Transformations of the State
CRC 597

TranState Working Papers

When US scholars speak of "sovereignty", what do they mean?

Adriana Sinclair
Michael Byers

No. 44

Universität Bremen • University of Bremen
Hochschule Bremen • University of Applied Sciences
Internationale Universität Bremen (IUB) • International University Bremen (IUB)

Staatlichkeit im Wandel • Transformations of the State
Sonderforschungsbereich 597 • Collaborative Research Center 597

Adriana Sinclair
Michael Byers

When US scholars speak of "sovereignty", what do they mean?

TranState Working Papers
No. 44

Sfb597 „Staatlichkeit im Wandel" − „Transformations of the State"
Bremen, 2006
[ISSN 1861-1176]

Adriana Sinclair and **Michael Byers**
When US scholars speak of “sovereignty”, what do they mean?
(TranState Working Papers, 44)
Bremen: Sfb 597 „Staatlichkeit im Wandel“, 2006
ISSN 1861-1176

Universität Bremen
Sonderforschungsbereich 597 / Collaborative Research Center 597
Staatlichkeit im Wandel / Transformations of the State
Postfach 33 04 40
D - 28334 Bremen
Tel.:+ 49 421 218-8720
Fax:+ 49 421 218-8721
Homepage: http://www.staatlichkeit.uni-bremen.de

CONTENTS

When US scholars speak of “sovereignty”, what do they mean?[1]

1. INTRODUCTION

This article examines American conceptions of sovereignty—as they appear in the writings of US scholars of international law, and those US international relations scholars who deal with international law. At first glance, the US literature is dominated by two distinct conceptions of sovereignty: (1) A statist conception that privileges the territorial integrity and political independence of governments regardless of their democratic or undemocratic character; (2) A popular conception that privileges the rights of peoples rather than governments, especially when widespread human rights violations are committed by a totalitarian regime. However, on closer examination, the two conceptions are in fact different manifestations of a single, uniquely American conception of sovereignty—one which elevates the United States above other countries and seeks to protect it against outside influences while, concurrently, maximizing its ability to intervene overseas.

The single conception of sovereignty is able to encompass both statist and popular sub-conceptions because the latter have different—though not mutually exclusive—agendas. The statist conception is concerned with protecting the United States against outside influences and has little to say about the sovereignty of other countries. The popular conception is concerned with limiting the sovereignty of other countries and has little to say about the sovereignty of the United States. This article exposes the single US conception of sovereignty—as it exists in the academic literature of international law and international relations—and arrives at some tentative conclusions derived from the unique position and history of the world’s most powerful state.

2. TWO CONCEPTIONS OF SOVEREIGNTY

Stephen Krasner and Louis Henkin provide us with exemplars of the two different US conceptions of sovereignty, with Krasner’s work being representative of the statist approach. He argues that it is: “[o]nly by creating a mythical past [that] contemporary observers have been able to make facile comments about the impact of globalisation on sovereignty”.[2] In actual fact, sovereignty has always been challenged. In recent years

---

[1] This article (forthcoming: Vol. 54, *Political Studies*) is part of a larger project on “Sovereignty, the State and Fundamental Transformations in Public International Law” funded by the TranState Project at the University of Bremen, Germany. We are grateful for constructive criticism from James Baker, Kal Holsti, Wade Huntley, Brian Job, Richard Price, Stephan Leibfried and Mark Zacher.

[2] Krasner, Stephen D., ‘Globalisation and Sovereignty’ in Smith, David A. Solinger; Dorothy J.; and Topik,

that challenge has come from two different directions: globalisation and the rise of human rights. Yet neither of these challenges alters the basic nature of rules, compliance and behaviour in the international system: to Krasner, this will always be characterised by “organised hypocrisy”.[3] Self-interest is still the defining cause of action, and sovereignty—despite seeming under threat—is not about to disappear, given the powerful state interest in its continued existence.

Henkin’s work is representative of the popular conception of sovereignty. Henkin argues that sovereignty is the primary obstacle to international law *as it should be*. It is a misleading and misguided term, an anachronistic hangover from the days of princedoms that is “largely unnecessary and better avoided”.[4] Whereas Krasner implicitly attributes normative value to state survival, Henkin argues: “The state system is a human creation and a human development; it ought to be continually examined, occasionally calibrated, and sometimes changed, the better to serve human purposes”.[5] Indeed, Henkin believes that the international system has already moved toward human values as its organising principle,[6] that “human rights law has shaken the sources of international law, reshaped its character and enlarged its domain”[7], and thus radically derogated from and infringed upon sovereignty.

These two conceptions of sovereignty—statist and popular—permeate most of the US literature on international relations and international law. And, as is demonstrated by some prominent theoretical writings, what appear to be different conceptions of sovereignty more often than not collapse into a single conception—a conception which generally favours the United States.

3. INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW

One of the more fertile areas of international theory in the United States concerns the relationship between international law and international relations. Consequently, the interdisciplinary literature of “IL/IR” offers valuable insights into US conceptions of sovereignty.

John Mearsheimer offers an unashamedly realist approach to international institutions (including international law) that comports clearly to the statist conception of sovereignty. He argues that the key disagreement between realists and so-called “institu-

---

Stephen C., (eds.) *States and Sovereignty in the Global Economy* (London: Routledge, 1999), pp. 34-52, p. 49.

3 Krasner, Stephen D., *Sovereignty: Organised Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

4 Henkin, Louis, *International Law: Politics and Values* (Boston: M. Nijhoff, 1995), p. 9.

5 Henkin, *International Law*, p. 25.

6 Henkin, Louis, ‘Human Rights and State “Sovereignty”’ *Georgia Journal of International and Comparative Law* (1995-6) vol. 25, pp. 31-45, p. 32.

7 Henkin, ‘Human Rights and State “Sovereignty”’, p. 36.

tionalists” concerns whether institutions markedly affect the prospects for international stability.[8] To realists, institutions reflect the distribution of power in the world; based on the self-interested calculations of the great powers, they have no independent effect on state behaviour.[9] States will participate in an institution only while it remains in their interest to do so. Mearsheimer rejects the institutionalists’ claim that institutions can produce cooperation, stability and, potentially, peace. Institutionalism has focused on absolute gains, and on areas where state interests align and cooperation is easy to secure. This has produced excessive optimism over the capacities and potential of institutions.[10] Indeed: “What is most impressive about institutions, in fact, is how little independent effect they seem to have had on state behaviour”.[11] To Mearsheimer the overriding logic of the system is self-help: states will do as much as they are able to get away with. International law has made few if any inroads on sovereignty.

Liberals have a different picture of the international system and the role of international law and other institutions. Robert Keohane argues that, in order to be able to understand international cooperation and discord, “it is necessary to develop a knowledge of how international institutions work, and how they change”.[12] Without institutions there can be little international cooperation and, without international cooperation, “the prospects for our species would be very poor indeed”.[13]

Keohane divides approaches to international institutions into instrumentalist and normative “optics”. Seen through the instrumentalist optic, “states use the rules of international law as instruments to attain their interests”.[14] Seen through the normative optic, “shared norms, and the processes by which those norms are interpreted”, have an impact on state policies.[15] The normative optic does not ignore power or interests but argues that such explanations are insufficient. According to Keohane, international relations scholars tend to be instrumentalists and international law scholars tend to be normative, and a synthesis of the optics can help explain international institutions.

---

8 Mearsheimer, John J., ‘The False Promise of International Institutions’ *International Security* (1994-5), vol. 19, no. 3, pp. 5-49, p. 7.

9 Mearsheimer, ‘The False Promise of International Institutions’, p. 7.

10 Mearsheimer, ‘The False Promise of International Institutions’, p. 47.

11 Mearsheimer, ‘The False Promise of International Institutions’, p. 47.

12 Keohane, Robert O., 'International Institutions: Two Approaches', *International Studies Quarterly*, 32:4, (1988) pp. 379-96, p. 379.

13 Keohane, ‘Two Approaches’, p. 393.

14 Keohane, Robert O., ‘International Relations and International Law: Two Optics’ *Harvard International Law Journal* (1997) vol. 38, pp. 487-502, p. 488.

15 Keohane, ‘Two Optics’, p. 488.

At the same time, Keohane argues that both optics can be characterised as instrumentalist: the instrumentalist optic is straightforwardly so, while the normative optic's concern for reputation is a "classically instrumentalist concept".[16] Both optics use narrative accounts to trace causal pathways. Both focus on elite groups of decision-makers and, crucially, (and certain normative optics people would say Keohane misinterprets them here) "these elites are viewed as making calculations about the consequences of their actions".[17] In other words, they are rational.

Although international institutions can affect states' formulation of interest, the rational calculation of interest remains the supreme analytical concern. Thus Keohane writes: "In the normative optic, [states']… purpose is to realise their principles; in the instrumentalist one, to achieve self-interested objectives"[18], though he presages this with "states cultivate reputations because of what good reputations will enable them to achieve."[19]

Keohane's emphasis here on rational choice and a statist ontology suggests a broadly statist conception of sovereignty. And this comes as no surprise, since Keohane has devoted much of his career to advancing of a theory of international institutions that aligns those institutions with the interests of powerful states. As we argue later with regard to his work on intervention, Keohane manifests an underlying, distinctly American conception of sovereignty: using a statist conception to buttress US sovereignty while applying a popular conception to limit the sovereignty of other, less powerful states. In this respect, his conception of sovereignty is different—but not all that different—from Mearsheimer's realist approach.

Anne-Marie Slaughter similarly advances a liberal interpretation of what the two disciplines should learn from each other and the type of world they see. Both disciplines study the regularities of state behaviour, and many scholars are "newly insisting on the importance of law as an explanatory factor" in the analysis of that behaviour.[20]

To Slaughter, liberal theory is based on three assumptions.[21] First, the fundamental actors are "members of domestic society, understood as individuals and privately

---

16 Keohane, 'Two Optics', p. 494.

17 Keohane, 'Two Optics', p. 495. Postpositivists would argue that actors are not capable of being entirely rational about their interests and circumstances.

18 Keohane, 'Two Optics', p. 500.

19 Keohane, 'Two Optics', p. 500.

20 Slaughter, Anne-Marie; Tulumello, Andrew S.; and Wood, Stepan, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', *American Journal of International Law* (1998) vol. 92, pp. 367-397, p. 369.

21 It is clear that this type of liberalism has relatively little in common with classic liberal theorists, such as Locke or

constituted groups seeking to promote their independent interests.”[22] Second, “[a]ll governments represent some segment of domestic society, whose interests are reflected in state policy.”[23] Finally, “[t]he behaviour of states—and hence levels of international conflict and cooperation—reflects the nature and configuration of state preferences.”[24]

According to Slaughter, a liberal conceptualisation of the role of law in international politics would move beyond institutionalism by providing tools to determine when mutual interests exist that can be furthered by international cooperation, and when institutions will be epiphenomenal.[25] As a result, “[a] liberal approach… opens the door to a new normative agenda in international law that in turn could change the conceptual apparatus employed by IR theorists”,[26] namely, by enabling them to see and theorise the emergence of new norms. However, when Slaughter puts her theory into action, the resulting interests—and the mechanisms for implementing those interests—take on a distinctly American flavour that works to strengthen US sovereignty while undermining the sovereignty of other, less powerful states.

In Slaughter’s latest work, *A New World Order*, she rejects what she sees as an interminable debate about the changing nature of sovereignty. The flaw is that everyone “still assumes that sovereignty is an attribute borne by an entire state, acting as a unit”.[27] The solution is the notion of the disaggregated state, broken down into its component parts: regulatory, judicial and legislative. The central conceptual move of the book is to argue that: “if states are acting in the international system through their component government institutions – regulatory agencies, ministries, courts, legislatures – why shouldn’t each of these institutions exercise a measure of sovereignty as specifically defined and tailored to their functions and capabilities?”.[28] This may seem strange but, Slaughter argues, if we see sovereignty, not as the power to exclude external meddling, but as the capacity to participate in international institutions of all types, then it is an altogether more manageable concept.

Clearly, the government networks that Slaughter sees as characterising the current world order, and her articulation of sovereignty, remains strongly attached to the statist

---

J.S. Mill.

22 Andrew Moravcik quoted in Slaughter, Anne-Marie, ‘International Law and International Relations Theory: A Dual Agenda’, *American Journal of International Law* (1993) vol. 87, pp. 205-239, p. 227.

23 Moravcik quoted in Slaughter, ‘A Dual Agenda’, p. 228.

24 Slaughter, ‘A Dual Agenda’, p. 228.

25 Slaughter, ‘A Dual Agenda’, p. 223.

26 Slaughter, ‘A Dual Agenda’, p. 235.

27 Slaughter, Anne-Marie, *A New World Order* (Princeton: Princeton University Press, 2005), p. 267.

28 Slaughter, *A New World Order*, p. 267.

paradigm. Her central ontological assumption—government networks—consist solely of the members of state bureaucracy, interacting with their counterparts in other countries or in supranational organisations.[29] The role of NGOs, transnational corporations, or any grouping that is not governmental is minimal and not of serious theoretical concern. Thus Slaughter's conception of sovereignty, despite her claim to a new articulation, is actually very statist and traditional. And it favours those powerful states—and especially the United States—with large, well-resourced bureaucracies.

Alexander Wendt's "constructivist" approach challenges the central assumption of realism: that the anarchical nature of the international system predisposes states to behave in certain ways. Wendt attempts to forge a "via media"[30] between realism's focus on structure as the ultimate causal force in the international system, and the focus of reflectivist approaches on processes of interaction.[31] Whereas neo-realists treat the self-help nature of anarchy as *the* logic of the system, Wendt argues that collective meanings define the structures which organise our actions, and actors acquire their interests and identities by participating in such collective meanings. Self-help is one such institution, hence Wendt's now infamous assertion: "Anarchy is what states make of it".[32] In other words, self-help is not an inevitable part of the international system but, at some level, a choice that states have made and re-make with every interaction.

Sovereignty is another institution that "exists only in virtue of certain intersubjective understandings and expectations which not only constitute a particular kind of state—the 'sovereign' state—but also constitute a particular form of community, since identities are relational".[33] The norms of sovereignty are continually reinforced and if, for some reason, states stopped respecting and adhering to those norms, the institution of sovereignty would disappear. It is not a "once-for-all creation of norms that somehow exist apart from practice."[34]

We question Wendt's argument on several counts. First, the social structures which play such a central role are very "light" things, made up of the ideas that actors hold. However, social structures surely reflect material structures, at least to some extent? Indeed, many would argue that we believe certain things because it is in our interest to

---

29 Slaughter, *A New World Order*, pp. 4-5.

30 Baylis, John and Smith, Steve, (eds.) *The Globalisation of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 1997), pp. 183-4.

31 Wendt, Alexander, 'Anarchy is what States Make of it: The Social Construction of Power Politics', *International Organization* (1992) vol. 46, no. 2, pp. 391-425.

32 Wendt, 'Anarchy is what States Make of it', p. 395, emphasis removed.

33 Wendt, 'Anarchy is what States Make of it', p. 412.

34 Wendt, 'Anarchy is what States Make of it', p. 413.

do so. Second, Wendt's theory pays little attention to power structures and the role power plays in the social interactions which, for Wendt, create identities and interests. Third, if interaction is prior to identities and interests, is there really a point of "first" interaction in which identity and interaction are unformed?

Wendt's work on sovereignty treats institutions and ideational structures as malleable. From his perspective, our conception of sovereignty can be rewritten simply by thinking about it differently. But while some evolution of the institution of sovereignty has undoubtedly occurred, the fluidity and "lightness" of Wendt's theorisation of social institutions would seem to take it too far. It ignores the impact of material differences between states, of power, and of centuries-old national conceptions of statehood and sovereignty—and this, intentionally or not, favours the world's most powerful state.

Although Wendt and other scholars of international relations in the United States take various approaches to sovereignty, those who have dealt with international cooperation and international law have relied on an underlying statist conception of sovereignty, or at least US sovereignty, while exhibiting more flexibility with regard to the sovereignty of other states. Perhaps it is not surprising that a discipline so consumed by a statist ontology and questions of power would fall back on traditional assumptions when venturing onto new ground. Yet many other international relations scholars deal with explicitly normative concerns and would undoubtedly adopt a more popular conception of sovereignty—if they wrote about international law. But since these scholars they have not yet done so, there is thus little evidence of a popular conception of sovereignty in this particular field of study.

4. MILITARY INTERVENTION

Military intervention is one of the key ways in which sovereignty is infringed and the US literature concerning it is particularly interesting for us—because conceptions of popular sovereignty are frequently deployed in justification.

In 1992, Thomas Franck seized upon the idea that governments derive their power and legitimacy from the consent of the governed, and used it to justify military intervention. Franck identified two emerging trends: legitimacy is increasingly dependent upon democracy and, as a result, there is an emerging right to democratic governance. Franck attributed to democratic states the power to recognise other states as legitimate, and argued that new regimes "want, indeed need, to be validated by being seen to comply with global standards for free and open elections".[35] However, Franck failed to explain why democratic states chose to do this, and why new regimes felt compelled to prove their democratic credentials. Franck's explanation was simply that, since the end of the Second World War, international institutions—primarily the UN, regional organisations

[35] Franck, 'The Emerging Right to Democratic Governance', p. 48.

like the European Union and Organization of American States, and NGOs—all sought to promote democracy. They did so primarily through the adoption of conventions such as the International Covenant on Civil and Political Rights. These conventions form the basis for Franck's right to democratic governance. He makes no mention of the power which accrues to rich countries as a result of the aid and trade they can offer smaller countries; nor is there any mention of the politics of democracy promotion.

What Franck does do is provide a clear link between democracy and sovereignty, or more pertinently, non-democracy and the absence of sovereignty. He writes: "undemocratic processes imposed on a people by their government are almost universally regarded as counternormative and not beyond the purview of the international community."[36] And this in turn, Franck argues, renders possible and justifies pro-democratic intervention. Of course, the United States, as an extremely powerful and more-or-less democratic country, is immune from such interference; its sovereignty remains intact.

Anthony D'Amato also linked human rights and intervention, arguing that rules prohibiting intervention "do not constitute the real rules of international law but, rather, are quasi-rules, invented by ruling elites to insulate their domestic control against external challenge".[37] Consequently, sovereignty is no bar to the protection of human rights.[38] Although D'Amato's preference is for multilateral intervention, ideally by the United Nations, his "bottom line is that… *any* nation with the will and the resources may intervene to protect the population of another nation against… tyranny".[39] Again, D'Amato's argument is inapplicable to the United States, except in so far as it facilitates US interventions elsewhere.

Michael Reisman argued that the term sovereignty "has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word".[40] It evolved away from meaning the power and control of a prince over his kingdom, to meaning popular sovereignty, vested in the people and based on human rights. Reisman contended that a coup, putsch, or even just corruption of the electoral process constitutes a violation of popular sovereignty and that the traditional idea of sovereignty, which would have prevented intervention by other states, is irrelevant to such situations. Thus, "a jurist rooted in the late

---

[36] Franck, 'The Emerging Right to Democratic Governance', p. 83.

[37] D'Amato, Anthony, 'The Invasion of Panama was a Lawful Response to Tyranny', *American Journal of International Law* (1990), vol. 84, pp. 516-524, pp. 522-3.

[38] D'Amato, "The Invasion of Panama', p. 522.

[39] D'Amato, "The Invasion of Panama', pp. 519-20, original emphasis.

[40] Reisman, W. Michael, 'Sovereignty and Human Rights in Contemporary International Law' *American Journal of International Law* (1990) vol. 84, no. 4, pp. 866-876, p. 866.

twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty”.[41]

In international law, the right of self-defence can be used to limit sovereignty at the same time that it is deployed to protect it. It has long been accepted that any state which attacks another state waives its right to the protections of sovereignty, within the limits of necessity and proportionality. But what about an attack that has yet to happen, and may never happen? John Yoo argues that the customary international law right to use force in anticipation of an attack is a “well-established aspect of the ‘inherent right’ of self-defence”[42], an argument he bases on article 51 of the UN Charter. With the concept of imminence having evolved since the development of nuclear weapons, there is a reformulated, expanded test for pre-emption. Yoo claims that this reformulated test was used to justify the 2003 Iraq War—though, as a justification, it collapsed in the absence of weapons of mass destruction.

Robert Keohane and Allan Buchanan propose a schema for pre-emptive intervention which comprises *ex ante* and *ex post* accountability. Before intervening, states would make an evidence-based claim and agree to submit themselves to evaluation by an impartial body afterwards. If the action proved justified, those states that had not shouldered the risk and costs of intervention would bear “special responsibility for financial support in rebuilding the country”.[43] But if the action was found by the impartial body to have been unjustified, the intervening states would have to provide compensation. Moreover, they would not be allowed to control the political situation in the intervened-in-state.

There are several problems with Keohane and Buchanan’s schema. Most notably, no state would have the option of opting out or simply disagreeing with the intervention regardless of the outcome, or even just disagreeing over the evaluation. There are shades of “you’re either with us or against us” here. Likewise, an impartial, independent body—the UN Security Council—arguably already exists to validate uses of force, though there the veto power of four other countries constrains US power too much for Buchanan and Keohane’s purposes. Finally, under the schema, if a group of democratic, “morally reliable” states wished to intervene in unjustified circumstances they would still be allowed to do so—providing that they paid for the privilege. This surely cannot be right. Clearly, Buchanan and Keohane’s schema is underpinned by a statist concep-

---

41 Reisman, ‘Sovereignty and Human Rights’, p. 871.

42 Yoo, John C., ‘International Law and the War in Iraq’ *American Journal of International Law* vol. 97, (July 2003) p. 563-576, p. 571.

43 Buchanan, Allen, and Keohane, Robert O., ‘The Preventive Use of Force: A Cosmopolitan Institutional Proposal’ *Ethics and International Affairs* (2004) vol. 18, no. 1, pp. 1-22, p. 14.

tion of sovereignty—a selective form of statist sovereignty that enables the United States to retain its sovereignty while facilitating intervention in other, less powerful states.

Writing on his own, Keohane asserts that a neglected element of the decision to intervene is the question of what happens afterwards: “In the next era of world politics we may observe a new phenomenon: the constructive phase of humanitarian intervention *following* traditional military intervention in self-defence”.[44] In this context, Keohane argues that we need to un-bundle sovereignty so that we can appreciate its gradations. And since sovereignty impedes further interventions to protect minority rights, it is foolhardy to grant unconditional sovereignty to new states with severe ethnic divisions. Instead, sovereignty should be compromised post-intervention to maintain peace and stability and to protect human rights, with a NATO or UN “proconsul” remaining in charge. Sovereignty would at first be denied, then nominal (legal) sovereignty reintroduced, and then domestic governance handed over to locals. Finally, what Keohane terms “integrated sovereignty” would result, under continued UN oversight.

Importantly, Keohane’s unbundling of sovereignty does not apply to all states, and certainly not to the most powerful state. As Martti Koskenniemi points out: “We deal with military intervention, peace enforcement, or the fight against terrorism in the neutral language of legal rules and humanitarian moralities, and so come to think of it in terms of a policy of a global public realm—forgetting that it is never Algeria that will intervene in France, or Finland in Chechnya”.[45]

Keohane also advances a theory of good and bad neighbourhoods. Bad neighbourhoods have low social capital. Where social capital is low, trust is low, people dislike each other and there is little hope that the neighbourhood will improve. And since the success of an intervention is dependent upon the ability to unbundled sovereignty and build long-lasting institutions connecting neighbouring states, social capital within the neighbourhood must be high if re-construction is to succeed[46] A good neighbourhood will educate the troubled state about, for example, “beliefs in the efficacy of the rule of law for attracting investment… and … liberal democratic norms”.[47] An additional problem lies in the fact that good neighbourhoods cannot simply be created: “in the short

---

[44] Keohane, Robert O., ‘Political Authority after Intervention: Gradations in Sovereignty’ in Holzgrefe, J. L., and Keohane, Robert O., (eds.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), p. 296.

[45] Koskenniemi, Martti, ‘‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law’ *Modern Law Review* (2002) vol. 65, no. 2, pp. 159-175, p. 172.

[46] Keohane, ‘Political Authority’, p. 293.

[47] Keohane, ‘Political Authority’, p. 294.

term, it would hardly be sage policy advice to suggest the creation of good neighbourhoods in order to make urgently needed humanitarian intervention successful”.[48]

The solution, therefore, is to redefine the boundaries of a neighbourhood. If the Balkans were a bad neighbourhood, the 1999 Kosovo intervention succeeded because Europe redefined its boundaries to include them. For this reason, any decision to intervene must consider not only the society, but the neighbourhood where it is located, and the possibilities for expanding good neighbourhoods close by.

Keohane’s neighbourhood theory is not a straightjacket. Sometimes, he argues, human rights abuses are so severe that outside states are left with no choice. Yet the states which are left with no choice are powerful Western states and, more particularly, the United States. And so, we ask, is Washington ever really left with no choice when faced with mass atrocities abroad? There must have been a choice in Rwanda, since the United States did not act. And there must be a choice in Darfur. Again, the language of humanitarianism—at root a popular conception of sovereignty—is deployed to justify limitations on the sovereignty of other states, while the United States remains free to act as it chooses.

5. NON-GOVERNMENTAL ORGANIZATIONS

Traditional conceptions of sovereignty limit this attribute to states, but non-governmental organizations have become an important feature of international affairs. NGOs often seek to challenge state sovereignty while operating in ways which bypass or undermine state power and control. They blur the boundaries between states and their citizens, and between states and the international system. By looking at the literature on NGOs, we can learn a great deal about US conceptions of sovereignty.

Harold Koh and Louis Henkin both highlight how NGOs are altering the values of the international system, and how those values are transferred into national systems. Koh argues: “Many efforts at human rights norm-internalisation are begun not by nation-states, but by ‘transnational norm entrepreneurs,’ private transnational organisations or individuals who mobilise popular opinion and political support within their host country and abroad for development of a universal human rights norm”.[49] Such actors operate along vertical rather than horizontal lines, bringing international norms into domestic society though a process of “interaction, interpretation, and internalisation”.[50] However, it is unclear whether Koh believes that NGOs could have succeeded without

---

48 Keohane, ‘Political Authority’, p. 293.

49 Koh, Harold Hongju, ‘How is International Human Rights Law Enforced?’ *Indiana Law Journal* (1999) vol. 74, pp. 1396-1417, p. 1409. Koh’s argument accords with Margaret Keck and Kathryn Sikkink’s analysis of transnational issue or transnational advocacy networks—as discussed below.

50 Koh, ‘How is International Human Rights Law Enforced?’, p. 1413.

state acquiescence or support. Crucially the perception of such groups in the US literature is similar to that of lobbyists, at least in terms of their functions, if not their political goals. Such groups are considered to supplement the political process rather than transcend it and consequently pose little threat to the sovereignty of the United States.

Henkin attributes the rise of human rights to a combination of state and NGO efforts after the Second World War. The rights themselves arise out of tensions between state values and human values, “between attempts to keep commitments modest and pressures to extend them”.[51] For Henkin: “No discussion of enforcement of international norms is complete without stress on the importance of non-governmental contributions to the complex of inducements” that motivate state action.[52] NGOs create these inducements by disseminating information and mobilizing outrage, and thus persuading states to change laws, institutions and practices. But Henkin also sees NGOs as lobbyists rather than legislators, since states are free to decide whether to accept these inducements. Unable to force states to do anything, NGOs have relatively little impact upon sovereignty.

Margaret Keck and Kathryn Sikkink have developed the concept of “transnational advocacy networks”—“forms of organisation characterised by voluntary, reciprocal, and horizontal patterns of communication and exchange”.[53] Their uniqueness lies in their advocacy, which revolves around “the centrality of values or principled ideas, the belief that individuals can make a difference, the creative use of information, and the employment… of sophisticated political strategies in targeting their campaigns”.[54] The primary tactic employed by transnational advocacy networks is framing,[55] whereby they use the “power of their information, ideas, and strategies to alter the information and value contexts within which states make policies”.[56] For our purposes, the most significant aspect of this analysis is the “boomerang pattern” whereby domestic NGOs bypass their state and search out international allies to bring pressure on their states from outside.[57] Through this tactic, they might seem to be subverting the statist conception of

---

51 Henkin, Louis, *International Law: Politics and Values* (Boston: M. Nijhoff, 1995), p. 184.

52 Henkin, *International Law*, p. 222.

53 Keck, Margaret, and Sikkink, Kathryn *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998), p. 8.

54 Keck and Sikkink, *Activists Beyond Borders*, p. 2.

55 S. A. Hunt, R. D. Benford & D. A. Snow, ‘Identity Fields: Framing Processes and the Social Construction of Movement Identities’ in E. Larana, H. Johnston & J.R. Gusfield (eds.), *New Social Movements: From Ideology to Identity* (Philadelphia: Temple University Press, 1994) 185-208.

56 Keck and Sikkink, *Activists Beyond Borders*, p. 16.

57 Keck and Sikkink, *Activists Beyond Borders*, p. 12.

sovereignty. Transnational advocacy networks certainly believe that “it is both legitimate and necessary for states or nonstate actors to be concerned about the treatment of the inhabitants of another state”.[58]

However, any assessment of the role of NGOs depends upon the conception of sovereignty underpinning it. If one expects states to have complete control over information and access to the courts, then NGOs represent a significant intrusion on sovereignty. But if one accepts that state control over civil society and public opinion has long been minimal—at least in the West—the achievements of NGOs are less dramatic. The key question is: does influence constitutes an expression of sovereignty? For again, the US literature on NGOs treats them as similar to lobbyists, which have never been accused of transgressing state sovereignty and occupy an accepted position in US politics.

Not only are NGOs generally espousing a different set of values, they are developing and pursuing ever more aggressive tactics, including litigation. Dinah Shelton has written on the use of amicus briefs by NGOs.[59] She argues that international cases often have a wider impact than domestic cases because they provide more persuasive precedents. And most international courts (with the notable exception of the International Court of Justice) enable third parties to make written submissions—providing a valuable point of access for NGOs in a system which is almost entirely limited to states. There are other advantages too: amicus briefs are relatively inexpensive, their authors are not bound by the decision and can re-litigate the same issue elsewhere, and they are not restricted to addressing the narrow legal issues of any particular case. But again, NGOs are not taking on the same role as states; instead, they are seeking to influence a system that remains dominated by states. And for this reason they are not undermining state sovereignty.

Julie Mertus explores the questionable democratic status of NGOs, their growing influence, and the possibility that they might be co-opted by states. Transnational civil society has power imbalances which are not widely recognised. For example, most NGOs operate from the top-down and, while they can potentially raise the concerns of unheard voices, some “act in a manner that silences marginalised voices and undermines democratic principles of transparency, accountability and participation”.[60] Indeed, many NGOs operate in ways that threaten local autonomy, either by believing that they know best, or simply striving to operate within the existing practices of inter-

---

58 Keck and Sikkink, *Activists Beyond Borders*, p. 36.

59 Shelton, Dinah, ‘The Participation of Nongovernmental Organizations in International Judicial Proceedings’ *American Journal of International Law* (1994) vol. 88, pp. 611-642, p. 642.

60 Mertus, Julie A., ‘Doing Democracy ‘Differently’: The Transformative Potential of Human Rights NGOs in Transnational Civil Society’ *Third World Legal Studies* (1999), pp. 205-234, p. 212-3.

governmental organizations such as the United Nations. As Mertus observes, since “powerful NGOs designed the ‘backdoor process’…they therefore have little incentive to change it”.[61] The situation is exacerbated by the growing tendency for NGOs to assume functions which were once the prerogative of states, for “[o]nce they become a sort of ‘public service sub-contractor’, NGOs are in continual danger of having their local accountabilities and ethical principles compromised by the financial and discursive capacity of states to shape their agendas”.[62] NGOs therefore: “no longer fulfil their role as nonstate counterparts in trasnational civil society”.[63] Mertus’ analysis confirms that, when US scholars write about NGOs, they do not perceive them as a threat to sovereignty, or at least not to that of the United States.

6. INTERNATIONAL LAW AND US DOMESTIC LAW

The peculiarity of US conceptions of sovereignty is brought into sharp relief in academic discussions of the relationship between international law and US domestic law—a relationship that has generated a substantial literature within the United States, not least because of the Alien Tort Claims Act of 1789.

Alien Tort Claims Act

International law considers some crimes so heinous that perpetrators can be brought to justice wherever they are found. This principle of universal jurisdiction entitles states to either prosecute those accused or extradite them to another state that will. The Alien Tort Claims Act (“ATCA”), a US piece of legislation, extended the principle of universal jurisdiction to civil litigation, granting jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.[64] The ATCA was enacted as part of the Judiciary Act of 1789, but was largely ignored until 1980 and the *Filartiga* case, when it was interpreted as providing a cause of action in federal courts in cases involving torture committed by officials of foreign governments. In *Filartiga*, the Federal Court of Appeals, Second Circuit, had to resolve several issues, not least the fact that the ATCA was almost 200 years old. It ruled: “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today”.[65] In subsequent cases, other federal courts have accepted this holding, and it is widely supported by legal scholars. Similarly the

---

61 Mertus, ‘Doing Democracy ‘Differently’’, p. 216.

62 Mertus, ‘Doing Democracy ‘Differently’’, p. 219-20.

63 Mertus, ‘Doing Democracy ‘Differently’’, p. 220.

64 Quoted in Stephens, Beth and Ratner, Michael, *International Human Rights Litigation in U.S. Courts* (Irvington-on-Hudson, NY: Transnational Publishers, 1996), p. 5.

65 Quoted in Stephens and Ratner, *International Human Rights Litigation*, p. 10.

court rejected that view that violations committed by states against their citizens are not violations of international law, as “clearly out of tune with the current usage and practice of international law”.[66]

The *Filartiga* approach has been attacked by a number of academics, as well as by the administration of George W. Bush. They argue that the ATCA, instead of applying to all torts committed in violation of international law, should only apply to those acts which violate rights under US law. However, in July 2004, in *Sosa v. Alvarez-Machain*, the US Supreme Court rejected this attempted reinterpretation.

Despite fears that *Filartiga* would unleash a flood of litigation, “only a handful of cases have sustained jurisdiction under the ATCA in the years since the *Filartiga* decision”.[67] Beth Stephens, a supporter of the *Filartiga* approach, writes: “One must hope that as they become more familiar with the concepts of international law, US courts will begin to accept international law arguments in a wider range of cases”.[68]

Harold Koh—another supporter, and the Dean of Yale Law School—offers a theory of transnational public law litigation that focuses on the attempts of both state and non-state entities to adjudicate human rights cases, and the arising overlaps between domestic and international law.[69] Although “United States courts routinely applied international law in domestic cases” during the mid- to late-nineteenth century,[70] more recently two factors have impeded the importation of international law. First, the doctrine of non-self-executing treaties (that is, treaties which must be implemented by statute to acquire domestic legal effect) has been invoked. However, Koh argues that the Supremacy Clause in the US Constitution, which makes treaties the supreme law of the land, does not distinguishes between self-executing and non-self-executing treaties.

The second factor identified by Koh is the Act of State doctrine, solidified in *Banco Nacional de Cuba v. Sabbatino*, where the US Supreme Court indicated that national courts lack judicial competence to inquire into the legality of acts by foreign states. The *Sabbatino* ruling cast “a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law”.[71] However, two important trends arose in the late 1970s: a growing public acceptance that federal courts should restructure wrongful systems; and an unprecedented growth in transnational commercial

---

66 Quoted in Stephens and Ratner, *International Human Rights Litigation*, p. 11.

67 Stephens and Ratner, International Human Rights Litigation, p. 20.

68 Stephens, ‘Litigating Customary International Human Rights Norms’, p. 200.

69 Koh, Harold Hongju, ‘Transnational Public Law Litigation’ *Yale Law Journal* (1990-1), vol. 100, pp. 2347-2402, p. 2371, original emphasis.

70 Koh, ‘Transnational Public Law Litigation’, p. 2353.

71 Koh, ‘Transnational Public Law Litigation’, p. 2363.

litigation, with federal courts increasingly deciding cases brought by individuals and private entities against foreign governments. This led to the question: “if contracts, why not torture?”[72] The two trends came together in the *Filartiga* case.

Promoters of the ATCA clearly support a popular conception of sovereignty. Consider, for instance, the impact on Paraguayan sovereignty of the *Filartiga* case, where the defendant had been a police chief at the time of the torture. Yet the ATCA does *not* apply to the US government or its officials as defendants (because of “sovereignty immunity” and the “political questions doctrine”), nor to acts committed within the United States. So supporters of the ATCA are in no way challenging the sovereignty of the United States. For this reason, one might ask why the Bush administration and some academics regard the *Filartiga* line of cases as a threat. As the following section suggests, it is not just sovereignty they perceive to be threatened, but the balance of power between the federal government and the constituent states of the United States.

International Law as US Law

Curtis Bradley and Jack Goldsmith argue against what they refer to as the “modern position”, which Bradley defines as “the proposition that customary international law has the status of federal common law”[73]—and therefore pre-empts inconsistent state law.

Bradley claims that one of the modern position’s central arguments, that customary international law had the status of federal law in the 19th century, is false. Instead, the relevant precedent is *Erie Railroad v Tompkins* (1938), which the modern position contradicts. According to Bradley, *Erie* was significant because it rejected two principles which had previously underpinned the jurisprudence: that federal courts can apply law not derived from a sovereign source, and that courts merely discover the common law rather than make it. Thus, to Bradley, *Erie* ended the debate as to whether customary international law is federal law, and whether federal courts can apply customary international law which has not been incorporated by the political branches.

Bradley and Goldsmith are particularly concerned about what they identify as “new” customary international law, which arose mainly in the twentieth century, predominantly concerns human rights, and is “less consensual and less objective than traditional customary international law, and … more likely to conflict with domestic law”.[74] More to the point, they fear that this new law will “regulate many areas that were formerly of exclusive domestic concern”.[75]

---

72 Koh, ‘Transnational Public Law Litigation’, p. 2365.

73 Bradley, Curtis A., ‘The Status of Customary International Law in U.S. Courts—Before and After Erie’ *Denver Journal of International Law and Policy* (1998) vol. 26, p. 807-826, p. 809.

74 Bradley, ‘*Erie*’ p. 822.

75 Bradley, and Goldsmith, ‘Customary International Law as Federal Common Law’, p. 821.

From a similar political standpoint, John Yoo and Eric Posner argue that the US Constitution recognises no judicial body as superior to the Supreme Court, and that this renders international courts irrelevant. Yoo and Posner even write that the International Court of Justice “insults American sovereignty by attempting to bypass the executive branch, which is constitutionally charged with conducting foreign policy for the nation”.[76] They are particularly incensed that the Federal Republic of Yugoslavia could bring a case against the United States during the 1999 Kosovo intervention, despite the fact that the case was dismissed on jurisdictional grounds. Curiously, this disdain for international law does not extend however to the Security Council—presumably because of the US veto—since Yoo relies on Council resolutions to justifying the 2003 Iraq War.[77] In any event, it is clear that Goldsmith, Bradley, Yoo and Posner ascribe to a statist conception of sovereignty, or at least US sovereignty. But what of those who oppose their views?

Koh disagrees that allowing treaties to have direct effect in US law is an affront to US sovereignty:

> *[I]f one uses “sovereignty” in the modern sense of that term—a nation’s capacity to participate in international affairs—I would argue that the selective internalisation of international law into US law need not affront US sovereignty. To the contrary … the process of visibly obeying international norms builds US “soft power,” enhances its moral authority, and strengthens US capacity for global leadership in a post-September 11 world.*[78]

Koh argues that the desire to remain unfettered by international law is “ultimately… more America’s loss than that of the world”[79] because it means that the United States rarely gets credit for the good it does, including by providing leadership on democracy and human rights. Moreover, “by opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves… [and] disempower itself from invoking those rules, at precisely the moment when it needs those rules to serve its own national purposes”.[80] Although he has a positive view of international law, note that Koh focuses on the law’s ability to re-enforce US power and thus, presumably, its sover-

---

[76] Posner, Eric A., and Yoo, John, ‘International Court of Hubris’ *Wall Street Journal* 7 April 2004.

[77] See discussion, supra, Yoo, John C., ‘International Law and the War in Iraq’ *American Journal of International Law* vol. 97, (July 2003) p. 563-576.

[78] Koh, Harold Hongju, ‘On American Exceptionalism’ *Stanford Law Review* (2002-3), vol. 55, pp. 1479-1527, p. 1479.

[79] Koh, ‘On American Exceptionalism’, p. 1485.

[80] Koh, Harold Hongju, ‘On American Exceptionalism’ *Stanford Law Review* (2002-3), vol. 55, pp. 1479-1527, p. 1487.

eignty—or at least its ability to not worry about the negative consequences of diminished or shared sovereignty.

Koh believes the correct reading of *Erie* and *Sabbatino* is that federal courts retain legitimate authority to treat established rules of customary international law as federal common law: “Far from being novel, the ‘modern position’ is actually a long-accepted, traditional reading of the federal courts’ function. Both before and after *Erie*, the federal courts issued rulings construing the law of nations. *Erie* never intended to alter or disrupt that practice”.[81] “At bottom,” Koh argues, “Bradley and Goldsmith’s complaint reduces to this: ‘unelected federal judges apply customary international law made by the world community at the expense of state prerogatives’.”[82] And to this he responds: “So what else is new?”[83] Moreover, “Bradley and Goldsmith nowhere explain why explicit federal legislation—a process notoriously dominated by committees, strong-willed individuals, collective action problems, and private rent-seeking—is invariably more democratic than the judge-driven process they criticize”.[84]

On the issue of a “new” and subversive customary international law, Koh replies that there is “no clear line [which] separates the ‘old’ from the ‘new’ customary international law because both have influenced American law through precisely the same transnational legal process”.[85] Moreover, since the United States has long been the most influential country in the making of customary international law, including in the human rights field, it is hardly being forced into positions it opposes.

But Koh, Bradley and Goldsmith, despite their differences, share a statist conception of US sovereignty. They simply differ in their assessments of where US interests lie. As Koh observes, Bradley and Goldsmith have simply stumbled into the “power struggle image” of state-federal conflict, which portrays states and national governments as competing sovereigns.[86]

7. THE ANTI-INTERNATIONALISTS

Bradley and Goldsmith are prominent contributors to a growing body of literature that seeks to protect US sovereignty from the constraints of international law. There are several strands to this literature. As we have already seen, there is a body of writing concerning the status of international law within the US legal system. Second, there a body of literature that applies game theory, or rational choice approaches, to distinguish be-

---

81 Koh, ‘Is International Law Really Law?’, p. 1841.

82 Koh, ‘Is International Law Really Law?’, p. 1852.

83 Koh, ‘Is International Law Really Law?’, p. 1852.

84 Koh, ‘Is International Law Really Law?’, p. 1854.

85 Koh, ‘Is International Law Really Law?’, p. 1859.

86 Koh, ‘Is International Law Really Law?’, p. 1857.

tween traditional international law (law of the sea, diplomatic immunity) and modern international law (human rights, international criminal law) and argue that only the former counts as real international law which binds the United States. Finally, there is a body of literature that denies international law is law, especially those rules which purport to constrain US military force. Collectively, we label these scholars the “anti-internationalists”.[87] They are unapologetically committed to the statist sovereignty of the United States.

Rational Choice

Rational choice theory has gained a following across numerous academic disciplines, especially in the United States, including among the anti-internationalists. Following basic rational choice precepts, Jack Goldsmith and Eric Posner argue that “international law emerges from states acting rationally to maximise their interests, given their perceptions of the interests of other states and the distribution of state power”.[88] At the same time, they exclude a preference for obeying international law from their composite of state preferences from which they infer interests. This they do for two reasons. First, it is “unenlightening”[89] to explain compliance in terms of a preference for obeying international law. Second, a preference for compliance is dependent upon what citizens and leaders are “willing to pay in terms of other things that they care about”, such as security or economic growth. Goldsmith and Posner assert that people “care about these latter goods more intensely than they do about international law compliance”.[90] Thus any theory of international law must show why states comply, rather than just assuming that they have a preference for so doing.

In common with other anti-internationalists, Goldsmith and Posner argue that an overly optimistic idea of the power and potential of international law can be a dangerous thing, encouraging states to sacrifice elements of their sovereignty, adopt multilateralism and compromise their ability to act independently. In echoing realist international relations theory, Goldsmith and Posner place survival at the apex of state preferences, closely followed by the strengthening of US business and the protection of US jobs. They manifest no concern for the welfare of people overseas.[91] For Goldsmith and Posner, the world is fairly simple: states comply for instrumental reasons; the task at hand

---

87 For a scathing review of the anti-internationalists, see: Peter J. Spiro, ‘The New Sovereigntists; American Exceptionalism and Its False Prophets,’ (Nov/Dec 2000) Foreign Affairs 9.

88 Goldsmith, Jack L., and Posner, Eric A., *The Limits of International Law* (Oxford: Oxford University Press, 2005), p. 3.

89 Goldsmith, and Posner, *The Limits of International Law*, p. 10.

90 Goldsmith, and Posner, *The Limits of International Law*, p. 9.

91 Goldsmith, and Posner, *The Limits of International Law*, p. 216.

is the elucidation of those interests, and here rational choice can assist. Their conception of sovereignty is, again, entirely statist.

Andrew Guzman also uses a rational choice approach, though for him the self-interest of states is manifested primarily as reputation. A good record of obeying international law and abiding by international agreements has, as its pay-off, an increased willingness on the part of other states to cooperate. As a result, “We can no longer be satisfied with the simple conclusion that *the* ordering principle of the international legal order is *pacta sunt servanda*, the principle that ‘treaties are to be obeyed’.”[92] And yet, Guzman’s approach, while more nuanced and less anti-internationalist that Goldsmith and Posner’s, shares its adherence to a statist conception of sovereignty.

Is International Law really Law?

A final strand of the anti-internationalist literature denies that international law is really law. This school of thought focuses primarily on the law regulating the use of force, and is motivated by a desire that nothing whatsoever should stand in the way of US sovereignty, including its sovereign right to assert itself abroad.

Michael Glennon argues that, since the 1999 Kosovo intervention, the rules concerning the use of force are “no longer regarded as obligatory by states” and “the [UN] Charter’s use-of-force regime has all but collapsed”.[93] The international system has become split into a *de jure* system where “illusory rules” govern the use of force and a *de facto* system where states follow self-interest and the legal rules are all but ignored. Maintaining the fiction that states are constrained by international rules is, according to Glennon, more dangerous than having no rules at all because it engenders a false sense of security.

Glennon argues that the United States and NATO have decided to follow a “vague new system that is much more tolerant of military intervention but has few hard and fast rules”.[94] But we should not mourn the death of the old system, for it was incapable of recognising a simple truth: that the core threat to international security comes, not from interstate violence, but from state sponsored terrorism.[95] In this context, “[t]he risks po-

---

92 Guzman, Andrew T., ‘A Compliance-Based Theory of International Law’ *California Law Review* (2002) vol. 90, p. 1823, p. 1887.

93 Glennon, Michael J., ‘The Fog of War: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter’ *Harvard Journal of Law and Public Policy* (2001-2002) vol. 25, pp. 539-558, p. 540. See also Glennon, Michael J., *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York: Palgarve, 2001).

94 Glennon, Michael J., ‘The New Interventionism: The Search for a Just International Law’ *Foreign Affairs* (1999) vol. 78, pp. 2-7, p. 2.

95 Glennon, ‘The New Interventionism’,p. 2-3.

sed by a universal system that provides no escape from lawfully centralised coercion remain greater than the risks of a system that lacks coercive enforcement mechanisms”.[96] Glennon does offer an alternative: an acceptance that states are not equal in power, wealth or their commitment to human rights, and that some are less sovereign than others. Securing justice requires power, not law, though if “power is used to do justice, law will follow.”[97]

In a *Wall Street Journal* op-ed in 1997, John Bolton, who was then a Fellow of the American Enterprise Institute and is now US Ambassador to the United Nations, wrote: “Treaties are law only for US domestic purposes” and that, “[i]n their international operation, treaties are simply political obligations”.[98] In other words, unless a treaty has been implemented by legislation, it is simply a political consideration and may be ignored. The same approach is evident in Bolton’s take on the International Criminal Court, which he rejects on the basis of sovereignty and the separation of powers doctrine. Similarly, Bolton believes that what is at stake in the debate over the United Nations is “the basic principle underlying constitutional representative government: legitimate sovereignty ultimately rests with the citizens”.[99] Thus Bolton’s approach, like that of the other anti-internationalists, has popular elements that—with regard to the United States at least—work to reinforce a strongly statist conception of sovereignty.

Although it is easy to score points off Bolton, his central argument needs to be addressed. Is the international system simply about power? Does might make right? Why is not in the interest of the United States to acquire what it wants, however it can, regardless of international law? At present critics respond to the argument in moral terms, but this is a weak defence because Bolton’s argument is implicitly moral. Those who argue that it is in the self-interest of the United States to garner world support depend upon the assumption that the United States needs that support. This, Bolton et al. deny.

Jeremy Rabkin likewise believes that international politics cannot be constrained by international law and that it is dangerous to allow restrictions on what could be entirely legitimate actions, such as anticipatory self-defence. Any supposition that there could be an underlying consensus which renders force unnecessary is greatly mistaken[100] and the

---

96 Glennon, ‘The New Interventionism’,p. 5.

97 Glennon, ‘The New Interventionism’,p. 7.

98 Quoted International Relations Centre, Profile of John R. Bolton, available at http://rightweb.irc-online.org/ind/bolton/bolton.php , accessed 1 October 2005.

99 Bolton, John R., ‘Downer is Right to Tell the UN to Get Lost’ *Australian Financial Review*, 31 August 2000, available at http://www.aei.org, accessed 1 September, 2005.

100 Rabkin, Jeremy A., *The Case for Sovereignty: Why the World Should Welcome American Independence* (Washington: The AEI Press, 2004), p. 7.

US “will not entrust its security to “authorities” that have no means of protecting the United States”.[101] Since international authority cannot compel the deployment of forces it cannot protect nations when needed; international organisations simply cannot perform the functions of states. Yet Rabkin insists that unfettered US sovereignty should not be feared; indeed he doubts that the world is scared of America. Most importantly, Rabkin considers sovereignty to be a good thing: it can promote peace among states but it can also enable people within a particular state to focus on how to improve their state without the distraction of intervention.

We thus see several elements in the anti-internationalist conception of sovereignty. First, there is an overriding concern that international law not impede US actions. Any attempts to impose international rules upon the United States are mistaken and ill-conceived. Second, rational choice theory is used to prove the conditionality of states' compliance which international law: such compliance is neither automatic nor guaranteed. States will defect if it is in their interest to do so. Both these elements lead to the questioning of whether international law is really law. According to this school of thought, international law is little more than wishful thinking and incapable of meeting the demands of international politics. All the anti-internationalists share the same underlying cynicism about the ability of law to constrain power. In the end, their conception of US sovereignty involves little more than that—unadulterated, overwhelming power.

8. SOME TENTATIVE CONCLUSIONS

John Jackson explains that debates about sovereignty are really debates about allocations of power and that a discourse of sovereignty is adopted to conceal what is really a discourse about power. Thus “most of the sovereignty objections of joining an international treaty are arguments about the allocation of power among different levels of different human institutions, mostly governmental.”[102] The sovereignty discourse is used because it has an emotional appeal and is often used in a “blunt and undifferentiated way as a surrogate argument by opponents of some government proposal.”[103]

The link between sovereignty and discourses of power might usefully be illuminated by a consideration of the early days of the American Republic, when considerable value was ascribed to international law. This was mainly because of the United States' relative weakness compared to other nations—America was glad of the protections afforded by international rules. The United States also promoted several developments in international law—such as the right to self-defence as an exception to the unlimited legality of

---

[101] Rabkin, The Case for Sovereignty, p. 11.

[102] Jackson, John H., ‘The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results’, *Columbia Journal of Transnational Law* (1998), vol. 36, pp. 157-188, p. 160.

[103] Jackson, ‘The Great 1994 Sovereignty Debate’, p. 187.

war, and the law of maritime neutrality—to protect it against being drawn into conflict with European powers. During the same period, Congress adopted the Alien Tort Claims Act and the US Supreme Court produced a series of pro-international law judgements.

After the Second World War, the United States sought to develop international law and international institutions in furtherance of its new-found status as the world's most powerful country. It led the development of the United Nations, World Bank and International Monetary Fund, as well as instruments such as the Geneva Conventions, Genocide Convention, Universal Declaration of Human Rights and General Agreement on Tariffs and Trade. Indeed, for much of its history the United States has supported multilateral rules and institutions, recognising that involvement equals influence, and that rules and institutions can facilitate as well as constrain.

Yet there are distinctive elements of the American psyche, identified early on by Alexis de Tocqueville, which would seem to influence how Americans conceptualize sovereignty today. Most important of these is the celebration of popular sovereignty within the United States. As Tocqueville saw it, Americans essentially did rule themselves, so weak and restricted was government, and so aware of its popular origins: "The people reign over the American political world as God rules over the universe. It is the cause and the end of all things; everything rises out of it and is absorbed back into it".[104] As a consequence, the US Constitution is considered—not just by John Bolton—to be superior to international law.

A corollary element is the high level of political activism amongst ordinary Americans, which Tocqueville called "a restless activity, superabundant force, an energy never found elsewhere".[105] In Tocqueville's account, if an obstacle blocks a road, the local people will form a committee and solve the problem themselves, without ever thinking of contacting local government.[106] A historic suspicion of government, particularly the federal government, helps explain the anti-internationalists' opposition to international law as federal law, and to supranational institutions especially.

Tocqueville also observed that the state and federal systems constituted "two distinct social structures… In a word, there are twenty four [now 50] little sovereign nations who together form the United States".[107] Suspicion of federal government was reinforced by the parochialism of American life where an individual's primary allegiance

---

[104] Tocqueville, Alexis de, *Democracy in America* edited by J.P. Mayer and trans. George Lawrence (Garden City, New York: Doubleday and Co., 1969), p. 60.

[105] Tocqueville, *Democracy in America*, p. 244.

[106] Tocqueville, *Democracy in America*, p. 189.

[107] Tocqueville, *Democracy in America*, p. 61.

was to her township, then to county, then to state, and only in the last instance to the United States. All the more reason for today's anti-internationalists to reject treaties and customary international law that could override the sovereign rights of the individual constituent states!

An additional explanation for the suspicion of government was provided by Frederick Jackson Turner, who argued that the frontier fundamentally shaped American identity.[108] For Turner, the frontier was a region of complete freedom where people were forced to be self-reliant and innovative, creating their own social and political institutions outside of the reach of law or government. The "frontier thesis" helps to explain the American suspicion of authority, especially authority imposed from the outside, as today's anti-internationalists perceive international institutions and international law to be. Of additional interest is the fact that Turner presented his thesis just as the American frontier was ceasing to exist. In this new context, the need to grow and conquer that was central to thesis meant that the United States had to expand overseas. And this new frontier, by definition, had to be devoid of law or government also.

Americans are also highly patriotic. As Tocqueville observed: "The American, taking part in everything that is done in his country, feels a duty to defend anything criticised there, for it is not only his country that is being attacked, but himself."[109] This "irritable patriotism"[110] produces a national pride which Tocqueville saw as "not only greedy but also restless and jealous… both mendicant and querulous."[111] Tocqueville analyzed the constant need to reaffirm the rectitude of the American way of life as a sign of insecurity, though it is possible that the continual assertion of the superiority of the American way of life has since moved beyond insecurity into unthinking arrogance.

The end of the Cold War created an unprecedented opportunity for countries to transcend statist conceptions of sovereignty. The UN Security Council's authorizing of the 1991 Gulf War gave legitimate hope that a "new world order" (to quote President George H.W. Bush) was possible, based on multilateral decision-making and the rule of law. What has emerged instead is American unipolarity and a slide towards disorder, partly—though not exclusively—as a result of the second Bush administration's response to the terrorist attacks of 11 September 2001. The administration used the fear and patriotism generated by the attacks to pursue political and legal changes that certain of its members had long desired, as evidenced by the Project for the New American Century. It helped too that the morality which has always been implicit in American

---

[108] Frederick Jackson Turner, *The Frontier in American History* (New York: H. Holt and company, 1937).

[109] Tocqueville, *Democracy in America*, p. 237.

[110] Tocqueville, *Democracy in America*, p. 2437

[111] Tocqueville, *Democracy in America*, p. 612.

political discourse increased in strength and stridency during this period—partly as a result of the language and actions of President George W. Bush himself.

Although a belief in self-government, popular sovereignty and its own moral superiority might push the United States to expand, a suspicion of big government and a preference for the parochial would seem to push it toward isolation. These two countervailing tendencies have shaped US foreign policy for centuries. They necessarily shape contemporary US conceptions of sovereignty.

We suspect that the dichotomous nature of US conceptions of sovereignty can be explained—at least partly—by these elements of the American psyche. On the one hand, self-belief, a “can-do” attitude and a conviction that others deserve popular sovereignty also, combine to generate a belief that the United States can and should intervene, and that interventions are invariably beneficial to recipient countries. In America’s perception of itself, the US national interest hardly ever appears. On the other hand, the isolationist tendency and the belief in self-government combine to generate a belief that American sovereignty may never be compromised. Thus, ideology, activism and arrogance permit and justify intervention in other states while the absolute privileging of US self-government—as opposed to the *relative* privileging of self-government elsewhere—prevents interference by outside actors in US affairs and makes Americans instinctively suspicious of international institutions and international law.

The bifurcated nature of the American psyche would thus seem to have contributed to a bifurcated conception of sovereignty, a conception that we have traced through the recent writings of a number of US scholars of international relations and international law. Regardless of whether they evince a statist or popular conception of sovereignty, and regardless of whether they support or oppose international law and international institutions, they almost never suggest that the sovereignty of the United States should be compromised. The sovereignty to be delegated, “unbundled” or otherwise undermined is nearly always that of other states.

It bears repeating that this bifurcated conception would likely be impossible without American self-belief. But what is self-belief if not self-interest? How do the two relate to each other? The moralistic overtones of US foreign policy have influenced—and in turn been influenced by—an assumption that the United States acts altruistically. It intervenes for the good of others, for it is simply not a part of the American identity that the United States could be exploitative or imperial. For non-Americans, at least, it is difficult to reconcile this apparent selflessness with what, on close examination, seems to be an entirely self-serving approach to sovereignty—until we understand that the two conceptions are but different sides of a single coin.

BIOGRAPHICAL NOTE

Michael Byers holds a Canada Research Chair (Tier 1) in Global Politics and International Law at the University of British Columbia.

Telephone: +1 604 822-3049
604 822-3129
E-Mail: michael.byers@ubc.ca
Address: University of British Columbia, Liu Institute for Global Issues, Vancouver, B.C., 6476 NW Marine Drive, Canada V6T 1Z4

Adriana Sinclair is a Post-Doctoral Fellow at the Liu Institute for Global Issues, University of British Columbia

Telephone: +1 604 822-1672
E-Mail: adriana.sinclair@ubc.ca
Address: University of British Columbia, Liu Institute for Global Issues, Vancouver, B.C., 6476 NW Marine Drive, Canada V6T 1Z4