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SOVEREIGNTY AND ITS RELEVANCE TO NATIVE AMERICANS IN THE TWENTY-FIRST CENTURY

*Hurst Hannum**

Before I begin, let me make clear that I speak to you today as an international lawyer, not as an expert in the complex area of Native American law. I have been asked to address the issue of sovereignty from that international perspective, rather than to examine the concept from the more specialized viewpoint of an Indian or constitutional lawyer. Thus, without minimizing the potential use of sovereignty in the purely domestic context, my primary focus will be the significance of international law — or the lack of it — on the issue of Native American sovereignty.

Some Definitions

Sovereignty has been the cornerstone of the international legal order for at least three-and-one-half centuries. Its development is most often traced to the 1848 Treaty of Westphalia, which ended the Thirty Years' War in Europe and replaced the hierarchical structure of the Pope and Holy Roman Emperor with a horizontal structure of independent sovereign states, theoretically equal in authority and legal legitimacy.¹ Despite its fundamental nature, however, there is no commonly accepted definition of sovereignty. The situation has changed little from that described by Oppenheim in 1905:

[T]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.²

Without entering into the intricacies of political theory, for our purposes, sovereignty may be understood as constitutional or legal independence. Even this definition may need to be nuanced somewhat, because states may delegate a wide range of powers to other entities, but it underscores the fact that a sovereign power is subject to no legal constraints other than those imposed by international law.

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1. All basic international texts address the general issue of sovereignty. In addition, interesting political or historical approaches to the subject may be found in JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1995); MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* (1995); FRANCIS H. HINSLEY, *SOVEREIGNTY* (1986); and ALAN JAMES, *SOVEREIGN STATEHOOD* (1986).

2. 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 103 (1905).

More important than defining sovereignty is identifying and understanding the purposes that the concept of sovereignty serves, in terms of allocating authority among the various institutions that exercise political power over individuals. The first purpose, which one might term the "positive" aspect of sovereignty, is to bestow legitimacy on the exercise of political power. No political or legal system can function without coercive machinery to enforce compliance with the decrees of the ruling authority. Where the ruling authority is a state, the concept of sovereignty legitimizes the acts of that state. Although the citizens of the state may be the theoretical source of sovereign power,³ it is the state that is imbued by the international order with the legal cloak of sovereignty.

Of course, sovereignty is not the only (or even the most important) means of legitimizing the exercise of power. Certain kinds of authority stem from religious or moral precepts, and community and peer values may be recognized as providing a legitimate basis for forms of social coercion. Sovereignty is relevant only to political power, primarily that exercised by states, which are themselves simply one particular form of political organization.

A second, "negative" or defensive purpose of sovereignty is to permit one political unit to defend itself from encroachment by another political unit. A sovereign need not obey the commands of another entity, absent an agreement between the two to the contrary. In this context, the primary issue is that of functional competence — to whom does authority belong? — rather than legitimacy.

Third, sovereignty is a useful construction that enables external actors to identify the locus of political power within a state; it clarifies expectations of behavior (who is empowered to do what?) and permits greater certainty in international relations. On the other hand, enforceable agreements between states and nonstate entities can take many forms, and possession of sovereignty is not a necessary prerequisite to entering into binding agreements.

It might be noted that there is no requirement that a sovereign state participate in international relations, although it may be held accountable by others for the observance of customary international legal norms. Likewise, it is possible for nonsovereign entities to have international legal personalities, acquire membership in international organizations, and participate directly in economic institutions.

It might be useful at this point to distinguish between the related (and often confused) concepts of sovereignty, self-determination, and statehood. The classic definition of a state is found in the 1933 Montevideo Convention on

3. Despite the advances in international human rights law since adoption of the Universal Declaration of Human Rights in 1948, we have not yet arrived at the time when international law requires a democratic government in order for a state to be recognized as legitimate.

Rights and Duties of States, which provides that a state should possess a permanent population, a defined territory, government, and the capacity to enter into relations with other states.⁴ Another common concept of the state underscores its monopoly on the legitimate use of force. Under any definition, there is an implication that the entity has the ability to exercise the normal functions of a state (policing, operating a legal system, national defense, etc.). Today, all states are theoretically sovereign, no matter what their actual degree of political or economic independence.

As already mentioned, sovereignty may be defined in many ways. However, whether sovereignty is defined as the final and absolute authority in a political community⁵ or as constitutional independence,⁶ many questions remain unanswered. Where does sovereignty lie in a federation or confederation? In the United States, despite the theoretical sovereignty of each individual state, the practical meaning of sovereignty changed considerably after the U.S. Civil War. Does sovereignty lie with the monolithic, unitary state per se (as maintained by Hobbes), or with the people, under Rousseau's concept of popular sovereignty? Or is it a purely legal construct, related to constitutionalism, as suggested by Kant?⁷

The right of self-determination in international law is the right of "peoples" to choose their own political status, both internally (i.e., the form of government) and externally (their relations with other authorities).⁸ It is frequently used as a rallying cry by ethnic entrepreneurs, as well as by those with legitimate grievances, to demand greater political power and even independent statehood. Whatever its political implications, however, the internationally recognized right of self-determination has been limited to the right of former colonial territories to independence; it does not presently include a right of secession — although it should be noted that international law does not prohibit secession, either.⁹

4. Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19, available in 1934 WL 5129.

5. HINSLEY, *supra* note 1, at 1.

6. JAMES, *supra* note 1, at 25.

7. See HINSLEY, *supra* note 1, at 141-57, for a brief description of these and other positions.

8. Among many recent or classical works on self-determination, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL (1995); RUPERT EMERSON, SELF-DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION (1964); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (2d ed. 1996) [hereinafter HANNUM, AUTONOMY]; Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973); and MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993).

9. See Hurst Hannum, *The Specter of Secession: Responding to Ethnic Self-Determination Claims*, FOREIGN AFF., Mar./Apr. 1998, at 13; see *supra* sources cited note 8.

Historical Development of Sovereignty and Statehood

In order to understand the meaning of sovereignty today and to evaluate its relevance in the future, a sense of the historical development of the concept is essential. At the risk of being slightly repetitive, let me summarize that development very superficially.

Early political communities had no notion of sovereignty as the term is understood today. They were stateless societies of tribal or lineage communities in which there was no need for a "sovereign" government and in which control was exercised pursuant to moral or social authority rather than through law. Legitimacy arose from the daily operation of the community and in conformity with its traditions.

From the time of the Greek city states and, later, the Roman empire, a distinction began to be drawn between manmade laws adopted by the community and higher religious laws. Because ultimate authority and legitimacy flowed from the gods, there was still no need for a separate conception of sovereignty to provide legitimacy to the rulers — so long as they acted in accordance with divine law. This system continued through the Middle Ages, although neither the Pope (in the Holy Roman Empire) nor the Caliph (in the Ottoman Empire) was able to exercise real control over the political system he theoretically headed.

The gradual separation of positive-secular law from divine-religious law in Europe culminated in the Treaty of Westphalia, which replaced the previous hierarchical structure with an international order based on the sovereign equality of states. That order continues to be the foundation of international law today, although it is under increasing pressure from the growing number of nonstate actors — including international organizations, nongovernmental organizations, and substate political entities — that participate in and influence international affairs.

The equation of a political unit (the state) with a single ethnic, cultural, or linguistic group reached its apogee in the nineteenth century, when assertions of nationalism led to the creation of Germany and Italy, as well as claims for autonomy within multinational states and empires.¹⁰ Nationalist principles

10. There are even more works on nationalism than on sovereignty. Among the better known books are BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991); JOHN BREUILLY, *NATIONALISM AND THE STATE* (2d ed. 1993); ROGERS BRUBAKER, *NATIONALISM REFRAMED* (1996); WALKER CONNOR, *ETHNONATIONALISM, THE QUEST FOR UNDERSTANDING* (1993); THOMAS HYLLAND ERIKSEN, *ETHNICITY AND NATIONALISM, ANTHROPOLOGICAL PERSPECTIVES* (1993); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983); LIAH GREENFELD, *NATIONALISM, FIVE ROADS TO MODERNITY* (1992); E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780* (2d ed. 1992); ELIÈ KEDOURIE, *NATIONALISM* (4th ed. 1993); ANTHONY D. SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1988); ANTHONY D. SMITH, *NATIONAL IDENTITY* (1991); Yael TAMIR, *LIBERAL NATIONALISM* (1993); and PIERRE L. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* (1981). A good survey of nationalist writings may be found in *NATIONALISM* (John Hutchinson & Anthony

provided a rough guideline for the creation of new states in the aftermath of World War I, following the destruction of the Austro-Hungarian and Ottoman empires, although these principles were hardly applied in a consistent manner. At the same time, however, the nineteenth and early twentieth centuries saw a plethora of complex arrangements among states and other entities that reflected the variety of political arrangements that existed in the world, such as suzerainty, protectorates, dependencies, colonies, dominions, etc.¹¹

The Contemporary Understanding of Sovereignty

By the mid-twentieth century, after the creation of the United Nations and under the impetus of decolonization, the "sovereign state" had come to be viewed by many as the only desirable and acceptable form of government. Any outcome of decolonization other than full independence was viewed with suspicion, and rarely were colonial territories permitted to change their borders upon achieving independence. The ethnic imperative of the nineteenth century had been replaced by the territorial imperative of the twentieth century.

The territory of the world is now essentially covered by sovereign states,¹² and the problems of an unalterable fixing of borders based on the principle of territorial integrity are becoming apparent. The resurgence of ethnic identity and conflict in the late twentieth century is, in many respects, an attempt to return to the cultural-linguistic focus of a century ago. While the demands of many groups for "self-determination" often focus on statehood as the ultimate goal, there also is increasing evidence of a willingness to formulate new arrangements of autonomy, minority rights, delegated powers, etc., that seek to arrive at realistic modes of power-sharing rather than to insist on formal delineations of sovereignty.¹³

Despite their "sovereign equality," the degree of independence actually exercised by states obviously varies greatly. Academics continue to debate whether sovereignty is indivisible (one is either sovereign or not) or functional (the rights and obligations of a sovereign state may vary),¹⁴ but all agree that sovereignty is not absolute. Today, the rights and duties of states are constrained by customary international law and often wide-ranging treaty

D. Smith eds., 1994).

11. For a brief description of some of these arrangements, see HANNUM, *AUTONOMY*, *supra* note 8, at 16-19. See generally W.W. WILLOUGHBY & C.G. FENWICK, *TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY* (1919); 1 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 221-598 (1963).

12. There remain only 17 colonial territories recognized as such by the United Nations, most of them small islands controlled by either the United States or the United Kingdom.

13. See generally HANNUM, *AUTONOMY*, *supra* note 8.

14. See FOWLER & BUNCK, *supra* note 1, at 63-82 (discussing the "chunk" versus "basket" theories of sovereignty).

obligations. States may yield "sovereignty" or delegate powers over, e.g., national defense (Micronesia), judicial appeals (Jamaica and other members of the Commonwealth), or economic policy (the European Union). State action is constrained by international norms concerning human rights, the environment, and the use of force in ways that have significantly altered the permissible content of sovereignty from its parameters in the seventeenth through the nineteenth centuries.

In some instances, the myth of theoretical sovereign equality is increasingly difficult to maintain. One commentator has suggested that small, weak states have become *de facto* international protectorates or "quasi-states," i.e., no longer fair game for conquest (as would have been the case under traditional international law) but not really capable of exercising truly sovereign powers on their own.¹⁵ The UN Security Council has sanctioned interventions in Haiti, Sierra Leone, Liberia, and elsewhere to quell civil wars that would earlier have been thought to be beyond the scope of legitimate international interest. It is difficult to understand the meaning of "sovereignty" in anarchic Somalia or occupied Bosnia and Hercegovina. Similarly, the recognition by many countries of Palestine and Western Sahara as states seems farcical, because neither entity exercises effective control over what it claims as its territory.

Even given all of these theoretical and practical problems, it is true, without a doubt, that sovereignty "will remain a sturdy foundation for the superstructure of international politics for years to come."¹⁶ At the same time, however, the increasing complexity and interdependence of the modern world require us to look beyond the stark extremes of "statehood or nothing," or sovereignty versus dependency. Granting too much significance to sovereignty and statehood may obscure the real interests of parties in sharing or dividing power, and it makes more difficult the articulation of new forms of relationships among and within states, governments, and peoples.

Sovereignty and Native Americans

During the past two decades, indigenous peoples have emerged as a distinct subject of international law.¹⁷ In 1989, the International Labor Organization revised its assimilationist Convention No. 107¹⁸ by adopting a more progressive Convention Concerning Indigenous and Tribal Peoples in

15. ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (1990).

16. FOWLER & BUNCK, *supra* note 1, at 164.

17. *See generally* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996); *THE RIGHTS OF PEOPLES* (James Crawford ed., 1988).

18. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (I.L.O. No. 107), June 26, 1957, International Labor Conference, 328 U.N.T.S. 247.

Independent Countries (I.L.O. No. 1969).¹⁹ In 1993, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a draft Declaration on the Rights of Indigenous Peoples,²⁰ which is presently under consideration by the Sub-Commission's parent body, the Commission on Human Rights.

Indigenous representatives, including many from North America, participated actively in drafting the Declaration, and, in many respects, it represents the aspirations of indigenous peoples worldwide. The draft does refer specifically to the right of indigenous peoples to self-determination, but there is no reference to indigenous sovereignty. And while the former is still considered to be controversial by some governments, any reference to indigenous peoples as "sovereign" would undoubtedly meet with unanimous opposition from states.

Even though it ignores sovereignty *per se*, the draft Declaration identifies most of the significant powers that "sovereign" indigenous governments would wish to assert, including the ability to define their own membership; establish their own government institutions; participate in national decision making that affects them; and control their territory, environment, natural resources, and economic development. The Declaration also calls for restitution of lands illegally taken, the observance of treaties entered into by indigenous peoples, and mechanisms to resolve disputes with states.

What does all of this have to do with Native Americans? The UN Declaration is unlikely to be adopted in the near future, and its legal impact on the United States will be minimal. Nonetheless, as "domestic, dependent nations," tribal governments within the United States have long been distinguished by a unique political status, even though U.S. and foreign governments have consistently proclaimed that tribes are not "states" in the international sense and do not possess international personality.

The reservation to Congress of plenary powers over the tribes, however, undermines the unique status and "self-determination" that Native Americans theoretically enjoy. Both the negative (protective) and positive (assertive) powers inherent in sovereignty are needed by Native American governments to prevent unwanted Congressional revocation of existing powers and, in some cases, to expand the scope of tribal authority. Does this suggest that the maintenance or reassertion of tribal sovereignty is the answer?

On a visit to Pueblo communities in New Mexico [in February 1998], Speaker Newt Gingrich told Indian leaders that he had trouble understanding the concept of tribal sovereignty

19. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 72 I.L.O. Off. Bull. 59.

20. Draft Declaration on the Rights of Indigenous Peoples, Report of the Working Group on Indigenous Populations, 11th Session, UN DOC. E/CN.4/Sub.2/1994/56, 105-115, 34 I.L.M. 541 (Oct. 28, 1994).

The president of the Navajo Nation, Albert Hale, offered Mr. Gingrich an explanation, telling him how an Indian leader would prefer to be treated.

"When I come to Washington, you don't send me to the Bureau of Indian Affairs," said Mr. Hale, leader of a tribe with nearly a quarter-million members. "You have a state dinner for me."

A week after the visit, Mr. Hale announced that the Navajo might block all roads for one day into their vast reservation, an area the size of West Virginia, as a demonstration of sovereignty. Three states overlap Navajo lands, and Mr. Hale's suggestion set off harsh criticism by members of his own tribe as well as neighboring communities

Mr. Hale has since resigned, under pressure over financial and personal improprieties, and the roadblock idea has yet to be revived.²¹

This anecdote illustrates two things. First, it exemplifies the reluctance on the part of non-Indian Americans even to consider the prospect of 554 "sovereign" nations within the United States, in addition to the fifty existing "sovereign" states. In addition, even if sovereignty might be meaningful for the Navajo, it is more difficult to comprehend the relevance of sovereignty to much smaller nations, some of which number only in the hundreds.²²

Second, however, the attitudes of both Gingrich and Hale demonstrate the confusion that bald assertions of undefined "sovereignty" are likely to create, as opposed to encouraging a more rational debate over the appropriate scope of tribal powers. State dinners and roadblocks are not the issues, and neither the recognition nor the denial of Native American sovereignty will automatically result in an appropriate division of powers among tribal, state, and federal governments.

In the international context, I have often criticized the insistence by minorities, national liberation movements, and states on symbolic declarations of sovereignty, self-determination, or national unity, since these slogans obscure the real issues in dispute between central governments and regional, minority, or indigenous groups. Given the peculiar history of tribal sovereignty in the United States, however, it would seem to me to be a mistake to abandon the concept at this stage.

At the same time, because sovereignty is not absolute, recognizing or reasserting tribal sovereignty does not automatically imply that every tribal act supersedes any inconsistent act by another government. Similarly, there are

21. Timothy Egan, *New Prosperity Brings New Conflict to Indian Country*, N.Y. TIMES, Mar. 8, 1998, at 3.

22. Some of these issues are raised in Robert A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?* 20 AM. INDIAN L. REV. 141 (1996).

no minimal powers inherent in sovereignty, except perhaps the ability to define one's own membership and the nature of governmental institutions, so the content of sovereignty must be negotiated.

Perhaps it is time for a new compact or agreement between Native American tribes and the federal government, to articulate the minimum content of the reserved (or delegated) authority of the tribes. Such an approach might offer the possibility to tribes of "opting in" to assume greater powers and responsibilities, so that larger, better organized tribes could exercise greater powers than smaller communities.

Of course, there is also a risk that any such new compact might bring (U.S.) states into the picture and create a three-way relationship that would not always operate to the benefit of the tribes. However, talk of tribal authority or sovereignty in the face of Congress' plenary power to override that authority is problematic, at best. Meaningful tribal authority and responsibility must rest on a firmer basis than the whims of Congress, and it may be time even to consider whether a constitutional amendment might be the best way in which appropriate guarantees can be ensured.

In summary, sovereignty *per se* is not the solution, although sovereignty remains a valuable concept that Native Americans may use to argue for retaining residual and treaty rights. But both parties also need to recognize — in any relationship short of complete tribal independence — that defining the extent of respective governmental powers requires mutual consent and the accommodation of often conflicting rights and interests. Law, whether domestic or international, cannot provide easy answers to the complex problem of how Native American governments will relate to other governments and citizens in the twenty-first century.

As Chief Justice Yazzie said at the Sovereignty Symposium, "To know where you are going, you need to know who you are." I would add that, to decide whether or not sovereignty is the answer, you also need to know what you want to do when you get to where you are going.

