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Sovereignty and Inequality

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Abstract

Inequality within and between societies has been a neglected issue in the contemporary theory of international law. The concept of sovereignty makes this neglect possible in traditional international law, as analysis of Oppenheim's 1905 textbook demonstrates. Globalization and democratization are placing state sovereignty under strain, as international rules and institutions appear to become more intrusive, transnational civil society more active, and unitary state control less pronounced. State sovereignty as a normative concept is increasingly challenged, especially by a functional view in which the state loses its normative priority and competes with supranational, private, and local actors in the optimal allocation of regulatory authority. But discarding sovereignty in favour of a functional approach will intensify inequality, weakening restraints on coercive intervention, diminishing critical roles of the state as a locus of identity and an autonomous zone of politics, and redividing the world into zones. The traditional normative concept of sovereignty is strained and flawed, but in the absence of better means to manage inequality it remains preferable to any of the alternatives on offer.

Inequality is one of the major subjects of modern social and political inquiry, but it has received minimal consideration as a theoretical topic in the recent literature of international law. While the reluctance formally to confront inequality has many causes, it has been made possible — and encouraged — by the centrality of sovereignty as a normative foundation of international law.[1] The discipline of international law has long encompassed some disparagement of sovereignty, even

[1] The sovereignty of state governments is defined in what has been perhaps the most influential and certainly the most enduring English-language treatise of the 20th century, Oppenheim's *International Law*, vol. 1 (1905), at 101, as comprising independence, and authority in the form of supremacy over territory and supremacy over persons. As 'supreme authority, an authority which is independent of any other earthly authority. ... [it] includes, therefore, independence all round, within and without the borders of the country'. (*Ibid*, at 171.) 'As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy. As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy.' (*Ibid.*) Although Oppenheim does not take this approach, sovereignty may also be

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while simultaneously embracing it. In recent years, however, proposals to abandon the normative concept of sovereignty have acquired new vitality, drawing on contemporary perceptions that the traditional concept of sovereignty might be outmoded in a new age of globalization and democratization. These proposals are sustained by what their proponents see as an emergent global public policy animated by commitments to markets, civil society, liberal peace, the rule of law, untrammelled communication, and transnationalism. This global public policy takes modest account of equality as a style of politics and as a procedural component of democracy and the rule of law, but it is not clearly committed to the substantive reduction of global inequality. The system of sovereignty has hitherto had the effect of fragmenting and diverting demands that international law better address inequality, but if sovereignty were to be displaced as a foundational normative concept for the structure of international law, an alternative means to manage inequality would become essential. No such alternative is presently on offer. This article argues that the lack of other means to cope with inequality is a serious problem for international law that has been wrongly neglected, but that the lack of such an alternative provides a strong reason to adhere to the existing concept of sovereignty, however much it may be strained by practice and problematized by theory.

The theory of sovereignty has relieved international lawyers from the need for a general theory of the legal management of inequality in three major ways.

First, the concept of sovereignty underpins a principle of sovereign equality that has attained almost an ontological position in the structure of the international legal system. This ontological status makes enough difference in the processes of international law and politics to modestly vindicate the significance and effectiveness of the system of sovereign equality: thus very small states are procedurally on an equal footing with the largest or most powerful states in the International Court of Justice, and groups of small states have made some difference in the dynamics of multilateral bargaining on issues such as climate change. In the same spirit, legal doctrines of the special status of great powers have been in the descendant since 1945, and such matters as the structure of the Non-Proliferation Treaty or the UN Security Council are dealt with by most legal writers as anomalies, however necessary or enduring, in the scheme of sovereign equality.[2] This conceptual scheme serves, if very unevenly, as a counter to the vast inequalities that might otherwise be expected to feature in the formal structure of the legal system.

Second, the concept of state sovereignty allows questions of social and economic inequality among people to be treated in international law as a responsibility of territorial states. International law and legal institutions are able to promote market activity, for example through the World Trade Organization or the International

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understood by reference to capabilities attaching uniquely to the supreme authority. The modern bureaucratic welfarist state has in many polities been understood as having unique capabilities in the organization of public power, public services, 'official' status, etc., a capability of *organizational* supremacy. See, e.g., C. Rousseau, *Droit International Public*, vol. 3 (1977), at para. 106.

[2]   A point made *à propos* Hans Kelsen's *The Law of the United Nations* (1950) by Danilo Zolo, 'Hans Kelsen: International Peace through International Law', 9 *EJIL* (1998) 306, at 315.

Monetary Fund, while in theory leaving largely to states the responsibility of mitigating social and economic inequalities associated with markets. Episodic attempts to address economic and social inequality directly through substantial non-market changes in the international legal order have met with little success outside the established human rights and environmental programmes.[3] Despite economic and political turbulence associated in some respects with inequality, concerns about it have remained displaced by preoccupations with reducing the role of the state in economic activity and in major market-distorting egalitarian redistribution. International institutions continue to play important roles in economic development, and political leaders in prosperous countries confronted with concerns about poverty or dislocation or maldistribution abroad increasingly hope for solutions from the World Bank and other intergovernmental agencies along with bilateral assistance and the much-vaunted voluntary sector. There is however a growing incongruence between the increasing market orientation of international law and the inability of international governance institutions or of many sovereign states to cope with problems of inequality that markets alone do not resolve. Intra-societal inequality in some countries, and unevenness in the global distribution of human flourishing whether defined in terms of well-being, capabilities, wealth or a human development index, appear to have been intensifying rather than diminishing.[4]

Third, the theory of sovereignty provides the means by which people can express, and be deemed to have expressed, consent to the application of international legal norms and to international institutional competences. Consent, whether express or tacit, plays a crucial role in legitimating international legal rules and institutional activities in situations where their legitimacy might be in doubt, as where they infringe deeply-held egalitarian principles.[5] This legitimating function is of vast importance for the international legal system. It is not clear that in the present state of heterogeneous international society, any non-consensual legitimating principle is

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[3]   This applies to state-oriented attempts to change the terms of the international economic order, efforts to recast international law in the spirit of post-1945 European social democracy, various pre-1990s projects to build an international law of development, and ongoing efforts to develop economic and social rights. For illustrative works see K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980); R. St.J. Macdonald (ed.), *The International Law and Policy of Human Welfare* (1978); A. Carty (ed.), *Law and Development* (1992), and M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995).

[4]   For illustrative works from the vast literature on unmet problems of social and economic inequality, see, e.g., United Nations Development Programme, *Human Development Report* (annual); L. Taylor and U. Pieper, *Reconciling Economic Reform and Sustainable Human Development: Social Consequences of Neo-Liberalism* (1996); Li, Squire and Zou, 'Explaining International and Intertemporal Variations in Income Inequality', 108 *Economic Journal* (1998) 26; Sen, 'Mortality as an Indicator of Economic Success and Failure', 108 *Economic Journal* (1998) 1; Chua, 'The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries', 95 *Columbia Law Review* (1995) 223; M. Nussbaum and A. Sen (eds), *The Quality of Life* (1993); A. Sen, *Inequality Reexamined* (1992).

[5]   A great deal of jurisprudential effort has been dedicated to finding other bases of legitimacy for international law. See, e.g., H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920); and the use of the concept of international community in, e.g., A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984).

viable; and sovereignty appears to be a relatively low-cost means to organize 'consent'.

There is thus a relationship of mutual containment between sovereignty and inequality. The system of sovereignty at least notionally precludes some forms of inequality, while helping to exclude other forms of inequality from real consideration. Conversely, inequality limits sovereignty — for example, where hierarchies are established among different political and legal units that in the traditional conception of sovereignty (now increasingly problematic) mean the subordinate units lack sovereignty. Inequality also grounds critiques of sovereignty that weaken it as a normative concept — including critiques flowing from human rights, self-determination, feminist theory, and critical theory.

Part 1 of this article will examine the relations between sovereignty and inequality in the mainstream tradition of international law, focusing on the approach charted at the beginning of the 20th century by Lassa Oppenheim and others that has endured, in its fundamentals, until the present. Although sovereignty is central to the mainstream tradition of international law, it has always been viewed with ambivalence in that tradition.[6] For mainstream writers sovereignty is at once the architecture for the present and future international legal system, an obstacle to a deepening rule of law system, a legitimation of morally dubious state conduct or social practices, a bulwark against the iniquities of dominance by powerful external forces, and a basis for identity and democratic decision-making.[7]

Globalization, democratization, privatization and the increasing self-assurance of liberal agendas have animated a shift away from this traditional ambivalence toward an outright rejection of the normative elements of universal and equal sovereignty, threatening to destabilize the established function of sovereignty as a device to contain inequality. Part 2 will consider some of these challenges, assess the extent to which

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[6]   Oppenheim acknowledged that the term 'is used without any well-recognized meaning except that of supreme authority', and showed some sympathy with the notion that it might usefully be eliminated from the list of necessary characteristics of statehood, and from the science of politics altogether. Oppenheim, *supra* note 1, at 108. Among contemporary writers, Louis Henkin, for example, argues: 'Sovereignty, strictly, is the locus of ultimate legitimate authority in a political society, once the Prince or "the Crown", later parliament or the people. It is an internal concept and does not have, need not have, any implications for relations between one state and another. ... For international relations, surely for international law, it is a term largely unnecessary and better avoided.' L. Henkin, *International Law: Politics and Values* (1995), at 9–10. See also H. Laski, *A Grammar of Politics* (4th ed., 1938), at 44–45.

[7]   Sketching a similar argument, David Kennedy suggests that sovereignty has been associated by members of each generation positively with its aspirations and negatively with the excessive formalism of its predecessor. In his characterization, sovereignty in 19th century international jurisprudence enabled separation of public and private, law and morals. After World War I it represented the aspirational liberalism of universality, defining familiar standardized interchangeable units, providing a basis for a strong process-based but non-substantive legal order, from which were eventually teased substantive principles such as non-intervention. Sovereignty became not a unity but a bundle of rights, 'demystified, available to be parcelled out, rearranged by law, managed by lawyers, technocrats, social engineers'. 'Some Reflections on "The Role of Sovereignty in the New International Order"', in *State Sovereignty: The Challenge of a Changing World, Proceedings of the 1992 Conference of the Canadian Council of International Law* (1992) 237, at 241.

such challenges have already led to adaptations in the traditional sovereignty-based account of international law, and note some implications for the treatment of inequality. Part 3 will consider whether the mounting critiques of the traditional concept of sovereignty might soon lead to the replacement of the present normative international law view by a functional view, and if so what the consequences might be for the management of inequality. The conclusion will return to the principal argument of this article, namely that a radical change in the international law concept of sovereignty will be hazardous without concomitant development of adequate alternative means to manage inequality.

1 Management of Inequality in Traditional Sovereignty-based Accounts of International Law

A *Equality as an Incident of Sovereignty in Traditional International Legal Doctrine*

The system of sovereign equal states represents one of the defining ideas of 20th century international relations. On it have been built the modern mainstream projects for a working system of international law. These projects have been based on status: entities of the same status enjoy comparable and reciprocal entitlements. As Oppenheim put it:

> In entering the Family of Nations a State comes as an equal to equals; it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. ... The equality before International Law of all member-States of the family of nations is an invariable quality derived from their International Personality.[8]

By the time of the drafting of the UN Charter, the first principle to be embedded in its architecture was an axiom: 'The Organization is based on the principle of the sovereign equality of all its Members.'

While there was widespread support for sovereign equality as a foundational principle of the international legal system, there was no agreement on its theoretical basis,[9] and unease about it persisted in practice. Neither the Concert of Europe nor the Allied and Associated Powers at Versailles operated on the basis of equality among

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[8] Oppenheim, *supra* note 1, at 160–161. Of course, 'Legal equality must not be confounded with political equality.' (*Ibid*, 162.)

[9] Vattel's anthropomorphization of inter-state law has been much criticized, e.g. by Carlos Escudé, *Foreign Policy Theory in Menem's Argentina* (1997), at 30–31, but Vattel's naturalistic approach, with its remarkable analogy between equality of individuals and equality of states, has remained influential; see e.g., P. H. Kooijmans, *The Doctrine of the Legal Equality of States* (1964). It persists in assertions that the exclusion of individuals from democratic participation in local and national government is the same injustice as exclusion of large third world states from permanent membership in the Security Council. For discussion see Pinto, 'Democratization of International Relations and its Implications for Development and Application of International Law', 5 *Asian Yearbook of International Law* (1995), 111. The positivist alternative, well represented by Oppenheim, sees equality as a logical corollary of sovereignty. A third

sovereign states, yet these groupings were decisive in the formulation of major legal elements of the public order of Europe. Several prominent international lawyers recognized and endorsed special rights and responsibilities of great powers,[10] and some saw such inequalities as grounds for rejecting the theory that sovereignty entailed equality.[11] In good positivist fashion, Oppenheim treated major inequalities, such as that between the Great Powers and other powers, as political but not legal.[12] But Oppenheim, unlike the vast majority of his successors among international lawyers, regarded the balance of power as a fundamental principle of international order, and took a distinctly realist view in accepting that the use of force could be justified to maintain the balance of power. He showed no sign of believing that the inegalitarian implications of a balance of power system ought to result in its subordination to the principle of sovereign equality.

The uncertainties as to the justifications for sovereign equality and the extent to which it negated differences in power are evident also in debates of the period concerning specific international legal doctrines. Recognized sovereign states were equal for such purposes as claiming diplomatic immunity and sovereign immunity and having their laws accepted in other states' courts, but non-recognition could be used to deny the premiss for such equality, as in the case of delayed recognition of the Bolshevik government after the formation of the USSR.[13] Equality was one of the principles weighed in arms control and disarmament projects in the period between the two World Wars, but it was departed from in specific treaties that were actually adopted, such as the Washington Naval Treaty. Special problems arose in the design of international institutions. After the deadlock in negotiations at the 1907 Hague Peace Conference for a new standing international court, which found no compromise between the insistence of less powerful states that equality meant every state must be permitted to appoint a judge and the insistence of the more powerful states that such a system was unwieldy and that only great powers could expect always to have judges of their nationalities appointed, international lawyers in the US and other powerful states sought to staunch the further extension of equal rights arguments,

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explanation, reciprocity, is preferred by structural realists in international relations (for whom particular configurations of power among states will largely determine the patterns of inter-state interactions), as reciprocity potentially accounts for the otherwise puzzling acceptance by states of formal equality despite disparities of power.

[10] For example, T. J. Lawrence, *Essays on Some Disputed Questions in Modern International Law* (2nd ed., 1885): 'It is not merely that the stronger states have influence proportionate to their strength; but that custom has given them what can hardly be distinguished from a legal right to settle certain questions as they please, the smaller states being obliged to acquiesce in their decisions.' The same view was maintained long after the 1907 Hague Conference: see, e.g., *Idem, The Society of Nations: Its Past, Present and Possible Future* (1919). Identifying what he believed was a fissure that must be crossed to build an international law for the future, James Brown Scott observed: 'The "Primacy of the Great Powers" was a fixed idea with Dr. Lawrence, just as the juridical equality of nations is an obsession of the present writer.' 'In Memoriam – Thomas Joseph Lawrence 1849–1920', 13 *AJIL* (1920) 223, at 225.

[11] Baker, 'The Doctrine of Legal Equality of States', 4 *BYbIL* (1923–1924) 1.

[12] Oppenheim, *supra* note 1, at 161–164.

[13] *Luther v. Sagor* [1921] 3 KB 532 (English Court of Appeal); *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 NY 23 (New York Court of Appeals, 1930).

which they saw as an obstruction to the progressive growth of effective international legal institutions.[14] In the design of new international organizations, sovereign equality was thought to mandate membership open to all states, equality in voting power, and unanimity rules in certain binding decisions and with respect to reservations to multilateral treaties, but each phase of institutional design in fact involved compromises between sovereign equality, great power primacy and institutional efficacy.[15]

B Racial, Religious and Cultural Diversity: To Whom Does Sovereign Equality Apply?

Confrontation with religious, cultural and racial difference was a perennial issue in the historical development of what became the Eurocentric international legal order. An earlier tendency in the European natural law tradition to discuss international law in universal terms and by reference to a *civitas gentium maxima*,[16] albeit with important distinctions tending to favour Europeans and Christians over others, was gradually from the 18th century displaced by a view of international law as the public law of the European heartland.[17] Europe was established as the original sphere of operation of international law. There was a geographic element to this, in that many of the problems regulated by international law, and much of the relevant practice and law-making activity, arose within or between European states. But the relevant practice and interactions came more and more to involve, especially during the 19th century, extra-European states and entities; many of these states and entities accepted and applied much the same set of legal standards, although others did not. This interaction contributed to a second development, the informal doctrinal promulgation of a membership test for international society, sometimes described as the 'standard of civilization'. Extra-European entities with the attributes of statehood were admitted to the Family of Nations as their degree of civilization and intercourse with the Family of Nations warranted. The test for membership was a creation of doctrine much more than of practice, and varied among publicists. Writing in 1905, Oppenheim had no hesitation in declaring that Christianity was not a requisite of a civilized state: civilization meant simply whatever was necessary 'to enable the respective State and its subjects to understand and to act in conformity with the principles of the Law of Nations'.[18] Acceptance of the system of sovereign states, and the convenience of the strongest powers, were two elements of the test for

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[14] This is a major preoccupation of E. D. Dickinson, *The Equality of States in International Law* (1920).

[15] L. Duguit, *Traité de droit constitutionnel* (2nd ed., 1921); J. H. Ralston, *Democracy's International Law* (1922); F. P. Walters, *History of the League of Nations* (1961); D. H. Miller, *The Drafting of the Covenant* (1928).

[16] E.g. F. Suarez, *Tractatus de Legibus ac Deo Legislatore* (1612); C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764/1934).

[17] J. J. Moser, *Grund-Säze des Europäischen Völcker-Rechts in Kriegs-Zeiten* (1752); G. F. von Martens, *Précis du Droit des Gens Moderne de l'Europe* (3rd ed., 1821); K. G. Günther, *Europäisches Völkerrecht in Friedenszeiten* (part 1, 1787).

[18] Oppenheim, *supra* note 1, at 31.

membership. This view conditioned a reductionist schematic of the history of international law, of which Oppenheim's account is exemplary: the international law of the Family of Nations originated amongst the Christian states of Europe, was extended with the independence of the former European colonies of the Americas and the establishment of other Christian states such as Liberia and Haiti, was extended again with the admission in 1856 of the Ottoman Empire to the advantages of the public law and Concert of Europe, and again with the acceptance of Japan as a great power after 1895.[19] In Oppenheim's view in 1905, the full members of the Family of Nations were the independent European states (including Turkey and Russia), the independent states of North, Central and South America, plus Liberia, the Congo Free State, and Japan. Egypt was half-sovereign owing to Turkish suzerainty. Tunis was half-sovereign owing to the French protectorate. Morocco and Abyssinia were regarded by Oppenheim as 'full-Sovereign States', but as members of the Family of Nations only for some purposes (for example, diplomacy and treaty-making), but not for other purposes (such as restrictions on the conduct of war). Similarly Oppenheim viewed Persia, China, Korea, Siam and Tibet as members of the Family of Nations for some purposes, but not as international legal persons with the same position as 'Christian States'.[20]

The insistence on a European model of statehood and the organization of the state, and the articulation in parochial terms of a 'standard of civilization' which was itself applied in self-serving ways, were all conducive to the structuring and promotion of a great deal of inequality. There was, in Oppenheim's view, no equality for half-civilized and similar states, states under suzerainty and under protectorate, or member states of a federal state (depending on the case). In his opinion — although this view was contested at the time — the law of nations placed no restrictions on the treatment of states or entities that are wholly outside the Family of Nations; such treatment was a matter of discretion, and frequently was 'not only contrary to Christian morality, but arbitrary and barbarous'.[21] The Eurocentric system excluded from its purview entities

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[19] For a comparable, if slightly more nuanced, scheme, see J. Westlake, *International Law: Part 1, Peace* (1904), at 44–48. The practice of interactions was so much more textured as to make every element of Oppenheim's schematic summary contestable. Useful studies include G. Gong, *The Standard of 'Civilization' in International Society* (1984); H. Bull and A. Watson (eds), *The Expansion of International Society* (1984); McKinnon Wood, 'The Treaty of Paris and Turkey's Status in International Law', 37 *AJIL* (1943) 262; Yongjin Zhang, *China in the International System, 1918–1920* (1991).

[20] Oppenheim, *supra* note 1, at 154–157. In the case of non-Christian states such as China, Korea, Siam and Persia, and the Christian state of Abyssinia: 'Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible. ... This condition of things will, however, not last very long. It may be expected that with the progress of civilisation these States will become sooner or later International Persons in the full sense of the term' (at 148 and 149). Lorimer in 188 3 offered a similar list to that of Oppenheim, although he regarded Turkey and Japan as deserving of only partial political recognition. In the case of Turkey he accepted the good qualities of the peasantry, but was unconvinced about any possibilities for progress amongst the upper classes. In the case of the Japanese, if they 'continue their present rate of progress for another twenty years' they may well become entitled to plenary political recognition. J. Lorimer, *Institutes of the Law of Nations*, vol. 1 (1883), at 101–103.

[21] Oppenheim, *supra* note 1, at 34, see also 346–347.

that powerful recognized states were not willing to treat as 'states', whether because they wished to dominate or colonize these entities, or because these did not closely resemble 'states' as the category had come to be understood, or because they showed little acceptance of the organizing ideas of the system, or because they did not seem likely to uphold international legal obligations. While a weaker entity such as Abyssinia might be excluded on grounds of difference, arguments that Meiji Japan was still too different were eclipsed by Japan's military victories, especially the 1904–1905 Russo-Japanese war. While power and interests were central to this system, they do not represent the whole explanation for the perpetuation of inequalities. The rejection of Japan's proposal for a racial equality clause in the League of Nations Covenant was evidence not just of the limited strength of Asian and African states in the Versailles diplomacy, but also of a deeper cognitive or identity-based resistance to racial equality as a global principle.[22] This was connected not only with systematic racial discrimination in independent states, but also with colonial policy in territories where the maintenance of colonial rule had come increasingly to depend on the structuring of distinctions among ethnic groups.[23]

This membership standard and the Western dominance that made it possible had the further important effect of establishing a degree of structural homology among sovereign states. The Western model of the state became established globally as a structural equilibrium or a reference point. Once established, it came to dominate the normative and ontological landscape, and helped to delegitimize the possible alternatives. Non-European forms of political organization that might have attained widespread legitimacy as alternatives to the European-style sovereign state were subordinated and delegitimized as global models, a situation which for the time being remains unlikely to be reversed, however important such non-European forms are in contemporary politics. With its global ascendancy and homologizing tendency, the Western system of international law provided some basis for the development of minimum standards on such matters as treatment of foreigners and their property, the law of the sea, recognition of governments, and perhaps even religious tolerance. Whatever its limitations and inequalities, this modest structure of international order was the foundation upon which attempts to regulate state conduct and establish legal responsibility have thereafter built.

The gatekeeping doctrines of recognition of states and membership in the Family of Nations allowed some consideration of regime type, but as between recognized member states the modest scheme described by Oppenheim in 1905 did not draw legal distinctions on the basis of regime type. The division of the world into functionally and juridically similar territorial units implied that, provided the entity was treated internationally as a state, its domestic structure and regime type did not matter.[24] This

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[22] Vincent, 'Racial Equality', in H. Bull and A. Watson (eds), *The Expansion of International Society* (1984), at 239.

[23] See, e.g., B. Anderson, *Imagined Communities* (2nd ed., 1991).

[24] For criticism, see Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992) 1907, at 1923–1926.

remained an orthodox view for most of the century, as the International Court of Justice made clear in 1986 in *Nicaragua v. USA*.[25]

Nevertheless, the characterization of the system of sovereign equality embodied in the writings of legal positivists such as Oppenheim as a 'billiard ball' approach is excessively stark. States were expected to be able to keep order, particularly to meet international obligations to foreigners. As international economic law and labour law began to develop, internal decisions of states began to be subject to external standards, as with the attempt in the early 1900s to achieve a level playing field through uniform restrictions on use of phosphorus in workplaces. There were proposals to apply viability criteria to states, although the practical application of these was limited. Oppenheim acknowledged the strength of the principle of nationality and the desirability of treating minorities within states on a basis of equality. Although the two pre-World War I editions did not contain it, the shattering effects of that conflict prompted the addition to Oppenheim's list of morals derivable from the history of international law of the proposition:

> that the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy. Autocratic government, not being responsible to the nation it dominates, has a tendency to base the external policy of the State, just as much as its internal policy, on brute force and intrigue; whereas constitutional government cannot help basing both its external and its internal policy ultimately on the consent of the governed. And although it is not at all to be taken for granted that democracy will always and everywhere stand for international right and justice, so much is certain, that it excludes a policy of personal aggrandizement and insatiable territorial expansion, which in the past has been the cause of many wars.[26]

Judicial decisions and arbitral awards of the period also suggested awareness of the importance in international relations of the links between sovereignty and domestic structures. The arbitral tribunal in the *North Atlantic Coast Fisheries Arbitration* (1910) rejected the implication of a servitude for the USA in the territorial waters of Canada, finding that the creation of such sovereign rights for the United States would involve dividing the sovereignty over the waters. The Tribunal acknowledged that this did occur among entities with 'quasi-sovereignty', as in the Holy Roman Empire, but opined that modern states, particularly Britain, had never accepted such partitions of sovereignty, 'owing to the Constitution of a modern State requiring essential sovereignty and independence.'[27] The doctrine of international servitudes was 'little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States and to the present international relations of sovereign States.'[28] The equivocation in this statement was matched in wider political discourse. Where Woodrow Wilson sought

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[25]   'Military and Paramilitary Activities' (*Nicaragua v. USA*) ICJ Reports (1986) 14.

[26]   *Oppenheim's International Law*, 4th ed., vol. 1 (A. McNair (ed.), 1928), at 100–101.

[27]   *Proceedings in the North Atlantic Coast Fisheries Arbitration before the Permanent Court of Arbitration at the Hague*, vol. 1 (1912), at 76.

[28]   *Ibid.*

to promote constitutional democracy as a general principle, E. H. Carr attacked the Wilsonian predilection for making American principles the principles of mankind, and Americans into the bearers of a higher ethic.[29]

Practice was often more nuanced than broad doctrinal assertions suggest, but it is nonetheless evident that treatment of issues of equality and inequality in the traditional conceptual structure of international law based on sovereign equality was grossly inadequate as a basis for accommodating the developments of this century; major difficulties have resulted from the simultaneous commitments to Oppenheim's basic structure and to making adequate provision for new realities.[30] Numerous devices have been honed to reconcile the system of sovereign equality and unit homogeneity with challenges posed by the facts of inequality and difference.

C Strategies for Reconciling the Sovereign Equality System with Existing Inequalities

Oppenheim, like many of his leading successors, was an accomplished exponent of devices to reconcile the idea of obligatory international law with the positivist conception of a legal system founded on state sovereignty, including the binding/non-binding dichotomy; the analytical separation of law and politics; and some focus on the then limited sphere of international legal process. These strategies were employed, for example, to enable adherence to the fundamental legal value of formal isonomy while limiting the range of inequalities with which the international legal system concerns itself. Thus Oppenheim, like other legal positivists, separates law from non-law so that the inequalities become social rather than legal facts. Many positivist writers emphasize consent (an analogue to the move from status to contract) as explanation for such phenomena as protectorates, oppressive rules and voting inequalities. Categories used for distinction or discrimination are defined by neutral-sounding criteria which are less likely to attract strict scrutiny; for instance, 'specially affected states' are deemed to be a relevant category in weighing competing practice to determine the existence or otherwise of a rule of customary international law,[31] but this category operates mainly (but, prudently, not exclusively) for the benefit of powerful states. The theoretical problem arising from the fact that many smaller states may not show any support (in the sense of practice) for a rule is addressed by the move from consent to consensus; this enables fixing responsibilities on states that have not

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[29] *The Twenty Years' Crisis* (2nd ed., 1946), at 167.

[30] Thoughtful reviews of the evolution of international law and the tensions within it, stimulated by the publication in 1992 of the 9th edition of Oppenheim's volume on the law of peace, include Reisman, 'Lassa Oppenheim's Nine Lives', 19 *Yale Journal of International Law* (1993) 255; Grieg, 'Oppenheim Revisited: An Australian Perspective', 14 *Australian Year Book of International Law* (1993) 227; and Janis, 'The New *Oppenheim* and its Theory of International Law', 16 *Oxford Journal of Legal Studies* (1996) 329.

[31] This approach is defended in Westlake, *supra* note 19, at 16–17. It is adopted by the ICJ in the *North Sea Continental Shelf cases (Denmark v. Germany, Germany v. Netherlands)*, ICJ Reports (1969) 3.

in fact accepted them, and is supported by the persistent objector rule which in practice is mainly a negotiating card (or possible outlet) for the powerful.[32]

Apparent inequalities among peoples in achieving independence and statehood were addressed by separating equality of states from equality of peoples, and managing some of the more pressing demands through the principle of nationalities, the principle of self-determination, and minority rights, all formulated as universal principles but applied only selectively in practice.

Progress toward equality has been continuously anticipated in international law: in Wilsonian or Leninist versions of self-determination, in the terms of the Class A Mandates of the League of Nations, in the provisions for trusteeship and decolonization under the UN Charter, in the hopes for general and complete disarmament in UN documents. Shortcomings in the attainment of equality are explained by the relative infancy and temporary weakness of international law.[33] Enduring inequalities among equal sovereigns, such as the structural inequalities in the United Nations Charter, the Nuclear Non-Proliferation Treaty, or the voting arrangements of the International Monetary Fund, are characterized either as special functional exceptions or as temporary accommodations to the realities of power. There are debates as to how equality is most fairly expressed in representative arrangements, such as proposals for the most populous states from particular regions to become permanent members of the Security Council, but accounts of international law that would base it upon the management of inequality, for example through the principle of balance of power recognized by Oppenheim, have virtually disappeared from the literature of international law, although they are more evident in its practice.[34]

2 Challenges to the Traditional International Law System of Sovereignty and Equality

The 'traditional' account of international law as law between states uses the notion of state sovereignty as a somewhat artificial organizing device to simplify the complex world in order to manage it. 'States' represent the carving of the world into non-overlapping territorial units, now virtually exhaustive of the earth's land area, vested with the authority to regulate in their territories, the responsibility not to harm certain interests of others, and the capacity to make claims when they or their nationals are affected by illegality for which other states or international organizations are responsible. A reasonably comprehensive if decentralized effort is made to connect every individual, corporation, vessel and aircraft with at least one territorial

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[32]   Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYbIL* (1985) 1; Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal* (1985) 457.

[33]   Cf. E. H. Carr's argument at the beginning of *The Twenty Years' Crisis* that international politics is still in its infancy — a position which indicates Carr's distance from political realists for whom basic political insights are almost timeless.

[34]   Cf., however, G. Ladreit de Lacharrière, *La Politique Juridique Extérieure* (1983). For a thoughtful response see Pellet, 'Le sage, le prince et le savant', 112 *Journal de droit international* (1985) 407.

state for these purposes. Even as it was becoming entrenched in the international law framework of the world, this organizing account of the legal system among sovereign states was confronted with numerous glaring problems. Refutations of, or uncertainty about, the suitability of the 'traditional' international law concept of state sovereignty have been a feature of the international legal literature throughout the 20th century,[35] but the recent perception of a globalizing, democratizing world, no longer dominated by the politics of bipolar confrontation between nuclear alliances, has provided empirical sustenance to normative arguments against excesses of the sovereignty system that have gained ground in the West. This part will briefly consider some possible implications of contemporary phenomena for sovereignty and for alternatives to the sovereignty system.

Globalization and Changes in International Rule-making. The depth and density of rules promulgated by intergovernmental organizations is increasing, and these organizations are becoming more assertive *vis-à-vis* individual sovereign states in rule-making and in implementation. Inequality between member states has become relatively common in intergovernmental organizations: requirements of unanimity in voting, conferring a veto on all, are now rare, despite the frequent use of consensus; systems designed to reflect major interests through weighted voting or specially defined functional majorities have become more common; and a few organizations are able to make intrusive demands on member states. State dominance in rule-making organizations is slowly accommodating increased roles of non-state groups, for example private standard-setting bodies in the International Standards Organization, indigenous peoples' organizations in the Arctic Council, and the influence of industry in the operation of the Montreal Protocol stratospheric ozone regime.

The amorphous congeries of phenomena loosely denominated economic 'globalization' suggest that transnational industries and markets increasingly require forms of transnational regulation or regulatory cooperation that differ from the methods and institutions of traditional inter-state law-making. In some sectors national laws are converging around standards established in the dominant states. In others important operational norms are shaped by non-governmental groups or by market practitioners, on such matters as forest management practices, labour standards for shoe and apparel exporters, accounting standards, marine insurance terms, and interpretation of international commercial contracts. Forms of 'world law' may be emerging — whether through mimesis, or world culture, or regulatory competition — from which most states are not free to depart except at intolerable cost.[36] These emerging features of rule-making are being replicated, more slowly, in evolving systems of implementation and enforcement. National courts, administrative agencies, and perhaps even legislatures are said increasingly to function not

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[35]   See, e.g., Korowicz, 'Modern Doctrines of the Sovereignty of States — II', 5 *Nederlands Tijdschrift voor Internationaal Recht* (1958) 150, dividing publicists into three camps: those for whom sovereignty is 'a foundation of the whole system' of international law; those who emphasize 'the necessity of increasing limitations of State sovereignty for the benefit of the international community'; and those 'who do not consider sovereignty to be a basic criterion of the State as subject of international law'.

[36]   See, e.g., G. Teubner (ed.), *Global Law without a State* (1997).

simply as parochial national institutions but as parts of cooperative regulatory and enforcement webs, to interact in transgovernmental networks 'with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.'[37] Proposals for private schemes of implementation are appearing in diverse areas, from tradable CO_2 emission permits to private contracting for enforcement of intellectual property rules.

There is some evidence of convergence of substantive legal rules across various groups of states, and of increasing cross-recognition by states of each other's national laws and institutional acts. To this body of convergent state norms must be added the norms established and applied by non-state actors *inter se*, whether with or without any state involvement — standard terms in particular industries, the UNCITRAL rules, normative practices of lawyers and other professionals in structuring capital market transactions, and the international arrangements of credit card agencies and global franchises. While these might be regarded as informal social norms, they are effective in shaping behaviour, and often constrain the regulatory possibilities effectively open to states and inter-state institutions.[38] In contemporary practice such transnational normative phenomena are important and must not be ignored simply because the sources-based conceptual apparatus of international law struggles to deal with them.[39] It is not realistic or adequate in all cases simply to reformulate such private norms on the basis of some consent or delegation by sovereign will. The net effect of such changes in the making and implementation of norms has been to shift decision-making to powerful states and non-state groups, widening the gulf between law-makers and law-takers.

Transnational Civil Society. For many proponents of the emergence of a transnational civil society, states should be seen simply as important loci of power and authority within a transnational civil society which permeates through their borders.[40] That society finds voice and political expression through states but not only through states — the interests of individuals and groups are also expressed in many other ways, and proposals abound for institutional reform to enhance such representation.[41] International law can be seen as the law of such a transnational society, regulating states but not dependent entirely on states for its existence, content, or implementation. In more ambitious versions of this theory, state sovereignty is in some respects constituted by the law of the transnational civil society, escaping the tendency within the traditional framework for international law to take sovereignty as a pre-legal social fact. Inequalities in access, participation, power and

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[37]   Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 189.

[38]   See, e.g., A. Verdross, *Völkerrecht* (5th ed., 1964); *Idem*, 'On the Concept of International Law', 43 *AJIL* (1949) 453; P. C. Jessup, *Transnational Law* (1956); Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181.

[39]   Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503.

[40]   Falk, 'The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions', in D. Archibugi and D. Held (eds), *Cosmopolitan Democracy* (1995) 163.

[41]   See, e.g., T. Franck, *Fairness in International Law* (1995), on the addition of a popular assembly in the United Nations.

accountability within this emerging transnational civil society have scarcely been confronted in international law, in part because of liberal commitments to the marketplace of ideas and suspicion of attempts to regulate information.

Democratization. Democratization potentially reinforces sovereignty: democracy legitimizes state institutions, and these institutions rather than international or transnational bodies are the principal organized expression of the popular will or interests whose vindication is sought by democratic theory. Nevertheless, it is sometimes argued that the realization of true democracy in complex polities may have the consequence that the unified sovereignty of states itself disappears, undermining the assumption that unitary sovereign states are the foundation for the international legal system. Authority and power are still identifiable, but the argument is that the concentration of these in any particular location has been so thoroughly checked, balanced and dispersed that there is no traditional 'sovereignty'. The critiques of unity and centralization directed at the sovereignty model by feminist theorists, radical ecologists, advocates of democratic decentralization, and institutional cosmopolitanists all favour wide vertical dispersion of sovereignty as a means to achieve such ethical goals as peace and security, reduced oppression, global economic justice, and participation.[42] Systems of divided or dispersed sovereignty provide one possible approach to the representation problems that are central to liberal political theory. Movements toward greater power for local communities, land and government rights for indigenous peoples, autonomy for various ethnic or territorial groups, fragmentation of authority to promote identity and difference, and legal recognition of civil society organizations, all promote more pluralistic governance arrangements. Thus far, however, such arguments have been met by responses of the sort formulated by Hans Morgenthau:

> Democratic constitutions, especially those consisting of a system of checks and balances, have purposely obscured the problem of sovereignty and glossed over the need for a definite location of the sovereign power. ... In their endeavor to make democracy 'a government of laws and not of men' they forgot that in any state, democratic or otherwise, there must be a man or group of men ultimately responsible for the exercise of political authority ... in a democracy that responsibility lies dormant in normal times. ... Yet in times of crisis and war that ultimate responsibility asserts itself, as it did under the presidencies of Lincoln, Wilson, and the two Roosevelts, and leaves to constitutional theories the arduous task of arguing it away after the event.[43]

But the reality is that crises of authority in which the pinpoint location of concentrated sovereignty must be established are sufficiently infrequent that more diffuse models are beginning to acquire some legitimacy, especially in the prosperous

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[42]   On the moral cosmopolitanist idea that every human being has a global stature as an ultimate unit of moral concern, see, e.g., Pogge, 'Cosmopolitanism and Sovereignty', 103 *Ethics* (1992) 48, at 49. See also T. W. Pogge, *Realizing Rawls* (1989); and C. Beitz, *Political Theory and International Relations* (1979). Pogge proposes division of sovereignty, not the creation of numerous autarkic sovereign units or Rousseau's advocacy of return to the city-state. For a more legally-oriented cosmopolitanist perspective, see Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53.

[43]   Morgenthau, *Politics among Nations* (2nd ed., 1958), at 305–306.

democracies. The European Union provides the most influential archetype. Nonetheless, the state has proved remarkably enduring as a locus of authority.[44] This is true even in the European Union, the most far-reaching institutional project for divided sovereignty and multiple levels of governance. While there is clearly a possibility of the European Union evolving in ways that displace the sovereignty model of the place of the state and do not simply substitute the EU as a new sovereign,[45] states have so far managed the institutional architecture to preserve major roles for themselves in taking the crucial decisions on governance forms, and the kinds of roles played by states in international relations are still played within the EU.[46]

The cumulative pressure on the traditional international legal doctrine of sovereignty arising from these empirical and conceptual changes is considerable. Some incidents of state sovereignty — the attributes of membership in the international legal order, such as the capacities to make treaties, join the United Nations, and claim sovereign immunity in other states' courts for certain governmental acts — are deeply embedded as constitutive rules of the game in the international law system.[47] This set of arrangements, established partly on the basis of mutual interest and reciprocity, has become a structural equilibrium.[48] Each actor has incentives to be part of this membership system, both for reasons of efficacy in the conduct of international affairs and because of benefits conferred on leaders in internal politics by international recognition. No significant powerful actors have an incentive to defect from the system. It is self-enforcing, self-perpetuating, and reinforced to some degree by cognitive entrenchment. It is likely to change only

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[44]   Applying this insight, Stephen Krasner astutely noted in 1988: 'The Soviet effort to base relations in Eastern Europe on transnational functional agencies rather than state-to-state agreements has eroded over time, despite the continued material domination of the Soviet Union.' 'Sovereignty: An Institutional Perspective', 21 *Comparative Political Studies* (1988) 66, at 89–90.

[45]   See, e.g., Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403.

[46]   See, e.g., A. Milward, *The European Rescue of the Nation-State* (1992); and Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', 31 *Journal of Common Market Studies* (1993) 473. This point is emphasized in the 1993 decision of the German *Bundesverfassungsgericht* (Federal Constitutional Court) on the compatibility of the Maastricht Treaty with the German Basic Law, 33 ILM (1994) 388, 424–425. The Court held that even after the Maastricht Treaty, the FRG remains a member of an intergovernmental community, the authority of which is derived from the Member States and has binding effect in German sovereign territory only if a German order governing application of law is issued. Germany may terminate membership in the European Union by passage of an appropriate act. Germany thus maintains its status as a sovereign state in its own right as well as the sovereign equality with other states referred to in Article 2 of the UN Charter. Some subsequent German actions, including actions of German courts in the controversy concerning the EU bananas regime, substantiate the impact of this view.

[47]   For fuller discussion see Kingsbury, 'Judicial Determination of Foreign "Government" Status', *Law Quarterly Review* 109 (1993) 377. A sovereignty of membership is emphasized in A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

[48]   The issues treated here are acutely analysed by Stephen Krasner in a series of articles: 'Sovereignty: An Institutional Perspective', *supra* note 44; *Idem*, 'Westphalia and All That', in J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy* (1993), at 235; *Idem*, 'Compromising Westphalia', 20 *International Security* (1995–1996) 115; *Idem*, 'Power Politics, Institutions, and Transnational Relations', in T. Risse-Kappen (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (1995), at 257; and in a forthcoming book on sovereignty.

incrementally unless it becomes grossly inefficient to its purposes, or suffers a crisis of legitimacy.

The position is more complex, however, in the case of other incidents of sovereignty in international law. *Independence*, in the sense of the freedom to make choices as to economic, political and social systems, domestic policy, and foreign policy, is routinely infringed. Where such infringement is non-forcible, the rules of general international law do not provide very comprehensive protection for independence, and not all of the rules bearing on this topic are upheld even by strong social pressure. Thus the prohibition of the use of force does not encompass economic coercion,[49] and economic coercion simpliciter in the conclusion of a treaty is not a ground for its nullity.[50] *Territorial supremacy* is more fully protected by international law rules, including most fundamentally the prohibition of the acquisition of territory by conquest, and the clear rules against overflight and incursions by foreign law enforcement officials. Even here, however, there are exceptions, including for example the stationing of UN guards in Northern Iraq, US air patrols over Iraq, the UN sanctions against Libya tied to the surrender of the Lockerbie bombing suspects,[51] and the relatively weak rules on remote sensing and on extraterritorial jurisdiction based on the effects doctrine. *Personal supremacy* of the state over its nationals has been eroded by human rights law, increasing acceptance of dual nationality with rights of one state of nationality against the other,[52] and increased availability to individuals and corporate bodies of a variety of national courts and international tribunals in which the action of a particular state may be challenged.[53] *Organizational sovereignty* is protected by doctrines limiting jurisdiction of other states and by the principle of non-intervention, but the burgeoning range of inter-state, mixed and private entities engaged in norm formation and governance is not closely controlled by international law; some European states found it necessary to amend constitutional monopolies on legislative power to accommodate the increasing legislative capacity of the European Community.

In sum, pressures on the traditional sovereignty-based system of international law have resulted in the weakening of the domestic/international split, percolation of

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[49]   See also *Nicaragua v. USA* (1986) *supra* note 25, where the ICJ showed little disposition to rule against the US under general international law on the abrupt and coercive denial of sugar import quotas to Nicaragua. On non-forcible counter-measures see L. Boisson de Chazournes. *Les contre-mesures dans les relations internationales économiques* (1992).

[50]   The formulation in Article 52 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty is void where the agreement was secured by the threat or use of force, but a proposal by a group of developing states to define force so as to include economic or political pressure was rejected. This represented, at the time, a diplomatic and legal victory for a group of Western states. For the perspective of US negotiators see Kearney and Dalton, 'The Treaty on Treaties', 64 *AJIL* (1970) 495, at 532–535.

[51]   For criticism of various actions of the UN Security Council on grounds of conflict with clear or contested international law principles, see Brownlie, 'International Law in the Context of a Changing World Order', in N. Jasentuliyana (ed.), *Perspectives on International Law* (1995), at 49.

[52]   See Franck, 'Clan and Superclan: Loyalty. Identity and Community in Law and Practice', 90 *AJIL* (1996) 359, at 376–382; and the jurisprudence of the Iran–US Claims Tribunal on claims by dual nationals.

[53]   Slaughter, *supra* note 39; Koh, *supra* note 38; *Idem*, 'Transnational Public Law Litigation', 100 *Yale Law Journal* (1991) 2347; L. Brilmayer, *Justifying International Acts* (1989).

commitments to formal isonomy and to some principles of substantive equality from domestic law and politics to international law, promotion internationally of forms of market equality and extra-market inequality associated with economic liberalism, gradual acceptance of international obligations toward non-state groups, the forced enlargement of the minimalist involvement of international law in human rights and in the structure of internal polities, and the clouding of the concept of international law as a pure state-privileging inter-state system. These adaptations in doctrine reflect the practical and normative inadequacies of the traditional conception of international law as the law among sovereign states that have long been recognized in international legal scholarship, but over the past century these adaptations have been accommodated by manipulation of the traditional framework rather than by construction of a widely endorsed alternative. The traditional system of sovereignty is under strain, but for the time being is continuing to creak along.[54]

3 Implications for Inequality of Discarding Traditional International Law Sovereignty

The continuing rapid changes often described as 'globalization' and 'democratization', and the new possibilities and uncertainties opened by the lifting of Cold War rigidities, have spurred intensified criticism of the traditional system of sovereign equality, and the construction of incipient alternatives.

It is all too evident that the high 20th century commitment to virtually universal formal equality of states in the sovereignty model has not resolved many of the underlying problems. In terms of their capacity to manage issues of national economic and social policy, their political ability to represent and regulate, their provision of a rule of law system and guarantees of property rights and basic civil rights, many putative states have only the trappings but not most of the effective functions of states. The activities of some state institutions appear to make human flourishing and economic activity more rather than less difficult. In some cases, they have neither monopolized the use of force nor achieved the maintenance of basic order; in other cases, there is order, but it is not provided by the institutions of the state. All of this leads to the argument that the traditional sovereignty-based system of international law has in egregious cases proved to be a travesty, in which priorities of good governance and human welfare were subordinated to a very formal commitment to ineffective structures.

One alternative to the traditional approach, deriving from Western liberal democratic theory, begins with individuals, organized into political groupings to pursue collective interests through the institutions and public politics of civil society,

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[54] See the judicious discussion in Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law* (1997) 7.

local, state, transnational and international institutions.[55] Institutions reflect both past decisions and the interests of particular constituencies presently wielding power. The regulatory influence of institutions characteristically reaches beyond those groups who are influential within them, but democratic principles require that all influenced by regulatory decisions have at least the possibility of a voice in the relevant institution. Regulatory competences are allocated among institutions on the basis of principles of constitutional design that vary with the architects but are seldom based purely on efficiency.[56] This approach leads to a view of state institutions not as representatives of sovereign power but simply as functional institutions competing with each other and with other actors in a market to provide cost-effective governance at the requisite standard. Responsiveness to the needs and interests of particular constituencies is a vital element of success in such a market.

What would be the effect of a general rejection of the present commitment to traditional sovereignty, and its replacement by a functionalist liberal view of market-based governance institutions? States would not disappear: they would remain the principal units of order and governance. Legal rules of mutual respect and coordination would continue to be necessary. The crucial change would be normative — the protections and status conferred by the concept of sovereignty would cease to be fundamental norms upon the maintenance of which the stability of the legal system depends, becoming instead overtly contractual, and defeasible. Just as the abolition of elaborate diplomatic orders of precedence, or of aristocratic titles, wrought a change to the normative environment without in itself redistributing material power, states would continue as loci of power and authority; but without the privilege conferred by sovereignty, some might suffer severely, and this suffering would be distributed unevenly. International law would perhaps arrive at a functional conception of sovereignty as a bargaining resource of variable quantum, similar to that described by Robert Keohane: 'Sovereignty no longer enables states to exert effective supremacy over what occurs within their territories .... What sovereignty does confer on states under conditions of complex interdependence is legal authority that can either be exercised to the detriment of other states' interests or be bargained

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[55]   See generally Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* (1997) 513; Keohane, 'International Liberalism Reconsidered', in J. Dunn (ed.), *The Economic Limits of Modern Politics* (1990), at 165. As Philip Allott points out, the view of democracy as a process for the expression of interests is associated especially with the United States: he contrasts this with what he regards as a distinctive post-Marxist Western European view of democracy as 'a political system for realizing the communal interest'. Allott, 'The European Community is Not the True European Community', 100 *Yale Law Journal* (1991) 2485, at 2491.

[56]   As Robert Boyer observes, 'asymmetry of power has definite consequences on the design of institutions, which only rarely enhance efficiency'. Boyer, 'The Convergence Hypothesis Revisited: Globalization but Still the Century of Nations', in S. Berger and R. Dore (eds), *National Diversity and Global Capitalism* (1996), at 56.

away in return for influence over others' policies and therefore greater gains from exchange.'[57]

The normative inhibitions associated with sovereignty moderate existing inequalities of power between states, and provide a shield for weak states and weak institutions. These inequalities would become more pronounced if the universal normative understandings associated with sovereignty were to be discarded, and sovereignty were to become simply a summation of the operations of the market, a bargaining resource to be traded off against other sources of value. Specific rules presently associated with sovereignty would continue to have a basis in contract and reciprocity, but the terms of these revisable bargains would reflect inequalities of power between states rather than the shared social understandings of what is inherent in statehood. Legal sovereignty would become, as the international relations aphorism has it, a variable rather than a parameter. Three more specific implications for inequality among states of a diminution in the normative power of the traditional concept of state sovereignty may be briefly noted. The question whether heightened inequalities amongst states might be justified by a reduction in inequalities and injustices among individuals and groups that an alternative system might achieve will be considered in the conclusion.

A Diminished Restraints on Coercive Intervention

The traditional international law concept of sovereignty constitutes an important normative inhibition to military intervention. There have been extraordinarily few cases of recolonization of former colonies once recognized as independent states.[58] Since 1945 not only has the death rate of sovereign states been remarkably low,[59] there have been few military invasions intended to terminate the independent existence of an established state. Direct large-scale unilateral military intervention without an invitation has probably been constrained somewhat by the sovereignty model and the UN Charter norms that give expression to it. Advocacy of displacing sovereignty in favour of a less state-centric, more liberal international legal order undervalues the importance of this achievement. Such advocacy is animated by international political economy and other governance issues rather than issues of

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[57] Keohane, 'Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society', in H.-H. Holm and G. Sorensen (eds), *Whose World Order?: Uneven Globalization and the End of the Cold War* (1995) 165, at 176–177. See also the discussion of 'operational sovereignty' in Keohane, 'Sovereignty, Interdependence, and International Institutions', in L. Miller and M. J. Smith (eds), *Ideas and Ideals: Essays on Politics in Honor of Stanley Hoffman* (1993), at 91.

[58] Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in T. Biersteker and C. Weber (eds), *State Sovereignty as Social Construct* (1996) 22, at 25; Strang, 'Anomaly and Commonplace in European Political Expansion: Realist and Institutionalist Accounts', 45 *International Organization* (1991) 143.

[59] K. Waltz, *Theory of International Politics* (1979). Oppenheim reflected the experience of his times in acknowledging that every now and again the odd state would disappear and new ones appear; but while the rate of new appearances has quickened, the rate of disappearances has declined to almost zero after 1945.

military security and the use of force in inter-state wars. This emphasis is defended by proponents on the ground that the absence of international war between liberal states reduces the importance of military security in a liberal 'zone of peace'.[60] But the world is far from being a zone of peace. There is a great risk of weakening hard-won normative arguments against military intervention that have been associated, especially since 1945, with the universal system of sovereign equality.

One of the major historic arguments for intervention, used frequently in the century prior to 1945, has been the unwillingness or ineffectiveness of local authorities in discharging international obligations. This was a principal justification of, for instance, extraterritorial consular jurisdiction imposed by European powers and the US on Turkey, Japan, China, Siam, Morocco and other entities, and the collective military interventions in Mexico in 1861 (conducted primarily by France, with the support of Britain and Spain), China in 1898–1901 (the suppression of the Boxer uprising by a group of Western powers and Japan), and Venezuela in 1902 (Britain, Germany, and Italy). In Greece, Turkey, Bulgaria, Serbia, China, Argentina and several other states, one or more foreign states took control of various government revenues to ensure payment of international obligations (principally debts and reparations).[61] The tenor of Western attitudes toward such foreign administration of struggling entities may be gauged from a report on US administration of the customs house in the Dominican Republic after 1905. According to the US author of this 1907 report, in the period since the failure of the movement to annex San Domingo to the USA in 1869–70, the country had experienced 'a miserable sequence of revolution and anarchy, interrupted by ruthless and blood-stained dictatorships'. After 1899, the 'country was laid waste, the people crushed to hopelessness, the treasury left to stew in utter bankruptcy, and a host of creditors, foreign and domestic, after tightening their hold upon the future became more and more insistent in the present'. Administration of the customs house used almost 55 per cent of the net revenues to repay debts, with the remainder going to government expenditure. Once put in place 'the Dominican Republic enjoyed a civil calm and an economic well-being such as it had not known for two generations'. If continued 'we shall speedily see a West Indian people who have never had a fair chance, developing into a decent, prosperous peasantry'.[62]

The modern form of this argument holds that states deemed insufficiently democratic, or with deeply divided societies not truly represented by the state institutions, or unable or unwilling to meet the plethora of international demands for adequate regulation, institutions and policies, ought to lose their legitimacy. In particular circumstances this may culminate in forcible intervention. The normative

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[60]   E.g., Slaughter, *supra* note 39, at 509–511.
[61]   Some of these episodes are discussed in Krasner, 'Compromising Westphalia', *supra* note 48, at 115.
[62]   Hollander, 'The Convention of 1907 between the United States and the Dominican Republic', 1 *AJIL* (1907) 287.

case for increased intervention has been made with passion and conviction,[63] but is less convincing as an argument for the uneven patterns of intervention that actually occur.[64] Force may achieve narrowly defined short-term objectives such as the delivery of food aid or the removal of a particular tyrant, but outside powers without fundamental interests directly at stake are ordinarily unwilling to commit forces on a scale or for a duration sufficient to have even a prospect of establishing long-term democracy or bringing peace to bitterly divided societies. Multilateral intervention has notable achievements, but inevitably political calculations and interests in the intervening states weigh heavily in all aspects of military operations, and in the case of conflict are likely to prevail over the liberal principles offered as justification.

B *Diminution of State Functions without Effective Alternatives*

Functionalist arguments for the delegitimation of state institutions in weak states presume that state functions are substitutable. Thus, where a state is held to have 'failed', its governance functions may be taken over by external agencies or private entrepreneurs: they may organize settlement of foreign investment disputes, repayment of debts, provision of security for diamond mines or oil pipelines, delivery of food and medical supplies, the conduct of plebiscites, and trial of alleged human rights abusers or narcotraffickers. Or outsiders may be positioned as 'trainers' or 'advisers' to judges, police forces or government ministries.

Some functions of states are not easily replicated by other institutions, however. In the traditional sovereignty system, even relatively fragile states play a potentially important function as a basis of identity and a focus of loyalty, balancing the pull of identities based on clan or ethnic group or religious solidarity or city. The representativity of the state and the performance of its institutions condition its effectiveness in these functions, but it is almost impossible for externally-based institutions to perform them. Some liberals are remarkably sanguine about this issue, proposing that the world will eventually evolve as the West is thought to have done in the account of Dan Deudney and John Ikenberry: 'As civic and capitalist identities have been strengthened, ethnic and national identity has declined. A distinctive solution to the problem of nationalism and ethnicity has evolved in the West. . . .' In their account, markets, a common civic identity, and a distinctive institutional order of international relations have produced in the West 'a complex polity spilling across the juridical borders of states and enveloping state institutions'.[65] But the West remains a region of strong and popular states. Delegitimizing the state by dispensing with its sovereignty — a process likely to be targeted on weak states outside the West

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[63] F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed., 1997); M. Bettati and B. Kouchner, *Le devoir d'ingérence: peut-on les laisser mourir?* (1987). See also O. Korten and P. Klein, *Droit d'ingérence ou obligation de réaction?* (1992).

[64] Brownlie, 'Humanitarian Intervention', in J. N. Moore (ed.), *Law and Civil War in the Modern World* (1974), at 217.

[65] 'The Logic of the West', 10 *World Policy Journal* (1993–1994) 17; and a 'Response' to commentators, 11 *World Policy Journal* (1994) 122, quotations at 124.

— leaves identity and loyalty to be conditioned exclusively by other forces in ways that may disserve the liberal objectives animating this challenge to sovereignty.

Another significant function of sovereignty has been to preserve some autonomy in decision-making, and hence some space for difference, for the community within the state. The liberal functionalist argument is that such autonomy is waning because of economic globalization, that real difference is declining inexorably with cultural, economic and political convergence, and that differences protected by state sovereignty often comprise such undesirable traits as the subordination of women, the maintenance of corrupt elites, or the suppression of political dissent or religious freedom. Thus, it is argued that the economic and cultural basis of the traditional sovereignty system is disappearing and that the legal order must adjust accordingly.

The processes of colonial expansion and state formation that made the traditional sovereignty system global were themselves highly intrusive, but the system now provides a mild check on further intrusion. The formation of modern states has transformed local political forms; a return to a pre-existing 'culturally-authentic' system for the organization of power and decision-making is improbable even in countries where the modern state is least well rooted. Nevertheless, the apparent homology among state institutions for international purposes does not reflect homogenization of local political forms, let alone uniformity in the social and economic patterns to which effective political institutions must be responsive. These patterns are often inegalitarian, but the freedom to seek to exert influence in a polity still open to local concerns is an empowering attraction of the sovereignty system. Governance by outside institutions, and external intervention, may transform local politics into struggles to capture the benefits supplied from outside or to lead resistance. In the long term, state institutions may be discredited from outside without any credible alternative means to achieve particular governance functions. In weak or externally-dominated states, and in deeply divided societies or those with systemic social violence, it is not at all clear that liberal functionalist alternatives to the traditional sovereignty system are likely to be realized in practice or to effectuate enduring improvement.

C Re-dividing the World into Zones

The universalization of the system of formally equal sovereign states — Oppenheim's 'Family of Nations' — has been a remarkable feature of the international legal order of the past century. The quest to fulfil these universalist aspirations, to establish more substantive equality among states in their capacities to influence legal development and to pursue agendas that are not simply those of the powerful, has been a leitmotif for generations of anti-colonial *tiers-mondiste* international lawyers.[66] Emerging liberal thinking about the international legal order argues increasingly that it is

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[66] See, e.g., Abi-Saab, 'International Law and the International Community: The Long Road to Universality', in R. St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 31; and Flory, 'Mondialisation et droit international du développement', 101 *Revue générale de droit international public* (1997) 609.

possible to divide the world into zones,[67] with a liberal zone of law, constituted by liberal states practising a higher degree of legal civilization, to which other states will be admitted only when they meet the requisite standards.[68] This is in some respects a continuation of recurrent patterns in the history of Western legal thought, traceable for example in the 16th century European divisions between Christians and infidels,[69] or in James Lorimer's late 19th century division of the world into a hierarchy of civilized nations, barbarous humanity and savage humanity.[70] As in the past, this identification of zones may be defended simply as a description of existing or emerging reality,[71] but its many normative advocates see the liberal West as the vanguard of a transformed global legal order in which many of the limitations of the sovereignty-based legal system can finally be transcended. The theory of liberal and non-liberal zones proposes differential treatment where the boundaries of the liberal zone are crossed, conferring privileges based on membership in the liberal zone, and setting high barriers to entry. The new standard of civilization is defended normatively as the means to promote the advancement of the backward. It is not clear, however, why human flourishing is better promoted by the construction of an identifiable 'other', an 'us' and 'them' from amongst the myriad ways of understanding and classifying the world. The construction of the zones of law in spatial terms reflects a territorial and state-based view of the world which much of the argument from globalization and the cross-cutting constituencies of liberalism is concerned to reject. The outcome seems likely to be the maintenance of a classificatory system which is itself both an explanation and a justification for those at the margins remaining there for generations.

4 Conclusion

Proposals to move away from the traditional account of international law based on state sovereignty — the account found in Oppenheim and preponderant throughout the 20th century — have not crystallized as a single coherent alternative. Some advocate a broader view of the range of norms encompassed in the concept of 'international law': norms of interaction for individuals and groups in transnational

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[67]   M. Singer and A. Wildavsky, *The Real World Order: Zones of Peace/Zones of Turmoil* (1993).

[68]   For critical discussion see Kingsbury, 'Whose International Law?: Sovereignty and Non-State Groups', 88 *Proceedings of the American Society of International Law* (1994) 1.

[69]   Martin Wight modelled this worldview as two concentric circles, the inner one being close-knit and bound by detailed rules, the outer one being looser and subject only to rather minimal rules. See Kingsbury and Roberts, 'Introduction', in H. Bull *et al.* (eds), *Hugo Grotius and International Relations* (1990), at 14. A more nuanced analysis of views of the extra-European world in the writings of Alberico Gentili (1552–1608) is given in Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment', 92 *AJIL* (1998) 713, and B. Kingsbury, *Alberico Gentili e il Mondo Extra-europeo: gli Infedeli, gli Indiani d'America, e la sfida della differenza* (forthcoming).

[70]   Lorimer, *supra* note 20, at 101.

[71]   E.g., Keohane, 'Hobbes's Dilemma', *supra* note 56, at 178–180.

civil society, many of which are chosen voluntarily by contract even if they often rely on state power for enforcement; rules and decisions promulgated by state institutions in transnational dialogue with other relevant institutions; and the law controlling state action, which will be a mixture of international agreements and national law and will generally be subject to enforcement in national courts and in supranational courts of which the European Court of Justice is a prototype.[72] Others propose to move away from the requirement of explicit consent by each state as the basis for binding obligation, finding universal law in a range of normative pronouncements from inter-governmental conferences, repeated provisions in treaties, the practice of international organizations, and other evidence of a general will of a diverse international community.[73] Modern extensions of natural law approaches, including the policy science and communication approach long advocated by the New Haven School, have an enduring attraction in seeming to base international law on community policies that reflect higher purposes and not simply on the putative will of formal sovereigns.[74] These different approaches all allow greater scope for the substance of international law to be influenced by 'global public policy'. This policy spans managed trade, market liberalism, protection of intellectual property and wildlife, civil rights, public participation and a range of other values favoured in the political West. It encompasses a commitment to some basic equality among human beings, but it is not at present a strongly egalitarian policy.[75] The commitments of the various advocates differ, but the aggregate of forces pushing to shift legal thought from a normative-status view of sovereignty to a functional-contractual view are not at present accompanied by a corresponding impetus to ameliorate and manage problems of inequality.

A decline in the traditional sovereignty system weakens the relationship of mutual containment between sovereignty and inequality. The justification that sovereignty provides for the modesty of the engagement of international law with problems of inequality within national societies — the justification for the weakness of international law regimes on landlessness, unemployment, gender inequity, homelessness, basic education, mental illness — threatens to disappear at a time when inequalities in many societies are rising. Inequalities between many societies are also growing larger, while the weakening of the sovereignty paradigm would remove the segmenting buffer that has been a moral underpinning, however incoherent, for inter-societal inequalities.[76] Inequalities in the structure of transnational activities and the incidence of their legal regulation intensify these inter-societal inequalities.

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[72] Slaughter, *supra* note 39, at 516–534.

[73] Charney, 'Universal International Law', 87 *AJIL* (1993) 529. Related issues are considered in Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 217; Grieg, 'Reflections on the Role of Consent', 12 *Australian Year Book of International Law* (1992) 125; and Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', in *ibid.* 22.

[74] H. Lasswell and M. McDougal, *Jurisprudence for a Free Society* (2 vols, 1992).

[75] Cf. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435.

[76] See, e.g., Miller, 'The Ethical Significance of Nationality', 98 *Ethics* (1988) 647.

The increasing need for regulation of non-state actors, including actors in the emerging transnational civil society, and for the development of a democratic transnational law, coincides with the weakening of the prerogatives of the institutions of some states, leaving many communities dependent in practice on the regulatory efforts of the strong states or of international institutions.

People experiencing a decline in their ability to shape deleterious or unsettling changes can be expected to resist. Sovereign states open the prospect of some autonomy, the possibility for individuals and groups to make a difference in a structured political space whose institutions and community shape their conscious identities. The suspension of the OECD negotiations on the Multilateral Agreement on Investment in May 1998, which occurred not simply through the involvement of citizens' groups in the OECD but in major part through public opposition expressed in the political systems of a number of participating states, illustrates the value many individuals place on autonomous decision-making within the state in the face of the imperatives of globalization. In strong states, the US above all, there is little prospect that the autonomy inherent in the traditional sovereignty system will be compromised, and the politics of the civil society will continue to be channelled through state institutions even as the activities and concerns of the civil society gradually become more transnational. Citizenship and loyalty will continue to have a vital political meaning defined by reference to the state. The 'citizenship' of the European Union, promised but underspecified in the legal texts of the Union, seems likely to take its substance as a gloss on the enduring loyalties and citizenships of individuals attached to the Member States.

The imperative for some degree of participation and autonomy has buttressed the traditional sovereignty system. It is often argued that a new liberal global legal order, or indeed a post-modern post-sovereignty international law, will make participation and active citizenship more possible, overturning tyrannies and hierarchies and increasing freedom and community and equality. But there will not soon exist a global community which is capable of sustaining the politics and institutions necessary to realize such ambitious visions. Their realization would require not only the conceptual change which their advocates promote and have begun to achieve, but extraordinary resources which new technology and global economy do not yet provide. In their aspirational but unrealized state, such visions serve in the interim to legitimate an extraordinary range of interventionist or otherwise coercive activities in other countries that reflect struggles and dilemmas in politics in the West: removal of dictators; extraterritorial police operations against narcotics cartels allegedly protected by corrupt regimes; no-fly zones to safeguard threatened ethnic groups; the empowerment of victims of gender discrimination, religious persecution, or gun control laws; protection of the unborn, tropical forests, intellectual property, marine mammals, foreign investors, or telecommunications service providers; promotion of peace processes, free if ethnically divisive elections, and unsafe safe havens. These agendas involve, and are often responsive to, groups outside the West, but they are largely set in the West, with timing suitable to political interests in the West, and with inconsistencies and vagaries driven in many respects by dynamics in the West. To be

pursued effectively they require, paradoxically, organized inequality, on a larger scale than presently exists. They require also a system for the management of inequality that international law at present lacks. The traditional sovereignty system is flawed, and will continue to be stretched and strained. But for the time being it remains a more realistic system for the management of enduring inequalities, and of other pathologies of the international system of law and politics, than any of the alternatives on offer.

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