From Sovereign Equality to Equally Reduced Sovereignty*

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THE CONCEPT OF SOVEREIGNTY AND ITS CONTEMPORARY CHALLENGES

Sovereignty is a legal and political concept, which has been formed—and transformed—depending on the specific circumstances of particular times and places. Its origin lies in constitutional law, as an answer to this basic question: who is entitled to the supreme authority within the state? Subsequently, sovereignty also became an important concept in international law, designating the characteristics of a state that determined its treatment as the equal of others.

For centuries, states have been the key instruments for the regulation of social life on their territory, and the exclusive subjects of international relations. National sovereignty has been perceived as the highest authority within the state and a prerequisite for granting equal status with other states in international relations. In the traditional concept of sovereignty we can identify several assumptions relevant for international law: only states are in charge of the creation and implementation of international law, international law is exclusively made with the consent of states, and no one can interfere with the way states treat their own inhabitants.[2]

Whether speaking of the internal (highest authority within a state) or external (equality with other states) aspects of sovereignty, time has wrought significant changes. While it once was quite consistent to speak of the highest authority of the monarch over his subjects, what does it mean now that sovereignty belongs to citizens? That the people are the highest authority over themselves? In the sense of the unrestricted behavior of a state within its own territory,

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what does sovereignty mean in light of the development of internationally protected human rights and humanitarian law? How does the supposedly consensual character of international law sit with the U.N. Security Council's decision to impose two *ad hoc* war crimes tribunals upon the relevant states concerned, or with the emerging right to humanitarian intervention?

It is clear that in today's rapidly changing world, state sovereignty has also been subject to changes. As a consequence of the need for coordination in an increasingly interdependent world, and demands that the most important individual rights are protected globally, the number of competencies claimed by international organizations are increasing, and international law is developing quickly.

States are faced with the dilemma of whether to try to preserve their traditional competencies or accept international authority in various areas, from environmental protection to human rights. An important choice in these circumstances needs to be made when defining a national position regarding the establishment of *ad hoc* and permanent international criminal courts and humanitarian intervention. If we accept the universality of core human rights and the need for universal rule of law, why not accept international mechanisms that can efficiently protect them? Are states really willing to submit their own citizens to international courts over which they have no influence, or accept the use of international force within their borders?

INTERNATIONAL PROTECTION OF HUMAN RIGHTS: THE ROLE OF INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LAW

When the Universal Declaration on Human Rights was adopted 50 years ago, many perceived it as merely a list of good wishes. It has proved to be an efficient program of action that has inspired different nations, international and national organizations, non-governmental organizations (NGOs) and many individuals to fight for recognition and protection of the human rights expressed in the Declaration.

Both the influence of human rights defenders and the scope of the beneficiaries have evolved significantly from half a century ago.[3] There is an ever-growing acceptance that the promotion and protection of human rights is a legitimate concern of the international community. An increasing number of states have recognized the value of the principle of international cooperation for human rights and accepted various forms of human rights assistance, monitoring and field presence as supplementary to national mechanisms.

The old paradigm of international relations, based on the assumption of sovereign states acting independently and taking into account only their own interests, does not reflect the present reality of international relations. States are no longer the only actors in international relations, and they are far from independent

in their actions, not only internationally, but also within their own borders. Governments and their partners in civil society are attempting to influence decisions with global implications by forming functional coalitions across geographic borders and traditional political lines.[4] International organizations and various associations of states are new and important actors in the international arena. Whether governmental or non-governmental, global or regional, international organizations are gaining in importance. In recent years, their number, diversity of form and influence have been increasing rapidly.

Delegating certain competencies to international organizations necessarily reduces the competencies of states. The way decisions are taken by international organizations defines the way in which states try to retain their influence despite the relegation of their former competencies.[5]

Increased global interdependence has led to important changes in international law. It should not be surprising that, if sharing a common destiny has become a historical, political, economic and sociological fact, this should be reflected in international law as well.[6] The process of transformation has been described as the "internationalization of the internal law." In some contexts, that development can be seen as part of a broader movement from private concern to public concern within the state, from national concern to international concern, and from international concern to international law.[7]

From a technical viewpoint, multilateral treaties represent an especially powerful instrument of transformation of international law. Their drafting sometimes takes a long time, since states may feel uncomfortable with formulations they consider inconvenient, or as a potential threat to their sovereignty. However, state authorities are often exposed to various pressures exerted by other countries, civil society and national and international non-governmental organizations advocating their acceptance. Once the treaty is adopted, reach magnifies its impact. Each multilateral treaty is equivalent to as many bilateral treaties as it would be necessary to regulate the same issues.[8] Some of them provide for mechanisms ensuring compliance with the obligations undertaken, such as monitoring by human rights treaty bodies, thereby adding to their importance.[9]

While international law has traditionally focused on the rights of nations in their relations with each other, international human rights instruments are focused on the individual and his protection from the human rights abuses committed by states (which thus are no longer regarded as "domestic or internal matters").[10] Therefore, states are often reluctant to adhere to international human rights instruments, especially to those that provide for efficient monitoring mechanisms. On the other hand, pressure to protect human rights internationally is increasing, so if the acceptance of adequate human rights instruments is too slow, it is often preceded by the development of corresponding customary law.[11] The Universal Declaration of Human Rights, for example, was followed by some important

human rights treaties, but is itself now often regarded as an authoritative interpretation of the human rights provisions of the U.N. Charter, and as established customary law, constituting the heart of the "global bill of human rights."

The legal protection of human rights has developed through different channels: multilateral treaties, the influence of the Universal Declaration of Human Rights on national legislation, the interpretation of existing national and international legal provisions, and the unusually fast development of customary law under the influence of legal science, media and the pressures of civil society, particularly NGOs. Many treaties related or other human rights monitoring mechanisms, including the U.N. High Commissioner for Human Rights and special rapporteurs for individual country situations, have been introduced. Even the Security Council has in its practice linked human rights closely to the protection of peace and security. It has used its Chapter VII enforcement powers under the U.N. Charter to create *ad hoc* war crimes tribunals for former Yugoslavia and Rwanda. Humanitarian intervention has occurred in Kosovo and its legal and political dimensions debated within the Council.[12]

The influence of progress in international law in the last 50 years has substantially impacted human rights.[13] What has changed? Almost everything. The subjects of international law have changed. States are no longer the sole subjects. The objects of protection have changed as well, taking into account the recognition of new, internationally protected human rights. The prevailing method of creating international law has changed. The role of multilateral treaties has increased tremendously. Finally, long and universal acceptance appears to no longer be a prerequisite for the development of custom in the field of human rights. General acceptance is sufficient.

In spite of these positive developments in the international protection of human rights, some serious obstacles persist. The main obstacles are twofold: the isolationism of some states and the abuse of human rights for specific political ends. Isolationism exists in the rebuffing of international concern for human rights by arguing for the protection of national sovereignty or preservation of certain traditional customs, both of which are often used as shields by state authorities who fear that their sovereignty is being limited, and that their internal affairs will be subject to international (and possibly hostile) interference. Given the fact that abuses of state power are the primary human rights problem, this fear is quite understandable, and has given rise to the need for international human rights protection.

The misuse of human rights, on the other hand, occurs in the application of selective standards to evaluate human rights in accordance with specific political interests.[14] Human rights are not treated as a value in themselves, but as a tool and justification for political pressures against countries selected and targeted for various reasons. The scrutiny under which different countries are placed is by no means objectively equal.

NATIONAL CHOICES: SOVEREIGNTY VERSUS INTERVENTIONISM AND EQUALITY VERSUS SELECTIVITY

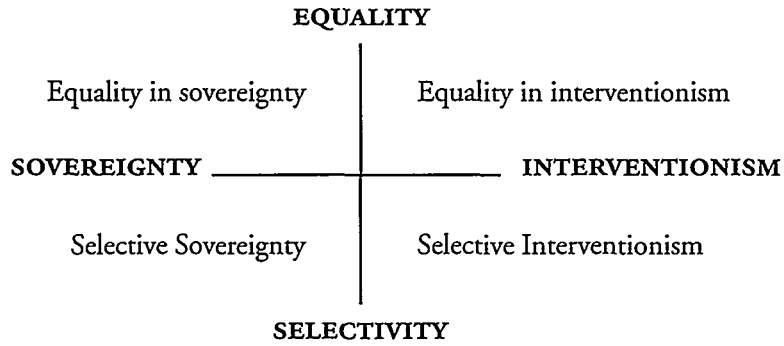
States and their administrations are faced with the process of change of international relations. They have to make a choice, whether to maintain the old version of sovereignty, trying to protect all their traditional rights, or to accept the international authority to intervene in some areas that were previously in their exclusive competence. This choice, let us call it "sovereignty vs. interventionism," must be made in various areas, from environmental protection to human rights.

The choice is often not easy. Although it is not difficult to accept that an increasingly interdependent world requires international coordination and regulation, it may be quite difficult to accept international competencies with regard to one's own country and citizens. These ambivalent feelings are often reflected in attempts to try to get the best out of both worlds: to support interventionism in general, when others are concerned, while trying to retain one's own sovereignty. This could be labeled the "equality vs. selectivity" dilemma.

A good example of deciding upon a national position in the question of sovereignty vs. interventionism and equality vs. selectivity is the attitude toward the international prosecution of crimes. If, for the sake of a better overview we include the choices concerning both options, we can create a framework within which we can identify four model situations corresponding to the possible attitudes of individual states.

For the purpose of creating such a framework the following definitions shall apply:

EQUALITY: Same treatment of all states in applying international criminal justice
SELECTIVITY: Different treatment of one's own State vis-à-vis other States in applying international criminal justice
SOVEREIGNTY: The exclusive authority of the State to apply criminal justice,
INTERVENTIONISM: The authority of an international body to apply international criminal justice.



Let us briefly comment on the four model situations. The first model situation is equality in sovereignty. It reflects the traditional view on state sovereignty and international relations. It implies the rejection of any international authority to prosecute crimes and hence the establishment of any sort of *ad hoc* or permanent international courts for that purpose. Countries are predominantly reluctant to publicly defend this hard line position.

The second model situation is the opposite of the previous one: equality in interventionism. It reflects the acceptance that increased interdependence should strengthen international competencies and the development of adequate structures. It implies the acceptance of international authority to intervene and to prosecute crimes as a limitation on state sovereignty. In practical terms, it implies support for the establishment of the International Criminal Court with universal jurisdiction. This is clearly the position of many NGOs engaged in the campaign to support the establishment of the ICC. To a significant extent it is also the position of the so-called "Like Minded Group," an informal group of states who support the establishment of the ICC.

The third and fourth model situations: selective sovereignty and selective interventionism are mutually complementary. Interventionism is supported in states other than ones' own, within which the preservation of sovereignty is reserved. It implies support for international authority to intervene and prosecute crimes in other states, but not in one's own. In practical terms, it means support for the creation of *ad hoc* tribunals (as long as one's own country is not concerned), and hesitation or rejection for the establishment of the International Criminal Court (ICC) in so far as it extends to one's own country and citizens.

Due to moral reasons and the principle of equality of states, it is not easy to defend such a position explicitly. How does one justify that some states, but not all, are sovereign over international law? Theoretical attempts to justify these, or similar views seem cumbersome.[15]

In practice, the position of selective sovereignty / selective interventionism emerges in various guises quite often. Irrespective of the principle of the separation of powers, it still seems an inconsistent practice for the U.S. Congress, when deciding about the payment of contributions to the U.N., to regard itself above international law. Another example was found in Laredo, Texas, when a judge gave priority to domestic over international law when deciding on the extradition of a person indicted by the International Criminal Tribunal for Rwanda.[16] This position is difficult to reconcile with the demand of the U.S. Administration that countries emerging from the former Yugoslavia should be penalized if they do not accept the supremacy of international over their national law with regard to the extradition of those indicted by ICTY. The same observation applies to the members of the U.N. Security Council, who had no difficulties imposing the statute

of the ICTY on countries emerged from the former Yugoslavia, but who firmly rejected the inclusion of the same rules in the ICC statute, regarding it as an unacceptable intrusion upon their sovereign rights.[17]

When compared to the question of international criminal jurisdiction, national positions regarding humanitarian intervention exhibit a similar pattern. There are countries that support as a last resort humanitarian intervention to protect fundamental rights through the use of force on the territory of a third state. There are also those who bitterly oppose it. The legal and political justification of those in favor of interventionism is that it is the duty of every state to stop the gravest human rights violations and sufferings. Its opponents adhere to the classic concept of sovereignty: noninterference in internal affairs and prohibition of the use of force.

In fact, international jurisdiction and humanitarian intervention are quite similar with respect to their value underpinnings, motives, and political impact. The underlying idea of both is that in the case that a country cannot protect, does not want to, or deliberately violates the most basic human rights, it is a duty of other countries to intervene. The third party acts as a protector of universally guaranteed individual rights. Humanitarian intervention is oriented to stopping and preventing further violations, while international criminal adjudication punishes perpetrators, establishes the truth, individualizes the guilt and creates the preconditions for reconciliation.

From the viewpoint of the underlying values, it seems rather inconsistent that some of the most influential supporters of humanitarian intervention do not accept that their armed forces are bound by the ICC jurisdiction. In fact, enthusiasm for humanitarian intervention without a readiness to commit to the jurisdiction of the ICC units that are participating in the intervention, is just a special case of the previously described notion of selective sovereignty/selective interventionism. Humanitarian intervention is perceived justified concerning the limits of sovereignty of a third state, whereas the application of international humanitarian criteria by an international judicial body is considered an unacceptable intrusion upon sovereignty when applied to one's own.

REDUCING SOVEREIGNTY, EQUALLY

It is obvious that states are no longer free simply to pursue whatever policy they wish within their borders. They have become limited by the powers of international organizations, emerging humanitarian and human rights law and the rights granted to each and every individual. The interdependence of peoples' lives and the need for cooperation calls for shared values, beliefs and commitments. Information and communication technology, and especially global media, help to develop them.

Certainly, we are still far from a "world order;" however, there is little doubt that sufficient interaction between states exists to make the behavior of each a necessary element in the calculation of the other. Furthermore, groups of states share common interests and values and concede to be bound by a common set of rules in their relations with one another.[18] More and more often such states enter into institutional relationships or associations.

The role of states will continue to change. Their role as a security and economic framework is decreasing. Global or regional organizations such as the United Nations (Security Council), the OSCE and NATO increasingly assume international peace and security tasks. Global trade and economy are falling under the increasing influence of the WTO, the Bretton Woods Institutions, international business practices leading to the development of international law and arrangements by various associations of states such as the EU, MERCOSUR or NAFTA.

The state is shifting its role towards a framework for the protection and promotion of traditions, culture, language and specific values and interests. Perhaps this explains the seemingly contradictory processes of the decreasing role of the state, and at the same time the increase of the number of states and the pressure to create new national states.[19] Czechs and Slovaks, Slovenes and Croats, Georgians and Armenians, respectively, have rejected Czechoslovakia, the Socialist Federal Republic of Yugoslavia and the Soviet Union as security and economic frameworks, and have established their own states in which they seek to protect and promote their national culture, traditions and specific values and interests.

The state is also becoming an intermediary between its citizens and the international community. It is through state representatives that the interests of citizens are represented in international organizations, during deliberations in various institutions or while participating in the creation of international treaties. As Brand puts it:

If the role of the sovereign is to provide security, and strengthening the international rule of law results in increased security, then the role of the sovereign must be to strengthen the international rule of law. If this is to be accomplished by delegating traditionally "sovereign" functions to an international body, then so be it. In a democracy-oriented world, the representative of the citizen-sovereign should in fact take every opportunity to enter into legal arrangements, whether national regional, or global, that will increase security for the citizens. That is the sovereign function.[20]

It seems that we have reached the stage when governments are not the sole and supreme masters within their own domain, but are required to conduct their "own affairs" subject to a public order constituted by the international community of states which takes into account global concerns.[21] As U.N. Secretary General Kofi Annan has put it:

> For in a world where globalization has limited the ability of States to control their economies, regulate their financial policies, and isolate themselves

> from environmental damage and human migration, the last right of States cannot and must not be the right to enslave, persecute or torture their own citizens.[22]

The state remains the organ through which the individual is represented in the development of international norms and mechanisms. However, the state need not interfere when those norms are applied and those mechanisms are implemented.[23] As the world shrinks through the development of information and communication technology, so does the distance between the individual and international law. The human rights of an individual can be represented as a sum of his "national" and "international" rights.[24] In this respect, occasional overlapping of the two does not represent a problem, but an advanced form of "double protection."

In a hypothetical sense, we can speak about the emergence of a new international "Social Contract." This time, though, the individual is giving up some of his powers and sovereign rights and transferring them to a state for the benefit of safeguarding his interests (as in the writing of Hobbes or Locke). Rather, states, upon the demand of their citizens and pressed by NGOs, are transferring some powers and rights to international organizations. Or, perhaps more correctly, it is individuals—the citizens—who are reminding the state that they are the ultimate source of sovereignty, and think that their interests are best protected if some of their powers and sovereign rights are transferred from states to international organizations. Individuals may decide that their interests can be better protected by transferring some powers to states and some to international organizations.

It is obvious that sovereignty is no longer what it used to be. It has been reduced through two parallel processes: the increase of competencies of international organizations and associations and through the development of individual, internationally guaranteed rights (something that the Secretary General of U.N. Kofi Annan has called "individual sovereignty").[25] Citizens all over the world are seeking to reclaim their individual sovereign rights and also want some of those rights to be protected globally through international mechanisms.

It is not so important whether we replace sovereignty with another concept, or whether we speak about changes in its content, as long as we are aware of the trends of development. The concept of sovereignty can still be useful. Historically, it has proven very elastic, allowing it to reflect the position of a monarch, as well as popular sovereignty. Perhaps it could be successfully adapted once more.

The maintenance of the concept of sovereignty might be particularly helpful with respect to protecting the principle of equality of states. Traditionally, international relations and international law have been based on the principle of sovereign equality of states. As we have described, development imposes various

limitations on sovereignty related to the increased competence of international organizations and associations and the spread of internationally protected individual rights. However, it is vitally important that all states are equally affected by such a reduction of sovereignty.[26] If they are not, or if there were a strong feeling they are not, there would be a heavy resistance to any transfer of powers to international or supranational bodies, and the whole process of transformation of international relations will be hindered. Therefore, in the evolution of the concept of sovereignty, the principle of the "sovereign equality of states" should be transformed into the principle of "equally reduced sovereignty."

In this respect, the United States, in its role of the only remaining superpower, has a special role. The ambiguous position of the U.S. on the issue of the protection and promotion of human rights is a good illustration of the dilemma that this Administration faces. On the one hand, the concept of human rights, especially individual and political rights, corresponds to U.S. national values, so it is plausible that the U.S. should stand for their protection internationally, and use various means to press countries that violate human rights. On the other hand, the U.S. is quite hesitant when deciding whether to adhere to international treaties on human rights.[27] As D'Amato puts it:

> Our government and ex-governmental lawyers fear international law more than they use it; they fear its use by other nations against us, and they don't use it too much themselves because they have other ways - withholding aid, using economic muscle, threatening the use of force - to get what they want.[28]

While some permanent members of the Security Council advocate humanitarian intervention in the case of the gravest breaches of human rights and humanitarian law, they refuse to accept the jurisdiction of the ICC. This should change. When the ICC is fully established, it will become impossible to justify humanitarian intervention if participating troops do not explicitly adhere to the jurisdiction of the ICC. If one country intervenes in a foreign country for humanitarian reasons, those countries participating in the intervention should at least accept international humanitarian standards and international jurisdiction over their behavior.

Indeed, it is quite possible in the foreseeable future that states wishing to contribute troops to U.N. peacekeeping operations will have to accept the jurisdiction of the ICC as a precondition for their participation. At first, adherence to the ICC's jurisdiction might be perceived as a comparative advantage when selecting troops, but sooner or later it will develop into a *conditio sine qua non.* If a country is entrusted with keeping international peace and security and in ensuring implementation of international humanitarian standards, it shall simply have to accept to be bound by those standards itself.

If the major powers, particularly the U.S., accept the challenge of the "equal reduction of sovereignty," the payoffs will be great. It shall tremendously

speed up the process, and encourage other countries to follow. The leverage of the U.S. in international organizations is and will continue to be such that the U.S. national interest, or better the interests of U.S. citizens, will be well protected, and international respect for U.S. will be accompanied by admiration. ■

NOTES

[1*] Some aspects of this article appear in Volume 28, Issue 3 of the *Georgia Journal of International and Comparative Law* under the title "State Sovereignty and Globalization: Are Some States More Equal." The views expressed are the author's and do not necessarily represent the views of the Government of the Republic of Croatia.

[2] For a more comprehensive list of assumptions see Louis Henkin, "Human Rights and State 'Sovereignty'," 25 *The Georgia Journal of International and Comparative Law,* 32 (1995/1996).

[3] See Ivan Simonovic (ed.), "Articulating Interests in a Changing World: Croatia At U.N. Headquarters 1998," *Institute for International Relations - IMO,* Zagreb, 1999, 137.

[4] An example of issues which have led to shifts in global policy are the anti-land mine campaign and the campaign for Millennium Debt Relief. Another very important campaign of the same sort concerns the establishment of the International Criminal Court.

[5] See Joel Trechtman, "The Theory of the Firm Applied to International Organization." III (2) *International Legal Theory (1997), 21.*

[6] See Harold J. Berman, *World Law,* 18 FORDHAM INT'L L.J., 1621-1622 (1995).

[7] See Henkin, *supra,* 575.

[8] The formula which indicates how many mutual bilateral treaties are "covered" by a single multilateral treaty is (n-1) x n . 2
This means that if 187 U.N. members (n in our formula) are signatories to treaty, it is equivalent to 17, 391 bilateral agreements mutually concluded by the mentioned number of states.

[9] Six committees have been established pursuant to the six core U.N. human right treaties to monitor their implementation: Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee on the Elimination of Discrimination Against Women, Committee on the Elimination of Racial Discriminations and Committee on the Rights of the Child.

[10] See Isabelle R. Gunning, "Modernizing Customary International Law: The Challenge of Human Rights," 31 *Virginia Journal of International Law,* 211 (1991).

[11] See Richard B. Lilic, The Growing Importance of Customary International Human Rights Law, 25 *The Georgia Journal of International and Comparative Law,* 1-15 (1995/1996).

[12] The Security Council held an Open Debate entitled "The Role of the Security Council in the Prevention of Armed Conflicts" on 29 and 30 November 1999.

[13] Compare Henkin, *supra,* 31.

[14] See I. Simonovic, *supra,* 144.

[15] Charles Vesscher defended the view that the major powers carry more weight in the formation of international customs, while Myres McDougle argued that General Assembly resolutions are binding if accepted by major powers and that major powers are exempt from some international rules. See more extensively D'Amato, supra, 62.

[16] For details see Barbara Crossete, "Judge in Texas Jars U.N. Effort On War Crimes," *The New York Times,* December 30, 1997.

[17] At the Conference in Rome representatives of the Republic of Croatia proposed that some articles of ICC statute use the same language already contained in the ICTY statute. There was very little support for this proposal.

[18] In 1991 Conference on Security and Cooperation in Europe explicitly stated that issues relating to human rights, democracy, and the rule of law are of international concern, since the respect for these rights and freedoms constitutes one of the foundations of the international order. (Moscow meeting on the Human Dimension, October 3, 1991.)

[19] There were 51 initial members of U.N. in 1945. Now, there are 187 members.

[20] See Ronald A. Brand, "External sovereignty and international law," 18 *Fordham International Law Journal,* 1696 -1697 (1995).

[21] See Johan D. van der Vyver, "Sovereignty and Human Rights in Constitutional and International Law," *Emory International Law,* 442 (1991).

[22] See address of Secretary General Kofi Annan to the 54th Session of the United Nations General Assembly in New York, September 20 1999, in Kofi A. Annan, *The Question of Intervention, Statements by the Secretary General,* United Nations, 1999, 33.

[23] See Jutta Brunnee, "Environmental Security in the Twenty-first Century: New Momentum for the Development of International Environmental Law?" 18 *Fordham International Law Journal,* 1744 (1995).
[24] See Anthony D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms," 25 *The Georgia Journal of International and Comparative Law,* 80 (1995/1996).
[25] See K. A. Annan, *supra,* 37.
[26] The discussion on the establishment of the ICC represents a good illustration of the problem of accepting "equality in reducing sovereignty" by a number of states. Considerations of international sovereignty, hardly voiced when the ad hoc tribunals (for former Yugoslavia and Rwanda) were set up, proved to be a huge implicit if not always explicit obstacle to the establishment of the international criminal court. See more extensively in I. _imonovi_, "The Role of ICTY in the Development of International Criminal Adjudication," 23 *Fordham International Law Journal,* 1401-1421.
[27] For example, the U.S. is one if only two U.N. member states that are yet to ratify the Convention on the Rights of the Child.
[28] See D'Amato, *supra,* 66.