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European Journal of International Relations 2001 7: 283

DOI: 10.1177/1354066101007003001

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The Endurance of Sovereignty

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It could (almost) be argued that the day of the sovereign state has only just begun!

(Alan James, 1999: 47)

This article has been written in response to a discrepancy we are witnessing in our respective fields of study, International Relations theory and international law — the discrepancy between, on the one hand, the choir of academics claiming that the concept of sovereignty as applied to states is obsolete and factually inaccurate and, on the other hand, the continued frequent use of the very same concept in international political and legal practice. This article attempts to account for these two contradicting positions. Its three basic aims are the following:

- First, to lay bare and criticize the so-called ‘descriptive fallacy’ with respect to sovereignty; the erroneous assumption that the meaning of the term sovereignty consists in a corresponding state of affairs in reality.
- Second, to advocate a ‘linguistic turn’ regarding the concept of sovereignty, which takes as its starting point the use of the term sovereignty as a specific form of legitimization.
- Third, to explicate and refine, on the basis of J.R. Searle’s theory of speech acts, the idea of sovereignty as specific form of legitimization.

We are not the first to embark on such a mission. Stephen Krasner has written about the descriptive fallacy, Searle’s work has been applied by George Sørensen, John Ruggie and Krasner again, while Cynthia Weber has applied a constructivist approach to sovereignty, following the pioneering work of Rob Walker. All of them have added important insights to the seminal studies of F.H. Hinsley, Alan James and Robert Jackson. We hope to contribute to this body of literature through a more refined analysis of the structure of the sovereignty argument in normative reasoning, and through

a more thorough examination of the rules governing the creation, continued existence and termination of sovereign states.

Section 1 criticizes the descriptive approach towards sovereignty, which interprets sovereignty as a reflection of the de facto internal control and external independence of states. It argues that this approach towards sovereignty cannot account for the fact that increasing international interdependencies, the growing power of international organizations and the globalization of the economy has not led to a renunciation of the idea of the sovereignty of states. On the contrary, threats to the state's autonomy and ability to rule have reinforced the claims to sovereignty rather than weakened them. The most passionate defences of the idea of state sovereignty can be found in times when the freedom and independence of states is believed to be at stake. Throughout history, the perceived inability to rule has legitimized and buttressed those exercising sovereignty vis-a-vis internal and external competitors. This phenomenon can only be understood if a different approach towards sovereignty is adopted. Instead of asking what state of affairs 'really' corresponds to the idea of sovereignty, one should ask in what context a claim to sovereignty is likely to occur, to whom a sovereignty claim is addressed, what — if any — normative framework is used to determine the legitimacy of a sovereignty claim, and what consequences generally follow from the acceptance of a sovereignty claim.

Section 2 further explicates this 'linguistic turn' with respect to sovereignty. It takes up and refines the notion of sovereignty as an institution as has been set out by, *inter alia*, Stanley Hoffmann (1993), Robert Keohane (1993), Stephan Krasner (1999), George Sørensen (1999) and John Ruggie (1998). On the basis of insights borrowed from speech act theory, it argues that sovereignty plays an important role in normative discourses by — imaginarily — bridging the gap between 'is' and 'ought' — a successful claim to sovereignty establishes a link between an institutional fact ('being' sovereign) and the rights and duties that follow from the existence of this institutional fact. Moreover, it uses insights of speech act theory to reconstruct the normative framework used in international society and international law to determine the legitimacy of claims to sovereign statehood.

Section 3 illustrates the approach towards sovereignty advocated here by discussing two contexts in which the idea of sovereignty is contested — the so-called 'quasi-states', whose existence largely depends on the goodwill of international society (Jackson, 1990), and the European Union, which has allegedly undermined the sovereignty of its member states (Wallace, 1999).

1. The Descriptive Fallacy and the Concept of Sovereignty

Many debates on the importance of sovereignty have been obscured by what the ordinary language philosophers have called the ‘descriptive or constative fallacy’ — the erroneous assumption that there must be something in reality corresponding to the meaning of the term ‘sovereignty’. On the basis of this mistaken interpretation of sovereignty, many scholars have declared sovereignty to be ‘factually inaccurate’, ‘obsolete’ and ‘dead’. In their view, sovereignty denotes the actual power or capacity a state possesses to exercise full control internally and to remain independent externally. It is not surprising that subsequently they find sovereignty ‘declining’ or even being of a ‘fictional character’ — due to technological developments, the rise of international organizations, transnational problems, etc. In other words, there is less and less in reality that corresponds to the idea of a sovereign state. Others have — based on the same descriptive interpretation of sovereignty — argued in defence of the sovereign state. They hold that the ability to rule is less in decline than ‘transnationalists’ want us to believe (see, transnationalists such as Cooper, 1968; Vernon, 1971; Keohane and Nye, 1972, 1977; Rosenau, 1990; Ohmae, 1995; versus e.g. Philpott, 1999; Sørensen, 1999).

The empirical type of criticism on the ability to rule is far from new. From the middle of the 19th century, starting with the Communist International, up to the present, the end of state sovereignty has been predicted on the basis of cross-border interdependencies, a revolutionary increase in interaction capacity, and the dominance of the world economy over politics (de Wilde, 1991). So far, however, many predictions have proved wrong all the time. At first sight, Krasner (1999) seems to offer a plausible explanation for the descriptive fallacy involved in this empirical debate by introducing the notion of ‘interdependence sovereignty’. Interdependence sovereignty is about the ability to control cross-border interaction — transnational interaction may increase but so may the ability to control it. The idea of interdependence sovereignty, however, suffers from the same descriptive fallacy as the traditional notions of internal and external sovereignty — the illusion that sovereignty is a measurable percentage of effective power or independence. The problem is not solved by introducing a third ‘realm’ of politics; while ‘politics’ is, nevertheless, conducted by sovereign (!) states.

The most fundamental reason why predictions about the end of sovereignty were and are wrong is that they misunderstand the nature of the speech acts in which the concept of sovereignty is used. As with concepts like ‘the legal person’, ‘the right to property’ or ‘the nation’ there is, in the words of H.L.A. Hart (1993: 23), ‘nothing which simply “corresponds” to these words, and when we try to define them we find that the expressions we

tender in our definition specifying kinds of persons, things, qualities, events and processes . . . are never precisely the equivalent of these words, though often connected with them in some way'. In order to understand the meaning of these concepts, it is more fruitful to reconstruct their use than to look for corresponding realities. In other words, the question as to what state of affairs corresponds to the meaning of the term 'sovereignty' should be replaced by questions like — In what context is a claim of sovereignty likely to occur? To whom is a sovereignty claim addressed? What normative structures are used to determine the legitimacy of a claim to sovereignty? What consequences follow from acceptance of a sovereignty claim? In order to deal with these types of question, it is useful to recall the specific circumstances under which the modern concept of sovereignty originally became one of the dominant concepts structuring politics in Western Europe.

Westphalian or Negotiated Sovereignty

As far as the domestic context is concerned, the concept of sovereignty has been used from the late Middle Ages onwards to legitimize the powers of the princes vis-a-vis the Emperor, the Pope, and the higher nobility. Moreover, it was used to legitimize a strong and undivided power that could secure law and order in times of civil and religious wars. This specific context reveals an important aspect of the 'sovereignty discourse' — sovereignty does not become less and less important in times when the power of the state (or any other claimant of sovereignty) is questioned or diminishing. On the contrary, especially in times of competing claims to authority, such as times of civil unrest, a strong claim to sovereignty is more likely to occur. It is in these contexts that Jean Bodin and Thomas Hobbes formulated their pleas for a strong, sovereign power, unbound by positive law. It is in the very same context that in the 1930s the controversial philosopher Carl Schmitt formulated his theory of absolute sovereignty. Writing against the background of the Weimar Republic, endangered as it was by centrifugal forces, Schmitt (1996) argued that the essence of sovereignty consists in the power to decide upon the existence of an exceptional (emergency) situation, as well as in the power to decide what should be done to put an end to this abnormality. In IR theory, Raymond Aron has also stressed the importance of the relation between sovereignty and the exceptional situation. According to Aron, sovereignty is the 'supreme power of deciding in a case of crisis'; a power that belongs to the authority that is both *legitimate and supreme*. The search for sovereignty, therefore, is 'the search for conditions in which an authority is legitimate and of the place, men and institutions in which it resides' (Aron, 1967: 746; cited by Fowler and Bunck, 1995: 36).

In hypothetical times of normalcy, when the state's ability to rule and its external freedom are not at stake, sovereignty is unimportant; or, in Morgenthau's words, 'the ultimate responsibility for the exercise of political authority . . . lies dormant in normal times, barely visible through the network of constitutional arrangements and legal rules' (Morgenthau, 1948: 344). West European integration under American hegemony comes close to such a situation. Sovereignty becomes important in times when the perceived ability of states to ensure effective internal rule and freedom from external interference is called into question. The Danish 'no' to the Euro on 28 September 2000, as well as the debate about the referendum underscores this point. 'Sovereignty' is a speech act to (re-)establish the claimant's position as an absolute authority, and to legitimize its exercise of power. This way of interpreting sovereignty resembles the 'linguistic turn' advocated in studies of international security. There too, the concept of 'security' is not understood as a descriptive concept. Instead, the attention is focused on the speech acts in which the concept of security is used; on the acts of *securitization* through which an actor presents a valued object as existentially threatened and legitimizes the breaking or suspension of rules that would normally govern conduct (Wæver, 1995b; Buzan et al., 1998; Werner 1999). Sovereignty represents an existential value that allows for extraordinary measures when it is at stake — and since it is a *claimed* status, with discursive functions, it tends to be at stake always. The inability of states to rule is a poor indicator of their vanishing sovereignty. If the authority were absolute, there were no reasons to say so. Crucial for adjudicating this question is whether states are successful in bringing forward claims that they are the supreme or ultimate authority to change things for the better.

As far as the external dimension of sovereignty is concerned, the concept of sovereignty played an important role in managing the breakdown of the Medieval *Respublica Christiana* (Jackson, 1999b) — the structure in which a common law and morality governed the community of believers under the guidance of Pope and Emperor. In response to the religious wars — and especially the Thirty Years War (1618–48) — Western European powers gradually adopted a system of international relations that has become known as the Westphalian system — a system of politically independent ('sovereign') rulers who mutually agreed to accept their independence and differences. The Westphalian system is easily misunderstood as resting on a belief in *de facto* isolation and autarky of resulting entities, most of which were territorially defined, and called states. In fact, however, the Westphalian system is quite the opposite. It takes as its starting point the inevitable permeability of borders and the inevitable international interdependence of states, including both their governments and their societies. The only reason to sit down in Münster and Osnabrück for more than four years of

negotiations (1644–8) is that 150 years of warfare had shown the difficulty of establishing sovereign power by brute force only. Particularly on Europe's mainland the population was decimated during the Thirty Years War, agriculture had come to a standstill, and in many parts local life was an anarchic survival of the fittest, close to the conditions of a Hobbesian state of nature. Subsequently attempts were made to provide for a normative structure to deal with this permeability of territories and the interdependence of rulers and societies in an orderly way.

Given the relatedness of the Westphalian principles — mutual recognition among sovereigns, territoriality of sovereign entities, and 'the exclusion of external actors from domestic authority structures' (Krasner, 1999: 20) — it is unfortunate that Krasner's typology of sovereignty restricts the term 'Westphalian sovereignty' to the 'exclusion of external actors'-principle only.¹ The essence of Westphalian sovereignty is its negotiated nature. This discursive characteristic sets it apart from a more imperial image of sovereignty in which locally accumulated power expands and fades away in concentric circles (de Wilde, 2000). The endurance of Westphalian sovereignty rests in the resilience of the discourse it gave birth to.

The idea of sovereignty would be completely unnecessary if states were indeed isolated and autarkic. Why would a state take the trouble of presenting itself as sovereign vis-a-vis others if it already exists in 'virtual' isolation from them? The essence of the Westphalian system, therefore, is *not* the creation of 'billiard-ball' states; rather it is the creation of a structure of de facto interdependent states that accept some basic principles in dealing with each other.

In the 17th century the primary focus of sovereignty was to prevent foreign interference in matters of religion (*cuius regio, eius religio*), and its focus shifted to questions of nationality in the 19th century (*cuius regio, eius natio*) and to problems of alien rule and decolonization in the late 20th century.² Its main function, however, has remained the same — to constitute a difference between 'internal' and 'external' spheres and, on the basis of this constructed difference, to legitimize claims to a special position vis-a-vis other sovereign entities, especially claims to freedom from 'external interference' in 'internal affairs'.

As can be deduced from its origins in the late Middle Ages, the existence of claims to external sovereignty presupposes a specific audience — an international society which recognizes the distinction between internal and external as valid and acts upon the belief in the existence of that distinction. 'It was a condition of the discovery of the international version of sovereignty', Hinsley argues (Hinsley, 1967: 245; as quoted by Ruggie, 1998: 148), 'that the notion of Christendom be replaced by a different understanding of international society — one that was compatible, as the

medieval understanding was not, with belief in the sovereignty of the state.³ According to the standard English School definition, ‘international society’ is ‘a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in the maintaining these arrangements’ (Bull and Watson, 1984: 1; based on Bull, 1977). Note, however, that Bull presupposes the existence of states (Bull, 1977: 8), whereas the original society in 1648 was not (yet) an interstate society. Sørensen (1999) makes the same presupposition (see below) — states exist before sovereignty. We disagree. Jackson (1999b) rightly points out that the Peace of Westphalia was still formulated in terms of the Christian universal language; even the Peace of Utrecht in 1713 confirmed that universalistic order. Hence, there was no modern international *system* before the international *society*. The universal medieval ‘state’ gradually turned into a combination of an international society and an international system.⁴

In the Westphalian structure both elements — system and society — are present and bound to each other. Westphalia was an agreement to disagree between rulers who lived within reach of each other’s power. Their existence has depended ever since on the functioning of the international society (as much, of course, as it has depended on the functioning of their domestic societies). In principle each major state that emerged in Europe had the power to rule continentally scaled empires — the empires they established outside of Europe are proof of this.

Obviously a society based on the mutual recognition and mutual non-intervention of its constituent units is inherently fragile — they are within reach of each other and hence have to fear each other. Mutual recognition among sovereigns at the bilateral level has never been uncomplicated, and occasionally ambitions for pan-European empires came close to overturning the Westphalian structure. Huge coalitions and investments in human capital were needed to destroy these ambitions, such as the bids for pan-European empire by the Habsburgs, Napoleonic France and Nazi Germany, which were halted in 1713, 1815 and 1945 respectively. Balance of power politics appeared crucial. Scholars like Hendrik Spruyt (1994) have made clear that the survival of this peculiar international structure has been far from obvious. In situations of interdependence there is a bonus on uncertainty avoidance, and international society grows on this, provided that it manages to overcome imperial attempts to nullify the perils of interdependence by conquest (De Wilde, 1991).

Summarizing, we conclude that the very state of affairs that many authors have qualified as the hallmark of sovereignty, complete control internally and impermeability vis-a-vis other sovereigns, turns out to be the context in which a claim to sovereignty is utterly useless. Claims to sovereignty are more likely to occur in quite other contexts — rival claims to supreme and ultimate authority, external interdependencies and (potential) interferences in what is regarded as internal affairs. Moreover, the possibility of making claims to sovereign independence presupposes the existence of an international society where these claims are recognized and generally accepted as valid. The Westphalian structure in international system/society was built on the medieval Christian one, constituting a pluralist version of it.

The existence of an international society, in which one has to recognize and accept a claim to sovereignty, means that at least two important audiences for a sovereignty claim can be distinguished — the domestic audience (to whom a claim to sovereignty is a claim to supreme or ultimate authority) and an external audience (to whom a claim to sovereignty is a claim to independence). Traditionally, these two claims (supremacy and independence) have been regarded as two sides of the same coin — a state could not be regarded as truly supreme in a given territory if it was not really independent from other sovereigns.⁵ The linguistic turn to sovereignty advocated in this section, however, makes it possible to take a more flexible position towards the ‘existence’ of sovereign states. As we will set out in the next section, history shows several examples of claims to sovereignty that were accepted by one audience and rejected by the other.

2. Sovereign States as Institutional Facts

The notion of sovereignty as a form of legitimation has been developed by others as well. Many scholars have emphasized that sovereignty does not stand for a state of affairs, but is a form of legitimation of the exercise of power. Hinsley (1986: 25) defined sovereignty as

a concept by which men have sought to buttress older forms of legitimisation and accountability or on which they have hoped to base new versions of these means by which power is converted into authority. Its function in the history of politics has been either to strengthen the claims of power or to strengthen the ways by which political power may be called into account.

Philpott (1997: 17) makes the same point — ‘Sovereignty, even at its most monarchical or dictatorial, is never a matter of mere power. Even Hobbes’s Leviathan only has total power because the people have completely relinquished to him their natural but vulnerable rights, legitimising his legislative capacity.’ Keohane (1995: 167) described the concept of sovereignty in the relations between states as an institution — ‘a set of persistent

and connected rules, prescribing behavioural roles, constraining activity and shaping expectations.’ Robert Jackson (1999b), Alan James (1999) and James Mayall (1999) also agree that sovereignty can only exist by virtue of mutual recognition between governments. Its functions are regulative and authoritative.

Sovereignty in world politics is a distinctive way of arranging the contacts and relations of political communities, or states, such that their political independence is mutually recognized and they co-exist and interact on the foundation of formal equality and a corresponding right of non-intervention. (Jackson, 1999b: 12)

The above-mentioned authors, however, leave unexplained the specific structure and function of the sovereignty claims in normative discourses. It is important to examine this structure and function in more detail, because it might help to understand the widely held (yet erroneous) belief in sovereignty as a matter of fact, as well as the opposite (also erroneous) belief that sovereignty is ‘only’ a norm. In order to explain the structure and function of sovereignty in normative discourses, we shall make use of the concept of ‘institutional fact’ as has been set out by J.L. Austin (1961) and J.R. Searle (1969, 1995). Institutional facts are ‘facts’ like the goal scored in a soccer game, the move made in a game of chess, etc. All these facts can only be understood on the basis of our knowledge of the rules that constitute and define their existence; the so-called constitutive rules like the scoring rules in a game, the rules that lay down what counts as a knight in a game of chess, etc. Constitutive rules, Searle holds, take the form ‘X counts as Y in context C’. Characteristic of constitutive rules is that they seem to describe what they constitute or make possible. It seems as if a scoring rule in a game simply defines what scoring a goal *is*; in fact, however, the scoring rule makes it — conceptually — *possible* to identify a certain type of conduct as scoring a goal. Take away the constitutive rules and no one is able to score a goal, make a move in chess, etc. But once the rules are in place, descriptive analysis of who has won is feasible.

At first sight Searle’s work is embraced by a wide variety of both constructivist and positivist writers on sovereignty in IR (e.g. Thomson, 1995; Ruggie, 1998; Krasner, 1999: 49; Sørensen, 1999). At a closer look, however, they end up distinguishing between sovereignty as a norm (formal or legal sovereignty), and sovereignty as an empirical fact (absolute authority, ultimately in terms of coercive power). Even if the constitutive nature of the norm of sovereignty is differentiated from the regulative rules that are derived from it (such as non-intervention) the authors who use Searle hardly differ from traditional IR scholars who seem to use the disciplinary boundary with international law as a convenient safety-valve —

sovereignty as a legal ‘attribute’ in the margin of the struggle for power, which is the ultimate arbiter.⁶ No wonder Krasner calls sovereignty ‘organized hypocrisy’. For example Sørensen (1999: 169–73), who gives the most elaborate application of Searle in the context of sovereignty, treats states as given matters of fact. In applying Searle’s formula ‘X counts as Y in context C’, he argues that X stands for ‘states with territory, people and government’, Y stands for constitutional independence ‘which is a legal, absolute, and unitary condition’, and C stands for ‘the international society of states’. In other words, sovereignty is a norm to steer the behaviour of states that would also exist apart from this norm. In the same fashion, the legal condition of constitutional independence would be based on the existence of effective control over a population living in a territory. However, as we will set out later in this section modern international society regards many entities without effective government still as sovereign states (e.g. states in civil war or under foreign occupation). This indicates that the relation between the legal (normative) and political (empirical) aspects of sovereignty is more complicated than many authors assume. To lay bare their intertwinement we emphasize the discursive context — a political collective (X) counts as a state (Y) in the context of a sovereignty discourse (C).⁷

Institutional facts play an important role in the foundation of normative arguments. In terms of J.R. Searle’s famous article ‘How to Derive Ought from Is’, this role of institutional facts in normative discourses can be reconstructed as follows (Searle, 1969: 175–98):

- First, a social relation is asserted as a matter of institutional fact (e.g. our relationship counts as friendship, a marriage, etc.).
- Second, the meaning of these institutional facts is explicated in terms of norms of conduct (e.g. between friends, spouses, etc. conduct Q is inappropriate).
- Thirdly, the asserted and explicated institutional fact is used as justification for the validity and applicability of certain norms of conduct in a particular case (e.g. you — friend, husband, wife, etc. — ought to refrain from doing Q).

In the same fashion, a claim to sovereignty attempts to establish a relation as an institutional fact (the ‘fact’ of being the supreme or ultimate authority and the ‘fact’ of being an independent authority) and a set of rights and responsibilities. Sovereignty, therefore, is more than a set of norms and principles; it is ‘fact’ and ‘norm’ at the same time. The institutional nature of sovereignty helps to explain the discrepancy between the socially constructed nature of sovereignty and its appearance as a matter of fact. ‘Once upon a time, the world was not as it is’, Rob Walker (1993: 179) argues in an understatement,

The patterns of inclusion and exclusion we now take for granted are historical innovations. . . . It, most of all is not simply there. . . . Nor is it inevitable. It is a crucial part of the practice of all modern states, but they are not natural or inevitable either. And yet, states have become (second) nature, and seem to be inevitable.

Walker's qualification neatly captures the way in which institutional facts function: as long as they are taken for granted, they seem as hard and inevitable as brute facts. Yet, as soon as the general belief in their existence wanes, institutional facts cease to exist. The disappearance of the former Federal Republic of Yugoslavia, the German Democratic Republic and the Soviet Union are telling examples in this respect. When, however, a critical mass keeps the faith, they generally tend to create brute facts by means of coercive force, in order to underscore their institutional recognition.

It is important to recall here that in the modern international system, claims to sovereign statehood require acceptance, not only from a domestic audience, but also from international society. Members of the international society have a keen interest in the creation, existence and termination of their sovereign counterparts. The creation, existence and termination of sovereign entities influences their legal position and may create new power constellations to be reckoned with. It is not surprising, therefore, that international society has sought to regulate the process of state-formation and has tried to accommodate the creation, existence and termination of states with other basic principles like international stability, human rights, self-determination and the non-use of force.

The nature of the normative framework that is commonly used to determine the legitimacy of sovereignty claims can be further explained on the basis of the concept of the '(legal) institution' as set out by MacCormick (MacCormick and Weinberger, 1986: 49–77).⁸ The concept of the (legal) institution can be regarded as a refinement of Searle's notion of institutional facts. MacCormick distinguishes between the institution itself (e.g. the legal concept 'contract') and instances of an institution (institutional legal facts like the contract between Smith and Jones). The institution itself consists of three types of rule (MacCormick and Weinberger, 1986: 53–4):

- *Institutive rules.* Institutive rules lay down under what circumstances an instance of an institution comes into existence. Institutive rules take the form of constitutive rules — certain forms of behaviour or certain circumstances count as contracting, marrying, divorcing, etc.
- *Consequential rules.* Consequential rules lay down the rights, duties and legal powers that follow from the existence of an instance of an institution.

- *Terminative rules.* Terminative rules provide for the termination of an instance of an institution.

The institutive rules lay down under what conditions a sovereign state can come into existence. One of the most important elements of institutive rules regulating the creation of states is what Alan James (1986, 1991, 1999) has labelled the ‘constitutional independence’ of a territorial entity. ‘A territorial entity claiming sovereignty must . . . show that it is territorially defined, contains people, and governs them, and also that there is no other state which claims formal authority over it and is providing effective physical backing for that claim’ (James, 1986: 41).⁹ One should be careful, however, not to regard the constitutional independence of a territorial entity as the constitutional state of affairs that simply corresponds to the meaning of the term ‘sovereignty’. By contrast to James (and those who follow him, like e.g. Sørensen), we do not hold that constitutional independence is the equivalent of sovereignty nor that constitutional independence is a necessary and sufficient condition for the existence of a sovereign state. Certainly, the criterion of constitutional independence often plays an important role in the determination of the legitimacy — and thus the acceptance — of a claim to sovereign statehood. It is not, however, a criterion which is always necessary or sufficient. International practice shows that there are several examples of entities which were constitutionally independent and yet excluded from the society of sovereign states, because their creation violated some fundamental norms of international law. The well-known examples in this respect are Southern Rhodesia after its declaration of independence in 1965 and the so-called ‘home lands’ created by South Africa in the 1970s (most importantly Transkei). Both Rhodesia and Transkei had independent constitutions and were able to exercise effective control over a population in a well-defined territory. Yet, neither of them was recognized as a sovereign state because of their racist origins and their alleged violation of the right of self-determination.¹⁰ Another example of an entity having all the characteristics of a sovereign state without being recognized as such is Taiwan. The fact that its contemporary international status is that ‘of a consolidated local de facto government’ indicates that it deserves a place in the international system.¹¹ Due to its claim not to be recognized as a sovereign state apart from China as a whole, Taiwan is deprived of some of the virtues of membership of the international society of sovereign states.

Moreover, international legal practice demonstrates that there are examples of entities that are not constitutionally independent and yet included in the society of sovereign states because this inclusion is believed to contribute to the preservation or realization of principles and aims of international law. The well-known examples in this respect are those situations where

sovereign states are deprived of their effective government due to civil war or foreign occupation (e.g. the situation in Lebanon in the 1980s, in Somalia after 1991 or in Europe during World War II). In these situations, entities that are recognized and treated as states cannot provide physical backing for their claim to constitutional independence (James's criterion for statehood). The criterion of constitutional independence, therefore, is not simply the equivalent of sovereign statehood; rather it is a condition 'ordinarily necessary' and 'presumptively sufficient' that must be met in order to create instances of the institution sovereign state.¹²

The consequential rules lay down what consequences follow from the successful creation of a sovereign state. If such a sovereign state exists, it is entitled to certain rights laid down in the consequential rules, such as the right to be free from interference by other states, the right to enter into treaties, the right to relative state immunity, etc. As a corollary, newly created states are under an obligation to protect and respect the rights of their fellow sovereigns. It is important to note that consequential rules not only prescribe how states ought to behave and what privileges they enjoy. International law is not a system solely for putting states under obligations or conferring rights on them. Besides the rules of conduct, international law contains constitutive rules — rules that enable states to create new identities and new forms of conduct that would have been (conceptually) impossible without these rules. This explains why regional variations in the sovereignty discourse can be detected — the sovereignty 'game' in the Middle East and much of Asia comes close to traditional balance of power logic, the 'post-colonial sovereignty game', to use Sørensen's (1999) label, in Sub-Saharan Africa and Latin America is about the consolidation of internal statehood, the 'post-modern sovereignty game' in the OECD world is about the strengthening of international society, with the European Union in the forefront. In the postmodern environment, states have been willing to accept far-reaching limitations on their internal powers. In return, they have opened up an entirely new theatre for power politics — IO politics, power politics in and of international organizations. This has added a new dimension to international politics and law, just as the invention of aircraft has added a new dimension to warfare (de Wilde, 1997).¹³ The development of constitutive rules also explains the variations in the sovereignty discourse over time (Jackson, 1999b); the shift from absolute monarchies and imperial sovereignty (the 'right' to conquer *terra nullius*) to national states and popular sovereignty (the 'right' of national self-determination). Although the constitutive and regulative rules regarding sovereignty have changed significantly, the sovereignty discourse is still dominant in international politics and law.

Finally, the terminative rules lay down how a state ceases to exist. The terminative rules with respect to sovereign states are rather peculiar. States can cease to exist, for example, by dissolving into other states (Soviet Union in 1991) or by merging with another state (the GDR in 1990). Taylor (1999: 136–7), however, rightly points at the ‘lack of any general procedure [in the UN] for derecognition’. Better known is what the terminative rules are *not* about – brute facts. A state does not cease to exist merely because it is no longer able to exercise effective control in situations of civil war or foreign occupation. International law has recognized several entities as sovereign states despite their lack of effective control. Also bankruptcy is no criterion, as was shown in the debt crisis of the 1980s, most notably in Mexico. It is difficult to join the league of sovereigns, but once inside, it is also difficult to be ousted.

Limits of Speech Act Theory and the Scope of Sovereignty

Though the constructive nature of sovereignty helps to define the ‘league of sovereigns’, its scope does not go beyond that. Sovereignty is about a claimed status but not about the problems these claims raise. Krasner (1999: 40) points at many of these problems and concludes that sovereignty is organized hypocrisy. He argues that, by referring to ‘international legal sovereignty’, the ‘logic of appropriateness’ is misused to hide a ‘logic of consequences’. Yet, it is part of the essence of diplomacy to conceal true objectives. The sovereignty discourse (created by diplomats in the first place) is ambiguous even in the abstract, in particular because conflicts about sovereignty cannot be solved by use of the concept of sovereignty itself. Its scope is limited. Take for example the problem of transboundary pollution. Here, two competing sovereignty claims are at stake — the claim that a state may use its own territory as it pleases on the one hand and the claim of other states to respect for its territorial integrity on the other. The ‘solution’ to the problem of transboundary pollution resembles the principles in the national context, which aim at solving conflicts of liberty. In the domestic sphere, this has led to the formulation of rather abstract and indeterminate principles like J.S. Mill’s harms principle,¹⁴ the maxim that my freedom ends where the freedom of the other begins. In the most authoritative source about transboundary pollution, the 1972 Stockholm Declaration, the dilemma is paramount. Principle 21 of this Declaration states that —

States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

The indeterminacy of sovereignty is also confirmed by certain concrete cases where a conflict between sovereignty claims occurred, as Koskenniemi's eminent chapter on the concept of sovereignty in international law demonstrates. Koskenniemi (1989: 208–20) gives various examples. In the Rights of Passage case (1960) a conflict arose between India and Portugal regarding Portugal's right to move (military) persons and goods from the Portuguese colony Damaõ, through India's territory to its enclaves deep inside India's territory. Both India and Portugal phrased their claims in terms of sovereignty. Portugal held that its right of passage was 'comme une nécessité logique, impliquée dans la notion même du droit souveraineté . . .' India, however, stated that 'these alleged rights of passage must evidently impinge upon and derogate from India's sovereign rights over the territory concerned'.¹⁵ In the Nuclear Test Cases (1974) Australia and New Zealand complained about French nuclear weapon tests in the Pacific. The tests, they argued, would produce radioactive fall-out, which violated their territorial sovereignty. France, however, also claimed its sovereignty by arguing that the tests were matters of national defence. The conflicting claims to sovereignty were summarized by judge Ignacia-Pinto:

Of course, Australia can invoke its sovereignty over its territory and its right to prevent pollution caused by another State. But when the French government also claims to exercise its right of territorial sovereignty, by proceeding to carry out tests in its territory, is it possible at all to be legally deprived of that right, on account of the mere expression of the will of Australia?¹⁶

It is interesting that in these cases the International Court of Justice refrained from explaining the nature or essence of sovereignty, while concentrating on the existence of positive rights, duties and competences of the states concerned. This has induced some authors to argue that the concept of sovereignty is obsolete (Hart, 1954; Kelsen, 1981; Brownlie, 1990). Since the concept has no meaning independent from existing rights, duties and competences, to speak of 'sovereignty' would merely be using a shorthand for that which really counts: — the bundle of rights, duties and competences concerned (Schrijver, 1998). This type of criticism, however, misunderstands the important constitutive function of the concept of sovereignty. Sovereignty is not merely a bundle of rights, but consists in a status (being sovereign) and in the use of this status to legitimize certain rights, duties and competences (the sovereign rights). Only if one takes the existence of states for granted and treats their existence as an unproblematic matter of fact, is it possible to argue that sovereignty boils down to merely a bundle of rights. This approach, however, runs into difficulties if it is to explain the continued existence of states where effective control is lacking (e.g. in cases of belligerent occupation, civil war, structural dependency on

foreign aid). If, on the other hand, one accepts that sovereign statehood is an institution, made up of constitutive and regulative rules, the creation, existence and extinction of states becomes a rule-governed matter of institutional fact. The fact that the International Court of Justice refrains from discussing the nature of sovereign statehood can be interpreted as proof for the limited relevance of sovereignty for the practice of dispute settlement; it cannot, however, be interpreted as an indication for the obsolescence of the concept.

The second limitation is within the approach to understanding sovereignty — the limits of speech act theory. There is a risk that the emphasis on rules, institutions and institutional facts may involve a ‘belief in a formalistic heaven, each with its neatly packaged set of essential rules which nicely settle all questions’ (MacCormick, 1986: 67). Some IR literature portrays legal studies in this way. If this were true, we simply would have replaced the (wrong) notion of sovereignty as the expression of a brute fact (effective control) with the (just as wrong) notion of sovereignty as a given set of rules.

As has been pointed out by critics of Searle’s theory of speech acts, the risk of a belief in a formalistic heaven of institutions is inherent in his interpretation of the meaning of speech acts (Lopore and Van Gullick, 1991; Meijers, 1994; Werner, 1995; de Jong and Werner, 1998). According to Searle, a speaker performs four acts simultaneously in the utterance of a sentence (Searle, 1990: 24–5):

- the utterance act, that is the mere utterance of words or sentences, the production of sounds;
- the propositional act, that is the act of referring and predicating;
- the illocutionary act, that is the act of giving the propositional content of a word or sentence a certain point (e.g. putting a question, making an assertion, ordering, etc.);
- the perlocutionary act, that is the production of a certain effect on the thoughts, emotions and beliefs of the hearer.

In Searle’s theory the utterance act and the perlocutionary act are contingent and factual in character and have no bearing whatsoever on the meaning of a sentence. Propositional acts and illocutionary acts, on the other hand, regard the meaning of a sentence involved (as perceived by the speaker) while being regulated by the constitutive rules of language. The meaning of sentences in Searle’s theory of speech acts is accounted for in terms of speakers who use the constitutive rules of language to express their intentions (Searle, 1983, 1987). Since the effect of a speech act is separated from its meaning, the position of the hearer and the bearing of the reaction of the hearer on the sentence is left unexplained. Relics of this exclusive

orientation on rules and intentionality can be found in parts of the institutional theory. Here too, the focal point of attention seems to be the instrumental use of pre-given constitutive rules by agents. The meaning of constitutive and regulative rules, however, is not self-contained and separated from their effects in social interaction. Rather, they are further developed and shaped in their use and through their effects. This explains the changing focus of the sovereignty discourse (from religion to freedom from alien rule; from dynastic to popular) as well as the evolving norms attached to a sovereign status (e.g. the changing rules about state immunity).

3. International Society and Sovereign Statehood

There are two contexts in which the concept of sovereignty is debated and contested most — the so-called quasi-states and the process of European integration. These two contexts offer interesting and in a way contrasting examples of the relationship between sovereign statehood and international cooperation. In the case of quasi-states, the importance of sovereignty is questioned because international cooperation is regarded as the prerequisite for their creation and prolonged existence. In the case of the EU, the importance of sovereignty is questioned because international cooperation is believed to have undermined the idea of sovereignty of the member states. In both cases, but for different reasons (respectively, lack of legitimacy, and the struggle with overlapping authorities and competing competences), the internal inability to rule is another reason to question the sovereignty of quasi-states and integrated states.

Quasi-states and the Concept of Sovereignty

Theories of sovereignty almost invariably assume a direct or even logical relation between the internal and the external dimensions of sovereignty. Sometimes it is argued that the external dimension follows from the internal dimension — since states are the supreme or ultimate authorities within a given territory, they are, within their territory, ipso facto independent from other sovereign entities. This can be called the Hobbesian logic of sovereignty. First, a Leviathan is created; next, he enters into relations with other Leviathans. However, it is also argued that the external dimension is a necessary prerequisite for the internal dimension — without external independence states could not possibly be the supreme or ultimate authorities within their territories. This is the Westphalian logic — out of the *universitas* of the Middle Ages rulers established political independence.

However, as we saw in the previous sections, there are many examples where the internal and the external dimensions of sovereignty are separated.

In case of civil war or foreign occupation, the entity claiming independence has no effective control internally and yet is recognized as a sovereign, independent state by the members of the international society. In cases where the creation of states is tainted by violations of fundamental norms of international law, the members of the international society have sometimes denied statehood to entities that were able to exercise effective control internally — a practice that, according to Paul Taylor (1999: 139–43) is cultivated by the UN system. Another example of the separation of the internal and the external dimensions of sovereignty can be found in what Robert Jackson (1990) has called ‘quasi-states’. The term ‘quasi-states’ refers to some (mostly African) states that were created in the process of decolonization in the latter half of the 20th century. Quasi-states are the result of the rapid process of decolonization that took place in many parts of Africa, due to the weakened power of the imperial states and the changing attitudes towards the legitimacy and usefulness of colonial rule. The basis for these newly created states, however, was not their proven ability to rule. Jackson (1990: 17) argues the only basis for their creation and existence was their colonial past — ‘To be a sovereign today one needs only to have been a formal colony yesterday. All other considerations are irrelevant.’ After the granting of independence, many states in sub-Saharan Africa did not manage to set up an effective government that could protect the constitutional independence of the newly created entity. Many fell prey to social, ethnic and religious wars; others simply remained so poor that they structurally relied on foreign aid.

If sovereignty is regarded as an empirical category — the power of a state to rule internally and to remain independent from others — the phenomenon of quasi-states simply confirms the factual inaccuracy of sovereignty. This approach towards quasi-states, however, fails to understand the importance of the concept of sovereignty in the creation of quasi-states in the first place, and in the attempts of the members of the international society to uphold many states in Sub-Saharan Africa. The concept of sovereignty was not used to describe a *de facto* control and independence of former colonial territories. Rather, it was used to *present* territorial defined spheres *as* independent states; a presentation whose success did not depend on its correspondence with reality, but on its being accepted as valid by members of international society — which *inter alia* is not the same as saying that these states were ‘more formal than real’ (Sørensen, 1999: 178). They *are* real (to the same extent that any other institutional fact is real). Only on the basis of this understanding of the use of sovereignty is it possible to account for the paradoxical situation that the claims to foreign aid (which indicate a relation of dependence) are successfully brought forward by the newly created entities *in their capacity* as sovereign,

independent states. In 2000 Kenya's government, for example, accepted IMF loans on the basis of extreme interference with its national accountability. Its high-ranking position in the lists of Transparency International, and poor past experiences of donors strengthened the IMF's tough bargaining position. The contract is a clear sign of weakness of the Kenyan government, but also a confirmation of its sovereignty — no one else in Kenya could have got this contract.

In order to account for the emergence and (prolonged) existence of quasi-states, Jackson introduces two pairs of concepts. The first pair consists of the concepts *negative* and *positive* sovereignty. Negative sovereignty can be defined as the legally protected freedom from outside interference (Jackson, 1990: 27). Positive sovereignty denotes a substantive condition — 'a positively sovereign government is one which not only enjoys rights of non-intervention and other international immunities but also possesses the wherewithal to provide political goods for its citizens' (Jackson, 1990: 29). Whereas negative sovereignty is essentially an absolute, legal condition, positive sovereignty is an essentially relative and political (empirical) condition. Quasi-states would enjoy negative sovereignty, but lack the capabilities necessary for the qualification as positive sovereigns. Related to positive and negative sovereignty are the concepts *empirical* sovereign statehood and *juridical* sovereign statehood. Empirical statehood or sovereignty denotes the material capabilities of a state to enforce, by means of its government, its claim to supreme authority over a population living on a given territory. Juridical statehood denotes the international recognition of a state under international law and the external rights and responsibilities attached to that international recognition. Quasi-states would enjoy juridical statehood, but disclose only limited empirical statehood (Jackson, 1990: 21) — 'their populations do not enjoy many of the advantages traditionally associated with independent statehood. Their governments are often deficient in the political will, institutional authority, and organized power to protect human rights or provide socio-economic welfare.'

Jackson's conceptual apparatus is certainly fit for pointing out some specific characteristics of quasi-states in Sub-Saharan Africa. It is less fruitful, however, for a more general understanding of the concept of sovereignty. In the first place, it gives too narrow an understanding of sovereignty as part of international law and international society. As set out in the previous sections, sovereignty is not equivalent to the right to freedom from interference and respect for immunities as such; rather, a successful claim to sovereignty establishes a link between a status and certain rights, powers and responsibilities that the sovereign entity possesses. Consequently, sovereignty in the legal sense is not purely negative — it not only protects states from interference in internal affairs, but also empowers them to create

new rules and institutions. These empowering norms do not lay down a freedom *from*, but rather a freedom *to*; a freedom that states have used to conclude treaties and to set up international organizations. Due to the constitutive rules of international law, states have been able to create new identities (like being a member of the UN or a member of the EU Council) and new forms of action (like vetoing a proposal, or voting in the General Assembly or Council of Ministers of whatever the intergovernmental organization).

Second, and more importantly, Jackson's conceptualization suggests that the empirical, factual element of sovereignty can be separated from its normative, juridical element. As set out in Section 2, this separation of norm and fact misunderstands the institutional character of sovereignty. Sovereignty is not the brute exercise of power nor is it a purely nominal phenomenon — it is a specific form of legitimization whose reality consists in its being accepted by relevant audiences. Rather than distinguishing between real, empirical sovereignty and nominal, juridical sovereignty, it is necessary to distinguish between two sovereignty claims put forward by quasi-states — the unsuccessful presentation of the state's sovereignty towards the internal, domestic audience(s) and the successful presentation of the state's sovereignty towards the international society. The result of these two claims is certainly paradoxical — an entity without control over its territory is regarded as independent by the international society and successfully assumes the right to speak for the population it is unable to govern. Yet, this paradox is not unique as the examples of failed states and states under foreign occupation demonstrate. Ultimately, it is the result of the institutional nature of sovereignty, which goes beyond empirical facts and nominal norms.

The EU and the Concept of Sovereignty

It is hard to find a field where the end of the sovereign state has been more often proclaimed than in the field of European integration. Many scholars argue that the pooling of sovereignty rights has led to a situation where the old Westphalian system of sovereign states is replaced by a network of overlapping and competing power structures and competencies. William Wallace (1999: 96) nicely captures this argument:

Students of European integration and international politics struggle to characterize a state system in which constitutional independence has been ceded, sovereign equality modified, economic autonomy long since deeply compromised, security managed through a common regime, monetary sovereignty shortly to yield to a single currency.

This transfer and pooling of sovereignty has puzzled scholars. Wæver

(1995a: 417) wonders how it would be possible for states to hand over parts of their sovereignty — ‘How does a state with two-thirds of its sovereignty look? How sovereign has the EU become, one-fifth? One quarter? Sovereignty is an indivisible quality, which a unit either enjoys or does not.’ He concludes that the EU has moved European politics beyond sovereignty; a dual order of formally sovereign states within a post-sovereign international structure. But how post-sovereign is this structure? When was Europe’s structure ‘sovereign’? How ‘sovereign’ was the Ancien Regime with its intermarrying class of aristocracy? Those who believed in the usefulness of measuring sovereignty by operationalizing it in empirical terms of levels of political and legal independence and economic autarchy will have a hard time to point out periods in modern history where sovereignty was as real as the myths about the state system have it. It was not there in 1648, it is not there today, it has never been there in between. The reality of institutional facts is of a different kind.

Much confusion concerning the possibility of sharing, transferring or pooling sovereignty can be prevented if one keeps in mind the nature of sovereignty as set out in Section 2 — a successful claim to sovereignty establishes a relation between a status (being the highest authority, being independent) and a bundle of rights, powers and responsibilities related to that status (the ‘sovereign rights’, like the power to conclude treaties, right to immunity, etc.). The claimed status as such is something that cannot be partly handed over or pooled; it is an indivisible quality. The rights and powers linked to that status, however, can be handed over to other states or international organizations. In fact, this power to hand over ‘sovereign rights’ is linked up to the sovereign status of a political collective. As the Permanent Court of International Justice said in the *Wimbledon* case (1923, PCIJ Series A no. 1, 25) — ‘The right of entering into international engagements is an attribute of state sovereignty.’

It would be unconvincing, however, to explain the process of European integration along these traditional lines — as just another example of sovereign states handing over parts of their powers to an international organization. There are at least three reasons why it is legitimate to wonder whether the EU has passed beyond the Westphalian system and whether sovereignty in the EU is, in the words of MacCormick (1999), something akin to virginity — a property lost by one but not gained by another. First, the degree to which powers have been handed over is unprecedented in the history of international organizations. There are hardly fields left where the EU has not gained powers. Second, the member states of the EU have handed over powers in fields which are traditionally considered essential for the sovereignty of the state — internal security, defence, immigration and — especially in human rights treaties — the determination of states of

emergency. Third, the member states of the EU have been confronted with a claim of the European Court of Justice that Community law constitutes an 'independent legal order' which autonomously determines the effect of EC law in the legal orders of the member states (the Van Gend and Loos case, and the Costa Enel case). This claim to autonomy is at variance with the traditional principle of international law, that states are at liberty to determine the status and effect of international law in their domestic legal orders.

The broad and far-reaching transfer of powers to the EU does not mean, however, that the EU itself has become a new, sovereign state. The reason for this is clear and compelling — the EU does not claim a sovereign status and is not recognized as sovereign state by the other members of international society. It is pointless to discuss whether the EU is *really* sovereign; the reality of sovereignty consists in its use and acceptance.

What about the member states? Have they lost their sovereignty during the process of integration? Is sovereignty indeed something akin to virginity, which is not gained by the EU, but still lost by the member states? In attempting to answer these questions, we should once again be aware of the pitfalls of the descriptivistic approach to sovereignty. One cannot find the answers by somehow 'counting' or 'measuring' the amount of powers left to the member states. Where would this leave Luxembourg? Is Norway more sovereign than Sweden by declining EU membership? Is Denmark more sovereign than Germany by refusing to join Euro-land? Useless questions. Rather, we should wonder whether the member states still rely on their sovereign status and whether relevant audiences accept their claims to sovereignty. As far as the status of the member states in international society is concerned, it is safe to conclude that the process of integration has not affected their sovereign status. Member states still successfully claim a sovereign status vis-a-vis other states and international organizations and still enjoy the rights and powers related to that status. The supremacy of the European Court of Justice and the European Court of Human Rights may feel like a bad bargain, but acceptance of their rule comes from member states, not from subjects (like Kenya's contract with the IMF).

This endurance of sovereign statehood is not surprising if we recall that the terminative rules of statehood are rather strict — it takes more than transfer of powers for a state to disappear. To a considerable extent, the sovereign status of member states also determines their position within the EU — member states enjoy a position that other entities (*Länder*, provinces, regions) cannot claim. Hence we disagree with Wallace (1999: 97) who argues that the five core states of the European order (Germany, France and the Benelux) have accepted 'that the defence of sovereignty is a zero-sum game'. For Luxembourg it is probably the only thing left to it; a very

precious asset in international political life.¹⁷ Their participation in the process of integration has not dashed their sovereignty, but rather redefined the focus of the sovereignty debate — it has institutionalized the power struggle in international relations to a point where territorial questions have become relatively unimportant (i.e. they have moved to the borders of the EU) and questions of law and institutional positions have become more important than ever in interstate relations.

As far as the relation between the state and its population is concerned, there are by now two rival claims to authority which have managed to gain support in legal and political practice — the sovereignty of the state and the autonomy of Community law. The existence of these rival claims does not automatically mean, however, that Western Europe has moved beyond the sovereign state. As set out in Section 1, the existence of rival claims to authority constitutes a context in which claims to sovereignty are most likely to occur. This phenomenon can be clearly witnessed in the EU, where the growing powers and importance of the institutions of the EU have been accompanied by claims to sovereignty by governments and national courts. Denmark's *nej* to the Euro in the referendum of 28 September 2000 is the most recent example. One of the most important claims is the ruling of the German Constitutional Court on the constitutionality of the ratification of the Maastricht Treaty.

Moreover, roughly the same states that want to pool (lose?) their sovereignty in the EU context, explicitly emphasize their sovereignty in other intergovernmental organizations — NATO, for example, prides itself on being a 'consensus machine' by nature, given the sovereignty (implying veto-power) of its member states. The blindness by which almost all authors treat the EU as a synonym of Europe explains much of the misreading of the alleged loss of sovereignty of its member states. In other European IGOs member states — including those of the EU — behave quite differently (with the exception of the authority of the European Court of Human Rights).

It is conceivable that European (read, EU) integration will reach a stage where claims of sovereignty have lost their relevance and fade away. It is difficult to conceive, however, that this stage will be reached as long as integration is regarded as a threat to the sovereignty of the member states. Since the reality of sovereignty consists in its being used and accepted, rival claims to authority will most likely reinforce the importance of sovereignty rather than weaken it. Hence its endurance in legal and political practice.

By comparison, quasi-states and EU states both turn upside down the conventional wisdom about the distinction between the internal and external dimensions of sovereignty. We maintain that this does not push them into a post-sovereign status, but that this presents exceptional cases

within the sovereignty discourse (compare other exceptional cases like occupation). The quasi-states have imported the logic of anarchy (the external sovereignty logic) into their domestic policy fields. Governments have a hard time legitimizing themselves, which is evidenced by their fierce repression and by civil war. Dictatorships, kleptocracies and at the other end of the spectrum failed states, are all symptoms of luring or manifest anarchy, in which self-help is paramount and democratization forms a security dilemma — the more power rests in civil society, the less the ruling elite can preserve its authority and the internal order. Externally, however, their very existence is a product of international society — their territorial integrity largely depends on the functioning of this society, as symbolized by the UN system.

The EU states have, by contrast, exported their domestic logic of hierarchy (the internal sovereignty logic) to their foreign policy fields. International anarchy has been abolished and replaced by a complicated structure of overlapping authorities and competing competencies. It is not a federation, since there is no single authority. Sometimes the regional great powers, most notably France and Germany, rule; sometimes the EU institutions, notably the Commission and the ECJ, rule; sometimes their mixture rules (the European Council); and sometimes, but less and less so, no one rules at all and it is self-help for every member state.

Partly the same process, be it much weaker, can be seen in all multi-purpose IGOs, particularly the UN system. Ad hoc alliances in international politics, law and economics have been replaced by firmly institutionalized members only clubs. This has strengthened international society to a point unique in history, but it is sovereignty-based. In a post-sovereign world, neither IGOs, including the EU, nor quasi-states would exist as institutional facts.

In Conclusion

Quasi-states and the member states of the EU form the hardest cases against the hypothesis about the endurance of sovereignty. Yet, these phenomena also underline rather than undermine the importance of the concept of sovereignty in international society. In the case of quasi-states the concept of sovereignty is used to present territorial entities without effective internal control as independent states. On the basis of this acceptance, quasi-states are treated by other states and their IGOs as independent, equal counterparts. This acceptance, in its turn, has enabled quasi-states to successfully claim rights and competencies under international law. Even in the case of quasi-states, therefore, sovereignty is a prize worth fighting for.

In the case of the EU, the member states are still regarded as sovereign

states by other actors in international society and they are still able to claim certain rights and powers in virtue of their being sovereign. Since the reality of sovereignty consists in its use and acceptance, it is pointless to wonder whether the member states, apart from their being recognized as such, are still really sovereign. Moreover, the rival claims to legitimate rule presented by the European Union are more likely to reinforce reliance on state sovereignty than abandoning the sovereignty of the member states. Here too, sovereignty is still a prize worth fighting for.

Moreover, Searle enriched by MacCormick helps to explain at a higher level of abstraction that sovereignty is still a prize worth fighting for. In applying Searle, both Stephen Krasner and John Ruggie rightly draw a comparison with money to explain that sovereign states are institutional facts — a dollar note becomes an ordinary piece of paper the moment the USA ceases to exist (Ruggie, 1998: 20; Krasner, 1999: 49). X counts as Y in context C. Also in less dramatic circumstances the value of paper money can change decisively, simply by declaration of the sovereign (!) authority — a currency can be revalued (ask the Russians about their roubles) or even be abolished (like the currencies of 11 Euro states probably will be in 2002).

The comparison between paper money and sovereignty gets more interesting if one looks at their histories. The history of money started out with payments in noble metals, gems or whatever the local durable good. The appreciation of gold and silver as valid currencies belongs to the realm of social facts, but these metals as such were concrete. Banking, however, has introduced a virtual world by reducing the parity of money to these precious metals, though it was well into the 20th century before the golden standard was abolished by the sovereign currency-keepers. Today, the value of money is no longer determined by the concrete amount of hard metal it represents but by the collective behaviour of governmental central banks, speculators and investors. The result is a house of cards in material terms but a solid rock in social terms — everyone depends on its functioning.

Sovereignty seems similar to money, but has a crucially different history. It has never been as good as gold. Sovereigns often claimed they were gold (*'l'état c'est moi'*), but the very fact they had to say so points to the opposite — apparently the hearers had to be convinced. Situations that are closest to the robustness of substantial sovereignty, i.e. 'effective' control over a population on a given territory, 'true' political independence and 'factual' economic autonomy, are those in which a sovereignty discourse is absent. Historically, isolated empires are the best candidates in international terms, but they were constantly endangered in their domestic coherence by intrigues at their courts, in their families, in their military, etc. It is precisely this *lack of sovereignty* that explains much of the centralization efforts, the

nationalization projects, and the international attempts to maximize their power. Beyond the horizon of the security dilemma lies a sovereignty dilemma. Once sovereignty is established it will be contested internally by throne-pretenders, and externally by potential conquerors and plunderers. The Sovereign — whether a state, a ruler or a nation — is intrinsically vulnerable because s/he is not a being, but a construct. Much of history is painted by attempts, if not obsessions, to overcome this vulnerability.

Notes

The authors would like to thank Barry Buzan, Thomas Diez, Lene Hansen, Morten Kelstrup, Ole Wæver, Bob Lieshout, staff members of the Department of Political Science at the UT and three anonymous reviewers of EJIR for their useful comments on earlier drafts of this article.

1. Krasner (1999) distinguishes four types of sovereignty — international legal sovereignty (capturing the principle and practice of mutual recognition and equality), Westphalian sovereignty (the principle and practice of territoriality and non-intervention as well as non-invitation), domestic sovereignty (the principle and practice of hierarchy), and interdependence sovereignty (not referring to a principle but only to the practice of ‘the capacity of a state to regulate movements across its borders’).
2. Note that the territorial component in *cuius regio, eius religio* was only ‘absolute’ for the Protestant states. From 1648 onwards the problem of overlapping, ‘foreign’, authorities continued to play a role in Catholic states, albeit on the basis of ‘invitation’ rather than ‘intervention’. (See on the distinction between intervention and invitation: Krasner, 1999, 20–7.)
3. See for the same argument Bartelson (1995: Ch. 2). In this respect Hashmi’s observation about Islamic perceptions of sovereignty may prove crucial for its development in the coming decades, ‘... state sovereignty is viewed by many Muslim theorists and activists as incompatible with Islamic ethics, which give priority to the Muslim community (*umma*). The Islamic state’s legitimacy derives from its ability to safeguard and enhance the life of the *umma*.’ (Hashmi, 1997: 7).
4. Turning points in history are seldom absolute and normally only receive their meaning much later. Our calendar, for example, starts (around) with the birth of Jesus Christ, but it would be foolish to argue that Europe was Christian from that moment on. Only because Christianity dominated Europe it made sense to let its history begin with a Christmas night that never took place the way it is celebrated. 1648 is a similar turning point. It is a myth to locate the birth of the modern state system in 1648, as has been argued convincingly by Krasner (1995/6). Yet, 1648 *is* the relevant turning point in history. The peace of Augsburg (1555) comes too early, the Concert of Europe (1815) comes too late.
5. See for example Krasner’s treatment of ‘domestic sovereignty’, which he partly defines as an ability to exercise control within territorial borders — an *empirical*

- requirement — and his problems with the notion of ‘invitation’, which he interprets as a violation of the non-intervention principle.
6. We are in doubt whether this critique includes Ruggie, since he is not explicit on this point. He compares sovereignty with private property rights using Searle (Ruggie, 1998: 148–9) and concludes on the one hand that both concepts enjoy an ‘irreducible intersubjective existential quality’ — a social fact *pur sang* — but on the other hand that both concepts ‘differentiate among units in terms of possession of self and exclusion of others’. It is unclear whether Ruggie sees this pre-existing unit as a state (Sørensen’s view) or as a political collective (our view).
 7. This explains *inter alia* why the vocabulary of the sovereignty discourse (including terms like international system, international society, internal/external dimensions of power, etc.) can be used to analyse periods in history when contemporaries were ignorant of this vocabulary, as is done in the impressive historical accounts of the English School (Watson, 1992; Buzan and Little, 2000).
 8. For a more comprehensive analysis for the concept ‘legal institution’, see Ruiter, 1998.
 9. James talks exclusively about ‘territorial’ entities, which, however, is an unnecessary restriction. The same logic applies to any ‘governmental’ entity and any ‘societal’ entity; hence to all elements of sovereignty. Moreover, it is tautological to argue that a territorial entity must show that it is territorially defined.
 10. The creation of Rhodesia violated the rule ‘prohibiting entities from claiming statehood if their creation is a violation of an applicable right to self-determination’, according to Crawford (1979: 106), who deduces this rule from the state practice towards self-determination in the period of decolonization.
 11. For an examination of the position of Taiwan and its refusal to be recognized as a state separate from China see Crawford (1979: 143–52).
 12. These terms have been borrowed from MacCormick and Weinberger (1986).
 13. Georg Schwarzenberger pointed at this new dimension already in 1941, and characterized IO politics as ‘power politics in disguise’ (Schwarzenberger, 1941: 181–350).
 14. ‘The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others’ (Mill, 1992: 223–4).
 15. Pleadings I, pp. 6, 26 (Portugal) and Pleadings II, p.113 (India). Rights of Passage case, ICJ Reports 1960, p. 6.
 16. Nuclear Test Cases, ICJ Reports 1974, p. 131.
 17. We also disagree that the core of EU Europe is formed by these five. Though Realpolitik in the Benelux advises their politicians to cultivate this myth (obviously adding Italy, the sixth founding member state, to the list), Joshua Fischer’s interpretation of a French–German core is far more accurate (Fischer, 2000). If Berlin and Paris don’t agree integration stagnates, and if they do agree all other member states watch them with suspicion.

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