| Chapter 4 |

Sovereignty in International Law

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ABSTRACT

Sovereignty is a concept enshrined in the theory of international law. As an attribute of independent states, it constitutes the basis for their autonomous activities in the international legal space. Virtually the entire contemporary primary conceptual apparatus of *jus gentium* has been developed around this notion. The principle of the sovereignty of all states results in their mutual sovereign equality. Sovereignty of states is protected by the prohibition against intervening in their internal affairs and the prohibition on the use of force in international law. The state exercises its sovereign rights over the population in a given territory. Sovereignty is associated with the right to freely shape relations within the state, and it means legal independence from external factors. Freedom of action by sovereign states means, first of all, the freedom to conclude international agreements between states and to assume obligations. Such actions do not infringe on states' sovereignty; rather, they are an expression of it whereby the state exercises its legal capacity. This is because only coerced actions undertaken against the will of a given entity could be perceived as an attack on a state's sovereignty. Of course, the sovereignty of a state can be eliminated by its own free will—this entity may join (unite with) another state entity, thus losing its sovereignty. However, it is not possible to confer sovereignty on another entity as a result of activities consisting in the transfer of only a limited scope of state powers. Even the transfer of a part of territory under the administration of another state does not deprive the transferor of sovereignty over the territory, to which it is entitled under international law. States may also delegate their competences to other subjects of international law—other states (most often this is the case of microstates, which are unable to perform all standard functions of the state, especially in the field of external relations, economic management, or the administration of justice) or international organizations. Such a delegation of competences does not imply a revocation of sovereignty. It occurs by way of an international agreement between entities transferring competences, or an agreement between the founding states of an international organization. At any time, the member states can withdraw the delegated competences or dissolve the organization. Even if the scope of the delegated competences is considerable and the organization begins to play an important role by assuming a supranational position in the area of the adopted internal law, it does not become a sovereign entity. Theories that suggest otherwise are essentially based on confusing the concept of sovereignty with the concept of competence.

KEYWORDS

state in international law, sovereign equality, territory, competences, transfer of state powers, international organization

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1. Introduction

Sovereignty is a concept of fundamental importance to the theory of international law. The essence of this legal order as a normative whole is based on it,[1] for there is no doubt that only by accepting the principle of state sovereignty can the fiction of the equality of states in the light of international law (*par in parem non habet imperium*) be maintained. Equality of states, on the other hand, constitutes the basis both for a universally recognizable plane of horizontally binding sources of law and for the space of international peace and security, which affects states' actions in other areas of social life. Of course, the situation of the sovereign equality of states is a legal construct that is based on a stable theoretical assumption. In reality, contemporary international law is based on the presumption that all states that declare such a state of affairs are sovereignly equal, irrespective of actual political inequalities between them.

Although in contemporary political science the concept of sovereignty is sometimes used to include other actors in international relations (not only those whose subjectivity is established in the light of international law), and as a philosophical concept it may even be extended to individuals,[2] in classical international law it is exclusively an attribute (feature) of states. The state is the basic and central concept in, and subject of, international law.[3] On the other hand, this change in the perception of sovereignty as an attribute of exclusively the state has led to attempts to limit this very sovereignty. Hence the theoretical concepts (e.g., of divided or shared sovereignty) that actually contradict the essence of the nation-state; instead, they provide a natural basis for the theory of global government. It seems that in view of linguistic, cultural, and political diversity, the replacement of sovereign political communities such as states with a global hierarchy is an utter fiction at present. Developing such a world order could only happen with the abandonment of not only state sovereignty, but also of democracy as the basis of their functioning.[4]

State sovereignty is a particularly crucial issue for the countries of Central and Eastern Europe. In this region, the perception of sovereignty, as well as the early recognition of threats to independence, is much more pertinent than in other regions of the Old Continent. This is due to the fact that these countries, due to their exceptionally unfavorable geographic location, have historically been particularly exposed to the actual violation of their independent existence. Although historical experience

1 The very notion of sovereignty is only a legal concept that defines a certain state of affairs. From the cognitive perspective, it refers to the factual sphere, not a legal one. It is not a norm within the meaning of legal science. Cf. Kranz, 2015, p. 50.

2 Tarasiewicz, 2015, pp. 11–13; also Tarasiewicz, 2012, p. 35. Cf. Perez, 1996, pp. 463–490.

3 Cf. Kaplan and Katzenbach, 1964, p. 81.

4 Cf. Schwab and Malleret, 2020, p. 45. The abandonment of democracy would have to occur at least in the initial phase of shaping a New World Order before democracy could possibly be applied at a centralised global level. Otherwise, the implementation of the new order may be impossible, because it should be assumed that in some local democratic entities their national interest will gain an advantage over the global interest.

in this regard can be traced back to the Middle Ages, it was manifested most clearly in the 20th century, when significant threats were posed by totalitarianisms rooted in left-wing ideologies (national socialism and communism), adopted by countries with a tradition of political domination in the region. Central and Eastern European states, victims of these totalitarianisms, are well aware of the fact that basing power—whether exercised by a state or indirectly derived from the will of sovereign states—on an ideology that is devoid of values, or founded on artificial values, must inevitably end up in failure. Hence, bearing in mind the socialist experiments of the past and the present collapse of values (the emptiness of the new values) on which the new European order is to be based, they approach the idea of federalization of the European Union with extreme caution.

It is worth devoting some attention to these issues by pointing to the fundamental role of state sovereignty in international law. Undoubtedly, of key importance for the determination of the scope of state sovereignty will be the resolution of "borderline" problems—e.g., to what extent the transfer of competences (understood as the ability to exercise power in a given area) by a state to another entity can be perceived as a loss of sovereignty by the former, or to what extent it is tantamount to relinquishing sovereignty.

2. The concept of sovereignty throughout history

In the case of ancient Greek cities, there were some grounds for basing relations on the equality of entities, but in the period of the Roman Empire, and then in medieval Europe, the parties to the then relations were not perceived as sovereign. The hierarchy of relations was not intended to lead to equality, and the so-called sovereign rights were applied to dynasties and monarchs.[5] The then perception of property rights over land (*dominium*) and state power (*imperium*) were identical. Landlords at different levels of the feudal ladder were active in the field of *jus gentium* relations.[6] The rights of the Christian community (*Universitas Christiana*), i.e., a global community of faith and an emanation of the Kingdom of God on Earth, were perceived as universally sovereign.[7] Importantly, however, this concept was approached slightly differently in medieval Central Europe—a significant role in the formation of Polish or Czech statehood was played by the interests of the national community and external territorial threats from the German State (Holy Roman Empire).[8] The Reformation and the

5 The very word "sovereignty" is derived from the Vulgar Latin word "*supremitas*," which means hierarchical superiority (*suprema potestas*). Cf. Maftei, 2015, p. 56.

6 Von Liszt, 1907, p. 39.

7 This thinking was manifested in the titles of rulers—once an emanation of sovereignty understood in a religious way: *Defensor Fidei* (King of England), *Rex Apostolicus* (King of Hungary), *Rex Fidelissimus* (King of Portugal), *Rex Catholicus* (King of Spain), *Rex Christianissimus* (King of France).

8 Szczaniecki, 1872, p. 34.

ensuing religious split forced a change in the perception of European reality, which became dominated by political realism detached from the existing Catholic dogmas.

The concept of sovereignty in the science of law was defined and disseminated by Jean Bodin,[9] a theoretician of absolute monarchy.[10] According to Bodin, sovereignty was *la puissance absolue et perpetuelle*, referring to the ruler's actions in both the internal and external fora. These aspects of sovereignty were later described by Vattel as self-governance and independence, respectively.[11]

A theoretical basis for the modern perception of sovereignty dates back to the Peace of Westphalia (although the significance of Münster and Osnabrück Agreements is considerably overestimated in this context). The essence of sovereignty in the era after the Peace of Westphalia (1648) was based on territoriality and the exclusion of external actors from domestic power structures.[12] Sovereignty was secured by the principle of non-intervention in the internal affairs of the state. Although perceived as an absolute idea, sovereignty did not admit the possibility of interfering with the rights of other independent entities. However, absolute independence from the influence of external state entities was not tantamount to absolute independence from the principles of morality and the rules of international law.[13]

In this way, a general change in the understanding of the concept occurred in the period from the Peace of Westphalia to the turn of the 20th century—a transition from the sovereignty of the monarch to the sovereignty of nations (and states as a way of organizing nations) coupled with a fundamental relativization of the concept of absolute sovereignty. The state started to be commonly perceived as an entity that had the legal and factual ability to prevent any other state from restricting its power over its territory and population. At the same time, by acting with other entities of the same type, the state may contractually change the scope of its rights and obligations.

Even at the end of the 19th century, the concept of absolute sovereignty still seemed to fundamentally interfere with the principle of equality of sovereign states. States striving for primacy over others could resort to any actions necessary to strengthen their position, including war as a last resort. The theory of absolute sovereignty attracted considerable interest in the philosophy of classical German idealism.[14] In the interwar period, however, it was significantly relativized, largely because of the views of Hans Kelsen.[15]

Georg Jellinek, a German theorist of state law, defined sovereignty as an attribute of state power, connected with the right to self-determination and to incur (external)

9 Bodin, 1577. Thomas Hobbes' views also assumed the transfer of full power to the sovereign as a result of a social contract (cf. Hobbes, 1668).
10 Cf. Potočný and Ondřej, 2006, p. 14.
11 De Vattel, 1758.
12 Dinicu, 2018, p. 182.
13 Verdross, 1964, p. 7.
14 See Hegel's concept of war as a form of striving for the highest state of sovereignty. Cf. Hegel, 1979, pp. 497–503.
15 Cf. Kelsen, 1920. See also footnote 59. Hans Kelsen also developed the theory of transferring sovereignty to international organisations in order to create global law—see Section 7.

self-obligations.[16] Sovereignty provides the state with the possibility of determining its own powers—the competence to create its own competences (cf. the German term *Kompetenz-Kompetenz,*[17] which in the English doctrine is also referred to as auto-determination). At the same time, the indivisibility of sovereignty as such was emphasized.[18]

Relative understanding of state sovereignty would sometimes carry the risk of grading the level of sovereignty depending on the scope of international obligations binding the state. This line of reasoning implies an inversely proportional relationship between binding international law and sovereignty. In its most radical version, relative sovereignty assumes the primacy of international law over sovereignty—according to this view, the former determines the level of sovereignty enjoyed by a state. However, such reasoning is burdened with the flaw of understanding sovereignty as a simple sum of state competences. Meanwhile, sovereignty also entails the right to freely delegate one's own competences. The delegation of competences by a state for the purpose of their implementation at the international level (i.e., by creating norms of international law) does not decrease sovereignty, which is indivisible.

In international jurisprudence, the modern classical perception of sovereignty was influenced by the 1927 judgment of the Permanent Court of International Justice in the Case of the S.S. Lotus.[19] It determined the fundamental limits of state sovereignty as restrained by the sovereign rights of other states.

The classic concept of sovereignty, as legitimized by international law, is currently predominant in the doctrine of *jus gentium*. It constitutes the basis for the activity of states in the area of creating binding international law. This concept can also be used to explain the mechanisms of transferring competences between sovereign states (which will be described later in this text), including those relating to territorial authority, as well as the establishment of international organizations with extensive powers. It is worth noting that already in the Wimbledon case,[20] the Permanent Court of International Justice stated that any restriction affecting the activity of the state as a result of voluntarily concluded international agreement cannot be perceived as a restriction of sovereignty. The right to freely conclude international agreements (*jus tractatuum*) is the essence of the sovereign rights of the state. Thus, international law regulations that reduce the competences of the state cannot be perceived as a restriction of sovereignty.

16 Jellinek, 1905, pp. 461 etc.

17 It ought to be emphasized that the *Kompetenz-Kompetenz* principle should not be equated with sovereignty—it basically refers to the possibility of a court (e.g., an arbitral tribunal) to determine its own jurisdiction in a case (competence to determine its own competence) and, as such, it is essentially developed in the jurisprudence of the Federal Constitutional Court. It was in this context that it was used by that court in relation to the mechanisms of European integration. That court stated that no competence-competence was established for the benefit of the EU—cf. 2 BvR 2134, 2159/92, BVerfGE 89, p. 155.

18 Cf. Makowski, 1918, p. 136.

19 S.S. "Lotus" (France v Turkey), Judgment No. 9, September 7, 1927, PCIJ Series A No 10.

20 S.S. "Wimbledon" (Britain et al. v. Germany), Judgment No. 9, August 17, 1923, PCIJ Series A No 01.

Of course, the scope of matters governed by international law is undoubtedly large at present; it is necessary to accept *erga omnes* obligations, universal norms of an absolutely binding nature (*jus cogens*) are in force, the interests of the international community as a whole need protection, and the rights of the individual have significantly expanded. All this results in a significantly greater number of matters that are transferred from the exclusive competence of the state to an area covered by its international legal obligations.[21] In particular, they are moved to a sphere governed by secondary entities of international law, such as international organizations. Although this does not directly affect the scope of state sovereignty, the scale of this regulation certainly contributes to the creation of theories aimed at the remodelling of contemporary international law, including with regard to the creation of new holders of the concept of sovereignty[22] (such concepts will be discussed in Section 7).

3. Contemporary definition of state sovereignty in international law

State sovereignty denotes a lack of dependence on the power of other entities. This position is recognizable from the external as well as internal perspective of the state. From the constitutional and legal viewpoint, the concept of sovereignty is often replaced by the essentially identical concept of independence, although the latter is associated with politics rather than with law (assuming that it is possible to attribute a given concept to a specific field of science).[23] Sovereignty is generally described in terms of behavior characterized by independence.[24] According to the classical formula, sovereignty is associated with the state's exclusive power over its own territory and its own citizens, including the internal freedom of shaping economic relations. It also refers to the external activity of the state—entering into alliances, establishing diplomatic relations, creating external economic ties, etc. Hence, the internal and

21 Cf. Roth, 2004, p. 1028.

22 Cf. Ferreira-Snyman, 2007, p. 395.

23 It could be exemplified by the Constitution of the Republic of Poland of 1997 (Journal of Laws 1997, no. 78, item 483), although with the reservation that it is a very unsuccessful creation in terms of its construction (which in practice makes it possible to draw mutually conflicting interpretations), hastily adopted as a result of a compromise between competing political parties. Undoubtedly, the Republic of Poland needs a new constitution, following the example of Hungary, and not one based on transitional post-communist solutions. In the Polish Constitution, the notions of sovereignty and independence are used interchangeably. Thus, the Preamble to the Constitution mentions the "possibility of a sovereign and democratic determination of [Poland's] fate." Article 5 of the Constitution of the Republic of Poland states, "The Republic of Poland shall safeguard the independence and integrity of its territory (...)." Referring to the competences of the President, Article 126(2) of the Constitution states that: "The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory." The very oath of the President, quoted in Article 130, again uses the term "independence."

24 See the concept of internal (people's) sovereignty—Rousseau, 1762.

external sovereignty of the state is clearly distinguished in the doctrine.[25] The former is defined in the old Polish legal doctrine as *całowładność* (the competence to regulate all domestic affairs), the latter as *samowładność* (legal independence from external factors).[26] In the external scope, the limits of state sovereignty are determined by other states' lawful interests and the scope of international legal obligations.[27]

The assumption of sovereignty entails derivative normative constructs, which are provided for in international law. Their character may be positive—they are legal institutions that directly support state sovereignty (e.g., the principle of sovereign equality, mentioned at the beginning, or the right to self-determination)—or they may create prohibitions against behaviors of entities of international law that violate sovereignty (e.g., prohibitions on intervening in the internal affairs of states, prohibitions on the use of force in international law).

The sovereign equality of states is presented in the United Nations Charter as a fundamental principle of the legal order (Article 2(1) of the Charter[28]). It also means that sovereignty implies the equality of sovereign subjects of international law.[29] The principle of sovereign equality is precisely defined in the UN General Assembly Resolution 2625 (25) of 24 October 1970 (The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States).[30] It ought to be mentioned that the concept of sovereign equality has also influenced treaty law and customary legal rules connected with diplomatic and consular relations (as well as protocol rules, which are not legal ones). Sovereign equality means legal equality. It is not synonymous with the political equality of entities, which may sometimes result in special rights connected with their international status (this is the status of the Great Powers, currently recognized by the law of the United Nations, and previously known at least since the European Concert of Nations).[31] Thus, equality before the law can be understood as equal subjectivity and legal capacity.[32] In particular (but not exclusively), this equality

25 In older publications of the Polish doctrine, external sovereignty is directly identified with the subjectivity of the state. Cf. Ehrlich, 1948, p. 104.

26 Cf. Bierzanek and Symonides, 1992, p. 115.

27 Gelberg, 1977, p. 102.

28 Quote: "The Organization is based on the principle of the sovereign equality of all its Members."

29 Cf. Góralczyk, 1989, p. 129.

30 Resolution (General Assembly) No. 2626 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: "(...) The principle of sovereign equality of States. All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States (...)."

31 Oppenheim, 1912, p. 170.

32 Shaw, 2000, p. 136.

concerns law-making. Generally, the equality of subjects has a formal character, which does not affect the exercise of the law, as it depends on factual factors (e.g., access to the sea).[33] Equality is usually associated with the "one state, one vote" principle of voting (in international organizations, at international conferences); however, states are free to change this mechanism. In practice, it happens in negotiations when the disproportion of votes is objectively justified (e.g., due to economic power or demographic potential).

The competence to regulate one's own internal relations is also enshrined in the United Nations Charter—Article 2(7) indicates that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (...)."

An issue worth mentioning here is state recognition. Under international law, sovereignty can only be assigned to a state. Therefore, it needs to be established whether a given territorial entity is a state. Unrecognized states or states with limited recognition (i.e., those that are recognized by individual states or a group of states) pose a significant problem in this respect. Regardless of whether we adopt a constitutive or a declarative theory of state recognition (which is more in line with practice), the decision whether an entity meets the criteria for recognition as a state (has a separate territory, permanent population, and effective government) is the prerogative of the recognizing state.[34] As a result, there are situations when a given state is not equally recognized by countries of even one region. This is currently the case of Kosovo, whose declaration of independence on February 17, 2008, meant a violation of Serbia's territorial integrity. Kosovo is not recognized by some EU countries, including some Central European countries (Romania, Slovakia). In this way, state recognition makes the problem of sovereignty a multifaceted question, as the same entity may be perceived as sovereign by one state and as an illegal territorial entity by another.

4. Partial sovereignty? Loss of sovereignty by the state

It ought to be be noted that the concept of part-sovereign states used in the history of international law contained a commonly recognized inaccuracy. These entities were characterized by a lack of independence in external relations. Partial sovereignty of a protectorate, for example, actually denoted a lack of sovereignty,[35] and the establish-

33 Cf. Combacau and Sur, 1997, p. 229. The fact that states do not have the same factual or legal capacity does not testify to the limited sovereignty of those that are less powerful. Sovereignty is not quantitative; it is not the sum of powers.

34 Richter, 2019, p. 20.

35 Such entities were created in the previous centuries by the British Crown by granting extensive autonomy to some overseas areas (e.g., South Africa). Cf. Lawrence, 1911, p. 120. The protectorate was used by Great Britain for the Ionian Islands (1815–1864; previously in 1800–1807 it was a joint British-Russian protectorate); protectorates were also used by France (e.g., in Tunisia, Morocco). Cf. Brierly, 1955, p. 128. There were also dependent areas in other regions of the world at the turn of the 20th century. Essentially similar constructions are used for some overseas territories today (e.g., Puerto Rico).

ment of a protectorate over a hitherto independent state would result in its loss of sovereignty.[36] Any autonomy of a dependent area (even if it reflects its former sovereignty) results from the consent of the sovereign state.[37] The relationship between the protector and the protected state is termed suzerainty.

In Poland's history, the Free City of Cracow was a protectorate in 1815–1846 (the protectors were the partitioning powers (Russia, Austria, and Prussia), then the city was annexed by Austria). In the interwar period, the Free City of Gdansk (Danzig) posed a special formal problem—it was under the "protection" of the League of Nations, which, however, could not be called the protector of Gdansk. The League of Nations, as an international organization,[38] was not sovereign, so it could not function as a suzerain for Gdansk—only a state could play such a role. Since the essence of a protectorate relationship is to take over the foreign affairs of the protected entity (regardless of its will), it was Poland, responsible for the foreign affairs of the Free City of Gdansk, that was considered its protector.[39] Importantly, the position of a dependent "state" or protectorate results from a special legal status imposed on a given entity, not its free will. The matters of this territorial entity are subject to the authority of the protector—a sovereign state, because the protected entity lacks sovereignty. Such a situation should be clearly distinguished from the conferral of an analogous scope of competences (including, for example, in the field of foreign, economic, or judiciary affairs) by one sovereign state on another. This situation has no impact on the sovereignty of the parties to such a relationship, but results from an international agreement. Therefore, situations that are seemingly identical in terms of effects may actually be completely different in legal terms.

The false concept of limited (partial) sovereignty of a dependent entity is in direct conflict with the principle of the indivisibility of sovereignty, on which international law rests. Hence the so-called dependent state is not a state as defined by international law, but part of another sovereign state's territory, irrespective of how much autonomy the former enjoys, even including the power to shape its external policy to some extent.

The threat of losing sovereignty does not seem to be particularly real nowadays. This is due to the existing *de jure* legal mechanisms supporting the maintenance of sovereignty by states. In view of the unlawfulness of war of aggression,[40] even

36 Glahn, 1965, p. 75.

37 It is incorrect to regard such phenomena as a sharing of sovereignty. Cf. Krasner, 2004, p. 1095. The author cites the alleged sovereign rights of Hong Kong after 1997 to support this thesis (including the right to participate in certain international organisations and to retain the final jurisdiction of British courts in certain cases) without noticing that this is due to China's consent to maintain such autonomy in the Special Administrative Region.

38 An organisation is a secondary entity (because it was created by the will of primary entities), with limited competences (compared to primary entities), and most importantly a dependent entity (because it can be liquidated at the will of member states—which happened in the case of the aforementioned League of Nations).

39 Cf. Cybichowski, 1928, p. 109.

40 *De jure* since the adoption of the Paris Pact of 1928 (General Treaty for Renunciation of War as an Instrument of National Policy signed in Paris on August 27, 1928 [the so-called Kellogg-Briand Pact], League of Nations Treaty Series 1929, vol. 94, no. 2137).

a complete annexation of a territory is not *de jure* regarded as a loss of statehood. Therefore, the loss of territory and real power over a population does not simply lead to a loss of sovereignty. The history of Central Europe knows examples of governments functioning in exile (e.g., the Polish or the Czechoslovak government during World War II), which emanated the sovereignty of states under illegal occupation. Regardless of this, any threat of territorial annexation (whether explicit, as was the case in Crimea in 2014, or *de facto*, through unrecognized external subjects, as in the Donbas region) raises fundamental questions about the loss of sovereignty over the territory. The loss of the actual possibility of exercising sovereign rights over a territory undoubtedly undermines the sovereign functioning of the state. The passage of time is also an important factor, as it may lead to the recognition of an illegal situation as legal by an increasing number of countries. Therefore, although an annexation resulting in the loss of control over a territory and population does not entail the loss of sovereignty by the state whose territory has been annexed, it certainly threatens its further sovereign existence.

States are free to relinquish their sovereignty. This happens by transferring the sovereignty of one state to another (newly created or already existing) as a result of unification. History knows many examples of federal states whose constituent parts used to be sovereign entities; as a result of unification, their sovereignty expired—it was conferred on the united state.[41]

5. Threats to economic sovereignty

Liberalized or free trade is not perceived nowadays as a threat to sovereignty. Different opinions in this regard were formulated as recently as in the interwar period. In 1931, the Permanent Court of International Justice recognized the customs union between Germany and Austria as undermining the latter's independence.[42] Following the Second World War, however, the increasing number of free trade agreements and

41 A separate issue, exceeding the scope of these considerations, is the right to secede from a federal state. In such a case, however, sovereignty should be seen as newly created at the moment of secession. Discussing the right to secession as a sovereign right of a constituent part seems to be incorrect from an international legal perspective, given that the constituent part is not sovereign until secession. However, it may be perceived differently from the perspective of the federation's internal constitutional law.

42 Customs Regime between Germany and Austria Question, Advisory Opinion—5th Sept 1931 PCIJ Series A / B. no 41. Despite the fact that Austria retained full freedom to withdraw from the treaty on the customs union, the court considered Austria's independence to be threatened by the economic influence of another state. Even then, however, this ruling faced formal criticism (although the content of the PCIJ opinion resulted from the specific legal rules concerning Austria contained in the Treaty of Saint-Germain-en-Laye; drawing conclusions of a general nature affecting the sovereignty of any entity, was too far-reaching). This criticism also reached Poland, a country that at the time was rather opposed to the customs integration of Austria and Germany (in any case the idea was abandoned by these countries before the court's ruling was issued). Cf. Dembiński, 1933, pp. 148–149.

the conclusion of the General Agreement on Tariffs and Trade (GATT)[43] changed the perception of economic threats to state sovereignty. Nowadays, the benefits of international trade to countries are generally not connected with the collection of customs duties. In view of the widespread interdependence of states in terms of resources and energy, economic ties are rarely perceived as a threat to sovereignty. However, much still depends on the nature of these relationships. On the one hand, the notion of sovereignty in the economy is often overlooked or presented as a problem of the past. This is especially important in view of the fact that corporations often have budgets that are many times greater than that of a not very rich country, which allows them to influence the political decisions of states. On the other hand, capital does have a nationality, which is well understood especially by the most powerful and largest countries in the world. The history of trade in raw materials shows that resources such as crude oil and natural gas can be an effective economic weapon when used, for example, by Russia against Central and Eastern Europe or as a source of financing for the expansion of Saudi Arabia's Wahhabi ideology, which destabilizes the social and politic situation in the Islamic world. Therefore, is it actually true to say that there has been a paradigm shift in this regard?

Undoubtedly, this is a thorny issue for the countries of Central and Eastern Europe. It seems that handing over commercial and economic matters to international organizations and foreign corporations may be perceived, perhaps not unreasonably, as a threat to sovereignty—not in legal terms, but as understood through the prism of politics. This is particularly evident with regard to raw materials. Countries such as Poland have experienced being blackmailed by Russia in connection with the supply of oil or gas. Maintaining independence in this respect requires costly projects connected with the diversification of suppliers of these raw materials (which has actually happened in the case of Poland, following the launch of a gas terminal and the construction of a gas pipeline from Norway). Dependence on one unpredictable supplier certainly poses a threat to the stability of economic development. In such circumstances, implementing economic policies is undoubtedly a challenge for the state authorities.

A fundamental question arises at this point: Does the economy as such have a direct impact on sovereignty? The state is free to make any economic decisions. A decision with unfavorable consequences may be forced by a monopolist supplier of raw materials. For example, blackmail connected with the supply of a raw material that is essential for the economy and that cannot be replaced or obtained from another source deprives the purchasing state of real freedom of action. Even if the blackmail constitutes a breach of an international treaty, the blackmailed state cannot usually take any retaliatory measures, which require proportionality. Since the direction of trade with the supplier of the raw material is typically one-way, there is no real possibility of applying retaliatory sanctions.

43 General Agreement on Tariffs and Trade, signed at Geneva on October 30, 1947 (United Nations Treaty Series 1950, vol. 55-I, no. 814).

Activities characterized by economic blackmail ("soft" coercion) cannot be considered coercive (i.e., carrying the consequences of Article 52 of the Vienna Convention on the Law of Treaties[44] in the event of having concluded an agreement). Nevertheless, this is undoubtedly a form of exerting influence on a state, which may deprive it of real, if not theoretical, freedom of action. While in theory it may be difficult to demonstrate the violation of sovereignty (as defined by law) as a result of a *de facto* forced dependence (often on very unfavorable financial terms) on a supplier of a raw material needed by the economy, in practice states recognize such situations and, if possible, try to prevent them. The fact that economic problems are identified with sovereignty also proves that this notion may be understood in political terms, which is subject to mythologization due to its unspecified character and inconsistency with the legal definition. The science of law must distinguish between non-legal pressures resulting from the clash of states' interests from violations of sovereignty due to the breaching of fundamental norms of international law (prohibition of the use of force, threat of use of force, intervention in internal affairs).[45]

6. Limitation of sovereignty, transfer of competences, or transfer of sovereignty?

The alleged limitation of sovereignty is often identified with phenomena that do not entail any real restrictions in this regard, and result from the use of solutions derived from private law, with origins in Roman law, in relations between states. Based on relevant agreements, states may apply solutions that delegate the temporary exercise of rights identified with sovereignty over a territory to another entity. However, this does not imply a loss of sovereignty over the territory or a restriction of the transferor's sovereignty. In this case, the distinction between sovereignty over a territory and territorial rights exercised as a result of a contractual title between states resembles the relationships of ownership and possession in civil (private) law. Sovereignty is the full title to rule a territory as understood by public international law, but a sovereign entity may relinquish some of its symptoms in favor of another entity. However, this is a transfer of competences, not sovereignty. The notion of the transfer of sovereignty itself is alien to classic international law (at most, one can consider here the unification of sovereign entities, as mentioned toward the end of Section 4). International law is unambiguous in this respect, even with regard to supranational organizations (as discussed later in this section).

In this way, various types of territorial lease mechanisms can be developed (concerning military bases, for example) that resemble the transfer of possession of things in civil law or servitude (in the case of the right to a passage through a territory,

44 Vienna Convention on the Law of Treaties done at Vienna, adopted on May 23, 1969 (United Nations Treaty Series 1980, vol. 1155, no. 18232).
45 Cf. Kranz, 2015, p. 111.

for example). The latter is perceived particularly negatively in Central Europe—the demand for a right to a corridor from Germany to East Prussia through Polish Gdansk Pomerania was aggressively asserted by the Third Reich in 1939.[46] Currently, one of the most protected and vulnerable territories within NATO countries is the Polish Suwalki Gap between the Kaliningrad Region and Belarus, which at the same time connects Poland and Lithuania.

In the history of Central Europe, a particularly telling case connected with authority exercised over a territory by an entity other than the sovereign concerned Bosnia and Herzegovina. Under the provisions of the Treaty of Berlin, in 1878–1908 it was formally a part of Turkey, but its governance rested with Austria-Hungary (which formally incorporated the province in 1908). Many such cases from other geographic areas are known to international law.[47] Acceptance of such solutions might have resulted from the fact that in spite of being based on titles other than the basic one (in domestic law, such a title is ownership of property, in international law sovereignty), they resembled the fiefdoms known to the law of medieval Europe. In practice, titles that introduce a limited administrative power of one state over a part of another state's territory also apply to much smaller functional territories, such as ports, port quays, or military bases. Depending on the content of the agreement between states, the exercise of limited territorial authority may entail the establishment of exclusive or partial jurisdiction of the state exercising administrative control over the territory.

It is also significant that in the event of an interstate dispute over their sovereignty over a given territory, the argument may be temporarily suspended by establishing a joint territorial sovereignty (condominium) without prejudging the affiliation of the disputed area.[48]

Delegation of competences by some states, including in particular so-called microstates or ministates, is a natural tendency. Due to objective factors (their demographic or economic situation), they are unable to undertake costly diplomatic activities or use permanent diplomatic and consular services to an extent that would allow them to maintain real relations with most countries of the world. Hence, cases of conferring competences on other entities are not uncommon. Similarly to the abovementioned assumption of administrative power over a territory, this happens

46 Łukomski, 2000.

47 Examples of the administration of the Panama Canal by the USA until 1999, or the lease of Hong Kong by Great Britain from China until 1997, are commonly cited in the doctrine. The Guantanamo base, for example, has a similar status—under the 1903 treaty, the USA exercises jurisdiction over territory whose formal sovereign is Cuba.

48 Historical examples of such condominiums include the New Hebrides (joint British and French management—since 1980, it has been the independent state of Vanuatu); until 1955, Sudan was also governed by the British-Egyptian condominium. Cf. Czapliński and Wyrozumska, 2006, p. 138. The notion of condominium can also be applied to sea areas. Thus, three coastal states have been recognized as exercising joint sovereign powers over Fonseca Bay. Cf. Judgment of the Central American Court of Justice of 9 March 1917 (*American Journal of International Law*, 1917, p. 702). Also see: ICJ Judgment of 11 September 1992 Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening (General List no. 75).

by way of an international agreement between the conferrer of competences and the state that is going to exercise them. Of course, this is only a conferral of competences, not of sovereignty. The conferrer has the right to revoke the transfer of powers, in whole or in part, at any time in order to exercise them by itself or transfer them to another entity, which may be another sovereign primary entity (state) or a non-sovereign secondary entity (international organization). Cases of such revocation of competences are not uncommon in international law. A good example is the situation of Liechtenstein, an independent state since 1866. Until 1918, its international affairs were managed by the Habsburg monarchy; after the collapse of Austria-Hungary, on January 1, 1924, a significant part of these powers was conferred on Switzerland.[49] In the 1990s, Liechtenstein introduced changes to the agreement with Switzerland, which modified the scope of the conferred economic and customs competences. In 1991 Liechtenstein decided to participate in the European Free Trade Association. In 1994 it decided to be the member state of the European Economic Area, to which Switzerland never acceded. The amended agreement returned some of the competences to the sovereign (Liechtenstein), which in turn delegated them for implementation under EFTA, and then EEA. These competences therefore became the competences of international organizations of which Liechtenstein is a member.[50]

The transfer of competences to an international organization is the most common situation today. States conclude an international agreement with each other, in which they simultaneously create a new entity—an international organization (secondary, with limited competences, dependent—because it can be liquidated at the will of the signatories). The founding states provide the organization with the necessary competences, derived from the states' own competences (as well as from competences conferred by other member states in the future). Although a conferral of a range of competences occurs in the case of accession to any international organization (e.g., with regard to its independent decisions concerning personnel or budget), it is particularly noticeable in the case of the so-called supranational organizations. They are usually tasked with achieving economic or even political integration of the member states within the scope of the powers conferred upon them. Such secondary entities have self-reliance that is essential for their purposes (they act on their own behalf and in the interest of the organization as a whole above all). They issue binding legal acts of secondary law, on the basis of which a separate legal order is built (which may even be an order that is dissociated from its international legal sources as a *sui generis* order). In addition, the assessment of compliance with this secondary law by member states is subject to a judicial authority established within the organization. Due to these factors, their exceptional character is noted. The impression that organizations manage the affairs of their member states contributes to the propagation of theories about their alleged sovereignty.

49 Vertrag zwischen der Schweiz und Liechtenstein über den Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet, Abgeschlossen am 29. März 1923, BBl 1923 II 374.
50 Hummer and Prager, 1997, pp. 377–410.

Regardless of the nature of an international organization, it is a secondary subject of international law. It can be dissolved by the member states, which can eliminate the legal order created by this organization. States can also withdraw from this organization individually. Since its legal existence fully depends on the will of other legal entities, it is a fundamental mistake to speak of its sovereignty in any respect. In the light of contemporary international law, a sovereign entity cannot be liquidated at the will of other entities. The ultimate impossibility of management of its own existence certainly makes such an entity as a supranational organization non-sovereign.

While transferring competences, only the sovereign entity (state) is active. An international organization merely "absorbs" its competences. Its legal status resembles the status of the recipient in the case of a donation agreement. The scope of the donation is determined by the donor. Analogously, an international organization may not actively request a conferral of competences or lawfully extend the scope of competences to an area not covered by the original conferral.[51] The fact of conferring competences clearly confirms the sovereignty of the conferrer. The entity receiving the competences does not have to be sovereign, and in the case of an international organization is not sovereign. The interpretation of the scope of the conferral of competences is subject only to the assessment of the conferring state. In particular, it is unacceptable to make self-findings and unilateral arrangements concerning the scope of the conferral by entities upon which the competences were conferred. It is worth quoting at this point the ruling of the German Constitutional Court in 2009, referring to the transfer of powers by a state to the European Union.[52] The concept of states as "masters of the treaty" (*Herren der Verträge*) cited by the Court accurately reflects the essence of the matter.[53] Sovereignty is understood as freedom within the law.[54] It is worth noting that the conferral of competences on an international

51 It ought to be be noted that the above is fully confirmed in the Treaty on the European Union (Consolidated version of the Treaty on European Union OJ, 26.10.2012, C 326, pp. 1–390). Article 4(1) of the Treaty states: "(...) competences not conferred upon the Union in the Treaties remain with the Member States." In accordance with Article 5(1) of the Treaty, "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." Later in Section 2 it is stated: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." Section 3 sentence 1 defines a limited scope of application of the subsidiarity principle: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." It seems that the European Union's problem is the violation of the competences of the Treaties by its bodies.

52 Cf. Judgment of the Federal Constitutional Court of Germany of 30 June 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (judgment of the FCC in the case of the Treaty of Lisbon, BVerfGE 123, p. 267).

53 Cf. Bainczyk, 2017, pp. 151, 208.

54 Cf. Kwiecień, 2015, p. 53.

organization is also stipulated to a limited extent by constitutions of some member states of the European Union—and undoubtedly it is up to them to make the final assessment of actions undertaken under the treaty.[55]

As mentioned before, the transfer of competences may take place in favor of a sovereign entity (another state) or a non-sovereign entity (an international organization). Competences may also be further transferred from one organization to another, when the former becomes a member of another international organization within the scope of the transferred competences.[56]

It is also possible to confer certain limited powers on entities that are not subjects of international law at all, such as protectorates or autonomous provinces of the state. Sovereignty means that states have the primary competence to self-organize, including in the field of foreign trade or even foreign affairs, so the possible powers of individual administrative parts of the state in no way violate the sovereignty of a complex state (e.g., a federal state). The distribution of competences occurs in accordance with internal law.

It is also worth noting that a separate problem concerning the limitation of sovereignty is currently connected with the subject of environmental protection and the protection and exploitation of natural resources. Paradoxically, these two issues are intrinsically irreconcilable, which means that the current model of state jurisdiction is not undergoing a sudden revolution in this respect. While the protection of the borderless natural environment may inspire international actions aimed at the reduction of exploitation by individual entities exercising their sovereign economic rights, granting states the rights to the natural resources in their territory clearly enhances the perception of their sovereignty.[57] The rights of the state to natural resources in its territory are defined in international law as permanent sovereignty.[58]

55 It is worth noting that in Article 90(1), the Constitution of the Republic of Poland, cited before in footnote 23, provides that "The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters." This provision mentions the delegation of competences (and not of sovereignty) and only in certain matters—and therefore to a limited extent.

56 For example, the European Union, as a separate customs territory, is a member of the World Trade Organization (WTO). Within the scope of its competences connected with civil procedural law and conflict of law rules, it is also a member of the Hague Conference on Private International Law, alongside its member states.

57 Cf. Conforti, 1995, p. 196.

58 The United Nations has repeatedly adopted resolutions confirming the sovereignty of a state over natural resources, trying to create instruments to counteract the depravation of the territory of developing countries by the developed ones. The Resolution of the General Assembly no. 3281 (29) of 12 December 1974 (Charter of Economic Powers and Duties of States) played a special role in this case. Cf. Chapter II(2)(1) of the Charter, which indicates full permanent sovereignty over natural resources. Cf. Skubiszewski, 1981, pp. 85–99.

7. Threats resulting from a change in the perception of sovereignty

Although international law seems to consistently enshrine sovereignty as a permanent attribute of the state, political concepts have emerged that proclaim a paradigm shift in this respect. They indicate the distribution of sovereignty to other entities.[59] Regardless of the fact that their influence on the doctrine of international law does not yet seem significant, they are still worth noting. It is equally noteworthy that they are based on a categorial shift—a fundamental logical fallacy that assumes the identity of the concept of sovereignty and state competence. Sovereignty is not just unlimited power, the full sum of powers in the hands of the sovereign. If this erroneous understanding were adopted, there could be no sovereign entities today, even including the great powers.[60] However, sovereignty may be associated with the right of the state to distribute its powers. States are free to choose how to perform their functions.[61]

The most dangerous theory that threatens the sovereignty of states is the theory of global law. Sovereignty as understood by Hans Kelsen (1881–1973) was to be significantly limited as a result of the institutionalization of international cooperation by means of newly established entities—international organizations. The law of individual countries would therefore need to be gradually subordinated to global law, which would be systematically developed on the basis of the activities of these organizations. Regardless of the formula in which it would occur—through a transfer of competences ultimately resulting in the assumption of sovereignty, or the creation of some unrealistic form of global government—it is striking to see that sovereignty would thus be limited by an arbitrary power, established independently of states' will and using law for purely instrumental purposes, not derived from natural law. Natural law has been a mainstay of sovereignty, regardless of the fact that since the times of Grotius and Hobbes the present understanding of this concept has been shaped by the so-called juridical rupture (*ruptura iuridica*), which secularized it. An arbitrary determination of sovereignty by a collective *super omnes* entity essentially presupposes a predatory seizure of sovereignty. It is essentially a violation of sovereign rights, without any title and legal legitimacy.

The creation of such a superstate power could take place only with the express consent of entities indicating the need for such *de jure* unification. On the other hand, it is worth bearing in mind that the development of world orders in modern history did on several occasions involve the abandonment of the existing principles and the

59 It is worth noting that examples of entities that are allegedly characterised by shared sovereignty include semi-internationalized or mixed tribunals, international companies managing investments, e.g., pipelines or raw material extraction, and dependent territories with autonomy. Cf. Krasner, op. cit., pp. 1095–1097.

60 Hence Kelsen's view (cf. Kelsen, 1942, p. 78) of an unreal bearer of sovereignty. Cf. Merezhko, 2019, pp. 46–48.

61 Cf. Kwiecień, 2004, p. 196.

adoption of new, completely different ones that, in the light of the existing order, would be considered illegitimate.

The activities of bodies of the European Union, as a supranational integration organization undertaking regional activities in Europe, evidently refer to the notion of centralized international authority. The sovereignty of a state is not reduced by powers conferred on other entities of international law, as long as this conferral is reversible. On the other hand, the acquisition of these competences by another entity, either by coercion or judicial lawlessness (appropriation of competences), can be perceived as a threat to sovereignty. A particularly drastic mechanism of violating state competences by entities of secondary law are attempts to extend competences to cover areas that were explicitly reserved as the exclusive domain of member states in the treaties establishing the international organization. Activities of organs of international organizations that consist in issuing acts of secondary law concerning matters beyond their competence, and of judicial authorities issuing decisions outside their jurisdiction, should be noticed and stigmatized by states.[62] A state whose sovereignty has been violated as a result of such practices has the right to not recognize the effects of the organization's legislative activities and not execute the judgments of its judicial bodies. Unfortunately, this issue is not purely theoretical. The organs of European integration seem to be departing from the regulations contained in their own treaties, which lie at their source.[63]

In Europe, this dispute over competences (in the future, perhaps, over sovereignty) has led to the emergence of phenomena that are far removed from the principles of democracy. Bodies of an international organization (without any democratic legitimacy, with the exception of its parliamentary bodies), operating within the scope of powers conferred upon them by states (under the alleged shared sovereignty), are appropriating the competences of primary entities on the basis of decisions of international judiciary bodies. Tribunals operating at international organizations have become tools for the gradual limitation of rights reserved exclusively for sovereign states. The practically unlimited jurisprudence of international judicial bodies (elected by secret ballot from among people who are dependent on

62 The fact that this occurs to a very limited extent in the case of the European Union demonstrates the weakness of some states compared to other, larger states in the EU that strive for such domination of the EU (because it is *de facto* their domination, and the possible future creation of a federal state on the basis of the EU will ensure their central status and a major advantage in this new country).

63 See footnote 51. Polish Member of the European Parliament Prof. Ryszard Legutko wrote about the activities of the European Union in this area: "I lost any faith in the European Union and the possibility of self-correction a long time ago. Anyway, all this language is mendacious. It mentions subsidiarity, that subsidiarity needs strengthening. Subsidiarity has long since been violated and killed in the European Union. It is no longer there. It is no longer in the powers of the European Commission, the CJEU, not to mention the Parliament. The principle of admission does not exist anymore—it has been violated. They use a language that is distorting or blurring the reality, they are not able to reform, they are just heading in that direction. It is like a huge machine that is slowly sliding down because it does not know how to brake, and even if it did, it would not want to brake" (Cf. Legutko, 2021).

political parties and "groups of influence") leads to a new system—"judicracy." The courts of an international organization usurp the right to contradict the decisions of the governments of sovereign states—governments that undoubtedly have the democratic legitimacy of citizens. Such practices of the Court of Justice of the EU[64] or the European Court of Human Rights[65] in relation to Hungary, Poland or Romania[66] are a clear example of this phenomenon. Opposition to such clearly unlawful practices is proof that the countries of the region continue to be sovereign. Indeed, through such *ultra vires* actions, international judicial authorities risk issuing *sententiae non existens* judgments, entering into a significant dispute with constitutional courts and authorities of the member states.

64 Judgment of the Court of Justice of 15 July 2021, C-791/19 European Commission v the Republic of Poland.

65 For example, the recognition by the ECtHR of the Constitutional Tribunal of the Republic of Poland as a court, which is not a court within the meaning of Polish law. Cf. Judgment of 22 July 2021 in the case of Reczkowicz v. Poland (application no. 43447/19), Judgment of the ECtHR of 7 May 2021 in the case of Xero Flor v. Poland (application no. 4907/18). Compare the Judgments of the Constitutional Tribunal of 14 July 2021 (reference number P 7/20), of 7 October 2021 (reference number K 3/21), and of 24 November 2021 (reference number K 6/21). A specific war between the national tribunals and the European Union (with clear support from the ECtHR) is obviously visible concerning the domestic judiciary. This matter, reserved for the competences of the member states, is subject to appropriation by the Court of Justice of the European Union. In the case of Poland, this appropriation has a special dimension, as it takes place as an attempt to block an important national reform of the judiciary. This is paradoxical as the CJEU thus situates itself as a defender of the communist judiciary (often still exercised by judges nominated by the communist dictatorship, who sentenced oppositionists to prison during the martial law period of 1981–1983). Courts in Poland did not undergo any serious reform after the change of the political system in 1989 (the structure of the National Council of the Judiciary was maintained against the Polish constitution until 2018), the judge-criminals of the communist era were never taken to account, and the body that could serve this purpose—the Disciplinary Chamber of the Supreme Court—has now been challenged by the European Union.

66 See CJEU judgment relating to the Constitutional Court of Romania—Arrêt (le 21 décembre 2021) dans les affaires jointes C-357/19 Euro Box Promotion ea, C-379/19 DNA- Serviciul Teritorial Oradea, C-547/19 Asociația «Forumul Judecătorilor din România," C-811/19 FQ ea et C-840/19 NC). *Nota bene,* this ruling was accurately countered by the Romanian Tribunal on December 23, 2021.

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