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GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER, by **Gerry Simpson**. New York: Cambridge University Press, 2004. 414pp. Hardback. \$95.00/£65.00. ISBN: 0521827612. Paper. \$35.00/£22.99. ISBN: 0521534909.

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In 1825, Chief Justice Marshall of the Supreme Court of the United States, in *THE ANTELOPE*, asserted that “No principle of general law is more universally acknowledged than the perfect equality of nations.” The Charter of the United Nations Organization, 120 years later, stated that it was based “on the principle of the sovereign equality of all its Members.” Sixty years further on, barely any one, including the Secretary-General of the United Nations, subscribes to such ringing declarations of the primacy or exclusivity of national sovereignty, let alone that of the sovereign equality of states.

At core, the idea of the sovereign equality of states posits that the conduct of states towards each other, their regulatory competence within their boundaries, and their capacities to participate in and generate rules for the international system are entitled to the same level of legal deference without regard to their territorial size, population, material wealth, technology, or cultural sophistication. In recent years, this doctrine has come under challenge from several sources. At a descriptive level, a common refrain is that the proposition cannot be squared with observed behavior, nor can it be maintained in the face of the ever-present and pressing realities of unequal military power and economic wealth between national societies. At a normative level, scholars puzzle over whether the doctrine applies in all contexts, or whether it is and should be constrained by subject matter, excluding it from application when the issue is protection of “fundamental human rights,” or some other notion of *jus cogens*. And cutting across both is whether the concept is applicable only in the context of the horizontal relationships of states to each other, or just as well to vertical relations between states and international institutions. An understandable answer among scholars has been to throw one’s hands up in frustration or ennui, asserting that sovereign equality is at best a deceptive bit of fiction, at worst an organized hypocrisy, and in both events a dystopia. A reader might thus ask whether we need yet another tome in this intellectual morass.

In *GREAT POWERS AND OUTLAW STATES*, Gerry Simpson provides a conceptualization of the doctrine of sovereignty – or, more accurately, the included concept of “sovereign equality.” He seeks to define the doctrine and to show how it coexists with legalized hierarchies among states in international law. He contends and demonstrates that the modern formulation of sovereignty since 1815 is as much about the legalization of [*492] hierarchies within the system as it is about the doctrine of perfect equality among nations. What flows from this understanding of the divergent impulses for legalizing the coexistence of both equality and hierarchy is what he terms “juridical sovereignty.”

“Sovereign equality,” Simpson contends, should be disaggregated into three distinguishable concepts: “formal equality,” “legislative equality,” and “existential equality.” While formal equality has always operated as a background norm of international relations – at least since the Treaty of Westphalia – it has never fully represented international society’s conception of the juridical basis for formal relations among states. To the contrary, it has operated in tandem with, and has been qualified by, its coexistence with two other conceptions of “equality”: the existential and the legislative. Embedded in these two latter conceptions is the hierarchical ordering of international society. Integral to any conception of existential equality is what Simpson terms “anti-pluralism,” while legislative

equality is conditioned by “legalized hegemony.”

These core concepts are developed in the Introduction and first three chapters of the book. Chapters 4-6 trace legislative equality and the correlative concept of “legalized hegemony” at foundational legal moments between 1815 and 1999; notably at the Congress of Vienna, the Second Hague Conference of 1907, the Versailles Conference of 1919, and the San Francisco Conference of 1945. Chapter 7 explores the relevance of legalized hegemony to the debate over the 1999 Kosovo war. Chapters 8-10 trace the foundations of existential equality and anti-pluralism between 1815 and the present. Chapter 11 seeks to demonstrate how disaggregating the concept of sovereign equality provides a superior understanding of the propriety of the use of force in Afghanistan in the aftermath of September 11, 2001.

Simpson confines the definition of formal equality to that of being no more than “equality before the law”—the right of similarly situated states to be treated in the same way by a judicial tribunal. In his view, formal equality does not entail legal acknowledgement or endorsement of the equal capacity of all states to act with equivalent force on all matters, and it certainly does not require identical allocation of substantive rights. As he puts it, formal equality “extends neither to forms of jurisdictional equality nor to equal capacity to vindicate rights outside the judicial context” (p.47). This limitation of formal equality to a very narrow and highly technical procedural sphere is essential for two reasons. First, it permits Simpson to argue that states – all states – are entitled to undiluted formal equality. (Parenthetically, the viability of even this most minimalist of claims surely has been put into doubt by the recent decision of the International Court of Justice in the case brought by Serbia and Montenegro against Belgium and other members of the North Atlantic Treaty Organization.) Second, and a good deal more significantly for this book, it also permits Simpson to contend that international law, while maintaining the concept of sovereign equality, validly has discriminated among states through the application of the doctrines of legalized hegemony and anti-pluralism (pp.47-48). [*493]

As a normative proposition, legislative equality embodies the notion that international law confers equal recognition and dignity upon the acts of states in the international arena. Simpson distinguishes between two possible statements of this norm. In its weak form, it recognizes that states are bound by only those legal norms to which they have assented. In a stronger form, it would “mandate an equally weighted vote and equal representation in the decision-making processes within international bodies, and an equal role in the formation and application of customary law and treaty law. More particularly, . . . a strong commitment to legislative equality would deprive the Great Powers of any special role within the international legal order” (p. 48).

Simpson has little difficulty demonstrating that the stronger form of legislative equality has never been recognized by international law, certainly not since 1815. Beginning with the Congress of Vienna, and running through Versailles and San Francisco, he conclusively shows how the diplomats who met to reconstruct their world orders in each case privileged the roles that great powers were to play in their refashioned worlds. The unequal legal position given to the five Permanent Members of the Security Council in the post-World War II international legal order, far from being aberrational, was consonant with prior practices. Nor, Simpson exhaustively demonstrates, were these decisions merely expedient or secretly imposed. Rather, they were the clear-eyed products of extended discussions and debates among diplomats and jurists as well as state practice at the various conferences and in the intervening years. The norm of legislative equality, Simpson thus persuasively argues, generates within the international legal order, an equally powerful antithesis, that of legalized hegemony. International law has not been able to (and more controversially cannot) embody the one without the other.

Existential equality, Simpson asserts, “arises out of a recognition by the international community that an entity is entitled to sovereign statehood and that equality is the immediate product of fully recognised sovereignty.” Its corollary is the principle of nonintervention by others in the internal affairs of the state, including its choice of government (p.53). This norm, which probably was at the core of Justice Marshall’s statement in *THE ANTELOPE*, has come under sustained attack in recent years. Indeed, it has become commonplace to treat the claim, when interposed as a limitation on crusades for “democracy” and for “international human rights,” as a canard. As with the treatment of legislative equality, Simpson sets out to demonstrate that our contemporary debunking of the primacy of existential equality – what he terms anti-pluralism – is by no means a singularly postmodern phenomenon. Again relying on contemporaneous historical sources, he demonstrates that international law has always distinguished

between the right of those within the family to equal treatment and respect, and the absence of such rights to outsider societies. And cultural homogeneity has always factored significantly in deciding which states belong and which do not. Contemporary classifications between so-called “pariah” or “rogue” states, on the one hand, and “liberal democratic” [*494] states on the other, and the prescriptive consequences that are to be attached to these distinctions, he cogently shows, have a rich pedigree. Anti-pluralism’s claim for a distinctive legal position for “liberal democracies” is in fact heir to a familiar nomenclature: that of the “Christian,” or “European,” or “civilized” family of states and nations.

As a historically-grounded study in the evolution and continuities of the concept of sovereign equality in international law, Simpson’s work is first-rate. He is careful to delineate with nuance and precision the spheres of his interest. Unapologetically – and I think rightly so – he comes at the claim of sovereign equality from an exclusively legal perspective. He does not portray sovereignty as a fixed or simplistic black box with which his preferred norms have to wrestle for supremacy, nor as an indecipherable metaphysical concept, nor as the product of unprincipled pragmatic compromises. Relying on familiar sources for a legal scholar – diaries, letters, diplomatic communications, conference working papers, speeches, academic writings and judicial opinions – he capaciously (if occasionally repetitiously) carefully argues for and effectively demonstrates the coherence and continuities of sovereignty and sovereign equality as legitimating legal formulations in the regularization of interstate relationships. His basic thesis, that diplomatic practice as well as the writings of jurists have persistently distinguished among forms of sovereignty, seems to me beyond cavil. His trichotomy of legalized inequalities is also persuasive.

Yet, for lawyers – including those who are academically inclined – the past is worth evoking and arguing about only to the extent that it provides ammunition for dealing with current conflicts. Simpson, clearly an academic, is just as much a lawyer. He tells us that his approach to international law has been influenced by the so-called “English School” of reasoning about the relationship of international law and international society. He identifies three elements of this school as being particularly relevant. These include: 1) emphasis on identifying the historical sources and evolutions of ideas and institutions; 2) a focus more on norms than on specific rules and doctrines; and 3) a view of law as a serious enterprise in which participants are bound together by accepted precepts (p.230). The English School would thus appear to treat the legal sphere as integral to but not beholding to politics. Law is an arena of principled realism that is neither abstractly idealistic nor cynically manipulative. So conceived, the School is a foil both to those American legal realists who treat law as a tool of contingent pragmatism, and to those continental legal philosophers who present jurisprudence as an exercise in abstract normative theorizing. In two striking chapters, Simpson valiantly deploys this methodology to evaluate contemporary debates about the legal validity of the use of force in international relations: NATO’s use of force to overthrow Serb rule in Kosovo, and the U.S. invasion of Afghanistan following September 11, 2001.

The “Kosovo action,” says Simpson “represents a potentially revolutionary moment in the history of the international order.” Discussion of the legitimacy of the action has been framed either as the usurpation of law, or as the [495] start of a constitutional renewal for international order. These arguments, he contends, are not unlike those engaged in by European diplomats and legal scholars following the defeat of Napoleon Bonaparte. He draws parallels between the special role for maintaining Europe’s collective security that was assigned to Austria, Great Britain, Prussia, Russia and France at the Congress of Vienna, and that given the Five Permanent Members of the Security Council at San Francisco. More tellingly, he analogizes the disagreements between the Five Permanent Members (and their supporting casts of academic commentators) over the legal propriety of intervention in Kosovo to that between the Eastern Powers of the Holy Alliance, on the one hand, and Great Britain, on the other, as to the propriety of Great Powers intervention in the Spanish crisis of 1822. And for this reader, most interestingly, he points to similarities between the normative underpinnings of the legal justifications for great power interventions in both Spain and Kosovo. Ultimately, in both cases, it is the self-imposed restraint (or lack of it) generated in arguments among the Great Powers – rather than any simplistic notion of legal sovereignty or of sovereign equality – that is the final arbiter of the legality or legitimacy of intervention.

The cogency of the explanatory value of history, demonstrated in the Kosovo case, is lacking in Simpson’s account of the possible legality of the U.S. invasion of Afghanistan. If Kosovo represents a contemporary checking of legislative equality by legalized hegemony, one might expect the invasion of Afghanistan to draw on the counterweight that anti-pluralism ostensibly presents to existential equality, and to some extent, Simpson attempts to make the case. Terrorism

(and those states that supposedly support it), Simpson aptly observes, has taken on the familiar pariah status (previously held by such nomenclature as “primitive,” “uncivilized” or “unchristian”) that is foundational to anti-pluralism. In the nineteenth century, pariah societies were, within the law, treated distinctly differently from member states of the European family. Similarly, the notion of rough parity in the treatment of outlaw states within our contemporary international law is a mistaken one. But despite this insight, much of Simpson’s discussion of the legality of U.S. invasion of Afghanistan is uninspiring, and relies very little on his hitherto carefully presented historical insights. For the most part, he simply rehashes the well-worn disagreements about the extent to which military responses to terrorism fit within the familiar legal paradigm of permissible self-defense under Article 51 of the United Nations Charter.

Concluding that the conventional arguments are either too narrowly formalistic or too expediently pragmatic, Simpson tentatively suggests that the legality of the invasion of Afghanistan is best understood in terms of the existence of a legal regime that discriminates in the application of international law norms between “outlaw” and “non-outlaw” states. Thus, while the United States arguably may legally invoke the self-defense justification in invading a Taliban-led Afghanistan, India may not legally rely on the same justification were it, in response to a terrorist attack across the line of demarcation in [*496] Kashmir, to attack Pakistan. Moreover, how about if Russia were to invade Georgia in response to Chechen terror? One may validly ask whether the advanced justifications are genuinely legal, and if so, what makes them so. If the value of Simpson’s work is that he deploys accepted legal tools in demonstrating and explaining the valid existence of hierarchies in our conception of sovereignty, this strength is conspicuous by its absence in his effort to proffer an acceptable alternative legal basis for evaluating the use of force by the United States against Afghanistan. His explanations, grounded neither in history nor in familiar legal doctrines amount to little more than the assertion of politics as law. And so, at least in the context of Afghanistan, the English School (at least as exemplified in this work by Simpson) provides no more an objectively responsive grounding for the place of law in international relations than the competing “formalist” and “pragmatic” schools.

In *GREAT POWERS AND OUTLAW STATES*, Simpson has provided a rigorous and useful model for conceptualizing the reach of the doctrine of sovereign equality in international relations. The effort to anchor the concept firmly within a legal framework is an important undertaking. As illustrated by its application to Afghanistan, however, it does have limitations, and the dissonance is likely to be even sharper when his model of legality is tested against recent events in Iraq. This failing, however, should be placed in context. It simply reminds us that the predictive value of legal models is only as good and as replicative as the behavior of human beings and human institutions. Those who seek a descriptive understanding of sovereignty as a legal concept will find that understanding substantially enhanced by Simpson’s work. Those who seek to find in the book a scientific theory of sovereignty will be disappointed, and rightly so.

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