

LIMITING SOVEREIGNTY THROUGH GLOBAL GOVERNANCE?*

Piotr Szwedo**

1. Introduction: the Concept of Sovereignty in International Law

International law regulates interactions between sovereign states and categorizes them as its primary subjects. Sovereignty constitutes a source and a point of reference for fundamental institutions of international law such as state's jurisdiction, statehood, subjectivity, the principle of self-determination, non-intervention in internal matters or immunities. Therefore, the idea of sovereignty constitutes the fundamental core of international law. Transformations of the international community and the growing role of international organizations gave rise to questions regarding the nature and role of sovereignty in changing circumstances. Simultaneously, the approach to sovereignty determines the answer to

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** Ph.D., Lecturer in the Department of Public International Law at the Jagiellonian University.

such central questions as legitimacy and the validity of the international legal order.¹

Between numerous designations of sovereignty one may recall the individual opinion of judge Anzilotti from 1931 in which he compared it to independence and described it as a situation in which “the State has over it no other authority than that of international law”². Simultaneously, sovereignty is also linked with the idea of state equality. This relationship is expressed in the United Nations Charter, which bases the United Nations Organization on the principle of “sovereign equality”.³

International law and sovereignty are mutually interrelated. Protecting states’ equality and sovereignty required their submission under the principles of international law. At the same time the emergence of international law required an existence of sovereign states which generated the norms of this legal regime.⁴ In the *Lotus case*, the Permanent Court of International Justice (hereinafter the PCIJ) stated that

[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁵

The last sentence inspires one to ask whether or how a state’s sovereignty may be limited or restricted.

¹ Roman Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym* [State’s Sovereignty. Reconstruction and Meaning of the Notion in International Law], Kraków 2004, at p. 169 *et seq.*

² Individual opinion of Judge Anzilotti, 5.9.1931, to advisory opinion on Customs Regime between Germany and Austria A/B41 at 57, also available at http://www.icj-cij.org/pcij/serie_AB/AB_41/02_Regime_douanier_Opinion_Anzilotti.pdf, accessed 16.4.2014.

³ Charter of the United Nations, 24.10.1945, 1 UNTS XVI.

⁴ Samantha Besson, *Sovereignty*, [in:] Rüdiger Wolfrum (ed.), ‘Max Planck Encyclopedia of Public International Law’, para 30, Oxford 2013, also available at <http://opil.ouplaw.com/home/EPIL>, accessed 20.5.2014.

⁵ The Case of the S.S. Lotus, Publications of the Permanent Court of International Justice, 7.9.1927, A 10, at p. 18.

2. Limited vs. Absolute Sovereignty

Many controversies related to sovereignty are related to the problem of how one understands this concept, especially in the aspect of its possible divisibility. Jean Bodin is sometimes seen as the father of the absolutist conception of sovereignty.⁶ In his opinion: “*la souveraineté est la puissance absolue et perpétuelle d’une République*”⁷. This is what “the Latins call *Maiestatem*, the Greeks *akra exousia*, *kurion arche*, and *kurion politeuma*; the Italians *Segnorìa*, and the Hebrewes *tomech shévet*, that is to say, the greatest power to command”.⁸ Bodin was skeptical of democracy or even aristocratic governments. He argued in favor of absolute sovereignty realizing subordination and supremacy.⁹ Bodin is often perceived as a founder and advocate of the indivisibility of sovereignty. The absolute monarch shall rule the country in an absolute and indivisible manner as God. The king shall be also absolute in the sense that he would be “absolved” from subservience to the laws he himself proclaimed. Bodin postulated that in every stable political order there must be an ultimate power, whether it be a single person or a group of persons, which makes the laws and therefore stands above them.¹⁰ Politically, Bodin’s writings were inspired by the events of religious wars in 16th century France, especially by the St. Bartholomew’s Day Massacre. He was arguing against the Huguenots who sought to limit the monarch’s authority and to resist and overthrow the monarch; for divisible authority and sovereignty. Nevertheless, even Bodin saw certain limits to sovereignty, resulting from the laws of God and nature.¹¹

The absolute perception of sovereignty inspired the evolution of this concept towards an idea of a “meta-power”, in the sense of the ability to

⁶ Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfers*, ‘Stanford Journal of International Law’ 2013, vol. 49, p. 371, at p. 408.

⁷ Jean Bodin, *Six livres de la République*, Paris 1583, Book One, Chapter VIII, at p. 122.

⁸ English translation of Bodin’s book, note 8 *supra*, by Richard Knolles, titled *The Six Books on a Commonweale*, London 1606, at p. 84.

⁹ See Rafał Lis, *Od Bodina do Rousseau: wokół paradoksu suwerenności i ludowładztwa [From Bodin to Rousseau: about paradox of sovereignty and democracy]*, forthcoming in ‘Horyzonty Polityki’.

¹⁰ Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, ‘Yale Law Journal’ 1993, vol. 103, p. 1651, at p. 1668.

¹¹ *Six books on a Commonwealth*, note 9 *supra*, at 92.

define one's limits of authority. The idea of *compétence de la compétence* would result in the capacity to determine the extent of rights and duties.¹² Such a conception of sovereignty was also supported by the Münster-Osnabrück treaty ending the Thirty Year's War. The rulers of numerous German states were recognized as sovereigns in the defined limits of their territories.

This meta-competence remained in competition with the "non-meta" approach, namely with the vision of sovereignty as a sum of competences. Henry Summer Maine, a 19th century English legal comparative scholar and a legal advisor to the government of India, viewed sovereignty as an aggregate of powers:

Sovereignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers or privileges [...] A sovereign who possesses the whole of this aggregate of rights is called an independent sovereign; but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor, and some with another. Sovereignty has always been regarded as divisible.¹³

Obviously, Maine's viewpoint was inspired by colonialism. If a subject possessed all separable powers, it was independent; but since sovereignty is divisible, other forms of non-independent subjectivity or statehood are possible, for example colonies with a variable degree of autonomy and subordination. This approach led some scholars to arrive at the concept of quasi-sovereignty to describe the status of sub-polities within empire-states that were said to retain some measure of authority over their internal legal affairs while holding only limited capacity to form international relations.¹⁴

This confusion of two approaches may be analyzed against the backdrop of at least two examples: international watercourses and international organizations.

¹² Donat Pharrand, *Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint*, 'Canada-United States Law Journal' 1994, vol. 20, at p. 19.

¹³ Minute by Sir Henry Maine dated 22.3.1864 in Sever, *Documents*, vol. 1, at 251, quoted in Barbara N. Ramusack, *The New Cambridge History of India, The Indian Princes and their States*, Cambridge, 2004, at p. 94.

¹⁴ Lauren Benton, *From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900*, 'Law and History Review' 2008, vol. 26, p. 595, at p. 596.

a. International watercourses

The opposition between absolute and limited territorial sovereignty has emerged in the context of shared natural resources, such as watercourses. According to classical international law, a river which crosses several states on specific distances is an object of their sovereignty on respective parts. The problem becomes more practical and serious in relatively dry parts of the world, such as the Middle-East where riparian states tend to maximize the seizure of water in order to achieve autonomy in their water management. This approach is also known as the doctrine of absolute territorial sovereignty, or the Harmon Doctrine. The latter term originates from an 1895 water dispute between the United States and Mexico. In this dispute, U.S. citizens diverted water from the Rio Grande River while the river passed within U.S. territory. This diversion of water, however, reduced the flow of the Rio Grande River to Mexican farmers. Mexico argued that, since their citizens had utilized the Rio Grande's water earlier than U.S. citizens, their claim took precedence over U.S. citizens' claims. The U.S. Attorney General, Judson Harmon, argued that the United States, as the upper riparian, could divert the flows of the Rio Grande, while within its territory, without considering the effect of its action upon a lower riparian. Subsequently, several states have asserted this doctrine to support their use of a watercourse.¹⁵

Disputes based on this position are well known in the context of the Euphrates and the Tigris. Turkey, as the upstream riparian state, has adopted a position based on absolute sovereignty which would allow it to use as much water as it wishes for irrigation purposes, or even to sell such water regardless of the needs of any downstream riparian states, namely Syria and Iraq. The only real obstacle of not applying the Harmon doctrine is a military threat. The situation of the Egypt and the Nile represent prime examples of such a situation. Egypt is a downstream state, whilst simultaneously being a regional military power, which prevents Sudan and Ethiopia from exercising the Harmon Doctrine.¹⁶ Similar tensions emerged around

¹⁵ Kevin P. Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of the Non-Navigational Uses of International Watercourses: Do They Adequately Address All The Major Issues Of Water Usage In The Middle East?*, 'Fordham International Law Journal' 1995, vol. 19, p. 2180, at pp. 2207-2208.

¹⁶ Scott L. Cunningham, *Do Brothers Divide Shares Forever: Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issues*, 'University of Pennsylvania

the project of the Farakka Dam on the Ganges River. During negotiations on the legality of the project, Bangladesh argued that the barrage had substantial effect on the flow of Ganges into the country. India asserted that the construction of such a dam is “the natural right of any country,” and that any water collected behind the dam belongs exclusively to the collecting country.¹⁷

The doctrine of absolute territorial sovereignty was criticized by scholars¹⁸, even if it is still used by upstream states in international disputes. As a counterpoint, the doctrine of absolute territorial integrity was developed. The theory is that a downstream riparian state may demand the continuation of the full flow of the river from an upper riparian state, free from any diminution in the quantity or quality thereof.¹⁹ This theory considerably limits the disposability of international waters by upstream states. It demands an “integral” approach to shared rivers.

Between the two theories lies the theory of “limited territorial sovereignty”, which holds that a state may make use of the waters flowing through its territory to the extent that such use does not interfere with the reasonable use of waters by co-riparians.²⁰

The proposed compromise based on the criterion of “reasonable use” reflects the Roman maxim “*Sic utere tuo ut alienum non laedas*” – one must use its own property in such a way as not to harm others’ [rights]. Scholars indicated²¹ that the principle of limited territorial sovereignty can be deducted from previous decisions of international tribunals concerning air pollution, military dangers and transboundary watercourses. In the *Trail Smelter* decision, the arbitrators clarified that: “[a] State has the right to use or permit the use of its territory in such a manner as to cause injury [...] in, or to, the territory of another or to the properties or persons therein”²².

Journal of International Economic Law’ 2000, vol. 21, p. 131, at p. 144.

¹⁷ *Ibidem* at p. 145.

¹⁸ Aaron Schwabach, *Diverting the Danube: The Gabcikovo-Nagyymaros Dispute and International Freshwater Law*, ‘Berkeley Journal of International Law’ 1996, vol. 14, p. 290, at p. 326.

¹⁹ *Ibidem*

²⁰ Albert E. Utton, *International Water Quality Law*, ‘Natural Resources Journal’ 1973, vol. 13, p. 282, at p. 283.

²¹ Aaron Schwabach, *Diverting the Danube*, note 19 *supra*, at p. 327.

²² Award of 16.4.1938, and 11.3.1941, III Reports of International Arbitral Awards 1965, available at http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf, accessed 19.4.2014.

In the *Corfu Channel* judgment, the International Court of Justice stated: “[it is] every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” which is a “general and well-recognized principle”²³. In the context of international watercourses, the decision based on the concept of reasonable use was invoked during the arbitration decision in the *Lake Lanoux* case, where arbitrators stated that:

according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.²⁴

The limited sovereignty approach was later supported by the Institute of International Law in its Resolution on the Utilization of Non-Maritime International Waters of 1961. Article 2 provides that: “[e]very state has the right to utilize waters which traverse or border its territory, subject to the limitations of international law [...] The right is limited by the right of utilization of other states interested in the same watercourse or hydrographic basin.”²⁵ This approach was also introduced into the text of the Convention on the Law of the Non-Navigational Uses of International Watercourses²⁶. According to Article 5:

[w]atercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

Article 6 enumerates different factors which should be taken into account when assessing the “equitable and reasonable manner” of water

²³ The *Corfu Channel Case (Merits) Judgment* of 9.4.1949, Reports of Judgments, Advisory Opinions and Orders, 22.

²⁴ *Lake Lanoux Arbitration* of 16.11.1957 (France v. Spain), Reports of International Arbitral Awards, vol. XII, p. 281; International Law Reports, vol. 24, p. 101, at para 22.

²⁵ Institut de droit international, *Utilisation of Non-maritime International Waters (Except for Navigation)*, Session of Salzburg – 1961, Art. 2, available at http://www.idi-iil.org/idiE/resolutionsE/1961_salz_01_en.pdf, accessed 19.4.2014.

²⁶ Concluded in New York, 21.5.1997, G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997).

exploitation; they are of natural (e.g. geographic, hydrological, climatic), but also of social and economic character; they shall take into account the existing and potential uses and also the availability of alternatives.²⁷

As an alternative to “limited territorial sovereignty”, the “community theory” was proposed. This involves a “sacrifice of sovereignty” by all basin states²⁸. It is a rather aspirational approach which views water as a common good, shared by riparian states or even the whole international community as a “common cosmopolitan good”²⁹. This method would require a communitarization or even an extraterritorialization of international rivers, which would be subject to a common management and dispute settlement system.³⁰ Some elements of the community theory were expressed in the PCIJ’s decision on the International Commission of the River Oder: “community of interest in a navigable river becomes the basis of a common legal right”³¹. A similar approach was proposed with regard to international ground waters in the Bellagio Draft Treaty. Under the Article III of this cooperation, the transboundary groundwaters would be managed by a joint commission decisions which would be enforced by the state-parties.³² In the Mar del Plata 1977 Action Plan a milder approach was suggested: the regulation “must be exercised on the basis of the equality, sovereignty and territorial integrity of all States”³³.

²⁷ *Ibidem* art. 6 (1).

²⁸ Aaron Schwabach, *Diverting the Danube*, note 19 *supra*, at p. 336.

²⁹ See Gabriel Bouin Genest, Frédéric Julien, Sylvie Paquerot, *L'eau en commun. De ressource naturelle à la chose cosmopolitique*, Quebec 2012.

³⁰ See Scott L. Cunningham, *Do Brothers Divide Shares Forever*, note 17 *supra*, at p. 149.

³¹ Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Permanent Court of International Justice judgement of 10.9.1929, Collection of Judgments, A 23, No. 16, at p. 27.

³² Bellagio Draft Treaty Concerning the Use of Transboundary Groundwaters; completed by an international group of independent experts, published in Robert D. Hayton, Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, ‘Natural Resources Journal’ 1989, vol. 29, p. 643; see also Stephen McCaffrey, *International Groundwater Law: Evolution and Context*, [in:] Samlan M.A. Salman (ed.), ‘Groundwater Legal and Policy Perspectives. Proceedings of the World Bank Seminar’, World Bank Technical Paper no. 456, Washington D.C., 1999, at p. 154 *et seq.* and Annex 3 therein at p. 224 *et seq.*

³³ Report of the United Nations Water Conference, Mar del Plata, Argentina, U.N. Doc. El CONF.70/29, at p. 53, also available at <http://www.ircwash.org/sites/default/files/71UN77-161.6.pdf>, accessed 22.4.2014.

b. International organizations

The institutionalization and communitarization of international water management brings with it another question, which requires a much greater-developed answer in times of integration and globalization. It involves an analysis of the interactions between states' sovereignty and the transfer of state powers to international organizations. Since the emergence of the post-war order, hardly any area of regulation has avoided internationalization. This phenomenon has both a regulatory and an institutional dimension.

Due to the quasi-universal membership of the United Nations, [almost] every state has shared its competence to act within different spheres of international relations. The most evident example of this is the resignation of self-assessments regarding the legality of the use of military force, which is now entrusted to the Security Council. The Second World War has clearly demonstrated to the international community that global peace and security cannot be effectively managed in the absence of an institutional structure. At the same time, it is too serious a matter to leave to the vagaries of national decision-making. According to the principle of subsidiarity, a higher level of decision-making should be involved if actions at the lower level cannot be effective. The prevention of global armed conflict could only take place at a global level. Nevertheless, the construction of the United Nations provided an institutional umbrella to a variety of problems which then became co-regulated by international law. Labor standards, food security and agriculture, health, finance and banking, air transport, maritime questions, telecommunication, meteorology, intellectual property, migration and refugees, atomic energy are the examples stemming from the activity of the UN Specialized Agencies.³⁴ Moreover, the activity of the Bretton Woods institutions resulted in a decisive impact of international law on economic matters such as trade, investment and capital flow.

Membership of the aforementioned organization occurred by way of treaty ratification by states. In this manner, the acceding states expressed their will to co-shape their legal regulations via international law and standards provided by different institutions. Internationalization would be an activity resulting from the transfer of state powers to intergovernmental organizations.

³⁴ The list is available at <http://www.un.org/Overview/uninbrief/institutions.shtml>, accessed 22.4.2014.

This phenomenon achieved an additional dimension in consequence of the emergence of regional integration organizations. The first symptoms of the integrational trend appeared in the 19th century, but it reached its full development following World War II. Scholarship³⁵ distinguishes between two models of integration: European and American. The former is of dynamic character – the ties of integration are to be constantly strengthened, including at a non-economic level; it has a well-developed legal system. The latter is rather static in nature, based on the idea of a free trade association where states possess relative autonomy, even in the areas that are subject of legal harmonization.

Regional integration inspired experts in international relations to provide the concept of sovereignty's relativization. This is manifested by the emergence of growing limits on states' unique authority and the growth of international organizations competences; the abandonment of unanimity requirements in voting procedures, the authority to bind states by the organizations' regulations, a growth in the authority of organs where not all member states are represented, the growth of organizations' economic power and their capacity to finance and influence state policy.³⁶ The debate about sovereignty's relativization led to two concurrent approaches about sovereignty, which invoke discussions regarding its divisible or non-divisible character.

The more Anglo-Saxon approach, exemplified in Maine's views, opted for sovereignty's divisible character. International economic lawyers emphasized its dynamic and relative character: "sovereignty' is the set of powers of any particular state, recognizing that this set of powers has evolved significantly since 1648, and that this set of powers differs among states. Thus sovereignty is contingent, both inter-temporally and intra-temporally."³⁷ Michael Lind has argued that the proper conception of sovereignty should not be viewed as a fixed quantity but, rather, as a divisible bundle of powers. According to Lind, "divisible sovereignty" has deep historical roots; absolutist notions of sovereignty have displaced this more accurate and

³⁵ See Cezary Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* [European Community Law. Theoretical and Practical Problems], vol. I, Warszawa 2000, at p. 3.

³⁶ *Ibidem* at p. 266, referring to Irena Popiuk-Rysińska, *Suverenność w rozwoju stosunków międzynarodowych* [Sovereignty and the Development of International Relations], Warszawa 1993, at pp. 185-188.

³⁷ Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 'Canada-United States Law Journal' 1994, vol. 20, p. 399, at p. 402.

constructive conception of how a government may consent to disbursing some of its powers.³⁸ As Krasner has suggested, “pure and exclusive state sovereignty never truly existed and such sovereignty was merely a myth and “organized hypocrisy”.”³⁹ The concept of “popular sovereignty” built in opposition to Bodin’s absolutistic views was more adaptable to argue in favor of more democratic concepts of sovereignty, with an idea of a people coming together to choose a form of government.⁴⁰

Contrasting with the idea of “divisible sovereignty” is the concept of “indivisible sovereignty” which is conferred to other subjects, such as international organizations. In this case, a clear distinction should be made between the “limitation of sovereignty” and the “limitation of the *exercise* of sovereignty”.⁴¹ In the former case, a state assumes a voluntary obligation not to act in certain situations in which the organization is entitled to operate. Pursuant to this view, conferring competences to international organizations does not constitute a limitation of sovereignty, since this process is always reversible.⁴²

In the milestone cases of the Court of Justice of the European Communities (now Court of Justice of the European Union, hereinafter referred to as the ECJ) *Van Gend & Loos* and *Costa v. E.N.E.L.* the court mentioned used the concept of limitation of “sovereign rights”.⁴³ It seems that the ECJ was rather reluctant to provide a clear answer about sovereignty’s divisibility and to explicitly choose one of the conflicting doctrines.⁴⁴

³⁸ Michael Lind, *Compounded and Divided: Toward a Synthesis of Popular Sovereignty and Divisible Sovereignty* 3, at p. 21 (unpublished manuscript), cited in Sarah Krakoff, *The Virtues and Vices of Sovereignty*, ‘Connecticut Law Review’ 2006, vol. 38, p. 797, at pp. 801-802.

³⁹ Comment on Stephen D. Krasner’s, *Sovereignty: Organized Hypocrisy*, Princeton 1999 [in:] Y. Blank, *Spheres of Citizenship*, ‘Theoretical Inquiries in Law’, p. 411, at p. 417.

⁴⁰ See Lind cited in Krakoff, note 37 *supra*, at p. 802.

⁴¹ See Cezary Mik, *Europejskie prawo wspólnotowe*, note 34 *supra* at p. 267.

⁴² The Polish Constitutional Tribunal has emphasized that, even under the legal status before Lisbon Treaty, in the event of an irresolvable contradiction between EU and Polish law, a state may always leave the organization. See Decision of the Constitutional Tribunal K 18/04, 11.5.2005, para. 6.4. at p. 43, thesis available in Polish OJ 2005 no 86, item 744.

⁴³ See Judgment of the Court of 5.2.1963 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, ECR 1963 at p. 3; Flaminio Costa v E.N.E.L., judgment of the Court of 15.7.1964, Case 6-64, ECR 1964 at p. 1141.

⁴⁴ Cezary Mik, *Europejskie prawo wspólnotowe*, note 34 *supra* at p. 270.

Nevertheless, in times of integration, sovereignty shall be understood as an authority which is not transferred. It means a potential capacity to regulate all relevant matters of the state. In particular factual or legal circumstances, the state can be forced to make given choices and has no ability to act otherwise. Nevertheless, factual limitations or transferred powers should not be confused with the ability to delegate. Sovereignty is a meta-norm which provides the possibility to allocate a state's competences. Such a concept of sovereignty may be reconciled with restrictions stemming from the law of international watercourses (see para. 2.a *supra*). The obligation not to cause significant environmental harm is a norm of international customary law and a fundamental principle of law expressed by the maxim "*Sic utere tuo ut alienum non laedas*".⁴⁵ Such obligations were tacitly accepted by states and therefore do not necessarily constitute a limitation of their sovereignty but rather a voluntary limitation resulting from their consensual acceptance of certain obligations.

3. Globalization and global governance

Leaving aside the cases of internationalization described *supra* (paras 2.a and 2.b), one may ask about the relationship between sovereignty and the challenges presented by globalization. The latter is a multidimensional phenomenon. It is an object of interest by scientists from various academic domains. Instead of attempting to construct a definition, it is possible to provide certain characteristics of this phenomenon that will lead to legal consequences. As examples of globalization's manifestations one can indicate: trade liberalization and the immense flow of information. The post-war world has witnessed a systematic reduction of barriers to trade which has accelerated, due to the General Agreement on Tariffs and Trade and subsequently the World Trade Organization, combined with the activities of numerous regional integration organizations, especially following the collapse of the socialist economies. The era of transformations of the former Eastern Bloc resulted in a quasi-omnipresence of the capitalist economy model which is oriented towards trade expansionism. With the increasing role of international financial institutions such as the World

⁴⁵ Stephen C. McCaffrey, *The Law of International Watercourses*, Oxford 2007, at pp. 415-416.

Bank, the International Monetary Fund and the growth of foreign direct investment the economic interdependence between states and private subjects has grown exponentially. This tendency has been clearly shown by the domino effect of the 2008 economic crisis.

Globalization also had its effect on law. International relations, which had hitherto been dominated by state actors, witnessed a growth in the role and activity of non-state entities. This phenomenon led to a progressive overtaking of several functions previously executed by states. Such growing activity may be illustrated by several examples. However, what is more important is to question how it affects sovereignty. While internationalization occurs as a result of states' consent expressed via the ratification of treaties, globalization is a phenomenon which may take place through the avenues of private law and in consequence is not regulated by sources of international public law. It seems that, in some dynamically evaluating areas, national legislators, or the even-more static international community, are unable to maintain pace with the changing reality. For that reason, civil society or industry fill the legal vacuum with regulations such as those stemming from the Internet Corporation for Assigned Names and Numbers (hereinafter the ICANN, see para. 3.a *infra*). Some areas, such as accountancy, require dynamic harmonization in times of trade liberalization and frequent foreign direct investment (see para. 3.b *infra*). Moreover, certain areas regulated by public law, such as environmental protection (see e.g. ISO 14000 standards⁴⁶) or security and military services (see para 3.c *infra*), are becoming the subject of private self-regulations.

a. ICANN

Not many phenomena are as cross-border in their essence as the Internet. Surprisingly, most of the aspects of cyberspace activity are not regulated by international law. Many problems remain unregulated or require the adaptation of pre-digital era legal institutions to new circumstances. International law is relatively slow in the process of law creation. Either it requires a longstanding practice, or the time-consuming process of negotiating and ratifying treaties. If done too hastily, without a transparent procedure for providing comments and suggestions, the result may

⁴⁶ Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 'Global Governance' 1998, vol. 4, p. 295.

lead to projects being rejected by stakeholders, as was the case with the Anti-Counterfeiting Trade Agreement, which sought to regulate several aspects of intellectual property rights in cyberspace.

The internet is an omnipresent reality requiring institutionalization. At the same time, it is a natural cross-border phenomenon requiring transnational regulations. One problem to which it gave rise was the administration of Internet names and domains. This is done by the ICANN. However, the latter is not an intergovernmental organization. It was created in 1998 as a private, nonprofit corporation⁴⁷ under the California Nonprofit Public Benefit Corporation Law⁴⁸ and has its headquarters in Playa Vista, Los Angeles California. The ICANN is governed by a Board of Directors composed of eight voting members selected by the Nominating Committee, six members elected by the Supporting Organizations an At-Large seat filled by an At-Large Organization; and the President / CEO, appointed by the Board.⁴⁹

The ICANN's activity may lead to interactions with public policies or national laws. For that reason, within the Corporation's structures the Governmental Advisory Committee (hereinafter the GAC) was created. The GAC is composed of representatives of governmental authorities "distinct economies recognized on international fora" (e.g. Hong Kong, Taipei), multinational governmental organizations may join the GAC as observers (e.g. International Telecommunication Union, UNESCO, World Intellectual Property Organization, INTERPOL and regional organizations such as the OECD, Asia Pacific Forum, and Council of Europe, European Commission representing the EU, Organization of American States).⁵⁰ The role of the GAC is to provide advice on the ICANN's activity which affects public policy issues. Such advice shall be duly taken into account in the formulation and adoption of policies.⁵¹ The ICANN's activity overlaps with public policies, since it manages the Domain Name System (DNS), which translates

⁴⁷ Para 1 of the Preamble of the Internet Corporation for Assigned Names and Numbers (ICANN) Governmental Advisory Committee (GAC) – Operating Principles, available at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>, accessed 1.5.2014.

⁴⁸ Division 2 of the California Corporation Code.

⁴⁹ Article 6 of the Bylaws for Internet Corporation for Assigned Names and Numbers, available at <http://www.icann.org/en/about/governance/bylaws#VI>, accessed 29.4.2014.

⁵⁰ Article I, Principle 1, of ICANN's Operating Principles, note 47 *supra*.

⁵¹ *Ibidem* para. 5 of the Preamble; "The GAC is not a decision making body", Article I, Principle 2.

human-friendly computer hostnames to IP addresses (e.g. <http://priel.uksw.edu.pl/> to 195.160.178.14).⁵² Without a functional DSN, internet users would have to know the numeric address of the Web site they wanted to access. ICANN is also responsible for dispute resolution regarding domains, for example when two or more trademark holders applying for the same domain name or domain names are intended to impugn a trademark holder. ICANN also decides how many generic top-level domains will be created, such as .gov, .com, mobi, .edu, etc.⁵³ Country code top level domains are to be operated in trust by the Registry for the public interest.⁵⁴ Those examples of ICANN's regulatory activity clearly indicate that it overlaps with states' public policies. However, effective management of the Internet takes place within a framework of a private corporation functioning under the laws of California. Such a structure raises doubts about the level of accountability at national and international levels and gives rise to questions regarding the need to adopt legal instruments of a public nature.⁵⁵

b. International Accounting Standards Board

In times of trade liberalization, global supply chains, multinational corporations and transnational investments, the need for harmonized system of financial accountability has arisen. The accountability standards are proposed by International Accounting Standards Board, which replaced the International Accounting Standards Committee in London. It acts as a body of the International Financial Reporting Standards Foundation (IFRSF), which was created as a not-for-profit, private organization under the laws of Delaware, working in the public interest. The IFRSF's objective is "to develop a single set of high-quality, understandable, enforceable and globally accepted International Financial Reporting Standards (IFRSs) through its standard-setting body, the International Accounting Standards Board (IASB)".⁵⁶ The Board's task is to develop and publish the

⁵² See Article 6 of the ICANN's Bylaws, note 49 *supra*.

⁵³ Those and other examples provided in Jonathan GS Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"*, 'Public Administration Review' 2005, vol. 65, no 1, at pp. 100-101.

⁵⁴ Para (6)(4) of the Preamble the ICANN's Operating Principles, note 45 *supra*.

⁵⁵ See Jonathan GS Koppell, *Pathologies of Accountability*, note 53 *supra*, at p. 105.

⁵⁶ <http://www.ifrs.org/The-organisation/Pages/IFRS-Foundation-and-the-IASB.aspx>, accessed 7.5.2014.

accountability standards. Its standards were listed by the Financial Stability Board (hereinafter referred to as the FSB)⁵⁷ as internationally accepted and important for sound, stable and well-functioning financial systems. The FSB is not a typical intergovernmental organization but, rather, a network of governmental and international representatives which act collectively to coordinate financial policies.

The IASB's standards served as a reference point for the harmonization of accountability rules at an EU level. The purpose of the 1606/2002 Regulation was to ensure a high degree of transparency and comparability of financial statements and hence an efficient functioning of the internal market.⁵⁸ The regulation makes direct reference to the IASB's standards as "international accountancy standards".⁵⁹ Nevertheless, they do not automatically become binding within the EU but must traverse the endorsement process. In 2008 the Commission accepted Regulation 1126/2008 in which it adopted certain international accounting standards listed in the annex thereto.⁶⁰ National regulations, including the Polish Act on Accountancy, make reference to international accountancy standards. If some of these are not already binding via EU law, they may be applied on a subsidiary bases.⁶¹

The United States applies an alternative set of accountancy standards known as the Generally Accepted Accounting Principles (GAAP) and progressive harmonization is taking place. In 2008 the American Security and Exchange Commission released a roadmap which previewed the adoption

⁵⁷ The Financial Stability Board replaced the Financial Stability Forum, which has been established to coordinate at the international level the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies. It brings together national authorities responsible for financial stability in significant international financial centers, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts, see <http://www.financialstabilityboard.org/about/overview.htm>, accessed 7.5.2014.

⁵⁸ Article 1 of the Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19.7.2002 on the application of international accounting standards, OJ L 243, 11.09.2002, pp. 1-4.

⁵⁹ *Ibidem*, Article 2.

⁶⁰ Commission Regulation (EC) No 1126/2008 of 3.11.2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ L 320/1, 29.11.2008, pp. 1-481.

⁶¹ Article 10(3) of the Polish Act on Accountancy of 19.9.1994, Polish OJ 1994, no 121, item 591, as amended.

of IFRS standards in 2014. The exact date would depend on the size of the issuer (filer)⁶². As the Commission has remarked, changing the system of producing financial statements would involve costs.⁶³ However, leaving the system unchanged would come at an even higher price, from a longer time perspective, since US-incorporated economic operators would be required to translate their documents into an alternative accountancy system and vice versa.

c. Military outsourcing

Globalization and privatization has also entered into areas traditionally conserved as public. In 1970s a trend of outsourcing military functions emerged; this became truly popular after 2001, alongside military operations in Afghanistan and Iraq. The biggest companies, such as Blackwater, G4S, Aegis, Erinys, Triple Canopy, and DynCorp work for the British and American governments but also for private companies (e.g. General Electric), international organizations (e.g. United Nations) and non-governmental international organizations (e.g. Care). The spectrum of services provided is broad: from cooking, driving, and protecting individuals, locations, and convoys, to training, intelligence gathering, target identification, the operation of complex military systems, and prisoner interrogation.⁶⁴

Since few states regulated military outsourcing⁶⁵, the normative lacuna has been filled by multi-stakeholder initiatives, such as the International Code of Conduct for Private Security Service Providers (hereinafter the ICoC)⁶⁶. The Code emerged as a consequence of the Montreux

⁶² Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards By U.S. Issuers, especially p. 35, available at <http://www.sec.gov/rules/proposed/2008/33-8982.pdf>, accessed 8.5.2014.

⁶³ *Ibidem*.

⁶⁴ See D. Richemond-Barak, *Regulating War: A Taxonomy in Global Administrative Law*, 'European Journal of International Law' 2011, vol. 22, p. 1027, at pp. 1029-1030.

⁶⁵ With notable exception of United States, e.g. the International Transfer of Arms Regulation which governs services sold to another governments by private security companies, 22 Code of Federal Regulations 120-130; and South Africa: Regulation of Foreign Military Assistance, published 10.5.1998, 'Government Gazette', 395, no 18912.

⁶⁶ International Code of Conduct for Private Security Service Providers, available at http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf, accessed 9.5.2014.

Document, which is not an international treaty but the result of a common initiative of the Swiss government and of the International Committee of the Red Cross. It reaffirms pre-existing norms of international humanitarian law and provides guidance on their applicability to private military and security companies.⁶⁷ The ICoC provided a detailed form of commitments which has already been signed by 708 subjects.⁶⁸ Formally, the ICoC does not create additional legal obligations or liabilities beyond those which already existed under national or international law.⁶⁹ In 2013 the ICoC was complemented by the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers (called 'Articles of Association', hereinafter referred to as the AoA).⁷⁰ The purposes of the AoA are to oversee implementation of the ICoC "and to promote the responsible provision of security services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients".⁷¹ Correct implementation thereof would be confirmed by way of certification.⁷² The Association would also monitor and report alleged violations of the Code.⁷³ The Association will act as a private body under Swiss civil law but its membership is open to private security companies, civil society organizations and states, which classifies it rather as a mixed organization.⁷⁴

Self-regulatory instruments, such as the ICoC, exist in parallel to formal national or international sources. As the authors of the Montreux Documents have highlighted: "[a]n international treaty would have taken many years to negotiate. Also, considering the very divisive nature of the issue and the strong political positions involved, a humanitarian, apolitical

⁶⁷ See The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf, accessed 9.5.2014.

⁶⁸ See The International Code of Conduct for Private Security Service Providers Signatory Companies, Complete List as of 1.8.2013, available at http://www.icoc-ppsp.org/uploads/Signatory_Companies_-_August_2013_-_Composite_List2.pdf, accessed 9.5.2014.

⁶⁹ See para. 14 of the Code, note 66 *supra*.

⁷⁰ Available at http://www.icoc-ppsp.org/uploads/ICoC_charter.pdf, accessed 9.5.2014.

⁷¹ *Ibidem*, Article 2.2.

⁷² *Ibidem*, Article 3.3.1.

⁷³ *Ibidem* Article 12.1.

⁷⁴ *Ibidem*, Articles 1, 3.

approach was more likely to have tangible and practical results.”⁷⁵ Therefore, private regulations play a subsidiary role; nevertheless, they may be more effective and practical. The primary sanction of note following the Code would be a loss of contractors which require their observance.

4. Conclusions

The article argues that sovereignty is indivisible and shall not be understood as a state’s ‘aggregate of powers’; it is rather a meta-norm and constitutes the power to delegate certain state competences. Such delegation may take place as a result of concluding treaties in which international subjects agree to limit their ability to act in exchange of rights or privileges. More particularly, such limitation may result from entering into cooperation within the framework of international organizations, especially those seeking greater integration. Alternatively the limitation of powers may result from tacit consent regarding particular legal norms resulting from international custom or general principles of law. Such would be the case of “limited sovereignty” which reduces a state’s ability to dispose of water from international watercourses which cut across their territories. Nevertheless, again it does not affect sovereignty but merely impacts upon particular capacities to act. The case of global governance is, to a certain extent, similar. Global governance is demonstrated in the activities of formally private subjects which nevertheless affect the sphere of public law. Such is the case of the Internet, accountancy and military outsourcing. States tolerate the activity of such subjects, including their ability to act as “private legislators” governing particular areas. Nevertheless, by implicitly or explicitly accepting such activities – for example by making reference to their norms in particular regulations – states do not definitively lose their ability to recapture the given sphere of regulation. These areas remain the subject of their sovereignty. If states leave certain areas unregulated, they do it mostly for practical or utilitarian reasons.⁷⁶ Abandoning or acting against such private standards is possible, although it may generate a high economic or political price to be paid.

⁷⁵ Explanatory comments to the Montreux Document, note 65 *supra*, at 42.

⁷⁶ See Roman Kwiecień, *On Some Contemporary Challenges to Statehood in the International Legal Order: International Law between Lotus and Global Administrative Law*, ‘Archiv des Völkerrechts’ 2013, vol. 51, p. 279, at p. 302.