

THE PROBLEM OF SOVEREIGNTY, INTERNATIONAL LAW, AND INTELLECTUAL CONSCIENCE

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Abstract

The concept of sovereignty is a recurring and controversial theme in international law, and it has a long history in western philosophy. The traditionally favored concept of sovereignty proves problematic in the context of international law. International law's own claims to sovereignty, which are premised on traditional concept of sovereignty, undermine individual nations' claims to sovereignty. These problems are attributable to deep-seated flaws in the traditional concept of sovereignty. A viable alternative concept of sovereignty can be derived from key concepts in Friedrich Nietzsche's views on human reason and epistemology. The essay begins by considering the problem of sovereignty from the ancient philosophical perspective inherent in the fundamental assumptions and ideas of Plato's political philosophy and epistemology. It then considers the contemporary problem of sovereignty in the context of international law by examining Louis Henkin's formulation of and approach to it in his essay *That S-Word: Sovereignty, and Globalization, and Human Rights, Etc.* Finally, the essay articulates Nietzsche's views on intellectual conscience, discusses their merits and advantages when used in dealing the problem of sovereignty in the context of international law, and proposes a solution to this problem that draws on the philosophies of Nietzsche, Novalis, Kant and Plato. The essay illustrates the relevance and advantages of this solution by examining the issue of states' reservations to international treaties and conventions.

INTRODUCTION

The concept of sovereignty is a recurring and often controversial theme in international law, and this concept has a long history in western philosophy.¹ Thomas Hobbes attacked the traditional notion of sovereignty by calling it an illusion.² John Locke used the Christian version of the traditional notion of sovereignty to bestow the highest authority on human rights and to make a state's authority contingent on its protection of these rights.³ These and similar views prove to be problematic in the context of international law. When international law premises its claims to sovereignty on the traditional concept of sovereignty as absolute, it thereby undermines nations' claims to sovereignty. This, in turn, challenges each state's right to self-determination and ultimately raises questions as to states' right to govern their own citizens. Conversely, when states premise their claims to sovereignty on the idea that each state's sovereignty is absolute, this implies that international law is not sovereign and thus that states are under no obligation to heed it. These all or nothing concepts of sovereignty vitiate meaningful dialogue and frustrate other vital forms of interaction between international law and nations.

This article argues that these problems are attributable to deep-seated flaws in the traditional notion of sovereignty and proposes an alternative concept of sovereignty derived from key concepts in Friedrich Nietzsche's views on human reason and epistemology. The article begins by considering the problem of sovereignty from the

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¹ Louis Henkin, 'That S-Word: Sovereignty, and Globalization, and Human Rights, Etc.' (1991) 68 *Fordham Law Review* (1999) 1.

² Thomas Hobbes, *Leviathan* (First published 1651, Hackett 1994).

³ John Locke, *Two Treatises of Government* (First published 1689, Yale University Press 2003).

ancient philosophical perspective of the fundamental assumptions and ideas comprising Plato's epistemology and political philosophy. It then considers the contemporary problem of sovereignty in the context of international law by examining Louis Henkin's formulation and approach to it in his essay *That S-Word: Sovereignty, and Globalization, and Human Rights, etc.* Finally, the essay articulates Nietzsche's views on intellectual conscience and elaborates on them with the help of ideas from the philosophies of Novalis and Immanuel Kant, as well as illustrates the relevance and advantages of Nietzsche's views by examining the issue of states' reservations to international treaties and conventions.

THE PROBLEM OF SOVEREIGNTY: AN ANCIENT PHILOSOPHICAL PERSPECTIVE

The concept of sovereignty poses difficult problems in both theory and practice. These problems are illustrated nicely in Plato's political philosophy. In Book VI of the *Republic*, and after addressing and solving numerous problems regarding the just state, Socrates, the lead interlocutor in the *Republic* and in most of Plato's dialogues, broaches a discussion of 'the most important subject,' namely the form of the good and the guardians' knowledge of it as a necessary condition of the constitution of the just state.⁴ In Plato's epistemology, true knowledge is knowledge of forms, and the highest form in the hierarchy of forms is the form of the good.⁵ The form of the good is the source of the existence, or being, of everything that exists; and it is the source of our knowledge of everything that we know.⁶ In Plato's view, a worthy philosopher, one qualified to rule in his ideal state, is a philosopher whose intellect and character make him, or her, capable of an 'erotic' love of wisdom that culminates in ratiocinative apprehension of 'the form of the good.'⁷ This apprehension of the form of the good does not yield complete knowledge of the good itself.⁸ Instead, it yields 'the idea of the good,' which Plato also refers to as 'the offspring of the good.'⁹ The idea of the good is 'the unhypothetical first principle of everything,' and in Plato's political philosophy, it serves as the starting point for the

⁴ Plato, *Republic*, in John M. Cooper (ed), *Plato: Complete Works* (Hackett Publishing 1997) 1126-1127. At 1125, Plato says: 'It's ridiculous, isn't it, to strain every nerve to attain the utmost exactness and clarity about other things of little value and not to consider the most important things worthy of the greatest exactness.' Glaucon replies by urging Socrates to talk about this 'most important subject.' At 1126-1127, Socrates says, 'I don't suppose, at least, that just and fine things will have acquired much of a guardian in someone who doesn't even know in what way they are good. And I divine that no one will have adequate knowledge of them until he knows this [the form of the good]. [...] But won't our constitution be perfectly ordered, if a guardian who knows these things is in charge of it?'

⁵ *ibid* 1132.

⁶ *ibid* 1129.

⁷ *ibid* 1131.

⁸ *ibid*. Socrates explains to Glaucon that he will have to 'omit a fair bit' from the description of the form of the good that he offers as a prerequisite to his account of the idea the good. This, of course, suggests that one can give an account of the idea of the good without giving, or even being able to give, an account of the good itself. This, in turn, implies that the idea of the good is not an exhaustive knowledge of the form of the good. Instead, the idea of the good is, as Socrates says, 'the unhypothetical first principle' from which one can derive knowledge of 'the usefulness and benefit of everything.' The limited nature of this knowledge is evident from the terms 'usefulness' and 'benefit.' The 'knowledge of everything' that the idea of the good makes possible is not an absolute knowledge but rather an essentially human knowledge, for it is a knowledge of how things are useful *to us* and of how things are beneficial *to us*.

⁹ *ibid* 1126.

philosopher king's construction of the just state.¹⁰ Plato makes it very clear that the idea of the good is not the form of the good itself, but he also says that it is that which is most like the good.¹¹ The problem of the concept of sovereignty is evident from the mixed messages Plato sends while discussing the form of the good, the idea of the good, and the relation between them.

Plato says of the form of the good that it is 'the most important subject,' 'the father of the idea of the good,' 'that which gives truth to the things known and the power to know to the knower,' and the sovereign of the intelligible realm.¹² As for the idea of the good, he says it is 'the offspring of the good,' 'that which is most like the good,' and the principle by means of which we come to know the 'usefulness and benefit of everything'; again, he says that the knowledge of the idea of the good is the knowledge that the guardians, or philosopher kings, must possess in order to construct the just state. These comments suggest, without explicitly saying it, that the idea of the good shares in the 'sovereignty' of the form of the good. At the same time, however, Plato makes many statements that seem designed to cast serious doubt on both the suggestion that the form of the good can be known at all and on the suggestion that the idea of the good, and thus the state, share in the good's sovereignty. Indeed, it is as though Plato wants to suggest both that the idea of the good and the state founded upon it are sovereign and that neither the idea of the good nor the just state are sovereign. Immediately after broaching the issue of 'the most important thing,' i.e., the form of the good, Plato says, 'we have no adequate knowledge of it' and that 'if we don't know it, even the fullest possible knowledge of other things is of no benefit to us, any more than if we acquire any possession without the good of it.'¹³ He also says that he is unable to give an account of the form of the good and that he wishes to 'abandon the quest for it for the time being' because it is 'too big a topic.'¹⁴

As consolation, Plato offers to explain the idea of the good, i.e., the offspring of the good.¹⁵ However this is indeed small consolation because Socrates claims that knowledge of other things is worthless without knowledge of the form of the good.¹⁶ Oddly, Glaucon gladly accepts the offer. It is as though the fervor of his conviction regarding the intelligibility of the form of the good completely blinds him to the shabbiness of Socrates' offer, and he lets Socrates off the hook in exchange for the mere promise to give an account of the form of the good on an indeterminate future occasion:

¹⁰ Plato explains, at 1130 – 1131, that the philosopher king spends his life working his way 'up' through various inferior forms of knowledge until he arrives at a limited knowledge of the good itself, and this knowledge takes the form of the idea of the good. Once he has acquired this 'unhypothetical first principal,' the philosopher king then works his way back 'down' through the same hierarchy of knowledge by considering the whole thing all over again, this time from the informed perspective of his or her newly acquired first principal. The insight that results from the philosopher king's process of working his way back down through the hierarchy of knowledge yields a new knowledge of the way in which everything benefits *us* and is useful *to us*. This new knowledge is therefore not absolute knowledge, whether with respect to its authority, objectivity or comprehensiveness. Instead, it is a knowledge that is relative to our own human needs. This knowledge qualifies the philosopher to rule because it enables him to construct a state that is rational and just.

¹¹ *ibid* 1129.

¹² *ibid* 1126.

¹³ *ibid* 1126.

¹⁴ *ibid* 1126.

¹⁵ *ibid* 1126.

¹⁶ *ibid* 1125.

'The story about the father remains a debt you'll pay another time.' Moreover, when, in Book X of *The Republic*, Socrates ends the discussion without having made good on his promise, Glaucon does not protest the breach of contract.¹⁷ To make matters even worse, Socrates casts doubt on the worth of any effort he might make to give an account of the idea of the good:

I wish I could pay the debt in full, and you receive it instead of just the interest. So here, then, is this child and offspring of the good. But be careful that I don't somehow deceive you unintentionally by giving you an illegitimate account of the child.¹⁸

Here, Socrates undermines his earlier lofty suggestion that the idea of the good, which serves as the basis of the constitution of the just state, wields the sovereignty of its 'father,' the form of the good. What is Plato's reader to make of the dramatic decline in the grandeur of the subject matter of Socrates' discussion? Initially, he proposes to discuss 'the most important subject,' but he quickly changes the subject to his inability to explain the form of the good. He then sinks even lower with his warning that the consolation he offers might not be trustworthy. Is this a classic case of bathos, or is Plato using indirection to convey a message that he would rather not state explicitly? The latter is the more likely alternative given the very pregnant analogies that Socrates uses in making his inherently dubious promises and apologies.¹⁹

First, there is the reproduction analogy, in which the form of the good is the father of the idea of the good, and the idea of the good is the offspring, or the child, of the father.²⁰ This analogy employs indirection in so much as one of its inherent and most important analogues is conspicuously missing, namely the mother of the idea of the good. Why is this notion of the mother of the idea of the good merely tacit in Plato's analogy when it is just as important as any other analogue? After all, the idea of the good arises in, and is thus born of, the human mind, so the tacit notion of the mother of the good suggests that we play a very active and important role in creating the idea of the good. Moreover, the notion of the mother of the idea of the good addresses the issue of the origin of the idea of the good, so this notion is of crucial importance to our understanding of the origin and nature of the idea of the good. What reason could Plato have for squelching the notion of the mother of the idea of the good by failing to state it explicitly?

Second, there is the financial analogy. The good itself is the investment, and the idea of the good is the 'interest' earned from this investment. This analogy is also suggestive owing to its missing analogue, namely the investor. Here too, the analogy suggests that the human mind produces the idea of the good in so much as we are the ones who, by investing our love, time and effort in the pursuit of wisdom, create the idea of the good – even if we do so by drawing, in some mysterious way, on the form of the good. Once again, however, Plato downplays this notion of the investor by failing to state this crucial analogue explicitly in the financial analogy.

Finally, there is the vision analogy. The sun is analogous to the good itself, the sunlight is analogous to the good's influence on human reason, the eye is analogous to

¹⁷ *ibid* 1199 – 1223.

¹⁸ *ibid* 1126.

¹⁹ *ibid* 1125 - 1126

²⁰ *ibid* 1127.

the human mind, the eye's power of sight is analogous to the human mind's power of reason, and that which the eye sees, with the help of the sun's light, is analogous to the idea of the good that the mind apprehends, with the help of the influence of the form of the good.²¹ Here, in the case of the disembodied eye, the missing analogue is the complex consisting of the body that hosts the eye and the mind that contemplates what it sees. Moreover, this analogue suggests that it is the human mind, working in concert with the body and informed by the body's needs, that produces the idea of the good—even if this product is only possible thanks to the influence of the form of the good. Thus, when the reader heeds Socrates' warning and supplies the missing analogues, he can glean from these analogies a very clear message. First, Socrates' suggestion that the idea of the good originates from the good itself is indeed 'an illegitimate account of the child' because, second, the idea of the good is essentially an earthly creation.²² One might propose that we attribute the omission to oversight, but Plato went out of his way to render that proposal untenable by leaving out the functionally identical analogue in all three of his analogies. One might object here by asking why Plato did not simply state his message to his reader explicitly. The answer is that Plato's decision to state the matter tacitly is a crucial part of his approach to the problem of sovereignty.

Plato chose to convey his message regarding the sovereignty of the just state tacitly because stating it explicitly would undermine the very useful, albeit illusory, concept of sovereignty. More specifically, Plato, who thought that only the most rational individuals could and should know the truth, opts to state the matter implicitly and in a manner that will speak only to readers who rely heavily enough on reason to glean his clues.²³ The message Plato conveys through his incomplete analogies is inconsistent with his initial suggestion that the idea of the good originates from and thus shares in the sovereignty of the form of the good, for this message tells the reader that the idea of the good has an earthly, as opposed to an otherworldly, origin and authority. The idea of the good originates from human reason, and it is from human reason that it derives its authority. Moreover, the purpose of the idea of the good underscores its earthly and limited nature because, as the unhypothetical first principle from which we can derive knowledge of the usefulness and benefit of everything *to us*, this principle serves merely to inform this earthly, human life and not to provide absolute knowledge or absolute truth.

In Plato's elitist view, this message is not appropriate for everyone, and that is why each of his analogies is missing a key analogue. Omitting these analogues leaves less rational readers, like Glaucon, less likely to discern the true origin and nature of the idea of the good and thus more susceptible to the suggestion that the idea of the good, and thus the state, is sovereign in the sense that it issues from an otherworldly and absolute

²¹ *ibid* 1128 – 1130.

²² The logic of this claim can be illustrated with the help of yet another analogy. While the sun indeed plays a very important role in the tree's production of its foliage, it would nevertheless be quite wrong to attribute the origin of that foliage to the sun because the tree's foliage originates from the tree and its own inherent nature. Similarly, in a theory like Plato's in which the form of the Good is distinct from our idea of the good but nevertheless influences our creation of it, we would be quite mistaken to attribute the origin of this idea to the Form of the Good because the idea of the good comes from us and yields limited knowledge, i.e. knowledge of the usefulness and benefit of everything *to us*. Indeed, Socrates went to great lengths to warn against this mistake.

²³ *ibid* 1198.

authority, namely the good itself.²⁴ This, in Plato's view, is, for the majority of citizens, the most suitable belief regarding the state's sovereignty. The elite guardians, on the other hand, may be permitted to know that the state is not sovereign because this knowledge affords them a freedom that, Plato thought, was essential to effective governing. As Plato's analogies suggest once their missing analogues are supplied, governing—or constructing, maintaining and enforcing a constitution within a state—is, though a rational a process, also an essentially creative process, and as such it requires the freedom to create – or to legislate.²⁵ However, governing is also a matter of maintaining order, which requires, or at least is made far easier by, a common, albeit illusory, belief in the state's sovereignty.²⁶ The tension between these two requirements poses, for Plato, the very difficult problem of sovereignty.²⁷

A CONTEMPORARY VIEW OF THE PROBLEM OF SOVEREIGNTY

In his essay, *That 'S': Word: Sovereignty, and Globalization, and Human Rights*, et cetera, Louis Henkin offers his own formulation of the problem of sovereignty. Unlike Plato, he articulates the problem by, in significant part, trumpeting his contempt for it. The title of his essay alone conveys his contempt, but he does not stop there. After introducing the points he intends to address, he immediately lets fly at sovereignty by saying, 'I don't like the "S word." Its birth is illegitimate, and it has not aged well.'²⁸ Henkin's concerns are, in important ways, similar to those in Plato's discussion of the idea of the good and its relation to the sovereignty of the state.

Henkin does not seem to want to say that the problem of sovereignty, or any part of it, can be illustrated using the analogy of a child sired out of wedlock by a father who subsequently fled the scene. Instead, his analogy seems intended to suggest something more like the warning that Socrates included in his disclaimer regarding his account of the idea of the good, 'But be careful that I don't somehow deceive you unintentionally by giving you an illegitimate account of the child.'²⁹ In other words, his claim that sovereignty is illegitimate involves an attack on the legitimacy of the traditional and contemporary account, or explanation, of our idea that the state is sovereign.

There are various sources of support for this interpretation of Henkin's essay. First, some support for it consists in the fact that he is prepared to accept that sovereignty is an important idea in some contexts, like the drive for self-determination

²⁴ This interpretation is consistent with Socrates' proposal that a 'noble lie' or 'useful falsehood' be told to citizens of the state as a means of bolstering the belief that the state is sovereign and thereby reducing the occasion for strife amongst the classes. The division of the state into three classes - the class of laborers and traders, the guardian class, and the elite guardian class of philosopher kings - would be questioned by people in each class unless they believed that this order was ordained by the gods. Thus, Socrates advocated persuading people to accept as true the myth that 'the god who made them' put gold in those capable of serving as elite guardians, silver in those who were auxiliaries (or non-elite guardians), and iron and bronze into farmers, craftsmen and market traders. So useful, according to Plato, is the idea that the state is sovereign in the sense suggested by the myth that it would be best if the state could 'persuade even the rulers [to believe it], but if that's not possible, then [at least to persuade] the others in the city [to believe it].' Ibid 1049 - 1050.

²⁵ Ibid 1127 - 30.

²⁶ Ibid 1050 - 1051.

²⁷ Ibid 1050.

²⁸ Henkin (n 1) 1.

²⁹ Plato (n 4) 1126.

in states seeking to liberate themselves from domination by foreign empires. Next, there is his own statement of his thesis, which says that ‘the sovereignty of states in international relations is a mistake, an illegitimate child,’³⁰ which suggests that while sovereignty has some not unworthy applications in certain contexts, it is somehow *completely* misapplied in the context of international law. Furthermore, this interpretation finds support in Henkin’s elaboration on and explanation of his thesis, which is entirely genealogical and thus aimed at giving a legitimate account of the child, i.e. sovereignty. Thus, an important aspect of Henkin’s thesis is its concern with giving a legitimate, or more faithful, account of the idea that states are sovereign. Henkin thinks that such an account will disabuse his reader of misconceptions that block the development of international law and its progress in protecting of human rights. In other words, the idea that the problem of sovereignty is essentially a conceptual problem is a crucial aspect of Henkin’s thesis.

Henkin says that the idea that states are sovereign and its use in the context of international law is at best unworthy and at worst ‘destructive of human values.’³¹ While it is not clear what falls into the category of the unworthy, Henkin leaves no doubt as to what the second category includes. The idea that states are sovereign destroys human values when it is used to shield states and their leaders from liability under international law for human rights violations or when it is used to undermine cooperation amongst nations.³² This conflict between the idea of sovereignty and human values is a crucial aspect of Henkin’s thesis because it captures the essential problem that results, he thinks, from using the concept of sovereignty in the context of international law. The problem, as Henkin understands it, consists in a conflict that has arisen between the way each state values the values that guides it and the interests and objectives of international law. States value their values *as* sovereign, and they often assert this valuation against the claims and interests of international law and universal human rights.³³ Henkin, on the other hand, claims not only that the system of values that guides a state is not sovereign but also that such a system is subject to a higher and more authoritative system of values, namely international law in its role as the protector of human rights. In other words, Henkin pits the sovereignty of one system of values, namely international law and global human rights, against the sovereignty of states.³⁴ Moreover, he is convinced that this conflict must be resolved at the expense of states’ sovereignty.³⁵ Henkin seeks to promote this resolution by exposing as illusory the concept of the sovereignty of the state, and he takes this approach because he thinks that the problem of sovereignty is essentially a conceptual problem.³⁶

³⁰ Henkin (n 1) 1.

³¹ Ibid.

³² Ibid

³³ Ibid 2.

³⁴ Ibid 6.

³⁵ Ibid 6.

³⁶ Ibid 1. Note that Henkin’s approach is virtually identical to that Nietzsche employs in his *Genealogy of Morals*. There, Nietzsche’s philosophical account of core Western values is genealogical. Specifically, he explains that values like good, noble, and the like are verbal expressions of the sense of superiority enjoyed by the conquering class – here Nietzsche makes descriptive historical claims and not prescriptive moral/ethical claims. These values and the circumstances that give rise to them lead to reactionary sentiments in those ruled, and these feelings eventually become creative and find expression in an

Henkin's approach to dispelling the illusion that states are sovereign takes the form of genealogical analysis. He claims that the concept of sovereignty originally referred to the Sovereign and his subjects. In other words, sovereignty was originally understood to be one of the attributes of a person, namely the person who ruled, and it served to distinguish the role that the ruler played from the role his subjects played. In time, however, this origin was completely forgotten, the idea of sovereignty took on a life and character of its own, and it came to be understood as one of the inherent features of a state. Specifically, sovereignty came to be understood as comprising such ideas as political independence, territorial integrity, exclusive control and jurisdiction within the state's territory, and nationality or nationhood. This new idea of sovereignty as inextricably bound up with statehood is, Henkin argues, illusory, and as such, it gives rise to an illegitimate account of the idea of the sovereignty of a state *as* issuing necessarily and absolutely from a state's very existence. Again, the legitimate account of the idea of sovereignty is, Henkin thinks, the genealogical account, but when this account is supplanted by the idea that sovereignty arises necessarily out of statehood, the result is 'distortion [of] and confusion [about]' the sovereignty of states.³⁷ This distortion and confusion gives rise to an idea of state's sovereignty that leaves the state free to trample human rights with impunity, renders it completely free from any obligation to cooperate with other states, and thus grants it an absolute right to wage war. In sum, this flawed conception of sovereignty gives birth to policy that is doomed to fail.

Henkin claims that this distorted concept of sovereignty underwent a series of metamorphoses, or 'transformations,' in the wake of World War I and II.³⁸ The first transformation consisted in the rejection of states' absolute right to wage war, the second in the belief that states needed to cooperate with one another, and the third in the idea that a state's violation of the human rights of those living within their borders was now a matter of international concern.³⁹ These transformations bear important features.

Their most striking feature is that while each could, theoretically, have been brought about through reflection on the concept of sovereignty and creative revision of its content, each transformation resulted instead from our reaction to the horrors of two world wars and the atrocities that Hitler's Germany perpetrated. Again, Henkin contends that the wars and their atrocities were premised on and made possible by an illusory understanding of the sovereignty of states.⁴⁰ So, the fact that these transformations were prompted by tragedies gives weight to Henkin's complaints about the current state of international law and its ability to protect human rights. This fact suggests that opportunities currently exist to prevent future injustices and tragedies at the mere cost of reflecting on and revising our concept sovereignty coupled with the concomitant adjustments in states' commitment to international law and human rights.

Another feature of these transformations is that they were very limited and halting. The world's most powerful countries, and thus those one would expect to lead in developing international law and protecting human rights, were disappointingly slow

opposing system of values. In time, the origin of all of these values is forgotten, and various illusory, or illegitimate, accounts of their origins supplant this legitimate account.

³⁷ Ibid 1.

³⁸ Ibid 2.

³⁹ Ibid 2.

⁴⁰ Ibid 2.

and reluctant to commit to international regulation given the overwhelming evidence of the need for such regulation. Henkin says of these transformations that although they marked ‘a major rent in the cloak of sovereignty,’ ‘[t]he banner of sovereignty still waves ominously over all human rights issues; [and] the mantra of sovereignty is still intoned against human rights.’⁴¹ In spite of the horrors of war and the worst possible atrocities, the concept of sovereignty predominantly retained its essential integrity at the expense of adequately addressing the clear need for new ways of protecting human rights. Henkin sums up these changes in the formulas ‘Sovereignty means ‘let’s leave each other alone – no war, no use of force’ and ‘we will engage in minimal [...] cooperation, if we as sovereign states consent [to do so].’⁴² Henkin says that this was the *status quo* at the end of the twentieth century and that the outlook for the future was dim until new developments further undermined the concept of states’ sovereignty.

The new developments Henkin discusses are globalization, the international market, cyberspace, and concern for the environment. These developments challenge states’ sovereignty because they seem beyond the sovereign control of any one state or even all of them working together. In other words, these phenomena seem to be themselves sovereign, and their sovereignty is undermining states’ sovereignty. However, instead of being delighted by this challenge to states sovereignty as one might expect him to be, Henkin expresses concern about it:

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.⁴³

Henkin says, after noting that he does not foresee the state system becoming obsolete any time soon, that those concerned about human rights must ‘work to make the state system more human-rights friendly.’⁴⁴ Specifically, he says that states have an obligation to protect human rights against all violations including those that the new global phenomena might bring. Moreover, he says that sovereign states have the ability and the obligation to bring global forces under their control in the interest of human rights. This is especially true in the case of what Henkin calls ‘the problem of external intervention,’ which refers to the emerging conviction that certain intra-state problems—like genocide, ethnic cleansing, and other atrocities—require a response from the international community in the interest of protecting human rights.

It is in light of these global phenomena that Henkin sums up his assessment of the contemporary problem of sovereignty:

So we have a problem. If [states’] 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.⁴⁵

⁴¹ Ibid 2.

⁴² Ibid 3.

⁴³ Ibid 4.

⁴⁴ Ibid.

⁴⁵ Ibid 4.

The crux of this summary is the phrase ‘imploded sufficiently.’ Like Plato, Henkin views states’ sovereignty as a potentially very useful means of maintaining order in the world in so much as each state might use its sovereignty to promote human rights both at home and throughout the world, but he also views states’ sovereignty as an obstacle to the kind of cooperation amongst nations that would give the international community the freedom to create and enforce new laws that will protect human rights everywhere. This, in Henkin’s view, is the contemporary problem of sovereignty. Henkin’s approach to this problem is to push for further implosion and the eventual demise of states’ sovereignty. He says that these global phenomena lead him to ‘reopen a quixotic campaign to try to decompose the concept of sovereignty’ and that he ‘would stop using the word’ and uses it ‘only to stop using it.’⁴⁶ Thus, unlike Plato, Henkin is willing, and even eager, to do away with sovereignty in the interest of clearing the way for a creative response to what he considers to be very pressing threats to human rights.

Henkin’s approach displays none of the caution, cunning or subtlety that Plato saw fit to exercise in navigating the tension between sovereignty’s role in preserving order and the philosopher king’s need for the freedom to create new laws. However, his heart is clearly in the right place because his approach is motivated by a passionate desire to curb and eventually put an end to human rights violations. In short, Henkin claims that ‘international bodies’ should be used to compel states to do the work that they are unwilling or unable to do on their own, and he claims that states’ sovereignty should be brushed aside in order to do this. Again, this approach is well intentioned, but it is also very risky and unlikely to find supporters amongst state leaders. As Plato observed, the concept of sovereignty is of great importance to the task of domestic governance, and as two world wars have taught us, it also has its uses in establishing and maintaining boundaries between states. Moreover, and as Henkin himself points out, *sovereign* states are important vehicles for cultivating and protecting human rights both within each state and globally, and they are also our best hope of keeping in check the new global forces that threaten to undermine human rights. Given what is at stake, Henkin’s approach to the contemporary problem of sovereignty therefore places too much importance on opposing the sovereignty of states.

In light of the considerations discussed above, it is difficult to avoid the conclusion that Henkin’s effort to correct the flawed concept of sovereignty leads only to another flawed concept of sovereignty. However, his effort is by no means a failed one. On the one hand, Henkin does succeed in moving the concept in a promising new direction by exposing the need for a concept of states’ sovereignty that is compatible with international cooperation aimed at protecting human rights. On the other hand, he is not entirely to blame for the shortcomings of his effort because, as will be argued in the next section, the limitations inherent in the traditional and contemporary conceptions of sovereignty with which Henkin was working predetermined his limited success. The conceptual difficulties that Henkin sought to remedy are addressed in promising ways in Friedrich Nietzsche’s discussion of the concept of ‘intellectual conscience’ in his *Die fröhlich Wissenschaft*.

⁴⁶ Ibid 6.

Nietzsche's Concept Of Intellectual Conscience

In sections 2 through 5 of his *Die fröhliche Wissenschaft*, Nietzsche presents his own take on the problem of sovereignty through a fictional caller who calls for an 'intellectual conscience.' This caller voices his dismay upon realizing that in spite of the fact that his fellow community members' values are clearly inadequate, they nevertheless refuse to reevaluate those values or even to consider the possibility that those values are problematic. He says:

I mean: the great majority of people does not consider it contemptible to believe this or that and to live accordingly without first having given themselves an account of the final and most certain reasons pro and con, and without even troubling themselves about such reasons afterward: the most gifted men and the noblest women still belong to this great majority.⁴⁷

The caller's concept of an intellectual conscience is best understood by comparing it with our everyday concept of conscience. Having a conscience means having a system of values according to which one makes certain decisions, especially moral or ethical decisions, as to how one should act and live. Acquiring an intellectual conscience involves subjecting the system of values that one inherits from one's society to a process of scrutiny and reflection in order to achieve certainty as to its merit and or expose its weakness. One's system of values is fundamentally flawed, the caller thinks, if one's commitment to it has not been tempered by an intellectual conscience. In other words, 'intellectual conscience' refers both to the state of one's knowledge vis-à-vis one's system of values and to the cornerstone value, namely intellectual conscience, in a truly meritorious system of values. The caller says:

But what are goodheartedness, refinement, or genius to me when the person who has these virtues tolerates slack feelings in his faith and judgment and when he does not account the desire for certainty as his inmost craving and deepest distress – as that which separates the higher human beings from the lower. ⁴⁸

The caller's contempt for the 'great majority' is ultimately aimed not so much at their values as at their unjustified yet obdurate conviction that their values are absolutely sovereign. This conviction betrays, the caller thinks, the great majority's 'bad intellectual conscience,' their 'hatred of reason,' and their inhumanity.⁴⁹ Here, the caller doles out his harshest criticism of the great majority, but he also betrays the arrogance of his own position. The caller passionately insists that questioning, especially when it is aimed at common values, is conscientious, rational and humane. In other words, he seeks to appropriate true conscientiousness, reason and humanity from the great majority by identifying these virtues exclusively with his own passionate questioning of common values. He is not bothered by the fact that he would thereby establish the sovereignty of his brand of questioning at the expense of the sovereignty of the great majority. It is here that Nietzsche's reasons for using the literary device of a fictional caller become evident. Nietzsche uses the caller to distance himself from the caller's views, and he does so

⁴⁷ Friedrich Wilhelm Nietzsche, *The Gay Science* (Walter Kaufmann tr, first published 1887, Random House 1989) 76.

⁴⁸ Nietzsche (n 48) 76.

⁴⁹ *ibid* 76.

because he thinks those views are mistaken. Thus, he has the caller say, though only at the very end of the passage, that '[s]ome folly keeps persuading me that every human being has this feeling [the desire for certainty achieved through questioning common values] simply because he is human. This is my type of injustice.⁵⁰

Except for this last insight as to the injustice involved in the caller's attempt to establish the sovereignty of his questioning by undermining the sovereignty of the great majority, Henkin's position is identical to the caller's. Henkin would establish the sovereignty of international law and its role in protecting human rights at the expense of the sovereignty of states. When we compare Henkin to Nietzsche's caller, he proves to be like him in that he lacks any sense of the injustice of his extreme opposition to states' sovereignty. In the next aphorism, Nietzsche considers the caller's position from the perspective of the great majority, and his comments can be used to further evaluate Henkin's position on states' sovereignty.

In aphorism 3, *Noble and Common*, Nietzsche exposes and explains the problem with the caller's stance on intellectual conscience by articulating two kinds, or modes, of reason. One of these modes of reason is *common nature*, which is characterized by a passionate and obdurate attachment to common values. In Nietzsche's words:

What distinguishes the common type is that it never loses sight of its advantage, and that this thought of purpose and advantage is even stronger than the strongest instincts; not to allow these instincts to lead one astray to perform inexpedient acts – that is their wisdom and pride.⁵¹

Nietzsche is critical of the strength of the great majority's 'thought of purpose and advantage,' despite his comment regarding its aversion to inexpedient acts. In Nietzsche's view, the great majority's sense of its own sovereignty is, at bottom, nothing more or other than its opaque awareness of the strength of its conviction as to the worth of its values. Due to the opacity of this awareness, the great majority misinterprets this sense of strength by conceptualizing it as an absolute authority that exists independently of itself and that inheres in common values. It is this misinterpretation of the strength of this conviction that renders the great majority's sense of its own sovereignty illusory, and it is in this limited respect that Nietzsche agrees with the caller regarding the deficiencies of the common system of values. The great majority, however, does not cognize its sovereignty as the mere strength of its conviction as to the worth of its values. The great majority's concept of its sovereignty is simply the unconsidered and untested thought, or belief, that common values are absolutely authoritative, or sovereign. Indeed, this is what the caller finds so alarming. The great majority is unwavering in this belief, yet it has never so much as questioned, let alone achieved certainty regarding the reliability of, the values that guide *all* of its activity. Thus, Nietzsche would agree with both Plato and Henkin that the idea that the state is sovereign is an illusory idea, and he thinks that this insight is one of the hallmarks of intellectual conscience. However, he also thinks that there is far more to intellectual conscience than this insight.

Common nature, which is nothing more or other than the collective passion for a common system of values, is rational in the sense that it makes possible a vast range of

⁵⁰ Ibid 77.

⁵¹ Ibid 77.

essential human activity.⁵² Common nature is a mode of reason in which the members of the collective use reason to act according to a common system of values, and this system of values is, in each case, extremely complex in the sense that it is comprised of numerous component systems of values. For example, by committing to certain linguistic values, i.e., to a given language, the members of the collective acquire the power to communicate with each other in speech and writing; by committing to certain political values, they are able to live in an ordered society; by committing to certain economic values, they are able to supply themselves with food, clothing, shelter and other needed and desired things; and by committing to certain moral or ethical values, they are able to live, interact and commune with each other in meaningful ways. The sum of the activity that results from collective emulation of this common system of values is an important part of human nature, and Nietzsche calls the totality of this activity common nature. Common nature is a nature that we ourselves produce precisely by living according to common values. Common nature is rational in the sense that it gives an essential form to human life. Indeed, common nature's essential function is to produce and maintain this form, so it might appropriately be termed *productive reason*.

Nietzsche contrasts common nature with noble nature. Common nature serves as a medium of growth for the individual members of the great majority. Noble nature is a mode of reason characterized by its willingness to sacrifice its common sense of purpose and advantage to its own natural instinct to respond to the world's problems by creating new values that address those problems, and it is this willingness to sacrifice in this way that makes it a noble as opposed to a common nature. This sacrifice involves the loss of the common sense of purpose and advantage; it involves the loss of the advantages and esteem that 'the most gifted men and the noblest women'⁵³ enjoy as their reward for championing the common values that define the great majority. However, this loss is compensated by the opportunity to bring forth new values that enable us to respond effectively to changing life conditions. Nietzsche's view is that when activity is informed by the common system of values as it is in the case of common nature, it causes life to evolve, and as life evolves, it inevitably outgrows, to a varying extent, the system of values that gives it form. This outgrowing, in turn, creates the need for new values. Nietzsche believes that human nature comes equipped with an instinct to respond to this need by means of a distinct kind, or mode, of reason that he calls *noble nature*. The essential function of noble nature is to bring forth new values in response to new or changing life conditions, so it may appropriately be termed *reproductive reason*.

The problem with the caller's insistence that to be rational is to question common values becomes evident when considered in light of productive and reproductive reason. Contrary to what the caller so passionately believes, reason is just as firmly on the great majority's side as it is on the side of the one who questions common values, and this is so because common nature is itself a form of reason. Moreover, the noble nature has a similarly weighty right to claim that reason is on its side because it, too, is a form of reason. Nietzsche's view is that each of these modes of reason – productive reason, questioning, and reproductive reason – is an integral part of human nature. It is in terms

⁵² In aphorism 4, 'What preserves the species,' Nietzsche conceptualizes common nature as the carefully regulated collective passion for common values. In my doctoral dissertation, *Reason, Values and the Cultivation of Body and Life*, hereafter RVBD, I offer a theory of collectivity as collective identification with a common system of values.

⁵³ Nietzsche (n 48) 76.

of these three modes of reason that Nietzsche develops his approach to the problem of sovereignty.

Each of these modes of reason is plagued by a natural tendency to interpret itself as sovereign. In aphorism 2, the caller complains of the great majority's supposed sovereignty when he says:

I keep having the same experience and keep resisting it every time. I do not want to believe it although it is palpable: *the great majority of people lack an intellectual conscience*. Indeed, it has often seemed to me as if anyone calling for an intellectual conscience were as lonely in the most densely populated cities as if he were in a desert. Everybody looks at you with strange eyes and goes right on handling his scales, calling this good and that evil. Nobody even blushes when you intimate that their weights are underweight; nor do people feel outraged; they merely laugh at your doubts.⁵⁴

It does not take much effort to find reasons to be suspicious of the 'sovereignty' of the common system of values, yet the great majority's conviction as to the sovereignty of its values is so strong that it renders the caller's call for an intellectual conscience virtually inaudible. The caller goes on to describe this conviction as 'a hatred of reason' that betrays the great majority's bad intellectual conscience. In so much as common nature does, in fact, loathe questioning, it is indeed guilty of misology, but what the caller fails to realize is that he harbors the same illusory conviction regarding the sovereignty of his beloved questioning. Indeed, the supposed sovereignty of the caller's questioning proves to be nothing more or other than the strength of his conviction as to the merit of questioning; and it is, in fact, merely this ungrounded conviction that gives rise to his contempt for the supposed sovereignty of the great majority. After all, by his own admission, he is searching for a yet to be found certainty. Thus, there is no basis for his contempt beyond his merely subjective sense of the sovereignty of his questioning, and the caller's brand of questioning may therefore appropriately be termed *skeptical reason*.

Ironically, the caller ultimately disproves his own claims regarding the sovereignty of his questioning. Presumably, the caller begins his quest, like everyone else, as a member of the great majority. Common nature nourishes his growth until one day he begins to ask questions. His questioning never arrives at the certainty for which he longed regarding common values; instead, it serves only to liberate him from his initial conviction that common values are sovereign. Thus, the caller's questioning culminates not in his discovery of certainty regarding common values but rather in his freedom to create new values.

As long as the caller remained bound by the belief that his values were absolute, he had no reason think that he, or anyone else, had any business creating new values; but upon realizing that common values are not absolute, he knows himself to be free to use those values as a means to create new values. Once freed in this way, the caller ceases using reason to engage in radical skepticism and begins using it instead to create new values.⁵⁵ In this way, a noble nature is born, and this noble nature is the spiritual and intellectual offspring of common nature. The noble nature's new values consist in a purely individual system of values, but these new values serve an important function.

⁵⁴ Nietzsche (n 48) 77.

⁵⁵ At this point, questioning is no longer the caller's highest value, especially when it is directed at his beloved new values. However, the caller continues to use critical or skeptical reasoning in creating new values, but his skepticism is no longer bent on attacking the notion that values are absolute.

Their purpose is to inform and facilitate the great majority's ability to respond to changing life conditions. Unfortunately, however, the noble nature undermines this purpose by insisting on the absolute sovereignty of his creation. In aphorism 3, which I will quote at length because it is so apt to the issues at hand, Nietzsche says:

The taste of the higher type [i.e. the noble nature] is for exceptions, [...]; the higher type has a singular value standard. Moreover, it usually believes that the idiosyncrasy of its taste is not a singular value standard; rather, it posits its values and disvalues as generally valid and thus becomes incomprehensible and impractical. Very rarely does the higher type retain sufficient reason for understanding and treating everyday people as such; for the most part, this type assumes that its own passion is present but kept concealed in all men, and this belief even becomes an ardent and eloquent faith. But when such exceptional people do not see themselves as the exception, how can they ever understand the common type and arrive at a fair evaluation of the rule? Thus, they too [i.e. like the one who questions], speak of the folly, inexpediency, and fantasies of humanity, stunned that the course of the world should be so insane, and puzzled that it won't own up to what is needful.⁵⁶

As in the case of the caller, this noble nature is so firmly convinced of the sovereignty of its own perspective that it develops a passionate contempt for the sovereignty of the great majority. The great majority's sense of its own sovereignty compels it to return the favor by finding contemptuous the noble nature and his new ideas. Nietzsche's discussion of these three modes of reason emphasizes the remarkable irony to which they give rise. Each mode of reason serves an equally essential function in human nature, yet none of them seems able to recognize or even acknowledge the others. On the contrary, each views the other as irrational and insists that reason is firmly and exclusively on its own side. This is, in short, is Nietzsche's formulation of the problem of sovereignty.

Nietzsche's entire discussion of the three modes of reason and their failure to effectively interact with each other is intended to demonstrate the importance of intellectual conscience and to warn his reader of the danger of succumbing to each mode of reason's natural inclination to insist on its own sovereignty. The supposed sovereignty of each of the three modes of reason results in a deadlock that, borrowing Henkin's words, 'is destructive of human values.' Nietzsche says:

In every teacher and preacher of what is new we encounter the same wickedness that makes conquerors notorious, even if its expression is subtler and it does not immediately set the muscles in motion, and also does not make one that notorious. What is new, however, is always evil, being that which wants to conquer and overthrow the old boundary markers and the old pieties; and only what is old is good. The good men are in all ages are those who dig the old thoughts, digging deep and getting them to bear fruit – the farmers of the spirit. But eventually all land is exploited, and the ploughshares of evil must come again and again.⁵⁷

The purpose of the noble nature's new values is to inform and facilitate common nature's efforts to adapt to changing life conditions, but when the noble nature succumbs to reason's natural inclination to view the values that guide it as sovereign, he thereby thwarts the very purpose of noble nature. In aphorism 5, 'Unconditional Duties,' Nietzsche says that this sense of sovereignty is '[...] the most natural and usually very

⁵⁶ Nietzsche (n 48) 78.

⁵⁷ Ibid 79.

influential opponent of moral enlightenment and skepticism [...].⁵⁸ The noble nature misinterprets its sense of its own sovereignty as meaning that its values are absolutely sovereign, and this interpretation compels it to insist on ‘conquering and overthrowing’ the alleged sovereignty of common nature.⁵⁹ An unenlightened common nature can only interpret this assault as proof that the noble nature and its proposals are essentially wrong, and common nature is limited to this interpretation because it is equally convinced of its own sovereignty. Thus, common nature’s muscles are set in motion, and it reacts to noble nature by treating it with varying degrees of hostility. As a result, these two modes of reason fail to effectively interact with each other. Thus, even when common nature exhausts its own resources and therefore needs the new ideas and values that noble nature has to offer, the deadlock is impassable and the only remaining avenue of change is the destructive path, i.e., the ‘ploughshares of evil.’

Nietzsche identifies four different kinds of evil, most of which are either ironic or counterintuitive. The first is the straightforward case of evil in the form of people who simply willfully do what is clearly wrong, i.e., ‘by force of arms, by toppling boundary markers, or by violating pieties.’ The second kind of evil is more ironic. It takes the form of individuals who the great majority initially deems evil because their message poses such a great challenge to common values but who, in time, are viewed as great individuals owing to their invention of ‘new religions and moralities.’ Examples would be Jesus and Socrates, both of whom were initially deemed so evil that they were put to death in the public interest, but who later proved, ironically, to be exemplars of goodness. What these two kinds of evil have in common is that they ‘relumed the passions that were going to sleep – all ordered society puts the passions to sleep (...).’⁶⁰ Nietzsche’s point is twofold. First, he wants to say that the great majority is essentially the result of each member’s emotional bond with common values. The emotion at the heart of this bond can be weaker or stronger, and there are two ways of making this emotion, and thus the bond, stronger. One is to make the system of common values more attractive or beautiful, and this approach is effective because what is beautiful elicits a spontaneous response of intense passion. The more the change is needed, however, the less attractive common values become and the less passionate the great majority feels about them. That is where the other way of strengthening passion for common values comes into play. Evil relumes the passions that were going to sleep because it inspires fear, and the default response to fear is a reactionary intensification of the passion for common values.⁶¹

Nietzsche thought that once the great majority’s resistance to change through new ideas became sufficiently obdurate, the only path to change left open to it would be the destructive path. The great majority begins down this path by becoming dependent for its own cohesion on evil and the fear that it inspires, and this approach to maintaining

⁵⁸ Ibid 80.

⁵⁹ A better interpretation of the noble nature’s sense of the sovereignty of its new ideas would be to see it as an intensely pleasurable, or halcyon, feeling that naturally accompanies creative or legislative reasoning. In aphorism 3, Nietzsche likens the noble nature’s irrationality vis-à-vis common nature to the relative irrationality of a buck that follows a doe anywhere and everywhere, even into dangerous territory, in search of a suitable place to bring forth their offspring – something the buck would never do outside of the mating season because there would be no reason to justify assuming the risk.

⁶⁰ Nietzsche (n 48) 79.

⁶¹ The problem with this reaction is that the resulting intensified passion for common values is irrational, and where the effectiveness of common values is waning, this reaction covers over their deficiencies and forestalls the needed change.

the political collective's coherence marks the third kind of evil. The fourth kind of evil consists in the noble nature's insistence on the absoluteness of its new values, which provokes in the great majority a fear-inspired aversion to change by undermining its sense of its own sovereignty. Eventually, evil sunders the *status quo* and the great majority is forced to make, in the wake of destruction, the change that it could have made willingly and creatively. Nietzsche suggests that reason's sense of its own sovereignty gives a firm coherence to consciousness, whether individual or collective, that is necessary during some phases of its development and useful in certain contexts. Common nature's sense of its own sovereignty contributes significantly to society's coherence. Skeptical reason's sense of sovereignty enables it to press on in spite of the strong convictions and powerful and pervasive expectations of the great majority. Noble nature's sense of sovereignty enables it to remain committed to its new values in spite of the great majority's indifference to and contempt for them. At the same time, each mode of reason is, in fact, not truly sovereign because each performs a merely limited function.

Nietzsche also suggests that reason's sense of its own sovereignty is nothing more or other than its opaque awareness of the strength of its conviction as to the merit of the values it has posited to guide it. While reason has misconceived or misinterpreted this sense as meaning that its values are absolute, it has, in fact, the ability to modulate the strength of this conviction. In order to do so, however, it must first become aware of its misconception as such. Acquiring an intellectual conscience involves using skepticism, as do Plato and Henkin, to expose the illusory nature of reason's interpretation of its sense of its own sovereignty; but it also involves the deeper insight that sovereignty is a rational dynamic or a dynamic aspect of the faculty of human reason. Sovereignty is neither an inherent attribute of states nor an independently existing entity or principle. In the case of common nature, sovereignty is neither an authority that exists outside and independently of the great majority nor an inherent attribute of the political collective. Instead, sovereignty is a function of common nature's ability to strengthen its conviction as to the worth of its values to a degree that diminishes and, in certain contexts, excludes the influence of the other two modes of reason. A mode of reason exercises this ability appropriately when it does so by preserving its own order and stability without undermining the exercise of the other modes of reason. Thus, because there are times when change is needed, common nature's prerogative to maintain order does not include enforcing a given *status quo* at the expense of needed change.

Living according to values causes life to grow and change, so it inevitably happens that, as Nietzsche says, 'all the land is exploited.'⁶² In other words, living according to common values eventually brings about new life conditions, and when it does, new values are needed in order to provide an appropriate form for life under these new conditions. When new values are needed, sovereignty, or the strength of common nature's conviction as to the worth of its values, must temporarily modulate itself to allow for the influence of skeptical and reproductive reason. However, sovereignty should not, as Henkin suggests, be forced out of the picture all together. That would be irrational because human reason is the vital interaction between a trinity of distinct modes of reason, namely productive (or executive) reason, skeptical/critical (or judicial)

⁶² Nietzsche (n 48) 78.

reason, and reproductive (or legislative) reason.⁶³ The solution is to seek a form of interaction between nations vis-à-vis international law that takes this dynamic into account. One such approach is suggested by Novalis in his essay, *Pollen*.

Novalis' Concept of a True Universal State

In his essay, and in aphorism 122, Novalis discusses the problem of the tension between monarchy and democracy as it was formulated in his time. In short, the problem with monarchy is that it is form without power. Monarchies had become unpopular in Novalis' time because the people had begun to develop a sense of their own worth and authority, and as this sense grew, monarchy lost favor with the public. Novalis said that the problem with democracy is exactly the opposite, namely that it is power without form. In his time, the people were rising up against their monarchs and seizing power, but they were initially not entirely sure what to do with that power. This summation of the problems facing monarchy and democracy is perfectly analogous to Henkin's critique of the state of international law in the world today. International law is currently form without power because nations are too keen on asserting their own sovereignty to allow international law to provide them with form, or law, where it is needed. States, on the other hand, have power, but, as the extent of human rights violations in the world today makes painfully clear, the power of states is sorely lacking in form. Novalis proposed the following solution: 'The theoretical politicians cannot be accused of daring. Hasn't it yet occurred to any of them to investigate – whether monarchy – and democracy, as elements of a true universal state, shouldn't and couldn't simply be combined?'⁶⁴ This proposal for a combination that yields a true universal state does not sound very promising at first glance, but Novalis did not propose to make the combination as one might expect. He says, 'Democracy in the usual sense is basically no different from monarchy, except that here the monarch consists of a mass of heads.' In other words, if you give the people the power without the form, then there may be a problem with democracy owing to a lack of form, but if you give them both the form and the power, then they become a mass of heads and you avoid the shortcomings of both monarchy and democracy.

The problem is that one cannot give individuals form in one fell swoop, but neither can one deny them power by forever vesting it in a sovereign monarch. Thus, creating a citizenry that effectively wields power because it possesses the requisite form is something that can only be accomplished, and was in fact accomplished, in time. Novalis says that on this reading of history, 'the constitution of a monarchy is [actually] the character of a *regent*.' A regent is a person who is appointed to administer a country only because the monarch is either absent or a minor. Thus, a regent is not sovereign but merely standing in until the sovereign returns or matures. When we add this concept of the monarch as regent to the idea of democracy as a society of sovereign individuals, the suggestion is that the monarch is just a surrogate for a yet to mature citizenry and community of nations. While the merits of this concept of democracy are debatable, the idea suggests a viable way of conceptualizing the institution of international law given

⁶³ These three functions are integral parts of both individual and collective rationality. To be clear, the judicial or skeptical function involves considering activity, one's own or that of others, to determine whether or not it accords with values as well evaluating values.

⁶⁴ Novalis, *Pollen* (Alexander Gellay tr) [1991] 22 *New Literary History* 383 (emphasis added).

that states remain so reluctant and so unlikely to let it reign at the expense of their own sovereignty.

We can think of the world's nations as analogous to the citizens of a burgeoning democracy. These nations already have the power, but they lack some or much of the form that would be necessary in order for them to constitute a universal state - as is evident from the fact that so many human rights violations and other important boundary trespasses go unaddressed. In so much as and to the extent that states lack form, a regent is needed to guide them in acquiring it; and this seems the most viable and appropriate role for international law to play given the nature of this form.

THE UNIVERSAL STATE AS A SYSTEM OF LAWS OF AGREEMENT HAVING THE BINDING FORCE OF A COMMON FAITH

In aphorism 76 of *Die fröhlich Wissenschaft*, titled 'The greatest danger,' Nietzsche discusses his concept of 'the ultimate noblemindedness.' He maintains that what it means to be truly noble minded is to be *an advocate of the rule* that guides common nature:

If the majority of men had not always considered the discipline of their minds – 'their rationality' – a matter of pride, an obligation, and a virtue, feeling insulted or embarrassed by all fantasies and debaucheries of thought because they saw themselves as friends of 'healthy common sense,' humanity would have perished long ago. The greatest danger that has always hovered over humanity and still hovers over it is the eruption of madness – which means the eruption of arbitrariness in feeling, seeing, and hearing, the enjoyment of the mind's lack of discipline, the joy in human unreason. Not truth and certainty are the opposite of the madman, but the universality and the universal binding force of a faith; in sum, the non-arbitrary character of judgments. And man's greatest labor so far has been to reach agreement about very many things and to submit to a law of agreement—regardless of whether these things are true or false.⁶⁵

In this passage, Nietzsche once again affirms that common nature is a fundamental form of human reason, and he also states, with greater specificity than in aphorisms 2 through 5, the teleology of common nature.

Common nature labors under a force, i.e., the universal binding force of a faith in common values, and the objective of this labor is, unbeknownst common nature, to produce a discipline of mind in which people are able to posit and live by laws that they know, accept and value *as* laws of agreement. It is this discipline, and not the traditional and otherworldly notions of authority and sovereignty, that wards off the greatest danger. The champions of common nature make this danger greater by insisting that common values have an absolute authority because in this way they thwart the slowly emerging, more enlightened and more down to earth view of common values as laws of agreement that makes possible the creative path to change. However, progressive minded people, or noble natures, also increase this danger by insisting that their search for certainty and their new ideas are absolutely authoritative. Nietzsche contends that the search for the *absolute*, which frustrates the mature discipline of mind that is at home with the idea that our values are laws of agreement, does as much as anything to cast doubt on humanity's future: 'This is the discipline of mind that mankind has received; but the

⁶⁵ Nietzsche (n 48) 130.

contrary impulses [the search for the absolute] are still so powerful that at bottom we cannot speak of the future of mankind with much confidence.⁶⁶

Nietzsche describes the march toward the goal of maturity, which we can think of as a universal binding faith in *a system of laws of agreement*, as a long, slow spiritual labor. He acknowledges that the nature and tempo of this process possess a serious challenge to the noble natures who, like Henkin, light upon viable new ideas and understand how urgently they are needed. Nietzsche postulates that:

... this faith, as everybody's faith, arouses nausea and a new lust in subtler minds; and the slow tempo that is here demanded for all spiritual processes, this imitation of the tortoise, which is here recognized as the norm, would be quite enough to turn artists and thinkers into apostates: It is in these impatient spirits that a veritable delight in madness erupts because madness has such cheerful tempo.⁶⁷

These 'impatient spirits' have, as Nietzsche noted in aphorisms 2 through 5, important roles to play in this spiritual process as goads to change and vessels of new ideas. However, they are not, he claims, virtuous spirits where their impatience compels them to undermine the one force that holds the center in place. Thus, in spite of their good intentions, Nietzsche sees in spirits like Henkin not true forces of progress but retrograde forces that would, albeit unintentionally, undermine humanity's best interests. True virtue consists in being an advocate of the rule that guides common nature and

[t]hus the virtuous intellects are needed – oh, let me use the most unambiguous word – what is needed is virtuous stupidity, stolid metronomes for the slow spirit, to make sure that the faithful stay together and continue their dance. It is a first-rate need that commands and demands this. *We others are the exception and the danger* – and we need to be eternally defended. Well, there actually are things to be said for the exception, provided that it never wants to become the rule.⁶⁸

Nietzsche reaffirms this view in aphorism 55, titled 'The ultimate noble-mindedness,' when he says, 'To become the advocate of the rule, that might be the ultimate form of refinement in which noble-mindedness reveals itself on earth.'⁶⁹ It is in step with the march of this universal faith that we make true progress. When we examine this faith from the perspective of the explicit system of values that each nation touts as its own, it does not seem to be universal at all. Indeed, the rule seems to be different for each nation. At bottom, however, each nation is marching, albeit to its own drum and at its own tempo, toward the same goal of a faith in a common, or internationally universal, system of laws of agreement. The opinions on reservations that the International Court of Justices has issued provide compelling evidence of this claim.

⁶⁶ Ibid 130.

⁶⁷ Ibid 131.

⁶⁸ Ibid 131.

⁶⁹ Ibid 117.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 15 (May 28)

In 1951, the ICJ issued advisory opinions on the question of whether states should be allowed to become parties to Conventions and Treaties without agreeing to all of their terms. In its reasoning, the Court alluded to principles indicative of a recognition that international laws are essentially laws of agreement. The Court began its discussion with the following statement:

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.⁷⁰

The point here is that agreement is what makes a convention or treaty binding law, and the heretofore accepted rule regarding reservations to a convention or treaty was that they were no exceptions to this rule. The problem with this rule was that it undermined the authority of agreement by giving authority over the final form of the treaty or convention to unanimity rather than to the essential underlying agreement of the parties as to what that form should be. Thus, the Court sought to remedy this problem with a more flexible approach to the problem of reservations.

The Court deemed flawed the principle that a multilateral convention is the result of an a freely concluded agreement that none of the parties is allowed to frustrate by asserting reservations that have not been unanimously ratified. The court explained that this principle is inappropriate in the context of the *Genocide Convention* because the character of this principle derives from the legal concept of a contract. Contract law aims at ensuring that the parties to an agreement are not allowed to alter it in ways that result in a windfall for one party or disadvantages for the other parties. Here, in the context of the convention, the situation did not involve any points of contention that would give rise to this kind of posturing. Instead, the objective at issue was one on which all 56 member States fundamentally agreed. As the Court averred:

The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitively universal in scope. It was in fact approved on December 9th, 1948, by a resolution [that] was unanimously adopted by fifty-six States. The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. [...] In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes [that] are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights

⁷⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 6.

and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.⁷¹

The key ideas in this passage, for the purpose of understanding how Nietzsche's concept of the binding force of a universal faith in a system of laws of agreement applies here, are the notions of 'inspiration,' 'high ideals' and 'the common will of the parties.' Ideals like these have a powerful natural force of attraction, and this force has the effect of uniting the parties into a natural agreement and establishing a common will. Moreover, the authority of the Convention's terms consists in nothing more or other than this agreement. It is clear from the Court's reasoning that it is operating on this assumption when it says: 'The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principals which are its basis.' In other words, the authority, or 'sovereignty,' of the values under discussion derives from and consist in the parties' agreement to abide by them. This, however, is not to say that what is agreed to is moral, humanitarian or principled simply because the parties agree to it. Instead, it is merely to say that if a value is judged moral or humanitarian or deemed a principle or a law, then its authority, or sovereignty, will be derived from our agreement to abide by it. Thus, the Court said that the parties to the Convention did not intend 'to sacrifice the very object of the Convention in favor of a vain desire to secure as many participants as possible.'

The Court makes a clear distinction between agreement and that to which the parties agree. This notion of the authority, or sovereignty, of laws as consisting in the parties' agreement to live by them allows for much needed flexibility in the concept of sovereignty. When one insists on more, as Henkin does when he advocates for the assertion of the sovereignty of international law at the expense of States' sovereignty, one thereby puts oneself at a disadvantage because one becomes one of those dangerous exceptions that, as Nietzsche said, 'need to be eternally defended.' An advocate of the rule, on the other hand, does not need to be defended. He is neither one of those common natures whose devotion to the idea of the sovereignty of common values 'is even stronger than the strongest instincts,' namely, our instincts to improve ourselves and our world, nor is he one of those misguided noble natures who assert the sovereignty of their novel ideas at the expense of the 'sovereignty' of common nature. He does, however, need to be patient because the march toward worldwide agreement regarding human rights and international justice is a spiritual and intellectual process that unfolds at a slow tempo. If the wait is difficult to bear because the thoughts and deeds of those on whom the world is waiting seem stolid and stupid, there is consolation in knowing that the wait is necessary and the results are worthwhile. This situation is clearly illustrated by reservations to multilateral human rights treaties.

While the majority of multilateral treaties are ratified either with no reservations or with reservations that do not adversely affect the substance of the treaty, this is not so in the case of multilateral treaties concerning human rights.⁷² It often happens that states enter such treaties with numerous reservations that go to the very heart of the treaty.⁷³ It is precisely here that Henkin loses all patience and abandons the concept of

⁷¹ Ibid 7.

⁷² Jeffrey L. Dunoff, Steven R. Ratner, and David Wippman, *International Law, Norms, Actors, Process* (3rd edn, Wolters Kluwer 2010) 436.

⁷³ Ibid 436.

States' sovereignty altogether. However, careful consideration of these reservations shows signs of a process requiring precisely the flexibility that they provide. Consider the role of the United States in the *International Covenant on Civil and Political Rights* (ICCPR).⁷⁴ The United States was instrumental in the drafting of the Covenant in 1966, but it would be 26 years before the US would sign it in spite of the fact that the Convention's provisions are consistent with the Bill of Rights.⁷⁵ The slow, metronomic pace set by the US is characteristic of its general reluctance to commit to international human rights provisions. Dunnoff, Ratner and Wippman, in their book *International Law, Norms, Actors, Process*, offer an explanation of this phenomenon noting that:

Conservative leaders in the United States in the 1950s feared that rapidly developing international human rights norms would threaten segregation and other racially discriminatory practices then prevalent in the United States, expand the power of the federal government at the expense of the states, and undermine the latter's constitutional authority to regulate matters previously considered 'local.' These concerns drove support for a proposed constitutional amendment, the Bricker Amendment, [which] would sharply limit the reach of the federal government's treaty power. To defeat this proposed amendment, the Eisenhower Administration announced in 1953 that it did not view human rights treaties as the proper and most effective way to spread throughout the world the goals of human liberty, and that it would not in the future support ratification of any human rights treaty.⁷⁶

Conservatives' concerns about rapid developments in human rights norms and their effect on the balance of power between federal and state governments illustrates that effective change is accomplished through a process that unfolds in time. The conservatives' *Bricker Amendment* and Eisenhower's response to it offer insight into the fundamental nature of this process and the consequences of attempting to circumvent it by supplanting States' sovereignty with sovereign international law. Ironically, the result of asserting international sovereignty is exactly the opposite of the intended objective of advancing human rights, namely a reactionary intensification of the state's assertion of its own sovereignty in the form of a disavowal of the efficacy of international law and a promise not to ratify any future treaties.⁷⁷ The assertion of the sovereignty of international law, even if merely in the seemingly innocuous form of the rapid development of human rights norms and growing international pressure on the U.S. to ratify such norms, 'sets the muscles in motion.'⁷⁸

The deep structure of the collective, or the great majority, is premised on a strong instinctive sense of its own sovereignty, regardless of the fact that the collective's common concept of that sovereignty is illusory.⁷⁹ The immanent threat of a rapid change in core norms or their sources, whether the change is for the better or the worse, challenges that sense of sovereignty and thus elicits a reactionary reassertion of it. This reaction is, from Henkin's perspective, maddening, but from the perspective of the inner logic and physics of common nature, it makes perfect sense. Although it would be

⁷⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid 436.

⁷⁸ Nietzsche (n 38) 79.

⁷⁹ My doctoral dissertation, RVBK, provides a rigorous theoretical account of the structure of the collective based on a concept of identification and an in depth analysis of the concept of the absolute, or sovereignty.

difficult to think of a better justification for overriding a state's sense of its own sovereignty than the very pressing need to end the kind of racism and discrimination at issue in this context, that sense of sovereignty is nevertheless necessary because there is nothing else holding the collective together. A closer look at the US response to the ICCPR reveals its consciousness of the challenge that the ICCPR poses to US sovereignty and hints at the merit of allowing the process to unfold in its own time.

In 1992, the Senate Committee on Foreign Relations released its 'Report on the International Convention on Civil and Political Rights.'⁸⁰ In the report, the Committee addressed certain concerns of the international community regarding U.S. reservations to the ICCPR in its assertion that

[t]he overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States. This approach has caused concern among some private groups and individuals in the human rights field who argue that U.S. law should be brought into conformance with international human rights standards in those areas where the international standards are superior.⁸¹

The challenge in the author's view to US sovereignty is twofold. First, there is a challenge to the worth of specific US standards in the form of the alleged superiority of international standards regarding the same issue. The example that the report cites is the issue of the minimum age at which a person can receive the death penalty in the US, which is lower than under the rules of the ICCPR. However, this challenge is not as serious as the challenge to the very nature of the US political collective. In a democracy like the United States, there is no Constitutional provision for bringing US law into conformity with the standards of an extraneous legal authority. In such a democracy, it is the will of the people, expressed at the ballot box and translated into legislation by the people's elected officials, that serves as the only legitimate source of law. Therefore, if the US were to impose laws in the manner proposed, it would thereby cease to be what it essentially is, and this poses the greatest conceivable danger to such a democracy. The solution to this problem requires a flexible notion of sovereignty that allows the process to unfold in its own time. The Senate Committees' response indicates that it was guided by precisely these concerns when it conceded that US law regarding the age at which one is subject to the death penalty should be questioned and possibly changed yet still insisted that any actual changes in the law must occur 'through the normal legislative process.'⁸² The Senate Committee's approach to this problem shows signs of both an intellectual conscience that allows for the possibility that common values are inadequate and a firm commitment to the rule of democracy. This approach may tax the patience of those who, like Henkin, are passionate about human rights and eager to advance them, but there are compelling reasons to doubt whether granting sovereignty to international law is really in the best interest of global human rights.

⁸⁰ *Senate Executive Report* (102d Cong. 2d Sess. 1992) 102-123.

⁸¹ Dunoff (n 55) 440.

⁸² *Ibid* 440.

CONCLUSION

In Book X of Plato's Republic, Socrates recounts the legend of Er, who had gone up into heaven to witness the process of reincarnation. Er said that the souls in heaven draw lots to decide who will be first to choose his or her next life and that their choices are informed by the character that they developed in their previous lives. Er says that the soul who drew the first lot chose a bad life because his character was weak. He says of this soul, 'He was one of those who had come down from heaven, having lived his previous life under an orderly constitution, where he had participated in virtue through habit and without philosophy.'⁸³ Plato's point is that living under a just constitution does not necessarily make one just. Instead, the citizens of a state only become just where their virtue arises out of their own philosophical consideration of their values.

Democracy, with its separation of powers and diverse parties, its pitting idea against idea, and its valuing only those laws that arise out of the political process, steeps its citizens in this process of philosophical consideration. It thereby enables its citizens to develop a virtue that is superior to one that arises merely from the force of habit. Where citizens' virtue is primarily a matter of habit, it is nothing more than obedience to laws imposed on them from an extraneous source, and this form of consciousness renders them forever dependent upon the illusion of a sovereign. It is by allowing this process to take place that citizens eventually become enlightened enough to accept their laws as laws of agreement and thus to welcome changes like those Henkin proposes.

Immanuel Kant in his essay, *An answer to the question: What is Enlightenment?* noted that 'Minority is [the] inability to make use of one's own understanding without direction from another.'⁸⁴ Kant thought that 'a public' would be able to accomplish this enlightenment in time provided that it was granted the 'freedom to make public use of its reason in all matters.'⁸⁵ Moreover, he thought that this could only be achieved slowly but that it would be worth the wait. On the other hand, 'a revolution,' Kant said, 'may well bring about a falling off of personal despotism and of avarice or tyrannical oppression, but never true reform in one's way of thinking; instead new prejudices will serve just as well as the old ones to harness the great unthinking masses.'⁸⁶ These points about the slow march to enlightenment are equally applicable to nations. Like the citizens of a nation, the member states of the community of nations can achieve, in time, the ability to abide by human rights if only they are granted the necessary freedom to make public use of their reason in the international arena.

What states need, then, is the kind of flexible concept of sovereignty, achieved through intellectual conscience, that Nietzsche proposes, i.e., one in which sovereignty is understood to be nothing more or other than the strength of our resolve to live by the laws to which we have agreed to live. This concept of sovereignty allows states to preserve their coherence while leaving them free to respond appropriately when confronted with more enlightened laws. International law has an important role to play here by providing an international forum in which nations can make public use of their

⁸³ Plato (n 3) 1221.

⁸⁴ Immanuel Kant, 'An answer to the question: What is enlightenment?' in Paul Guyer and Allen Wood (eds) *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 17.

⁸⁵ Ibid.

⁸⁶ Ibid.

reason on matters regarding human rights. Thus, international law could advance its own interests in protecting human rights if it were to embrace a flexible notion of its own sovereignty. Although it may, under certain circumstances, be necessary for the institution of international law to join with other nations in asserting the sovereignty of human rights, it would do the most good by playing the role of regent to nations that have yet to cast off their self-imposed minority. Conceptualizing sovereignty in this way allows the world's nations and their citizens to help each other on the long slow march toward a truly just world.