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KEYNOTE: SUSTAINABILITY AND SOVEREIGNTY IN THE 21ST CENTURY

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Sovereignty has a venerable history in the field of International Environmental Law. Indeed, the history of the field can be seen as a history of the struggle to reconcile the sovereignty of states with their environmental obligations toward their neighbors and the environment generally.

This was so much the case in the first half of the 20th century that the famous *Trail Smelter* tribunal had to struggle to find any authority on the question of whether one state was allowed to cause transboundary pollution harm to another.¹ Finding no international cases, the tribunal finally resorted to seeking answers from decisions rendered by courts in federal systems: a Swiss case about army target practice that sent bullets whizzing into the neighboring canton² and American cases that were somewhat more cognate, involving interstate air and water pollution.³

The rule the tribunal ultimately fashioned, largely on the basis of these federal authorities, is often characterized as the fountainhead of international environmental law—in large part because, rather incredibly in today's world, it was the first time an international tribunal had said that a state cannot cause transboundary pollution damage to its neighbor.⁴ These are the tribunal's words—while many of us could probably recite them in our sleep, I think it is worth stating

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1. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A.1905, 1962-63 (1938 & 1941) [hereinafter *Trail Smelter*].

2. *Id.* at 1963 (citing Cantons of Solothurn and Aargau, (1900) RO 26, 1, 444, 450-51 & RO 41, 1, 137 (Switz.)) (also referencing Dietrich Schindler, *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*, 15 AM. J. INT'L L. 149, 172-73 (1921)).

3. *Id.* at 1264-65 (citing *New Jersey v. City of New York*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906); *Kansas v. Colorado*, 185 U.S. 125 (1902)).

4. Rebecca M. Bratspies & Russell A. Miller, *Introduction*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 1, 3 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

them so they are fresh in our minds:

[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁵

The tribunal did not use the word “sovereignty” even once in this rule-formulation. But the specter of sovereignty clearly loomed over the proceedings like Justice Oliver Wendell Holmes’ “brooding omnipresence in the sky.”⁶

While the *Trail Smelter* tribunal said nothing about sovereignty in the rule it articulated, the equally famous Principle 21 of the 1972 Stockholm Declaration—which is commonly thought to have been inspired by *Trail Smelter*—gives pride of place to it.⁷ Once again, Principle 21 is well known, but I would like to emphasize its oxymoronic character. It reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, 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 of areas beyond the limits of national jurisdiction.⁸

It is true that the “sovereign right [of states] to exploit their own resources pursuant to their own environmental policies” is hedged about somewhat by the statement that states have this right “in accordance with the Charter . . . and the principles of international law.”⁹ But if the point of this principle is to articulate a prohibition of causing transboundary environmental harm, why begin by letting the “sovereignty” genie out of the bottle?

As written, Principle 21—and the nearly identical Principle 2 of the Rio Declaration,¹⁰ adopted twenty years later—essentially says to states: Go ahead with your resource exploitation activities until some other state cries ‘ouch!’ Then it is possible that you may have to moderate them if that other state can prove that you are causing ‘damage’ to its ‘environment.’ This is not a proposition with much deterrence value. The real problem with the formulation is that if the first half does

5. *Trail Smelter*, *supra* note 1, at 1965.

6. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

7. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 21, U.N. Doc. A/CONF.48/14 (June 16, 1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].

8. *Id.*

9. *Id.*

10. United Nations Conference on the Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex 1 (Aug. 12, 1992), *reprinted in* 31 I.L.M. 876 (1992).

not preemptively cancel the second half, and in fact, it may very well outweigh it, because the first limb of the principle gives license to “exploit” resources under the fig leaf of sovereignty.¹¹

Now, one might think that the international community would have moved beyond anchoring the prohibition of transboundary environmental harm to a doctrine with roots in the Middle Ages, when “sovereigns”—princes, kings and queens—walked the Earth. But no—far from moving beyond it, we have repeated it *ad nauseam* in a whole litany of highly important environmental treaties and other instruments, including: the Convention on Long-Range Transboundary Air Pollution;¹² the Vienna Convention on the Protection of the Ozone Layer;¹³ the Convention on Biological Diversity;¹⁴ the Forest Principles adopted at Rio in 1992;¹⁵ the Desertification Convention;¹⁶ and, of course, the Framework Convention on Climate Change.¹⁷

The question might fairly be asked, why, in the 21st century, an era characterized by the interconnectedness of states, and one that is pervaded by environmental obligations, based both on treaties and on customary international law, do we continue to genuflect at the altar of sovereignty? This seems a rather important question, because if states are going to continue to follow the Machiavelli-inflected, self-centered idea of sovereignty, we are doomed to repeat the environmental mistakes of the past and to fail to make progress in the future—in a word, to fail to live *sustainably* in our remarkable, beautiful planetary home.

The great international lawyer and scholar Louis Henkin was not fooled by the concept of sovereignty. In several pieces on what he called *The Mythology of Sovereignty*, Henkin did the forbidden: he said that the emperor, sovereignty, has no clothes. Specifically, Professor Henkin said:

[A]s applied to states in their external relations, sovereignty . . . is a mistake. Sovereignty is essentially an internal concept, the locus of ultimate authority in a society. Its origins are in “sovereign” princes: as applied to the modern, secular State . . . it is not meaningful to speak of the State as sovereign [in relation to other secular States] . . .

“Sovereignty,” I conclude . . . is not *per se* a normative conception in international law.¹⁸

11. See *Stockholm Declaration*, *supra* note 7, princ. 21.

12. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.

13. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293.

14. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

15. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/26 (Vol. III), Annex III (Aug. 14, 1992), reprinted in 31 I.L.M. 881 (1992).

16. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3.

17. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

18. Louis Henkin, *The Mythology of Sovereignty*, in *ESSAYS IN HONOUR OF WANG TIEYA* 351,

But Louis Henkin is not the only great figure in the field of international law to raise the yellow flag of caution in relation to this concept. Philip Jessup, also of Columbia University and a judge on the International Court of Justice, wrote in 1948: "Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built."¹⁹

Jean Bodin, who invented the idea of sovereignty, would most likely have agreed with the views of Henkin and Jessup. In his *Republic*, published in 1576, Bodin made clear that according to his conception of sovereignty, it was a principle of internal political order.²⁰ Bodin's sovereign, or supreme power, was an essential attribute of statehood.²¹ Brierly comments that Bodin "would certainly have been surprised if he could have foreseen that later writers would distort . . . [sovereignty] into a principle of international disorder, and use it to prove that, by their very nature, states are above the law."²²

How, it might be asked, does all of this relate to sustainability, the subject of this conference? Participants in this conference no doubt know the answer: all of the peoples of the world are interdependent, as are Earth's ecosystems. As John Muir put it in his brilliantly simple way, "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe."²³ The "environment" does not stop at a state's border, with a new one picking up on the other side. We all know this, and indeed it's intuitively obvious. So, why the continued obeisance to sovereignty?

For one thing, for some less powerful countries, it is an important affirmation of their dignity and worth. This quality of sovereignty is captured well in the Report of the International Commission on Intervention and State Sovereignty, the group that developed the doctrine of the "Responsibility to Protect," or "R2P." The Report states as follows:

1.32 In a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best—and sometimes seemingly their only—line of defence. But sovereignty is more than just a functional principle of international relations. For many states and peoples, it is also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny. In recognition of this, the principle that all states are equally sovereign under international law was established as a

352-3 (Ronald St. John Macdonald ed., 1994).

19. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 2 (1968).

20. See JEAN BODIN, *ON SOVEREIGNTY* 1-88 (Julian H. Franklin ed. & trans., Cambridge Univ. Press 1992) (1583) (this passage includes chapters 8 and 10 from *Les six livres de la republique*).

21. *Id.*

22. ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS* 10 (7th ed. 2012).

23. JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 211 (1911).

cornerstone of the UN Charter (Article 2.1).²⁴

This passage makes another crucial point concerning assertions of sovereignty: there are other states out there that are also sovereign.²⁵ This complicates matters for a state that would like to rely on sovereignty to justify conduct that adversely affects other states (or the global commons). It suggests that in exercising its “sovereign rights,” a state must take care not to infringe the sovereign rights of other states. The Commission on Intervention recognized this, and I quote again from its report: “1.35 . . . It is acknowledged that sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”²⁶

I am interested for present purposes in the first aspect of sovereignty, the “external” one: states must respect the sovereignty of other states.²⁷ Because even if you agree with Lou Henkin’s position that “[s]overeignty is essentially an internal concept,”²⁸ you have to admit that the sovereign equality of states, and the correlative norm of non-intervention, would at least make a person think twice before advising a government that it would be okay to dump pollution into a transboundary stream, or into a shared airshed.

This could be taken much further, of course, to argue that the emission of greenhouse gases or ozone-depleting substances violates the norm of non-intervention, and thus the territorial sovereignty of other states. But if Western European states chose not to make that argument concerning the effects there of the Chernobyl disaster, I doubt it will get us far in the cases of climate change and stratospheric ozone depletion, where causation is far less clear.

Yet the basic point *is* clear: “sovereignty” is a correlative concept. My freedom to swing my fist ends where your nose begins. Similarly, I should do nothing to hinder your efforts at sustainability. This must be part and parcel of the concepts of both sustainable development and sustainability. Because if my myopic focus on my own sustainable development or sustainability keeps you from realizing yours, then we will not achieve the Brundtland Commission’s grand objective,²⁹ and indeed, I will be undercutting my own efforts at achieving sustainability because of Earth’s interconnectedness.

It may seem that we have learned this lesson; that in the 21st century we know better than to mix sovereignty with sustainability. Not true, unfortunately. The

24. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 7 (2001).

25. *Id.*

26. *Id.* at 8.

27. *Id.*

28. Henkin, *supra* note 18, at 352.

29. Rep. of the World Comm’n on Env’t and Dev., 42d Sess., Aug. 4, 1987, at 54, U.N. Doc. A/42/427; GAOR, 42d Sess., Supp. No. 25 (1987) (“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”).

poster child for this, in my book, is the misbegotten set of draft articles adopted by none other than the International Law Commission (“ILC”), in 2008, on the Law of Transboundary Aquifers.³⁰ I would like to offer a brief explanation of why this is the case.

First, a word of background. In 1994, the ILC adopted a set of draft articles on the Law of the Non-Navigational Uses of International Watercourses.³¹ That draft was the basis of the negotiation of the 1997 U.N. Convention on the same subject.³² The draft, and the Convention, define the critical term “watercourse” to include both surface water and related groundwater, since the two form a unitary system.³³ Excluded are only the rare aquifers that do not interact with surface water and do not receive significant recharge—these are sometimes referred to as “fossil water” in the Middle East and North Africa because they are ancient; they are also generally found far below the surface.³⁴ But the Commission adopted a resolution stating that the principles in the watercourses draft could be applied to such unrelated groundwater, which it called “confined transboundary groundwater.”³⁵ This, again, is in 1994.³⁶

In 2002, the Commission decided to take up the study of confined transboundary groundwater, and appointed Ambassador Chusei Yamada, Special Rapporteur.³⁷ It also set up a working group to assist the Special Rapporteur, something that is not uncommon in the ILC today.³⁸ Interestingly, the chair of the Commission’s working group on transboundary aquifers, which seems to have had a greater influence on the draft articles than Special Rapporteur Yamada himself, was Ambassador Enrique Candioti, from Argentina.³⁹ Now, the enormous Guarani Aquifer of South America, parts of which are situated in Argentina, Brazil, Paraguay, and Uruguay, has an estimated volume of some 37,000 cubic kilometers.⁴⁰ But the largest portion of the aquifer is located within the borders of

30. Rep. of the Int’l Law Comm’n, 60th Sess., May 5-June 6, July 7-Aug. 8, 2008, 19-27, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10 (2008) [hereinafter 2008 ILC Report].

31. Rep. of the Int’l Law Comm’n, 46th Sess., May 2-July 22, 1994, 89-135, U.N. Doc. A/49/10; GAOR, 49th Sess., Supp. No. 10 (1994) [hereinafter 1994 ILC Report].

32. Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M 700 [hereinafter Convention on International Watercourses].

33. *Id.* art. 2(a).

34. See United Nations Educ., Sci. & Cultural Org., *Preface to NON-RENEWABLE GROUNDWATER RESOURCES: A GUIDEBOOK ON SOCIALLY-SUSTAINABLE MANAGEMENT FOR WATER-POLICY MAKERS* (Stephen Foster & Daniel P. Loucks eds., 2006), available at http://www.hydrology.nl/images/docs/ihp/2007_Non-renewable_groundwater_resources_146997e.pdf.

35. 1994 ILC Report, *supra* note 31, at 135.

36. *Id.*

37. *Summary Records of the 2727th Meeting*, [2002] 1 Y.B. Int’l L. Comm’n 106, 106-07 U.N. Doc. A/CN.4/SER.A/2002 [hereinafter *2727th Meeting*].

38. *Summary Records of the 2726th Meeting*, [2002] 1 Y.B. Int’l L. Comm’n 98, 104 U.N. Doc. A/CN.4/SER.A/2002.

39. *2727th Meeting*, *supra* note 37, at 107.

40. Org. of Am. States: Office for Sustainable Dev. & Env’t, *Guarani Aquifer System*, WATER PROJECT SERIES, Oct. 2005, at 1, available at

Brazil.⁴¹

The ILC's work on Transboundary Aquifers was completed in 2008.⁴² The draft covers both confined and unconfined aquifers—oddly,⁴³ because unconfined aquifers are already covered by the Commission's 1994 draft and the 1997 Convention based on it.⁴⁴ The ILC sent its 2008 draft to the General Assembly.⁴⁵ The Assembly adopted a resolution in which it “[took] note” of the Commission's draft articles on the law of transboundary aquifers, “encourage[d]” states sharing such aquifers to make arrangements for the management of shared groundwater, “taking into account” the ILC's draft, and “decided” to examine at a later session whether the draft should form the basis of negotiations on a convention on the law of transboundary aquifers.⁴⁶ The Assembly has yet to decide on the fate of these draft articles.

Why do I say that this product of ILC work is the “poster child” for our failure to exorcise sovereignty from efforts at achieving sustainability? Because the very first “general principle” of the draft, the *leitmotif* of the way in which the International Law Commission of the United Nations believes the use of internationally shared groundwater should be regulated, is the sovereignty of aquifer states.⁴⁷ Now, let us think about this for a minute. There is an aquifer—a water-bearing geologic formation—that is intersected by a border between our states. We both need the water, whether for irrigation, domestic use, or some other purpose. We are told we have, quote, “sovereignty over the portion of the . . . aquifer . . . located within [our respective] territory[ies].”⁴⁸ What kind of incentive does this give us? It incentivizes us to out and buy the biggest pump we can find! To get the water before the other guy does! An illustration of this on the domestic level is what T. Boone Pickens is doing to the immense Ogallala Aquifer from his ranch north of the Dallas-Fort Worth area: draining this resource, which spans portions of eight states, with enormous pumps and selling the water to the Dallas metropolitan area.⁴⁹ Surely this is not a model for sustainability.

In fairness to the ILC, the article on “sovereignty of aquifer states” goes on to

http://www.oas.org/dsd/Events/english/Documents/OSDE_7Guarani.pdf.

41. *Id.*

42. See Press Release, General Assembly, Legal Committee is Told Protection of Global Water Resources, Now Urgent Necessity, is Strengthened by Law Commission Proposals, U.N. Press Release GA/L/3352 (Oct. 28, 2008).

43. 2008 ILC Report, *supra* note 30, at 20-21.

44. Convention on International Watercourses, *supra* note 32, art. 2; 1994 ILC Report, *supra* note 31, at 90-92.

45. 2008 ILC Report, *supra* note 30, at 18.

46. The Law of Transboundary Aquifers, G.A. Res. 63/124, ¶¶ 4-6, U.N. Doc. A/RES/63/124 (Jan. 15, 2009).

47. 2008 ILC Report, *supra* note 30, at 21.

48. *Id.*

49. Charles Laurence, *US Farmers Fear the Return of the Dust Bowl*, THE TELEGRAPH (Mar. 7, 2011, 7:00 AM), <http://www.telegraph.co.uk/earth/8359076/US-farmers-fear-the-return-of-the-Dust-Bowl.html>.

say that aquifer states “shall exercise [their] sovereignty in accordance with international law and the present draft articles.”⁵⁰ But this is like closing the barn door after the horse has escaped: it’s too late. We’re back to using a shared resource until our neighbor cries “ouch,” then putting the burden on the neighbor to establish that our use is unlawful. This is a very difficult task indeed, especially in an international system that lacks compulsory third-party dispute resolution mechanisms. And even assuming our neighbor can prove that our use is unlawful, by then the damage may already have been done; at the very least, infrastructure will be in place that may be costly and difficult to reverse, and people will have come to rely on the supplies of the resource.

The danger spawned by the ILC’s approach materialized very quickly in the form of the 2010 Agreement on the Guarani Aquifer.⁵¹ That treaty, between Argentina, Brazil, Paraguay, and Uruguay, begins by stating that “[e]ach Party exercises sovereign territorial domain over their respective portions of the Guarani Aquifer System”⁵² Ambassador Candiotti, in his capacity as an impartial expert on international law in the ILC, did well for his country. But, I would submit, not for sustainability generally. Rather than sustainability, the ILC struck a blow here for Garrett Hardin’s Tragedy of the Commons.⁵³ But in this case, it is not who has the most cattle, but who has the biggest straw in the milkshake—or, the biggest pump—that wins. In reality, however, no one ultimately wins in such a scenario because, as Hardin so aptly put it, “[r]uin is the destination toward which all men rush, each pursuing his own best interest”⁵⁴ Especially when the resource in question is as vital as water, this is a true tragedy.

In the end, the conclusion is this: that no, this is not a good way to achieve sustainability. What would be better? It seems to me that if some overarching principle is necessary to guide our efforts to achieve sustainability, that principle is equity. This is equity both within and between nations; that is, both inter- and intra-generational equity. Sovereignty is the enemy of sustainable management of shared natural resources. We do not seem to have learned that yet. I only hope that we do, before it is too late.

50. 2008 ILC Report, *supra* note 30, at 21.

51. See *Acordo sobre o Aquífero Garani* [Agreement on the Guarani Aquifer], Arg.-Braz.-Para.-Uru., Aug. 2, 2010, Ministério Das Relações Exteriores [Brazilian Ministry of Foreign Affairs].

52. *Id.* art. 2.

53. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244-45 (1968) (suggesting that individual actors will overdraw resources from a common pool out of self-interest, despite their understanding that by doing so, they will eventually destroy the resource).

54. *Id.* at 1244.