

LECTURE

THAT “S” WORD: SOVEREIGNTY, AND GLOBALIZATION, AND HUMAN RIGHTS, ET CETERA*

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In an academic lecture it is the subtitle that counts. After you get past “That ‘S’ Word,” I offer the principal themes, globalization and human rights, and that mysterious “et cetera,” in which I will pack a few tidbits.

I don’t like the “S word.” Its birth is illegitimate, and it has not aged well. The meaning of “sovereignty” is confused and its uses are various, some of them unworthy, some even destructive of human values.

Not all of the uses are unworthy. During the past half-century, many cheered the yearning for sovereignty by peoples that did not have it: sovereignty was the watchcry for the principle of self-determination¹ and for the end of empires—the British, the French, the Soviet. Some also cheered the disintegration of other once-

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1. See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 *Stan. J. Int’l L.* 255, 262 (1996).

sovereign countries, such as the U.S.S.R. and Yugoslavia.²

I will not talk about that. I address the sovereignty of states. It is part of my thesis that the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring. Sovereignty began as a domestic term in a domestic context. It referred to relations between rulers and those they ruled, between the "Sovereign" and his or her subjects. Its application to modern states—a state is not a person, but an abstraction—and its relation to other abstractions, such as the governments which represent states, has inevitably brought distortion and confusion.

When Queen Elizabeth I was sovereign to her British subjects, she carried her majesty, her sovereignty and her sovereign perquisites with her when she dealt with other kings and queens. But what did her sovereignty have to do with the insistence of governments today, say of Iraq, that they cannot be held answerable for violating human rights within their own territory? Or with Augusto Pinochet's claim to some kind of sovereign immunity from being tried for horrible crimes against humanity?³ Why does the sovereignty of Queen Elizabeth I render the world helpless to deter, prevent, or judge genocide, or to establish an international criminal court to bring to justice those whom "sovereign" states cannot, will not, or do not bring to justice?

What has state sovereignty meant in our expiring century? In simpler days, state sovereignty implied several key elements. Primarily, it meant political independence.⁴ It also meant territorial integrity⁵ and virtually exclusive control and jurisdiction within that territory.⁶ By extension, we also developed the concept of nationality,⁷ perhaps harking back to the days when sovereignty involved a Sovereign and a Subject. We sometimes refer to state

2. See generally Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 Loy. L.A. Int'l & Comp. L.J. 581 (1992) (analyzing the dissolution of the Soviet Union); John F. Burns, *Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia*, N.Y. Times, Apr. 28, 1992, at A1 (reporting the formal separation of former republics from Yugoslavia); Chuck Sudetic, *Yugoslav Groups Reach an Accord*, N.Y. Times, Mar. 19, 1992, at A9 (reporting moves toward an independent Bosnia and Herzegovina).

3. See Tim Golden, *Pinochet in the Dock; Arresting a Dictator Is One Thing. Then It Gets Tough*, N.Y. Times, Oct. 25, 1998, § 4, at 5.

4. See Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 67 (1999); Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. Pa. J. Int'l Econ. L. 745, 757-58 (1997); cf. U.N. Charter art. 2, para. 4 (prohibiting members from infringing upon the "territorial integrity or political independence" of any state).

5. See U.N. Charter art. 2, para. 4; Taylor, *supra* note 4, at 757-59.

6. See U.N. Charter art. 2, para. 4; Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. 843, 898-99 (1999).

7. See Louis Henkin, "Nationality" at the Turn of the Century, in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht 89 passim* (Ulrich Beyerlin at al. eds., 1995) (discussing the evolution of national identity and its effect on international politics).

sovereignty in relation to the “nationality” even of corporations, and state authority and jurisdiction over them.

That much has been agreed, and was agreed upon in the early part of the century, and it is what professors of international law and politics have long taught. But something happened to that “S word” in the twentieth century. I address what one might call “transformative” developments.

The first, perhaps the most important, came after two world wars, after the sacrifice of several human generations and millions and millions of human lives. After the defeat of Hitler, sovereignty began to mean “let’s leave each other alone—no war, no use of force.” That was the law that was established in the United Nations Charter and at Nuremberg.⁸ War became illegal,⁹ then nuclear weapons made world war unthinkable, and world war was in fact kept “cold” for thirty years. We may not appreciate how remarkable that was, that transformative development in the middle of the twentieth century: “sovereign states” gave up their “sovereign” right to go to war.

Another development, less dramatic, also followed the end of the Second World War. At mid-century, states had to learn to pursue “cooperation.”¹⁰ Cooperation by “sovereign” states did not come easily, and it continues to be difficult. I blame the delusions and mythology of sovereignty for the failure of states to collaborate more extensively. Sovereignty does not encourage cooperation; it breeds “going it alone.”

We have had some cooperation, but it has been limited in the name of sovereignty. We pursued a quest for world order, but a limited world order. We created a United Nations, but it is a limited United Nations.¹¹ We have a World Bank and an International Monetary Fund and other specialized agencies, and they are all limited by the concept of sovereignty. They are limited, not only in achievement but even in aspiration, by a persistent addiction to this notion of sovereignty.

The international human rights movement is a third transformation. Until 1945, sovereignty, political independence and territorial

8. See U.N. Charter art. 2, paras. 1-4; Principles of International Law Recognized in the Charter and Judgement of the Nuremberg Tribunal, Report of the International Law Comm., U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

9. See U.N. Charter arts. 1, 2, paras. 4, 33; Nuremberg Principles, *supra* note 8, Principle VI(a).

10. See U.N. Charter preamble; Treaty Establishing the European Economic Community, preamble, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing the North Atlantic Treaty Organization (NATO)).

11. See U.N. Charter art. 10 (providing the General Assembly the power to make nonbinding recommendations); *id.* art. 27, para. 3 (requiring an affirmative vote of nine members of the Security Council, as well as unanimous consent of the permanent members, before a binding resolution may be issued).

impermeability meant that how a state treated its own inhabitants was not a subject of international concern.¹² How a state treated its own inhabitants was nobody else's business.

That was Hitler. The world stood by, and had nothing to say about it. International law said nothing about it. What went on behind territorial frontiers was cloaked by an iron curtain of sovereignty.

The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.¹³

I need not say that sovereign states did not rush to embrace international human rights, to welcome that gaping gap in their sovereignty. But, slowly, they have accommodated. They have agreed to human rights treaties. Even big, powerful sovereign states, such as the U.S.S.R. and China, and the big-power sovereigns of Europe, France and Great Britain, and the United States, became parties to human rights treaties.¹⁴ They accepted international human rights standards, as expressed in the Universal Declaration of Human Rights,¹⁵ specific, particular international standards¹⁶ to replace their own once-sovereign standards (or lack of standards). They imposed international standards on other sovereign states—at Nuremberg, on Germany;¹⁷ and all the sovereign states had no difficulty flouting the sovereignty of South Africa when they voted for sanctions against apartheid.¹⁸

So a major rent developed in the cloak of sovereignty, due to this

12. See *supra* note 4 and accompanying text.

13. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984) [hereinafter Convention Against Torture]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980) [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD]; International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

14. See ICCPR, *supra* note 13, at 256-301; ICESCR, *supra* note 13, at 52-106.

15. UDHR, *supra* note 13.

16. See *supra* note 14 and accompanying text.

17. See Nuremberg Principles, *supra* note 8.

18. See *infra* note 31 and accompanying text.

idea of human rights. Sovereign states have not done this eagerly, but some 150 states out of fewer than 200 have adhered to the major covenants, in which they undertake legal obligations as to how they will treat their own inhabitants. One hundred and twenty-five states have adhered to the Genocide Convention.¹⁹ One hundred ninety—nearly every state except the United States of America—have adhered to the Convention on the Rights of the Child.²⁰ One hundred fifteen are party to the Convention Against Torture;²¹ 160 to the Convention on the Elimination of Racial Discrimination;²² and 160 to the Convention on the Elimination of Discrimination Against Women.²³

I do not wish to paint a rosy human rights picture—or, if you prefer, to paint a dark picture of the condition of state sovereignty. The banner of sovereignty still waves ominously over all human rights issues; the mantra of sovereignty is still intoned against human rights. Sovereign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to. They submit to monitoring, to judgment by international human rights courts and commissions, if they wish, to the extent they wish.

And so, state sovereignty at the end of the twentieth century—and at the beginning of the twenty-first—can be summarized as: “Sovereignty means ‘leave us alone.’” Sovereignty is: “We will engage in a minimal amount of cooperation, if we as sovereign states consent.” Sovereignty is subject to some “creeping” international human rights, to the extent sovereign nations consent. In general, I fear sovereignty as we have known it is alive and well.

That would have been my conclusion if asked to speak five years ago. Now, however, as we face a new century, a new millennium, one hears that “S word” again. We hear it invoked, proclaimed, protested, perhaps protested too much—as if the concept is under siege. I have noted three contexts in which we hear the cry of sovereignty, cries of joy or of anguish, but surely of confusion.

The first is “globalization”—a new word, a new development, a new phenomenon, that has become almost a buzzword. State socialism is gone, and state capitalism, too, is giving way to privatization.²⁴ A global economy is largely replacing and overwhelming national and regional economies.²⁵ Companies created in one country are

19. See Genocide Convention, *supra* note 13.

20. See Convention on the Rights of the Child, Nov. 20, 1989, *reprinted at* 28 I.L.M. 1448 (1989).

21. See Convention Against Torture, *supra* note 13.

22. See ICERD, *supra* note 13.

23. See CEDAW, *supra* note 13.

24. See Wolfgang Freiherr Von Marschall, *Creating the Necessary Instruments for a Market Economy in the Post-Communist Countries of Eastern Europe: Policies and Problems*, 39 St. Louis U. L.J. 951, 951 (1995).

25. See Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective*

headquartered in another with branches and subsidiaries, or mines and factories, in third or fourth or fifth or more countries.²⁶ Multinational companies are swallowing up national companies, and finding themselves subject to the confusion and inefficiency of competing sovereignties.²⁷

What is globalization doing, or what has it done, to that concept of sovereignty, the oldest idea in international relations? Giant companies have become largely independent of states, of the states that created them, of the states in which they operate. Some of them are replacing, or at least jostling, the states themselves in the state system. So we have the phenomenon of globalization and everybody thinks it is doing something to sovereignty (I think it is, too, although I'm not sure exactly what).

The "international market" is a related concept. We read and hear about "the Market." Where is the Market? Where is it physically or geographically? Under whose laws and under whose control? Who is sovereign in regard to the Market, or perhaps is the Market sovereign?

There are other terms, or concepts, out there, some of which I don't understand.

Cyberspace—where is cyberspace? Is it subject to state sovereignty? To the same state sovereignty? Is cyberspace sovereign?

And perhaps a different, earlier "globalization," slowly recognized, still barely attended to, is "the environment."²⁸ Where is the environment? Is it sovereign? Is it subject to some state's sovereignty, or perhaps to the sovereignty of several states, or to the sovereignty of all states?

In theory, in very theoretical theory, every state can try to subject these global phenomena, or some pieces of them, to its sovereign jurisdiction. In theory, in theoretical theory at least, sovereign states can get together and agree to laws and create institutions. But no sovereign state, and not all state sovereignties together, seem to be sovereign enough to solve the problems that these developments have brought to our human society at the end of the twentieth century.

There is growing, though grudging, realization that world economic

on the Public/Private Distinction, Federalism, and Democracy, 31 Vand. J. Transnat'l L. 769, 815 (1998); Eleanor M. Fox, *Vision of Europe: Lessons for the World*, 18 Fordham Int'l L.J. 379, 385 (1994).

26. See Lan Cao, *Law and Economic Development: A New Beginning?*, 32 Tex. Int'l L.J. 545, 558 (1997) (book review).

27. See Paul B. Stephan, III et al., *International Business and Economics: Law and Policy* 302 (1993).

28. See, e.g., Neil A. F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 Colum. Hum. Rts. L. Rev. 487, 487-96 (1996) (describing the international recognition of the importance of global environmental issues).

affairs, world communications, and inevitably, therefore, world politics, are no longer cabined within the state system. And suddenly, or perhaps slowly, the realization is sinking in that sovereignty has lost its nerve, and sovereign states have realized that they are losing their control, that the state system is losing control.

I would devote a few minutes to ponder the effects of globalization in all of its forms in relation to the other phenomenon of our time, the law and politics of the international human rights movement.

The contemporary human rights movement, I have suggested, represents a significant deviation from pre-Second World War conceptions of sovereignty. In fact, some have seen sovereignty as threatened by the very idea and ideology of human rights, by the whole of what we call international human rights, by the ever-growing body of covenants and conventions and international and regional institutions. And, as some see it, sovereignty is also threatened by busybody governments and busybody nongovernmental organizations—Amnesty International, Human Rights Watch, the Lawyers Committee—and by professors, by litigious lawyers who are after Karadzic and Pinochet, and some day perhaps Milosevic, and many still anonymous in many parts of the world.

Sovereignty continues to raise its head against monitoring, against the efforts to shame governments, efforts by their own citizens, by other governments, by international bodies, by nongovernmental organizations, by the media, and by professors.

Now, if state sovereignty has resisted the human rights movement, and if globalization has begun to threaten state sovereignty, that may sound promising for the human rights movement. But I do not find comfort for human rights in the various forms of globalization. The fact is that human rights and the human rights movement depend on governments and on the state system. With a nod—or, if you will, a thumb of the nose—to the shade of Karl Marx, I do not see the withering away of the state as a result of globalization. If Marx's ideology did not end the state, and with it the state system, neither will globalization in its various forms, singly or together. In any event, if the state is going to wither away, the time has not come, and will not come soon.

Rather, for those who care about human rights, the need is to work to make the state system more human rights-friendly, even in the age of globalization, even taking globalization into account. Human rights advocates must learn to use the state system against threats posed by various forms of globalization (in addition to those presented by governmental abuses). I do not consider globalization to be beyond or outside the state system. Some sovereign states singly, several of them together, or all of them together through international institutions, can bend the globals to their will, and they can do so for human rights purposes. Globalization does not relieve states of

responsibility for the human rights of people subject to their jurisdiction. The state is required to ensure those human rights which it is able to protect. It cannot encourage or condone violations. It cannot encourage or condone violations even by globals, if it can regulate or control them.

Those of us who work these two fields, globalization and human rights, have to rethink what we taught for fifty years, and persuade others that our rethinking is necessary, desirable, and good.

For example, sovereignty used to mean that only states—not individuals, not companies—were subject to international law and to national laws purporting to implement international obligations. But if globalization is changing that, if we no longer say, as we have for almost fifty years now, that only states are subject to international law, we may be able to create a new set of “responsibles,” of “persons” responsible for human rights violations under international law. It is not only the states that are responsible. When giant-tentacled companies become substitutes for governments, can they perhaps be held responsible for human rights violations? The obligations of states to respect and to ensure rights need to be cast so as to include the activities and violations, of global companies wherever and whoever, they are.

International law and national law can, and do, address human rights violations or complicity in violations by multi-faceted companies in far-flung places, including big companies with big names. If they are charged with complicity in human rights violations—for example, child labor—they can be sued, as they are now in U.S. courts,²⁹ as once only government officials could be. They can be targeted in Nigeria and Burma,³⁰ as once they were in South Africa.³¹ The ILO³² has awakened from a reasonably deep slumber. NGOs,³³ shareholders, consumers, the media, and the academy are joining forces against human rights violations by the globals.

The market too, sovereign or not, is open to regulation by governments, by a few governments singly, by several who cooperate,

29. See Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens on U.S. Human Rights Litigation*, 39 Va. J. Int'l L. 41, 55-56 (1998).

30. See *id.* at 56.

31. See, e.g., Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5111 (1988) (imposing prohibitions against a broad scope of economic relations with South African business and government agencies, to be lifted upon “substantial progress” toward eliminating apartheid); Security Council Res. 418, U.N. SCOR, 32d Sess., 2046th mtg., U.N. Doc. S/RES/418 (1977) (imposing mandatory sanctions against South Africa, constituting the first mandatory sanctions against a U.N. member state); Julie Fairchild Grey, Note, *The Passage of the Federal Anti-Apartheid Act: The Culmination of Anti-Apartheid Efforts Within the United States*, 11 Suffolk Transnat'l L. Rev. 387, 409-413 (1987) (discussing the development of United States foreign policy toward South Africa).

32. International Labor Organization.

33. Non-Governmental Organizations.

and by those who cooperate institutionally through IFIs, international financial institutions.

Cyberspace also impinges on human rights. It is not sovereign, whatever that means, but it relies upon physical, legal, and political points of contact in one or more states, and depends on the consent of its participants; all are subject to state law and the state system. The environment, of course, also comes into every sovereign state, and some states, many of them, can regulate it if they are willing.

Our job, therefore, as academics, as citizens, as actors in the human rights movement, is to take the human rights idea of fifty years ago and apply it to a globalized world. We cannot take for granted that the answers are obvious or easy; we certainly should not take negative answers.

And then “et cetera.” It is a useful basket in which to put other issues related to sovereignty. Some of them are unhappy examples.

Who is sovereign in a “failed state?”³⁴ A distinct sovereignty does not exist in these, for example in Liberia a few years ago. Some states are failed even though they may be members of the UN.

Who is sovereign when the state is helpless against local terrorists, or against suicide bombers? Who is sovereign, or what can sovereignty do, against ethnic conflict within or across state borders, against civil war, whether it spills over into other territories? And how sovereign is a state if it cannot prevent genocide? And then, there are other kinds of terrible things: what can sovereignty do for (or against) floods of refugees or internally displaced people?

If the state system is losing control, if it is exploding, is state sovereignty perhaps also imploding? If a government no longer has control within a state’s territorial boundaries, who does? Can there be a sovereign state with nobody in control? If what happens inside a state’s territory is no longer subject to effective internal control, who is in charge? Who in the state system is responsible for genocide within the former Yugoslavia? Who is responsible for ethnic cleansing, for crimes against humanity, for war crimes, for internal wars, and for terrorism, whether internal, transnational, or international?

Or—helplessly—who is responsible for the devastating consequences of natural disasters—floods, hurricanes, and earthquakes that have devastated economies and blighted hopes for economic and social development, and economic and social rights for hundreds of millions of people seeking human dignity? Who is responsible for the recurrent problem of terrorism, transnational or

34. In a failed state, “the central authority in a country has collapsed and there no longer exists a functioning government to maintain order.” Charles W. Kegley, Jr. et al., *The Rise and Fall of the Nonintervention Norm: Some Correlates and Potential Consequences*, 22 *Fletcher F. World Aff.*, Winter-Spring 1998, at 81, 89.

international, or for drug smuggling and people smuggling, and various other forms of international crime, or for internal crimes which states cannot or will not address, or may even promote or condone?

“Et cetera” also provides an opportunity to look generally at the responsibility of sovereign states and of their citizens in the state system at the end of our century. This sub-sub-sub heading includes the problem of external intervention. Until recently, the state system, the system of sovereign states, was committed to territorial integrity, which excluded all forms of external intervention, even for noble purposes.³⁵ It meant that even international law generally did not apply and international bodies had no authority within some state’s territory. We called it “domestic jurisdiction.”³⁶

Therefore, international law and international bodies could not intervene in internal wars; they could not intervene to address atrocities, even genocide, inside a state’s territory. We have made a little progress in bringing the laws of international war to internal wars, but it came hard and it is hardly complete. And we have had to learn, slowly, to address various forms of humanitarian intervention—that is, intervention for humanitarian purposes, but intervention under law. Unilateral humanitarian intervention at the will or whim of some state is too dangerous to contemplate. Group intervention—NATO³⁷—has raised its own objections, and it does not work very well. It depends on volunteers, and volunteers are few and reluctant. In Yugoslavia and Rwanda, the system recognized that internal hostilities and gross human rights violations—apartheid or genocide or other crimes against humanity—create threats to international peace and security.³⁸ There has not been too much objection to the Security Council asserting that it has a right to intervene in such

35. See *supra* note 4 and accompanying text.

36. See John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *The Present State of International Law and Other Essays* (International Law Association 1973) 75, 75 (describing the traditional view that human rights fell “within domestic jurisdiction and hence beyond the reach of international law”).

37. North Atlantic Treaty Organization.

38. In the aftermath of human rights violations in Rwanda and the former Yugoslavia, the United Nations established international criminal tribunals to identify and punish the perpetrators of the atrocities. See Security Council Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing an international tribunal for human rights abuses in Rwanda); Security Council Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (implementing an international human rights tribunal for the former Yugoslavia). Whereas resolutions of the U.N. General Assembly are not binding upon U.N. members, the U.N. Charter obligates members to obey Security Council Resolutions. See U.N. Charter art. 25. The Security Council is authorized only to issue a binding resolution to combat a threat to international peace and security. See *id.* art. 39. In order to mandate international action against human rights violations, the Security Council must first find that the violations threaten peace and security across national boundaries.

internal matters on the theory that they present threats to international peace and security.³⁹

The U.N. Security Council, however, is not a perfect body. It is hampered by the veto.⁴⁰ It is embarrassed by its slanted membership, dominated by the big powers.⁴¹ It does not have troops at its disposal; it depends on voluntary contributions of armies and monies, not always forthcoming, or sometimes forthcoming only from unacceptable sources on unacceptable terms.

So we have a problem. If sovereignty has imploded sufficiently, so that the human community feels responsible for what goes on inside territories, we have to find ways of addressing problems occurring in other states, ways that are legally, morally, and politically acceptable.

There are ways. Sovereign states may have to extend their own jurisdiction to matters that are internal in other states. We may have to extend the reach of the international mantle inside states. We may have to persuade states to attend to what their companies do, for which the state has jurisdiction, whether based on nationality or some other link. We may have at least to assert "universal jurisdiction," the premise that all states have jurisdiction over crimes against humanity.⁴²

Bemoaning the disappearance or erosion of sovereignty, or asking where it is, are not productive approaches to these problems. Solutions require the attention and cooperation by all who are affected by them, and today that still means governance by those who have jurisdiction and law-making authority, not only under their own national systems but also under international law.

If the global community and the market are not easily ruled by any one state, and if we consider controlling them important, one or more states can govern them, and several can combine to do that more effectively, whether for the cause of human rights or otherwise. When sovereign states are helpless or unwilling, we need international bodies, such as the tribunals in Yugoslavia or Rwanda, such as the proposed International Criminal Court, happening around us.⁴³

Finally, "et cetera" leads me to reopen a quixotic campaign to try to decompose the concept of sovereignty. Gradually, I would stop using the word. I use the word only to stop using it.

More important than the word, I would abandon some of its questionable assumptions and its undesirable accretions. I would identify the elements that have legitimate claims and the values which each of those elements is supposed to serve. Consider state

39. See U.N. Charter art. 24.

40. See *id.* art. 27, para. 3.

41. See *id.* art. 23, para. 1.

42. See U.N. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, U.N. Doc. No. A/CONF. 183/9, art. 7 (defining crimes against humanity).

43. See *id.* art. 1 (establishing the International Criminal Court).

autonomy; it is comparable to the autonomy of individuals within societies. But the autonomy of states is not intrinsically a human value, though it has important indirect consequences for human values.

Consider the parallel, individual autonomy. When in the course of human events we began to talk about the rights of man, we emphasized that "all men are created equal,"⁴⁴ and that they are endowed by their Creator with certain unalienable rights, among them life, liberty, and the pursuit of happiness.⁴⁵ States can also be said to have rights to life, liberty, and the pursuit of happiness. But, Mr. Jefferson went on to say, "to secure these rights, Governments are instituted among Men."⁴⁶ That is the point. The sovereignty of the individual in the state of nature did not prevent a social contract, and it would not have survived if we did not have a social contract. The international system of states also needs a social contract. Sovereignty should not mean anarchy. It should not mean refusal by states to be governed. Because sovereignty and sovereign states are sometimes, often, ineffectual, some seek to build new international institutions, new institutions of governance, but states continue to set up sovereignty as an argument for frustrating their efforts.

We need to back, to shore up, the international systems we have created. There are many ratifications of human rights agreements, but with many sovereign reservations, and those who are concerned to do something about them have not yet seriously begun to resist reservations. We have not begun the struggle to withdraw existing reservations—for example, to the Convention on Women,⁴⁷ or even to the ICCPR⁴⁸—reservations imposed in the name of sovereignty (and sometimes a special kind of sovereignty, religion, which is a subject for another lecture).

In sum, sovereignty should not mean isolationism. It should not mean resistance to cooperation. It should not mean indifference to, or forfeiture of responsibility for, what happens elsewhere. It should not mean refusal to assume obligations. It should not mean failure to comply with obligations we have assumed. Sovereign states, one has to remind governments, can adhere to human rights treaties, and they can do so without reservations. And they can cancel reservations they have entered.

And the easy ones: sovereignty means territorial impermeability, but it does not immunize genocide and it does not immunize rape from external communal concern, judgment, and intervention.

Above all, we have to avoid the temptations of traditional

44. The Declaration of Independence para. 2 (U.S. 1776).

45. *See id.*

46. *Id.*

47. *See CEDAW, supra* note 13.

48. *See ICCPR, supra* note 13.

sovereignty. The autonomy—the “privacy” of states—is an important value, but not as an iron curtain. We cannot insist that what we do at home is no one else’s business, even if we do it in the name of religion or in the name of some other value. A decent respect for the opinions of mankind, you will remember, was our undertaking from our nation’s birth,⁴⁹ and we have to honor that as part of our sovereignty.

Sovereignty as a right to do as one pleases is part of the concept, but not sovereignty as anarchy, not sovereignty as resistance to cooperation. And not sovereignty as immunity. The most common use of the word “sovereignty” may be in sovereign immunity—immunity from law, immunity from scrutiny, immunity from justice. General Pinochet gets no votes from me.

What shall we do about the “S word?” I have tipped my hand. We need to address what has happened to traditional notions of sovereignty as a result of forces we have identified, and others, globalization, the market, and cyberspace.

But, to sum up, if the state system has lost control, single states still have jurisdiction over pieces of that global activity which can be localized in its territory or with which it has links of nationality and of money—and some states have quite a lot of links of nationality and money. States, for example the United States, have power in their law and power in fact to ensure that companies respect human rights, companies with which they are affiliated, and that these companies do not themselves, or in complicity with others, including foreign governments, violate human rights.⁵⁰

What single states cannot themselves control, they can control by cooperation—as to the market, cyberspace, and the environment. If globalization has given private entities power to impinge on human rights, states can still exercise their sovereign power to induce compliance with the international obligation of the state to ensure, as well as to respect, human rights.

If states do not act, sovereign companies can be induced by shaming,⁵¹ by NGOs,⁵² the responsible press, by stockholders, by consumers, by codes more or less voluntary, codes of the kind that we learned to use in connection with South Africa.⁵³

But I do not want to leave the impression that it is easy. Globalization, in its various components or aspects, bespeaks the helplessness of human institutions. Sometimes the framework in

49. See U.S. Const. amend. I; The Declaration of Independence *passim* (U.S. 1776).

50. See *supra* note 31 and accompanying text.

51. See Taylor, *supra* note 4, at 807.

52. Non-Governmental Organizations.

53. See *supra* note 31 (describing mandatory codes); G.A. Res. 41/35F, 41 U.N. GAOR Supp. No. 53, at 28, U.N. Doc. A/41/53 (1987) (implementing a voluntary code).

which we have learned to see problems and pursue solutions, the framework of sovereignty and sovereign states, does not help us even see where to begin.

So I offer no magic formula, no guarantee of success in vindicating human values. But we would do better than we are doing, if we saw in the tatters of our sovereignty not obstacles, not as pretext for indifference, for isolationism, but responsibility and opportunities to secure human values.