lost. Functional necessities clearly restrict the juridical freedom of states to disagree.¹² Still, consent is legally needed, even if it cannot be politically denied.

That consent, derived from sovereignty, is decisive, does not mean that international law relies only on contractual relations, without any general rule binding on States. No legal system could indeed work without some general rules, establishing at least what are the necessary requirements to be contractually bound. In international as well as in national law, general rules are consequently needed to organize the relationship between states; sovereignty cannot set them aside. But at the same time, sovereignty prevents the validity of general rules from being based on the unilateral will of some authority that claims to be empowered to bind states. Even for general rules, consent is consequently decisive.¹³ Consent finds further expression, in its absence, in the international custom that up till now is the only rule that binds all members of international society. While validity of the custom is not technically dependent on the express agreement of states, what would be confusing customs with treaties, States bound by custom must take part in a practice that would result in a legal rule if it were to be invigorated by some *opinio iuris*. Moreover the right of the so-called persistent objector not to be bound by the rule stemming from a practice that it has constantly disputed confirms that consent is still the governing principle, even if it is not always immediately decisive.¹⁴ States still are their own law makers, even as regards general rules.

It is common knowledge that customary law meets today serious difficulties in international relations. Apart from technical objections based on the unavoidable slowness and vagueness of customary provisions, hardly compatible with the present urgent need for detailed regulations, general practices are disappearing among states whose divergent interests, objectives and purposes make convergent attitudes and conducts more and more unlikely. This won't surprise anybody. Still, the need for general rules is more and more obvious. The practical result of this failure of custom to meet the contemporary need for general rules is the distortion of the sources of law in the international legal order. Rules are said to exist where there is no compliance with the elementary technical requirements of the process that should control the existence and validity of the alleged rule. New customs are alleged to spontaneously come into existence, despite gross contradiction with institutional habits, on which custom necessarily relies. New customs are said to be based on their some objective (*consuetudo*) or subjective (*opinio iuris*) element only, whose existence is usually not seriously established. Aside from expanded—and specious—notions of consent and custom, other sources of legal authority are sought. Resolutions of international organizations—primarily of the General Assembly of the United Nations—and general principles of law are consequently resorted to in an attempt to generate law. The fact is, nevertheless, that these resolutions are usually not binding on member states, despite whatever political authority they might enjoy. The explicitly non-binding character of

¹² Cf. A. James, *op. cit.*, p. 221.

¹³ Cf. O. Schachter, *op. cit.*, pp. 10–14.

¹⁴ Comp. P.M. Dupuy, A propos de l'opposabilité de la coutume générale: enquête brève sur l'«objecteur persistant», in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally*, 1991, pp. 257 ss.

U.N. resolutions makes it difficult to explain how states can technically be bound, despite the intellectual gymnastics that are displayed in this regard. General principles provide apparently more convincing sources of law. Yet even here, elementary questions remain unanswered: where do these principles lie, what do they consist of and what is to be done to explicate them.¹⁵ The only certitude is that there are "common principles," i.e. principles based on the internal rules of the states that are members of the "family of Nations." These are the principles that are referred to in article 38 of the statute of the PCIJ and the ICJ. Despite a large body of principles in the contemporary international practice, none of these principles is "common." Once more, this is no real surprise. Apart from sheer platitudes, what could seriously be considered as common between states that are primarily concerned with what should be specific—i.e. objectively divergent—to each of them?

Can treaties offer an effective substitute for inadequacy of custom to meet contemporary requirements? Such was the belief of many scholars and diplomats soon after the 2nd World War. Treaties were supposed all the more useful because they provide an opportunity to adapt existing rules to changing circumstances and realities. Treaties were consequently negotiated in order to codify and to develop rules at international law. Technically, the solution was wrong; even "universal," treaties remain special law, binding only upon those who ratify or adhere to them. Sociologically, it would have proved to be right, whatever technique be used at a later stage in order to transform into general rules the contractual obligations formally accepted by states. In fact, it nevertheless did not. Sure, the number of treaties did in fact increase. Still, universal treaties remain exceptional. Only a few were effectively negotiated, and among them, only a few effectively entered into force, at least among states that could reasonably claim to be representing the international community as a whole. Difficulties are related not only by technicalities resulting from the number of participants or of the complexity of the issues at stake. After all, these problems can be settled by using "extraordinary" techniques, as was done, for instance, in the now famous Law of the Sea Conference. The point is, mostly, that no common will can be found among states appearing unable to agree on obligations that could satisfy everybody.¹⁶ Many treaties are consequently dead even before coming into force, just because no political compromise has been achieved despite the agreed wording of a common text. Once more, this is not really surprising. Why should states be unable to develop constant and converging practices be able to agree on universal treaty provisions?

Failing an effective entry into force of "general" treaties, resort is made to subterfuge in order to bind states by what they did not expressly accept. The most common is to assign a declaratory character to a treaty so that its provisions are considered binding on both the states that did not take part in its negotiation and those that have refused to ratify it. As such, the solution is technically flawless; nothing should indeed prevent the provisions of a treaty from being of a customary character and from binding consequently all the members of the international community. Ingenious as it may be, this should however not conceal the fact that there is ordinarily no evidence whatsoever of the general (customary) character of the rule allegedly merely declared or codified by the treaty. . . .

¹⁵ Cf. J. Verhoeven, *Le droit, le juge et la violence. Les arrêts Nicaragua c. Etats-Unis*, *R.G.D.I.P.*, 1987, pp. 1206 ss.

¹⁶ Cf. B. Simma, *Consent: Strains in the Treaty System* in R. Macdonald and D. Johnston (Ed.), *The Structure and Process of International Law*, 1983, pp. 485 ss.

In other words, the sacrosanct consent is more and more lacking in international law, be it expressed either through taking factually part in a common practice that could result in a customary rule, or through formally adhering to a treaty. The paradox is thus that states no longer really control the extent of their own obligations, despite their traditional attachment to their sovereignty. This possibly explains why they favour, in recent practice, commitments that are not binding at law, notwithstanding the various controls their effective implementation is possibly subjected to.¹⁷ The so-called Helsinki agreement and the CSCE that was supposed to supervise compliance with it probably constitute the most important example of such non legally binding commitments that take the place of legal obligations. Originally, such a rejection of law in organizing the relations between states was possibly justified by the necessities of the Cold War, at a time when no place existed in Europe where socialist and non socialist could meet in order to discuss common issues. Such an explanation for preferring politics to law is clearly not valid any more, after the fall of the iron curtain and the dismemberment of the Soviet Union. Still, European States, or more exactly the members of the CSCE that now extends from Vladivostok to Vancouver, refuse to enshrine into law the basic rules that are supposed to safeguard peace and prosperity in a time obviously full of dangers. Accordingly, the Charter of Paris, as well as the Helsinki Declaration, is still a legally non binding agreement, that the contracting parties expressly declared not fit for a registration with the Secretary General of the United Nations. . . .

The time is consequently for the "soft" law. "Soft" implies not only rules that purport to be law but that reveal some technical defects regarding the conditions of their creation or the radical vagueness of their content. "Soft" also implies rules that do not purport to be law, law at all, but that explicitly intend to remain outside of the realm of legal obligations. Is this the revenge of states whose consent is apparently not legally decisive any more, in a system of law whose normative processes have become irrational? Who knows? Soft law should however not be construed as the final victory of sovereignty over law, as the systematical repudiation of law.

Despite the rather naive belief that a political order could be substituted to a legal order, and whatever be the present circumstances that make such an attempt apparently necessary, there is no chance, even in the short term, to exempt the international society from law, i.e. from rules legally binding on its members. The only problem is obviously to adopt normative techniques that are compatible with the present state and that will satisfy the present needs of international relations. Part of the demand is to find techniques that permit to formulate precise obligations while remaining flexible enough to adapt these obligations to changing circumstances. Part of the demand is clearly also to respect the legitimate will of states, of those states that still constitute the "natural" addresses of international law rules. This is only but quite trivial. Is the will of individuals not to be taken into account by the national legislation? But there is probably no place left for sovereign consent, if this means, as traditionally, immediate control by a state of its own obligations. Of course, this will not prevent states from contracting as they always did; but technical devices for producing general rules in an efficient way should be established. International

¹⁷ Cf. W. Wengler, Les conventions "non juridiques" (Nichtrechtliche Verträge) comme nouvelle voie à côté des conventions en droit (Rechtsverträge), in *Nouveaux itinéraires en droit, Mélanges F. Rigaux*, 1993, pp. 637 ss.

law traditionally resorted to customary techniques for the production of general rules, but the time of custom is now clearly over. The time of a world legislatures unilaterally enacting statutes binding on states, is clearly yet to arrive. In the meantime, original tools should be forged in order to secure the passage from legal sovereignty to legal autonomy of states.

To speak of autonomy rather than sovereignty clearly implies the limitations on liberty. i.e. that whatever be the freedom of any state to decide on its own conduct, some basic social requirements have always to be complied with. At municipal law, this principle explains why contracts inconsistent with public policy should be nullified. The rule is quite common in national legal orders, and also in international law. Article 53 of the Vienna Convention on the law of treaties explicitly declares null and void treaties violating the *ius cogens*. Such a *ius cogens* is often said to undermine considerably the sovereignty of states. Possibly, the opposite conclusion is right. Even if states are sovereign, some basic rules—and notably the ones allegedly safeguarding the sovereignty—should never be disregarded. The difficulty is rather that, except sovereignty, nothing is really worth to be absolutely protected within the collectivity of states. In other words, the space left for imperative rules, of a *ius cogens* character, will necessarily remain very few as long as the so-called sovereignty remains the main concern of states in their intercourse with other states.” This calls into question the very idea of an “international community of states,” that “community” that has to recognize norms to which no derogation is permitted, under article 53 of the 1969 Vienna Convention on the law of treaties, or obligations so essential for the protection of its fundamental interests that their breach is recognized as an international issue, under article 19 of the ILC Draft articles on state responsibility.

III. Which Collectivity of States?

Obviously, it exists a “collectivity” of states, i.e. a grouping of legal subjects that recognize each other and whose relations are submitted to commonly agreed rules. This grouping constitutes at least the milieu within which international law is expected to organize the permanent intercourse of states, without which no law can seriously be thought about. The fact that the members of this “milieu” consider themselves as sovereign and equal does not change nothing to the reality of some State’s collectivity that is required by the very idea of an international law binding on states. The characteristics of this “milieu” are still far from being totally clarified.

The idea of an international “society” or “community” seems now widely accepted. It is for instance expressly referred to in many international treaties, or in the judgements of the ICJ whose *dictums* are now quite well known in this respect. Some scholars, especially among the French, nevertheless resist this idea of a “community” of states. They suggest that the need for a decent organization of the relations between states, and notably the exclusion of the resort to war, does not imply, beyond the mere organizing of their in-(ter)dependence, the existence of a “society” as such.¹⁸ Clearly, answering the objection

¹⁸ Cf. M. Virally, *Panorama du droit international contemporain*, R.C.A.D.I., t, 183 (1983-V), pp. 37-40; Nguyen Quoc Dinh, P. Daillier et A. Pellet, *Droit international public*, 4ème éd., 1992, n° 5.

would require that the essence of a "society" or a "community" be specified, as distinct from a "collectivity" or of a "milieu." No doubt, the meaning of these terms is not exactly identical. Still, what does exactly differentiate each from the others is far from being generally agreed. It is nevertheless beyond the scope of the present paper to enter into detailed discussions about what is or is not constituting a community, a society, etc. . . . It is enough to look at the basic issues that lie at the root of these terminological dispute.

What is called the Westphalia pattern of international relations expresses a minimal view of the social conduct of states. Their basic concern was indeed to stay sovereign, i.e. to safeguard their exclusive power to decide freely about their people and territory. This is purely "national." Especially at a time when national societies were largely organized on an autarchical basis, "international" requests or demands did not really exist. Or at least they have kept a purely negative form: foreign states were only asked to abstain from interfering with a sovereign exercise of powers, and not at all to occur in any manner with the satisfaction of some needs or wishes of the members or groups largely closed up on themselves. This was probably necessity, not the wish of governing authorities. It was not yet the time for the idealization of the sovereign state, that was advocated three centuries later. The fact was only that the authorities that came out of the dismantling of the polities of the Middle Ages were unable to substitute any common policy for those that informed the Mediaeval city; they were just fighting for survival, i.e. to impose their equal right to decide alone about their "national" issues.

In other words, the common concern at Westphalia was obviously extremely limited: leave any state free to decide for itself, even possibly to change the fragile balance that resulted from the relative equality of power among the members of the "family of Nations." This is obviously very little on which to base a "society." Sure, some common rules are needed in order to organize the coexistence of states. Some law-making process was consequently required in order to prevent the system from resulting in a disastrous anarchy. But that is almost all. For the rest, the alleged international society was only constituted with purely national, and sometimes dramatically competing, prospects. If a society is first of all concerned with the security of the elementary requirements of its constituting groups and individuals, the "international" society had nothing to deal with, except the jealous protection of non international interests and values. It was a club, but without any associative design. No doubt, its institutional deficiencies are easily understandable in such a context. Why indeed should states have developed common institutions if they have no responsibilities to assume together, excepting the preservation of their respective "supreme power"?

The situation is said to have been basically changed with the signature of the Charter of the United Nations in 1945. Much more than the Covenant of the League of Nations, the Charter is indeed seen as expressing a new ordering of the international legal order, radically departing from the Westphalia conception until then governing the relations between states.¹⁹ Formally, nothing however was fundamentally changed by the Charter of San Francisco, except maybe that war was clearly outlawed as a matter of principle.

¹⁹ Cf. R. Falk, The interplay of Westphalia and Charter Conceptions of the International Legal Order, in R. Falk and C. Black (Ed.), *The Future of the International Legal Order*, vol. I, 1969, pp. 32 ss.; Comp. G.W. Keeton, *National Sovereignty and International Order*, 1939, pp. 68 ss., 169 ss.

States are still equal and sovereign, the UNO's organs being not legally entitled to bind them by its decisions, except in a few exceptional circumstances. And these states still continue to assume in isolation their own responsibilities, with the only reservation of a certain extent of collective security that should be provided by the Security Council where the Big Five play a dominant role. The exception is nevertheless very important, since collective security is obviously the price for the consent of states to the prohibition of war.

It is common knowledge that this United Nations machinery did not effectively work, at least not in accordance with the rules of the Charter as originally drafted by its negotiators. In particular, collective security has proved to be a total failure notwithstanding the palliatives that have been found to compensate for the setbacks of the UN. Many reasons have been put forward in order to explain this failure. One of the most important, if not the most important, was the profound splitting of the collectivity of states into politico-ideological blocks that turned into a cold war what should have been the restoration of peace. Consequently, the use of the so-called veto became common practice within the Security Council, mainly in the hands of the Soviet Union that was usually in the minority of the voting members. In other words, the system resulted in a deadlock, that could be avoided only by mutually agreeing on very general and rather vague commitments or injunctions whose authority was generally unrelated with any provision of the Charter.

Despite its apparent failure in some (basic) respects, the United Nations is more than ever feeling itself as the centre or the core of a some international "community" whose basic concern is far beyond mere the safeguarding of the "supreme power" and total independence of its members. The fact that it has succeeded in being really universal, in sharp contrast to the League of Nations, is probably one of the decisive elements in this sense of community. Such is also the basic reliance on the United Nations of those of its members whose existence and survival is immediately dependent on the (political) decisions of the General Assembly. Certainly, national interests and selfish preoccupations are still overwhelmingly important. The fact is nevertheless that, despite the criticism of scholars, states behave more and more as the members of a society whose members have goals and prospects in common, and not only as parts of a "milieu" deprived of any social concern outside the safeguarding of a sacrosanct sovereignty.

A "society" requires necessarily some institutional structure, reflecting the various powers that are in charge of the basic functions that have to be assumed. Up to now, such a structure exists only in a embryonic state through the UNO. It is far from being totally successful. What does not surprise, especially taking into account the fact that it had originally much more limited purposes and objectives, important as they were. Still, it does exist and it has an incomparable value as the main place where the "societarization" of the relations between states is under way. This should explain why the UNO is entitled to claims a specific legal regime, possibly departing from the rules that are normally applicable to the other international organizations.

In this United Nations, traditional notions of sovereignty did originally explain why states, while being free to stay outside of the organization, stand on an equal footing—excepting the privilege of the veto and permanent membership given to the Big Five within the Security Council—and cannot normally be addresses of binding decisions of the organization. No doubt, such a system was very soon faced with serious changes as a result of the cold war. At the end of the day, they did not however totally jeopardize the organiza-

tion, even if its global architecture was seriously modified. Sure, the Charter was not revised; still, its effective implementation varied. Originally confined to some exhorting role, the General Assembly has in particular progressively overridden, the Council of Security, entangled in its veto and incapable of representing the whole "community" of nations. It became the place where compromises vital for the future of international relations were sought, and provided with an undeniable political authority—superseding legal force—when they were found. It became the place also where new strategies were conceived, in order to face the dramatic stakes of the coming decades. No doubt, an appalling logomachy and confusion was often the price for exercising new responsibilities. The evolution is still fundamental.

It is possible that the changes recently inherited from the disintegration of the Soviet Union will have in this respect a contradicting influence. The Security Council whose members are not systematically divided and whose super-power(s) is(are) more than ever powerful could be induced to resume part of the responsibilities that it was unable to exert before, as a result of the cold war. And this could be justified by the "necessity" to abide lastly by the provisions of the Charter of San Francisco that have had no chance until now to be strictly applied, despite the fact that they were supposed to achieve peace and prosperity. To some extent, such a reaction is desirable. It is in the interest of every state to have a Security Council exercising effectively responsibilities that can not be adequately assumed by the General Assembly, despite the clumsy substitutes contemplated or implemented at a time the whole system went wrong. Security is surely one of these cases. But apart from that, the General Assembly should not accept to regain the back of the scene. The predominance of the Security Council, as originally devised, was indeed expressing the need to organize what was becoming the "community" of nations, but under the prevalence of some great powers acting in concert to preserve their personal projects that were supposed to coincide with the interests of mankind, as naively reflected for instance in the treaties establishing the legal regime of the Spitzberg²⁰ or of the Antarctic.²¹

Such a backwards move should not be admitted. The point is not that individual sovereignty is overlooked in a system investing a few powerful states with the responsibility to decide for all. Sovereignty, in its traditional meaning, is still to be overlooked to the extent it makes impossible any functional organization of the society of states. The point is only that it should not be overlooked at the sole end of strengthening the "supreme power" of some to the detriment of others. Elementary requirements of democracy should be respected in the society of states as well. This is particularly relevant at a time when the United Nations are more and more confused in large sectors of the public opinion with the United States, from now on the last super-power of the XXth century.

No doubt, "powerful" states will still be necessary. Facts clearly show that they are more than ever needed, in order to face the new stakes of the post-cold war era, and that they should act collectively through a body that is capable of quick and efficient interventions. Sovereignty however does not basically matter in this respect, even if it does not facilitate unavoidable changes. It is purely a question of practical efficiency to establish the bodies

²⁰ Cf. D. Bardonnet, *Le projet de convention de 1912 sur le Spitzberg et le concept de patrimoine commun de l'humanité*, in *Humanité et droit international. Mélanges R.J. Dupuy*, 1991, pp. 13 ss.

²¹ Cf. J. Verhoeven and Ph. Sands (Ed.), *The Antarctic Environment and International Law*, 1992, pp. 17 ss.

and to set up the machinery that could adequately satisfy the current requirements and the present expectations of the "community" of nations. And it is purely a question of democracy to decide for instance what relations should exist between the General Assembly and the Security Council or what restrictions should be given to the traditional equality of states in order to guarantee the "credibility" of the United Nations decisions. Obviously, this is not an easy task. Still, the issue is not "sovereignty" any more. The reason is simple: as a matter of fact sovereignty in its traditional meaning, ambiguous as it might be, is gone. The time is now to organize the autonomy of states within a common structure clearly necessitated by the importance and the complexity of the problems of tomorrow. This should not be misunderstood. It does not mean that states have now to give up some exorbitant prerogatives that they used to enjoy, and to be satisfied with autonomy. As a "supreme power," sovereignty is not any more in the hands of most of the existing states, no matter whether they are said to be micro-states or not. In other words, it has already been lost. The issue is now to achieve autonomy in an appropriate way, compatible with both individual expectations and common needs, factual situations and theoretical requirements. Whatever be its relevance at a time when it was mainly aiming at a concrete exercise and balance of power among states, sovereignty does not help anymore to settle these issues.

A "society" does not require institutional structures only; it presupposes also that common principles are agreed on beyond immediate bargaining interests and that responsibilities are implemented in order to assume certain basic functions. Sovereignty that cares only for itself has traditionally been very little concerned with such social issues. As pointed out before, consent was decisive and it was unilaterally extended as long as states found any interest in consenting. The "purposes and principles" referred to in the Charter of San Francisco mark nevertheless a substantial change in this respect. Anxious as it was to respect the formal sovereignty of its signatories, the Charter expresses some basic common concern that cannot be separated from a "community" of nations. The fact was not absolutely new; never before these social requirements were nevertheless so openly confessed.

Technically, the general rules are still missing, particularly in a context where customary provisions are vanishing. General principles however are generally acknowledged among states, whatever be the possible difficulties of applying them in given circumstances. They explicit some basic recognition of what is the general framework within which particular compromises between antagonistic interests are to be found. This implies a radical shift from sovereignty, as usually destructive of any organizing principles. In this sense, the collectivity of states has now probably become a community of principles, as the term is used by R. Dworkin,²² the signature of the United Nations Charter being surely the critical date in this respect.

Clearly, these principles do not necessarily amount to legally binding provisions, and consequently the legal sanction of their violation remains largely unclear, except in exceptional mechanisms like public policy. Some will consequently remain skeptical about the reality of a legal system that is largely unable to provide for secondary rules, according to Hart's terminology. The difficulty is serious and, for the time being, cannot be convincingly overcome, at least without breaching elementary legal technicalities. Clearly, the

²² *Law's Empire*, 1986, pp. 211 ss.

United Nations alone should tomorrow be in a position of exercising some law-making and law-sanctioning role, what will entail some drastic retreat of "sovereign" consent. In fact, it is already involved in such a role; needless to say, law is nevertheless far from accepting what facts suggest. It is possible that in such a context "consent" is still technically the best way to explain a binding character, especially in a system that is said to repudiate any formalism. This brings back to sovereignty. But consent does not explain anymore why states are or feel obligated, as they often do without being formally bound. Legitimacy is possibly one explanation for this.²³ What is legitimacy? It remains unclear. It has surely some purely subjective, psychological, connotations. But apart from that it expresses also some social necessity or utility going far beyond "sovereignty." In other words, associative requirements are clearly at stake behind the present success of legitimacy, particularly at a time when strict positivists, favouring some Austinian approach to law, are unable to provide a reasonable explanation of what is going on in the international legal order, that has no direct relationship any more with sovereignty.

Apart from law-making, three issues are especially critical for the present organizing of the community of states: the satisfaction of some elementary welfare, the settlement of disputes and the collective security.

It is surely hazardous to transpose to the community of nations the welfare schemes and patterns that were discussed in relation with national states, especially within liberal democracies that were supposed not to assume direct responsibilities as regards economic and social issues. The context is so different indeed that the problematic of the welfare state is not as such usable in international relations. That said, the international society is still faced with increasing difficulties resulting from underdevelopment, unemployment, economic migrations, overpoverty, environmental degradations, . . . and similar issues that will surely be decisive for the next century. Until now, this society had not proved to be successful in this regard, despite efforts that have for instance been made within the United Nations to plan decades of assistance to developing countries. This won't surprise seriously anybody. The important point is however that the international concern is now obvious in this respect as exemplified for instance by the ever increasing meetings on conferences on environmental issues. "Principles" are laid down, whose importance is undeniable even if the duties imposed on states remain often particularly vague. Possibly, they have as such no binding character, unless they duplicate existing rules of international law. This will confirm that the international society lacks the necessary equipment to deal adequately with contemporary issues. But it is also confirmed that these issues are now definitively outside of the realm of national sovereignty. At the time when the modern state was created, it could legitimately claim to resolve satisfactorily the basic problems of its people and of its territory. And in fact it did to a large extent. This time is now clearly over. The basic problems are "international" and need to be dealt with accordingly.

The settling of disputes is obviously a major stake for any society. The latter indeed could not survive, should existing disputes between its members remain unsettled. Sovereignty is said to have in this respect disregarded judicial settlement and favoured diplomatic or political solutions. The fact is unquestionable. Judicial techniques remain indeed exceptional since their use is totally contingent on the agreement of states that obviously

²³ Cf. Th. M. Franck, *The Power of Legitimacy Among Nations*, 1990, pp. 183 ss.

do not like to submit their disputes to either arbitration or the ICJ. They clearly prefer diplomatic methods leading to solutions whose binding character rests ultimately on the sole consent of the states. Modern practice has given rise to sophisticated techniques of conciliation that are certainly more successful than the classic judicial machinery. Tomorrow, a more integrated society of states, facing the new responsibilities that are imposed by a fundamentally changing world, will however not be able to keep the judge aside, the way it was until now. Some judicial settlement is needed, whatever be the intrinsic merits of political conciliation, when social relations, generating complex legal regulations, increase. The developments in the law of the sea are quite significative in this respect.

Recent changes in world politics could facilitate a reevaluation of the judicial function in international relations. Just before disappearing the Soviet Union did in fact agree to make more resort to judicial techniques in order to settle international disputes.²⁴ The fact was important, the USSR having never before agreed to submit a dispute to arbitration and the USA having violently slammed the door of the ICJ after its judgement on jurisdiction in the Nicaragua case. The present roll of the ICJ is confirming the growing importance of the judge in the international legal order. If sovereignty is responsible for the difficulties of the judge in international relations, this will help to prove that it is losing its credit. To some extent, the conclusion is indisputable. As pointed out before, sovereignty in its traditional reference to a "supreme power," naturally hostile to any third-party binding decision, is now a past dream. That said, it should be oversimplistic to reduce all the problems of the judicial settlement in international relations to an issue of sovereignty. The internal characteristics of international law as such, especially in an unhomogeneous world, as more relevant in this regard. It is the law much more than the judge that states, sovereign or not, distrust. It is quite interesting to note that the most significative success of international adjudication is related with maritime delimitations, where law is totally fading behind so-called equitable considerations.²⁵ Moreover, the success of judicial settlement should not in any way be overestimated. After all, the judge does not in most cases really settle a dispute; it only makes possible for the legal system to go on as if the dispute were settled. "Political" methods are much more efficient in this respect; there is really no dispute any more when an agreement is finally achieved. Resorting to a judicial machinery is in other words useful only when the system permits to be satisfied with a "legal" settlement only, without threatening social cohesion. Sovereignty is not directly concerned with this. The point at issue is solely to determine the extent to which judicial settlement is of any use in the international society, as shaped by its "internal" law, whose integration is clearly not facilitated by the claim of its members to be "sovereign."

Security is the last issue. No doubt, it is fundamental. How could a society get a harmonious development if the elementary security of its members is not secure? The banning of war is surely in this context the critical step. Should states not be allowed any more to have resort of armed force, it is absolutely necessary to provide to each of them

²⁴ Cf. Ph. Bretton, *Vers un élargissement du rôle de la C.I.J.? La déclaration américano-soviétique du 23 septembre 1989 relative à une initiative commune à propos de la C.I.J.*, *A.F.D.I.*, 1990, pp. 322 ss.

²⁵ Comp. J. Verhoeven, *A propos de la fonction de juger en droit international public* in Ph. Gérard, F. Ost and M. van de Kerchove, *Fonction de juger et pouvoir judiciaire*, 1983, pp. 447 ss.; I. Brownlie, *Politics and Principle in Major International Settlements*, in *International Law in Transition*, Essays in Memory of Judge W. Singh, 1992, pp. 11 ss.

some collective safeguard of its political independence and territorial integrity. This is all the more the case since, as a result of new "international" decisions, states have come to existence without the actual possibilities the "sovereigns" traditionally enjoyed to preserve their existence and identity. The provisions of the charter of San Francisco are in this respect well known: the Security Council is empowered under chapter VII to decide any measure, including armed force, that is necessary "to maintain or restore international peace and security" (article 42). It has not proved to be much more successful than the League of Nation's provisions. The main reason for such a failure is quite clear: the paralysis resulting at a time of the cold war from the systematic use of the veto. Consequently, states were compelled—or inclined—to make of (collective) self-defence a use by far exceeding what had been anticipated by the negotiators of the Charter, at least when no alternative formula has been improvised. Collective security became the exception, self-defence being the rule. In principle, this situation is now over. Nothing should normally prevent a strict application of the Charter's provisions, since the veto of antagonistic powers is not systematically blocking any more the Security Council. Spectacular decisions were consequently taken during the Iraq-Kuwait crisis, in the early days following the end of the cold war. (Mostly) western powers made solemn calls to the "international community." They were not left unanswered. The success of the (military) operation is undeniable. The independence and integrity of a state unlawfully annexed was officially restored. That said, the enterprise has expressed the joint will of (western) states much more than the collective decision of the United Nations, as reflected in the resolutions of the Security Council. This is not really surprising. It has been many times confirmed since then that states are not ready to transfer men, arms and funding to the United Nations so as to enable the organization to take effectively charge of collective security. They will still for a long time prefer concerted interventions that they do control to collective exercises under the ruling of the United Nations.²⁶ Is "sovereignty" an explanation for this? Surely not. Most of the present members of the United Nations are in any way kept out of any concerted or collective decision. National selfishness, making illusive disinterested enterprises benefiting to others, and power bargaining should be the main reasons, apart from any legal consideration. The biggest change is surely that in such a perspective some concert of powerful nations, reminding of initiatives taken in the beginning of this century, is covertly substituted for the United Nations. This shows clearly why the United Nations Charter should be modified in order to satisfy both efficiency and democracy. Now that individual "sovereignty" is overstepped, it would be a pity to replace it by some oligarchic control of the most powerful of the formerly sovereign states.

Final Remark

Possibly, sovereignty is still at the center of international law rhetorics, i.e. is still intended to secure the global coherence of a system despite contradicting expectations and

²⁶ Cf. J. Verhoeven, *Etats alliés ou Nations Unies? L'ONU face au conflit entre l'Irak et le Koweït, A.F.D.I., 1990, pp. 185 ss.*

conflicting rules among the members of the international "society."²⁷

It should be clear however that this concept does not reflect the actual problems and present stakes of international relations that cannot be reduce to interstate intercourse only. The "supreme power" is not the real issue any more. The time is now for organizing an international community, what implies common prospects, collective structures and shared values. The process started seriously in 1945 with the United Nations. It has nevertheless been paralysed for several decades, as a result of the Cold War. The obstacle is now over. This does however not mean that all the difficulties are settled. Obviously, a machinery finalized in the mid forties, with the League of Nations as a precedent, is not fully in a position to cope effectively with the problems of the XXIst century. New techniques must be devised, to secure both efficiency and democracy. A club of powerful nations could possibly achieve the former, never the latter. The ephemeral successes of a coalition of (mostly western) states should therefore not delay the unavoidable restructuring of the community of states, of the revising the United Nations system.

If sovereignty is still to be preserved, it is in its internal, "constitutional, meaning only. The right of each state to determine freely its own form of organization must indeed be protected. The wish of the people much more than the will of the governing authorities is however to be safeguarded in this respect, as reflected in the present concern for human rights and minority groups. This is perfectly legitime, at least as long as nations refrain from claiming any "supreme power."²⁸

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²⁷ Comp. D. Kennedy, *International Legal Structures*, 1987, pp. 196–200.

²⁸ Comp. M. Korowicz, *La souveraineté des Etats et l'avenir du droit international*, 1945, pp. 240–241.

CONCLUSION