Chapter Two

SOVEREIGNTY

As Thomas Friedman says, “globalization involves the integration of free markets, nation-States and information technologies to a degree never before achieved...” it consequentially also affects the concept of sovereignty.22 ‘Sovereignty’ is a word used in the sphere of international law and also in the political arena, that is, at the national level.

Globalisation and inter-dependence are challenging the traditional theories of sovereignty that treat nation-States or societies or legal systems as discrete, impervious entities that can be studied in isolation either internally or externally. (Proceeding from the Ohmaean premise that globalisation is a modern phenomenon.) As Professor Twining says, “this challenge operates in two main ways: municipal law can no longer be treated in isolation from outside influences, legal or otherwise.”23

As the case involving the extradition of former Chilean President, General Augusto Pinochet Ugarte, from Britain demonstrated in 1998-99,24 the multi-dimensional impact of European Union (EU) laws on constituent States, and the establishment of the International War Crimes Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) show, there is a fast growing trend

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toward internationalisation of issues. Stock theories of law that assume municipal legal systems as self-contained or public international law as solely concerned with external relations between States no longer fit snugly with modern international practice or realpolitik. Therefore, in view of this steady challenge to traditional doctrines of national sovereignty and non-interference in internal affairs of independent States, there is a need for deconstruction and refinement of these concepts.

The glissade transition from tribalism to nationalism to regionalism to globalism calls for revisionism in several key conceptual areas particularly sovereignty of States and intervention, both of which this thesis tackles and tries to re-define.

This chapter deals with the concept of sovereignty, its origins, and development, its national and international law dimensions, and its dilution in the process of globalisation. A revised definition of ‘sovereignty’ is posited at the end of the chapter which tries to bring the concept in line with international practice and to enable modern States better cope with foreign intervention and outside interference in their internal and external affairs and their diminished sovereign status in weltpolitik.

This re-definition is necessitated because the nation-State still plays a dominant role in public international law. Conversely, this implies a predominant role of international law and a weakening of the sovereign State.

Sovereignty, in international law, was always concerned with not where it essentially resides or is located within the State but how it is exercised and is impacted in an interdependent world. Herein, however, lies the paradox that inter-State relations (or State practices) play a significant role in constituting the sovereign State (as do relations between individual States and their societies) but
also derogate from that aspect of sovereignty affecting as they do the ability of authoritative and independent decision-making.

**CONDITIONS OF STATEHOOD**

International Law primarily concerns itself with States and matters relative thereto. The essential characteristics of a ‘State’ have long been debated. But the Montevideo Convention of 1933 on the Rights and Duties of States agreed that ‘the State as a person of international law should possess the following qualifications:

(a) A permanent population;
(b) a defined territory;
(c) a government; and
(d) a capacity to enter into relations with other States.’

Finer\(^{25}\) says the defining characteristics of a State... are:

1. It is a territorially defined association;
2. It embraces, compulsorily, all persons in that territory;
3. It possesses the monopoly of violence throughout this area, by virtue of which it has the capacity, even if not the moral authority, to guarantee the finality of its decision in political disputes arising from the conflict of individuals or groups within its territory;
4. As a necessary accompaniment of all this, it has a body of persons who exercise this monopoly of violence in its name, namely, the common government.

According to H.J.W. Hetherington\(^{26}\), “the [S]tate is the institution or set of institutions which, in order to secure certain elementary common purposes and


\(^{26}\) Strong, C.F: *Modern Political Constitutions* (1972), pp. 4-5.
conditions of life, unites under a single authority the inhabitants of a clearly-marked territorial area."

This single authority is the power or authority to make law. So Woodrow Wilson says: "A [S]tate is a people organised for law within a definite territory."\textsuperscript{27}

There is no stipulation as to the minimum or maximum of population necessary to constitute a State. But the human element is a \textit{sine qua non}. Aristotle (384-322 BC) and Jean-Jacques Rousseau (AD 1712-1778) placed definite limits on the size of population; they were influenced by the idea of direct democracy. Rousseau, for example, fixed the number at ten thousand. Aristotle preferred a population large enough to be self sufficient and small enough to be well governed. Till about mediaeval times, security was thought to be in numbers. With modern technological advancement, \textit{inter alia}, in the fields of weapons and armaments and nuclear deterrence the number theory became otiose. Britain, for centuries, for instance, ruled more than two-thirds of the world. Now we have countries as thickly populated as China and as sparsely populated as Nauru or the Vatican.

A fixed territory is not a \textit{sine qua non} even though there is hardly a modern State not territorially defined. The external (as well as internal) boundaries may keep on changing but that may not alter the identity of the State. Some States may be territorially incontiguous, \textit{e.g.}, Britain and its erstwhile and present colonies. The states of Alaska, and Hawaii, do not have geographical contiguity with the United States mainland. The Jews were recognised to constitute the independent State of Israel in 1948 even when they did not confine themselves to a particular territory. 'The formulae in the classic treatises somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory [of a State] does not necessarily include precise delimitation of the boundaries of that territory.'\textsuperscript{28}

\textsuperscript{27} Professor Jessup, United States representative on the United Nations Security Council, on 2 December 1948, with regard to Israel's qualifications to be admitted to the United Nations.
Although a definite territory may define or identify a nation, increasing regionalism, and technological advances are diluting their significance. Under international law, as at present, a lot of rights and duties accrue from the precise definition of national boundaries.

Government, sometimes used synonymously with the term 'State', is more a sub-set of the State. It is the organisation that organises the nation, the people. The State is more a theoretical concept while the government of a State is its functional aspect. A Government is, according to Oppenheim, 'one or more persons who are the representatives of the people and rule according to the law of the land'. However, the view that a government is that organ of the State through which its will is expressed and enforced may not be entirely true. A lot would hinge on the interpretation of that 'will'. Quaere, in an autocracy or dictatorship, can the government be said to express the 'will' of the State. Some like Miliband argue that the State as such does not exist. What 'the State' stands for is a number of particular institutions which, together, constitute its reality, and which interact as parts of what may be called the State system. He says the treatment of one part of the State—usually the government—as the State itself introduces a major element of confusion in the discussion of the nature and incidence of State power; and that confusion can have large political consequences. Thus, if it is believed that the government is in fact the State, it may also be believed that the assumption of governmental power is equivalent to the acquisition of State power. Such a belief, resting as it does on vast assumptions about the nature of State power, is fraught with great risks and disappointments. To understand the nature of State power, Miliband goes on, it is necessary first of all to distinguish, and then to relate, the various elements which make up the State system.

It is not very surprising, he writes, that government and [S]tate should often appear as synonymous for it is the government which speaks on the [S]tate’s behalf. It was the [S]tate to which Weber was referring when he said, in a famous phrase, that, in order to be, it must ‘successfully claim the monopoly of the legitimate use of physical force within a given territory’. But, according to Miliband, ‘the [S]tate’ cannot claim anything: only the government of the day, or its duly empowered agents, can. Men, it is often said, give their allegiance not to the government of the day but to the [S]tate. But the State, from this point of view, is a nebulous entity; and while men may choose to give their allegiance to it, it is to the government that they are required to give their obedience. A defiance of its orders is a defiance of the [S]tate, in whose name the government alone may speak and for whose actions it must assume ultimate responsibility…

But here lies another difficulty. In most political systems, even if the citizen does not owe allegiance to the government per se it does not detract from his allegiance to the State. Administration is part of the functions of the government and the administrative process is part of the political process. Administration, according to Miliband, is always political as well as executive, at least at the levels where policy-making is relevant. Officials and administrators, he adds, cannot divest themselves of all ideological clothing in the advice which they tender to their political masters, or in the independent decisions which they are in a position to take. Notwithstanding variations in the extent of their powers from State to State, these officials contribute directly and appreciably to the exercise of State power. This thesis is also concerned with the foreign influences that affect such decision-making for ultimately it is these decisions that constitute the outward manifestation of the sovereignty of the State, in its relations with its own citizens and vis-à-vis other States in the international arena.

The last attribute of the State is ‘sovereignty’. The word ‘sovereignty’ is derived from the Latin word superanus and means ‘supremacy’. According to
Koskenniemi31 “there simply is no fixed meaning, no natural extent to sovereignty at all.” According to Oppenheim32, ‘sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all around, within and without the borders of the country’. A sovereign State implies a State is sovereign or in complete command of matters internal as well as external. Sovereignty is “that characteristic of the State in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself”.33 Strong says that “etymologically the word sovereignty means superiority, but when applied to the [S]tate it means superiority of a special kind, such superiority, that is to say, as implies law-issuing power.”34 He contends further, “sovereignty is the power of the State to make laws and enforce them by all means of coercion it cares to employ. It has a double aspect—internal and external. Internally it means the supremacy of a person or body of persons in the [S]tate over the individuals or associations of individuals within the area of its jurisdiction. Externally, it means absolute independence of one [S]tate as a whole with reference to all other [S]tates.”35 Koskenniemi says that ““sovereignty” is usually connected with the ideas of independence (“external sovereignty”) and self-determination (“internal sovereignty”).”36 Apropos of this thesis a distinction will have to be drawn between sovereignty in the national context and international context. State sovereignty vis-a-vis a State’s own citizens and a State’s sovereignty vis-a-vis other States in its relations with them. But the latter might be a function of the former.

32 Oppenheim, ibid., pp. 118-119.
35 Strong, ibid.
36 Koskenniemi, ibid., p.209.
Ancient Indian political thought was not ignorant of the concept of sovereign powers. Terms like rajya, svarajya, samrajya, bhaujya, vairajya, maharajya, and adhipatya find mention in ancient texts like the Atharva Veda, the Taittiriya Samhita, the Aitareya Brahmana, and the Jaiminiya Upanisad Brahmana. Of these terms, the first is taken to mean “sovereign power”, which when coupled with another term asandi (sitting on the throne) came to be one of the characteristics of samrajya. Kaultila38 (circa 346 BC-?) expatiates on the concept of sovereignty in the Arthasastra (“Treatise on Polity”). Kaultila in his Concept of Rajamandala39 and the Saptanga Theory (or Theory of State) says the king, the ministers, country, fort, treasury and army, the friend and enemy are the elements of sovereignty40.

According to Manusmriti41, the king, his minister, his capital, his realm, his treasury, his army and his ally are the seven constituent parts of a kingdom. Kaultila adds another: the enemy.

The secular conceptions of a modern sovereign State and of a modern independent sovereign find mention in the works of Jean Bodin42 (1530-1596); Niccolo Machiavelli43 (1469-1527); and later, in the seventeenth century, Thomas Hobbes44 (1588-1679); and Hugo Grotius45 (1583-1645).
The modern State is allegedly and putatively a sovereign State. It is, therefore, in traditional conceptual terms, independent in the face of other communities. It may infuse its 'will' toward them with a substance which need not be affected by the 'will' of any external power. It is, moreover, internally supreme over the territory that it controls. It issues orders to all persons and all associations within that area; it receives orders from none of them. Its 'will' is subject to no legal limitation of any kind. What it proposes is right by the mere announcement of its intention.46

In the western world, the most familiar statement on the doctrine of sovereignty is by John Austin (1790-1859):

'If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent... Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme.'47

This bears resemblance to the following extract from Leviathan, that antedated Austin's work, on the 'Rights of the Sovereign':

'A commonwealth is said to be instituted, when a multitude of men do agree, and covenant, every one, with every one, that whatsoever man, or assembly of men, shall be given by the major part, the

45 "Sovereignty is the supreme political power vested in him whose acts are not subject to any other and whose will cannot be overridden." His actual name was Huig de Groot, but he is better known by his Latin name.
right to present the person of them all, that is to say, to be their representative; every one, as well as he that voted for it, as he that voted against it, shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.

From this institution of a commonwealth are derived all the rights, and faculties of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.⁴⁸

The term sovereignty was first used by French jurists in the 15th century. "The word sovereignty entered into the vocabulary of political theory from the feudal order, wherein it designated a relationship between persons. The term sovereignty had been applicable to any feudal overlord with authority over his subjects in his dominions."⁴⁹ The term sovereignty was introduced into political science by Bodin in his celebrated work De la Republique, which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word souverain was used in France for an authority, political or other, which had no other authority above itself. Thus the highest Courts were called Cours Souveraines. Bodin, however, gave a new meaning to the old conception. Being under the influence of, and in favour of, the policy of centralisation introduced by Louis XI of France (1461-1483), the founder of French absolutism, he defined sovereignty as 'the absolute and perpetual power within a State'. Such power is the supreme power within the State, according to Bodin, without any restriction whatever except the Commandments of God and the Law of Nature. No Constitution can limit sovereignty, which is an attribute of the king in a monarchy, and of the people in a democracy. A sovereign is above positive law. A contract is only binding upon

⁴⁸ Hobbes, T: Leviathan, op.cit., pp.177-78.
The conception of sovereignty thus introduced was forthwith accepted by writers of politics of the 16th century. But, the majority of these writers diluted the idea of an absolute sovereign saying sovereignty could be restricted by Constitution and by positive law. A weaker conception of sovereignty than that postulated by Bodin was thus born. On the contrary, Hobbes, in the 17th century, went even beyond Bodin, maintaining that a sovereign was not bound by anything, and had a right over everything, even over religion.

Although Hobbes developed a great following, there were others who denied the omnipotence of sovereignty. According to Samuel Puffendorf (1632-1694), sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be Constitutionally restricted. Yet in spite of all the differences in the definitions of sovereignty, all writers of the 16th and 17th centuries agreed that sovereignty is indivisible.

This then is the State; and its supreme power and monopoly of coercion (which it can devolve in many ways on its own terms) is sovereignty. The political process revolves around the acquisition of this sovereignty; the administrative around its executive utilisation. It is the peculiar characteristic of the State that its will alone dominates and overrides all wills, whether of persons or associations; to it all other wills are potentially subject. Without sovereignty a State cannot express its ‘will’. Arguably, without a ‘free will’ there cannot be a sovereign State. This conceptual cognition of ‘sovereignty of a State’ in terms of

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50 Bodin, J: *De La Republique*, quoted in Ebenstein: *ibid.*
51 Puffendorf was the disciple of Hugo Grotius and son of a Lutheran pastor, who rebelled against theology and embraced the fashionable philosophy of rationalism. His *magnum opus* is *De Jure Naturae et Gentium Libri Octo* (Of The Law of Nature and Nations Eight Books). He was Professor at the University of Heidelberg.
53 ibid., p.10.
‘a free will’ and ‘allegiance of a body of people’ is what the present thesis questions as being unrealistic and unpragmatic, and posits a redefinition and re-conceptualisation of the perception of ‘sovereignty of a State’.

A classical definition can be found in the statement by Judge Huber in the Island of Palmas Case,\(^5\) anent a dispute between the Netherlands and the United States over the sovereignty on the Island of Palmas (Miangas) in the Pacific:

> “Sovereignty in the relations between States signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”

Even in the Austro-German Customs Union Case,\(^6\) the idea of independence was again defined by the Permanent Court of International Justice in its advisory opinion as:

> “…the continued existence of [a State] within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other…”.

Thus, sovereignty is related to \textit{de facto} independent power.

According to Koskenniemi, “in modern international law “sovereignty” plays a role analogous to that played by “liberty” in domestic liberal discourse. It works as a description and a norm. It characterizes the critical property an entity must possess in order to qualify as a State. And it involves a set of rights and duties which are understood to constitute the normative basis of international relations.”\(^7\)

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\(^5\) \textit{Island of Palmas Case}, II United Nations Reports of International Arbitral Awards (UNRIAA), p.829. Also, Jessup 22 AJIL 735 (1938).


\(^7\) Koskenniemi, \textit{op.cit.}, p.262.
MONIST AND PLURALIST SCHOOLS OF SOVEREIGNTY

Monists believe that sovereignty is absolute, exclusive, universal, inalienable, permanent and indivisible. Pluralists, on the contrary, feel sovereignty is to be divided and shared by all associations. Semble, divisible sovereignty would be antinomical. Among pluralists are Harold Laski, Ernest Barker, G.D.H Cole, R.M. Maclver. Otto von Gierke (1844-1921) and F.W. Maitland (1850-1906) were pioneers of pluralist school of sovereignty. They espoused the cause of groups and associations which, according to them, had a consciousness and will of their own. And, each of these groups having a personality of its own made a contribution to the framing of laws. As law is a command of the sovereign, by logic, sovereign elements were manifest in such groups and associations.

An increase in international co-operation and understanding, the birth of several international organisations, and advances in science, technology and communications, have tended to weaken the traditional concept of sovereignty. The maintenance of international peace and collective security have further diluted the narrow conception of sovereignty. With the growth of international associations, pluralists began advocating greater functional independence and autonomy for such institutions.

Emile Durkheim (1858-1917), a Frenchman, regarded as the principal originator of ‘functionalism’, 58 was of the view that if the State is to be prevented from becoming tyrannical, sovereignty has to be divided between it and social associations.

58 ‘Functionalism’ is an attempt to find a way of comparing both the structures and the operations of all social systems by finding necessary elements common to any stable social system. Much of its origin depends on analogies with biological systems. Functionalists have tried to understand what are the necessary ‘functions’ that must be carried out in any political system if it is to cope with its environment and achieve its goals, and to locate the ‘structures’ (political parties, socialising agencies like churches, etc.) which facilitate its functioning. See, Robertson, David: Dictionary of Politics (London: Penguin Books, 1986) p. 135.
If democratic polity does not necessarily imply the strict limitation of the influence of the State, how is the individual in civil society to be protected against an indefinite extension of State control over social and economic life? Secondary groups, like corporations and social associations, Durkheim suggested, are to have a dual role: they should provide a buffer (as well as a mutual connection) between the State and the individual, shielding him from its possible excesses; but they have also to help to maintain the distance between civil society and the State necessary to ensure that the social order does not lapse into the conservatism of unreflective routine.  

The pluralists are not sure whether the State is *unus inter pares* (one among equals), or *primus inter pares* (first among equals). Harold Joseph Laski (1893-1950), British political scientist, who served on the bench of the United States Supreme Court, argued the case for pluralism, saying that the mask of absolute sovereignty should be torn off the face of the State and it should be relegated, from its superior status, to a status coordinate with other associations. He was confident that a time would come when the concept of absolute sovereignty would be discredited and rejected like the Divine Right Theory of Kings. He believed that the legal theory of sovereignty could not be made valid for political philosophy, and that it would be good if the whole concept of sovereignty is surrendered. Laski, it may be noted, became a monist in his later years.

The State, according to Maclver, is an association which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order.

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IS SOVEREIGNTY DIVISIBLE?

Federalism is a form of government in which power is constitutionally divided between different authorities in such a way that each authority exercises responsibility for a particular set of functions and maintains its own institutions to discharge those functions. *Semble*, in a federal system each authority is, therefore, in theory sovereign within its own sphere of responsibilities, because the powers which it exercises are not delegated to it by some other authority.

With regard to the United States of America, Alexander Hamilton, James Madison, and John Jay argued that sovereignty is divided between the states on the one hand and the federal union on the other, so that ‘the whole sovereignty consists of a number of partial sovereignties’.62 They supported and defended the “theory of concurrent sovereignty” of the federal State and its member-states. Wherever the real power in a government lies, in view of James Madison, there is the danger of oppression. ‘In our government the real power lies in the majority of community’.

John C. Calhoun (1782-1850), United States Vice President (1825-32), argued that sovereignty is an entire thing; to divide it is to destroy it. It is the supreme power in a State; and “we might just as well speak of half a square or half a triangle as of half a sovereignty”.63

The issue is not academic in nature. In case the divisibility of sovereignty is admitted, the units in a federation will claim the right to secede from the structure of their volition. In the United State of America, it is now settled that, legally, sovereignty in a federal State is vested in the amending body of the Constitution. Hence, while governmental powers are divided between two governmental authorities, sovereignty itself is not divided; it is vested in that

63 A Disquisition on Government, 1851, quoted in Hofstadter, ibid., Chapter IV.
body which is empowered to alter the Constitution or Basic Law—which in
Austinian terms can be said to obey no like superior but receives habitual
obedience from the bulk of a given society.

Austin says that the sovereignty is a determinate person or body of
persons. So, what is the tangible manifestation of sovereignty in a State? In
Britain, sovereignty resides in Queen in Parliament. In United States of America,
sovereignty has its locus in the body which has power to amend the Constitution,
but this body is not determinate. The discovery of sovereign in a federal State is
an “impossible adventure”.64 Even in a unitary State it is often difficult to locate
the sovereign.

According to Oppenheim65, “the question which is now [in the twentieth
century] confronting the science of law and politics is how far sovereignty as it
presents itself from the point of view of the internal law of the State, namely, as
the highest, underived power and as the exclusive competence to determine its
jurisdictional limits, is compatible with the normal functioning and development
of International Law and organisation. The very notion of International Law as a
body of rules of conduct binding upon States irrespective of their Municipal Law
and legislation, implies the idea of their subjection to International Law and
makes it impossible to accept their claim to absolute sovereignty in the
international sphere. Their mutual independence is indeed a fundamental rule of
International Law; but it is only by reference to a higher legal order that the
mutual independence of States, viewed as a rule of law, is conceivable. On the
other hand, owing to the weakness of International Law, its supremacy over the
States composing the international community is limited to the duty which it
imposes upon them to observe and, within a restricted sphere, to submit to the
enforcement of the existing rules created by custom or treaty or flowing from the
very existence of the society of States”.

64 Laski, ibid.
65 Oppenheim, ibid, pp.122-23.
Since the end of the Cold War, a competence of the part of the international community to impose fresh obligations upon an unwilling State, or to interfere with its rights in cases in which changed conditions require the adaptation of International Law to the requirements of international peace and progress seems to have emerged. Haiti (1994) and Iraq (1990) being cases in point. But, it does not, as yet, include the duty to submit international disputes to judicial determination. "The abstract doctrine of equality of States is, to a large extent, yet another manifestation of that conception of sovereignty."\(^66\)

It is being increasingly realised that progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the securing of the rule of law.

**SOVEREIGNTY OF A STATE IN INTERNATIONAL LAW**

In the classical sense, State sovereignty is a description of the powers and liberties the State is endowed with. The State's liberty was construed as extending to anything the State itself thought appropriate to extend it to. This would also be the ideal construct of sovereignty: the untrammelled freedom to do whatever the State deems fit and proper to do shorn of all external control and free from all outside influences. According to Koskenniemi,\(^67\) "the international doctrine of State sovereignty bears an obvious resemblance to the domestic-liberal doctrine of individual liberty."

Modern thinking oscillates between ascending and a descending perspective on Statehood. Ascending sovereignty implies the consensual nature of international law that State behaviour, will and interest are determining of the

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\(^{66}\) Oppenheim, *id.*

law, while descending sovereignty connotes that sovereignty is determined by international law agreed to between States but which overrides individual State behaviour, will or interest.

![Diagram](image)

**ASCENDING SOVEREIGNTY**

**DESCENDING SOVEREIGNTY**

The concept of ascending and descending sovereignties is derived from Koskenniemi\(^\text{68}\) who has taken it from Ullmann\(^\text{69}\).

If States want to form and/or be part of a legal international régime based they have to, out of normative necessity, accept a delimitation of their spheres of liberty reified in the concept of sovereignty.

There is a relationship between the sovereignty of State and norms of intervention in that contemporary patterns of intervention reveal a decisive shift in orientation from the State-centric system to a framework of authorisation that is based on the international community. That is, there is "a qualitative shift in the relationship between States and the international community" in favour of the latter.\(^\text{70}\)

There is a long history of constraints on sovereignty, but growing interdependence and the end of the Cold War have intensified this trend. Recent

\(^{68}\) op.cit.


constraints on sovereignty have increasingly focused in the *internal* activities of the States rather than, as in the past, on their external relations with other States.\textsuperscript{71}

There is no doubt that State sovereignty is eroding, but it will remain the dominant organising principle of international life for the foreseeable future. A range of non-State actors has emerged for the promotion of "the public good" which has contributed to this erosion. These non-State actors are not subject to the control of the host State vis-à-vis their policies, objectives or agenda; the host State, if it disagrees with their avowed aims, can merely ask them to leave or proscribe them but cannot influence them *per se*, rather the reverse. Another contributory factor leading toward this weakening of the State system is the emergence of global market forces.

In conventional analyses of contemporary international law and politics, the Westphalian system provides the organising conceptual framework. Territorially defined States possess sovereignty: they are free from ostensible external constraints, and the authority of their governments is supreme within their borders. This system of organising political power is said to have come into being in the 17th century with the Peace of Westphalia when sovereign territorial States replaced the feudal order. This Westphalian system of territorially defined, sovereign States did not emerge full-blown in 1648 alone. The process was gradual and had roots deep in history. It was not put in place throughout the world until de-colonisation occurred in the second half of the twentieth century. The structure of the global system is the consequence of historical processes. But the common understanding seems to be that the sovereign, territorially-defined State replaced the feudal order in an essentially linear process because of its superior war-fighting capacity.\textsuperscript{72}

\textsuperscript{71} Ibid.
The sovereign State emerged around the year 1000 and then triumphed as the superior mode of organising political authority. According to Spruyt, population growth and technological developments resulted in increased opportunities for economic transactions and put pressure on the feudal order. These very factors once again put pressure on the sovereign State system possibly heralding the transformation or graduation to a more internationalised or globalised economic and political order.

Some writers have been proclaiming the end of the nation-State for some time. The nation-State, they allege, cannot satisfactorily deal with challenges resulting from such issues as the globalisation of production and global environmental change.

The two dimensions of sovereignty, external and internal, have already been discussed. According to Janice Thomson, recognition of sovereignty’s external or international dimension accounts, in part, for the demise of sovereignty as a matter of State-society relations occurring in an international vacuum. Bodin’s and Hobbes’s “theories” of sovereignty, for example, according to Ferguson and Mansbach, were largely “aspirational” as both sought to bring order out of political turmoil by expanding the powers of the central State.

To talk of the ‘demise’ of sovereignty at the internal level is too harsh a conclusion as the role of the Austo-Kelsenian sovereign commander in ordering of State-society relations cannot be gainsaid. A political chain of command is a sine qua non of the State structure. But, Thomson rightly argues that the domestic-international dichotomy and the interplay between the two are crucial to the institution of sovereignty. In a globalising world, external forces play an integral role in constituting, defining, and shaping sovereignty, the State, and State-society

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73 ibid.
76 Ibid.
relations. In some aspects, these outside forces weaken the latter concepts and in others strengthen them, as we shall see later in the chapter on Intervention and its typologies.

It has to be said that with the internationalisation of norms the paradigm of ‘State’ sovereignty is weakening. This can perhaps be illustrated as a progression as in figures a to g, where GS represents the Global Structure, SS the State System, and NSA the non-State Actors.

![Diagram](image-url)

a. PAST  
b.  
c.  
d. Present  
e. Present  
f. Future  
g.
If the trend toward globalisation continues, it seems that in the future the State System will be subsumed by the global superstructure with the former retaining some of its identity—more like cells in a body in a Spenserian model—albeit with weakened sovereignty.

Falk and Strauss\textsuperscript{77} say the economic and political problems of [1998] have driven home just how reliant the world has become upon effective international solutions to what would previously have been considered regional or local problems. They say further that “because of a more interconnected, globalized world it seems inevitable that the international order will play a significantly enhanced role in the next century.” As there is “no structure in place to ensure that this order will be organized along democratic lines”, Falk and Strauss suggest “a worldwide grassroots campaign to establish the first Global Peoples’ Assembly.” They argue that ‘globalisation is creating a non-governmental global civil society composed of non-governmental organisations, trans-national business, labour, media, cultural and religious institutions and networks, and cosmopolitan individuals with extraordinary wealth and influence, and that this numerically small yet highly visible globalized citizenry now has the capacity, perhaps with the help of some forward-looking governments, to organise such an assembly.’

The establishment of such a Global Peoples’ Assembly—although quite some way off albeit not impractical—will require the redefinition of our common understanding of sovereignty of States which this thesis focuses on.

Many writers speak of sovereignty and State as two distinct ideas: sovereignty being the enabling feature of the State. Thomson talks of conceptualisation of sovereignty as an institution, rather than an organising principle or process, which imparts to the State a “meta-political authority.”\textsuperscript{78}

\textsuperscript{78} Op. cit.
But, to this writer it seems more like the mind-thought relationship: one being unable to exist without the other.

Sovereignty provides a rationale for the existence of States. It gives States a sense of identity as discrete entities. In absence of sovereignty, States would be but mere fiction. Having said that, paradoxically that is exactly what they are. And that is why we need to continue to have a concept of sovereignty; and to make it viable we need to reconstruct it. Because we cannot have a world without States like we cannot have States without people. If we did not have the concept of sovereignty, we would require some other basis to justify State existence.

Weakening sovereignties in a globalising require re-definition of the existing concept of sovereignty, as already underscored above. It has to be pointed out that the idea of sovereignty has indeed evolved with time. The Austinian notion of sovereignty stands largely discredited in the eyes of many writers. The rigid Hobbesian, and somewhat ideal, notion of sovereignty as unlimited and unfettered freedom has persistently been buffeted by the winds of globalisation and interdependence consistently weakening it. Independence and interdependence are antithetical. And, globalisation, according to globalisation-sceptics like Hirst and Thompson\(^8\), is nothing new. The history of international law and international relations is a history of globalisation. The nation-State, according to them, is still intact, and so is national government.

On the other hand, hyper-globalisers like Ohmae\(^9\) and Held et al.\(^8\), say that everything is in change, and different from before, that the nation-State exists in name only and is mere fiction. According to Ohmae, there will be 2000 city-states rather than 200 States in the next hundred years. According to Giddens, the

\(^7\) Hirst, Paul Quentin—Thompson, Grahame: Globalisation in Question: the international economy and the possibilities of governance (Oxford University Press, 1996)


launch in 1967 by U.S.A. of the first experimental communication satellite could
mark the shift toward globalisation, as the Morse Code in the nineteenth century
marked the first development in a globalising world.82 He says that new
structures of sovereignty are being created, and refers to the former British
Empire as “a quasi-globalised structure”. He recommends regulation of
globalisation believing it to be a “multi-textured, free-floating phenomenon”
creating new institutions, and not simply a decision-making process that can be
reversed at some stage.83 He forthrightly says that “nations have lost most of the
sovereignty they once had…the era of the nation-[S]tate is over.”84

Even four decades earlier, Schwarzenberger had observed that “on the
international level, independence is increasingly giving way to
interdependence”85, and critics like Jessup felt that sovereignty is greatly
overrated.86

It is not as if globalisation is a new concept. Contrary to Ohmae’s
assertion, globalisation is an old idea gaining increasing recognition as the rate of
its spread and its strength has increased in the past century. In the days of yore,
even the discovery of new lands and territories by intrepid travellers and seafarers
was part of the process of globalisation. Every new discovery or invention
contributes to this process. The invention of the airplane and the World Wide
Web pushed this process even harder. Writing on the invention of the airplane,
Bill Gates says, “The Wrights created one of the greatest cultural forces since the
development of writing, for their invention effectively became the World Wide
Web of that era, bringing people, languages, ideas and values together. It also
ushered in an age of globalisation, as the world’s flight paths became the
superhighways of an emerging international economy. Those superhighways of

82 Giddens, Anthony: Interdisciplinarity and Globalisation. Lecture delivered at School of
83 Ibid.
the sky not only revolutionised international business; they also opened up isolated economies, carried the cause of democracy around the world and broke down every kind of political barrier. And they set travellers on a path that would eventually lead beyond Earth’s atmosphere. The Wright brothers and their invention, then, sparked a revolution far-reaching as the industrial and digital revolution.”

CHAPTER THREE

INTERVENTION