

Internationalized Sovereignty: Erosion or Extension?

Written by Hyginus Okechukwu Iwuh

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HYGINUS OKECHUKWU IWUH, MAY 4 2011

The following essay discusses James Gow's insistence that the requirement to "exercise... sovereign right within domestic jurisdiction in such way that it does not cause a disturbance in international order" (Gow, 2005: 41), is an extension of external sovereignty rather than its negation.

The argument presented by the author goes contrary to Gow's suggestion and is built on the historical development of the concept of sovereignty as well as its post-1945 legal framework. The recent challenge to the concept of sovereignty presented by the new norm of international scrutiny of the exercise of domestic powers of states is discussed. Gow's argument is briefly presented and applied to the case of the NATO intervention in Kosovo in 1999, and the subsequent international administration of its territory until a unilateral declaration of independence in February 2008.

The author concludes that Gow's argument does not hold in the case of Kosovo, as the sovereign right of Yugoslavia (later Serbia and Montenegro, and Serbia) to govern its own territory without foreign interference was breached and later removed completely – all on the basis of the very requirement that states have to exercise their domestic jurisdiction in such way as not to cause disturbance to international order.

One of the earliest works attempting a coherent theorization of sovereignty was Jean Bodin's *The Six Books of the Commonwealth*, first published in 1576. Bodin defined sovereignty as "the absolute and perpetual power of a commonwealth" (Bodin 1992: 1), permitting for an overall superiority of god and his divine power. Indeed, god himself was the source of a ruler's power: "it is the law of God and of nature that we must obey ... him to whom God has given power over us" (Bodin 1992: 34). In Bodin's view, princes stood on earth in the place of lieutenants of God, guided by the divine law and above the positive. Their power over the territory God entrusted them was absolute, they were sovereign rulers of it.

Seventy-five years later, in 1651, another influential book scrutinizing the problem of sovereignty was published – the famous *Leviathan* by Thomas Hobbes. He disposed of God as the source of sovereigns' power and instead presented his social contract theory (Hobbes 1976). In his narrative of the rise of sovereign power, every man would at an imaginary point in history say to every other man that he would give up his right of governing himself and authorize a third man or assembly of men to exercise power over him, on the condition that the others would do exactly the same. The aim of this act would have been to end the state of war of every man against every man, in which life was "poor, solitary, nasty, brutish and short" (Hobbes 1976: 86). With this act the Leviathan of state power with sovereignty as its artificial soul arises. Again, the very nature of sovereignty is the ultimate earthly authority over the given territory.

The third formative work in classical philosophy of sovereignty is Jean-Jacques Rousseau's *The Social Contract*, first published in 1762. While again asserting the voluntary and collective character of relinquishing of self-government by individuals, his social contract differed from Hobbes's in significant detail – rather than forwarding the right to govern to an individual or limited group of individuals, each person submitted to the general collective will. This collective will represented by the 'public person' formed of the individuals Rousseau called the republic or body politic: "it is called State by its members when it is passive, Sovereign when it is active, and Power when it is compared to others like itself" (Rousseau 1983: 25). Members of the collective were to be called 'people' as a

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collective, or individually, 'citizens' in respect to sharing in the power and 'subjects' in respect to the law created by general will. Appropriating the people (citizens) to the sovereign (state), Rousseau suggested that sovereignty is "nothing less than the exercise of the general will", which "can never be alienated, and" exercised by "the Sovereign, who is no less than a collective being" and "cannot be represented except by himself" (Scott 2006: 69).

In his assertion on what is the political body called and when, Rousseau touched upon a novel aspect of sovereignty – its relationship to other sovereignty-endowed entities. While the individuals forming collectives submitted themselves to the general will, it is also important that the other such 'public persons' recognized the collective as a 'Power'. The parallel with the modern notions of internal and external sovereignty is apparent. By the time Rousseau's book was published, the Westphalian system emergent from the long series of religious wars in 1648 was firmly in place, establishing the new norm of equal sovereign states in place of nested sovereignties of pre-Westphalian Europe. Often likened to the Hobbes's covenant of every man with every man, the Peace of Westphalia brought the covenant of every state with every state^[1] on inviolability of sovereign authority of each state over its territory and their mutual equality (Shinoda 2000: 14).

In the Westphalian era, sovereignty developed into a central institution of international relations, designed to ensure the maintenance of order by asserting two key aspects – supreme authority of the state over its territory and non-interference by other states (Butler 2009: 41). The defining features of the Westphalian sovereignty are therefore independence (internal sovereignty) and co-existence (external sovereignty) (Kreijen 2004: 108). Thus framed, sovereignty has persisted from the Peace of Westphalia until very recently. The following section discusses its legal institutionalization especially in post-1945 period.

The aforementioned Peace of Westphalia was the first early step towards the legal institutionalization of sovereignty. The Treaties of Westphalia signed in Munster and Osnabruck in 1648 established sovereignty as an institution of international treaty law on the basis of territoriality and the exclusion of any external agents from the domestic structures (Lesaffer 2004: 45). They revolved around the principles of independent conduct of each state in their domestic matters, equality among states and non-intervention in the internal matters of other states.

Save for the 1993 Montevideo Convention on Rights and Duties of States, which codified what elements defined the sovereign state in 1933 within the limited framework of the Seventh International Conference of American States^[2] (Scott 1940: xxix); sovereignty would only become codified on the universal level after almost 300 years following the Treaties of Westphalia. Indeed, the principle of recognition of sovereignty by other sovereigns was carried forward into following period of legalisation of sovereignty as well (ICISS 2001: 6).

Charter of the United Nations (UN 1945) in its first chapter – 'Purpose and Principles' – states that the organization is "based on the principle of the sovereign equality of all its Members" (Article 2(1)) combining in one sentence both the internal and external aspects of sovereignty as established by the Treaties of Westphalia. The chapter continues to assert that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (Article 7(1)) to reaffirm the commitment to the sovereign rights of states.

Further to this, the International Court of Justice (established by the UN Charter) in one of its first reports suggested that mutual "respect for territorial sovereignty is an essential foundation of international relations" (ICJ 1949: 4) and several decades later repeated this assertion saying that state sovereignty was the fundamental principle on which the whole of international law rested (ICJ 1986: p. 263).

Thus the institutions of the international system emergent from the Second World War laid the legal foundations of state sovereignty internally and externally. While external sovereignty refers to legal equality of states, internal sovereignty is associated with domestic jurisdiction (see above), which corresponds to the "power, authority, and competence of a state to govern persons and property within its territory" (ICISS 2001: 7). Domestic jurisdiction covers prescriptive and enforcement competencies alike. The states have power to prescribe law as well as implement it in their own territory, and this authority is protected by principle of non-intervention. Moreover, all states have a right to be recognized as equal by other states and participate in the creation of international legal norms.

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Yet, this understanding of sovereignty anchored in international law has become the subject of redefinition recently, in the aftermath of an evolving understanding of security and threat in international context. Some authors have argued that these changes undermined sovereignty as a concept, while others insist that it has been enhanced.

The challenge can be viewed from multitude of vantage points, with a majority of authors arguing that sovereignty as defined by international law is being undermined (Zaum 2007, Reka 2003, Lyons and Mayall 2003). Yet, this assertion is a point of considerable contention and alternative debate challenges what has become a conventional wisdom. In terms of this essay, the most interesting are the two poles, which argue that: a) social re-construction of the notion of security towards the concept of human security resulted into a re-definition of sovereignty, but not necessarily by way of undermining it; b) state elites actively manipulate the notion of security towards the concept of human security to assert state sovereignty and power. These two poles are best represented by the works of James Gow, *Defending the West* (2005), and Mark Neocleous, *Critique of Security* (2008). Given the limited word count of this essay, both poles cannot be explored and examined – the focus on the vantage point that derives different conclusions from the same argument (that redefinition of security resulted in changes to the concept of sovereignty) perhaps provides the most interesting topic for enquiry.

James Gow observed that a recent shift towards understanding security in its 'human security' rather than 'national security' framework was the first instance since formulation of the notion of sovereignty, which significantly altered its meaning (Gow 2005: 40). Human security is said to shift the focus away from the security of a state to the security of an individual. Emphasis is placed upon "protecting individuals from severe disruptions in their lives that may derive from a variety of sources, including the economy, the environment, and politics" (van Langenhove et al. 2009: 1). Gow suggested that the shift towards human security indeed transformed the international system in the post-Cold War era; yet, humanitarianism did not become the foundation of sovereignty. Instead, Gow argued that the shift exercised strong influence upon conditions of exercising sovereign rights and moved the source of sovereignty from popular to international level. This redefinition is in Gow's view the key to understanding the change, as it placed the international source of sovereignty (presumably, recognition by other states) on an equal footing with popular principles, rather than eroded its exercise (Gow 2005: 40).

In theory, this would mean that internal and external aspects of state sovereignty remain the same. What changes is the fact that the population of a given state is no longer the primary sources of its sovereignty. The international community has been placed on equal footing, not only in process of recognition of state sovereignty, but also in terms of well established sovereignties. Here, Gow argues, exercise of sovereignty was in fact extended rather than eroded, as states were given – as a part of their external sovereignty – the right to challenge legitimacy of sovereignty of such state that poses a threat to the redefined human security (Gow 2005: 41). Whether this argument holds in practice will be the topic of a short case study in the last part of the essay.

Many academic books and articles have been written on the topic of the NATO intervention in Kosovo in 1999 (Bieber and Daskalovski 2003, Greenwood 2002, Chomsky 1999), however, for the purposes of this essay the reasoning behind the decision to undertake the intervention and its aftermath are more significant than its actual conduct.

To start with, the Kosovo intervention was the first one in history to be justified solely on the basis of human rights breaches by a sovereign state within its territory, which were judged to present a threat to international order as defined in 1992, in the wake of the crisis in Somalia by the UN Security Council resolution 733 (UN 2008: 881). In the aftermath of the intervention, international control under resolution 1244 was established. Nominally, the resolution reaffirmed the territorial integrity of Yugoslavia, but demanded withdrawal of Belgrade forces from Kosovo and authorized the establishment of NATO's Kosovo Force (KFOR) as the international security presence coupled with international civil presence established under the auspices of the UN Secretary General (UNMIK). The effect was for the people of Kosovo to "enjoy substantial autonomy within the Federal Republic of Yugoslavia" (Harland 2010: 77). However, the result was somewhat different – still under prolonged UN and NATO presence, Kosovo presented the world with a unilateral declaration of independence on 17 February 2008 (Economides et al. 2010: 99). In effect, the aftermath of the humanitarian intervention was the removal of Belgrade's authority over part of its territory by the international community and, eventually, a declaration of that territory's independence. Sixty-nine of

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the 192 members of the UN recognized independent Kosovo by June 2010.

How do Gow's assertions of extended/strengthened sovereignty in the aftermath of security and threat redefinition hold if applied to this case?

From Gow's point of view, one could interpret the decision to conduct the intervention as an exercise of extended external sovereignty of the NATO states. They decided to deny Yugoslavia international source of sovereignty and intervene in the situation in Kosovo. Under *post hoc* added UN umbrella, the international community administered Kosovo instead of Yugoslavia. Yugoslavia's sovereignty over the territory of Kosovo was effectively non-existent, as it was not granted by the population of Kosovo or the international community, the two sources of sovereignty. A unilateral declaration of independence by Kosovo established a new sovereignty recognized by the international community and the population. Thus sovereignty, as a concept, was not undermined – its redefinition provided for denial of a source of Yugoslavia's sovereignty by the international community, rather than curbed its ability to exercise it.

Yet, such argumentation is seriously flawed. First of all, resolution 1244 confirmed Yugoslavia's territorial integrity, therefore, its sovereignty in regards of Kosovo. Yet, the international community was to administer the territory through UNMIK and police it through KFOR. Thus it was the exercise of sovereignty rather than its source that was denied to Belgrade. The source of sovereignty was only denied by the unilateral act of a declaration of independence in 2008 – and that not completely, as there remain 2/3 of the UN members who did not recognize Kosovo's independence and Kosovo's government certainly does not have the support of the whole population it now governs.

The three seminal works in classical Enlightenment theory of sovereignty, quoted in the opening section, reflect the developing view of normative justification of the sovereign – while in Bodin's work, the right to rule its subjects is bestowed upon the ruler by God, in Hobbes's view the subjects voluntarily submit themselves to the rule of an autocrat, in Rousseau's thesis the subjects themselves as a collective constituted the general will of the sovereign state. Despite these differences, the function of sovereignty – the highest authority over certain territory and everything within, remains unchanged as well as its utility – to establish and maintain order in otherwise disorderly human communities. Thus we can conclude that since the early days of its theorization, it was the normative basis of sovereignty, rather than its function or utility that has been repetitively questioned and reformulated.

The post-1945 period cemented the concept of sovereignty as a right of recognized entities to exercise exclusive authority over certain territory and legal equality with other such entities. Sovereignty was associated with the state and its absolute right to govern certain territory, assuming the communion of interests between the state and its population, as per Locke's view of commonwealth as representation of general will.

Yet, in the post Cold War period the shifting emphasis from security of the state to the security of human beings and the professed dedication of the international community as well as major powers to protect of human rights. Human security, rather than state security, became the centre-point of new extended security concerns and states were made responsible for conducting their internal affairs in such way as not to endanger international peace and order. The question of this essay was whether such imperative created a situation in which sovereignty of states was enhanced or eroded.

A different vantage point built on interesting and strong methodological basis and featuring well defined arguments was presented – that of James Gow, who argued that the redefinition of security did not necessarily mean the undermining of sovereignty.

However, Gow's assertion did not hold even in the simplified scrutiny of a real case – that of Kosovo. In fact, the case suggested that the conventional wisdom that a shift towards human security does erode state sovereignty holds best in face of reality. From any vantage point, the bottom line remains that Belgrade's sovereignty over Kosovo was first breached and then completely removed by the international community. Regardless of whether the cause was just, Yugoslavia's sovereign right to conduct internal matters independently was breached. In contradiction to Gow, this author would argue that it was not the source of sovereignty that moved from the population towards the

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international level. It was the internationally-recognized conditionality of the exercise of sovereignty that shifted its focus from the rights of the state to the rights of people.

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Written by: *Hyginus Okechukwu Iwuh*
Written at: *University of Westminster*
Written for: *Dr. Aidan Hehir*
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^[1] Perhaps, more appropriately, covenant of every prince with every prince

^[2] Basic requirements included defined territory, permanent population and functioning government. Crucially, qualitative condition was added to the requirement of functioning government stating that it had to display authority over the territory it claimed and that to the effect of exclusion of any other state. This understanding is said to have been carried forward in understanding of sovereignty promoted in the later UN documents (ICISS 2001: 6).