9. Sovereignty and the ILO

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The centennial of the founding of the International Labour Organization (ILO) in 1919 provides an opportunity to reflect on how certain values have influenced the ILO's progress over the past century. Among those values are social justice, freedom of association, peace, and national sovereignty. This chapter looks at the influence of sovereignty on the ILO and of the ILO on sovereignty.

The chapter proceeds in four sections. The first section reconstructs the image of national sovereignty on the eve of the ILO's establishment. The second section looks at how the dictates of sovereignty shaped the architecture of the ILO. The third section examines the role of sovereignty arguments during the first decade of the ILO's efforts to write labor standards for the global economy. The fourth section discusses ways in which the ILO contributed to the ontology of sovereignty. Although there is voluminous literature on sovereignty and extensive literature on the ILO, there is not much literature on the ILO *and* sovereignty. Thus, using the original sources, this chapter examines aspects of the ILO's intellectual history which heretofore have not received much scholarly attention. Due to space constraints, this study of the ILO has been limited to its early years.

THE DOCTRINE OF SOVEREIGNTY IN 1919

Sovereignty has always been a contested term and so to reconstruct its meaning among a specific group of ILO founders in 1919 would be difficult. As a proxy, this chapter relies upon what leading 19th-century publicists wrote about sovereignty. Likewise, the 19th-century doctrines were influenced by the intellectual inheritance from the 18th century, such as from the German philosopher Christian Wolff. In 1749, Wolff set forth that 'absolute' sovereignty is the exercise of the will of a nation 'independent of the will of any other nation' (Wolff 1934, pp. 130–31). Another classic legal treatise of the 18th century was authored in 1758 by the Swiss international lawyer Emer de Vattel who insisted that a sovereign state 'must govern itself by its own authority and its own laws' (Vattel 1916, p. 11).

Every 19th-century jurisconsult of public international law gives an account of sovereignty.[1] In 1812, the US Supreme Court, in an opinion written by Chief Justice John Marshall, affirmed that the sovereignty of a 'nation within its own territory is necessarily exclusive and absolute', and therefore any exception 'must be traced up to the consent of the nation itself' (Marshall 1812, p. 136). In 1836, US diplomat Henry Wheaton declared that a 'sovereign state is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers' (Wheaton 1836, p. 62). He also insisted that 'Treaties of equal alliance, freely contracted between independent states, do not impair their sovereignty' (ibid., p. 63). In 1854, Robert Phillimore, a member of the British Parliament, explained that a sovereign state has 'control over all persons and things within its boundaries' and that sovereign states exercise 'free and uncontrolled agency in their external

relations with Foreign States' (Phillimore 1854, pp. 94, 119). In 1865, Yale President Theodore D. Woolsey denoted sovereignty to be 'the uncontrolled exclusive exercise of the powers of the state; that is, both of the power of entering into relations with other states, and of the power of governing its own subjects' (Woolsey 1865, p. 50). In 1879, another US college president, Edward M. Gallaudet, opined that sovereign states 'depend upon no other power, and are only to themselves responsible for the maintenance of those rights and the observance of those duties which constitute the necessary and primordial basis of all free society' (Gallaudet 1879, p. 80). In addition, Gallaudet wrote that 'The right to negotiate and conclude treaties and conventions is one of the essential attributes of national sovereignty' (ibid., p. 181). In 1884, the English barrister William Edward Hall suggested that in state sovereignty, the independent 'will of the state shall be exclusive over its territory' (Hall 1884, p. 48). Moreover, according to Hall, the sovereign state 'asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion' (ibid.). That same year, Francis Wharton, a legal scholar who was soon to become a professor at George Washington University, characterized a sovereign government as one having 'authority [that] is coextensive with the territory' and as a government that is 'capable of entering into binding relations with foreign powers' (Wharton 1884, pp. 213–14). In lectures delivered in 1887, British Professor Henry Sumner Maine described a sovereign government to be a government 'which exercises the power of making and enforcing law within a Community, and is not itself subject to any superior Government'. Also, in 1888, Leone Levi, a British jurist of commercial law, ascribed to state sovereignty the 'right of independent action, without reference to the will of any other State' (Levi 1888, p. 81). Lastly, in 1895, the Reverend Thomas Joseph Lawrence, a British professor, recognized in sovereignty the 'complete liberty on the part of every state to manage its affairs according to its own wishes' (Lawrence 1895, p. 115). Thus, by the end of the 19th century, the prevailing doctrine of sovereignty was professed to be that a state has independent autonomy in exercising control over its territory and managing its affairs.

Nevertheless, the publicists admitted two key limitations on the real-time exercise of the sovereign will. First, despite the doctrine of 'uncontrolled' state power (Woolsey) and 'complete' state liberty (Lawrence), there were antecedent legal controls in the form of divine law, natural law and the customary law of nations. As the American political scientist James Wilford Garner noted in 1925, even the French 16th-century jurist Jean Bodin[2] did not deny that the sovereignty 'was limited by the law of God, the law of nature, and the law of nations' (Garner 1925, p. 4). In the late 19th century, Wharton insisted that law must both 'precede and define sovereignty' and that 'law tests the title of sovereignty and determines its extent' (Wharton 1884, pp. iv, 102). A second limitation comes from agreements with other states that can be 'binding' (Wharton) and can discipline a state's 'right of independent action' (Levi). For example, Woolsey contended that no state 'can annihilate an obligation to another state' (Woolsey 1865, p. 52). Levi postulated that every state is bound to 'be punctual in the observance of Treaties and in the payment of its debt' (Levi 1888, p. 109). Whenever controlling hands from the past continue to steer the state's current choices, there may be an encroachment of what had notionally been absolute autonomy to choose policies in the present.

The purity of domestic sovereign control gets further diluted from the osmosis across geographic borders of goods, services, people, investment, technology, ideas, pollution and disease. A veneration of sovereignty and autonomy at home does not guarantee a state's actual 'control over all persons and things within its boundaries' (Phillimore) and control over 'what acts shall or shall not be done, within its dominion' (Hall). In other words, having authority

'coextensive with the territory' (Wharton) may be sufficient governance for a planet having only one territory. But it is insufficient governance for a planet with territories exposed to cross-border impact. Effects from other countries make it much harder for a state 'to manage its affairs according to its own wishes' (Lawrence). Traditional sovereignty gets eroded when the problems of the 'community' (Maine) become transnational and global rather than being merely national.

Although international law had arisen in antiquity as a way of managing effects from neighboring countries, during the 19th century governments stepped up efforts to legislate the rules and cooperation needed to achieve 'the will of the state' (Hall). In the field of worker rights, the first international labor rule blossomed in 1814, at the end of the Napoleonic Wars, when the British government, responding to private petitions, succeeded in including the abolition of the slave trade in the Final Act of the Congress of Vienna in 1815. Nevertheless, such advances in government practice did not get immediately incorporated into the doctrines of sovereignty. A time lag existed for legal doctrines to catch up with the state practice. As Walther Schücking, the German pacifist and legal scholar, noted in 1912, legal science 'always hobbles along behind the facts' (Schücking 1918, p. 120).

Problem by problem, governments worked together to exercise the 'consent of the nation' (Marshall) and 'free and uncontrolled agency' (Phillimore) to legislate solutions that could not be achieved by governments acting alone. Regimes for trade, agriculture, and labor began as treaties were attained for the regulation of sugar bounties (1864), the control of the Phylloxera vineyard pest (1877), and the prohibition of night work of women in industrial employment (1906). In addition, cooperating governments and transnational actors recognized that while treaties and general international law can be a good foundation for cooperation, that foundation will also support the creation of specialized international institutions to manage transborder problems. Among the initial experiments with international administration were the official International Telegraph Union (1865) and the semi-official International Association for Labour Legislation (1900).

Although sovereign governments may resist unwanted interference by other countries, a sovereign government may sometimes want such interference. For example, Government A may rationally seek a treaty with Government B in order to be able to influence the decisions of Government B that cause harm to A. To successfully negotiate what Government A needs from B, A may be willing to allow B to exercise similar influence on A. The agreement of A and B could be sought to clarify the state responsibilities of A and B or to overcome collective action problems regarding shared resources or ecosystems. Whatever the particular motivation for cooperation, action by a government to craft and join international treaties and organizations does not constitute a loss of sovereignty. As the educator (to the deaf) Gallaudet had explained in 1879, 'The right to negotiate and conclude treaties and conventions is one of the essential attributes of national sovereignty.'

By the early 20th century, the exposition of the doctrine of sovereignty began to catch up with the 19th-century advances in international lawmaking. In the United States, two internationalists, Bridgman and Reinsch, worked to reformulate the understanding of sovereignty. In 1905, Raymond L. Bridgman, a US journalist and free trader, wrote the book *World Organization* for a public audience. One chapter in Bridgman's book, titled 'National Sovereignty Not Absolute', avers that because nations 'are upon the same planet', a sovereign nation's 'relations with its neighbors' must 'affect its internal policy' and so 'no nation can be absolutely sovereign' (Bridgman 1905, pp. 7–8). Bridgman offers a vision of an ongoing

process 'toward the recognition of a law of mankind superior to all laws of nations' (Bridgman 1905, p. 10).

In 1909, political scientist Paul S. Reinsch[3] wrote an influential article propounding a provocative thesis that as 'social and economic interest' assume a 'world-wide relation', such activities can 'be effectively regulated only upon a world-wide basis' (Reinsch 1909, p. 2). Reinsch provides numerous examples of fields where new international 'public unions' are already being tested, and looking ahead, he sees a growing need for 'international administrative law' (Reinsch 1909, pp. 1, 5) in many additional fields. For example, he asserts that 'the problems of labor legislation can be dealt with satisfactorily only from an international point of view' (pp. 3–4) wherein the 'control which the state exercises over the conditions of labor is stimulated to greater action by the international agreements and conventions on that subject' (p. 16). As Reinsch (who cites Bridgman) recognizes, 'economic life within the national state is dependent for its prosperity upon international cooperation and membership in international unions,' and this fact 'serves as a balance to the ever-present desire to preserve sovereignty unimpaired' (p. 9). Noting that 'it is evident that the old abstract view of sovereignty is no longer applicable to the conditions of the world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect', Reinsch denies that there is 'an abdication of sovereignty simply because' interests are being 'organized on an international basis' (pp. 10–11).

Even as one of the great prophets of public law internationalism, Reinsch is comfortable with the nation state. He recognizes that 'the national state remains on the center of the stage' (Reinsch 1909, p. 11) and insists that 'the state remains necessary to the achievement of internationalism' (p. 17). For Reinsch, what needs changing is not the state, but rather the 'old abstract view of sovereignty' (p. 10). In his own words, the task of the state becomes a 'new diplomacy' to achieve 'through common action [the] advantages … which no isolated state could command if relying merely on its own resources' (p. 15).

During the same era, parallel ideas arose in Europe about the role and status of the state in international society. Professor Schücking coined 'the modern concept of sovereignty' and explained that this modern concept rejects the 'old idea of sovereignty which opposed every legal obligation upon the will of the state' (Schücking 1918, pp. 123–4 n. 2).[4] For Schücking, the new idea of sovereignty recognizes that states seek legal obligations. To wit, 'We see in sovereignty to-day merely an unlimited commercial competency' of states, by which he means that far from being 'taken away' by a treaty, sovereignty 'is rather put into effect' through the 'contractual consent of the states' (p. 122). The one condition Schücking posits for maintaining sovereignty in a treaty is 'the right to leave it' and 'the right to denounce' the treaty (pp. 82–83, 121, 150, 263). Later that decade, Schücking serves on the German delegation to the Peace Conference. In 1931, he becomes the first German judge elected to the Permanent Court of International Justice (PCIJ).

By the end of World War I in 1918, the emerging (if not prevailing) concept of sovereignty was the nuanced modern sovereignty of Schücking, not the binary traditional sovereignty of Wolff. Unlike Wolff (who wrote in 1749), Schücking in 1912 had the benefit of witnessing the phenomenon of states entering into treaties and international organizations to pursue more effective international governance. Wolff nailed the law of sovereignty for his era. Schücking was wise enough to envision a law of sovereignty for the 20th century.

HOW SOVEREIGNTY SHAPED THE ILO'S CONSTITUTION

For the founders of the ILO, sovereignty was a gauge for assessing the authorities to be granted the ILO. The basic concept of preparing international labor treaties (called 'conventions') to guide individual countries was not new in the ILO; it had been pursued in the International Association for Labour Legislation since 1905. The central issue for the design of the ILO was what domestic legal effect should arise from the enactment of an international convention by the ILO's annual intergovernmental conference. Or, looking at it spatially, what legal authority would the ILO exert downward upon national sovereignty?

In late January 1919, the Allied Supreme Council set up a Commission on International Labour Legislation to prepare labor clauses for the Peace Treaty. The Commission used the British government's Draft for the ILO circulated in early February 1919 as the basis for discussion. The Draft proposed that the Conference of ILO member countries be able to adopt conventions with a two-thirds vote. Each state would participate equally with four individually cast votes split between the government (two votes), workpeople (one vote), and employers (one vote).[5] Following the enactment of a convention by the ILO Conference, each ILO member government would have the obligation 'to communicate its formal ratification … unless such convention is disapproved by its legislature' (British Draft 1919, Art. 18[19]). As written, the Draft seemed to provide a default of automatic ratification for which a government could opt out by formal legislative disapproval. In an earlier internal Memorandum of the British Labour Ministry, the proposal is presented in a less demanding form; namely, that governments would be required to lay ILO decisions 'before their national Parliament for consideration' (British Memorandum 1919, p. 122). Commenting on this proposal, the Memorandum opined that 'A scheme on these lines does not infringe the real sovereignty of any country' (ibid.).

During the early debate within the Commission on the details of the labor clauses, British Minister George Barnes acknowledged that two aspects of the proposed ILO would adversely affect sovereignty. First, Barnes asserted that the system of individual voting 'not defined by national frontiers … clearly infringed' the 'principles of State sovereignty' because non-government worker and employer delegates could vote in the ILO Conference; moreover, said Barnes, in giving each government only two of the four national votes, the governments would 'abandon half their sovereignty' (ILO 1919–20, pp. 47–8). Second, Barnes asserted that with 'the obligation imposed on the Governments to submit to their legislative authorities the decisions arrived at by this [two-thirds] majority, even if they themselves did not agree, the principle of State sovereignty was again infringed' (ILO 1919–20, p. 47).

The question of what obligation should ensue from the ILO's adoption of a convention was the most intensely discussed issue within the Commission. The British Draft was objected to from both sides. Some governments, such as Japan, Cuba, and the United States, perceived the obligation of presumptive ratification as being too strong. Both the British and US governments proposed reformulations, and the compromise agreed was that ILO members would be obligated to bring the convention 'before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action' (ILO 1919–20, p. 180; Treaty of Versailles 1919, Art. 405). Commenting on these negotiations two years later, the first report of the ILO Director noted how the British proposal was amended so that the Treaty would not 'trench in any way upon the sovereignty of the individual States' (Report of the Director 1921, p. 920).

On the other hand, some governments asserted that the (soon to be watered down) obligation in the British Draft was too weak. The French and Italian delegations proposed revised language to give states an obligation to ratify the ILO Conventions. Arthur Fontaine, from the French Labor Ministry, acknowledged that giving the Conference 'the real power to take decisions … would be to that extent an infringement of the sovereignty of the different nations' (ILO 1919–20, p. 110). As the debate ensued, the French and Italian proposals did not garner much support and soon their proposals for obligatory ratification were dropped.

The issue of sovereignty also came up in connection with the trade sanctions that were to be available against a government found to be infringing an ILO convention it had ratified. The proposed Treaty language had left the imposition of such sanctions to the discretion of individual governments, and at one point in the debate, Fontaine suggested an amendment to make the imposition of the sanctions obligatory. Barnes objected that the French amendment 'affected the question of sovereignty' and he convinced Fontaine to withdraw the amendment (ILO 1919–20, p. 184).

In addition to establishing the ILO and its rules, the allied countries also debated a set of labor principles to announce to the world as part of the Treaty of Versailles. Several important principles were agreed to, but some were left on the table. Two of the discarded proposals favored economic integration. One was the principle of 'freedom of migration' proposed by the Italian and Belgian delegations (ILO 1919–20, pp. 210, 232, 240). The other discarded proposal was to add a Preamble reference to the 'connection between the reduction of tariffs and the progress of labour legislation' (ILO 1919–20, p. 111).

When he presented the Commission's Report (with treaty language) to the Allied governments, Barnes stated that a majority of the Commission felt that the time 'was not yet ripe' (ILO 1919–20, p. 263) to agree to the French and Italian proposals for supranational lawmaking. He surmised:

> If an attempt were made at this stage to deprive States of a large measure of their sovereignty in regard to labour legislation, the result would be that a considerable number of States would either refuse to accept the present convention altogether, or, if they accepted it, would subsequently denounce it. (ILO 1919–20, p. 263)

The Supreme Council discussed the Commission's Report briefly, made a few slight amendments, and then approved it. Pierre Colliard, the French Minister for Labor, supported the Report and noted that there were 'divergent opinions' within the Commission 'as regards reconciling the sovereignty of State rights in the matter of Labour legislation with the authority that the permanent [labor] organisation ought to possess' (ILO 1919–20, p. 293). Colliard further explained that while some delegations 'wished to give more power to the decisions of that organisation', other delegations 'were more careful of the sovereignty of the people which they represented' (ILO 1919–20, p. 293). Also expressing support was Belgium's Minister Emile Vandervelde who had served on the Commission. Vandervelde noted that some delegations would have preferred that the ILO be a 'Super-Parliament', but that with 'Politics' being 'the science of what is possible', Vandervelde did not demand 'the national abdications to which the nations themselves would not have consented' (ILO 1919–20, p. 296). 'We must deal tenderly with the sovereignties which are beginning to draw closer to each other, and one day will federate', he opined (ibid.).

Germany supported the inclusion of a labor component in the Peace Treaty. Indeed, as David Hunter Miller (the legal adviser to the US delegation) later wrote, the labor clauses

were 'perhaps the only idea, about the Treaty, which was held in common by the Allies and by Germany' (Miller 1921, p. 135). Yet when they were presented the sovereignty-friendly labor clauses, the German delegation to the Peace Conference objected. While agreeing that 'domestic peace and the advancement of humanity' are 'dependent on the solution of labor questions', the German diplomats saw a flaw in the absence of legally binding force for future ILO conventions. Ulrich von Brockdorff-Rantzau, the first Foreign Minister of the new Weimar Republic, offered a counterproposal that would allow ILO conventions to be binding if approved by a 4/5 vote within the ILO (ILO 1919–20, pp. 318–19).

Germany's proposal was rejected by French Prime Minister Georges Clémenceau on the grounds that 'workers in one country are not prepared to be bound in all matters by laws imposed on them by representatives of other countries' (ILO 1919–20, p. 320). Regardless of Germany's call for more authoritative labor standards in the Peace Treaty, Clémenceau insisted that Germany will 'be called upon to sign it' (ILO 1919–20, p. 315).[6]

In summary, the protection of national sovereignty was one of the markers laid down for the drafting of the ILO Constitution.[7] In analyzing the proposed labor clauses, the negotiators used as a lens the prevailing concept of sovereignty. These drafters showed respect for sovereignty as they understood it and rejected any treaty language that would be sovereignty-infringing. To quote David Hunter Miller, the ILO 'leaves unimpaired the sovereignty of the States which participate in its formation' (Miller 1921). Harold Butler, a senior official on the British delegation to the Labor Commission who became the ILO's first Deputy Director and its second Director, recalled decades later his service in the drafting of the ILO's constitution and observed that 'This peculiar constitution with its delicate balance of forces and its compromise between international action and national sovereignty has stood the test of thirty years' experience' (Butler 1950, p. 159).

SOVEREIGNTY AS A TOUCHSTONE DURING THE ILO'S FIRST DECADE

The ILO got down to business even before the Peace Treaty went into force. At the ILO Conference held in Washington in November 1919, the delegates considered an ILO convention providing for reciprocal treatment of foreign workers employed domestically (ILO (ILC) 1919, p. 236). During the debate on the proposal, a French government delegate proposed further study 'with due regard to the sovereign rights' of the 'native country' and the 'country to which' the 'migratory workers' are 'proceeding' (ILO (ILC) 1919, p. 134). While supporting the principles espoused by this convention, the Conference decided to adopt them in the form of a non-binding recommendation rather than as a convention that would be binding for the ratifying governments. When it approved the Reciprocity of Treatment Recommendation (No. 2), the Conference also directed the Governing Body to create an International Emigration Commission 'while giving due regard to the sovereign rights of each State' (ILO (ILC) 1919, p. 276).

Another issue that arose at the Washington Conference was whether to allow Finland to join the Conference even though Finland was not yet a member of the League of Nations. The Conference voted against admitting Finland. In doing so, the Conference seems to have been influenced by the Minority Report from a committee presented during the debate that argued that the ILO Conference did not have the authority to grant Finland membership status.

The Report explained that the 'powers' of the ILO Conference were 'limited and defined' by the ILO's 'constitution' (ILO (ILC) 1919, p. 209). Asserting that the constitution of the ILO 'does constitute in effect a certain restriction upon the sovereignty of its members', the Report referred to the 'well-recognised rule of interpretation that a limitation or restraint upon sovereignty is never presumed or implied' (ibid.). Based on that rule, the Report concluded that the Conference has no power to introduce a new basis for ILO membership that would violate every state's 'complete freedom of action concerning its associations with other States for any purpose whatever' (ILO (ILC) 1919, p.210).

In November 1919, the ILO Governing Body selected France's wartime Munitions Minister Albert Thomas to be the ILO's first Director. A veteran socialist parliamentarian, Thomas had progressive ideas on sovereignty. In a 1919 essay, Thomas had written that 'the old concept of national sovereignty is obsolete' (Thomas 1948, p. 149). He completely dismissed the views of 'jurists of former times' that no higher law could restrict the will of the sovereign state (pp. 149–50). But he was also dismissive of the 'hedge' of the 'ablest of our statesman' that 'nations limit their sovereignty' by 'consent' (p. 149). Instead, Thomas seemed to be proposing just to skip the step of consent. Looking ahead to the new League of Nations then under construction, Thomas imagines (or hopes) that states 'will be subject to a body of regulations and of higher laws which limit their sovereignty' (p. 150). Furthermore, Thomas opines: 'the limitation of sovereignty will not be confined exclusively to relations between State and State' but will also apply to 'the internal affairs of a State' (pp. 150–51). Although his prediction on the result to emerge in the Peace Treaty proved too optimistic, Thomas correctly perceived that new international institutions would challenge conventional views about sovereignty. He declared that 'The old notions of sovereignty and of balance of power between sovereign States persist unconsciously even in minds which are trying to free themselves from them' (ibid.).

By the time he came aboard as ILO Director, Thomas fully appreciated that the founding governments did not believe that they had forsworn sovereignty in establishing the ILO. In a letter to George Barnes in late 1920, Thomas urged that the member governments 'should use that sovereignty which the Peace Treaty has respected' for the purpose of putting into practice the Conventions already adopted by the ILO (ILO 1920, pp. 10–11). Earlier that year, the ILO Governing Body had directed the International Labour Office ('Office') to launch a comprehensive enquiry into world production. The Office responded with an Introductory Memorandum for the Enquête which is notable in being the first ILO report to use the term 'world economy' (International Labour Office 1920, p. 56).

The issue of sovereignty was also raised in 1920 in an essay by Columbia University history professor James T. Shotwell who had served as a key US negotiator at the Peace Conference. After making a perfunctory declaration that in the ILO's machinery 'there is no derogation of sovereignty whatever', Shotwell asserted that the ILO's 'provision for overseeing the enforcement of labour legislation' runs 'counter to the principles of national sovereignty as understood and applied' (Shotwell 1920, pp. 53–5).[8] He went on to say that the Commission of Enquiry that can be invoked to investigate complaints about a failure to comply with a ratified ILO convention goes 'a long way towards the breakdown of that conception of sovereignty as absolute which was the ruinous doctrine upon which the old régime, before the war, was based' (Shotwell 1920, p. 56).

The International Emigration Commission took its work seriously and pushed the limits of its mandate by investigating barriers to migration. For example, at one public hearing, the

representatives of the White Star Line and the Cunard Line advocated a policy of 'free play of emigration and immigration' and catalogued the problems they faced from 'conflicting policies of the various nations aimed at keeping back, supervising, or refusing immigrants according to their own particular interests' and taking 'more account of national than of humanitarian considerations' (ILO 1921, p. 105). This sort of talk led to a pushback against the ILO's role on emigration. At one point, the Director warned of 'the practical difficulties and the danger of undertaking tasks of ill-defined scope which might be regarded as an infringement on the sovereign rights of states' (ILO 1921, p. 104). After the Commission presented a package of Resolutions in August 1921, the ILO did not re-charter the Commission. In a summary of its first decade published in 1931, the Office reported that 'In a world which is constantly growing smaller, and in which exchanges of all kinds – of workers, of commodities, of literature, of ideas – are becoming more general, the question of international migration has been little more than touched upon' (ILO 1931, p. 194).

During the 1921 ILO Conference, there was a discussion of freedom of association which was one of the labor principles enshrined in the Peace Treaty. At one point in the debate, the French worker delegate (and ILO drafter) Léon Jouhaux expressed frustration that whenever an international measure was proposed, the 'question of national sovereignty is instantly raised by some Governments' that 'insist on dealing with these problems nationally and not internationally' (ILO (ILC) 1921, p. 143). In his Report of the Director, Thomas took the opportunity to remind those inside and outside the ILO that the Labor Commission in 1919 had rejected binding ILO Conventions, and so the ILO 'did not trench in any way upon the sovereignty of the individual States' (Report of the Director 1921, p. 46).

The 1922 Report of the Director returned briefly to the issue of sovereignty. Thomas noted that the States 'rightly watch with jealousy any encroachment on their national sovereignty, and when they consent to limit this sovereignty voluntarily in treaties or international agreements, they believe that no concessions will be demanded other than those to which they have consented' (Report of the Director 1922, p. 904). With regard to the 'delicate' questions of emigration, Thomas noted that 'Constant regard must be had for diplomatic considerations, the intentions of Governments, national susceptibilities and rights of sovereignty' (Report of the Director 1922, p. 660).

In 1924, the *International Labour Review* published an article by José de Vilallonga, the ILO's Legal Adviser, that sought to explicate the ILO's legal character including whether the ILO manifested any 'public authority' (Vilallonga 1924, p. 202). Vilallonga explained that the ILO had no such coercive authority and therefore the states who joined the ILO 'are not exposed to any attack on their rights or their sovereignty by abuse of power on the part of the Conference or the Governing Body of the International Labour Office' (ibid.).

During the 1924 ILO Conference, there was a discussion of sovereignty in the context of hours of work. One of the principles included in the ILO Constitution was the eight-hour working day. In 1919, the ILO had adopted the Hours of Work (Industry) Convention, No. 1 to implement that principle, but in the early 1920s, the Convention was not widely ratified. At the 1924 Conference, a labor ministry official from Czechoslovakia (which had ratified the Convention) complained about the 'prolongation of hours of work in Germany' which was causing 'social dumping' (ILO (ILC) 1924, p. 74). In response, the German labor ministry delegate explained that longer hours were needed to pay reparations. Moreover, since Germany had not ratified the Convention, Germany viewed 'international control over its hours of work' as 'an infringement of our sovereignty' (ibid.). This contretemps was discussed by several

delegates and by the Director-General who explained that while a discussion could continue on a 'purely moral plane', there was no legal issue for the Conference to discuss because a state like Germany 'may appeal to its sovereignty and to its freedom to ratify or not to ratify' (ILO (ILC), 1924, p. 819). In addition, Thomas speculated that if Germany had ratified the Convention, the parties could have agreed to grant an exception to Germany while still maintaining the 'guarantees against unfair competition' secured by the Treaty of Peace (ILO (ILC) 1924, p. 828). Thomas admitted that Germany could still have been 'impatient of outside supervision', but in his view, the ILO 'rests on certain voluntary limitations of sovereignty' (ibid.). Relatedly in the Director's Annual Report, Thomas noted that 'despite the anxiety of States to maintain unimpaired their national sovereignty …, no State has left [the ILO]' (ILO (ILC) 1924, p. 662).

Sovereignty was also discussed by several delegates during the ILO Conference of 1926. A British worker delegate declared that 'no State could permit any curtailment of its sovereignty by authority vested in this Organisation' (ILO (ILC) 1926, p. 74). During the conference debate about establishing the Committee of Experts (today's Committee of Experts on the Application of Conventions and Recommendations), the South African Secretary for Labor decried the 'red herrings … of sovereignty, infringements of sovereignty, sanctions, and what not' (ILO (ILC) 1926, p. 253). In his view, the ILO could use 'expert assistance in shedding light on obscure corners of the work' and he declared that 'the people in my country would never permit the hiding up of things that ought to be shown up' (ibid.). In his address upon being elected Conference President, Monseigneur Nolens, a government delegate from The Netherlands, pointed out that states voluntarily join international organizations 'and to that extent have voluntarily agreed to a limitation of their sovereignty' (ILO (ILC) 1926, p. 9). That same year, George Barnes expressed similar views stating that 'all nations are being tied up together in an economic mesh from which none may escape. The much-vaunted self-determination of the political theorist is already in industry a thing of the past' (Barnes 1926, p. 36).

The issue of sovereignty arose in two contexts during the 1929 Conference. The first context was the debate on drafting a new treaty against forced labor – a debate that reached fruition the next year with the ILO's adoption of the Forced Labour Convention, 1930 (No. 29). Early in the multi-day debate, Jouhaux pointed out that some delegates were objecting to 'international control' because that would 'infringe the national sovereignty of the various Colonial powers' (ILO (ILC) 1929, p. 50). Jouhaux disagreed with that objection, countering that without international control, the Convention 'will be entirely futile' (ibid.). His colleague the Belgian worker adviser Henri Pauwels agreed with the need for a robust convention and observed that the proposals under consideration were 'not encroaching upon national sovereignty' (ILO (ILC) 1929, p. 398). In addition, Pauwels made clear that the workers believed in 'the superiority of the moral law[9] and of international necessity over any principle of national sovereignty' (ibid.). The debate also focused on the items to be included in the proposed questionnaire to governments which was a key step in the drafting process for a new convention. Portugal's Ambassador Vasco de Quevedo objected to some of the proposed questions on the grounds that 'No independent country would consent to reply to a question which implied interference with its sovereignty, or internal politics' (ILO (ILC) 1929, p. 422). Jouhaux countered that the Conference should 'consider the questions before it from an international point of view' and when doing so, the Conference should be 'to some extent, leaving aside questions of national sovereignty to discuss international questions' (ILO (ILC) 1929, p. 425).

The second context was the Conference debate on China's Resolution to provide for 'the application of labour legislation to the nationals of certain States which enjoy the privilege of extra-territorial jurisdiction' (ILO (ILC) 1929, p. 625). In other words, the issue before the Conference was whether the ILO should support China being allowed to impose its labor protections throughout its territory, rather than having to omit labor protections to factories in foreign-controlled territories. The Resolution touched on sovereignty – or, more precisely, dueling sovereignties of China and the imperialist powers. During the debate, the Director of China's Department of Labor averred that 'China is extremely anxious to give her helping hand to help the world to a better order', and he opined that if the resolution be 'allowed to drift, it will amount to a denial to China of the right to carry out her responsibilities as a Member' (ILO (ILC) 1929, p. 622). The Chinese employers supported the Resolution, remarking that 'we are ready to do all we can for the interests of the workers, for justice and for peace, and if nothing is done in this matter now it will not be the fault of the Chinese employers, but this Conference will bear the responsibility' (ILO (ILC) 1929, p. 625). Joining him in support of the Resolution, the worker adviser from the Irish Free State explained that China was appealing 'for respect for her national sovereignty' so that China could 'get on her feet' and 'establish a stable Government' (ILO (ILC) 1929, p. 626). The only Government delegate that spoke in favor of the Resolution was from Germany and he urged: 'We must get away from political considerations here and consider the matter solely in its social aspect' (ILO (ILC) 1929, p. 624). Unfortunately, when the resolution was voted on, the ILO showed that it was not ready to support humane conditions of labor throughout China. Although no delegate registered a public vote against the resolution, a majority of the delegates (many from the imperialist countries) shamefully refused to vote so as to prevent a voting quorum.

As the ILO's first decade drew to a close, scholars were continuing to explore the role of the ILO in relation to national sovereignty. For example, in 1929, Ernest Mahaim, a longtime Belgian government member of the ILO Governing Body (and ILO drafter) authored a study of the legal character of ILO membership. In Mahaim's view, governments joining the ILO assent 'to a limited extent' to 'restrictions on their sovereignty' (Mahaim 1929, p. 783). He gives no specific examples of such restrictions, however, other than to assert that there is an 'abdication of sovereignty' from the fact that ratified ILO conventions 'are subject to a procedure of sanctions' (ibid.). In 1930, French law professor and jurist Georges Scelle wrote a study of the ILO, characterizing it (and the League of Nations) as a 'constitutional and legal organization' (ILO 1930, p. 865).

In summary, national sovereignty served as a reference point and delimitation for the ILO throughout its first decade. Although the history recited above shows several instances in which participants suggested that the ILO was impinging upon national sovereignty, a close look at those statements shows that they are more rhetorical than substantive. The only specific ILO feature pointed to by anyone as sovereignty-infringing is the ILO's (never-used) enforcement system.

HOW THE ILO INFLUENCED THE CONCEPT OF SOVEREIGNTY

The ILO contributed to the concept of sovereignty in four distinct ways: first, in providing a working model of an international organization for which each state could engage in what Reinsch called 'new diplomacy' and use what Schücking called 'commercial competence'

to write and possibly ratify an ILO convention; second, in embedding within sovereignty the right of a state to participate in the international community; third, in reconceptualizing sovereignty as competence to choose to address a problem of globalization at the national or the international level; and fourth, in rethinking international relations when there is no longer a sovereign at the center of national sovereignty.

The ILO's first contribution was to advance the idea of sovereignty as calculated consent. When a state signs on to a law-making treaty, the question arises as to how such treaty disciplines affect the holism of sovereignty. In the 1910s and 1920s, the prevailing doctrinal answer was that such a treaty effected a limitation on sovereignty. For example, in 1922, the Chinese legal scholar Chang Chun Mai (Carsun Chang) advanced 'the theory of the limited sovereignty' in contradistinction to the 'theory of unlimited sovereignty in external relations' (Chang 1922, p. 56).

But limited sovereignty was not the only doctrinal answer. As noted above, some 19th-century publicists advanced a more fluid approach to states and treaties. Wheaton said that treaties of equal alliance did not impair sovereignty. Gallaudet said that the negotiation of treaties was an essential attribute of sovereignty. If sovereignty meant that a government had the right to choose, then choosing to enter into a treaty was no more a limitation of sovereignty than choosing not to enter the treaty. Indeed, Albert Thomas had made that point in 1924 when he explained that sovereignty was the freedom 'to ratify or not to ratify'. Although treaties could certainly be written to erode state sovereignty,[10] treatymaking per se does not subvert the sovereignty of states and does not impose any costs on treaty parties.

Two features of the ILO Constitution were especially sovereignty sparing. One was that the ILO had an open door for governments to join or quit.[11] The other was that the ILO labor conventions were not *corpus juris*, but rather à la carte agreements that governments could choose to ratify or not ratify.

Early in the ILO's life, the PCIJ was asked to give an advisory opinion on whether the ILO had legal competence to regulate labor in agriculture. In 1922, the Court ruled that the ILO did have such competence. In reaching that conclusion, the Court considered pleadings urging that because the ILO 'involved an abandonment of rights derived from national sovereignty', the ILO's competence 'should not be extended by interpretation' (PCIJ 1922, p. 23). The Court avowed that while there 'may be force in this argument', the question of competence could be answered based 'on the construction of the text itself' (pp. 23, 41). Whether the Court regretted seeming to accept the premise that the ILO involved an abandonment of sovereignty, I do not know. But a year later, the Court got another opportunity to interpret national sovereignty.

In 1923, the PCIJ issued its first contentious judgment, the *Wimbledon* case, where the Court handed down the most pellucid and concise explication of sovereignty in any international judicial ruling. In the Treaty of Versailles, Germany had agreed to maintain open passage through Germany's Kiel Canal. Nevertheless, because of the Russo-Polish war, Germany had barred passage of a British ship (the *S.S. Wimbledon*) chartered by a French company carrying munitions to a Polish naval base. This interdiction led to the dispute at the PCIJ brought by the United Kingdom and other countries against Germany. Among the defenses offered by Germany was that the Treaty should not be interpreted as a renouncement of an essential part of Germany's sovereignty. In ruling against Germany, the Court explained that it

> declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an

> obligation of this kind places a restriction upon the exercise of the sovereign rights of the States, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty. (PCIJ 1923, p. 25)

In recognizing treaties to be an exercise of sovereignty, not a diminution of it, the PCIJ adopted Schücking's insight of 1912 that treaties put sovereignty 'into effect'. Ironically, Schücking himself was not in a position to claim scholarly credit. He had been appointed by Germany to serve ad hoc on the PCIJ as the defendant country judge. Schücking dissented from the PCIJ's *Wimbledon* decision on the grounds that the Court was requiring Germany to violate its neutrality obligations to Russia.

The PCIJ's opinion regarding the ILO's competence on labor in agriculture underlines that the ILO is an international organization with a volition distinct from any of its individual member states. As the episodes discussed above show, any time the ILO reaches a decision, some states might win and others lose. But no decision reached by the ILO could reflect total independence from the ILO's collective membership. Thus, the ILO itself does not have an innate volition and does not manifest any sovereignty. In ILO membership, a state does not transfer any of its domestic regulatory authority to the ILO because the ILO acts only on the international plane and does not have any domestic authority, just as states lack any international authority.

The ILO's second contribution was that the essence of sovereignty is the right of a nation to participate in international governance. The ILO was a laboratory for observing new interactions between states and international organizations, and an individual in the 1920s with one of the best viewpoints was Edward Phelan, the director of the ILO's Diplomatic Division.[12] In 1924, Phelan wrote an article about the ILO and Ireland (his home country) which made an important contribution to the sovereignty literature. Phelan observed:

> just as an interval elapses before scientific discoveries affect the practical activities of men, so statesmen in their day to day work are still hampered by obsolete theories and terms. 'Sovereignty' was a useful generalisation when the world was a world of independent States. It has progressively become a less useful generalisation as civilisation has knit itself together into an international complexity of economic and industrial bonds, as States ceased to be independent and became inter-dependent. (Phelan 1926, pp. 396–7)

With the 'old term' (Phelan 1926, p. 397) of 'sovereignty' becoming less useful, Phelan calls for a 'new system' atop the old term. In such a system, states should seek 'to defend their interests and to protect the interests of their citizens and therefore [seek] the maximum of influence in the new inter-dependent world society' (ibid.). Looking ahead to when the 'League fulfils its mission of securing concerted action on matters of general concern', he suggests that action on such matters might only be achievable through the League's 'organisations' (ibid.). Participation in such organizations, therefore, takes on a greater importance. Thus, for Phelan, 'the first effective condition of modern sovereignty is Membership of the League, the possession by a State of what may be called international citizenship and the international franchise' (ibid.).

Phelan's thesis that 'modern sovereignty' is the international citizenship of the state was reinvented in the late 20th century by Abram and Antonia Handler Chayes. According to the Chayeses, 'for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably

good standing in the regimes that make up the substance of international life' (Chayes and Chayes 1995, p. 27). The Chayeses coined the term 'the new sovereignty' as the idea that 'In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system' (ibid.). As Kal Raustiala notes, in 'the Chayes' vision, participation in multilateral institutions, far from reducing sovereignty, paradoxically instantiates sovereignty' (Raustiala 2000, pp. 416–17).

The ILO's third contribution was to mediate the dynamic interplay between domestic and international law. Every nation rationally exercises its sovereignty by thinking through whether a particular social, economic, or environmental problem can be effectively regulated at the national level or, to quote Reinsch in 1909, can 'be effectively regulated only upon a world-wide basis'. In the ILO context, sovereignty is the competence of ILO member states to determine when the ILO should pursue international solutions. The ILO debates of the 1920s quoted above show Léon Jouhaux grappling with these tensions. For example, in 1921, he lamented that some governments insisted on dealing with certain problems 'nationally and not internationally'; in 1929, he called on his ILO colleagues to consider 'international questions' from 'an international point of view'.[13] Distinguishing the national questions from the international questions and the national points of view from the international points of view is a matter of science, politics, and law.

A question of law arose in 1926 when the ILO asked the PCIJ to decide whether the ILO's competence regarding the workplace covered only the work of wage earners, or also covered 'the same work performed by the employer himself' (PCIJ 1926, p. 24). In Advisory Opinion No. 13, the Court ruled that while the ILO could have competence over the employer, the Court would not decide in advance questions that 'should be left to the Labour Conference itself to decide' (PCIJ 1926, p. 23). In reaching that conclusion, the Court stated that the governments adopting the ILO Constitution 'must be assumed to have acted deliberately in providing for the co-operation, strictly limited as it is, of the International Labour Organization in the exercise of their sovereign powers in respect of labour measures, national and international' (PCIJ 1926, p. 22). The Court's point was that the sovereign power of a government included both a decision to write a national labor measure and a decision to cooperate with other governments to invoke the ILO's competence to write an international labor measure.

This concept of sovereignty as ascertaining optimal competence finds reflection in the scholarship of John H. Jackson who in 2003 called for a more refined approach to the outdated concept of sovereignty. Jackson proposes a new term 'sovereignty-modern' to replace the term 'sovereignty' (Jackson 2003, p. 785). Observing that in most 'current policy debates', the reference to sovereignty is 'about the allocation of power' between the 'nation-state (US) level' and the 'international level' (Jackson 2003, p. 790), Jackson suggests that a power allocation approach to sovereignty 'can help overcome some of the "hypocrisy" and "thought-destructive mantras" surrounding these concepts so that policymakers can focus on real problems rather than myths' (Jackson 2003, p. 800).

The ILO's fourth contribution was to peer inside the sovereign personality of states and to recognize that state sovereignty is not synonymous with an exclusive representational role for governments. Already by 1909, as noted above, Reinsch had professed that 'the old abstract view of sovereignty is no longer applicable to the conditions of the world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect'. The nongovernmental representation in the ILO demonstrated that

national interests had diverse voices. More importantly, the tripartism of the ILO demonstrated how traditional sovereignty was being denatured by transnational interests.

The ILO's breakthrough was noted by many commentators. For example, in 1924, Albert Thomas compared the League of Nations to the ILO and remarked: 'The members of the Assembly of the League of Nations are diplomats, direct representatives of Governments. … In the International Labour Conference, on the other hand, the peoples are represented through their trade organisations' (Thomas 1948, p. 145). Writing about the ILO in 1932, Harvard Law Professor Manley O. Hudson observed that 'for the first time in history international co-operation which was organized with some reference to other than national interests has proved to be possible' (Hudson 1932, p. 48). In 1936, Phelan pointed out that the ILO system of government, worker, and employer delegates 'constituted at its inception an almost revolutionary novelty and an astonishing break with the traditions of official international conferences and the principle of State sovereignty on which their composition and procedure had been based' (Phelan 1936, p. 4).

Besides its feature of nongovernmental delegates, the ILO has another unique constitutional feature – that is the system discussed above that requires governments to transmit draft conventions to the national parliament or other competent legislative authority. In 1925, Phelan observed that this 'system' is 'a general international recognition of the fact that the real seat of sovereignty has now passed to the legislative authority' (Phelan 1925, p. 617).

In conclusion, the lens of sovereignty reveals important details about the founding of the ILO and its first decade. The dictates of national sovereignty constrained the design of the ILO and its early work program. The ILO was not endowed with superparliamentary authority, but rather was fashioned as an organization (or community) in which governments, workers, and employers would cooperate to write and implement international labor standards. At the same time, the lens of the ILO began to refocus the doctrines of sovereignty. The ILO showed that states need not be represented solely by governments and that states could cooperate on a functional basis to address problems overlapping sovereign jurisdiction. A century after Schücking's and Phelan's 'modern' sovereignty, the contemporary public debate on the management of the global economy can continue to learn from the ILO.

NOTES

1. In conducting this research, the author relied largely upon online resources and therefore admits an inability to present additional 19th- and early 20th-century legal literature from around the world.
2. Bodin was an early theorist of sovereignty (Nagan and Haddad 2012, p. 431).
3. Reinsch had studied under Frederick Jackson Turner who had studied under Woodrow Wilson. For a thoughtful discussion of Reinsch's work, see Klabbers (2014).
4. Schücking references several of the publicists discussed above including Reinsch.
5. The proposed system of sharing each state's vote among its government, workers, and employers was invented in the ILO Constitution and was soon termed 'tripartism' (Maul 2019, pp. 42–3).
6. Germany was forced to sign a Peace Treaty with several provisions that showed a disregard for the future of the Germany people. An episode in 1924 regarding reparations will be discussed herein.
7. A reviewer of this paper observes that the composition of the ILO Governing Body as laid out in the Peace Treaty was an infringement on the 'sovereign equality of states' because the ILO Constitution reserved eight of the twelve government seats for the states of 'chief industrial importance'. The point is well taken. Indeed, the establishment of any Governing Body could be claimed to undermine the so-called sovereign equality of states.

8. The ILO Constitution featured a process for bringing complaints about non-enforcement to a Commission of Enquiry and the Permanent Court of Justice. If a violation were found and went uncorrected, the Commission or the Court could authorize ILO member governments to impose measures of an economic character against the scofflaw country (Charnovitz 2019).
9. Pauwels was Secretary-General of the Confederation of Christian Unions. His long service to the ILO ended in 1946 when he died in a plane crash near Gander Airport on the way to the ILO Conference in Montreal.
10. For example, the Treaty of Versailles states that 'If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty' (Treaty of Versailles 1919, Art. 281).
11. The episode in 1919 with Finland's accession stands as an exception.
12. Phelan, who had been appointed by Thomas as the ILO's first civil servant, was one of the ILO's founding fathers and was the principal author of the 1919 British Memorandum. In 1941, the ILO elected Phelan to be its fourth Director and he served until 1948.
13. In 1951, Jouhaux was awarded the Nobel Peace Prize.

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