RE-ENVISIONING SOVEREIGNTY

Re-Envisioning Sovereignty

The End of Westphalia?

Edited by
TRUDY JACOBSEN
CHARLES SAMPFORD
Griffith University, Australia
and
RAMESH THAKUR
United Nation's University, UK

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
To be added

Library of Congress Cataloging-in-Publication Data
To be added

Contents

List of Tables and Figures

List of Contributors

Professor Howard Adelman is Principal Research Fellow, Institute for Ethics, Governance and Law, Griffith University, Australia.

Dr Neil Arya is a family physician in Waterloo, Ontario, an adjunct professor at the University of Waterloo in the Department of Environment and Resource Studies, an Assistant Clinical Professor in the Department of Family Medicine, Faculty of Health Sciences, and a lecturer in the Centre for Peace Studies at McMaster University.

Professor Ross Buckley is a Professor in the Tim Fischer Centre for Global Trade and Finance at Bond University and is Program Leader of the Australia 21 research program, 'Enhancing Australia's Security, Stability and Prosperity in the 21st Century'. He is series editor of Kluwer's *Global Trade & Finance Series* and has published widely.

Professor Joseph Camilleri is Professor of International Relations at La Trobe University.

Dr Lorraine Elliott is Reader in International Relations and Programme Director for the Graduate Diploma and MA in International Relations at the University of Warwick. She also holds a Senior Fellowship in the Department of International Relations at the Australian National University.

Professor Barry Hindess is Professor in Political Science in the Research School of Social Sciences at the Australian National University.

Professor Wayne Hudson is Chair of Philosophy, University of Tasmania.

Dr Trudy Jacobsen is ARC Postdoctoral Fellow in Anthropology and the Centre of Southeast Asian Studies of the Monash Asia Institute.

Professor Brian Job is a Professor of Political Science and the Director of the Centre for International Relations at the Liu Institute for Global Issues at the University of British Columbia.

Dr Paul Keal is Senior Fellow and Acting Deputy Director of Studies, Graduate Studies in International Affairs, in the Department of International Relations, Research School of Pacific and Asian Studies at the Australian National University.

Mr C. Raj Kumar is a Associate Professor in the School of Law at the City University of Hong Kong.

Dr Robyn Lui was a Research Fellow at the Key Centre for Ethics, Law, Justice and Governance at Griffith University.

Professor William Maley, AM, is Director of the Asia-Pacific College of Diplomacy at the Australian National University.

Dr Jackson Maogoto is a Lecturer in the School of Law at the University of Newcastle.

Professor Amin Saikal is Director of the Centre for Arab and Islamic Studies and Professor of Political Science at the Australian National University.

Professor Charles Sampford became the Foundation Dean of Law at Griffith University in 1991. He later became Director of the National Institute for Law, Ethics and Public Affairs, which was incorporated into the Key Centre of Ethics, Law, Justice and Governance at Griffith University. He is presently the Director of the Institute for Ethics, Governance and Law (IEGL), a joint initiative of the United Nations University, Griffith University, Queensland University of Technology and in association with Australian National University. He is also Convenor, ARC Governance Research Network and President, International Institute for Public Ethics.

Professor Jan Aart Scholte is Professor in Politics and International Studies at the University of Warwick, and currently Acting Director of the Centre for the Study of Globalisation and Regionalisation at Warwick.

Dr Gerry Simpson is a Senior Lecturer in the Law Department at the London School of Economics.

Dr See Seng Tan is an Assistant Professor in the Institute of Defence and Strategic Studies and the Coordinator of the Multilateralism and Regionalism Programme at Nanyang Technological University, Singapore.

Professor Ramesh Thakur is Distinguished Fellow at the Centre for International Governance Innovation and Professor of Political Science at the University of Waterloo in Canada and Adjunct Professor, Griffith University in Australia.

Dr Yongjin Zhang is Head of the School of Asian Studies and Associate Professor in both Asian Studies and Political Studies at the University of Auckland.

Preface and Acknowledgements

Sovereignty, as a concept, is in a state of flux. The multiplicities of meanings that states, international organisations, and other global actors have come to attach to the idea of sovereignty in the past century have worn away at traditional conceptualisations of what it constitutes; perhaps more significantly, the limitations of sovereignty have been altered as transnational issues compete with domestic concerns for precedence. Simultaneously, this more inclusive, global understanding of sovereignty has necessarily resulted in an incorporation of other perspectives of sovereignty not deriving from Western, post-Enlightenment scholarship. In a time of intense rivalry between secular and religious authority, can there be a consensus on sovereignty? Does post-secularism indeed spell the end of Westphalia? Or will traditional, Western theories of sovereignty prevail?

These questions, among others, were addressed at a workshop entitled 'The End of Westphalia? Re-Envisioning Sovereignty', organised jointly by the Institute for Ethics, Governance and Law, Griffith University, and the Peace and Governance Programme at the United Nations University, which took place over three days in April 2005 at the Australian National University, Canberra. The initial papers presented at this workshop have been augmented and expanded to include feedback arising from discussion and subsequent dialogue before appearing in their final form as chapters in this book. The editors thank all those who participated in the workshop for their time, their insight, and their contribution to this attempt at exploring the meanings and assumptions attached to notions of sovereignty in current discourse; without them this book would not have been possible.

Similarly, the workshop itself would never have been eventuated without the initial efforts of Margaret Palmer and Edward Newman, the sustained enthusiasm and organisational proficiency of Christine Thomson, the cheerful logistical assistance of Lynette Farquhar and Susan Lockwood-Lee, the stern editorial gaze of Carmel Connors, and the diligence and dynamism of Melea Lewis.

Trudy Jacobsen, Charles Sampford and Ramesh Thakur
Brisbane and Tokyo, 27 May 2007

List of Acronyms

Aids	Acquired Immune Deficiency Syndrome
APA	ASEA Peoples' Assembly
ASC	ASEAN Security Committee
ASEAN	The Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CD	Community of Democracies
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMECON	Council for Mutual Economic Assistance
COP	Conference of the Parties
CSD	United Nations Commission for Sustainable Development
CSIS	Canadian Security Intelligence Service
CSR	Corporate Social Responsibility
CTBT	Comprehensive Test Ban Treaty
DAR	Development Assistance for Refugees
DLI	Development through Local Integration
EEC	European Economic Community
EU	European Union
G8	Group of Eight
GATT	General Agreement of Tariff and Trade
GDP	Gross Domestic Product
HAP	Humanitarian Accountability Project
HIV	Human Immunodeficiency Virus
ICANN	Internet Corporation for Assigned Names
ICARA	International Conference on Assistance to Refugees in Africa
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSU	International Council of Scientific Unions
IDP	Internally Displaced Person
IFI	International Financial Institutions
IL	International Law
ILGA	International Lesbian and Gay Association
IMF	International Monetary Fund

IPCC	Intergovernmental Panel on Climate Change
IR	International Relations
IRN	International Rivers Network
IUCN	The World Conservation Union
MAI	Multilateral Agreement on Investment
MDG	Millennium Development Goal
MEA	Multilateral Environmental Agreement
MESCOSUR	Southern Common Market
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non Government Organization
NYU	New York University
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PGA	Peoples Global Alliance
PNG	Papua New Guinea
PRSP	Poverty Reduction Strategy Papers
PTBT	Partial Test Ban Treaty
Sars	Severe Acute Respiratory Syndrome
TI	Transparency International
TRAFFIC	The Wildlife Trade Monitoring Network
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNI	Union Network International
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNU	United Nations University
US/USA	United States of America
USSR	Union of the Soviet Socialist Republic
WEDO	Women's Environment and Development Organization
WEF	World Economic Forum
WHO	World Health Organization
WMD	Weapons of Mass Destruction
WMO	World Meteorological Organization
WSF	World Social Forum
WTO	World Trade Organization
WWF	World Wide Fund for Nature

Introduction

Trudy Jacobsen, Charles Sampford and Ramesh Thakur

Sovereignty is a central concept in international relations (IR), international law (IL), political theory, political philosophy and modern history. Indeed, it predates the separation of those disciplines. However, its meaning and effect are unstable and hotly contested within and between those disciplines.

One source of growing tension has been between traditional conceptions of state sovereignty based on the effective control of territory[1] and popular sovereignty. While the former still dominates IR and IL, the latter dominates domestic political and legal theory in all democracies – generating an increasing disconnect between the national and international conceptions of sovereignty and some significant challenges to the latter. Two of these challenges were acknowledged and articulated by Kofi Annan in 2000. In his Millennium Address he challenged the international community to devise principles governing the exercise of sovereignty and the conditions under which humanitarian intervention would be justified. In the inaugural Ministerial Conference of the Community of Democracies (CD), Annan proposed that 'wherever democracy has taken root, it will not be reversed'. The International Commission on Intervention and State Sovereignty (ICISS) responded to the first challenge in 2001 and a Council on Foreign Relations Task Force responded to the second challenge in 2002.[2]

These responses have stimulated rather than resolved debate between traditional state sovereignty based on power and popular sovereignty based on the active choice of the governed. Indeed they now compete with a cosmopolitan vision which aspires to supersede both and an imperial vision of sovereign power assumed by the US government. However, it would be wrong to focus only on the challenges to sovereignty posed by the understandable urge to protect peoples from sovereign states that tyrannise them. Sovereignty in all its variations is under constant and growing challenge as a result of the globalisation of trade and commerce, communications, and the rapid interstate transfer of people, ideas, and capital. New diseases, environmental degradation, international terrorism, concern for and threat of refugee flows, illicit drugs, human smuggling and laundered money by international criminal

1 H. Kelsen (1989) *Pure Theory of Law* (Gloucester MA: Peter Smith). Dubbed the 'prior successful use of force' by Sampford in C. Sampford and M. Palmer (2005) 'The Theory of Collective Response', in M. Halperin and M. Galic (eds) *Protecting Democracy: International Response* (Lanham: Lexington Books).

2 ICISS Responsibility to Protect, Gareth Evans and Mohamed Sahnoun Co-Chairs. Independent Task Force Sponsored by the Council on Foreign Relations Threats to Democracy: Prevention and Response, Madeline K. Albright and Bronislaw Gremek, Co-Chairs.

syndicates raise questions concerning the ability of sovereign states to control these problems.

These conceptual and policy challenges are so significant that they cannot be answered by piece-meal tinkering with the concept. What is needed is a systematic effort to re-envision sovereignty through conceptual analysis and cross-disciplinary theorising, through historical comparisons of the demise of the old regal sense of the sovereign, the rise of the variety of different conceptions of sovereignty in modernity, and by applied functionalist empirical studies in relationship to specific cases and specific challenges. The ultimate goal is to examine emerging conceptions of sovereignty and to craft a coherent concept that can respond to the multiple challenges and then to consider the institutional structures that would realise such a reconceived sovereignty.

This book is the first part of a major project by the United Nations University and the Institute for Ethics, Governance and Law (a joint initiative of UNU and Griffith University) to address these challenges. The essays were originally papers delivered at a workshop held at the Australian National University in Canberra and funded by the Australian Research Council, UNU and Griffith.

Multiple and confusing conceptions of sovereignty

Most historical accounts focus on the histories of 'independent' sovereign states. The dominant trend in IR focuses on inter-state relations between sovereign states that recognise each other's independence in the domestic sphere as the ultimate source of law and as the exclusive repository of coercion in determining when and where to use the state's instruments of might in governing and protecting its citizens and a defined land mass,[3] effective domestic control became the primary basis for international recognition of sovereign legitimacy and the right to take part in the international order.[4] With states varying so radically in power, IR focuses on trying to establish an equilibrium to avoid inter-state wars to protect incumbent elites[5] that evidently works, according to a recent comparative case study,[6] when local elites provide strong leadership. Without that enlightened leadership, the effective sovereignty of less powerful states is frequently compromised and occasionally extinguished.[7] In contrast, ignoring inequalities in power, IL is based on a model of an international

3 Sampford's 'the prior successful use of force'.

4 S.D. Krasner, (2002) 'Realist Views of International Law', 96 *American Society of International Law Proceedings* 260; and Charles Tilly (1990) *Coercion, Capital, and European States*, *AD 990–1990* (Cambridge MA: Basil Blackwell).

5 C.A. Bayly (2004) *The Birth of the Modern World, 1790–1914* (Oxford: Basil Blackwell).

6 Simon Chesterman, Michael Ignatieff and Ramesh Thakur (2004) *Making States Work* (Tokyo: UNU Press).

7 N. Krisch (2003) 'More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law', in Byers and Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press).

community composed of legally *equal* sovereign states; so that the classical sources of IL are inter-state activity such as treaties and state custom and practice.

The approach taken to domestic sovereignty has varied over time and been affected by domestic political theory. In absolutist states, the sovereign entity enjoyed absolute power in which the lack of international checks was matched by a lack of internal checks. The twentieth-century successors were totalitarian states devoted to a secular ideology or religious radicalism. In liberal states, state sovereign power was initially seen as limited by conditions of an imagined social contract and later a real constitution.[8] With the rise of democracy, state sovereignty was challenged by popular sovereignty, first conceived of as the consent, and then active choice, of the governed. Internal power relations suffered a Feuerbachian reversal – subjects were no longer accountable to sovereigns but states were accountable to citizens. This was, in turn, challenged by *republican* sovereignty[9] rooted in Montesquieu and Edmund Burke, in which the people are those who have inherited common traditions and possess the virtues to be self-legislators in a homogeneous *nation*-state. These new sovereignties generated secessionist versions in multi-ethnic, multi-religious and multi-lingual states and demands by dispossessed indigenous peoples for sovereign recognition[10] on the basis of new conceptions of societal security,[11] challenging state-centric assumptions of IR theory.[12] The scope of self-determination remains controversial in IL;[13] its potential width[14] has not been widely recognised except during the period of European de-colonisation.

Just as constitutional arrangements and distribution of powers between different branches and levels of government qualifies the absolutism of domestic sovereignty, so international constitutional arrangements through agreements entered into voluntarily qualify external sovereignty, for example the UN Charter, ICJ statute, WTO, the EU/NATO (pooled sovereignty), and so on. While the limitations of domestic sovereignty have been long recognised, it is only recently that limitations have been introduced to international sovereignty with discussion of suspended

8 B.M. Russett (1995) *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press).

9 Joyce Appleby (1992) *Liberalism and Republicanism in the Historical Imagination* (Harvard: Harvard University Press).

10 Brooke Larson (2004) *Trials of Nation Making: Liberalism, Race, and Ethnicity in the Andes* (Cambridge: Cambridge University Press).

11 The Copenhagen school.

12 P. Keal (2003) *European Conquest and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press).

13 J. Crawford (1979) *The Creation of States in International Law* (New York: Oxford University Press); E.J. Cárdenas and M.F. Cañás (2002) 'The Limits of Self-Determination', in W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World* (New York: Lynne Rienner Publishers); and R. McCorquodale (2000) 'Self-Determination', in R. McCorquodale (ed.), *Self-Determination in International Law* (Aldershot: Ashgate).

14 Friendly Relations Declaration.

sovereignty,[15] interrupted sovereignty[16] and, most significantly, conditional sovereignty.[17] The International Commission on Intervention and State Sovereignty (ICISS) argued that states had a *responsibility to protect* the rights of their citizens. While the best solution to disintegrating states 'was to strengthen and legitimate states rather than overthrow the system of states',[18] the gross failure of a state to meet that responsibility triggered a broader international responsibility to protect those rights via UN sanctioned intervention. The UN Secretary-General's High Level Panel on Threats, Challenges and Change adopted the same principle in *A More Secure World: Our Shared Responsibility* and more recently, the principle was also endorsed in the Report of the Secretary General entitled *In Larger Freedom: Towards Security, Development and Human Rights for All.*[19]

Locke had asserted that domestic sovereignty was held in trust, conditional on meeting subsequently asserted duties and revocable by popular revolution. The ICISS was making a similar claim for international state sovereignty – with the trust revocable by the UN Security Council (UNSC). Even more controversial is the American claim that this function could be taken on by coalitions of democracies, with the claimed right to invade states either for a smorgasbord of reasons including the elimination of a self-determined future threat to security and/or non-democratic rule. By declaring a 'war' on terrorism, others' sovereignty is necessarily compromised as warring parties do not recognise the sovereign rights of 'enemies' – although historically many states have been prepared to insist on their own absolute sovereignty while violating others.[20]

Concrete challenges

However, it would be a major mistake to treat sovereignty as mainly a function of the law and practice of state intervention. The concept of a state as the ultimate authority and power is also challenged by the realities of the twenty-first century. Certainly, one set of challenges relates to recognising the power dynamics in the international system where the only superpower, the US, has considerable power which it is able to exercise virtually unchecked. The relationship between the distribution of power (in particular unipolarity) and sovereignty demands attention. The war against Iraq in 2003 and the willingness of some countries to use preventive and pre-emptive force

15 A. Yannis (2003) 'The Concept of Suspended Sovereignty in International Law', *European Journal of International Law* 13, 5.

16 For example trusteeships, see G.B. Helman and S.R. Ratner (1992–1993) 'Saving Failed States', *Foreign Policy*, 89, 3.

17 ICISS.

18 Chesterman, Ignatieff and Thakur, *Making States Work*.

19 United Nations, Report of the High-Level Panel on Threats, Challenges and Change (2004), *A More Secure World: Our Shared Responsibility*, paras 199–203; Report of the Secretary General (2005), *In Larger Freedom: Towards Security, Development and Human Rights for All*, para 135.

20 S.D. Krasner (2002) 'Realist Views of International Law', 96 *American Society of International Law Proceedings* 260.

against asymmetrical threats represents a significant challenge to the post–Second World War international order based upon deterrence, stability and sovereignty.

Probably more fundamental are the set of challenges from the rise and recognition of new actors playing significant roles and wielding significant power, including transnational corporations,[21] the UN itself, international agencies[22] imposing aid conditionality,[23] indigenous peoples, international NGOs, powerful individuals.[24] Indeed, individuals have become subjects of international law as bearers of duties[25] and holders of rights under human rights instruments and some treaties.[26] A third set of challenges comes from the apparent inability of some states to maintain the internal order and control that is central to sovereignty. Accordingly, state break-ups and 'state failure' may mean the end of viable central public authority and control so that the rights of citizens cannot be met and inter-state relationships cannot be meaningfully pursued. A fourth set of challenges lies in the formal end of professed indifference to the internal governance of other states and the attempts to formulate norms for such internal governance that are intended to be enforced. Some argue for an emerging right of democratic governance,[27] at least where democracy has been established.[28] This highlights the disjunction already noted between IR and IL conceptions of sovereignty as the prior successful use of force and the internal conceptions of popular sovereignty that now dominate a majority of nations. Of course, the consequences of transferring domestic and internal approaches to sovereign legitimacy to international relations would be so profound that there is a natural hesitation in linking international legitimacy to domestic democratic legitimacy. Nevertheless, there is clear movement in this direction with some states joining bodies that impose obligations concerning internal governance.[29] While armed intervention is still relatively rare to enforce internal standards of governance and respect for human rights, there are increasing attempts to generate formal mechanisms for protecting human rights from the UN Committee on Human Rights to the European Court of Human Rights which can give binding orders to sovereign states as well as tying aid and trade to what is considered to be acceptable internal behaviour of states. A fifth set of challenges is based on the fact that many issues

21 One hundred of which are wealthier than all but eight states.

22 For example the World Bank and IMF.

23 M. Cosnard (2003) 'Sovereign Equality – "The Wimbledon Sails On"', in Byers and Nolte (eds), *United States Hegemony and the Foundations of International Law*.

24 D. Josselin and W. Wallace (eds) (2001) *Non-State Actors in World Politics* (London: Palgrave).

25 Since the Nuremberg trials.

26 R.A. Brand (2002) 'Sovereignty: The State, the Individual and the International Legal System in the Twenty-First Century', *Hastings International and Comparative Law Review* 25

27 T.M. Franck (1992) 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86, 46.

28 K.A. Annan (2000) *Millennium Report of the Secretary-General: We, the Peoples: The UN in the 21st Century.*

29 For example, the European and African Unions.

cannot be dealt with within traditional boundaries for example, environmental and health problems such as Aids, Sars and avian flu.

The most pervasive set of challenges arises from the movement of people, ideas and goods. International communications weaken a state's control over its own people, and more people are on the move reducing loyalty to the state. For some, the participation in economic success, not coercive power or legal authority, becomes the primary source of identity. Commerce is boundariless while the state's authority and ability to use its laws and coercive power stops at its borders as the most lucrative business of all, the 400 billion dollar trade in illicit drugs and human smuggling, grows exponentially. Transnational criminals use weak or failed states as bases and safe havens as well as sources to fund their operations.[30] Just when police officials in pursuit of a suspect must halt at a border, money launderers cross with ease and transfer millions of dollars all over the globe instantaneously. As the state weakens economically, so does any real threat to use its coercive power and its system of the rule of law to coerce other states to follow its pattern. Instead, chimerical wars on drugs are launched at the same time as anti-terrorist wars unleash new sources for those same illicit drugs.

Many of these challenges are reinforcing and produce contradictory behaviour. Countries that provide legal protection to refugees in flight from persecution also interdict refugees and prevent them from arriving on their shores. The threats to sovereign states themselves heighten the debate over the conception of sovereignty. Accordingly, the sovereignty of states unwilling or unable to fulfil certain basic standards of human rights may be jeopardised,[31] while their actions[32] may threaten the security of other states.[33] As states are weakened economically and become weaker sources of identity, individuals and groups may look to other ethnic and religious identities – either within states (for example, in the Balkans) or across states (as in ideas of a new Islamic 'caliphate'). This approach is particularly likely for those excluded from, or alienated by, the international market economy.

Rather than merely discussing 'erosion' of sovereignty,[34] this project places the current challenges in a historical and conceptual context and considers how sovereignty might be re-envisioned for the twenty-first century. This discussion is overdue and of great practical importance. Governments are jealous of the sovereignty of the states they govern and resist responding creatively to challenges. They frequently use

30 J. Stern (1999) *The Ultimate Terrorists* (Cambridge MA: Harvard University Press) and M. Galeotti (1995) *Cross-Border Crime in the Former Soviet Union* (Durham: Durham University).

31 S. Chesterman (2001) *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press).

32 For example, in generating refugees.

33 H. Adelman and G. Loescher (1992) 'Refugee Movements and International Security', *Adelphi Paper*, 268.

34 T.A. Camilleri and J. Falk (1992) *The End of Sovereignty* (London: Elgar); K Ohmae (1995) *The Borderless World: Power and Strategy in the Interlinked World Economy* (New York: Harper Business); S. Strange (1996) *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press) and A. Giddens (2000) *The Third Way and Its Critics* (London: Polity Press).

Westphalian concepts to insist that compliance with international norms is voluntary to avoid collective action on common problems. The international community must consider the extent to which sovereignty should either be bolstered against these challenges or modified to deal with them. The ability of international law and international relations as well as political and philosophical theory to respond to the reality of change has been limited. Tackling the issues of conception, historical dynamics, international law, and international relations in the context of rich textual comparative case studies[35] (without using hard and soft variables and patterns of covariation given the limited number of cases) is more likely to produce genuine results than ardent defences of one conception or another.

The increasing policy emphasis placed on so-called 'non-traditional' security threats crossing state boundaries[36] stress the urgency of revisiting various conceptions of sovereignty, particularly the continuing relevance and usefulness of the dominant Westphalian notion of state sovereignty, to examine their adequacy in both explaining behaviour and guiding policy. At the same time, however, Australia is seeking greater engagement, co-operation and binding trade treaties that voluntarily limit what some might see as 'sovereign rights'. Sovereignty is a guiding principle of both international relations and international law, yet two contradictory conceptions dominate each making coherent policy impossible. There is a need for strong conceptual, legal and policy foundations to shape a new and more global approach to issues, particularly important for a middle power like Australia. Because it lacks the power to enforce its own will on other significant players in the region, it is much more reliant on an effective international system. On the other hand, its vital alliance with the US puts pressure on Australia to play an important regional role as well as a role within US-led coalitions that places less emphasis on respect for the sovereignty of others. These create internal and external tensions. This project will help sovereign polities and international bodies (most notably the UN) to think with greater clarity in confronting these problems and tensions.

Re-envisioning sovereignty

The approach to answering the articulated conceptual challenges is a systematic effort to re-envision sovereignty through conceptual analysis and cross-disciplinary theorising, through historical comparisons of the demise of the old regal sense of the sovereign, the rise of the variety of different conceptions of sovereignty in modernity, and by applied functionalist empirical studies in relation to specific cases and specific challenges. The examination of emerging conceptions of sovereignty provides the means by which to craft a coherent conception that can respond to the multiple challenges and ultimately consider the institutional structures that would realise such a reconceived sovereignty.

---

35 Charles C. Ragin (1987) *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Los Angeles: University of California Press)

36 Ramesh Thakur and Edward Newman (eds) (2004) *Broadening Asia's Security Discourse and Agenda: Political, Social, and Environmental Perspectives* (Tokyo: United Nations University Press).

The book contributes to the study of a theoretical concept using empirical case studies as well as comparative historical studies and are geared to policy. Theory with respect to sovereignty is of importance based on the significance of theory in reconstituting social structures.[37] In this approach, that theory is developed by combining critical theory and a problem-solving approach to try to realise 'unappreciated policy and institutional possibilities'.[38] In explaining how concepts such as sovereignty are created, develop and evolve in different contexts, history can contribute to the project of developing a new framework for conceptualising sovereignty relevant to both international relations and international law by developing an understanding of how conceptions adapt and fail to adapt to threatening changes, and the enormous costs of such failures. Ultimately the aim of compiling cross-disciplinary approaches is to produce a range of potentially defensible conceptions of sovereignty that meet some or all of the contemporary challenges to sovereignty. Ultimately, this will lead to discussion of the kinds of institutions and practices that would be necessary to realise such conceptions of sovereignty in whole or part.

Combined, the chapters contribute to the analyses in terms of determining whether processes at the international and intra-state levels require a reassessment of the contemporary meaning and relevance of sovereignty, in particular as it relates to the constitution of international order. The concept of 'conditional sovereignty', and the gap between empirical and juridical sovereignty, have taken on a renewed importance in the context of a number of contemporary concerns. The volume brings together a multifaceted range of analyses – economic, social, strategic, political, normative – in order to approach the question in a holistic manner.

The contributions to this volume are divided into six overarching parts and explore a wide range of issues that have altered the theory and practice of state sovereignty – including human rights and the use of force for human protection purposes, norms relating to governance, the war on terror, economic globalisation, the natural environment and changes in strategic thinking. It is these considerations that inform the wider challenges for international order and multilateralism.

The first set of contributions consider sovereignty as a traditional and emergent concept. Wayne Hudson's chapter examines how anglophone literature on sovereignty is shaped by an historical discourse that posits an alleged concept and then invokes its history as a rhetorical strategy to emphasise the self-evidence of a specific view of the subject matter. This problematic nature of the history of sovereignty is related to the tendency to emphasise the historical record without consulting it in the requisite detail. Hudson's chapter relates the problematic nature of the history of sovereignty to its possible transformation. A wider ambit of historical examination is required, so that differential features of the historical record can be recognised and can impact upon ways in which the problem of sovereignty is discussed.

In examining the historical discourse associated with sovereignty, Hudson outlines a constructive realist approach to history which can impact on prospections

37 Wesley W. Widmaier (2004) 'Theory as a Factor and the Theorist as an Actor: The "Pragmatic Constructivist" Lessons of John Dewey and John Kenneth Galbraith', *International Studies Review* 6(3), September, 427–445.

38 See *ibid*.

of future institutional organisation by privileging a 'laying out' framework rather than a recursive inquiry. In part two of the chapter, the dominant approach to the existing literature on the history of sovereignty which suggests that sovereignty emerged in the context of the wars of religion in sixteenth-century Europe in close proximity with the emergence of the modern state is criticised, using the example of F.H. Hinsley's *Sovereignty*.[39] For Hudson the historical background is more complex than the dominant discourse recognises and provides effective illustration as to why sovereignty cannot be explained in terms of the modern state. The chapter concludes by suggesting the respects in which it may be possible to modify sovereignty in ways which retain its purchase as an institutional end point, while freeing this end point from political and cultural practices which now appear less useful.

Joseph Camilleri's chapter, 'Sovereignty Discourse and Practice – Past and Future' considers the concept of sovereignty and the attempts made over time to modify the discourse. Camilleri argues that these attempts are at their most illuminating for what they tell about the deficiencies of the existing sovereignty edifice. The combined weight of the elements of internationalisation of trade, production and finance, the homogenising architecture of technological change, the globalisation of insecurity, impact of ecological change and the growth of transnational social consciousness have created a context for change in legal and institutional development and the way in which authority is understood and exercised. For Camilleri, the globalising processes of integration and fragmentation require a reinterpretation of the physical and social space. For this reason the paramount question to be addressed has to do with governance, not sovereignty. Already, functions and powers overlap across boundaries, creating a loose but multi-tiered framework of governance. Some, but far from all, of the principles that underpin this complex and rapidly evolving edifice can be found in the sovereignty concept. Three key principles are suggested as offering useful guidance for the reinterpretation of social space and the emerging international order, namely autonomy, subsidiarity, and the related notions of legitimacy and accountability. All three principles need to be combined in a new synthesis that reconceptualises the relationship between governance, market and civil society.

Gerry Simpson in 'The Guises of Sovereignty' poses three initial questions important for considering sovereignty. Is sovereignty a political or legal concept? What do we want with sovereignty? To what extent do we want to associate sovereignty with the state or with law? Of real interest, for Simpson, is the decomposition and reformation of sovereignty as opposed to the death of sovereignty or the reliance on notions of sovereignty to resist intrusions of the market, Security Council or multilateralism. Simpson considers several guises adopted by sovereignty to underpin his question of an uncoupling of sovereignty from statehood. In reconceptualising traditional sovereignty, Metaphysical Sovereignty; Extraterritorial Sovereignty; Deferred Sovereignty; Internationalised Sovereignty; Incipient Sovereignty; and Deterritorialised Sovereignty are analysed in the chapter.

39 F.H. Hinsley (1986), *Sovereignty*, 2nd edn (Cambridge: Cambridge University Press).

The part of the book considers international perspectives on sovereignty. Amin Saikal explores the elements associated with the secular meaning of sovereignty in the Muslim Middle East, together with an analysis of the Islamic meaning of the concept. Saikal uses these understandings of the concept to examine whether a balance between the different meanings is achievable: the aim being to use the balanced meaning of the concept as a way of reducing violent challenges to the current international order.

See Seng Tan's chapter considers how sovereignty has been configured in relation to contemporary Southeast Asia. Recent regional developments that question the traditional understanding of sovereignty in the region are considered to assess how regional perspectives may evolve. They call into question features of Southeast Asian regionalism, state centrism, non-interference, 'soft power' and 'soft institutionalism'. For Tan, if all four developments are pursued vigorously this would increase the intrusiveness in the affairs of ASEAN states from within and without the region. This approach does not automatically erode or endanger sovereignty. The growing regulation of the judiciary and legal processes experienced in the region may lead to state sovereignty being reinforced as the Asian states continue to mature and develop. It is not inconceivable, however, for sovereignty to be recast in more inclusive forms; but this requires a major political commitment.

Yongjin Zhang, in 'Ambivalent Sovereignty: China's Re-Envisioning of the Idea and Practice of Sovereign Statehood', examines the changing Chinese perspective on sovereignty. Tradition, revolution and globalisation constitute an important historical and social environment that conditions and shapes China's understanding, practice and (re)conceptualisation of the sovereignty norm in international relations. Sovereignty has been re-imagined in different policy and intellectual contexts and the government position on matters related to sovereignty has been shifting. The Westphalian ideal is no longer taken for granted as a given, there has been ongoing debate in China about sovereignty in both terms of rights and responsibilities of sovereign statehood. The interesting question is why China seems to be unreasonably recalcitrant on some sovereignty issues, while truly ready to compromise on others?

Human and global security and their relationship with sovereignty are examined in the contributions made by Brian Job, Howard Adelman and Robyn Lui. Job's chapter addresses the dilemmas facing the state centric international system in confronting international terrorism. Such challenges arise in terms of principle, over the assertion of the rights and responsibilities of sovereignty; and also in terms of practice as states attempt to cooperate on a multilateral level, while at the same time holding divergent perceptions of the causes of terrorism and its longer-term remedies. Job examines these issues in terms of how international terrorists and terrorist actions take advantage of the resources and vulnerabilities of the contemporary state and international state system as this is critical to understanding the dilemmas that arise as states seek to justify counter-terrorist agendas. Terrorism attacks the state-centric system through acts to inflict damage and intimidate the advancement of an ideological agenda. Ultimately moves on the part of the states to prevent terrorism face the dilemma that measures against terrorists are likely to stoke the resentment that fuels such ideological movements. Traditional principles of sovereignty

are contested as states dispute their rights and responsibilities. The right of self-defence becomes complicated when confronting non-state, transnational actions and increasingly so too does the responsibility to protect argument. Ultimately, for Job, these issues facing the conception of sovereignty impact on the ability to coordinate counter-terrorist policy effectively.

Howard Adelman uses the issue of security, immigration and refugees to discuss the principle of balance as a mode of resolving tensions between opposing values and the different types of sovereignty associated with this issue. In considering these concepts, we have immigration and national sovereignty, refugees and individual sovereignty and cosmopolitan individual rights and security and state sovereignty. According to Adelman, similar arguments are used for a balance between concerns for national security and the protection of human rights. They differ only on how to strike that balance. They are trying to do what is impossible – provide a common criterion for balancing two incompatible factors. Adelman questions whether there is a different balancing model by using a decision of the Canadian Federal Court of Appeal, which ruled in favour of the use of Security Certificates. The Court held that an effective response to terrorism has to be balanced against the values of the rule of law: a balance between two complementary facets of the same whole.

The supreme norm of the international system is state sovereignty and the society of states is the cornerstone of international order. For Robyn Lui, this order has shaped our characterisation of the 'refugee problem' and the interventions implemented in the name of protection since the beginning of the twentieth century. Refugees are not forgotten people; the movement of people is a highly regulated affair. As a result, any serious re-visioning of sovereignty would lead to a re-envisioning of international relations and present a different normative framework for thinking about responsibilities. Sovereignty is instrumental to the territorialisation of political community, while territory provides a tangible basis for the exercise of sovereign power to divide the human population and circumscribe relationships. The problematisation of populations defined as refugees reflect the centrality of the order of sovereign states. The relationship between the boundaries of citizenship and the system of states has profound effects for claims of equality. An important function of the refugee regime is to uphold the global system of national states as the primary political organisation in international relations and the value of citizenship as membership of a political community.

Transnational issues associated with sovereignty are examined by Neil Arya in terms of a new model for preventing and healing global threats; Lorraine Elliott in relation to environmental issues; and Jackson Maogoto in relation to human rights and humanitarian norms. Neil Arya's chapter 'Do No Harm: Towards a Hippocratic Standard for International Civilisation' offers a new model for the prevention and healing of global threats based on the basic tenets of peace and environmental and health ethics and practice. From the environmental perspective, humans have a responsibility to preserve the functioning of the system, with this perspective comes morally responsible behaviour towards nature. The ecosystem approach is an integrated systemic approach that transcends jurisdictional boundaries. In peace studies, the ultimate power is the ability to change oneself, to transcend to find solutions. The first principle of medicine is, first of all, do no harm. Conflicts and

threats to states may be approached using a public health prevention model, which looks to preventing disease at various phases. Primordial prevention considers root causes, the underlying risk factors for conflicts breaking out in the first place. Primary prevention concerns prevention of war from breaking out when a situation of conflict already exists. Secondary prevention refers to situations where wars have already broken out and methods to make peace are sought. Tertiary prevention is post-war peace building. There are particular situations in which military intervention may be sanctioned under these principles. The principle also provides for limitations to be placed on such action.

Lorraine Elliott's chapter explores the relationship between sovereignty and environmental change and considers whether environmental issues take us 'beyond Westphalia'. Elliott examines six environmental issues that impact on the conception of sovereignty. For Elliott, environmental degradation undermines sovereignty through the transgression of borders. The exercise of sovereign rights is a fundamental cause of environmental degradation as states, under international law, have the sovereign right to 'possess and determine freely the use of natural resources' forming an understanding of internal sovereignty as a form of property right. The array of environmental agreements that have been established to manage environmental collective action are perceived either as evidence that states have relinquished their sovereignty or they have developed new means of exercising collective sovereignty where they can no longer exercise it effectively alone. The exercise of sovereignty as authority within the state remains a necessary condition for the implementation of international environmental law and for environmental management. The sovereign state is losing its status as the primary locus of authoritative power and normative appeal as actors besides sovereign states have independent authority and contributions, suggesting a re-visioning of sovereignty embedded in citizenship rather than in statehood.

Jackson Nyamuya Maogoto's chapter analyses the role of the development of human rights and humanitarian norms in reshaping the content and contour of Westphalian sovereignty. State sovereignty 'as the absolute power of the state to rule' has been delimited by recognition that the state may be responsible for its breach of certain international obligations. Maogoto's redefinition of sovereignty recognises that direct links have developed between the individual and international law and that the promotion of human rights and humanitarian norms then is consistent with this notion of sovereignty; evidenced by the allocation of a lawmaking competence to the international community over particular criminal law concerns through which 'sovereign' conduct is held accountable to international norms – without the ability to imply or claim a lack of continuing consent to those norms. For Maogoto there has been a qualitative shift from state supremacy to an ethical vision in which human values ultimately prevail over state rights, where the two are in conflict.

The relationship between sovereignty and development is examined by Ross Buckley through an analysis of the control exercised by the IMF over state economies. C. Raj Kumar examines the same relationship and the impact of corruption and human rights. Roland Rich examines sovereignty in relation to Official Development Assistance (ODA). Buckley's chapter offers that if the IMF is to require nations to cede such a considerable amount of economic authority to the Fund in return for

assistance, the Fund must be able to demonstrate that it is better placed than the nations themselves to exercise control. For the IMF to be more successful, more attention needs to be paid to the institutional environment of the recipient country. In examining this proposition, the chapter analyses four developments: The Brady Plan implemented to address the Latin American debt crisis; Chile's response to increasing capital inflows; Malaysia's response to the Asian Economic Crisis and Argentina's ongoing economic crisis.

Kumar examines the relationships between sovereignty, corruption, human rights and development by developing a framework upon which to understand the concept in the context of globalisation, human rights and development. Kumar discusses the relationship between corruption and the violation of human rights and the need for rights-based approaches to combat corruption. Consequently, sovereignty is undermined by corruption and violates the rights to self-determination as the right to a corruption-free society originates from the right of people to exercise permanent sovereignty over their natural resources. When corruption is understood as a violation of human rights the impact of corruption on development is also evident. Kumar's 'developmentalising rights' is understood by evaluating the effectiveness of rights-based approaches to development and how the 'right to development' can be implemented. Globalisation has altered the parameters of power in the institutions of governance with the emergence of a 'transnational civil society'. In terms of the human rights discourse, it has challenged the traditional understanding of sovereignty through the institutionalisation of human rights; the rise of NGOs internationally; the development of domestic constitutional systems; and the rule of law.

Rich, in 'Development Assistance and the Hollow Sovereignty of the Weak' examines the intersection between concepts of sovereignty and Official Development Assistance (ODA) and the issue of conditionality associated with such programs. Rich's deconstruction of ODA examines the different rationales for such schemes as the different perspectives impact on the way in which sovereignty and conditionality are viewed. International Financial Institutions (IFIs) and bilateral programs are examined to illustrate the issues involved with the conditionality component of ODA. The rise of global civil society on the ODA decision-making process also challenges traditional notions of sovereignty given the extensive lobbying and consultation processes involved. Finally, Rich considers the way in which ODA influences the dissemination of ideas globally and the impact the dominant orthodoxy has on the ODA recipient country.

William Maley, Barry Hindess, Paul Keal and Jan Aart Scholte examine issues associated with reconceiving the idea of the state in line with multiple and often conflicting ideas of sovereignty discourse. According to Maley, in disrupted states the problem of the erosion of trust arises. It is integrally related to predictability and is crucial to the proper functioning of organisations. Such erosion is problematic at the mass level in anonymous trust but is most corrosive at the political elite level. Another problem is associated with legitimacy, where no obvious mechanism exists for securing support for new political arrangements. Generally the strategy to proceed towards a legitimate polity with high levels of trust is the process of socialisation, neutral supply of security and institutional development. There may be virtue in exploring new conceptions of sovereignty as a way of confronting these

problems. Shared sovereignty in the legal sphere is an approach compatible with constructivist conceptions of sovereignty and with operational requirements of states in a globalised world. Shared sovereignty mandates the structural integration of domestic institutions with external institutions that are components of other states or of organisations with international personality.

Barry Hindess's 'Sovereignty as Indirect Rule' offers that the contemporary state system should be seen not as a victim of globalisation but rather one of its important products and that the claim that state sovereignty and the international order are under threat from globalisation is misleading as it lacks historical perspective. The expansion of the states system through imperial acquisitions and more indirectly territories brought into the system through the deployment of a discriminatory standard of civilisation and the emergence of independent states from imperial rule are features of the Westphalian system that inform our understanding of later developments. That the behaviour of contemporary states is subject to significant external constraints is not in itself a cause for concern. Rather, we should be concerned with the unequal character of the international order from which these constraints derive. A clear majority of the new states have found themselves subject to a specific international regime of development based on the liberal civilising improvement project pursued by significant minorities in ex-imperial domains and more indirectly, by Western states operating through aid programs. As a result, the use of markets to regulate the conduct of states and governments has become increasingly prominent. The new form of indirect rule provides a global political context in which the promotion of 'good governance' has to be understood. Good governance is seen as involving democracy, but it is also seen as ensuring that the freedom of action of these governments is severely constrained by both internal and international markets.

Paul Keal's chapter addresses the theme of indigenous sovereignty in four sections. The first considers the problem of defining indigenous peoples and argues that this analysis is best done in relation to the emergence of a global movement of indigenous peoples, which Ronald Niezen calls 'indigenism'. The second section identifies different ways in which indigenous sovereignty has been used and is especially interested in the argument that the discourse of sovereignty should be rejected by indigenous peoples for being alien to indigenous concepts of power and authority. Thirdly, the argument that sovereignty is indivisible in international law is discussed and rejected. The final section deals with the relevance of indigenous sovereignty for central government and suggests ways in which indigenous aims might be met.

Jan Aart Scholte, in 'Civil Society in a Post-Statist Circumstance', suggests that the growth of global civil society has been part of a general shift in the mode of governance from statism to polycentrism. 'Statism' refers to the condition where societal governance is more or less equivalent to the regulatory operations of territorial national governments. Following half a century of accelerated globalisation and growing supraterritorial connection, statist conditions no longer mark governance today, although the end of statism in no way entails the end of the state itself. Governance has become multi-layered, which may be called 'polycentrism' to denote its distinctive feature of emanating from multiple interconnected sites. The chapter

questions what the move from statism to polycentrism means for civil society activity. In today's context, we may conceive civil society as a political space that unfolds in relation to a governance apparatus. Civil society associations have redirected some of their attention from states to other sites as the have begun to address the governance of transplanetary problems and have obtained global qualities.

PART 1
Sovereignty as a Traditional and Emergent Concept

Chapter 1

Fables of Sovereignty

Wayne Hudson

Much of the dominant anglophone literature on sovereignty is shaped by an historical discourse that posits an alleged concept and then invokes its history as a rhetorical strategy to impress the reader with the self-evidence of a specific view of the subject matter. What passes for the history of sovereignty in this arguably coercive mode is often a series of fables whereby authors invoke the historical record without consulting it at an archival level, or in the detail which any serious inquiry might be held to require. To be fair, there are outstanding exceptions to be noted and major revisionist historiography is well under way.[1] However the field itself remains to be reconfigured, and many of the lessons of attempts to rethink the historical record have not as yet been universally or even generally received.

In this chapter, I relate the problematic nature of the history of sovereignty to its possible transformation. A contemporary approach to this matter, I suggest, needs to be informed by higher levels of philological caution and a much wider ambit of historical inquiry, so that differential features of the historical record can be recognised with more justice than is currently the case, and so that the social and legal experiences of humanity generally, and not merely to those of Western Europeans, can impact upon ways in which the problem of sovereignty is discussed. In the first section of this chapter, I outline a constructive realist approach to history with the capacity to impact on prospections of future institutional organisation. In the second section, I criticise the older cartographies of the history of sovereignty, which suggest that sovereignty emerged in the context of the wars of religion in sixteenth-century Europe in close proximity with the emergence of the modern state. I use as my example the dated, but still standard, work by F.H. Hinsley, *Sovereignty* (second edition, 1986). I conclude by suggesting that it may be possible to modify sovereignty in ways which retain its purchase as an institutional end point, while freeing this end point from political and cultural practices that now appear less useful, and in some contexts morally repugnant.

1 See, for example, the outstanding works of Cary J. Nederman especially (1993) *Medieval Political Theory: A Reader: The Quest for the Body Politic, 1100–1400* (London: Routledge), and (1996) *Difference and Dissent: Theories of Toleration in Medieval and Early Modern Europe* (Lanham, MD: Rowman and Littlefield). There are also exceptional studies published by Cambridge University Press.

Constructive realism

Today the future of history as a discipline is in question. Although history written in the nineteenth century realist vein still sells in paperback, there is disquiet at the self-reflexive core of the discipline.[2] The challenges to history are partly technological, as a video-watching generation loses the literary skills to access remote primary sources or even the best secondary texts. The survival of historical consciousness will depend on finding better ways of relating historical thinking to the problems of advanced technological societies. If this is not done, then the current enthusiasm for history in subjects such as literary studies, sociology and social anthropology may prove misleading. One way to do this is to show that historical materials can be relevant to contemporary problems.

The notion that history should concern itself with policy concerns is still resisted by most historians, even though, under the influence of the work of the distinguished German conceptual historian Rheinhardt Koselleck, there is widespread appreciation of the need to study the emergence of new historical horizons and what are felicitously called 'futures past'. This is partly because of an understandable desire to avoid the allures of fool's gold, and partly because of a suspicion of epistemologically insecure enterprises.[3] The fool's gold issue can be disposed of by clarifying a number of key arguments. After the fall of Marxism, there is a widespread consensus that attempts to foretell the future are radically unreliable, a conclusion reinforced by the failure of Marx's predictions about the collapse of capitalism and the inevitability of proletarian revolution. Given the contingency and undetermined character of human affairs, as Sir Karl Popper famously argued in *The Poverty of Historicism* (1960), it is not possible to predict future events on the basis of alleged historical laws. Popper's critique, however, was directed only against theories which required such laws. It did not rule out all attempts to use history to think about the future, and more recently historical sociologists, such as Michael Mann and John Hall, have argued that it is possible to specify long term *patterns* of historical development, to speak of *tendencies*, and to make specific structure-related *predictions*.[4]

---

2 Most history, of course, continues to be written in nineteenth-century modes, especially in the mode of biographical narration, in the mode of foreign correspondents' report, and in the mode of action-packed story of a hero, just as Romantic tropes still shape much historical writing and the Romantic figure of the unique landscape is still crucial to the history of many nation-states. Nonetheless, Braudel's emphasis on the absence of change over vast periods and his rejection of 'events' as so much foam on the sea of slow-moving geopolitical data have sensitised historians to the limitations of novelistic drama as a model for historical analysis and are new genres of historical writing emerging, including attempts to write long-term history in terms of engineering machines and chaos theory. See M.A. De Landa (1997) *A Thousand Years of Nonlinear History* (New York: Serve Editions).

3 The future as a history also has a history. See R. Koselleck (1985) *Futures Past: On the Semantics of Historical Time* (Cambridge, MA: MIT Press). For discussions of the alleged 'death of the future', see D. Wood (ed.) (1990) *Writing the Future* (London: Routledge).

4 See J. Hall (1985) *Powers and Liberties: The Causes and Consequences of the Rise of the West* (Oxford: Blackwell).

A more important reason why historians tend to underestimate our capacity to think about the future, however, is that they unconsciously accept the bias *towards epistemological enterprises* built into modern Western organisations of knowledges and knowledge-generating institutions. By 'epistemological enterprises' I mean enterprises which are justified and grounded by knowledge claims, not only by claims to know, but by claims about how what is alleged to be known is known to be knowledge. The epistemological cast which Descartes gave to Western intellectual culture, a cast vastly extended, in different ways, by British empiricism and neo-Kantianism, has tended to downgrade intellectual enterprises which are not primarily epistemological; hence, the decline in modern times of practices of self-appropriation, such as those involved in classical rhetoric and the relative neglect of invention within modern disciplines. Of course, this bias is more marked in some areas than others, and both the arts and commercial design have been more open to invention than, for example, education, sociology or, at least until very recently, medicine. It is not necessary, however, for work on historical materials to take an epistemological form. On the contrary, a constructive approach to historical materials is possible.

In the current literature, constructivism refers to a brace of tendencies which emphasise the 'making' of objects traditionally construed in realist terms. In recent years, constructivism has come to the fore in many disciplines. In psychology, sociology and international relations theory, constructivism is associated with how entities are discursively produced. In education, there has been a major reorientation of pedagogy and instructional design under the influence of theories which emphasise how students make or construct their objects of knowledge. The crucial move, exemplified in the work of theorists such as von Glasersfeld,[5] is from an epistemological approach, in which students allegedly learn to know a pre-existing 'real' to an approach which emphasises the personal and the social 'making' of knowledge objects. A focus on the 'making' of knowledge objects characteristically involves tensions between an emphasis on the 'making' of entities, the claim that entities already made can be made differently, and an emphasis on the role social and economic conditions have in determining how entities are made. I submit that these tensions can be resolved, however, by opting for a form of constructivism which privileges a 'laying out' rather than recursive inquiries into how *x*s were produced.[6]

---

5 See E. von Glasersfeld (1995) Radical Constructivism: A Way of Knowing and Learning (London: Falmer Press).

6 My approach here can be contrasted with various American forms of constructivism. John Rawls, for example, argues that political justice can be represented *as the outcome of a certain procedure of construction*. Rawls does not claim that this 'procedure of construction' *produces* the order of moral values or that the variation on eighteenth-century social contract theory with which his model begins ('the original position') is itself constructed. See J. Rawls (1993) *Political Liberalism* (New York: Columbia University Press), 103. Compare the attempt by the Harvard legal theorist Roberto Unger to develop a constructive social theory that treats 'society' as a set of contingent assemblages which have been 'made'. See Roberto Unger (1987) *Politic: A Work in Constructive Social Theory* (New York: Cambridge University Press) and other books. The Harvard theologian Gordon Kaufman advocates an approach for which theological symbols are 'made' by emphasising human beings as socio-

A constructive approach of this kind challenges nineteenth-century European history's obsession with narratives, chronicles and stories, and expose the limitations of a conception of history which implies that truth can be produced by examining the testimony of eyewitnesses (*histor*, an eyewitness). Whereas nineteenth-century European history often sought to confirm the reader's belief in moral values already constitutive of the socio-legal order in which she or he lived, a constructive approach seeks to persuade the reader that socio-legal innovations are needed in light of historical materials.[7] Work of this kind does not depend upon attempts to totalise an unlocatable present, or to predict actual historical futures in detail. In place of the aesthetic expressivism and nostalgia that played such an important part in the work of the great Basel cultural historian Jacob Burckhardt, and the later historians influenced by him, it emphasises the instauration of new frameworks which cannot be derived from the materials which suggest them. To this extent, it contributes to a non-historicist *Historik* that works *from* historical materials in order *to lay out* frameworks which can cast light on organisational possibilities.[8] These frameworks can include prospections. Prospections are attempts to articulate *immanent organisational possibilities*. They are not prophecies that particular changes are going to happen, but thought experiments designed to enhance contemporary perceptions. Prospections can help to focus and reform current thinking about organisational possibilities, even though the constellations outlined in them may never come to pass, precisely because they do not depend on arguments about how things *will* turn out.[9]

---

cultural animals evolving under bio-historical constraints. See Gordon Kaufman (1993) *In Face of Mystery: A Constructive Theology* (Cambridge: Harvard University Press).

7 Here much can be learnt from the work of Walter Benjamin and Michel de Certeau, both of whom attempted to make a path for history which transformed rather than repeated its sources. Benjamin's notion of *Wirkungsgeschichte*, however, easily falls into surrogate religious notions of history as a teleological temporal process. The same holds for demands to 'meet the demands of the age' or to discern 'the needs of the times', although, as Foucault's work shows, a certain emphasis upon the interrogation of the subjectively experienced 'present' can add motivation and edge born of suffering. For de Certeau's conception of historiography as 'operation', see J. Ahearne (1995) *Michel de Certeau: Interpretation and Its Other* (Cambridge: Polity Press).

8 J.G. Droysen (1808–1886) introduced the German tradition of *Historik*, the detailed study of the practices and procedures of the historical profession, with his *Grundriss der Historik* (1858) dealing with the methodological principles of historical research. For an excellent study, see J. Rüsen (1969) *Begriffene Geschichte Genesis und Begründung der J.G. Droysens* (Paderborn).

9 Here there is a link to the jurisprudential concerns of the Italian and French Renaissance humanists who contributed so much of the framework of modern historical thought. My approach can be usefully compared with the revised version of historicism advanced in recent years by the leading contemporary German theorist of history, Jörn Rüsen. Rüsen remains committed to the Enlightenment notion that the primary task of history is the detection of myth, and to a modernism with secularist implications. He understands history in terms derived from German Idealism, and speaks of 'historical consciousness' as a coherent set of mental operations which define the peculiarities of historical writing as an autonomous source

Cartographies of historical sovereignty

I now turn to the approach to the history of sovereignty that dominates much of the existing anglophone literature. Much of this literature refers almost exclusively to work in English and even references to French and German secondary literature are occasional rather than systematic. Little reference is made to Italian, Spanish, Russian, Chinese, Arabic or African sources. Similarly, many of these texts contain Latin words, although no reference is made to the meaning of those words in their different historical contexts, and ancient Greek terms (for example, *polis*) are given modern senses, and medieval terms are discussed as if they had classical meanings. In the context of globalisation, however, it is possible and arguably necessary to historicise sovereignty as something that has taken very different forms across the millennia, in different parts of the world, and in indigenous as well as modern societies. Once sovereignty is historicised in this way, the anglophone discourse about sovereignty from 1600 on looks increasingly myopic. But even in its own terms this discourse is often problematic. Much of it is frankly presentist and finalist, as well as omissive and biased towards particular examples (England and France). It also sometimes tends to underwrite the goal of statist repression of religion. As a result, complex and many faceted historical processes are reduced to idealisations, and the nature of sovereignty is to this degree in some respects concealed. Often it is suggested that sovereignty is an abstraction or a practice, as if the historical reality that sovereignty has been many things on many sites was thereby disposed of. Similarly, complexities are noted, but not accounted. For example, the fact that sovereignty has been ascribed to God, the Prince, the people, the nation, Parliament, the law, reason and individuals is conceded, but the organisational implications of this fact are repressed. In much of the literature, this repression is facilitated by an endemic failure to clarify what sovereignty is. Indeed, much of the anglophone discourse about sovereignty oscillates between sovereignty in the sense that *there is a supreme power within a body politic*, sovereignty in the sense that *power coordinates with territoriality*, and sovereignty as *a way of regulating the relations between states*, without explaining why these were so hard to relate to each another.[10] Often the implication is that absolute sovereignty is the correct approach to supremacy within a body politic, territorial sovereignty is the best way to conceive of statehood and a system of sovereign territorial states is the best way to regulate relations between states. This approach pushes the discussion to counterfactual levels since governments throughout history fail to attain the right form, statehood is often hard

of historical meaning. See J. Rüsen (1993) *Konfigurationen des Historismus* (Frankfurt am Main: Suhrkamp).

10 Nor are these problems really solved by more sophisticated and theoretically driven approaches that construe sovereignty as a discursive practice, as a social construction, or as an objective logic of ideas best grasped by only weakly contextual 'conceptual history' or some variant on Carl Schmitt's legal sociology of ideas. Jens Bartleson (1995) *Genealogy of Sovereignty* (New York: Cambridge University Press), offers a relentlessly Foucauldian approach uninformed by research or multilingual sources for which the history of knowledges falls into epochs according to the master's plan without bothering to understand how precisely discourse proceeded in Byzantium or even Ottoman Istanbul.

to find or mythical, and interrelations refuse to stay on the right path. It also obstructs understanding since the three senses of sovereignty are not always coterminous, and one often declines for decades at a time.

The most influential, although admittedly dated, English-language account is F.H. Hinsley's *Sovereignty* (second edition, 1986). Accordingly to Hinsley, sovereignty is not a fact but a concept applied in certain circumstances. It originally expressed the idea that there must be a final and absolute authority in the political community.[11] The concept of sovereignty will not be found, however, in societies in which there is no state.[12] When a society is ruled by means of the state, the concept is sovereignty is sooner or later unavoidable.[13] Far from arising at once with the emergence in a community of the forms of the state, the concept will not have appeared until a subsequent process of integration or reconciliation has taken place between a state and its community. It will infallibly have struggled to the surface, on the other hand, whenever and wherever that process has advanced to a certain point. Once the concept has emerged in any society, its further development will have been ultimately linked with further changes in the relations between the society and its government.[14] Hinsley attributes this development to the re-discovery of classical culture, not to contemporary political conditions. In a strikingly finalist attitude, he speaks of the notion of sovereignty 'eluding' theorists from the twelfth century onwards.[15] Sovereignty, it seems, goes with the rise of the state, which is a necessary but not a sufficient condition for the concept.[16] Hinsley's account is grossly Eurocentric and presentist. It is also anti-religious and specifically anti-Catholic (Calvinists, Lutherans, Orthodox and Muslims are largely ignored). Religion as a potential plague is what sovereignty is designed to control and Christian theocracy in particular is to be blamed for various delays in the emergence of sovereignty as the true form of the state in the West.

The historical record, however, is considerably more complex. Sovereignty is not a modern concept, the doctrine in sovereignty was not produced by the modern state, and there were no states in the modern sense at the time that the alleged theorists of modern sovereignty (Hobbes, Bodin and Locke) were writing, or even until the nineteenth century. Nor was sovereignty intrinsically secular, and the extensive reality of religious government, including actual territories in the German Empire and elsewhere, cannot be left out of account. Nor can sovereignty be explained in terms of modernity,[17] a contested concept covertly which historians rightly point out is confuted by attempts to apply it, whether to fourteenth-century Europe, when it is counterfactual, or even to nineteenth-century Europe, where its application is muddy at best.

---

11 F.H. Hinsley (1986) *Sovereignty* (Cambridge: Cambridge University Press), 1.

12 Ibid.

13 Ibid., 17.

14 Ibid., 22.

15 Ibid., 72–77.

16 Ibid., 17–18.

17 Onuf associates sovereignty with modernity. See N. Onuf (1991) 'Sovereignty: Outline of a Conceptual History', *Alternatives* 16, 425–446.

I now offer a selective rereading of the history of sovereignty designed to alert the reader to the entitative diversity occluded by the standard cartography. Attempts to find sovereignty in ancient Greece or in the Persian empire are currently weakly supported, although the Persian case is more arguable. Sovereignty was first formulated the Roman Empire in the first century CCE. The *populus romanus* was the authority in whose name the magistrates enforced law. But the law still meant primarily what it had meant for Aristotle, not the will of the Roman people so much as the higher morality which it was Rome's duty to uphold. *Imperium* did not yet denote a political and territorial community. Under the principate there was a concept that the Emperor's *auctoritas* prevailed over other authorities with the increasing stress on the divinity of the Emperor. Early in the third century Ulpian advanced the principle that the *princeps* was above the law (*princeps legibus solutus est*) and what has pleased the *princeps* has the force of law (*quod principi placuit legis habet vigorem*), but the Senate maintained the republican tradition and insisted that the Emperor should be elected. There was no notion of completely absolute sovereignty and *imperium* meant the rule of rules, just as autocracy was delimited by the normative force of Roman traditions, the Stoic natural law, the Roman doctrine that every member of the *populus* was a bearer of public power and subjected only to the laws of the whole community to which they belonged, and the role of the *ius gentium*. Rome transmitted the concept of sovereignty to Byzantium, where the Emperor was Lord of the entire world, but the complexities of Byzantine doctrine and practice are little noted even though the empire lasted for over a thousand years and diffused notions of sovereign governance to Russia. In neither the Roman Empire nor in Byzantium was sovereignty ever applied to international affairs.

The medieval heritage can hardly be understood in terms of the anachronistic distinctions between secular and sacred in terms of which many modern scholars have attempted to write it. In the medieval period many forms of sovereignty were recognised, even if the realities differed from the Roman law terms in which they were couched. From the fifth to the fifteenth centuries the Pope was the *universalis monarchia* exercising the *universale regimen* and the popes considered princes to be auxiliaries to assist in their government. God was sovereign over the created world and the Pope as the vicar of Christ was sovereign over the church.[18] Similarly, the Emperor was the supreme monarch of the single *societas* or *republic* of Christendom. However, the empire claimed to be a true *respublica* with a true public law and the Emperor claimed only a limited *potestas*. The supreme *auctoritas* remained with the papal monarchy. From the thirteenth century some writers claimed that the king had no superior in temporal matters within his realm. Hence, both the French and Neapolitan kings claimed significant independence from the Emperor with the Church's support. The emergence of theocratic kingship based on *Rex Dei gratia*, a doctrine of fifth-century Oriental origin associated before that with the

18 See M. Wilks (1963) *The Problem of Sovereignty in the Late Middle Ages* (Cambridge: Cambridge University Press); G. Post (1964) *Studies in Medieval Legal Thought: Public Law and the State 1100–1322* (Princeton: Princeton University Press); J.M. Blythe (1992) *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton: Princeton University Press).

Council of Nicaea, was used to justify some strong claims for independence but not necessarily sovereignty in any modern sense. Kings were vice regents of God and vicars of Christ, the powers of the king were conferred on him by God alone, and the king conceded to his subject (*subditus)* rights. Nonetheless, the *superioritas* of the theocratic king manifest in the giving of law and in the role of protection still assumed a spiritual order above any human power.[19] By the end of the middle ages, however, classical doctrine was functioning less well in a transformed context. Indeed, it was often grossly fictitious, especially as Pope and Emperor came to have mainly supervisory and diplomatic roles in some contexts. The problem of how to theorise political authority within a body politic was not solved and there was also no effective regulation of relations between temporal powers. Natural law and the *ius gentium* were invoked as the resources for what would later be called international law, but actual power and theoretical authority were not well integrated. The growing independence of England and France as bodies politic in which rulers had become supreme and the emergence of autonomous cities in Italy and Flanders pointed to the need for new models. With the Reformation and the horrors of religious war, major changes were inevitable.

The word 'sovereignty' became current at the beginning of the sixteenth century, but it is important to resist anachronistic misreading. In Renaissance discourse, government territory and population remained the property of the Prince. Even in Machiavelli the state refers to 'the state of him', as Viroli has brilliantly argued.[20] Similarly, international conflict was not theorised in the sixteenth century in terms of sovereignty, but in terms of concentric resemblant laws. The first writer to state the theory behind the word was Jean Bodin in his *Six livres de la république* (1576). For him sovereignty was indivisible absolute and perpetual power over the republic and perhaps essential to any proper body politic, although this is more contested.[21] In the dominant accounts, it is suggested that Bodin marked a turning point because he correctly understood that the chaos of religious war could only be avoided if the ruler had the right to give laws unto to all and everyone and to receive more from them. But this is non-contextual and ignores the complex classical, medieval, Jewish and Islamic sources of Bodin's thought.

---

19 I deliberately omit here the crucial but overemphasised case of England, which alone in the sixteenth century experienced an interlude of internal peace, is exceptional and not exemplary. The Tudor Crown accepted the customary law and derived its prerogative and privileges from the positive law of the land as the representative of the community. The power the king received *Dei gratia* was restricted to the absolute prerogative to the dispensing with this law in the interest of equity and of an emergency action for the common weal, although once again actual practice was different. See J.W. McKenna (1979) 'The Myth of Parliamentary Sovereignty in Late-Medieval England', *The English Historical Review* 94 XCIV, 481–506.

20 See M. Viroli, (1992) *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250–1600* (Cambridge: Cambridge University Press).

21 For recent discussion of Bodin's work, see D. Engster, (1996) 'Jean Bodin, Scepticism and Absolute Sovereignty' and J.H.M. Salmon (1996) 'The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism', *History of Political Thought* 17(4), 469–498 and 500–522.

Bodin asserted only a limited form of sovereignty, always accepted that the ruler was subject to God and the natural law, and made other concessions in various and inconsistent ways. The standard view that ignores the specificity of the contexts in which he held that strong sovereignty was appropriate. In fact, sovereignty did not characterise either law or government in France in the seventeenth century to the degree that had been generally assumed, and medieval-type negotiations and adjustment of diverse rights prevailed.[22] Bodin was also perhaps the first to marry the internal and external dimensions of sovereignty and he reduced the *ius gentium* to the common elements of the civil law systems of separate communities. Human society was theorised as society of separate and sovereign states. Bodin had little influence on his contemporaries or his successors, however, and it was half a century before the *ius gentium* became the *droit des gens*. In the historical context, both Catholic and Protestant theorists were much more important. Catholic theorists emphasised continuing papal sovereignty. For the great Jesuit theorist Suarez, states were not sovereign, although the people were given significant inalienable rights. Protestant theorists differed among themselves, with Lutherans placing emphasis on the rights of princes to govern harshly the world of sin. Calvinist theory was very different and a huge resource for subsequent American developments up to the present. The Calvinist Althusius gave absolute primacy to the sovereignty of God and went on to theorise sovereignty in specific spheres. Sovereignty remained permanently with the people and all government was derived.[23]

The contributions of Grotius, Hobbes and Pufendorf were more substantial still and offer a tremendously rich terrain. I pass over them here because, unlike most of the field, they are well treated in excellent studies and the research is getting even better. Even in these magnificent cases, however, reservations to the standard accounts should be noted, including bothy a statist and an apostate Protestant bias in many of the books on the Protestant natural law tradition. Grotius in *De Jure Belli ac Pacis* (1625) insisted on the need of a body for a positive international law. He conceded that the supreme power was capable of division and made a huge contribution by attempting to develop a positive international law, but he did so in a still distinctly theological context as a Protestant thinker who hoped to reunify the Catholic Church. In Germany, the dominant theory was that of Samuel Pufendorf who argued against Hobbes that sovereignty signified merely supremacy, not absoluteness, and insisted on obligations under a universal moral order.[24] Once again the Lutheran context is crucial, not some kind of incipient secularism. Hobbes in his *Leviathan* (1651) developed a more absolute account of sovereignty than Bodin, but his ideas were not taken up for more than a generation. They are also qualified in ways little noted by passages in his Latin works and by his theological views

22 D. Parker (1989) 'Sovereignty, Absolutism and the Function of the Law in the Seventeenth-Century France' *Past and Present* 122, 36–74.

23 See H. Dooyeweerd (1996) *Essays in Legal, Social and Political Philosophy* (London: The Edwin Mellen Press).

24 See the *The Law of Nature and of Nations* (1672). For excellent discussion, see D. Boucher (2001) 'Resurrecting Pufendorf and Capturing the Westphalian Moment', *Review of International Studies* 27(4), 557–577.

which remain an extremely contested subject. Hobbes was not the secularist he is portrayed, and he is more European than British scholars often allow.

According to the dominant accounts, the modern approach to sovereignty was elaborated as a concept in sixteenth- and seventeenth-century Europe to explain and legitimise the rise of the centralised and absolute state. Indeed, it is widely assumed in English that sovereignty was linked with crucial aspects of state formation such as the integration of the political power; the growing coincidence of territorial boundaries with a uniform system of rule; the creation of new mechanisms of law-making and enforcement; the centralisation of administrative power; the alteration and extension of fiscal management; the formalisation of relations among states through the development of diplomacy and diplomatic institutions; and the introduction of a standing army. But the actual historical record is messy. The Treaty of Westphalia laid down laws for the Holy Empire, and after the Treaty, the Empire continued to be crucial for over another 150 years. Universal institutions, including a temporally active and territorial Catholic church, did not disappear. The Treaty (or rather treaties) did not create a state system, and they were signed by many signatories who were not representing states in any modern sense. Indeed, confederations, republics, principalities, duchies, imperial and free cities as well as ecclesiastical states continued in the Empire. There may have been sovereign 'states' in a weak sense before Westphalia, but the importance and actuality of territorial states is easily exaggerated in this period, although some of them did pursue forms of independence long before the Treaty. On the other hand, it may be fair to see the Treaty as embodying an efficient approach to relations between states which did not depend on theological conceptions over which Europeans differed, and which pointed beyond the increasingly moribund orders of the Papacy and the Empire. It did not, however, create an actual system of sovereign states and even contained passages delimiting the powers of rulers.[25]

It is also crucial to recognise the strength of the popular sovereignty tradition stemming from classical antiquity, where, of course, it bore a very different sense. Here it is traditional to laud the work of Locke, who rejected Hobbes' 'war against all', prioritised natural rights and insisted that the political society always has the right to resume the sovereignty temporarily placed in the legislature. Locke's influence is well documented, but he was much less influential in England than in America and his European reception, like Newton's, was much delayed. Contrary to many American readings, he was far from secular and believed in orthodox Christianity. He also held that the whole universe was full of spirits.[26] As a result, it is crucial to emphasise that his well-known political doctrines had a place within a larger outlook which was much more theological than the older books suggest. At the end

25 See S. Beaulac, (2004) 'The Westphalian Model in Defining International Law: Challenging the Myth', *Australian Journal of Legal History* 8(2), 181–213. Beaulac denies that the agreements reached in Westphalia have anything to do withy the creation of a state system (p. 188) and argues that the traditional interpretation is refuted by the details of the agreements reached.

26 See J. Yolton, (2004) *The Two Intellectual Worlds of John Locke: Man, Person, and Spirit in the Essay* (Ithaca: Cornell University Press).

of the seventeenth century, sovereignty played a part in the internal understanding of power within some Western states, some of whom who applied it ruthlessly to non-Western peoples and forms of government, usually to their own advantage. It also was important in an emerging Western state system, although the wider picture was confused by a wide variety of regimes, many of which could hardly be dubbed 'states'.

In the eighteenth century, parts of Western Europe acquired characteristics widely ascribed to the fifteenth and sixteenth centuries. The tradition of popular sovereignty was reasserted in the work of Rousseau, who based the sovereignty of the people on natural rights. The modern conception of international law emerged with Christian Wolff's popularisation of Vattel's *le Droit des gens* (1758) for which the state, and not the Prince, was the subject of international law. According to Vattel, the first principle of the natural law was the sovereignty of the independent state. Nations were moral persons obliged to live with other states according to the laws of the natural society of the human race.

In the nineteenth century, there were major contradictions between the French, German and English doctrines of sovereignty. At the beginning of the century, the doctrine that God was the sovereign was accepted in Prussia, Russia and Austria under the Holy Alliance. Under Napoleon, the Holy Roman Empire was abolished and the sovereignty of states other than France was often problematic. Following the defeat of Napoleon, sovereignty was applied to the monarch and based on the historical rights of dynasties by conservative theorists such as De Maistre and Bonald, while French liberals developed a more rationalist alternative. According to Royer Collard the true sovereign was reason. Similarly, Victor Cousin argued that sovereignty was the same as absolute right.[27]

Developments in the German worlds were different again. Apart from the outstanding contributions of German idealism from Kant's *Rechtsstaat* to Hegel's attribution of personality to the state as an organism, there was much more sense of participation and pervasional acquirement than in England or France. The subject retained its sense of the active power and bearer of rights as it did not in France, and many theorists applied sovereignty to the state as whole, and not to the ruler or to the people. The Historical School (Hugo, Savigny, Otto Gierke) attacked natural law theories of sovereignty based on voluntary agreement just as they promoted a very different model of law based on *Sozialrecht*.[28] Jellinek, Gerber and Labard recognised non-sovereign states, while Hugo Preusz rejected sovereignty entirely as an intrusion of Roman law into the German legal order. Other patrimonialists derived authority from property. Thus the Swiss theorist Ludwig von Haller refused to place the state

27 C.E. Merriam (1900) *History of the Theory of Sovereignty Since Rousseau* (New York: Columbia University Press), see in particular, Chapter 6 'The Sovereignty of Reason'.

28 Gierke argued that the Romans failed to develop any notion of association, except in a fictitious sense, and also lacked a proper account of personality. The German tradition, however, provided crucial alternatives both in its doctrine of associations and in its ability to thematise group personality. See O. Gierke (1868–1881) *The German Association Law*, (1874) *The Fundamental Concepts Of Public Law*, (1887) *The Theory of Association Law*.

above a private society, denied that the state could possess moral personality, and insisted that it was based on the natural God-given right to property.[29]

Crucial issues raised by European federalism also became central during the American Civil War, when arguments for divided sovereignty were invoked by the South, and by J.C. Calhoun in particular. More generally, conceptions of sovereignty were conflated with nationalist doctrines, which implied that every people had a right to its own state, doctrines which threatened the survival of the Austro-Hungarian Empire among others. In the twentieth century the First World War and the experiment of the League of Nations led to more and more attempts to allow international law and some muted form of natural law such as human rights to qualify claims to absolute sovereignty, although the sovereignty of the papacy survived and the actual situation in individual states was immensely complex, especially in fascist and communist states. Sovereignty was attributed to law in several versions – psychological (Krabbe), nomological (Kelsen) and legal sociological (Duguit, Gurvitch), the latter attributing sovereignty to the nation and to the international community of the peoples.

What follows even from this elementary and far from accurate reading? Firstly, monistic approaches to sovereignty arguably conceal the heterogeneous sites on which multiple *personae* and diverse capacities are exercised. Secondly, the flat spatialisation and partitional construction of boundaries which delimit many contemporary approaches to sovereignty can be qualified by both differential spatiality (familiar in the medieval world and probably in China as well) and by notions of participation, co-inclusion, multilocation and multipersonality. Thirdly, the association of sovereignty with secularism can be qualified in major ways. Western political theory has tended to minimise the importance of religion in political and legal contexts. Indeed, many writers on politics assume that religion has no legitimate role. In civilised societies, they assume, religion will either die out or become so emasculated that it can be ignored for most practical purposes. It may play a symbolic role in times of crisis and ornament public funerals, but it has nothing substantive to contribute to the management of the state. This is a very narrow and short-sighted view, and one that takes little account of the role of religion in the Islamic world, in India, in Russia or in Catholic countries such as the Philippines. Instead, it is important to recognise that religion is not declining worldwide, despite some Northern European trends,[30] and that the management of religious diversity is an important issue in many different parts of the world.[31] The whole issue of the relationship between sovereignty and religious governance may be able to be

29 See Ludwig von Haller (1816–1834) *The Restoration of Political Science, or the Theory of the Natural-Social Condition Opposed to the Chimaera of the Artificial Civil*.

30 For excellent discussion, see P. Berger (ed.) (1999) *The Desecularisation of the World: Resurgent Religion and World Politics* (Washington DC: Eerdmans) and P. Norris and R. Inglehart (2004) *Sacred and Secular Religion and Politics Worldwide* (Cambridge: Cambridge University Press).

31 For contemporary discussion see R. Audi (2000) *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press), and N.L. Rosenblum (ed.) (2000) *Obligations of Sovereignty and Demands of Faith. Religious Accommodation in Pluralist Democracies* (Princeton NJ: Princeton University Press).

rethought as discourse urging human beings to practice *social recognition of each other in their religious differences* becomes constitutive of future legal positivities. Here the experience of China, India, Africa, Islam and Mezzo-America may be of considerable import,[32] especially once the governance practices of indigenous peoples worldwide is taken into account.

Fourthly, it may be possible to preserve Carl Schmitt's insight into the connection between sovereignty and the ability to decide the exception[33] with historically unprecedented notions of individual dominion and reflexivity since disaggregation of the elements modern writers associate with sovereignty is manifestly possible. In the longer term, a revised view of sovereignty may relate to the possibility of a reflexively articulated state. Granted that there will be contexts in which 'reasons of state' need to overrule the discursive option – taking of individuals, future statecraft may be able to make more of Mill's insistence on the sovereignty of the individual and take more account of the self-reflexivity of agents. It is controversial, of course, to suggest that the tough view of sovereignty deserves reassertion even as some practices of governance based on *absolute sovereignty* are modified in a dialogical direction. However, a constructive historical reading of the historical record strongly suggests that experimental practices may be able to be introduced that overcome current confusions of sovereignty with misinterpretations of the political theology of *monarchia.* Once we recognise that the historical record abounds in emergent institutional *personae*, it may be possible to conceive of new forms of sovereignty based on emergent institutional *personae.*

Conclusion

My strategy in this chapter has been to open up discussion by introducing 'thick' historical material in order to widen the debate. I have not provided the detailed world historical rewrite of the history of sovereignty that will be needed in the long run. Nothing in my argument implies that the nation-state will necessarily decline or disappear. In fact I envisage that some nation-states may grow stronger. Nor does anything in my argument imply that realist international relations perspectives are now obsolete or that it is possible to dispense with reference to actual political and legal centres of power. However, my argument does imply that it should be possible to re-theorise sovereignty in new ways, even though nation-states will continue to dominate the international system in the immediate term, despite the partial emergence of an international or global civil society.[34]

32 C. Gibson (1969) *The Inca Concept of Sovereignty and The Spanish Administration in Peru* (New York: Greenwood Press).

33 C. Schmitt (1985) (German 1922) *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: The MIT Press).

34 J.A Camilleri and J. Falk (1992) *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World* (Aldershot: Algar).

Chapter 2

Sovereignty Discourse and Practice – Past and Future

Joseph Camilleri

Sovereignty is a notion that over the course of the last five centuries came to dominate our understanding of national and international life.[1] In many ways, its history parallels the evolution of the modern state. But sovereignty and state are not one and the same thing, nor is there an umbilical cord that somehow keeps them indissolubly linked. If states in their diverse manifestations have been with us for the best part of five millennia, the history of the sovereign state is barely five hundred years old. With the passage of time, especially over the last hundred years and even more strikingly over the last fifty, sovereignty's hold over political discourse and practice has been severely eroded. In response to the withering critique to which the concept has been subjected, theorists and practitioners alike have had to acknowledge, at times grudgingly, its diminishing utility. It is now widely accepted that a revised analytical framework may be needed if we are to make better sense of actual political reality, let alone of emerging trends or future possibilities.

Conscious of sovereignty's theoretical and practical limitations, a number of writers, primarily in the English speaking world, have sought to salvage something of the battered sovereignty edifice by proposing various ways of refurbishing and possibly renovating it. To this end, they have sought to modify or somehow adjust the discourse of sovereignty. This is not an entirely new enterprise. The incongruities and ambiguities of the concept have in the past prompted sympathetically disposed political and legal theorists to draw distinctions between relative and absolute sovereignty as well as between positive and negative sovereignty,[2] and again between *de jure* and *de facto* independence and supreme legal authority and supreme coercive power.[3] To these older distinctions a host of new ones have recently been added, hence the attempt to qualify sovereignty with such adjectives as 'relational', 'constitutional', 'earned', 'shared', 'suspended' or 'transitional', 'divisible', and

1 I am deeply indebted to George Myconos for the invaluable research assistance he has given me in preparation of this chapter.

2 Georg Schwarzenberger (1969) 'The Focus of Sovereignty', in W.J. Stankiewicz (ed.) *The Defense of Sovereignty* (New York: Oxford University Press), 167–200, p. 167.

3 K.W.B Middleton (1969) 'Sovereignty in Theory and Practice', in W.J. Stankiewicz (ed.) *The Defense of Sovereignty* (New York: Oxford University Press), 132–159.

'post-statist'.[4] These valiant attempts are at their most illuminating for what they tell us about the deficiencies of the existing edifice rather than for what they offer by way of refurbishment and renovation.

The rescue operation generally falters because of a striking lack of clarity on three distinct, but often closely connected fronts. First is a lack of definitional clarity. What precisely is it that is being earned, shared, suspended, divided or in some other way qualified? What, in other words, is sovereignty at its core? Does it have a core? Second is a lack of clarity as to purpose. What is the underlying aim of the whole exercise: descriptive, analytical or prescriptive, or some amalgam of these? Is it to salvage a particular discourse, to improve its explanatory power, to offer policy-makers more effective tools with which to address pressing social, cultural and political problems? If the latter, is the exercise centred primarily on problems that are internal to the state, or on the better ordering of international society, or on some combination of the two? Third is a lack of normative clarity. Where are these attempts to be located on the normative and cultural landscape? In so far as any discussion of sovereignty is ultimately a normative project, what are the norms which are invoked or implied? How, for example, do they relate to the North–South economic and political divide, or to the related Occident–Orient divide? In so far as norms are involved, whose interests, preferences and perspectives do they most forcefully represent or reflect?

Before we examine more closely these various attempts to endow sovereignty with renewed meaning and relevance, it is necessary that we remind ourselves, however briefly, of the principal characteristics as well as shortcomings of the concept. Here we choose to rely on the analysis offered in *The End of Sovereignty?*,[5] which, though written at a time when the full implications of the demise of the Cold War were just beginning to emerge, still offers a relatively coherent and accurate account of the evolving configuration of political space. For our purposes here, a brief restatement of the study's principal conclusions should suffice.

The central argument is that the intellectual coherence and plausibility of the sovereignty principle, despite the considerable ideological and institutional support it still enjoys, has been in steady decline at least since the early part of the twentieth century. The original meaning of the principle requires therefore careful explication.

---

4 These notions are associated with the following scholars (respectively): Jenik Radon (2004) 'Sovereignty: A Political Emotion, Not a Concept', *Stanford Journal of International Law* 40(2): 195–209; Hideaki Shinoda (2000) *Re-Examining Sovereignty: From Classical Theory to the Global Age* (Houndmills: Macmillan); James R. Hooper and Paul R. Williams (2004) 'Earned Sovereignty: The Political Dimension', *Denver Journal of International Law and Policy* 31(3): 355–375; Thomas L. Ilgen (2003) 'Reconfiguring Sovereignty in the Age of Globalization', in Thomas L. Ilgen, (ed.) *Reconfigured Sovereignty: Multi-Layered Governance in the Global Age* (Aldershot: Ashgate), 6–35; Alexandros Yannis (2002) 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics', *European Journal of International Law* 13(5): 1032–1054; Edward Keene (2002) *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press), 1037–1052.

5 Joseph A. Camilleri and Jim Falk (1992) *The End of Sovereignty?* (Aldershot: Edward Elgar).

The sovereignty discourse, as traditionally understood, implies first and foremost a way of defining and exercising politico-legal authority within clearly demarcated boundaries. It is only by virtue of this critically important first step (theoretically and practically) that it becomes possible to conceive of sovereignty as a way of partitioning the world, of allocating resources and organising exchanges between states and national economies, of distinguishing groups, cultures and nations. Such partitioning, and the insider/outsider dualism which it reflects, seems, however, increasingly out of step with the intensifying interconnectedness of political spaces and human destinies.

That a noticeable disjuncture should have emerged between principle and reality should come as no surprise. Sovereignty, after all, was a concept elaborated to fit the unique circumstances of sixteenth- and seventeenth-century Europe. In short, it was designed to explain and legitimise the rise of the centralised and absolutist state. As a consequence, sovereignty bestowed on the exercise of authority three defining characteristics: absoluteness, permanence and indivisibility. The question arises: is such an understanding of sovereignty consistent with the reality of sixteenth- and seventeenth-century Europe, not to speak of the reality that has unfolded in the aftermath of the Enlightenment and the Industrial Revolution? It is difficult to see how a concept which was definitionally centred on notions of the absolute can be reconciled with emerging or re-emerging religious, ideological, ethnic and other loyalties (and obligations). Nationalism might for a time serve as cement to fill the cracks of cultural and ideological heterogeneity, but neither 'national' nor state sovereignty can for long bridge the gap between the state understood as a geometric abstraction and the highly specific and variable organisation of civil society.

Placed in a contemporary international setting, the sovereignty principle gives rise to a closely related and equally troublesome contradiction. If all states are deemed equal by virtue of their sovereignty, is this theoretical equality – itself the legal expression of an abstract spatial relationship – in any way consistent with or related to the actual geopolitical inequalities associated with colonialism, domination, empire, intervention and war? If state boundaries cannot effectively screen the undesired consequences of internal conflict on the one hand or outside military and economic pressure on the other, then the domestic order cannot be divorced, conceptually let alone practically, from its external environment.

With hindsight, it would appear that the sovereignty principle has served to reify the state and abstract it from reality, thereby obscuring its role as both agent and product of a dynamic and still unfolding historical process, as well as its close institutional and ideological connection with the larger project of modernity and capitalist expansion. The net effect has been to overlook or understate the modern state's historical function in the formation first of national markets, and more recently of the world market.

Simply put, the argument is that a historical and contextual approach puts the sovereignty principle in a new light. By situating both the theory and practice of sovereignty against the backdrop of rapid technological, economic and cultural change, it becomes possible to revisit the nature, function and unavoidable variability of the modern state, and to interpret the trajectory of states over the last sixty years

in significantly different ways from those favoured by the classical theories of sovereignty.

The analysis developed in *The End of Sovereignty?* paves the way, then, for a seemingly simple yet far-reaching conclusion, whose implications are still only dimly perceived.[6] States without doubt remain key pillars of the contemporary global edifice, but this is not to say that the functioning of states accords with the notion of sovereign entities acting as conscious, autonomous agents and exercising absolute authority. It is arguable that the principle of sovereignty was an important, perhaps indispensable instrument in the development of the national basis of capitalism, but it may well be that with the emergence of a full-fledged global capitalism, we have entered a new historical phase which, embryonically at least, is giving rise to new forms of politico-legal theory and practice.

Wither the rescue operation?

Why then might one be tempted to retain for the sovereignty principle a central place in the politico-legal lexicon, in the analysis of legal and political phenomena, in guidance to policy makers operating in different tiers of governance? A survey of a representative sample of recent writings appearing in English-language publications suggests several possible answers, although these are seldom explicitly acknowledged. For some, the analytical approach is one driven largely by convention or habit. Old habits, we know, die hard in the best of times, let alone in uncertain times when alternative ways of thinking, interpreting and acting may not be emotionally compelling, and in some quarters at least unduly threatening. For others, a key consideration is institutional inertia. The sovereignty principle is deeply embedded, legally and institutionally, in numerous national, regional and international arrangements. Even where the principle now fulfils little more than a rhetorical or symbolic function, the prolonged psychological and organisational investment in it is likely to act as a powerful disincentive to the development and incorporation of new language, let alone new concepts or new codes of conduct. Even those who see the wisdom of entertaining new approaches may be disinclined to embark on an enterprise that is likely to meet stiff resistance, not least from those who occupy positions of power and authority. The motive here, especially for the scholar, may be entirely well intentioned. If a judgement is made that changes are called for, whether in theory or practice, might not a prudential approach be one which retains something of the language, imagery, mindset and even organisational and legal form of what has hitherto held sway? Might this not be a more effective way of handling the complex process of change, especially in the highly contested and emotionally charged domain of state or 'national' sovereignty?

In other studies, a third dynamic appears to be at work. Though the gap between the sovereignty principle and geopolitical and geocultural reality may be wide and growing, a number of actors (states included) may nevertheless have formed the

6 For a more detailed exposition of this argument, and of the reading of recent trends on which it rests, see Camilleri and Falk, *The End of Sovereignty?*, 236–246.

judgement (well founded or not) that their interests are best served by continuing to give lip service to the principle. In the case of states, or to be more precise in the minds of those who hold authoritative positions within states, that judgement may rest on the assumption that the declaratory commitment to the principle, even when devoid of effective operationalisation, can nonetheless help to deflect unwanted external intrusion into their affairs. Weak states may see invocation of the sovereignty principle as one of the few instruments still available to them to help discourage great power intervention. Powerful states, on the other hand, may see in the principle a useful lever with which to obstruct or delegitimise the work of any multilateral institution intent on monitoring their activities or otherwise restricting their freedom of action. Here, three observations are relevant. First, there is in much of the literature in question a tendency to confuse invocation of the principle with adherence to the principle, a failure, in other words, to give due weight to the function of 'hypocrisy'.[7] Secondly and more importantly, there is at least an implicit assumption that states that invoke the principle do so successfully, although, as we shall see, considerable evidence drawn from the experience of both strong and weak states suggests otherwise. Thirdly and most importantly, even where an objective is successfully pursued, it cannot be readily assumed, as happens all too often, that success is attributable in whole or in part to the invocation of the sovereignty principle.

With these general observations in mind, let us look a little more closely at some recent English-language writings on the subject. For purposes of analytical convenience, these can be grouped into three categories, each with a relatively distinctive position on the contemporary relevance of sovereignty discourse. The first category, best captured by the label *end of sovereignty*, comprises a small number who are persuaded that the yawning gap between the concept's absolutist pretensions and the complexities of contemporary economic and political life dictates new ways of understanding and linguistically expressing politico-legal theory and practice.[8] The second category, which asserts the *centrality of sovereignty*, is advocated by a somewhat larger but rapidly diminishing number who, regardless of caveats, continue to consider the sovereign state as the ideational and legal foundation of the society of states.[9] As Steinberg puts it, all states are 'legally sovereign', though they may vary in the extent to which they are 'behaviourally sovereign'.[10] The third category, which proposes the *qualification of sovereignty*, refers to a large but diverse body of writing which acknowledges the limitations of the concept in international legal and political discourse, but remains nevertheless persuaded of the residual utility and

---

7 See Stephen D. Krasner (1999) *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press) especially 3–42, 220–238.

8 See for example Ian Ward (2003) 'The End of Sovereignty and the New Humanism', *Stanford Law Review* 55, 2091–2112.

9 For example, Kalevi Holsti (2004) *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press); Alan James (1984) 'Sovereignty: Ground Rule or Gibberish?', *Review of International Studies* 10, 1–18.

10 Richard H. Steinberg (2004) 'Who Is Sovereign?', *Stanford Journal of International Law* 40(2), 330.

resonance of the concept. As a way out of the dilemma these writers seek to qualify, update or somehow reconceptualise the meaning and practice of state sovereignty.

Here, we are primarily concerned with this third and more disparate group who promise a great deal but in the end deliver much less. A few of these, it should be said, are concerned not so much to make a distinctive contribution to the debate as to classify or review the existing literature. Some do little more than record the sharply contrasting ways in which writers interpret and apply the principle.[11] Others attempt the more difficult but valuable task of retracing the historical evolution of the concept, highlighting along the way the culturally and politically contingent character of the discourse, a theme to which we shall return.[12] Others still embark upon a grander process of demystification and deconstruction, though not always achieving the desired degree of illumination.[13] Bartleson places the accent on the ambiguities of the sovereignty concept, but little is said regarding the theoretical or practical implications of such ambiguity. To argue that the concept offers a continuity 'between inside and outside' and between 'knowledge and reality' may add something to the postmodernist rendition of the state,[14] but does little to assist the theorist or practitioner concerned to diagnose recent trends and articulate useful signposts for the future. Similarly, Biersteker and Weber may be right to describe sovereignty as a social construct, and to point to the ways in which the construction of meanings and policies change over time, but such deconstruction does not of itself explain the past, let alone help to reconstruct the future. Expositions of this type need not detain us here. To do justice to the other exponents of 'qualified sovereignty', a further categorisation is needed, which takes account of their different purposes and vantage points.

At one end (the 'conservative' end) of the spectrum are those who, notwithstanding the subtleties of their conceptualisation, wish to retain the core meaning of the sovereignty principle as the distinctive exercise of political and legal authority in the context of the modern state. Conceding that a number of states – usually the reference here is to collapsing or failed states – lack the necessary legal, administrative or cultural infrastructure to be able to exercise sovereignty as the principle ideally requires, they advocate a range of legal adjustments which would in effect suspend for a time the sovereignty of a given state, and a number of administrative arrangements which would eventually restore the state's membership of the system of sovereign states. This view is most clearly articulated by Yannis, who advocates that the notion of 'suspended sovereignty', usually associated with

11 Refer, for example, to Ersun N. Kurtulus (2004) 'Theories of Sovereignty: An Interdisciplinary Approach', *Global Society* 18(4), 347–371; Radon, 'Sovereignty: A Political Emotion, Not a Concept', 195–209.

12 Representative of this tendency is Shinoda, *Re-Examining Sovereignty: From Classical Theory to the Global Age*.

13 Into this category I would situate the following: Jens Bartelson (1995) *The Genealogy of Sovereignty* (Cambridge: Cambridge University Press); Thomas J. Biersteker and Cynthia Weber (1996) 'The Social Construction of State Sovereignty', in Thomas J. Biersteker and Cynthia Weber (eds.) *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 1–21.

14 Bartelson, *The Genealogy of Sovereignty*, 50.

states under occupation, be applied to what may loosely be referred to as other 'abnormal' legal situations.[15] In line with this reasoning comes the suggestion that suspended sovereignty applies to any number of states which may have been placed (for example, Cambodia, Kosovo, East Timor), or might in future be placed, under a degree of international administration. Suspension, it is implied, is at most a temporary and partial aberration from normal practice (the theoretical norm itself, or principle, remains constant). Indeed, suspension is but the mechanism which allows for international intervention, hence for the reassertion of the norm as practice, though with the expectation – hope would be the more accurate word – that such a process would not 'reintroduce hierarchical relations'.

Much the same approach is proposed by Haass who, while acknowledging that the ideal has never entirely squared with reality, depicts sovereignty as a primary source of domestic and international stability in Europe and beyond. Sovereignty is said to have established 'legal protections against external intervention' and 'a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law'.[16] When weak states lack the will or capacity to exercise their full authority, it becomes incumbent on the international community to assume the responsibilities of sovereign statehood. Perhaps the most significant and sophisticated exponent of this view is Stephen Krasner who in a major study posited four conceptions of sovereignty: domestic, interdependent, international legal, and Westphalian sovereignty.[17] While conceding that the latter (the principle of non-intervention) is in practice often ignored, Krasner concluded nevertheless that the imperfect notion of sovereignty continued to buttress state sovereignty. The state's capacity to control may have diminished, but its ultimate authority remained essentially intact. In subsequent writings, Krasner's position underwent significant change. Sovereignty, as conventionally understood, was now declared a failure. The distinct but closely related principles of domestic authority, autonomy and non-intervention were now thought to have run their course. As a consequence, a range of new institutional arrangements were envisaged.[18] Transitional administration, governance assistance, trusteeships, partial sovereignty, shared sovereignty and protectorates were considered part of the conceptual and practical mix needed to take account of the circumstances of troubled societies and divided states. Nor could this be assumed to be a temporary aberration: the transfer of at least parcels of domestic authority to external actors might prove to be of long, perhaps indefinite duration.

At first sight, the conceptual leap proposed by the writers we have located at the conservative end of this spectrum may seem unusually bold. Do they not

---

15 Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics', 1037–1052.

16 Richard N. Haass (2003) speech at the School of Foreign Service and the Mortara Center for International Studies, US Department of State, Washington, 12 January 2003.

17 Krasner, *Sovereignty: Organized Hypocrisy*, 3–4.

18 Stephen D. Krasner (2004) 'Troubled Societies, Outlaw States, and Gradations of Sovereignty'. Paper presented to the Christopher Browne Center for International Politics, University of Pennsylvania, 5 February 2004.

after all countenance the demise of sovereignty as we have known it? Certainly, the legal fiction of the sovereign equality of all states is firmly abandoned. Yet, it is arguable that the norm itself remains reasonably entrenched, notably the notion that a sovereign state is one that exercises supreme authority within its clearly demarcated boundaries, and where a state fails to live up to the norm, it is incumbent upon the international community or some delegated or self-appointed members of that community to compensate for the deficit until such time as normalcy has been restored.

There are nevertheless many who are not satisfied by these limited moves on the conceptual and practical chessboard of sovereignty, and who are instead drawn to bolder adjustments. This cluster of contributions, which we locate at the more radical end of the spectrum of 'qualifiers', usually entails one or more of the following three manoeuvres: making the exercise of sovereign authority divisible between different tiers of governance (shared sovereignty), subjecting it to conditions (conditional sovereignty), and detaching it in part or in whole from the state (post-statist sovereignty). One should hasten to add that with one or two notable exceptions most of the contributors in question do not articulate their position with the conceptual clarity or linguistic crispness suggested by the above categorisation. If what we are offered often suffers from varying degrees of awkwardness and imprecision, it is largely because, as we have hinted more than once, the writers in question do not situate themselves clearly enough in relation to the classical theory of sovereignty as developed from Bodin to Kant via Grotius, Hobbes, Locke and Rousseau. As a consequence, if there is to be a shift, it is not always clear from what and to what we are meant to be shifting. Be that as it may, it is possible to read into the recent literature an inclination to move in one or other of three directions. These are not necessarily presented as distinct options, though for analytical convenience we choose to treat them so.

First are those expositions which somehow seek to make sovereignty divisible. In some cases what is proposed is the sharing of legal powers between the state on the one hand and a sub-state or one or more international institution. The notion of 'earned sovereignty' proposed by Hooper and Williams falls into this category.[19] Here the main focus is on the resolution of territorial conflicts and the legitimation of political conflicts vying for statehood. One might, for example, imagine some politico-legal arrangement which might lead the Indonesian state to devolve substantial powers and functions to a Papuan or Acehnese political entity, or the Russian state to a Chechnyan entity. The outcome would not be the creation of a new state, but of a hybrid between one and two unitary states, an extension of what is generally understood by 'federation' or 'confederation'. Similarly, the process of devolution could move upwards rather than downwards with the bundle of authority and functions shared between a state and a regional or global institution. Here the proposed 'sharing of sovereignty' is envisaged not as a short-term aberration but as a long-term 'normal' practice. Similarly, Philpot proposes that we countenance a

19 Hooper and Williams, 'Earned Sovereignty: The Political Dimension', 355–375.

pluralist conception when we describe or prescribe the 'holders of sovereignty'.[20] Supreme authority may be embodied in an individual, a group of individuals, or a constitutional framework which may include not only state constitutions, but the law of a regional organisation (for example, European Union) or indeed the whole of international law. Though all these entities – to be more exact we should refer to them as 'sites of legal authority' – may be collectively sovereign in an absolute sense, individually none of them can be said to exercise absolute authority. In other words, this conception calls into question both indivisibility and absoluteness, which the founding fathers of the discourse posited as intrinsic attributes of the concept of sovereignty.

A second move has been proposed, which seeks to connect the exercise of sovereign authority with – and in a sense makes it dependent upon – the satisfactory performance of certain functions. Expressed at its most general, this formulation redefines sovereignty as the commitment to human values. *Relational sovereignty* is said to place a 'duty of care' at 'the center rather than the periphery of responsible governance'.[21] Haass also sets out exceptions to the norm of non-intervention. States that engage in culpable behaviour with respect to genocide and crimes against humanity, terrorism, or policies that constitute a threat to international security are said to forfeit their sovereignty.[22] Krasner's position may also be reasonably included under this category. Regrettably, there is often a tendency to concentrate on general principles without following these through to their theoretical or practical conclusion. Not enough light is shed on how the conditionalities of sovereignty are to be interpreted and applied, on whose authority and by whom. A better known and somewhat more precise, though still far from compelling version of the same notion is to be found in the report of the International Commission on Intervention and State Sovereignty. As the Commission puts it:

> There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* on both internal functions and external duties. (italics in the original)[23]

'Re-characterisation' is a suitably ambiguous word which in practice obscures more than it clarifies. If responsibility and not control is to be at the heart of the new concept, several unanswered questions remain: Who is to exercise responsibility? On whose authority, when and in what circumstances? And where there is disagreement on the answer to these questions, especially between different authorities and different tiers of governance, how is that disagreement to be resolved?

The third and most radical move, at times implicit but never explicit in the previous two formulations, is the proposition that sovereignty (however defined)

---

20 Daniel Philpot (2001) *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press), 19.

21 Helen Stacy (2003) 'Relational Sovereignty', *Stanford Law Review* 55, 2045.

22 Richard N. Haass (2003) speech at the School of Foreign Service and the Mortara Center for International Studies, US Department of State, Washington, 12 January 2003.

23 International Commission on Intervention and State Sovereignty (2001) 'The Responsibility to Protect'.

need not be located in the state or indeed in any other accepted site of legal authority (regional or global), but in a plurality of groups, communities and associations, indeed in the disparate elements that comprise civil society. This post-statist notion of sovereignty[24] again evades many of the most critical questions: What are the specific entities other than states in which sovereignty may be invested? What are the attributes these entities must possess to be eligible for such investment? In what sense can these multiple and diverse entities be said to exercise sovereignty? When these entities, however defined, are in disagreement, how is that disagreement to be resolved? If civil society, as distinct from the state, is to be brought within the purview of the exercise of sovereignty, how is the geographical or territorial extension of civil society to be conceptualised? One exposition of this idea countenances a return to a form of 'medievalism', where sovereignty is shared between public and private actors as well as between geographically distinct political entities (for example, city-states, nation-states and regional states).[25] The neo-medievalist response to the contemporary exercise of authority is a highly suggestive one, but the formulation here is threadbare, offering little by way of explanation as to how this complex and variable sharing is to be negotiated and implemented functionally or territorially, particularly when the exercise assumes global proportions.

The problem with many of these attempts to redefine sovereignty and bring it more closely into line with practice, is that wittingly or otherwise they rob the concept of its distinctive meaning. As Bertrand Badie, one of the more incisive writers in the field has put it, sovereignty 'evokes a transcendence which must by definition, rise above equivocation, doubt and misunderstanding'. Sovereignty, if it is to mean anything, refers to 'the ultimate, absolute and perennial power, the principle from which all authority derives … the ideological centrepiece authorising each state to become the exclusive actor on the official world stage'.[26] It is, in the final analysis, a social construct which, whatever coherence it may have once conferred on our understanding of the domestic and international order, must be reshaped or even altogether abandoned once it has lost touch with reality.

More promising avenues of reconceptualisation

The difficulty encountered by many of the contributions we have cursorily surveyed is the absence of historical context. Here reference is not just to the history of ideas, but to the evolution of the material conditions of economic, social and political life. If sovereignty discourse was a highly specific intellectual response to a highly specific set of circumstances obtaining in certain parts of sixteenth- and seventeenth-century Europe, then it follows that any discussion of sovereignty in the contemporary world must first engage in a detailed assessment of the evolutionary trajectory of the last three hundred or more years.

---

24 Associated with Hoffman, 'Is It Time to Detach Sovereignty from the State?', 9–25.

25 Ilgen, 'Reconfiguring Sovereignty in the Age of Globalization', 6–35.

26 Bertrand Badie (1999) *Un Monde sans souveraineté: Les Etats entre ruse et responsabilité* (Prasi: Fayard), 83.

Of the many elements that constitute the kaleidoscope of contemporary change five are worth highlighting: the accelerating internationalisation of trade, production and finance, the homogenising architecture of technological change, the globalisation of insecurity, the escalating impact of ecological change, and the growth of transnational social consciousness.[27] This is not to say that any one of these tendencies represents a radically new departure, but rather that their combined weight has created the context and impetus for change in the development of laws and institutions, and more fundamentally in the way authority is understood and exercised.

One other critical dimension is worth noting here: globalising processes – and the increasing interconnectedness which they imply – are experienced differently by different collectivities, and such differences are of necessity expressed and even reinforced by differences based on nationality, ethnicity, religion, class, caste, gender or age. Integration coincides with and fosters fragmentation.[28] The cumulative impact of these two interacting tendencies dictates a substantial reinterpretation of physical and social space. The anchoring of communities to particular places, and the relationship of communities to other places are both undergoing qualitative change. The image of a world where space (physical and social) is authoritatively appropriated and articulated by sovereign entities (be they state-centric or boundary maintaining systems more generally) is a tool of increasingly doubtful conceptual and practical utility.

What, then, is to take its place? Before indicating in broad outline an alternative conceptualisation, three preliminary observations may be helpful. First, many of the ideas and proposals just reviewed – in particular those that seek in some way to qualify or update the sovereignty discourse – are not entirely without merit. They do offer useful signposts. Our contention, however, is that some of the more valuable ideas so far advanced could be better formulated and integrated if they were to form part of a sharper and more coherent analytical framework that adopts an evolutionary perspective,[29] posits clear objectives and principles, and eschews the language of sovereignty, given all the ambiguities and contradictions which this language necessarily entails – ambiguities and contradictions that have steadily deepened over the last hundred years, and promise to intensify in the years ahead.

---

27 There is now a rich literature covering most aspects of this evolving landscape. Particularly useful in this regard are Martin Albrow (1997) *The Global Age: State and Society Beyond Modernity* (Stanford CA: Stanford University Press); Aseem Prakash and Jeffrey Hart (eds) (1999) *Globalization and Governance* (London: Routledge); Kenneth Pomerantz and Stephen Topic (1999) *The World that Created: Society, Culture and the World Economy, 1400 to the Present* (Armonk NY: M.E. Sharpe); Pierre Jacquet and Frédérique Sachwald (2000) 'Mondialisation: la vraie rupture du XX siècle', *Politique étrangère* 3–4: 597–612; John Urry (2003) *Global Complexity* (Cambridge: Polity Press).

28 James N. Rosenau (1997) *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press).

29 The evolutionary perspective has not until recently received the attention it deserves. Apart from Modelski's contribution, see Christopher Chase Dunn and Thomas D. Hall (2000) 'Comparing World-Systems to Explain Social Evolution', in Robert A. Denemark *et al*. *World System History: The Social Science of Long-Term Change* (London: Routledge), 85–112.

Secondly, an alternative reading of the unfolding historical process need not (indeed, should not) treat the classical notion of sovereignty and its modern derivatives as devoid of analytical insight or practical utility. Such notions as legitimacy (that we associate with the more democratic conceptions of governance and citizenship), non-intervention and the equality of states, which form an important part of the normative impulse that underpins much of sovereignty discourse, may be worth preserving, at least in qualified form. Thirdly, of the many attempts to redeem sovereignty and endow the concept with new or additional meaning, by far the most suggestive and helpful contributions have been those of the last two Secretaries-General of the United Nations, which strangely enough have attracted less than the scholarly attention they deserve.

In line with the third observation, it is helpful to recall the attempts at linguistic innovation made by Boutros Boutros-Ghali and his successor Kofi Annan. In *An Agenda for Peace*, Boutros-Ghali argued:

> The time of absolute sovereignty … has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.[30]

In his view, national sovereignty had to co-exist with and be complemented by 'universal sovereignty'.[31] Kofi Annan's notion of 'individual sovereignty' points in the same direction:

> States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights.[32]

Important as human rights were for both men, their conception of evolving trends was far more encompassing. In Annan's words:

> We need to adapt our international system better to a world with new actors, new responsibilities, and new possibilities for peace and progress … State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation.[33]

Important similarities characterise these two attempts at reconceptualisation. Yet, subtle differences in both language and emphasis are worth noting. Boutros-

30 Boutros Boutros-Ghali (1995) *An Agenda for Peace 1995*, 2nd edn. (New York: United Nations), 44.

31 Boutros Boutros-Ghali (1992) 'Empowering the United Nations', *Foreign Affairs* 72(5), 99.

32 Kofi Annan (1999) 'Two Concepts of Sovereignty', *The Economist*, 18 September, 49.

33 *Ibid.*

Ghali's reading offers a sharper appreciation of historical change and its implications for individuals, states and the international community. His incisive and nuanced interpretation of the evolving geoeconomic landscape leads him to call for a new balance in both analysis and advocacy:

> Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. Globalism and nationalism need not be viewed as opposing trends, doomed to spur each other on to extremes of reaction. . . The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead … Our constant duty should be to maintain the integrity of each while finding a balanced design for all.[34]

While both Boutros-Ghali and Annan retain a place for sovereignty – the holder of the highest office within the UN system could hardly renounce in full public view a key plank of the organisation's charter – the concept is nevertheless slowly but surely redefined to make way for a new conception of governance.

This, then, is the first conclusion – obvious enough yet often overlooked. The paramount question to be addressed has to do with governance (and the related concept of citizenship), not sovereignty. The latter's meaning and relevance is largely dependent on the former. Sovereignty was introduced into sixteenth- and seventeenth-century Europe's political cosmology because it was perceived to be useful – by theorists who saw in it a way of interpreting the attempts of centralised monarchies to maintain or restore legal and political order within their respective domains, and by practitioners who saw the concept as a way of securing and legitimising the rise of absolute monarchies, while at the same time moderating the competitive dynamic of their external relations. More than three centuries later similar questions need to be asked but in the context of radically different circumstances. The integrative and disintegrative tendencies of the present epoch have combined to produce a multi-tiered framework of governance, in which functions and powers overlap and intersect across the boundaries of municipal, provincial, national, regional and global spaces.

What are the emerging (and what might be the preferred) principles for the organisation of this complex, multi-tiered edifice? Many of these are explicitly embodied in the sovereignty concept; others are at best implicit in it; while others still are absent from it or stand in direct contradiction to it. It is not a question, then, of jettisoning old ideas or of crafting entirely new ones, but of developing a new synthesis which simultaneously builds on past foundations and takes cognisance of emerging trends.

One of the most potent ideas sustaining the sovereignty discourse over a long period of time and to some extent even now is the notion that political communities are distinct and autonomous entities. There is good reason to think that contemporary political communities, regardless of the physical and social space they occupy,

34 Boutros Boutros-Ghali (1992) 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping', *International Relations* 11(3), 204.

remain jealous of their identities and freedom of action. In *autonomy*, we have a key ordering principle that has continuing relevance to governance and applies as much to the municipal, provincial or regional level as it does to the national level. Respect for autonomy, and its corollary non-intervention, may therefore be seen to have wider application than is often supposed. States or provinces, as the case may be, in the American, Australian and Canadian federations may not lightly interfere in each other's internal affairs. Nor is it generally considered acceptable for federal authorities to exceed their powers by trespassing into state or provincial territory. In the German case, the federal and Länder authorities are part of a complex legal and organisational framework in which they are both represented and are said to have equal status. The overarching institution of this framework is the Conference of the Heads of Governments of the Federation and the Länder, which meets every four months and is based on accommodation and compromise.

Federal and confederal arrangements may be understood as politico-legal arrangements that enshrine the principle of autonomy but connect it to another equally important principle which simultaneously strengthens and qualifies autonomy, namely *subsidiarity*.[35] Under this principle, the municipal, provincial and national tiers of governance remain autonomous, each acting within its own sphere of competence, but with provision made for decisions to be made at a higher level when the issues to be determined involve degrees of interconnectedness and interdependence which make them irresolvable at lower levels. There is no reason why the related principles of autonomy and subsidiarity could not be extended to cover two additional tiers of governance, namely the regional and global tiers, though with an additional caveat. As the development of regionalism in different parts of the world, and especially in Europe, has shown over the last fifty years, establishing the grounds rules for the operation of a relatively new tier of governance is bound to prove at times painful, often slow and invariably contentious. A complex process of negotiation and trial and error is needed to arrive at a set of consensual ground rules governing the division of functions and powers and to identify the circumstances when a particular problem will be deemed irresolvable at the lower tier of governance and brought within the purview of a higher tier. What is true of regional governance applies with even greater force at the global level, notwithstanding the accumulated experience derived from the functioning of the League of Nations and now the United Nations.

A few general rules of thumb nevertheless suggest themselves. First, is the need for caution. We have already stressed that, when it comes to the functions and powers of the regional and global tiers, we are still navigating in relatively uncharted waters. It follows, therefore, that deeming a problem to be irresolvable at a lower level and proceeding to resolve it a higher level in ways that run counter to the accepted division of functions and powers is a procedure that should be seriously entertained only in highly unusual circumstances. Even greater caution will need to be exercised when the proposed resolution of the problem is likely to involve the use

35 Joseph Camilleri (2002) 'The Politics of Reform', in Esref Aksu and Joseph Camilleri (eds) *Democratizing Global Governance* (New York: Palgrave Macmillan), 256; D. Held (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press), 234.

of force in ways that do not have the support of the relevant authorities at the lower tier of governance, where the problem in question would normally be resolved. This is not to say that the contemporary organisation of human affairs should not seek to develop the legal and institutional flexibility needed to deal with extreme situations. Rather, it is to suggest that the ground rules that are set for this purpose have to be transparent, widely understood and accepted, and that the mechanisms to be used for interpreting and applying these ground rules must themselves be transparent and legitimate. It is not enough for the objective (for example, grappling with an otherwise irresolvable humanitarian catastrophe) to be just; the mechanisms and procedures by which decisions are made at the higher level (regional or global) in support of that objective must themselves satisfy the most stringent requirements of *transparency*, *accountability* and *legitimacy*.[36] Simply put, the principles, ground rules and mechanisms must be clearly, coherently and consensually established well before they are to be applied in a crisis situation.[37]

In the contemporary international setting, principles, ground rules and mechanisms will not meet the required standards of transparency, accountability and legitimacy unless they form the basis of a prolonged and extensive process of negotiation which fully and openly takes account of two distinct but closely related international fault-lines: North–South and Occident–Orient. These, it is true, are broad brush categories which, though they have an important geographical dimension, are first and foremost convenient labels to describe profound economic, political and cultural divisions in the world. The western imperial project, centred in the past on the major centres of power in Europe and now on the American superpower, may be said to have laid the foundations for the present international order. Partly as a consequence of its global economic, political and military reach, the West has come to believe in the universality of its cultural norms and to define progress as synonymous with its own achievements. In this sense, economic and military power has combined with cultural dominance to enable the Global North to set the norms of international conduct – a process to which military, political and economic elites in the South, many of them educated, financed and otherwise supported by the North, have themselves wittingly or unwittingly contributed. In this sense and in others too, the Global South – just like the Global North – is anything but monolithic.

It is nevertheless the case that states, nations and movements in the South have periodically called into question the underlying premises of international order. The older processes of decolonisation and national liberation have now given way to new forms of resistance – witness the economic rise of East Asia generally and the 'Asian vs. Western values' debate which gained considerable currency in the 1990s, China's rapidly expanding economic and geopolitical weight, and the dramatic resurgence

36 These three principles are examined in relation to the UN's peace and security function in Joseph A. Camilleri (2002) 'Peace Operations: The Road Ahead', in Esref Aksu and Joseph Camilleri (eds) *Democratizing Global Governance* (New York: Palgrave Macmillan).

37 The notion of setting out the ground rules that are to govern UN sanctioned military intervention with greater clarity and coherence is a major premise of the recommendations in Kofi Annan (2005) *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General to the UN General Assembly, 21 March, 33.

of Islam as a factor in international relations. Any attempted reconceptualisation of the governance *problématique*, to have theoretical or practical validity, must be sensitive to and in significant ways internalise these profound cultural and political undercurrents. The principles, ground rules and mechanisms to be agreed upon and applied cannot reflect, or be seen to reflect, exclusively or primarily the interests and priorities of the rich and the powerful in the North, any more than they can reflect, or be seen to reflect, exclusively or primarily the normative, cultural or intellectual preferences of the West, let alone of the dominant centre of power in the West (and the North).

International oversight and intervention by the international community cannot be, or be seen to be, oversight and intervention by the North in the South. Nor can emerging notions of responsible governance be so defined as to insulate the North from the same probing international scrutiny to which the South has been habitually subjected. Moreover, the framework to be negotiated must of necessity seek to reduce or mitigate the impact of the present differentials of power and wealth. The legitimacy of the resulting politico-legal framework will in considerable measure depend on the success of this undertaking, which is why the discussion will have to involve not just politico-legal authorities in the various tiers of governance across both North and South, but the civil societies that they represent, and the diverse organisational forms through which they express themselves. Citizenship itself will need to be reconceptualised to take account of the integrative and disintegrative tendencies that simultaneously characterise the age of rapid globalisation.[38] Few of the proposed reconceptualisations of sovereignty address this central question at all adequately, for the simple reason that they cannot connect the citizen to the rapidly evolving spaces created by technological, economic and cultural change. Increasingly, the informed citizen has to connect with all tiers of governance, and to this end engages with a wide range of both private and public institutions occupying all kinds of political and social space. Citizenship can no longer function exclusively or even primarily within the boundary-maintaining confines of the sovereign state.

Similarly, the negotiation of the framework needs to be endowed with an inter-cultural dimension, hence the relevance of such categories as Occident and Orient.[39] To reconstitute at the global level the politico-legal arrangements that are to underpin the future organisation of human affairs is a profoundly cultural enterprise. In this sense inter-cultural and inter-civilisational dialogue, which, interestingly enough, significant non-western voices have largely pioneered, may prove to be not an ethical luxury but a politico-legal necessity.[40] The UN's adoption of an agenda and action

38 See Joseph A. Camilleri (2005) 'Citizenship in a Globalising World', *Peace and Policy* 10, 19–28.

39 This is a theme which Iran's former President, Mohammad Khatami, repeatedly stressed in speeches delivered in the West. See, for example, his address at Florence University, 10 March 1999 (http://www.iranian.com/News/March99/speech2.html).

40 For an analysis of the implications of the Occidental–Oriental divide in the Asian context, see Joseph A. Camilleri (2003) *Regionalism in the New Asia-Pacific Order: The Political Economy of the Asia-Pacific Region* (Cheltenham, UK: Edward Elgar) vol. 2, 280–295.

program for the dialogue of cultures and civilisations[41] may prove both prescient and insightful in ways that many western theorists and practitioners have yet to acknowledge let alone fully internalise.

Put simply but not inaccurately, the world is now comprised of multiple 'autonomies', which make for growing complexity and heterogeneity. These autonomies extend to state and inter-state organisations, but also to civil society and the marketplace. They assume political and economic but also social and cultural forms. As Bertrand Badie argues, the resulting heterogeneity is comprised of multiple cultures (and civilizations) but also of multiple spaces and rationalities. This world is no longer 'sovereign', in any plausible sense of the word. For the ensuing plurality is at the same time held together by numerous connectivities (economic, technological, scientific and even cultural).[42] From these multiple interdependencies arises a consciousness of interdependence, an awareness of a world society in the making, of the relevance and value of public goods from which all social actors benefit and for which they must exercise a certain stewardship and responsibility. Governance and citizenship must increasingly come to terms with a world that is simultaneously universal and plural.

[41] See the Resolution adopted by the UN General Assembly, 'Global Agenda for Dialogue among Civilizations', 21 November 2001.

[42] Badie, *Un Monde sans souveraineté*, 302–303.

41

42

Chapter 3

The Guises[1] of Sovereignty

Gerry Simpson

In this chapter, I begin by invoking three of sovereignty's familiar guises: degraded sovereignty, resurgent sovereignty and decomposed/recomposed sovereignty.[2] These three poles provide an opening framework for thinking about sovereignty (I use the airport as an enlivening metaphor for this framework). Before illuminating these concepts later in the chapter, I ask three important preliminary questions. First, is sovereignty a political or legal concept? (Or is it both? Neither?) Second, what do want from sovereignty? Or, put another way, what normative purchase does the idea of sovereignty possess? Third, to what extent ought we to be wedded to the link between sovereignty, the state and (international) law? I conclude by advancing an idea of sovereignty that is best understood as a potentially degradable, potentially hegemonic, potentially de/recomposing territorial space defined by a set of internal and external legal relations. Despite the claims of the international or the global, and in the face of attempts to reconfigure sovereignty as non-territorial, this space, legally defined and redefined, is the place where much of what constitutes political life continues to, and ought to continue to, occur.

Openings

On 25 February 2005, I had lunch in London and arrived in New York in time for afternoon tea. No doubt there are jaded cosmopolites who long ago ceased to find that remarkable. But my body tells me this *is* remarkable, and that I lack a genetic inheritance to help me recover from the flight speedily. Flying, of course, is one of those activities that international lawyers point to when asserting the relevance of our field in public meetings or at dinner parties. 'Have you looked at the back of your ticket with its Chicago and Warsaw Conventions?' we ask.[3] 'Without international law, your plane would have been shot down over New England' we offer, smugly.

---

1 'Guise', OED definition: 1. manner, method, style; 2. custom, habit, practice; 3. external appearance … assumed appearance; 4. a disguise, a mask.

2 Earlier versions of this chapter were presented at the *End of Westphalia? Re-Envisioning Sovereignty* workshop in Canberra, 8–10 April 2005, and at the *Rethinking International Law* series in New York City. I would like to thank Joseph Weiler and Alan Tzvika Nissel for inviting me to speak in that colloquium.

3 For a recent decision applying the Warsaw Convention to a national airline, see *Olympic Airways v Husain* USC No 02–1348, (2004) at http://www.supremecourtus.gov/opinions/03pdf/02–1348.pdf.

Here we seem to be asserting the virtues of multilateralism over sovereignty, law over territorial exclusivity. Something broader is sometimes being claimed here, too. Air-travel is posited as a corporeal expression of the forces of late-capitalism that threaten the extinction or demise of the state or sovereignty altogether.

But air-travel is also a reminder of the state's potency, of sovereignty's self-assertions. Flying to Australia, the cabin is fumigated just before touchdown, and, on my visit to the United States, as we entered the terminal building at JFK, I saw thumbs were being stamped, men of a certain profile were being led into waiting areas and interview rooms, and people were queuing to get into the state. One is made to feel a potential enemy of the state. Giorgio Agamben, who has written of the way in which to the sovereign everyone looks like a slave, now refuses to fly to the US because of the biopolitical implications of thumb-printing.[4] Ian McEwan, the best-selling British author, was taken into a holding area for many hours during his visit last year to this country. When he arrived belatedly for a writers' festival in Seattle, he declared that the US was being well defended from the threat posed by English novelists.

A chapter on sovereignty then might be based around these two poles: the state as withered and the state as resurgent. But what about the spaces that seem to fall through the cracks of statehood and sovereignty? The airport is a node of globalisation and the site of transparent sovereign authority at the same time. But it is something else, too, because in the airport and around it are all sorts of pseudo-sovereign, quasi-international spaces. In a European Court of Human Rights case called *Samuur*, the Court discussed the international zones at French Airports (also called transit zones).

At airports the international zone means the sealed-off area (or one that can be sealed off) used for the arrival of international flights and situated between the passengers' point of arrival and the police checkpoints.[5]

Asylum seekers are held in these zones, and are deemed not have entered French territory. Facilities are 'suitably adapted to the types of surveillance and accommodation required for the alien in question'. Sometimes these zones are found at hotels off-site, designated extra-territorial for these purposes. Meanwhile, in the United States, there are 200 odd Free Trade Zones in and around airports where goods can be transferred without the payment of duties and tariffs. According to an enthusiast:

> [T]his means that one could buy a product produced in country 'A', in a FREE ZONE located in country 'B', and then re-export that product to country 'C' without having to have paid any duties or taxes in country 'B'.[6]

So, the airport and air-travel seem somehow exemplary for the purposes of this discussion representing the sovereign as both attenuated and powerful but also conjuring into existence spaces that seem to challenge the whole notion of traditional

4 For a discussion of biopolitical life see Giorgio Agamben (1999) *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press).

5 *Amuur v France*, 22 EHRR (1996) 533 at para 19.

6 Discussed at http://www.seariders.com/.

sovereignty. We might begin then by interpolating these three sovereignties: degraded sovereignty, resurgent sovereignty and decomposed/recomposed sovereignty.

Three preliminary matters

Any discussion of sovereignty, at least from a legal perspective, has to encounter some preliminary theoretical matters. In the interests of symmetry let me break these into three also. First, is sovereignty a political or legal concept? Or is it both? Neither? Second, what do want from sovereignty? Or what normative purchase does the idea of sovereignty possess? Third, to what extent ought we to be wedded to the link between sovereignty, the state and (international) law?

Sovereignty's faces

First, in discussions of sovereignty there is a tendency to commit one of two errors. The first is the conflation of the 'social' and the 'juridical', and the second involves the radical separation of the two. In the first case, one commonly hears of the retreat of the state or the deepening of interdependence but it is left unclear how these various social, political or cultural forces are related to sovereignty.[7] Does the penetration of Coca Cola into many aspects of cultural and economic life have anything to do with sovereignty or the state? Has any state disappeared as a result of globalisation?[8] In one sense, sovereignty seems to have more vigour than it did, say, in 1815 when statelets and principalities were wiped off the map forever by the concert of Great Powers meeting in Metternich's Vienna apartment.[9]

And yet this is hardly the whole story. We know that forms survive long after the conditions of life that brought them into existence have disappeared. British sovereignty will be fiercely defended long after it has passed in substance to Brussels or to Strasbourg or Edinburgh. It may be that continuing to insist on a distinction between a juridical form and a concrete circumstance will result in unsustainable disjuncture. Whatever we think of this, we need, I think, to be attuned to the problem of working in law and politics. Are international lawyers, for example, doing different work on sovereignty to that of, say, Martin Loughlin on the idea public law, or Charles Tilly's sociological conceptions of sovereignty or Perry Anderson's analysis of the link between state and capital?[10] How much of their work (as international

7 For example, David Smith, Dorothy Solinger and Steven Topik (eds) (1999) *States and Sovereignty in the Global Economy* (London: Routledge); Susan Strange (1996) *The Retreat of the State* (Cambridge: Cambridge University Press).

8 On the question of state extinction see Matthew Craven (1998) 'The Problem of State Succession and the Identity of States under International Law', *European Journal of International Law* 9(1), 142–162.

9 See B. Gooch (1970) *Europe in the Nineteenth Century* (London: Macmillan), 57.

10 M. Loughlin (2003) *The Idea of Public Law* (Oxford: Oxford University Press); Charles Tilly (1990) *Coercion, Capital, and European States, A.D. 990–1990* (Oxford: Blackwell); Perry Anderson (1979) *Lineages of the Absolutist State* (London: Verso).

lawyers or as an inter-disciplinary working party assessing the Westphalian political and legal order) is ours?

Perhaps some sort of preliminary distinction might help. Without either pretending that sovereignty is indivisible or assuming it can be neatly deconstructed, we could embrace a view of sovereignty that distinguished its different forms. Neil McCormack alludes to a distinction between the two concepts of legal and political sovereignty, and notes that any such distinction would require some working theory about the relationship between law and politics.[11] Steven Krasner and Brad Roth have each proposed further subdivisions of sovereignty. Roth has distinguished between forms of legal sovereignty (external and internal), and political sovereignty or, 'a state's empirical capacity, as measured by the tools of social science, to control its internal affairs'.[12] Krasner, meanwhile, seems to be making a similar distinction between political sovereignty (interdependence sovereignty – the ability to 'control transboundary movements') and different forms of legal sovereignty including Westphalian sovereignty (the formal exclusion of competing external authorities from particular territories), 'legal sovereignty' (the mutual recognition of sovereigns as international actors) and domestic sovereignty (the way public authority within the state is configured).[13] There is, of course, slippage here. Krasner's 'domestic sovereignty' seems to possess material (effective *control*) and juridical (public *authority*) qualities while his interdependence sovereignty mixes the brute fact of territorial exclusion with the quality of a legal regime.

After all this, we might be left with the sense that distinguishing political and legal sovereignty is both necessary and impossible. But this hardly ends our task. Legal sovereignty itself is the subject of some contention. I recently worked up a taxonomy of three juridical sovereignties in international law: formal sovereignty (the idea that states are equals before international tribunals), legislative sovereignty (the assumption that states are equal as subjects [law-makers] and objects [law-recipients] of international law), and existential sovereignty (the immunities and privileges sovereigns enjoy as part of their very being [territorial integrity, political independence]).[14] But if this makes sense from an international lawyer's perspective, it leaves things unresolved from the perspective of say, public lawyers or international relations scholars. From the perspective of public law, international law notions of sovereignty tell us little about where sovereignty resides within a state's territory: what Brad Roth calls 'the last word on public order.'[15] Where is the Leviathan (Hobbes), who has the monopoly on legitimate violence (Weber), who issues the commands (Austin) or who decides the exception (Schmitt)? This

11 Neil McCormack (1993) 'Beyond the Sovereign State', *Modern Law Review* 56(1), 11.

12 Brad Roth (2004) 'The Enduring Significance of State Sovereignty', *Florida Law Review* 56, 1019.

13 Stephen D. Krasner (1999) *Sovereignty: Organised Hypocrisy* (Princeton: Princeton University Press), 9 –15.

14 Gerry Simpson (2004) *Great Powers and Outlaw States* (New York: Cambridge University Press), 25–61.

15 Roth, 'State Sovereignty', 1019.

aspect of sovereignty goes to the sovereign's supremacy over internal competitors.[16] International law has long wanted to know who this person is (from the perspective of effective control) but not what he is (from the perspective of legitimacy).

And so, the contrast (and the failure to contrast) between the international lawyer's sovereignty situated in the external world of an international society's self-ordering, and that of the public lawyer's internally located authority and the political scientist's material competence, produces the sort of confusion we witnessed over Iraq's 'sovereignty'. In Security Council Resolution 1500 (2003), for example, the Council welcomed the formation of a Governing Council that would mark 'an important step towards the formation by the people of Iraq of an internationally recognised, representative government that *will* exercise the sovereignty of Iraq' (my italics). Resolution 1511 (2003) stated aid that the Governing Council 'embodies the sovereignty of Iraq during the transitional period'. Resolution 1546 then spoke of Iraq's reassertion of 'full sovereignty' in June 2004. But prior to these resolutions, Resolution 1483 (2003), passed a few weeks after the invasion, had reaffirmed the sovereignty (and territorial integrity) of Iraq.

How do we explain this profusion of sovereignties? From whence came this fascinating idea that the Coalition Provisional Authority or the Security Council had returned 'sovereignty' to Iraq in June 2004? Where had it been? Who possessed it between 20 March 2003 and June 2004? One partial explanation of this mystery is that there was one signifier and many signifieds floating around during this period. In the early resolution, the Council was talking of Iraq's external sovereignty (uninterrupted by invasion and occupation, Iraq was still recognisably 'Iraq') while in the latter three resolutions (and this applies to the rhetoric of the Bush Administration, too) sovereignty referred to the site of governmental authority within the pre-constituted sovereign state of Iraq (though this sovereignty was merely being exercised on behalf of the Iraqi people).

One final complication. The idea of legal sovereignty itself is undergoing something of a shift. One way to see this is to posit a merging of the internal and external aspects of international legal sovereignty, with the external somehow linked more concretely to the internal. Hans Kelsen argued that internal sovereignty lacked any meaning without the legitimacy conferred by international norms. The sovereignty of states was assured through recognition by other states.[17] But it might work the other way, too. The privileges of external sovereignty might depend on the exercise of true internal (or popular) sovereignty.

In Iraq, at least, the old liberal idea that sovereignty resides in the people, occasionally, was used to justify the intervention. It was not so much that the Council had authorised the war or that this was legitimate pre-emptive self-defence or that it was a humanitarian intervention. Instead, the argument went, the Coalition of the Willing was simply returning to the Iraqi people that which had been taken away from them by the dictatorship.[18] This war was fought for the idea of substantive

16 What Stephen Krasner calls 'domestic sovereignty'. See Krasner, *Sovereignty*, 9.

17 Hans Kelsen, *Pure Theory of Law* (New Jersey: The Law Book Exchange), 61–62.

18 For an early version of this thinking see W.M. Reisman (1984) 'Coercion and Self-Determination: Construing Charter Article 2(4)', *American Journal of International Law* 78,

sovereignty (contrast this with Koskenniemi's idea that the 1991 war was fought for the idea of formal sovereignty that is, Kuwait's formal sovereignty exercisable by the *state* of Kuwait).[19] It is for this reason that there was no real contradiction in the first blush, double-speak of claiming to invade a country in order to protect its sovereignty. And this is why there was such insistence on the Iraqis themselves trying former President Hussein as part of their newly established sovereign prerogatives. Having restored sovereignty to the people, we are asked to leave the people to their sovereignty. Making a people sovereign is not such a contradiction in this respect.

Sovereignty's purpose

What do we want to do with sovereignty, though? We might decide that sovereignty is something that we want to chip away at on the road to cosmopolis or regionalism or localism or the federation of trading republics. Sovereignty is perceived here as a way-station, tolerable while we settle our differences perhaps, simply, intolerably, 'pro-Saddam'.[20] Or we might remember sovereignty as the basis for international order ending the Thirty Year War.[21] Prior to this sovereignty, there were cross-border massacres of 'heathens' or religious enemies and repeated interference in succession within states. So sovereignty replaces medieval chaos with anarchical society. And we might recall, too, that Westphalia (a mountain of revision aside) rejected the idea of universal hierarchy or central religious authority.[22] Much of the debate about international order tends to be couched in precisely this language. Martin Wight, for example, distinguished three traditions of international thought. According to Wight, each of these three theories (or patterns of thought) corresponds to an ingredient or condition of the international legal order. Realism lays stress on the condition of international anarchy (the absence of a world sovereign) and the sanctity, or at least, priority of the many (sovereigns). The processes of state interaction (including those regulated by law) are emphasised in the rationalist approach to international studies. Finally, notions of moral solidarity or global society find expression in theories variously known as revolutionist or cosmopolitan. The realist tradition was represented in Wight's scheme by Machiavelli, Hobbes and Spinoza and takes as its focus the idea of international relations as a lawless state of nature, a *bellum omnium contra omnes*. Power is the dominant force here. There can be no justice, no society and very little law in a political environment in which power is anterior. States must

642.

19 M. Koskenniemi (1991) 'The Future of Statehood', *Harvard International Law Journal* 32(2), 397.

20 'There'll be more fighters', Daisy says. 'And when the first explosion hits London your pro-war views …'

Henry: 'If you're accepting my position as pro-war, then you'd have to accept that yours is effectively pro-Saddam'

Daisy: 'I' m amazed at the crap you talk, Dad' (Ian McEwan (2004) *Saturday*).

21 Needless to say, these are western conceptions of sovereignty. See Amin Saikal, 'Westphalian and Islamic Concepts of Sovereignty in the Middle East' (Chapter 4 in this volume) for an alternative view.

22 See, too, Wayne Hudson, 'Fables of Sovereignty' (Chapter 1 in this volume).

and will inevitably seek security, power, prestige, status and, ultimately, survival in this hostile environment. Neither compliance with law (rationalism) nor promotion of moral solidarity or democracy or human rights (revolutionism) is likely to be uppermost in the minds of statesmen steering their countries through the system.[23] Nor should it be, according to the realists like Hans Morgenthau and Joseph Greico. For them, the idea of sovereignty is itself worth preserving.

The rationalist tradition, or the classical international law conception, accepts that international affairs occur in a state of nature but takes a kinder, gentler view of this state. Locke and Grotius are the masters here. Locke argued that the state of nature was place of sociability and goodwill. This state, then, was deemed capable of generating the sort of minimal social contract upon which an international legal order can be based. The traditions of thought described as positivist, Grotian and statist (despite their differences) belong in this category. For rationalists, states are a protected category because only they are capable of engaging in the sort of international social contracts that produce the conditions for peace and prosperity under law.

Those who emphasise moral solidarity, individual rights or world citizenship, Wight describes as revolutionists because they wish to do away with what are seen as an illegitimate state of affairs operating in international order. The inter-state system and anarchy (givens for rationalists and realists) are temporary aberrations on the path to enlightened federative unions (Kantianism), political revolution (Marx), world government or cosmopoli of varying strengths (Falk). In its darker moments this revolutionism takes Stalinist or fascist forms. Wight, himself, is very sceptical of revolutionisms describing them as 'doctrinal imperialisms' and tracing them from Philip II of Spain to Nikita Khrushchev.

The point about these debates, and they continue to animate a large amount of thought in international relations theory, is that the state (and sovereignty) is conceptualised as a norm with value. But we could decide we do not want a normative commitment to sovereignty at all. It is a very abstract idea after all. One can be Christian or Buddhist, but can one really hand on heart be a sovereigntist? This idea sounds like Benedict Anderson's 'tomb of the unknown liberal' – it does not have a great deal of resonance.[24] There is an alternative to this abstract commitment. It requires a more instrumental view of sovereignty, and one that encompasses the insight that some sovereigns are worth preserving while others are not. Some international lawyers took this position in relation to the sovereignty of Serbia in 1999 and Iraq in 2004: disposable in the first case, defensible in the second. All of this refers back to the discussion on Iraq, and recalls Westlake's distinction between states with good breeding and states without (Blair's 'irresponsible' states, the State

23 M. Wight (1987) 'An Anatomy of International Thought', *Review of International Studies* 13, 221. Interestingly, Wight describes this realist view as the 'governing conception' of the United Nations Charter. For contrasting views see A.-M. Slaughter (1994) 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', *Transnational Law and Contemporary Problems* 4, 377.

24 Benedict Anderson (1983) *Imagined Communities* (London: Verso), 9.

Department's 'states of concern' or Rawls' 'indecent states').[25] Oppenheim referred to entities that, being states (with sovereignty), were nonetheless not members of the 'family of nations'.[26] This seems intuitively appealing but politically dicey and historically regressive. Nonetheless, many intelligent observers believe it makes sense to draw a line between, say, Pol Pot's Kampuchea and modern Sweden from a scientific and moral perspective. Some argue that since these states behave differently as international agents, they ought to be treated differently by virtue of this.

I have described this tendency as *anti-pluralism*: the practice of making legal distinctions between states on the basis of external behaviour or internal characteristics.[27] The states that are subject to this suffer from degraded sovereignty; they are half-sovereigns. Couched in altogether more palatable terms, this distinction is the idea of the zeitgeist.[28] From *The Millennium Statement* to the International Commission on Intervention and State Sovereignty's 'Responsibility to Protect' and the Kosovo Report, and, now, the High-Level Panel Report and the Secretary-General's *In Larger Freedom*, the talk has been of relocating sovereignty in the people of a state and away from the state itself or, more minimally, making states responsible to their people.[29] One potential consequence of this, though not one necessarily contemplated by the authors of these reports, is a society in which some sovereigns are more equal than others.[30]

---

25 J. Westlake (1984) *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press); J. Rawls (1999) *The Law of Peoples* (Cambridge MA: Harvard University Press); Interview (2003), Prime Minister Blair and Jeremy Paxman, *BBC Newsnight*, 6 February at http://news.bbc.co.uk/1/hi/programmes/newsnight/2732979.stm; Nicholas Berry (2000) 'State Department Classifies Foreign States: "States of Concern"', *The Weekly Defence Monitor* 4(27), 10–11.

26 L. Oppenheim (1920) *International Law*, 3rd edn. (London: Longmans), 33.

27 Hudson, Chapter One.

28 See Jackson Maogato, 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept' (Chapter 12 in this volume).

29 See for example Kofi Annan (2005) *In Larger Freedom*, Annex, 'Freedom to Live in Dignity', Principle (b) at p. 84. See, too, Camilleri's discussion of 'radical sovereignty' in 'Sovereignty Discourse and Practice – Past and Future' (Chapter 2 in this volume).

30 International law has historically been a language of equality. Indeed, one of the most persuasive images of international legal order posits a community of equals engaging in relations through juridical forms. Equality is regarded as integral to sovereignty. In a lecture on the future of international law, in 1920, Lassa Oppenheim called the equality of states, '… the indispensable foundation of international society'. More recently Bruno Simma has asserted that 'all states in the world possess *suprema potestas* and are thus not placed in any kind of hierarchy, international law must proceed from the basis of equal sovereignty of states'. This principle is usually described as *sovereign equality*. The idea of sovereign equality does much work in international law but it has two primary roles. First, it parlays into a commitment to a pluralist international legal order (bluntly, one in which state diversity is tolerated). Or as Vattel put it: 'Nations treat with one another as bodies of men and not as Christians or Mohammedens.' Second, the principle of sovereign equality conveys the idea of an egalitarian international legal order (one in which states are legally equal). There is a tension between the pluralist, egalitarian aspect and the anti-pluralist, hierarchical (or hegemonic aspect).

But even in the case of the Kosovo Intervention, and this is true of each of the reports referred to above, the presumption was in favour of sovereignty. There have to be good reasons for overturning the 'sovereignty presumption'. In the case of Kosovo, UK Government officials adverted to the existence of a humanitarian catastrophe or emergency capable of outweighing a commitment to the sovereignty principle.[31] It remains the case, then, that sovereigns are the 'indispensable building blocks of the international system'.[32] As Martti Koskenniemi argued in his 1991 essay, 'The Future of Statehood', proponents of globalisation or cosmopolitanism or environmentalism as *alternatives* to the state have much work to do to make a convincing case for abandoning these 'building blocks' altogether.[33]

Law, the state and sovereignty

One final theoretical quandary emerges at this point: to what extent ought we to associate sovereignty with the state or indeed sovereignty with (international) law? Should we envisage or promote a world in which, potentially, there is sovereignty everywhere for example, sovereignty exercisable by actors other than states?[34] Or do we want to stick with the view of Hans Morgenthau: 'There is a profound and neglected truth hidden in Hobbes's extreme dictum that the state creates morality as well as law, and that there is neither morality nor law outside the state'.[35] I will give some consideration to these questions in the final part of the chapter. For the time being, I want to briefly discuss how international lawyers think about sovereignty and the state.

The state is certainly central to the international lawyer's preoccupations about sovereignty. *Public* international law, at least, is configured around the state. Most of the topics we teach as international lawyers (for example, territorial sovereignty or state responsibility or state jurisdiction or sovereign immunity) could simply be reconfigured as aspects of 'the state' (what it controls, what it is, what it can do and what it is again?). Thomas Baty's usually dusty and under-disturbed 1930 treatise on international law begins with the sentence: 'International law, it is generally agreed, has something to do with states'.[36] But states can seem remote and otherworldly. I do not want to dwell on the standard international law approach to statehood and sovereignty but I will offer three glosses on it.

The first thing we notice is the pre-eminence of an otherwise forgettable piece of international legislation purporting to define the state, and known as the

---

31 See Government Statement in *Hansard, HC*, 328, cols 616–617, 25 March 1999.

32 Annan, *In Larger Freedom*, 7.

33 M. Koskenniemi (1991) 'The Future of Statehood', 397.

34 Slaughter, *New World Order*, 269.

35 Hans J. Morgenthau (1951) *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf), 34.

36 Baty (1930) *Canons of International Law* (note the very modern plural) quoted in Colin Warbrick (2003) 'Statehood', in Malcom D. Evans (ed.) *International Law* (Oxford; New York: Oxford University Press). (Baty wrote novels as a woman and ended up being excommunicated from the International Law Association for assisting the Japanese during the Pacific War.)

Montevideo Convention. The Convention has a reassuring look about it: a list of criteria. But look harder and the criteria turn out to be a series of vaguely tautological propositions followed by a general statement about the need for the aspirant state to have 'capacity'. This 'capacity' seems to both refer us outwards to the subjective assessments of other states in the community and inwards to the legal independence of the sovereign.

Second, there is an unarticulated theory about abnormality and normality in the background of most standard discussions of statehood. The overarching assumption is that there are normal cases where there is the routine application of the Convention norms alongside strongly constrained acts of recognition, and then there are the cases we actually study. For example, there are states arising out of the process of decolonisation and therefore not subject to the usual rules about government or independence. They become states because it is morally imperative that they achieve independence. But the process, a serious departure from the existing practice, and outcome, the creation of quasi-sovereigns and the liberation of a billion people from imperial rule, can't seem to tell us much in general about statehood and sovereignty.[37] This sort of state sovereignty can be best understood, according to one of the students I taught recently at NYU, as consisting in 'a series of legitimating scripts of proper behaviours directed towards an external audience of Western powers'.

For another example, there are states established after the liquidation of pseudo-empires, in Yugoslavia or the Soviet Union, but these are unusual because of special historical circumstances (Lithuania) or the presence of nuclear weapons (Ukraine) or the, perhaps, brutal behaviour of the parent state (Bosnia) or because Europeans have imposed special settlements in these areas. No matter where we look, then, there is the spectre of the *sui generis*: Bangladesh is a geographical quirk, Eritrea an entity with prior treaty rights to autonomy. Any rethinking of statehood and sovereignty would have to reckon (and I think *could* reckon) productively with this split between normality/abnormality.

Third, though, there is the play between statehood as a material object, and statehood as something constituted through linguistic convention or legal form. James Crawford says at the beginning of his classic 1979 study of this area that states are not like chairs. You cannot see them or sit in them. On the other hand, a state may not quite be simply or solely a legal form. There is materiality there; at one level we can touch the state. In the textbooks, it is now fashionable to deplore the influence of the declaratory and constitutive theory on the law of statehood (prior to a cursory discussion of it) but the movement between material and psychosocial aspects of statehood and sovereignty ought to be held onto. Maybe statehood is the one area of international law where there is some candour about this relationship (it is present in discussions of customary international law, too). The dilemmas of statehood and sovereignty, as it were, constitute the field.

---

37 Robert H. Jackson (1990) *Quasi States: Sovereignty, International Relations and the Third World* (Cambridge; New York; Melbourne: Cambridge University Press); Siba Grovogui (1996) *Sovereigns, Quasi-Sovereigns and Africans: Race and Self-Determination in International Law* (Minneapolis, MN: University of Minnesota Press).

Three ideas about sovereignty: degraded, resurgent and de/recomposed

Degraded sovereignty

I cannot pretend to answer these preliminary questions. But, for some, they may not be worth asking in the first place. If the state or sovereignty is dead, then why theorise about it? Critique has become orthodoxy, and for a while, it looked as if no-one was interested in defending the state in the face of these challenges.[38] What one writer characterised as a series of sociological and moral critiques of the state, appeared to be prevailing.[39] At a seminar recently, my recent book on the Great Powers was described, a little contemptuously I thought, as 'statist'. My interlocutor on that occasion wanted to convey the idea that I had written a twentieth-century book for the twenty-first century. Had I failed to notice the demise of the state? Why arrange them into neat little hierarchies so close to their expiry date?

The 1990s, then, might be remembered as a decade of assaults on the state. Human rights seemed to offer up an ongoing program of opposition to the state with its prisons, torturers and censors. The ecology movement told us that states had failed us (sovereignty threatened us with doom), and states were failing themselves in Somalia, in Bosnia, in the DRC. Even those that that did function were either too big (sclerotic, prone to resisting right-thinking projects of internationalisation for example, the ICC or Rio/Kyoto) or too small (by-passed and rendered irrelevant by the sweep of global capital). Alongside these normative claims were a series of pretty straightforward descriptions of declining statehood. Globalisation was an elephant among ants, threatening to render notions of political independence null. There was an ongoing denationalisation of the economic levers. As for territorial integrity, once *South Africa.com* had sued South Africa (unsuccessfully, if I remember rightly) for the naming rights to the domain name, it seemed that territory was itself on the way out. There was the 'new actors' insight. Individuals could make claims at the international level (human rights), they were guilty of crimes so monstrous that their trials took place at the international level (individual responsibility), they drew together to influence policy through civil society (NGOs) and through commercial muscle (corporations and so on). States, meanwhile, were threatening to invent themselves out of existence through the creation of more and more intrusive institutions (a criminal court with criminal jurisdiction over citizens or a World Bank increasingly resorting to the imposition of particular economic (and therefore political) programs on sometimes-reluctant sovereigns. And various non-state peoples continued to push for some sort of recognition as sovereign or, at least, visible.

These critiques were tied together by a knowing historicism. Sovereignty was a passing phenomenon. True, it may have reigned somewhat supreme for perhaps three hundred odd years but its time has come. This notion is the view of Neil

38 David Held (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: University of Stanford Press).

39 Koskenniemi, 'The Future of Statehood', 398 (for an attempt to defend the formal state against 'modernism's authoritarian impulse').

McCormack, and it is the view of Justin Rosenberg, who as well as trying to explain *why* it arose when it did, also points to some symptoms of morbidity.[40] A colleague of mine once gave a paper entitled 'The Last Paper on Sovereignty', and this, for all its immediate inaccuracy – I gave a paper on sovereignty right after her – seemed to capture the prevailing mood.

Resurgent sovereignty

Sometimes it seems that this end of sovereignty cliché has been displaced by a revivalist orthodoxy according to which the state remains in the rudest of health in 2005.[41] The global war on terror resolved itself (at the prompting of the Bush Administration) into a couple of classic inter-*state* wars (in Afghanistan and in Iraq) and many non-state peoples, it turned out, did not want to challenge the Westphalian order altogether but simply wanted some sovereignty of their own. Cosmopolitans celebrated the coming of a new humanitarian order but this turned out in many cases to be the product of enlightened law-making by states (the Rome Statute) or law-enforcement by state judicial organs (*Pinochet*).[42] Most of all, there was a pro-state backlash on the right (the New Sovereigntists), the left (localists who wanted to retrieve the welfare compact), from nationalists (recovering authentic communities from the predatory and homogenising market).[43] Others have examined globalisation from an historical perspective and declared that there was more of it about in the nineteenth century or that the periodisations do not work properly or that there is nothing special about post-1945 or post-1973 or post-1989 or 2001. Finally, of course, there has been the idea of Great Power centrality expressed often as the idea of unilateralism or unipolarity or American hyperpower, and itself expressing a resurgence of state power capacity.[44]

---

40 Justin Rosenberg (1994) *Empire of Civil Society* (London: Verso), 1; Neil McCormack 'Beyond the Sovereign State'.

41 Viet Dinh (2004) 'Nationalism in the Age of Terror', *Florida Law Review* 56, 867.

42 For example, *Rome Statute for an International Criminal Court*, adopted 17 July 1998, http://www.un.org/law/icc/statute/romefra.htm; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other* (Appellants), *Ex Parte Pinochet* (Respondent) (Second Appeal hearing from a Divisional Court of the Queen's Bench Division holding that former heads of state are entitled to immunity), House of Lords, 24 March 1999 [1999] 2 All ER 97, [1999] 2 WLR 827, http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm.

43 On the new sovereigntists see Jack L. Goldsmith and Eric A. Posner (2005) *The Limits of International Law* (Oxford; New York: Oxford University Press). In the case of anti-colonial socialism this same resistance is found in the NEIO where developing states sought to ally their new political liberty to an economic independence from the forces of the market, from international law's own neo-colonial tendencies and in opposition to the economic power of the Western states. See for example, *Charter of Economic Rights and Duties of States*, 1974 G.A. Res 3281 (XXIX). 1975 14 *ILM* 251. On nationalism and globalisation see Anthony Smith (1990), 'The Supersession of Nationalism?', *International Journal of Comparative Sociology* 31, 1–31.

44 For a discussion see Barry Buzan (2004) *The United States and the Great Powers: World Politics in the Twenty-First Century* (Cambridge: Polity).

Decomposing/recomposing sovereignty

What is truly interesting now, though, is not the death of sovereignty or, even, reliance on notions of sovereignty and state autonomy to resist the intrusions of the market or the Security Council or multilateralism but, instead, the decomposition, diffusion, grading and re-formation of sovereignty itself. (Perhaps this can somehow be understood as an uncoupling of sovereignty from statehood?) It is worth considering for a moment how dominant the centralised territorially sovereign state had become by the second half of the twentieth century. The idea of territorially discrete, uniform sovereigns had been around since at least Westphalia, as we are repeatedly told. But, in fact, the nineteenth century, at least, was a period in which sovereignty was decomposed (Leopold's privatisation of sovereignty in the Congo), dispersed (the Ottoman experiments in local sovereignties), graded (civilised/uncivilised) and divided (the *Imperial Rescript* over Bosnia, Bulgaria's status under the Treaty of Berlin 1878) in all sorts of interesting ways. John Westlake, for example, devotes nearly half of his *Chapters on International Law* (1894) on the different manifestations of sovereignty in the international legal order, teasing out the distinctions between semi-sovereigns, protectorates and vassals.[45] By the time we reach the heights of the decolonisation period, though, statehood had settled into a position of almost exclusive market dominance: Europe had not yet taken off as an alternative quasi-supranational model, the idea of distinguishing states on the basis of material capacity or ideological predilection had been rejected at San Francisco, and subsequently in the *Membership Case*, and experiments in sovereignty (Danzig, the mandates, the trusts) were deeply unpopular and, in the latter two instances, tainted.[46] Some of this has changed, and this may be good news, intellectually, for those interested in sovereignty though troubling from any number of other perspectives.[47] I want to approach these changes inductively by

45 J. Westlake (1894) *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press).

46 *Admission of a State to the United Nations (Charter, Article 4)*, Advisory Opinion: (1948) ICJ Rep., 57.

47 Within the field we have experienced some significant movement on rethinking sovereignty and the state. Robert Cooper, one of Tony Blair's intellectual mentors, has called for a return to liberal imperialism in 'Reordering the World: The Long-Term Implications of September 11', Foreign Policy Centre at www.fpc.org.uk. Antony Anghie's (2005) elegant treatise on colonialism argues that we have yet to leave that mode, a mode that defines and is constitutive of international law (*Sovereignty, Imperialism and the Making of International Law* (Cambridge: Cambridge University Press)), and Catriona Drew's (forthcoming) *Population Transfer: The Hidden History of Self-Determination* will offer an iconoclastic reading of the creation of sovereignty through self-determination *and* mass population transfer (sovereignty's roots not in mass suffrage or ethnic self-identity but in international projects of crude social engineering and population movement, for example at Potsdam and Dayton). Work by Brad Roth, Susan Marks, Andrew Linklater and others has tried to anticipate, follow and/or trace the lineaments of the social forces discussed in the earlier section. And this is just the legal-political literature. There are other voices calling for an understanding of the consequences for legality of this decomposition or reframing of sovereignty (say, Gunther Teubner) or the

sketching, very briefly, some recent guises adopted by sovereignty. I characterise these as metaphysical sovereignty, extraterritorial sovereignty, deferred sovereignty, internationalised sovereignty, incipient sovereignty and deterritorialised sovereignty. These definitions are presented very much as provocations to further thought rather than assertions about the future of sovereignty.

Metaphysical sovereignty

Justice Souter referred to this idea during oral pleadings in the *Rasul* case at the US Supreme Court to describe Cuba's sovereignty over Guantanamo Bay.[48] In this case, one of the Guantanamo Bay detainees claimed that his continued incarceration was in violation of certain US constitutional principles. At one point, the Supreme Court engaged in a discussion of Guantanamo Bay's status for the purpose of determining federal jurisdiction. It was clear from the proceedings that the status of the base was highly ambiguous and Souter's coinage was directed at this ambiguity. This event followed a revealing discussion in a lower court hearing, *Gherebi*, where the Court moved between substantive and formal interpretations of sovereignty. Is it Cuba's because it says so in the 1903 Treaty? Or is it US sovereignty because it says so on the ground in the American flags, the barbed wire, the fast-food joints and the executive orders? This debate recalls a similar relationship between form and substance in the discussion of statehood's material and inter-subjective faces. Perhaps, sovereignty here remains metaphysical in the sense of somehow ungraspable and unknowable. And perhaps sovereignty in Guantanamo Bay is a metaphor for understandings of sovereignty generally. Or, perhaps, Guantanamo Bay is, simply, *sui generis*?

Extraterritorial sovereignty

For some, the *Rasul* decision represents an exercise of judicial imperialism: US federal law reaching into Cuba. And any discussion of sovereignty would have to engage with this re-energised extra-territoriality as well as any resistance to it. So, we have Belgian legislation asserting jurisdiction over Congolese Foreign Ministers, and the ICJ's upbraiding of Belgium for the same (*Arrest Warrant*), and Spanish enthusiasm, now somewhat tempered (*Guatemalan Genocide Case*) for universalising its sovereign jurisdiction (over various malefactors in Central and South America).[49] Most recently, the UK High Court has found that the UK Human

cosmopolitan undermining of sovereignty (D. Archibugi (2000) 'Cosmopolitan Democracy' *New Left Review* 40(4), 137–150) or demanding recognition of a counter-hegemonic politics that would locate the challenge to sovereignty not in the work of capital or the maintenance and expansion of multilateralism or regimes but in social forces from below (for example, Boaventura de Sousa Santos (ed.) (2005) *Democratising Democracy* (Cambridge: Polity)).

48 Martin Puchner (2004) 'State of Exception', *London Review of Books* 26(24) at http://www.lrb.co.uk/v26/n24/puch01_.html.

49 *Arrest Warrant Case (DRC v. Belgium*), ICJ Reps, 2000 at http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm;

Guatemalan Genocide Case, Supreme Court of Spain, Judgment No. 327/2003 (25 February 2003).

Rights Act 1998 applied in Iraq during the interregnum between war (March 2003) and 'sovereignty' (June 2004). In the *Mousa* decision,[50] the Court held that the Act applied to the detention of Iraqis by UK forces near Basra. It is clear that these humanitarian extensions of (jurisdictional) sovereignty are a growing phenomenon in international society.

Deferred sovereignty

Kosovo returns us again to the question of substance and form that seems to dog, or make interesting, this whole field. On one hand, Security Council Resolutions make it clear that Kosovo remains within Serbian sovereignty but in substance there is a different sort of sovereignty being exercised on the ground. This is what some people call 'territorial administration' but in substance it looks like a form of sovereignty exercisable on behalf of or by the international community. And if Iraq's sovereignty remained enigmatic in, say, May 2003 or Kosovo's today, what happened to that of Serbia and Montenegro between 22 September 1992 (when the General Assembly rejected Serbia's right to participate in the work of the Assembly) and 1 November 2000 (when Serbia was formally admitted to the UN)?[51] The International Court of Justice has held that Serbia was a state (capable of being impleaded before the Court in *Bosnia v. Serbia*) but two judges in the *Legality of Force* case held that Serbia was an entity incapable of bringing a claim against the states of NATO for lack of *ratione personae* (because it had not been a member of the United Nations at the relevant time).[52] Where was Serbian sovereignty at various points in the 1990s? And where is Kosovo's now?

Internationalised sovereignty

Of course, it may simply be that Kosovo is a protectorate or, at least, a space where sovereignty is internationalised in some way. At least one nineteenth-century institution that underwent a revival in form if not in name in the 1990s was that of the trust or mandate or protectorate. Some writers argued that trusts or protectorates

50 *R. (Al Skeina) v. Secretary of State for Defence*, [2004] EWHC 2911, *Times*, 20 December 2004 and at Westlaw 2004 WL 2810920.

51 *Application for Revision of Judgement, July 11, 1996 (Serbia v. Bosnia)* (2002) at http://www.icj-cij.org/icjwww/idocket/iybh/iybhframe.htm. The Court acknowledged this, saying, '… the difficulties which arose regarding the FRY's status between the adoption of that resolution (G.A. Resolution 47/1 barring Serbia from continuing the membership of Yugoslavia at the United Nations) and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not ' generally accepted', the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC and in the meetings of States parties to the International Covenant on Civil and Political Rights, and so on) at http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003–08_ybh_20030203.htm.

52 See Peter Bekker and Christopher Borgen (1999) 'World Court Rejects Yugoslav Request', *ASIL Insights*, June.

were required to bring order to degraded or anarchic states.[53] For some, the existence of the failed state inverts the classic Hobbesian picture of a serene domestic society located within an international state of nature.[54] Instead, it is the failed state that resembles Hobbes's state of squalor and brutishness, and international society that attempts to impose hierarchy or order on the failed state.[55] The failed state, thus, becomes the focus of attention of the international community and the techniques adopted to solve the problem of failure are usually highly intrusive.

Failed states, or, what John Rawls calls, 'burdened states', are those states that lack a central governmental authority and cannot deliver services or provide security to their population.[56] They are in a state of insanity or nonage, to use Lorimer's nineteenth-century idiom. Of course, in the nineteenth century only highly successful and centralised states were able to qualify for statehood under the rigorous entry requirements at the time. Large swathes of the earth's territory were enclosed by empire and its associated legal forms, for example, protectorates and suzerainties. By the beginning of the twentieth century, these arrangements had been converted into mandates (under the League of Nations) and trusteeships (at the United Nations). However, none of these various arrangements have implications for the sovereignty regime because none of the entities that were the object of these imperial techniques were states.

Today's failed states are a product of a particular moment in world history that combines the highly unequal distribution of political and economic resources, the degradation of traditional social forms (kinship in Somalia) and, most importantly, the fact of decolonisation. This latter process, engraved in The 1960 Declaration on The Granting of Independence to Colonial Peoples (Resolution 1514), abolished empire and, at the same time, and for a period, installed the sovereign state as the sole legitimate form of political community. Many of these sovereign states exercised a form of sovereignty that was severely attenuated and limited by weak government and economic dependence. These were the very conditions that might have resulted in a loss of sovereignty prior to 1960. However, the force of decolonisation was such that these states were protected by what Robert Jackson has called the negative sovereignty regime; a system which offered to juridical shells the classic protections of statehood that is, non-intervention, territorial integrity without really supplying these states with the means to do anything with that statehood (positive sovereignty).[57]

This sovereignty, it seems, can now be supplanted by a system of international protection that resembles, in deed if not in name, the nineteenth-century social forms

53 Frederick Cooper (2004) 'Empire Multiplied', *Comparative Studies in Sociology and History* 46, 247–272.

54 Robert H. Jackson (1999) *Global Covenant* (Oxford; New York: Oxford University Press).

55 'Anarchy is a domestic condition', Jackson, *Global Covenant*, 295.

56 Rawls's own definition is inevitably more detailed. He describes burdened states as those entities that lack the economic capacity to care for their people and, especially, lack a political culture capable of remedying this defect (at least independently). See John L. Rawls (1999) *Law of Peoples* (Boston: University of Harvard Press), 106.

57 See Jackson, *Quasi States*.

discussed earlier. In as stronger version of this the whole problem of sovereignty ceases to be a barrier to intervention because sovereignty considerations no longer apply.[58] Hence the current propensity of the international community to place states under 'protectorates' (for example, Liberia, Somalia, East Timor and parts of Yugoslavia). Peter Lyon argues that 'UN trusteeship would almost certainly be an improvement on the anarchical conditions of the several quasi-states the world has now'.[59] Mervyn Frost compares the international society of states to '… social workers … educat[ing] inadequate parents' in relations with failed states.[60] Robert Jackson, while arguing against interventionism, suggests that 'failed states could be banished …'.[61] Most importantly, John Rawls, the political philosopher, has made it clear that burdened states occupy a place lower in the sovereignty hierarchy to that of well-ordered states though his solution is a duty of assistance. This duty of assistance extends to 'insisting' that a certain level of human rights protection is in place before lending economic support to a state. The use of force against such states is 'ruled out' by the Law of Peoples but other forms of interference are presumably not.[62]

Incipient sovereignty

On Saturday, 19 February 2005, *The Guardian* carried a report on a classic South Sea Bubble surrounding some stock in a company called White Nile. After four days trading on the Alternative Stock Market, shares in the company had increased in value by a factor of thirteen. White Nile was known to have secured some sort of deal in Sudan but no-one was sure what it was. Certainly, it promised massive profits. One company, operating in the 'war-torn region' in the midst of 'bloody conflict' was already, in the words of one expert analyst 'throwing off cash like Billyoh'. Hedge fund chief executive Philip Richards could hardly contain his delight: 'It's a bit like the nineteenth century – the world is opening up and you can invest in places that fifteen years ago it would have not been possible'.[63] What was curious about all this was the identity of the 'state' partner, namely, the autonomous government of South Sudan. This partner was an authority at most but was most decidedly not a recognised sovereign. To be sure, it had control over the territory but what sort of agreement was this? Would it be enforceable in a court of law?[64] This, of course, raises the rather

58 Fernando R. Tesón (1998) *A Philosophy of International Law* (Boulder, CO: Westview Press), 64.

59 Peter Lyon (1999) 'The Rise and Fall and Possible Revival of International Trusteeship', in M. Twaddle (ed.) *Decolonisation and the International Community*, *Journal of Commonwealth Politics* 31, 96–110, quoted in Jackson, *Global Covenant*.

60 M. Frost (1991) 'What Ought to be Done about the Condition of States?', in Cornelia Navari (ed.) *The Condition of States* (Philadelphia PA: Open University Press), 183–196 at 195.

61 At 312.

62 At 110.

63 *The Guardian*, 19 February 2005, A28.

64 No, according to a contemporaneous report in the *Financial Times* http://money.cnn.com/services/tickerheadlines/for5/200502210842DOWJONESDJONLINE000160_FORTUNE5.htm.

old question about the status of belligerents within states or the legitimacy of self-determination movements. Any sensible discussion of sovereignty is likely to have to confront this question anew. I do not wish to add to the voluminous literature on self-determination here except to say that self-determination movements have the capacity to both buttress sovereignty (many self-determination movements aspire to sovereign status, after all) and reconstitute it (other groups seek forms of autonomy that challenge Westphalian notions of sovereignty.[65]

Deterritorialised sovereignty

Alongside these twists on the conventional picture of territorial sovereignty, we might want to embrace the larger thought that sovereignty has somehow been de-territorialised in the process of decomposition/recomposition.[66] A rendering of sovereignty along these lines would take us far, far away from the Montevideo Convention and questions of statehood. Instead, we would find ourselves doing interstitial work – between the state and the global, between the private and the public, between politics and economics: on bilateral investment treaties (BITs) perhaps or on European integration or on NAFTA. Is there some sense in which those who govern are also always sovereign? Or, to put it another way, is governance a form of sovereignty? If we say it is, then this perhaps reduces governance to a category it might be uncomfortable about inhabiting. In addition, we might have bent sovereignty out of shape. And, of course, if we render sovereignty too ubiquitous it is in danger of disappearing altogether.

Conclusion

So, we reckon with three forces: (1) the apparent decline of traditional command-based territorial sovereignty but more interestingly, (2) the resilience, durability and entrenchment of this same sovereignty (thumbprints, exceptionalism, anti-terror laws, military action), on one hand, and (3) its decomposition, diffusion and reformation (extra-territoriality, hierarchy, de-territorialisation, supra-nationalism), on the other. This, then, is a mystifying and exasperating time to study sovereignty. I think we can understand several things to be occurring here. The first is that the relationship between traditional legal sovereigns is more and more marked by what we might call 'juridical sovereignty'. This sovereignty is protean and flexible and is constituted through the interplay of three languages: the languages of Great Power prerogative, outlawry (or anti-pluralism) and sovereign equality. In other words, the categories of Great Powers, friends and enemies (or outlaws), and sovereign equals are each important to our understanding of the international legal order and the taxonomies

65 I (1996) discuss this in greater detail in 'The Diffusion of Sovereignty: Self-Determinations in the Post-Colonial Age', *Stanford Journal of International Law* 32(2), 255–286. See, too, Camilleri's and Elliot's discussion of shared sovereignty in this volume (Chapters 2 and 11 respectively).

66 For a discussion of this post-statist sovereignty see Joseph Camilleri, 'Sovereignty Discourse and Practice – Past and Future' (Chapter 2 in this volume).

of sovereignty. Second, there are spaces which do not seem to belong to even this reconceptualisation of traditional sovereignty. These abnormalities – metaphysical, extraterritorial, deferred, internationalised and deterritorialised sovereignties – need to be configured in some way in any rethinking of Westphalian sovereignty. Third, and finally, we have to work out what is at stake in rethinking sovereignty. If sovereignty is to be made conditional on some sort of popular mandate then we need to be very clear about how this might be established and defined. As for more dramatic narratives about the eclipse of sovereignty (or the decoupling of sovereignty and the state) and its replacement by other forms of social organisation, these, perhaps, need to be approached with caution. The sovereign state remains, in theory, a publicly directed political form.[67] After all, neither privately governed, nor globally directed, alternative institutions and enterprises are marked by overwhelming levels of legitimacy.

67 Annan, *In Larger Freedom*, 7 at para. 19.

PART 2
Sovereignty in International Perspective

Chapter 4

Westphalian and Islamic Concepts of Sovereignty in the Middle East

Amin Saikal

Whatever its semantic origins, 'sovereignty' has come to be as confused a concept in intellectual discourse and politics in the Muslim Middle East as it is in international politics more generally. It has meant different things to different people, and has proved to be multi-dimensional in its application. In relation to the Muslim Middle East – that is, the region stretching from Iran to the Persian Gulf, the Levant and North Africa – much of the confusion has arisen from the difference between the Westphalian meaning of the concept and the complex Islamic understanding of the phenomenon, which has influenced the thinking and behaviour of many citizens and has enabled ruling elites to justify authoritarian or concealed authoritarian regimes.

This chapter has three main aims. One is to explore briefly the important features associated with the secular meaning of the concept in the Muslim Middle East. Another is to investigate the Islamic meaning of the concept and the complexity to which it has given rise in relation to a growing dichotomy between state and society in the region, on the one hand, and to an enforcement of obstacles to democratisation in many constituent states on the other. The third is to examine how a balance could be found between the Westpahlian and Islamic meanings of the concept as a way of diminishing the violent challenges mounted by some extremist forces of political Islam to the current international order.

As a concept connoting exercise of legitimate authority over an internationally recognised political and territorial entity, and as a way of legally defining and safeguarding the international borders of that entity on the basis of relations between states, the idea of sovereignty has fulfilled an important historical function and worked quite well for many industrialised capitalist democracies. It has been associated with the development of democratic norms and values and has at times spawned positive nationalism in support of political and territorial defence, especially in the case of those states where an extensive degree of ethno-linguistic and cultural homogeneity has prevailed, such as France, the Netherlands, Japan and perhaps, to some extent, the 'melting pot' of United States.

However, in the Muslim Middle East, in general two understandings of the term 'sovereignty' have developed in parallel with each other. One is its basic Westphalian meaning, which is embraced by most among the Western-inspired and educated elites, and tolerated by the bulk of ordinary Muslim citizens, who uphold

political and territorial unity as a convenient device for the promotion of national identification, exercise of domestic power and authority, and legal safeguards against outside aggression. This meaning has increasingly gained firm currency ever since the European colonisation of the Middle East and the division of the region into various nation-states, which began to emerge from the end of World War I, but assumed momentum with the decline of the European colonial order and advent of age of decolonisation following World War II. As such, the concept of nation-state–based sovereignty was imported as a European construct and was grafted under the aegis of European colonial powers on what had existed as the Islamic imperial domain in the Middle East from the seventh century.[1]

The Westphalian meaning, promoted by the secular and semi-secular elites that have been dominant in most of the Middle Eastern Muslim countries, from Syria to Jordan to Tunisia and Morocco, has become pervasive among citizens throughout the region, even among those living under manifestly Islamic regimes, such as Saudi Arabia and Iran. It has gained so much popular acceptability that today most citizens, in whichever country they live, identify themselves first by affiliation with their respective countries and then by other identity references, such as family, clan, tribe, ethnicity and religion. For example, if a Saudi is asked about his/her identity, he/she is most likely to say first Saudi, second Arab, third Muslim and fourth this or that tribe. The same goes for most citizens in other constituent states. This is not to deny that most citizens in the Muslim Middle East wear multiple identities, such as ethnic, tribal and cultural; they do. However, the identity that has come to be more prominently on display than any other reference of identification is the one related to attachment to nation-state. In this sense, a majority of citizens have come comfortably to embrace the concept of nation-state,[2] with all its political and territorial attributes associated with the Westphalian meaning of sovereignty. And these citizens have little or no difficulty in adapting to such a meaning even when they migrate from the Muslim Middle East to elsewhere in the world.

However, this tells only one side of the story. There is another understanding of sovereignty that is rooted in the religion of Islam and its historical manifestations. The Islamic concept of sovereignty, although open to diverse interpretations, is radically distinct from the Westphalian understanding of the term. In a classical sense, and in a nutshell, it implies exercise of divine-based power and authority to enforce God's rule within an Islamic order in a borderless domain of the Muslim faithful, known as the *Ummah* (Muslims as a nation regardless of country). It resonates strongly with those who are known as Islamists or who in general believe in Islam as an ideology of political and social transformation of their societies as well as a primary and universal reference of identity. Islamists are, of course, very diverse and overlapping; they come in different forms and schools – some with a very rigid adherence to a

1 For details, see Eugene L. Rogan (2005) 'The Emergence of the Middle East into the Modern State System', in Louise Fawcett (ed.) *International Relations of the Middle East* (New York: Oxford University Press), Chapter 1.

2 A comprehensive discussion of diverse views on the application of Islam within the modern system of nation-states is provided in James P. Piscatori (1986) *Islam in a World of Nation-States* (Cambridge: Cambridge University Press).

literal understanding of Islam as the source of all truth, containing everything that man needs to know in order to have a successful and virtual existence on earth, and some with a creatively interpretive understanding of Islam as a religion and ideology of change and development to be applied in the course of history according to the changing times and conditions.

As a result various clusters of Islamists have emerged, with diverse approaches to application of Islamic sovereignty. However, before discussing two generic clusters, it is appropriate to outline briefly the nature of the Islamic doctrine that has shaped such clusters' understanding of Islamic sovereignty.

Islam as a religion, and as an ideology of change and societal living, is akin to the two other main revealed religions: Christianity and Judaism. It came into existence in the early seventh century to complete rather than contradict those religions. It shares much in common with Christianity and, for that matter, Judaism in terms of both beliefs and values. As monotheistic faiths, all the three religions embrace a common concept of God and His attributes, and give equal weight to the sanctity of life (as a precious gift from God), human dignity, and a moral, ethical and virtuous earthly existence. They are all rich in fundamental moral and social principles from which strong notions of universal ethics, justice and dignified existence can be drawn, and in relation to which a virtuous life can be organised on earth.

In Islam, as in Christianity and Judaism, God is the creator and mover of the universe, and the source of everything alive and dead. He is the ruler of all and in command of all, with His will standing supreme over all. He is the Sovereign of all sovereigns, and all earthly sovereignty ought to be owed and subordinated to His will. Islam's message is universal and eternal for all peoples and all times. As such, at the doctrinal level, Islam is monolithic and does not recognise any compartmentalisation of life in terms of racial, political, social, cultural and territorial divisions, and essentially calls for the creation of a unified source of earthly power and authority as a reflection of those of God.

As a corollary to this, in Islam, as in Christianity and Judaism, the notions of the power of God and vulnerability of man and woman as His creatures are combined to caution strongly against an earthly existence that defies God's commands and results in a life contrary to those principles which ensure a pious, truthful, just and communally acceptable living. Islam is essentially a religion of a borderless community of believers and is expressed in the ways of that community: it emphasises that the rights, freedoms and welfare of the individual should be determined in relation and proportion to the dignity and wellbeing of that community. It attaches high importance to human individuality, creativity and responsibility, but within an Islamic framework and the bounds of the requirements of a dignified communal existence. While intimating that a humane and virtuous existence cannot be fulfilled without citizens being assured of their common basic rights, freedoms and responsibilities, with access to the necessary opportunities to enable them to fulfil themselves to the best of their abilities, it ordains that all this needs to be practised in proportion to the 'common good' requirements of the *Ummah* as a whole. God's will stands supreme, but His creatures are given the faculties of thinking and reasoning to act responsibly on earth in fulfilling God's pleasure in accordance with the changing times and conditions, for Islam is a religion for all times and all people.

In reflecting Islamic dictates, the Prophet Mohammad stressed from the outset to his followers the value of education and reasoning, and placed no barriers to critical thinking, expression and debate. The Prophet and his four companions who succeeded his religious and political leadership (but not his prophecy for he was the seal of prophets), set an example of this by stressing the importance of *'Ilm* (knowledge) and sanctioning consultation, participation and consensus, as well as emphasising the sanctity of a citizen's privacy against arbitrary actions, and of the rule of law with justice, or what has in history evolved as *Sharia* (Islamic law), as principles to underpin the operation of the *Ummah*. From this, many Islamic thinkers have concluded that Islam has enshrined the value of a participatory system of governance, whereby citizens determine their political destiny on earth in conformity with Islamic teachings. In the course of its historical evolution, Islam has also come to accommodate pluralism from within, such as the Sunni-Shia sectarian division, despite all the tensions this division on occasion has entailed and from outside, as in the case of cultural differences between its followers. It has demonstrated a degree of elasticity in its internal and external dispositions that has been significant in ensuring its continuity as a dynamic religion and fostering its position as the fastest growing faith even in today's world.[3]

Islam cautions its followers not only against unjust rule and arbitrary impositions, but also against living in conflict with one another and with the wider world. It is rich with principles and practices that call for a humanised and humane world, and has provided many principles on the basis of which the creation of a peaceful democratic way of life can be justified. As such, on the one hand, Islam can be used to justify absolutism, and, on the other, it can be deployed to rationalise a pluralist democratic existence according to changing conditions in time space.

It is against this backdrop that Islam – like any other religion or ideology – has been wide open to a range of interpretations and methods of application in the course of history. This approach, on the whole, has engendered two clusters of Islamists, who, while sharing the same doctrinal platform, have come to differ from one another when it comes to the application of Islam, and more specifically and relevantly Islamic notions of sovereignty, in the Muslim world in general, and the Muslim Middle East in particular. They are Jihadi and Ijtihadi Islamists, bearing in mind that each cluster is highly diverse from within.

In general, the Jihadi Islamists[4] call for assertive and strict adherence to fundamentals of Islam as literally pronounced in the Qur'an and Sunna. They present a highly monolithic version of Islam, with a firm conviction that there is no separation between religion and politics in Islam and that they are the two sides of the same coin. They contend that there is only one way to build God's government on earth and that is the way that God has ordained in the Qur'an (Islam's book of revelations) and that Prophet Mohammad pursued in creating the original Islamic

3 See Amin Saikal (2003) *Islam and the West: Conflict or Cooperation?* (London: Palgrave), especially Chapter 2.

4 For a recent detailed discussion of Jihadis and their diversity, see Fawaz A. Gerges (2005) *The Far Enemy: Why Jihad Went Global* (New York: Cambridge University Press), Chapters 4–5.

community. They advocate that the only legitimate form of political system in a predominantly Muslim society is an *Islamic* government, whose task is to apply *Sharia* as the law of the land. They postulate that individual, and for that matter communal, rights and freedoms are expendable when it comes to the higher goal of protecting and defending Islam and an Islamic community. They have no serious aversion to the use of violence as a means to achieve their objectives. They strongly endorse the notion of self-sacrifice and martyrdom, with a proviso to go beyond the limits set in Islam for waging lesser Jihad (combative assertion), and if necessary to engage in war without rules or what has widely been viewed by many inside and outside Islam as 'terrorism' to establish 'Nizami Islami' (Islamic order) on earth.

Most Jihadi Islamists uphold sovereignty as universal authority driven from God. To them, the concept does not delineate any political or territorial, or for that matter any kind of, division; it implies a wholesale exercise of divine-based (but 'popularly accepted') authority within the *Ummah* and against those who threaten or violate the *Ummah*. As such, sovereignty means the application of the rule of God within the *Ummah*. Their concept of Islamic sovereignty originates from their understanding of the most central Islamic principle of *Tawhid* (the unity of God), from which flows all other principles in Islam, and of the way the Prophet of Islam, Mohammad, and his Companions exercised religious and political authority. They strictly adhere to the fact that Islam affirms *Tawhid* with the command that there is one God who is the creator and mover of the universe and the Sovereign of all. Everything living and non-living comes from Him and belongs to Him.

Many contemporary Jihadi Islamists take their inspiration from a leading Egyptian theological writer and activist, Sayyid Qutb, who was imprisoned by the semi-secularist regime of President Gamal Abdul Nasser (1954–1970) and was hanged in 1966.[5] Qutb states:

> There is no ruler save God, no legislator, no organiser of human life and human relationships to the world, to living things or human beings save God. From him alone is received all guidance and legislation, all systems of life, norms governing relationships and the measure of values.

However, he acknowledges that there can be variations of the Islamic system, provided that these variations conform to Islamic dictates. He writes:

> The Islamic system is not restricted solely to a replica of the first Islamic society, but is every social form governed by the total Islamic view of life …. The Islamic system has room for scores of models which are compatible with the natural growth of the society and the new needs of the contemporary age as long as the total Islamic idea dominates these models in its expansive external perimeter.[6]

---

5 For an account Qutb's life, see Adnan Musallam (1998) 'Sayyid Qutb's View of Islam, Society and Militancy', *Journal of South and Middle Eastern Studies* 22(1), 64–87. For an analysis of Qutb's thought, see Yvonne Y. Haddad (1983) 'Sayyed Qutb: Odeologue of Islamic Revival', in John L. Esposito (ed.) *Voice of Resurgent Islam* (New York: Oxford University Press), Chapter 4.

6 Quoted in *ibid*.

Jihadi Islamists believe that *Tawhíd* provides a single direction and demands a unified spirit of its adherents. They equate sovereignty with rule or governance of God (*hakimiyyah*) on earth, and view the role of men as acting simply as God's reflection and therefore His vicegerent to implement what God has already legislated in the Qur'an, and what the Prophet has elaborated upon the Qur'anic contents. They advocate that the mission of Muslims is to build on what the Prophet founded as *Nizam-i Tawhíd* (system based on unity of God) and to expand and maintain no other type than Islamic sovereignty within an *Ummah* engulfing Muslims wherever they live, but more specifically the lands inhabited predominantly by Muslims in today's world. In this sense, some have claimed that they advocate a continuous globalised Jihad in defence of maintaining and strengthening their version of Islam within what has increasingly become a globalised world.[7]

They postulate that all Muslims have a moral and religious duty to protect the *Nizam-i Tawhíd* and Islamic sovereignty within the *Ummah*. From their perspective, if any part of *Ummah* and its *Nizam* is either threatened or violated by an outside force, it is obligatory upon all members of the *Ummah* to mount an Islamic defence. It is in this context that they also believe that Islam advocates the use of lesser Jihad (combative exertion), involving self-sacrifice (martyrdom) and whatever other means necessary to enforce and maintain the dignity of Islam. Further, they endorse the concept of Islamic *Khilafat* (divinely legitimated rulership) as most appropriate in the exercise of earthly power. They affirm the Islamic practices of *Shura* (consultation) and *Ijmah* (consensus), but only within a strict Islamic framework consonant with to their puritanical understanding of Islam.

In short, Jihadi Islamists predominantly equate sovereignty with the exercise of power and authority as undivided variables within a borderless domain of worshippers, with two important implications. One is that Islam is essentially opposed to territorial divisions along the lines of geopolitical units or states, and recognises no other boundary than that of the Islamic faith. Another is that Islam locks its followers in a position, from where notions of self-sacrifice, suppression and suffering, if they become necessary in the name of satisfying Islamic sovereignty, can be justified. If in the process innocent blood is shed, that is permissible in pursuit of the wider Islamic cause.

The Jihadi approach has spawned in the course of history a doctrine of political Jihadism adopted in different ways by a variety of groups. Some of them have proved to be more universal and puritanical than others, but some have also been catalytically reformist in pursuit of re-Islamising the polities of their societies against prevailing authoritarianism. Further, some have been more extreme than others in their attitude to the application of violence as a means to achieve their objectives. Some have openly opposed Western notions of sovereignty, democracy and human rights, and others have grudgingly and disturbingly become tolerant of the Westphalian concept of sovereignty and pro-Western modernity in their societies.

---

7 See Oliver Roy (2002) *Globalised Islam: The Search for a New Ummah* (London: Hurst & Company); Daniel Benjamin and Steven Simon (2005) *The Next Attack: The Globalization of Jihad* (London: Hodder & Stoughton).

In recent times, Jihadi political Islamism has come to produce a range of extremist groups, including Al Qaeda and many of its associated groups, more importantly Jama'a Islamiyya and the Hezbi Islami Afghanistan (*Gulbuddin Hekmatyar*), as well as the Taliban and *Lashkar-e Toiba*. These groups have been willing to wage acts of violence without rules and constraints in pursuit of gaols of establishing Islamic order within the Muslim countries and beyond in defiance of the prevailing Westphalian geopolitical divisions in the world.

However, despite becoming increasingly vocal and active ever since the Iranian revolution of 1978/79 and the Afghan Islamic resistance to the Soviet occupation of Afghanistan in the 1980s, Jihadi Islamists of all strips constitute a minority in the Muslim world. They are enormously outnumbered by their Ijtihadi counterparts, who share a common doctrinal platform with Jihadi Islamists, but call for a creative interpretation and application of Islam based on independent reasoning.

In general, the Ijtihadi Islamists[8] subscribe to the view that Islam provides neither a theory of the state nor a blueprint for what exactly should constitute an Islamic system of governance. Although some of them, such as the prominent Pakistani Islamic ideologue Abul Ala Mawdudi (1903–1979), who endorsed the conception of Pakistan as an 'Islamic state',[9] fall within the range of Jihadi-Ijtihadi Islamists, in general the Ijtihadis maintain that while Prophet Mohammad left behind a powerful and everlasting legacy, he left it to the followers of Islam to apply Islam in the course of history according to changing circumstances. They hold that Islam from the start exhibited an inherent degree of internal flexibility and external adaptability that ensured its continuity as a dynamic religion. They argue for a softer relationship between religion and politics in Islam, with a claim that although Islam rejects territorial, political and social divisions, and emphasises the importance of undivided power and authority, it is nonetheless endowed with many principles and pointers that also make it adaptable to changing conditions. They view Islam as essentially compatible with democracy and what is contained in the Universal Declaration of Human Rights (with the exception of capital punishment, which Islam endorses) as well as the scientific, technological and economic demands of a modern way of life. Most of them see the Westphalian concept of territorial and political sovereignty as a reality of changing historical conditions that Islam has recognised as possible in the course of evolution of human society. They do not necessarily contend that Muslims by adopting the Western constructs of nation-states and political and territorial sovereignty violate their religion or their mission to uphold Islam as a universal religion and live in harmony with one another and the rest of the world. Some of the contemporary Ijtihadi Islamists have gone so far as to argue that it is even possible under today's circumstances to have a secular government in a predominantly

8 For a succinct historical discussion of Ijtihad, see Wael B. Hallaq (1995) 'Ijtihad', in John L. Esposito (ed.) *The Oxford Encyclopedia of the Modern Islamic World* vol. 2, (New York: Oxford University Press), 178–181. For a wider analysis of various schools of thought, including 'Islamic liberals' (involving Ijtihadi Islam), see Nazib Ayubi (1991) *Political Islam: Religion and Politics in the Arab World* (London: Routledge), especially Chapter 3.

9 For a discussion of Mawdudi's contributions, see Charles J. Adams (1995) 'Mawdudi and the Islamic States', in Esposito, *Voice of Resurgent Islam,* Chapter 5.

Muslim society as long as Islam is respected as the religion of the majority within the state and that state as a cooperative part of the Muslim domain.

The Ijtihadi approach has produced a variety of what have also been termed as 'liberal' Islamists. A prominent living example from the Sunni Muslim side is the former Indonesian President Abdurrahman Wahid (1999–2001)[10] and from the Shia side the former Iranian President Mohammed Khatami (1997–2005).[11] Both Wahid and Khatami have creatively argued for upholding Islam within the bounds of Westphalian sovereignty and have rejected any interpretation of Islam presenting it as unadaptable to the changing realities of modern life.

In many ways, Khatami proved to be a Shiite mirror image of Abdurrahman Wahid. Like the Indonesian leader, Khatami argued for Islam's compatibility with democracy and basic human rights and freedoms within the bounds of political and territorial states as the building blocs of the existing international order. The only area in which Khatami parted with Wahid was in relation to the issue of the permissibility of secular politics within a Muslim society. Khatami consistently upheld the need for operating within an Islamic framework, as laid down by the founder of the Iranian Islamic republic, Ayatullah Khomeini. He called for the creation of what he termed 'Islamic civil society' and 'Islamic democracy', with the principle of 'dialogue of civilisations' governing Muslim states' foreign relations, in conformity with, rather than in opposition to, existing international norms. A close scrutiny shows that his concepts of Islamic democracy and Islamic civil society came very close in their disposition to embracing most of the values and practices which underpin the Western constructs of state, civil society and liberal democracy.

In this sense, the Ijtihadi Islamists' position on the question of state and sovereignty is supportive of that which prevails in the world. However, this does not dilute their resolve to see Muslim states instituting reforms and exercising their independence along Islamic lines, although in interactive, peaceful co-existence with the rest of the world. The Ijtihadi approach has indeed been instrumental in aiding the bulk of Muslims to come to terms with the Westphalian concept of sovereignty as a given reality of historical change. And it is also this approach on which most of the secular or semi-secular elites in the Muslim world have relied to gain a growing degree of popular acceptance for their own embrace of the Westphalian concept.

It is the Jihadi Islamists' approach that has caused much confusion and conflict within Muslim countries, and the relations between these countries and the wider world, especially the United States and some of its allies. Ironically, it is also this approach that ruling elites in many Muslim countries have exploited whenever desirable to constitute and enforce authoritarian or concealed authoritarian rule of

10 For a detailed analysis of Abdurrahman Wahid's views, see Greg Barton (2002) *Abdurrahman Wahid: Muslim Democrat, Indonesian President* (Sydney: University of New South Wales), especially Parts 3–5.

11 For Mohammad Khatami's views, see Mohammad Khatami (2000) *Islam, Dialogue and Civil Society* (Canberra: Centre for Arab and Islamic Studies, The Australian National University); Amin Saikal (2003) 'Democracy and Peace in Iran and Iraq', in Amin Saikal and Albrecht Schnabel (eds) *Democratization in the Middle East: Experiences, Struggles, Challenges* (New York: United Nations University Press), Chapter 9.

one kind or another to impede an Ijtihadi reformation of their politics and societies. In recent times, especially since the end of the Cold War, the US support (and in some cases protection) of many such elites for self-centred geopolitical reasons has not helped the situation. On the one hand, it has enabled these elites to engage only in a kind of reformation which would be conducive to maintaining their authoritarian rule and limiting the opportunities for even Ijtihadi Islam to assume a meaningful role in the processes of transformation of Muslim societies. On the other hand, it has contributed to promoting some of the Jihadi Islamists to break out of their societies to take up violent opposition to their regimes and the United States, and for that matter whatever they have regarded as Western and in variation to their understanding of Islam. This approach has included their opposition to the division of the Muslim domain into sovereign states, with a call for the recreation of Islamic *Ummah* and *Khilafat*. It is not just the core leaderships of many Jihadi groups which have made this call. Even many of their distant supporters have now responded to the call. The ringleader of the home-grown July 2005 London suicide bombers, Mohammad Sadiq Khan, also took up the cause. In a videotape that he left behind, he made it clear that he saw all Muslims as part of one *Ummah* and he claimed that when 'my people' (that is Muslims) are bombed and gassed, imprisoned and tortured, then he felt duty bound to act on their behalf.[12]

There is no meeting of the minds between the core Jihadi Islamists' and Wesphalian concepts of sovereignty. They stand diametrically opposed to one another. In the meantime, the influence of Jihadi Islamists in the current world situation seems to be on the rise rather on the wane in the Muslim world. The best way to combat their extremism is for the United States and its Muslim and non-Muslim allies to change their policy behaviour, with a view to widening the space for Ijtihadi Islamists at the cost of their Jihadi counterparts. An empowerment of Ijtihadi Islamists to take the centre stage in the conduct of discourse not only within the Muslim societies, but also with the US and its allies, could create an ideological and popular backlash that would contribute substantially to the weakening of Jihadi Islamists.

It is only then that the Jihadis' violent challenge to Westphalian sovereignty may also diminish. As the situation stands, the extremism of Jihadi Islamists is countered by extremism of re-born Christians, neoconservatives and right-wing nationalists who dominate the Bush Administration from the US side and intense religious Zionists from the Israeli side. This clash of extremisms has not served any side well. The time has come for new thinking and a new approach to build a more durable, stable international order.

12 For the full text of the videotape, see *BBC News*, 1 September 2005.

Chapter 5

Whither Sovereignty in Southeast Asia Today?

See Seng Tan

Sovereignty is often treated by students and practitioners of international security alike as a foundational concept. This approach is equally true of the study and practice of regional security in Southeast Asia. Recent developments in the Southeast Asian region challenge the foundational status and meaning of sovereignty as understood therein. Nevertheless, to simply conclude that sovereignty is therefore a variable concept, without showing how those various meanings shift and reform, leaves much to be desired. This chapter analyses how sovereignty has been configured in the context of contemporary Southeast Asia, paying attention to how regional states have been represented, ever so tenuously, as sovereign institutions.

Although the unity of the Southeast Asian region and that of its 'imagined communities' (*á la* Anderson[1]) is more likely characterised, as McCloud has suggested, by its divisions within (geographical, religious, ethnic, and so on) and a mosaic of overlapping and cross-cutting loyalties,[2] these complexities have evidently not prevented efforts by security scholars to refract the region and its inhabitants largely through the prisms of nationalism and state sovereignty. With the aid of some insights from recent critical reflections on sovereignty, I offer below, in an extremely preliminary and incomplete fashion, an exploration of how regional thinking and practice in Southeast Asia might conceivably evolve in the light of recent regional developments that question the traditional understanding of sovereignty in the region.

Rethinking sovereignty

> Politically speaking, God died around the time of Machiavelli, not of Nietzsche. Sovereignty was in effect His earthly replacement.[3]

1 Benedict Anderson (1983) *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso).

2 Donald G. McCloud (1995) *Southeast Asia: Tradition and Modernity in the Contemporary World*, 2nd edn. (Boulder, CO: Westview Press).

3 R.B.J. Walker (1996) 'Space/Time/Sovereignty', in Mark E. Denham and Mark Owen Lombardi (eds) *Perspectives on Third World Sovereignty: The Postmodern Paradox* (London: Macmillan), 22.

Widely embraced, on one hand, in the international relations (IR) literature as the 'primary rule' of international life,[4] sovereignty has also long been regarded on the other by scholars as a problematic and contested idea because of its variegated meanings. At least four usages have been identified, the oldest being 'domestic sovereignty', which emphasises the legitimacy of the source of *authority* within a single polity (although one may equally speak of multiple sources of authority in liberal democratic polities).[5]

In Hinsley's classic definition, sovereignty is 'the idea that there is a final and absolute political authority in the political community', and that 'no final and absolute authority exists elsewhere'.[6] Second, there is 'international legal sovereignty', which involves the status of a political entity in the international system, to which recognition of territory and formal juridical autonomy is extended. Third, there is 'interdependence sovereignty', which views flows and movements that characterise globalisation as possible threats to the sovereignty of states. As Camilleri and Falk have noted, 'it is reasonable to expect that changes in global culture and political economy may well have repercussions for the concept and practice of sovereignty'.[7] In this sense, sovereignty is less a matter of authority than of *control*.

Finally, there is 'Westphalian sovereignty', which treats states as not only *de jure* independent, but *de facto* autonomous. When the ostensible autonomy of the state is perceived as being eroded as a consequence of globalisation pressures – leading to contentions regarding the 'retreat' or imminent 'demise' of the state – it is important to understand this not in terms of the erosion of sovereignty precisely for the reason that sovereignty 'is absolute and not relative' since an entity 'cannot be more or less sovereign'.[8] Likewise, whereas state control and autonomy have fluctuated greatly over time and over regions and issue-areas, states' claim to ultimate political authority have however remained quite persistent and pervasive.[9]

Related to this fourth meaning of Westphalian sovereignty is the fundamental notion, first popularised by Wolff and Vattel in the latter part of the eighteenth century, of *non-intervention* – including, I might add, the more subtle Southeast Asian variant of non-intervention understood as non-interference – which for many

4 J. Samuel Barkin and Bruce Cronin (1994) 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations', *International Organization* 48(1), 107–130 at 107.

5 Stephen D. Krasner (2001) 'Problematic Sovereignty', in Stephen D. Krasner (ed.) *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press), 1–23.

6 F.H. Hinsley (1986) *Sovereignty*, 2nd edn. (Cambridge: Cambridge University Press), 26, original emphasis.

7 Joseph A. Camilleri and Jim Falk (1992) *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Aldershot, Hants: Edward Elgar), 44.

8 Marc Williams (1996) 'Rethinking Sovereignty', in Eleanor Kaufman and Gillian Young (eds) *Globalization: Theory and Practice* (London: Pinter), 112.

9 Janice E. Thomson (1995) 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research', *International Studies Quarterly* 39(2), 213–233 at 214.

constitutes the *sine qua non* of the sovereign state system.[10] Of the abovementioned versions of sovereignty, it is safe to say that Westphalian state sovereignty is the model privileged within IR theory and practice.[11] In some instances, interventionism can violate Westphalian sovereignty without being inconsistent with international legal sovereignty, which suggests that Westphalian sovereignty is a 'well understood cognitive script, [but] one that is sometimes honoured and sometimes not'.[12] This is particularly the case when international legal norms gravitate towards supporting national rather than state sovereignty.[13]

From the preceding discussion, at least three things about the ways in which sovereignty has been understood and deployed in the literature are noteworthy for my purposes.

Sovereignty as a conflated concept

When expedient, IR scholars are not averse to conflating the different connotations of sovereignty, deliberately so or otherwise. Richard Little, for example, has this to say: 'According to [IR] theory, states are defined as sovereign institutions which possess absolute authority over their own territory. Any erosion of this authority is considered to challenge the sovereignty and, therefore, the existence of the state'.[14] More often than not in IR and international security discourse, conceptual conflation occurs through the subordination of other understandings under the sovereignty rubric. That is, in political practice 'sovereignty' serves as an overarching trope that effectively encapsulates one or more sovereignty understandings in ways that may not be immediately apparent.

Sovereignty as an uncontested concept

Against the wide acknowledgement regarding sovereignty as an 'essentially contested' concept, the manner in which sovereignty is treated in political practice is effectively

10 Robert H. Jackson (1990) *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press), 6.

11 Cynthia Weber and Thomas J. Biersteker (1996) 'Reconstructing the Analysis of Sovereignty', in Thomas J. Biersteker and Cynthia Weber (eds) *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 285.

12 Stephen D. Krasner (1999) *Sovereignty: Organized Hypocrisy* (Princeton NJ: Princeton University Press), 69.

13 As Barkin and Cronin argue, 'when international norms legitimize state rather than national sovereignty, the international community and its institutions will tend to defend the rights of established states against nationalistic claims of domestic ethnic groups. On the other hand, when norms of international order favour national over state sovereignty, the international community will be more sympathetic to pleas for national self-determination, often at the expense of established states' ('The State and the Nation', 108).

14 Richard Little (1987) 'Revisiting Intervention: A Survey of Recent Developments', *Review of International Studies* 13, 49–60 at 57.

uncontested.[15] Despite our labours at teasing out the concept's various expressions and nuances, sovereignty, as Lombardi has it, 'is a concept accepted as 'truth' by many scholars, statespersons and laypersons in much of the political discourse around the world'.[16] Contrary to the oft-heard lament concerning the divide between theory and practice, what this suggests is that the *practice* of international politics by both scholars as well as statesmen is equally given to a kind of 'theoretical performance' without it necessarily being recognised or acknowledged as such. In this respect, analysts, practitioners as well as regular folk who purport to make factual claims about the world that are objective, non-normative and purely empirical should bear in mind the tacit ideology and/or interest in their discourse, especially when they employ concepts such as 'sovereignty' as terms of reference.[17]

Sovereignty as a claim

The point in all this is simply that sovereignty is fundamentally and ultimately a claim, one that provides a discursive/linguistic frame through which political communities, always shifting and incomplete, are nevertheless imbued with essence and rendered intelligible as sovereign territorial states, already self-evident and autonomous.[18] 'Boundaries may become blurred, but they ultimately remain intact and given', as Doty observes of claims on behalf of state sovereignty. 'The ontological commitment to the state ensures that the starting point is the existence of boundaries that are then transgressed, rather than always-in-process practices that effect the construction of contingent, and never fully fixed, boundaries'.[19] In other words, the treatment of contingent and incomplete boundaries as fixed and hardened often has more to do with discursive claims in social discourse which belie metaphysical fidelity to the

15 R.B.J. Walker (1992) 'Gender and Critique in the Theory of International Relations', in V. Spike Peterson (ed.) *Gendered States: Feminist (Re)Visions of International Relations Theory* (London; Boulder, CO: Lynne Rienner), 179–202.

16 Mark Owen Lombardi (1996) 'Third-World Problem-Solving and the 'Religion' of Sovereignty: Trends and Prospects', in Mark E. Denham and Mark Owen Lombardi (eds) *Perspectives on Third World Sovereignty* (London: Macmillan), 153.

17 On the effects of theory on our daily practice, see Marysia Zalewski (1996) "'All these theories yet the bodies keep piling up": theory, theorists, theorizing', in Steve Smith, Ken Booth and Marysia Zalewski (eds) *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press), 340–353. Nor should theory-making and application be seen as an objective enterprise; as Robert W. Cox (1986) once argued, 'Theory is always for someone and for some purpose. All theories have a perspective'. See Robert W. Cox (1986) 'Social Forces, States and World Orders: Beyond International Relations Theory', in Robert O. Keohane (ed.) *Neorealism and Its Critics* (New York: Columbia University Press), 206.

18 As Edkins and Pin-Fat have noted, 'We seek to convince ourselves of the existence of 'reality' by trying to trace the outline of objects over and over again. As Wittgenstein points out, this is a trick of our language. We appear to be dealing with the essence of a real object, but what we are doing is tracing the frame through which we see it'. See Jenny Edkins and Véronique Pin-Fat (1999) 'The Subject of the Political', in Jenny Edkins, Nalini Persram and Véronique Pin-Fat (eds) *Sovereignty and Subjectivity* (Boulder CO: Lynne Rienner), 4.

19 Roxanne Lynn Doty (1996) 'The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration', *Alternatives* 21, 171–189 at 175.

idea of state sovereignty rather than serious engagement with the ambiguity and antinomy that inhere in the life-world 'out there', despite protests to the contrary.[20]

But while some hold that globalisation engenders new and different practices of statecraft that could in turn lead to a rewriting of the state in terms other than that of exclusivity and territoriality,[21] others, such as R.B.J. Walker, are less optimistic:

> If it is true that contemporary world politics is characterized by profound challenges to the principle of state sovereignty, whether these challenges are characterized through concepts of interdependence and globalization or, as I prefer, by reference to (late- or post-modern) processes of temporal acceleration, then the theoretical and philosophical assumptions that are themselves constitutive of all claims to sovereign identity are not likely to provide much critical perspective on what these challenges might bring.[22]

Thus understood, it is equally unlikely that recent and ongoing regional developments in Southeast Asia would produce significant change to how regional security therein has been managed, unless the sorts of assumptions that underpin and affirm sovereignty claims in the region are themselves radically contested. The three observations on sovereignty above provide a useful starting point. Notably, there is no attempt on my part to depict the state as a given agent or identity, on one hand, and sovereignty as a given institution or norm structure. Rather, the idea is to treat the state, as agent or identity, and sovereignty, as discourse or institution, as 'mutually constitutive and constantly undergoing change and transformation'.[23]

Sovereignty and Southeast Asia

As in most other area or region studies, the study of Southeast Asia is partly reflective of the modern concern with the making of tradition, where pride of place is given to stories of origins, reified teleologies, and grand narratives of continuity and discontinuity. As Sir Ernest Barker has argued, 'The self-consciousness of nations is a product of the nineteenth century. This is a matter of the first importance. Nations were already there; they had indeed been there for centuries'.[24] Here we see the twinning of ontological priority with an ontological 'primitivism'. Invented traditions serve to entrench and legitimise groups in power by, among other things,

---

20 For a treatment of this argument in realist discourses on Southeast Asian security, refer to See Seng Tan (2005) 'Untying Leifer's Discourse on Order and Power', *The Pacific Review* 18(1), 71–93.

21 Kuah writes: 'Globalization does not erode sovereignty. The spatiotemporal transformations that lie at its heart endanger the territorial logic underpinning state sovereignty'. See Adrian Kuah (2003) 'Sovereignty and the Politics of Identity in International Relations', Working Paper No. 48, Institute of Defence and Strategic Studies, Singapore.

22 R.B.J. Walker (1993) *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press), 161.

23 Biersteker and Weber, 'The Social Construction of State Sovereignty'.

24 Ernest Barker (1927) *National Character and the Factors in Its Formation* (London: Methuen), 173.

naturalising and de-historicising sets of historical relations.[25] In short, they act not unlike discourses of the modern, which is in fact what they are.[26] Moreover, works like Ben Anderson's treatise on nationalism, *Imagined Communities* similarly positioned the nation-state as the *de facto* unit of analysis, wherein the nation-state is seen as defining and describing the limits of modernity. These limits are continually affirmed by, among other things, international relations discourses that privilege the state and, by extension, the discourse of national sovereignty.

Pre-modern Southeast Asia

My aim in this brief section is not to offer a lengthy discussion on sovereignty notions in pre-modern Southeast Asia. Rather, I simply want to make the point that concepts popular with some Southeast Asian historians, particularly the *mandala*, is hardly contiguous with sovereign states.[27] Comprising multiple centres of authority wherein patterns of kinship loyalty, wrought through spiritual beliefs and material benefits, evidently mattered more than attachments to territory, *mandalas* were fluid, even at times chaotic, social and political arrangements that lacked the conceptual fixity and absolutism of contemporary sovereign states.[28] Attempts as such to retroactively assign the sovereignty label to the *mandala* concept constitutes an instance of 'presentism', namely, the notion that 'we study the past for the sake of the present' for the purpose of facilitating 'the abridgement of history'.[29] Caveats aside, a serious effort at exploring sovereignty conceptions (if any) in pre-modern Southeast Asia is quite beyond the scope and intent of this essay.

Cold War Southeast Asia

More than anything else, Southeast Asia during the Cold War years fosters the indelible impression of a region principally marked by difference and diversity – historical, racial, religious, cultural, political and economic – that overlap national borders hastily and arbitrarily drawn by colonial powers on the retreat during decolonisation.[30] While such cleavages have clearly complicated the nascent nation-

25 Eric Hobsbawm and Terrance Ranger (eds) (1983) *The Invention of Tradition* (Cambridge: Cambridge University Press).

26 Adrian Vickers (2004) '"Malay Identity": Modernity, Invented Tradition and Forms of Knowledge', in Timothy P. Barnard (ed.) *Contesting Malayness*: *Malay Identity Across Boundaries* (Singapore: Singapore University Press), 29.

27 O.W. Wolters (1999) *History, Culture and Region in Southeast Asian Perspectives*, 2nd edn. (Singapore: ISEAS for Cornell Southeast Asia Program Publications), 28.

28 Timothy P. Barnard (2003) *Multiple Centres of Authority: Society and Environment in Siak and Eastern Sumatra*, *1674–1827* (Leiden: KITLV Press).

29 Butterfield concludes, 'Such a disposition serves to simplify the study of history by providing an excuse for leaving things out'. Herbert Butterfield (1931) *The Whig Interpretation of History* (London: Bell), 24.

30 John Funston (2000) 'ASEAN and the Principle of Non-Intervention: Practice and Prospects', in David Dickens and Guy Wilson-Roberts (eds) *Non-Intervention and State Sovereignty in the Asia Pacific* (Wellington: Centre for Strategic Studies), 6.

building experiments and 'rediscoveries' and assertions of indigenous identity, the discourse on state sovereignty was however well served by, among other things, Marxist conceptions which framed the region as 'a lure for outside intervention and intrigue' owing to its wealth of 'natural resources, discordant nationalisms and unstable regimes'.[31]

To be sure, not everything can or should be characterised in terms of dissidence and resistance, since a fair bit of historical subaltern activity within Southeast Asia can also be seen in terms of accommodation. The tension between accommodation and resistance is clear in the following observation by Nicholas Tarling:

> In Southeast Asia nationalism was both reactive and creative, constructive and destructive. Generally nationalists were reacting against colonial rulers, seeking to destroy the colonial regimes. At the same time, they were domesticating the nationalist idea, and in some sense, even when they were struggling with their rulers, collaborating in a common endeavour.[32]

That said, the post-colonial international relations of Southeast Asia was clearly underwritten by the principle of sovereignty (and its cousin, non-interference), which implicitly permeated ancillary discourses on modernisation, nation-building, and the like. Writing about ASEAN, the late Michael Leifer rendered the following observation:

> Without discounting a common anti-communism and a related concern with the military staying power of the United States among founding members, ASEAN was established in order to locate post-conflict intra-regional reconciliation within an institutionalized structure of relations. *That structure was to be based, above all, on respect for national sovereignty* …[33]

Indeed, as a recent survey has demonstrated,[34] the predominance of the sovereignty concept in academic and policy discourses on the region was largely promoted through the spate of scholarly writings on Cold War Southeast Asia – say, works by Brecher, Colbert, Simon, Jorgensen-Dahl, Tilman, Gordon, Rajendran and of course Leifer[35] – which framed the region in primarily realist terms. International law had

---

31 John L.S. Girling (1969) *People's War: The Conditions and the Consequences in China and in South East Asia* (London: George Allen and Unwin), 19.

32 Nicholas Tarling (1998) *Nations and States in Southeast Asia* (Cambridge: Cambridge University Press), 75. Also see See Seng Tan (2006) 'Introduction: States and Subalterns in Southeast Asia', in See Seng Tan (ed.) (2006) *States and their Subalterns: Identity and Contestation in Southeast Asia* (Singapore: Marshall Cavendish).

33 Michael Leifer (1999) 'The ASEAN Peace Process: A Category Mistake', *The Pacific Review* 12(1), 25–38 at 27, emphasis added.

34 Alan Chong (2005) 'Southeast Asia: Modernization, Deficiency and the Search for an Authenticity', presented at the 'Why is There No Non-Western IR Theory?' workshop jointly organized by the London School of Economics and the Institute of Defence and Strategic Studies, Singapore, 11–12 July 2005.

35 Michael Brecher (1964) *The New States of Asia: A Political Analysis* (London: Oxford University Press); Evelyn Golbert (1977) *Southeast Asia in International Politics 1941–1956* (Ithaca: Cornell University Press); Sheldon W. Simon (1982) *The ASEAN States and Regional*

a part to play too, never mind the fact that many of the Southeast Asian nations constituted sovereign states in name only.[36]

Recent regional developments

For Southeast Asia, the post-Cold War years have been anything but prosaic. Since the Asian financial crisis of 1997–98, a pervasive circumspection regarding where the region is headed has emerged, fuelled most recently by the growing spectres of terrorism and large-scale humanitarian crises arising from flu pandemics, earthquakes and tsunamis. For some, events such as these expose the 'myth' of regional community and cooperation which ASEAN leaders have purportedly created about the Association, when in reality serious bilateral tensions, the burdens of membership enlargement and overall disunity better describe intra-ASEAN relations.[37]

Conversely, others argue that specific institutional changes have in effect been taking place which reflect broader and more long-term geopolitical and economic shifts in the international system.[38] As one analyst has noted, 'Traditionally, ASEAN has resisted recognising any humanitarian intervention in the affairs of sovereign states, but it is now having to adapt to a changing normative environment'.[39] These developments affect the regional environment in that they call into question certain enduring features of Southeast Asian regionalism, among which four stand out: state centrism, non-interference, the importance of 'soft power' over structural or hegemonic leadership, and the preference for 'soft institutionalism' over legalistic and formalistic cooperation. In this regard, four areas in which one or more of

---

Security (Stanford: Hoover Institution Press); Arnfinn Jorgensen-Dahl (1982) *Regional Organization and Order in Southeast Asia* (London: Macmillan); Robert O. Tilman (1987) *Southeast Asia and the Enemy Beyond*: *ASEAN Perceptions of External Threats* (Boulder: Westview Press); Bernard K. Gordon (1966) *The Dimensions of Conflict in Southeast Asia* (Englewood Cliffs NJ: Prentice-Hall); M. Rajendran (1985) *ASEAN's Foreign Relations: The Shift to Collective Action* (Kuala Lumpur: Arenabuku); Michael Leifer (1989) *ASEAN and the Security of South-East Asia* (London: Routledge).

36 As Robert Jackson (1996) has put it, 'Many Third World states are scarcely self-standing realities but nevertheless are completely sovereign jurisdictions recognized by international legitimacy and law. Rugged individualism in international relations hardly applies to these entities which for the most part are creatures of a novel international protectionism'. Cited in Roxanne Lynn Doty *Imperial Encounters*: *The Politics of Representation in North-South Relations* (Minneapolis MN: University of Minnesota Press), 147.

37 David Martin Jones and Michael L.R. Smith (2002) 'ASEAN's Imitation Community', *Orbis* 46, 93–109; and Nicholas Khoo (2004) 'Deconstructing the ASEAN Security Community: A Review Essay', *International Relations of the Asia-Pacific* 4, 35–46.

38 Amitav Acharya (n.d.) 'Institutional Change in Asia Pacific Regionalism: Sources and Directions', seminar at the Asia-Pacific Policy Program, Center of Business and Government, John F. Kennedy School of Government, Harvard University.

39 Shaun Narine (2004) 'Humanitarian Intervention and the Question of Sovereignty: The Case of ASEAN', CANCAPS Papers No. 33, March.

these hitherto intractable features is presently under challenge are especially noteworthy.[40]

The normative challenge to non-interference

The first challenge involves the longstanding principle of *non-interference*, which for the most part continues to underpin regional diplomatic relations.[41] The financial crisis exposed the reluctance of ASEAN members to provide early warning to one another, presumably out of deference to this norm. Transnational challenges such as the SARS crisis and the haze emanating from forest fires in Indonesia caused serious economic and health concerns for neighbouring countries, while mounting problems with drug and human trafficking and refugee flows have proved equally worrying. Bangkok's call to replace the Association's 'constructive engagement' policy, which in itself is rooted in non-interference, with the more intrusive approach of 'flexible engagement' met with resistance from member capitals, especially Hanoi and Yangon.

Moreover, the failure of ASEAN (during its 'enhanced interaction' phase, no less) to provide a timely response to the violence in secessionist East Timor damaged the Association's credibility at providing 'regional solutions to regional problems'. While ASEAN members remain divided on the issue of non-interference, there are encouraging signs that indicate some willingness among member states to adopt less dogmatic interpretations of the doctrine, including the decision in 2000 to institute a 'Troika' system that could conceivably provide a rapid diplomatic response to unfolding crisis, the conduct of economic 'peer reviews' and the creation of an 'ASEAN Surveillance Process' in regional financial cooperation. While affirming that non-interference remains a cardinal Association principle, an Indonesian senior official nevertheless conceded that 'it is no longer a principle which cannot be discussed'.[42] Even the political-security dimension, has not remained completely impervious, as evidenced by the discussion of domestic political concerns in Myanmar in the presence of its head of state at the ASEAN summit in Singapore in

40 The following discussion draws partly from See Seng Tan (2005) 'NGOs in Conflict Management in Southeast Asia', *International Peacekeeping* 12(1), 49–66; and Amitav Acharya and See Seng Tan (2003) 'Regionalism, Institutional Change, and New Military Missions in the Asia Pacific', *Nontraditional Roles of the Military and Security in East Asia* (Tokyo: National Institute of Defense Studies), 141–157.

41 The temptation for some may be to read these changes as indicating a discernable shift in regional elite thinking away from realist power politics, the traditional model of Asia-Pacific security, to liberal institutionalism. Elsewhere others have sought to make a case that these institutionalist leanings in the post-Cold War Asia-Pacific experience, though in contravention of neo-realist principles, are not necessarily antithetical to realist thought as understood within the classical realist tradition. See, for example, Ralf Emmers (2003) *Cooperative Security and the Balance of Power in ASEAN and the ARF* (London: Routledge).

42 Meidyatama Suryodiningrat (2000) 'Will RI Commit ASEAN's Sin?' *The Jakarta Post*, 26 July 2000, 1.

2002, or member nations' evident success at persuading Myanmar to forfeit its turn at chairing the Association in 2006.[43]

At best, these developments constitute a limited challenge to non-interference, which raises questions in the areas of interdependence and Westphalian modes of sovereignty for the recipient countries, and possibly even domestic sovereignty for the governing military junta in Myanmar. That the peace missions in Cambodia and East Timor took place implies that the regional commitment to non-interference does not automatically preclude interventionism, especially not when those challenges prove sufficiently severe to warrant resort to quite intrusive measures, not least humanitarian intervention.[44] Furthermore, it has also been argued that ASEAN has quietly engaged in actions that, for all intents and purposes, militate against the non-interference principle: diplomatic efforts at resolving the Cambodian conflict (1979–93); diplomatic overtures to Myanmar in welcoming it to the ASEAN fold; establishing institutional mechanisms for dealing with the haze problem (that is, the Regional Haze Action Plan) and the financial crisis (that is, a regional surveillance and early-warning mechanism).[45]

The quasi-functional imperative for legalisation

A second development has to do with the growing trend towards a more formalised regionalism, which contradicts the model of soft regionalism as the region's preferred mode of institutionalism. Whether this shift amounts to a sort of 'functional imperative' is debatable. Few however would question that the hallmarks of the once-venerated 'ASEAN way' (decision-making by consensus, preference for informality and organisational minimalism, and so on) are increasingly coming under duress for its failure to facilitate ASEAN's effort to cope with new challenges. Interestingly enough, the Association has not been particularly averse to arming itself with formal provisions for monitoring compliance through the use of regional mechanisms that have legally binding dispute-settlement authority backed by sanctions (for example, Southeast Asia Nuclear Weapons-Free Zone Treaty, the ASEAN Free Trade Area, Regional Haze Action Plan).[46] Such agreements challenge the model of soft regionalism with which many so readily associate ASEAN.

---

43 Aung Hla Tun (2005) 'Singapore, Myanmar PMs meet, reform pressure grows', Reuters, 30 March 2005.

44 Noting the common criticism of ASEAN inaction during the height of the violence in East Timor, one analyst has also called attention to the largely ignored roles played by various ASEAN members in response to that crisis and in ways that underscored the heightened consciousness within the region over perceived political sensitivities (presumably) affecting Jakarta. Mely Caballero-Anthony (2003) 'Regionalization of Peace in Asia: Experiences and Prospects of ASEM, ARF and UN Partnership', Working Paper No. 42, Institute of Defence and Strategic Studies, Singapore.

45 Mely Caballero-Anthony (2003) 'Asian Attitudes and Approaches to Peace Operations', UNISCI Papers No. 29, Faculty of Political Science, Complutense University, Madrid.

46 Acharya and Tan, 'Regionalism, Institutional Change, and New Military Missions in the Asia Pacific', 147.

The latest expression of ASEAN-styled *Gesellschaft* is the declared intention to establish an ASEAN Community comprising security, economic and socio-cultural components.[47] Where the ASEAN Security Community (ASC) is concerned, existing institutions and mechanisms within ASEAN to strengthen national and regional capacities to counter terrorism, drug and human trafficking and other trans-national crimes, and the spread of weapons of mass destruction would apparently be deployed. However, the manner in which ASEAN member nations have sought to manage bilateral disputes suggests that the main instrument for resolving intramural problems, notably the High Council, would not likely be tapped, and that, even when it is, it may be hampered by the non-interference principle (which the ASC has reiterated). At best, the ASC 'promises the vague long-term prospect of more effective mechanisms for regional conflict resolution and, ultimately, a less fragile region offering fewer opportunities for interference by the rising Asian major powers as their diplomatic assertiveness and military capacity grows'.[48]

The liberalisation of Southeast Asian regionalism

A third development involves the ongoing though sketchy 'liberalisation' in Southeast Asian regionalism, which is partly a consequence of democratic transitions in ASEAN countries such as the Philippines, Thailand and most recently Indonesia.[49] Regional cooperation in Southeast Asia has been an essentially state-centred and elite-driven project, while the engagement of civil society has been minimal despite the proliferation of Track 2 processes.[50] However, the post-Cold War attention

47 Declaration of ASEAN Concord II (Bali Concord II), Bali, 7 October 2003, available at http://www.aseansec.org/15159.htm. Consisting of twelve principles, the ASEAN Security Community (ASC) emphasises the continued importance of existing political instruments such as the Treaty of Amity and Cooperation (TAC), as well as the ZOPFAN Declaration and the SEANWFZ Treaty, to regional stability. According to the ASC, these instruments would continue to play a key role in confidence building measures, preventive diplomacy and approaches to conflict resolution. Also, see Leonard C. Sebastian and Chong Ja Ian (2003) 'Towards an ASEAN Security Community', *The Straits Times*, 7 October 2003, available at http://taiwansecurity.org/ST/2003/ST–100703.htm.

48 To be sure, much like China's accession to the TAC at the Bali summit, such nebulous promises hardly constitute security guarantees. As such, ASEAN members would in all likelihood continue to pin their security on not only national diplomacy and military capabilities, but in some cases also on links with external powers, most prominently America. Barry Desker (2003) 'Security Cooperation in Southeast Asia: ASEAN's credibility tested', *Strategic Comments* 9(8), available at http://www.iiss.org/stratcomsub.php?reason=nologin&returnTo=stratcomsub.php&scID=294.

49 In Thailand's case, the proclivity of Thai prime minister Thaksin Shinawatra for rolling back liberal gains made since Thailand began democratising in the early 1990s has led some to suggest that the increased prospects for an authoritarian turnover in Thailand have compromised the nation's democratic transition.

50 Track 2 processes are occasionally if unconvincingly cited as examples of the participation of civil society in regional institution building. In reality, however, these processes more or less are dominated by state-sponsored or supported think tanks led by individuals with close professional or personal ties to their respective governments. Moreover, a key

paid to trans-national and 'non-traditional' issues has given rise to NGO-initiated campaigns on environmental degradation, human rights abuses, poverty and social justice that have been pursued at the regional level and which usually contradict state policy.[51] Clearly, political openness in ASEAN countries that have undergone domestic political transition has, among other things, led to the empowerment of civil society actors with regional and international agendas. Moreover, the expansion of the security agenda of states to include 'human security' considerations provides rationalisation for the closer involvement of NGOs in regional cooperation, a domain that traditionally has remained the exclusive preserve of governments.[52]

Needless to say, NGOs in Southeast Asia have long been reluctant to collaborate with regional intergovernmental organisations, preferring instead to pursue their own separate networking and advocacy activities, although this view is gradually changing as well.[53] Despite such constraints, modest efforts by both governments and civil societies to promote dialogue over social and security issues have been pursued, such as the ASEAN Peoples' Assembly (APA) meetings in the Indonesian locales of Batam in 2000 and Bali in 2002. Castigated as 'an incoherent babble of voices',[54] on one hand, the APA has also been viewed, on the other, as a:

> …sign of the times – one characterized by an increasing willingness by actors in the second and third tracks to engage including the unlike-minded for the achievement of the goals they cannot obtain in isolation from or in hostile opposition to each other'.[55]

---

principle of Track 2 – the participation of government officials 'in their private capacities' – is largely chimerical for seldom have they been able to rise above national interests and concerns in ostensibly 'nonofficial' deliberations.

51 See various essays in Shinichi Shigetomi (ed.) (2002) *The State and NGOs: Perspectives from Asia* (Singapore: Institute of Southeast Asian Studies).

52 Since the mid 1990s, for example, various international networks of NGOs have held regular meetings to deal with issues and challenges arising from open regionalism and globalisation; some of these sessions are parallel conferences that coincide with intergovernmental gatherings such as the annual APEC summits. Contra longstanding official positions on security matters, these NGOs seek to challenge the dominant discourse and practice of security in their efforts to 'build constituencies for peace'. Mely Caballero-Anthony (2004) 'Re-visioning Human Security in Southeast Asia', 45th Annual ISA Convention, Montreal, 17–20 March (unpublished).

53 Most Southeast Asian governments regard NGOs in either of two ways. On the one hand, there is a general lack of governmental appreciation and support for NGOs, although this situation varies from country to country in the region. Accordingly, NGOs are variously treated as special interest organisations that do not keep the broader public interest at heart, as threats to social unity, or as private organisations that place additional burdens on government bureaucracies. On the other hand, thanks partly to the financial crisis, some ASEAN governments have come to recognise the utility of NGOs in dealing with many newly emerging socio-economic problems that are beyond their capacity to handle directly.

54 Rehman Rashid (2001) 'Agenda Malaysia: The ASEAN People's Assembly', in *Report of the First ASEAN People's Assembly* (Jakarta: Centre for Strategic and International Studies), 237–240.

55 Carolina G. Hernandez (2002) 'A People's Assembly: A Novel Mechanism for Bridging the North-South Divide in ASEAN', unpublished. Also see Mely Caballero-

> These sessions attest to a growing recognition by regional officialdom of the importance of engaging with regional civil society, and can rightly be regarded as a significant first step in the turn towards 'participatory regionalism'.[56]

The impact of 9/11

A fourth key development is the growing agenda of regional cooperation against international terrorism and the conditions that engender and support it. Since 9/11, terrorism has come to dominate the security perceptions and agenda of Southeast Asian governments. Seen by some as the 'second front' in the global war on terror, the region is viewed as an attractive home to international terrorism because of the confluence of multiethnic societies, weak and corrupt regimes with a tenuous hold over peripheral areas, economies and governments debilitated by the financial crisis, ongoing separatist insurgencies that lend themselves to potential exploitation by foreign elements, and democratic transitions in countries such as Indonesia and the Philippines which paradoxically have inhibited efforts at preventive suppression of terrorist elements.[57]

The impact of terrorism on regionalism has been both positive and negative. On the one hand, it has galvanised regional cooperation, including information and intelligence exchanges and measures to deal with money laundering. Counter-terrorism cooperative pacts at the intra-Association level and between ASEAN and the US, for example, have been established. On the other hand, constraints to further cooperation persist, such as varying perceptions among ASEAN states regarding the severity of the terrorist threat, which has encumbered efforts to devise common responses.[58] While regional cooperation against terrorism has thus far involved primarily intelligence and security collaboration at the inter-governmental level, it is not unreasonable to suppose that civil society and nongovernmental actors can and likely would be drawn into humanitarian and conflict prevention efforts in the war on terror, just as many already are in civil conflict settings.[59] In the post-9/11

Anthony (2003) 'Non-State Regional Governance Mechanism for Economic Security: The Case of the ASEAN Peoples' Assembly', presented at the IDSS-Sasakawa Workshop on 'Globalization and Economic Security in East Asia: Governance and Institutions', Singapore, 11–12 September.

56 Amitav Acharya (2003) 'Democratization and the Prospects for Participatory Regionalism in Southeast Asia', *Third World Quarterly* 24(2), 375–390.

57 Kumar Ramakrishna and See Seng Tan (eds) (2003) *After Bali: The Threat of Terrorism in Southeast Asia* (Singapore and London: World Scientific).

58 Some analysts are decidedly less sanguine about the level and substance of existing cooperation; see David Martin Jones and Michael Smith (2002) 'The Perils of Hyper-Vigilance: The War on Terrorism and the Surveillance State in South-East Asia', *Intelligence and National Security* 17(4), 36. Others however insist that even such limited collaboration has nevertheless proved relatively effective despite the limited capacities, divergent political imperatives and differing perceptions of the ASEAN member nations. See Seng Tan and Kumar Ramakrishna (2004) 'Interstate and Intrastate Dynamics in Southeast Asia's War on Terror', *The SAIS Review of International Affairs* 24(2), 91–105.

59 For example, some governments, including the United States, are already enlisting the assistance of humanitarian and relief organisations and other NGOs in their wider

Southeast Asian context, Track 2 communities have begun engaging in confidence-building efforts through informal dialogue activities with representatives of Muslim organisations.[60] The attention on nongovernmental actors can be double-edged, however, in that religious-oriented NGOs have increasingly come under the counter-terror spotlight.

Sovereignty and Southeast Asia today

Whether the aforementioned region-wide developments would engender significant change in the way Southeast Asian nations conduct their diplomacy and security remains uncertain. Indeed, most scholars would classify those states as 'quasi-sovereign' or 'neo-Westphalian' because they, in the view of one recent study, 'are neither completely able to achieve cohesion within their boundaries, nor able to convince their populations to react in rational disciplined ways to scientific problems that attend to a global capitalist economy, or to the unconventional security threats posed by connected transportation and communication networks'.[61] What is clear, however, is that all four developments, if pursued vigorously, would mean increased intrusiveness in the affairs of ASEAN states and societies from within and without the region. Even then, increased interference does not automatically connote the erosion of or endangerment to sovereignty.

In this regard, the foregoing regional developments are equally ambivalent where their repercussions on sovereignty are concerned. Various forms of regional engagement ('constructive', 'flexible' and so on) and institutionalism proposed in response to quite serious economic, environmental and human concerns confronting the region can potentially erode the perceived autonomy, authority and control which ASEAN countries, under the traditional sign of 'sovereignty', have long presumed as their exclusive preserve. That said, it should however be noted that one likely provenance from which such calls for engagement stem shares precisely the same concern, namely, preservation of one's sovereignty, which is perceived to be under threat from environmental or health hazards posed by neighbouring states. The regional 'imperative' towards legalisation institutionalises and regularises intrusion

---

counter-terror efforts. See remarks by USAID administrator Andrew S. Natsios (2004) 'Foreign Assistance in the Age of Terror', 21 April, available at http://www.usaid.gov/press/speeches/2004/sp040421.html.

60 That it was the ASEAN-ISIS, the principal Track 2 outfit in Southeast Asia that formed and continues to fund and facilitate the APA bears reiterating here (see Caballero-Anthony, 'Non-State Regional Governance Mechanism for Economic Security'). For instance, recent Track 2 meetings organised by the Council for Security Cooperation in the Asia-Pacific (CSCAP) have included panel discussions along these lines – as was the case in Jakarta in December 2003. Moreover, interfaith dialogue sessions have also been held among religious organisations. See David R. Smock (ed.) (2002) *Interfaith Dialogue and Peacebuilding* (Washington DC: United States Institute of Peace Press); Syed Farid Alatas, Lim Teck Ghee and Kazuhide Kuroda (eds) (2003) *Asian Interfaith Dialogue: Perspectives on Religion, Education and Social Cohesion* (Singapore: Centre for Research on Islamic and Malay Affairs, Singapore and the World Bank).

61 Chong, 'Southeast Asia'.

and thereby legitimises 'interference'. On the other hand, it could also reinforce the sovereignty norm in other ways. The growing liberalisation in regional cooperation and conflict management, or what has been called 'participatory regionalism', strains the longstanding conviction hitherto held by many that Southeast Asia is principally an elite-driven region with little allowance for non-state initiatives.

Nevertheless, illustrations of territorial disputes between ASEAN members – Indonesia and Malaysia over Sipidan and Ligitan islands and oil; Malaysia and Singapore over a litany of issues as well as between Northeast Asian nations; Japan and South Korea over the Takeshima/Dokdo islands; China, Japan and Taiwan over the Senkaku/Diaoyu islands – highlight the readiness of Asian democracies to spark and sustain diplomatic furores on the basis of sovereignty claims. Simply put, neither exclusivity nor territoriality, and hence sovereignty, is necessarily antithetical to democracy.[62] On a significantly lesser note and in highly circumscribed ways, regional cooperation against terrorism has included some form of participatory regionalism. On the other hand, existing regional efforts in the war on terror have for the most part expanded the authoritarian powers of the state in ways that have shaped society and politics throughout the region.

Whither sovereignty in Southeast Asia today in the light of these apparent paradoxes? Two possibilities stand out, both in contrast to the popular but problematic notion of sovereignty as being eroded and endangered, namely, the *reinforcement* and *reinstatement* of sovereignty.

Sovereignty reinforced

The growing legalisation and liberalisation experienced in the region, when viewed as a sort of 'normalising' necessity, could lead to state sovereignty being reinforced as Southeast Asian nations mature from developing 'quasi-states' to developed 'normal states', as it were.[63] In the regional context of contemporary Southeast Asia since decolonisation and the subsequent formation of newly independent nations, sovereignty claims therein, as earlier discussed, have been especially pronounced precisely because of their apparent dubiousness. The paradox is not difficult to appreciate since such contentions hailed primarily from claimants for whom 'sovereignty' remained a highly tenuous proposition as nascent nations struggled to consolidate their sovereignty in the face of challenges (in some cases quite severe) against their ostensible sovereign right to exist as states.

Take, for example, the case of Malaysia, whose newfound sovereignty as a country was immediately contested by President Sukarno of Indonesia, who inaugurated a policy of confrontation (*konfrontasi*) through which the Indonesian leader vowed to 'crush' (*ganjang*) the nascent Malaysian federation.[64] Or take the case of Singapore,

62 William E. Connolly (1991) 'Democracy and Territoriality', *Millennium: Journal of International Studies* 20(3), 463–484.

63 Robert H. Jackson (1990) *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press).

64 The events leading up to the formation of ASEAN, including the concerns raised here, are taken up in the following works: Jorgensen-Dahl, *Regional Organization and Order*

whose independence came amid the throes of confrontation and at the expense of Malaysian unity.[65] From this vantage point, the institutional significance and utility of the formation of the Association of Southeast Asian Nations (ASEAN) in August 1967 thereby lies in the formal recognition of the sovereignty principle which the ASEAN diplomatic framework provides its members and the assurance that ASEAN members would acknowledge one another's sovereign right of existence. That the older members of the ASEAN fraternity (Malaysia, Singapore, Thailand, and arguably Indonesia, and so on) have experienced significant levels of economic and social development as well as political consolidation since their formative years suggests a pattern (albeit uneven) of state evolution/normalisation which, in turn, could arguably enhance or reinforce state sovereignty.

However, reinforcement would in all likelihood be transitory for a variety of reasons, not least our current awareness of the difficulties which globalisation and other contemporary phenomena pose for a traditionalist sovereignty paradigm. But as implied in the above discussion, sovereignty claims have not abated with liberalisation, which further suggests that the ontological commitment to territoriality remains virulently robust in popular renditions of sovereignty – a point alluded to as far back as Edmund Burke, or Machiavelli for that matter.

Sovereignty reinstated

Much like other effects of globalisation, the institutional developments reviewed above raise questions concerning the suppositions of exclusivity and territoriality at the core of sovereignty. In view of their increasing un-tenability, it is not unconceivable that sovereignty in the regional context might likely be recast in relatively more inclusive and/or 'virtual' forms.[66] As noted earlier, sovereignty – or, more accurately, the various things for which the word ostensibly signifies in the regional context – is never fully fixed nor formed, but remains incessantly under contestation.

Despite its contested 'nature' as a concept, sovereignty has demonstrated a remarkable adaptability and durability in daily practice, not least by Southeast Asian countries. Nevertheless, the shift towards an inclusive and/or virtual sovereignty requires a major political commitment. For not only would this involve a rewriting of the state and of sovereignty in terms other than that of exclusivity and territoriality; it would also assume a widespread willingness – so far nonexistent – on the part of international relations scholars and practitioners to relinquish their inveterate hold on certain philosophical and theoretical prejudices which inform a particular understanding of sovereignty.

---

in Southeast Asia; Leifer, *ASEAN and the Security of South-East Asia*; and Simon, *The ASEAN States and Regional Security*.

65 Michael Leifer (2000) *Singapore's Foreign Policy: Coping with Vulnerability* (London: Routledge).

66 Even mainstream IR theorists are presumably reformulating their ideas about the state in the light of globalisation. See Richard Rosecrance (1996) 'The Rise of the Virtual State', *Foreign Affairs* 75(4), 45–61.

Conclusion

Nearly four decades ago, Martin Wight reminded us that 'the stuff of international theory … is constantly bursting the bounds of the language which we try to handle it'.[67] Much as the stuff of Southeast Asian international relations during the Cold War could never quite fit within the bounds of the national sovereignty concept – but which were nevertheless 'made to do so' in realist scholarship; contemporary regional developments are also arguably threatening to burst the bounds of sovereignty, if only in an incremental fashion. Whether it will actually succeed in doing so is unclear. To be sure, the bounds of the sovereignty concept have thus far proven rather elastic. Indeed, whether we speculate in terms of reinforcement or reinstatement, it is unlikely that we are done with sovereignty as concept or practice precisely for the reason that sovereignty, as a 'political fact' in Southeast Asia, has been employed and deployed, through claim-making, in ways that variously conflate quite different meanings and which, for all intents and purposes, remain largely and effectively uncontested. Writing shortly after the Cold War ended, Ken Booth, appealing for the construction of concepts that can better accommodate new international realities, triumphantly announced, 'Our work is our words, but our words do not work anymore'.[68] If so, then sovereignty clearly stands out as one significant exception, at least where Southeast Asia is concerned.

67 Martin Wight (1966) 'Where is There No International Theory', in Herbert Butterfield and Martin Wight (eds) *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen and Unwin), 33.

68 Ken Booth (1991) 'Security and Emancipation', *Review of International Studies* 17, 313–326 at 313.

Chapter 6

Ambivalent Sovereignty: China and Re-Imagining the Westphalian Ideal

Yongjin Zhang

In the opening address to the United Nations General Assembley on 20 September 1999, Kofi Annan, the UN Secretary General, highlighted a fundamental systemic change of the global international system. In his words, 'State sovereignty, in its most basic sense, is being redefined', while 'at the same time, individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the charter of the United Nations and subsequent international treaties – has been enhanced'.[1] As arguments in this book show compellingly, one central debate about the recent transformation of the global order, both before and after Annan's speech, is whether indeed international relations in the twenty-first century is going beyond Westphalia. Globalisation, the advance of human rights norms (in the instance of the need to protect, for example), the discourse on 'failed states', the changing conception of legitimate statehood, and looming transnational issues all challenge the Westphalian ideal of state sovereignty. Conditional sovereignty, suspended sovereignty and sharing sovereignty, among others, have been proposed as part of the new package of sovereignty norms in the emerging global order.

This chapter joins the current debate on state sovereignty and on the changing Westphalian international system with a particular proposition. It outlines China's discursive engagement with the sovereignty norm historically and in its contemporary manifestations. This is especially instructive because China is still very often regarded as the 'last bastion' of Westphalia, or the 'champion' of the Westphalian conception of absolute sovereignty. Working within a broad constructivist analytical framework, my examination aims to show how historical circumstances and contemporary social environment condition and shape China's understanding and practices of sovereign statehood as embodied in the Westphalian ideal. Using China as a case study, I hope to provide a useful, but perhaps also balancing, perspective on how sovereignty norms have been diffused to those states that have not always been (fully) sovereign and have been incorporated into the Westphalian system in often violent processes of the expansion of the European international society.

1 Kofi Annan (1999) 'Balance State Sovereignty with Individual Sovereignty', speech at the General Assembly of the United Nations, 20 September.

My central argument is that contrary to conventional wisdom, historically, China's understanding and practices of sovereign statehood have been either incomplete, selective, instrumental or even contradictory. These variations in China's understanding and practices of sovereignty have been heavily informed by China's historical transformation from a universal empire to a civilisational state, and its contemporary metamorphosis from a revolutionary power to a globalised state. Contemporary Chinese discourse of sovereignty demonstrates, on the other hand, that China has become increasingly ambivalent towards the Westphalian ideal of state sovereignty. China's often idiosyncratic re-envisioning and re-enacting the sovereignty norm is but a reflection of its perpetual agony to come to terms with sovereignty as a dynamic institution constantly reconstituted and reconstructed by practices among states.

The principal part of my discussions in this chapter is organised around three social and historical contexts that I have identified as most significant for China's socialisation with the sovereignty norm. They are Tradition, Revolution, and Globalisation. I will discuss respectively in three separate sections how such radically different social and historical milieu affects China's changing state identity formation and informs its discursive engagement with the changing sovereignty norm. The first challenge, though, is to contest a persistent myth and misperception about China and Westphalia.

China and Westphalia: conventional wisdom and its discontent

The claim is often made that China is the last bastion of Westphalia, or the 'vicar' of the high church of Westphalia, jealously guarding the sacrosanct nature of sovereignty. The classical expressions of China's understanding and practices of sovereignty norms can best be found in Chinese official statements as well as in Chinese policies on the Taiwan question, human rights issues and the non-intervention in international relations. Speaking just two days after Secretary General Kofi Annan's 1999 opening address to the UN General Assembly, the Chinese Foreign Minister Tang Jiaxuan forcefully claimed that

> Sovereign equality, mutual respect for state sovereignty and non-interference in the internal affairs of others are the basic principles governing international relations today. … If the notion of 'might is right' should prevail, a new gunboat policy would wreck havoc.

It is further argued that the classical conception of sovereignty as an absolute value and the systemic attribute favoured by classical realists and neo-realists is entrenched in the Chinese discourse on security and sovereignty, as well as in the state practices. China's willingness to use military force to back up its claim on territorial integrity related to Taiwan, if necessary, has very often been evoked as clear evidence that China is stuck in the anachronistic ideal of Westphalia. Further, China's active engagement in what Christensen calls the 'Chinese realpolitik' in

world politics[2] is underlined by a Hobbesian conception of sovereignty. China continues to engage in power politics in international relations characteristic of the classical Westphalian international system.[3]

This prevailing perception of China's fascination or obsession with the Westphalian ideal of sovereignty is either simplistic, or simply false. The practices of sovereignty by the Chinese state in the past and at present are much more complex and rich and less consistent than the conventional wisdom suggests. They are certainly more often erratic. Further, this caricature of China obscures the simple fact that many other states have their own fascination and obsession with the sovereignty norm in practice. As Stephen Krasner has argued persuasively, social practices of the sovereignty principle by states in global politics are fraught with deviations and anomalies from Westphalia.[4]

That there exist widespread variations in the state practices of sovereignty norm in contemporary international relations is indisputable. At one extreme end of a long spectrum of such variations stands the recent claim of legitimacy and practice by the United States (and to a lesser extent Australia) to mount the pre-emptive strike as a sovereign prerogative in the current global war on terror. At the other extreme end is the willingness and success of the European states to pool their sovereignty together in the supra-national institutions of the European Union. The new American strategies in dealing with dictators such as Milosevic in Serbia and Saddam Hussein in Iraq, Kal Holsti argues, defy the parameters of the Westphalian tradition, which tolerates political diversity.[5] China's uncompromising rhetoric on sovereignty and non-intervention in internal affairs may have frequently been used to defend its policies on Taiwan and human rights. It has not, nevertheless, stopped the Chinese leadership from making significant political and economic concessions in order to gain China's membership in the World Trade Organization (WTO), compromising China's economic sovereignty. Historically, China pursued sharply contradictory policies on state sovereignty. While staunchly defending its own national sovereignty and territorial integrity in the 1950s and the 1960s, revolutionary China did not hesitate to support the insurgent communist movements in Southeast Asia and attempted to export the Chinese revolution to its neighbors.[6]

The observation of such wide-ranging variations in the social practice of sovereignty norm has at least two significant implications in our context here. One is that state sovereignty as a principal institution and an ideal invented at Westphalia has been reproduced and reconstituted through state practices. The other is that while the static Westphalian myth and ideal of sovereignty persists as a systemic feature of

---

2 Thomas Christensen (1996) 'Chinese Realpolitik', *Foreign Affairs* 75(5), 37–52.

3 Alistair I. Johnston (2003) 'Is China a Status Quo Power?', *International Security* 27(4), 5–56.

4 Stephen D. Krasner (1999) *Sovereignty: Organized Hypocrisy* (Princeton NJ: Princeton University Press).

5 K.J. Holsti (1999) 'The Dynamics of Enduring Rivalries', *Political Science Quarterly* 114(1), 158–159.

6 Yongjin Zhang (1998) *China and International Society Since 1949: Alienation and Beyond* (Basingstoke: Macmillan); Bates Gill and James Reilly (2000) 'Sovereignty, Intervention and Peacekeeping: The View from Beijing', *Survival* 42(3), 41–59.

contemporary international relations, in practice, states often deviate from the ideal of the sovereignty norm attributed to Westphalia. China is no exception.

If China appears recalcitrant on sovereignty issues such as Taiwan and Tibet, and inflexible on the principle of non-intervention, insisting on the Westphalian conception of absolute sovereignty, there are many other instances where its sovereignty, both internal and external, political and economic, have been severely constricted, and such constrictions have been sometimes voluntarily and sometimes reluctantly accepted. Politically, the innovative formula of 'one country, two systems' that has facilitated the handover of Hong Kong and Macau reflects not only political imagination, but also a negotiated compromise of China's (absolute) sovereignty. Economically, China accepted the WTO-imposed, in some cases Draconian conditions for its entry; with a strict schedule of compliance that dictates the agenda of domestic economic and institutional reforms. In the moral debates on human rights, China has conceded to the universality of human rights principles; and increasingly also to the idea of the legitimate statehood as justified by the state's role in guaranteeing the respect of basic human rights. Such debates and acceptance have recently led to China's public acknowledgment of the need of international intervention under the UN auspices in cases of massive violation of human rights such as genocide.

Two different perspectives exist, therefore, in interpreting China's understanding and practice of sovereignty norms as embodied in the Westphalian ideal. The conventional wisdom suggests that China has an anachronistic understanding and interpretation of sovereignty, the meaning of which has been redefined, re-negotiated and reconstituted by interactions among states. China is very much outside of the reproduction of sovereignty norms. Contra the conventional wisdom, the alternative perspective asserts that the Chinese experience is an intimate and indispensable part of the mutual constitution of state and sovereignty in international relations. China's interpretation and practice of sovereign statehood constitutes a significant social and discursive process through which inter-subjective understanding among states continuously reconstructs the meaning and dynamics of the Westphalian ideal of sovereignty.

In the rest of this chapter, I argue that China's discursive engagement with the Westphalian ideal of sovereignty since the mid-nineteenth century is part and parcel of the dynamic process that reproduces the meaning of state sovereignty and at the same time reconstitutes the Chinese state in the changing international system. More important perhaps, the content and consequences of such engagement are contingent on different historical and social contexts. It is within three such chosen contexts that I sketch an analytical approach to examining how the Westphalian ideal of sovereignty has been imagined and re-imagined in China's social practices in international society.

Tradition and transformation

The historical encounter between the Chinese world order and the expansion of the Westphalian system of states and its impact on the transformation of the global international society have long captured the imagination of historians and IR scholars

alike.[7] It is worth emphasising, though, that China's historical acceptance of the sovereignty norm in the late nineteenth century was informed, among other things, by China's transformation from a universal empire to a nation-state, a historical process in which imperial China tenuously embraced the Westphalian international system in its foreign relations.

There are two 'essentialist' stories to tell here. The first story is about the Chinese international system prior to the arrival of the Westphalian international society with the European expansion in the second half of the nineteenth century. Not only was there a system of states in ancient China before 221 BC when the imperial Chinese system was first constructed, but there existed also the Chinese world order that proved most enduring. With significant institutional variations in different historical periods, it persisted over two millenniums until its final collapse at the turn of the twentieth century. Both Chinese international systems, ancient and imperial, have their own constitutional principles and institutional rationale. They have both developed their own norms, hierarchy, rules, rituals, as well as justice claims. While the ancient Chinese system of states defines and represents a nexus of social relations among all states within ancient China, the Chinese world order as embodied in the imperial Chinese international system establishes and constitutes a set of unique authority relationship between imperial China and other states within and beyond.[8]

It is perhaps not surprising that the systemic configuration, the institutional norms and features, the organising principles and operational logic of the Chinese international system as we find in the eighteenth and nineteenth centuries are fundamentally different from those of the expanding European society of states. This is best illustrated in Table 6.1. In the ensuing encounter between the two international

Table 6.1 Constitutional structures and fundamental institutions: a comparison between the traditional Chinese international system and modern European society of states

Societies of states	Imperial China	Modern (European)
Moral purpose of state	Promoting cosmic and social harmony	Augmentation of individuals' purposes and potentialities
Organising principle of sovereignty	Sovereign hierarchy (civilisational)	Liberal sovereignty
Systemic norm of procedural justice	Ritual justice	Legislative justice
Fundamental institutions	Tribute system	Contractual international law Multilateralism

7 Ssu-yu Teng and John King Fairbank (eds) (1954) *China's Response to the West – A Documentary Survey 1839–1923* (Cambridge MA: Harvard University Press); Gerrit Gong (1984) *The Standard of 'Civilization', International Society* (Oxford: Clarendon Press); Yongjin Zhang (1991) *China in the International System, 1818–1902: The Middle Kingdom at the Periphery* (Basingstoke; New York: St.Antony's-Macmillan Series, Macmillan; St. Martins Press).

8 Yongjin Zhang (2001) 'System, Empire and States in Chinese International Relations', *Review of International Studies* 5, 43–63.

systems in the second half of the nineteenth century, 'grafting' Westphalia to Imperial China was never a viable option.

Naturally, the second story is about how the Westphalian norm of sovereignty was imposed upon imperial China in the second half of the nineteenth century. By the same token, it is also about the demise of the Chinese international system. There are two aspects that are particularly important in our discussions. One is the transformation of China from an ancient empire and an international order of its own making into what Lucian Pye calls 'a civilisational state'.[9] Even more demandingly, this civilisational state was to be squeezed into a globalising international system of sovereign states within a short span of time in the second half of the nineteenth century.[10] Legacies of this transformation are rich and revolutionary. They are still reverberating today. The main thrusts of all Chinese revolutions in the twentieth century can be regarded as nation-wide attempts either to re-invent or to re-build the sovereign state of China. One fundamental and lasting challenge to China is to accept and accommodate the changing moral purpose of the state defined by the invading and alien international society based on the Westphalian model.

The other is the manner in which the sovereignty norm is diffused to East Asia in general and to China in particular; and of the same importance, what particular incarnation of the Westphalian sovereignty the European states claim to be dominating its relations with Imperial China. As is well known in world history, the encounter between the Chinese international system and the European society of states in the second half of the nineteenth century was violent and sometimes brutal. The idea of the sovereign state, and institutions associated with the European society of states such as sovereign equality, international law and resident diplomacy, were diffused to East Asia in general and imperial China in particular through so-called 'gunboat diplomacy' characterised by 'unequal treaties'.[11] It is perhaps only logical that the invading European society of states imposed a distorted notion of sovereignty norms on imperial China in regulating their relations. As Adam Watson observed,

> The rules and institutions which the Europeans spread to Persia and China in the nineteenth century were those which they had evolved with the Ottomans (e.g. capitulations, consulates with jurisdictions over their nationals) rather than those in use within itself (e.g. free movement and residence virtually without passports).[12]

China's socialisation with the European international society started then with a particular slant in understanding the ideas and institutions associated with the Westphalian ideal of sovereignty and their functions. It is the loss of China's sovereign rights and sovereign equality in the second half of the nineteenth century

9 Lucien Pye (1991) 'China, Erratic State and Frustrated Society', *Foreign Affairs* 69(4), 56–74.

10 Teng and Fairbank, *China's Response to the West*; Gong, *The Standard of 'Civilization'*; Zhang, *China in the International System*; Shogo Suzuki (2005) 'Japan's Socialization into Janus-Faced European International Society', *European Journal of International Relations* 11(1), 137–164.

11 Gong, *The Standard of 'Civilizarion'*.

12 Adam Watson (1987) *The Evolution of International Society* (London: Routledge).

that started the discourse of sovereignty in China in the first place. It is a skewed discourse. While the discourse of popular sovereignty was not entirely muted and was the inspiration for the revolution against the Manchu rulers, the discourse about sovereign state focused on its external facet, in particular, in defending and recovering China's lost sovereign rights. With the establishment of the Republic of China in 1912, Dr. Sun Yat-sen, claimed that China would try its best 'to carry out the duties of a civilized nation so as to obtain the rights of a civilized nation'. The emerging Chinese nationalism at the turn of the twentieth century has a strong and distinctive anti-imperialist and anti-foreign attribute.

Revolution

For China, the twentieth century is truly a century of revolutions and reforms. Two revolutions in particular, Nationalist and Communist, constitute important process of rebuilding and reinventing the Chinese state. They have fundamentally transformed China's domestic politics and international relations. China's discursive interpretation of the idea of sovereignty and its actual practice of sovereign statehood is historically contingent upon this particular social context. The systemic changes in world politics add another historical and social dimension that need to be considered. In such a broad context, revolutionary China embarked on three critical discursive pathways to re-imagine the idea and practices of sovereignty as a norm increasingly entrenched as a Hobbesian conception. These three discursive pathways develop sometimes in parallel and sometimes in crisscrossing fashion. Revolutionary China's practices of sovereign statehood are fraught with contradictions.

The first discursive pathway is the nationalist one. One discourse that is shared by both the Nationalist and the Communist Revolutions in China in the twentieth century is that of the 'century of humiliations'. This refers to the period between the Opium War (1840) and the end of the Second World War in 1945, when China suffered from imperialist expansion and invasion and when unequal treaties and extra-territorial rights of foreign powers dominate China's foreign relations. China did not become fully (nominally) sovereign until 1943, when the last two great powers, Great Britain and the United States, reluctantly renounced their extra-territorial rights and privileges in China in the midst of the Second World War. The shared goals of the Nationalist and the Communist Revolutions were to recover lost territories and to regain full sovereignty. After 1949, safeguarding China's newly won independence as a sovereign state and its full membership in international society became as important as defending the Communist Revolution.

This nationalist discourse gives a particular interpretation to the Westphalian idea of sovereignty. The People's Republic of China's hard-won battle for international recognition after 1949 was not just a struggle for the new regime to gain international legitimacy. It was also a clear acknowledgement that internal sovereignty as a principle for domestic political organisation is constituted, as least partially, by social and legal recognition of other members of international society. China's strong and unremitting advocacy of five principles of peaceful co-existence provides further analysis on this nationalist discourse on sovereignty. The perception

of China as a nationalistic state has been largely sustained by a nationalist discourse on territorial integrity and on irredentism. Recent anti-Japanese protests throughout China continue to entrench the idea of China as a victim of imperialist expansion.

The second pathway might be called the revolutionary one. China was a revolutionary power between 1949 and 1979. It publicly advocated surgical transformation of the existing international system, and rejected prevailing international institutions, including the United Nations. It openly pursued confrontational approaches to both the United States and the former Soviet Unions. It espoused radically different ideas in world politics, including that of a world revolution. China's international strategy is said to have changed from 'breaking into the system' in the 1950s to that of 'breaking up the system' in the 1960s. Some practices of revolutionary China can be regarded as part of what Hedley Bull calls 'the revolt against the West'.[13] Others are better explained by China's alienation from international society.[14]

China assumed the identity of a revolutionary power at the time when the idea of sovereignty underwent revolutionary changes, which Daniel Philpott calls 'revolutions in sovereignty'.[15] Revolutionary China engaged intensely in the discourse that led to 'revolutions in sovereignty' in the 1960s. It quickly embraced the ideas of equality and legitimate claim of independent statehood by colonial peoples. It lent strong support to the principle of national self-determination and the national liberation movements in Asia, Africa and Latin America. In its own fashion, revolutionary China contributed to the transformation and the expansion of international society in the mid-twentieth century attributed by Mayall to the rise of nationalism.[16]

It is in this context that revolutionary China exported, sponsored and supported communist revolutions and armed struggles in many parts of the world, particularly in Southeast Asia. Such actions are clearly contradictory to the principle of non-intervention of internal affairs, a foundational principle of the Westphalian international society that China professes to subscribe to. It also deviates from the five principles of peaceful co-existence of its own invention. It is interesting to note that the Chinese leadership tacitly acknowledged in the early 1970s that the tangled relations between the Chinese Communist Party (CCP) and other communist parties and revolutionary movements must be dealt with by transcending ideology in international relations. With the 'dual track diplomacy' as a mediating scheme, the Chinese Communist Party's disengagement with communist parties and movements in Southeast Asia in the late 1970s and early 1980s was determined and comprehensive.[17]

---

13 Hedley Bull and Adam Watson (eds) (1984) *The Expansion of International Society* (Oxford: Clarendon Press).

14 Zhang, *China and International Society Since 1949*.

15 Daniel Philpott (2001) *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton NJ: Princeton University Press).

16 James Mayall (1990) *Nationalism and International Society* (Cambridge: Cambridge University Press).

17 Zhang, *China and International Society Since 1949*.

The third one is what I call the Hobbesian pathway. In the thirty years between 1949 and 1979, China was not only a revolutionary power; it was also an isolated state. Its interpretations of the nature and structure of the global international system and the function of sovereignty therein are not only coloured by its historical experience and ideological commitment, but also conditioned by evaluation of its security environment. It tacitly embraced the Hobbesian view, restated by realists, that states are driven by their considerations of national interests and that the Hobbesian logic of international politics as a state of war of all against all is embodied in anarchy as the systemic attribute of international relations. War is the permanent feature of this anarchic international system. Self-help is therefore the last resort for state survival. Looming nuclear threats, containment and perceived encirclement by both superpowers stimulated a profound sense of insecurity of China both as a revolutionary power and an isolated state. In this highly militarised security order, claims of the sacrosanct nature of absolute sovereignty in external facet became an indispensable first as well as last defense of China's sovereign statehood.

China's Hobbesian reading of the international system, however, has a particular twist. Conflicts and war in the Cold War international system, according to Mao Zedong, are produced by the capitalist system and imperialism. They are not attributable to any biological or psychological make-up of human beings. While recognising, like many other world leaders, that rivalry and cooperation between the two superpowers constitute the central feature of the Cold War power politics, Mao's particular interpretations make it possible for China to play a significant role in the balance of power in the biplolar international system.

It is clear that two discursive engagements with sovereignty in China, nationalist and Hobbesian, cross their paths here. Sovereignty and security are indivisible. Not only must all sovereign claims must be recovered, but all sovereign rights must be vigilantly guarded. Further, only a (militarily) strong and assertive state can be an effective independent producer of security in this particular security order. China's readiness to use force in territorial disputes has led to frequent and persistent border conflicts and wars with its neighbours.[18] The claim that China is not only the high church of realpolitik, but also the vicar of Westphalia seems to be born out by China's determination to defend its territorial integrity at whatever cost in the case of Taiwan.

It is worth restating that revolution constitutes a broad social context within which the discourse of sovereignty in China takes place. The paradox is that Chinese revolutions and revolutions in sovereignty both inhibit and emancipate China's interpretation and application of sovereignty in international relations. Variations in China's practices and seemingly contradictory advocacy of the sovereignty norm are clear reflections of such a paradox. Strange it may seem, through these engagements and discourse, the Westphalian ideal of sovereign statehood of its nineteenth century incarnation in its external face is further entrenched in China's understanding and practice of sovereign statehood.

Until recently, what have been missing in China's discursive engagement with the sovereignty norm are the sources of legitimacy for the internal claim of

18 Johnston, 'Is China a Status Quo Power?'.

sovereignty. As discussed earlier, during the nineteenth century expansion of the European international society into East Asia, the concept of internal sovereignty is at best muted. The emerging Chinese nationalism at the turn of the twentieth century has a strong and distinctive anti-imperialist and anti-foreign attribute. The twentieth-century Chinese revolutions, nationalist as well as communist, continue to justify the legitimate statehood and rightful state action mostly in terms of safeguarding China's external sovereign claims, and of defending China's territorial integrity. Its discursive engagement with the new legitimating principle for the claim of sovereignty based on the state's will and competence to respect human rights is minimal until the late 1990s. China, in other words, has to catch up in the contemporary discourse of the changing moral purpose of the sovereign state.

Globalisation

The opening of China and economic reform begun in 1978 heralded the beginning of state transformation of revolutionary China, and the formation of a new identity of China as a normal power and a globalised state today. It coincided with the intensification of a transformative process in global political economy, that is, globalisation. China's appointment with globalisation led to gradual, and sometimes grudging, embrace of market and global capitalism in China's economic modernisation. Its economic success story demonstrates not only how it has accommodated the exigencies of a global market economy but also how it capitalised upon the opportunities offered by globalisation. More importantly, it also shows how globalisation has been produced.

China's full engagement with globalisation and the transformation of the Chinese state also means that for the first time, Chinese policy makers, advisers and academics are able to participate fully in global discourse and debate on sovereignty. China's social and intellectual environment in which it engages discursively with the sovereignty norm has changed radically and decisively. It is important to note that this discursive engagement with the socially constituted sovereignty norm is happening in a period when the Westphalia-informed sovereignty norm is most contested by, among others, globalisation, and during the time China is debating, challenging, contesting and adopting a whole range of global norms at multilateral forums as well as at home addressing its domestic audience.

China's most recent re-imagining of sovereignty in theory and practice can therefore be best understood against the social context of accelerated globalisation at the turn of the twenty-first century. Three discursive engagements warrant our particular attention: embracing globalisation, contesting sovereign practices and problematising sovereignty.

Embracing globalisation

Globalisation poses particular intellectual and political challenges to the Chinese leadership and elites. This is not in the least because globalisation is seen to be driven by the global capitalist market economies that revolutionary China rejected outright,

nor is it because globalisation is perceived as a process controlled by developed economies, particularly the United States, the main benefactor of globalisation. It is also generally believed to be eroding the state sovereignty, particularly economic sovereignty, which China has jealously guarded. For a weak state like China, it is also seen as detrimental to state (capacity) building by promoting economic vulnerability. Further, can Chinese nationalism accommodate globalisation and *vice versa*? Will China be reduced to a 'semi-colonial' state again in playing a peripheral role in the global division of labour? What potential impact is globalisation likely to exert on China's traditional values and state identity?

The 'vociferous and emotional debate' on the contradictions of globalisation within China is now a familiar story.[19] From the perception of globalisation as a double-edged sword to the public pronouncement that globalisation is an irresistible trend, the evolving discursive engagement conducted by Chinese elites with globalisation reveals intellectual agonies, as well as political and economic imperatives that drive China's custom-made globalisation. In spite of their concerns about the political, economic, social, cultural and strategic implications of globalisation, the Chinese leadership seems to have become increasingly committed to incorporating China's full engagement with globalisation as an important part of its grand strategy. The Asian financial crisis, and more aggressive assertion of the American hegemony in the global war on terror may have temporarily unsettled such commitment, but can never reverse it.[20] It is perhaps surprising that in what is generally believed to be an extremely 'nationalistic' China, its opposition to and protest of globalisation are either unusually muted or notably marginalised.

It is nevertheless important to observe the instrumental rationale for China's initial engagement with economic globalization. Global capital flows into China and China's trade growth are two pillars of success in its economic development strategy. The perception that China is a winner in globalization can be partially attributed to this success. It is even more important, however, to note that the Chinese state plays a unique role in brokering China's engagement with globalization, and how this brokering role leads to China's broader normative commitment to a wide range of global norms and to the transformation of state identity. Increasingly, globalisation is seen as a historical opportunity not just for China's economic development, but more significantly for its state reinvention.[21] In this sense, the successes of China as a globaliser, particularly in its economic development, further encourage the redefinition of the (moral) purpose of the state for the Chinese elites. Embracing globalisation, therefore, entails radical reconsiderations and adaptation of China's international behavior in a whole spectrum of areas where global norms are being

19 Banning Garrett (2001) 'China Faces, Debates, the Contradictions of Globalization', *Asian Survey* 41(3), 409–427; Yu Keping *et al.* (2004) *Quanqiuhua yu guojia zhuquan* [State sovereignty and globalization] (Beijing: China Social Sciences Archive Press).

20 Yong Deng and Thomas G. Moore (2004) 'China Views Globalization: Toward a New Great-Power Politics?', *The Washington Quarterly* 27(3), 117–136.

21 Yongnian Zheng (2004) *Globalization and State Transformation in China* (Cambridge: Cambridge University Press); Yongjin Zhang (2005) *China Goes Global* (London: Foreign Policy Centre).

constructed, contested, reformulated and reconstituted. It leads to contestations of traditional concepts of sovereignty within China, and promotes more variations in China's practices of sovereign statehood.

Contesting sovereign practices

Chinese analysts and policy-makers are fully aware that globalisation poses serious challenges (and threats) to the Westphalian ideal of state sovereignty, which is being reconstituted. Although most of them reject the claim of the end of nation-state, they have reached a general consensus that global capital and multinational companies have transformed the boundaries of the domestic and the international. As a result, the traditional role of the state in exercising economic sovereignty has been significantly undermined. Global economic governance through global economic institutions, such as the International Monetary Fund (IMF) and the World Trade Organization (WTO), and regulatory regimes associated with them, also place limits on state sovereignty.[22]

In matters related to economic sovereignty, China seems to have navigated very carefully through many issues with great flexibility. The deepening of Chinese economic reform and opening to accommodate the expanding demands of global capital and investment are couched in terms of China's converging with international practices, not erosion of its sovereignty. Policies aimed at seeking China's economic integration, which often involves the weakening of sovereign control, are said to be necessary *quid pro quo* and indispensable in China's quest for great power status. Economic interdependence strengthens, rather than compromises, China's sovereignty. Tacitly and also resolutely, China has abandoned the idea of absolute sovereignty in economic matters.

Many observers were surprised at how many concessions China was prepared to make in order to gain its WTO membership. The strictly imposed compliance schedule clearly dictates China's domestic reform agenda. The monitoring mechanisms and measures imposed by WTO can be regarded as a clear infringement of Chinese sovereignty, as traditionally conceived. Surely there are marginal voices condemning the Chinese leadership of 'selling out Chinese interest to the West by joining the WTO'.[23] What is perhaps truly surprising is a collective reticence throughout China about a significant compromise and transfer of both its political and economic sovereignty embodied in China's accession to WTO. This attitude is testimony as to how far sovereignty, as least in its economic incarnation, has been reformulated by Chinese elites. It is interesting to note that Chinese analysts argue with increasing conviction that it is not economic globalisation *per se* that weakens state sovereignty. It is state policies regarding its active participation in economic globalisation that determine the weakening or strengthening effect of globalisation on sovereignty.

22 Yu *et al.*, *Quanqiuhua yu guojia zhuquan*.

23 Garrett, 'China Faces, Debates, the Contradictions of Globalization', 415.

Contestations of traditional sovereign practices also take place in a number of areas of the political sphere. In the recent debates about non-traditional security, particularly after the SARS crisis, Chinese elites readily acknowledge that new global issues such as environmental protection, climate change, epidemics, global terrorism and transnational crimes are not challenges to individual states, but to international society and humanity as a whole. Dealing with these issues compels simultaneous consolidation of state capacity and transcendence of state sovereignty.[24] In so far as the state is a culprit producer of insecurity, its sovereign practices must be subject to the discipline of international society. As has been observed, China has played an increasingly greater role in the UN peacekeeping operations. Chinese policies towards humanitarian intervention have also shifted progressively, significantly softening its position on non-intervention as embodied in the Westphalian ideal.[25] China's recent embrace of multilateralism as a fundamental institution in global politics is also telling of China's new understanding of sovereign statehood.

The above discussions do not intend to glide over limitations of China's contesting the traditional conception of sovereignty norm. On issues related to territorial integrity, particularly Taiwan, China's assertion of its absolute sovereignty, including the use of force, is uncompromising. The tension between China's position on territorial sovereignty and that on economic sovereignty is inexplicably obvious. The transformative effects of globalisation have induced China's new understanding and interpretation of changing norms of sovereignty. But China's normative commitment to the newly constituted sovereignty norm, if anything, is still shallow. It is nevertheless significant that in mounting these contestations, China is seeking to comprehend the changing meaning and evolving practice of sovereignty in the age of globalisation.

Problematising sovereignty

Two accounts on sovereignty also stand the current period out from the earlier ones discussed. First, there has been extensive debate within China on sovereignty induced largely by globalisation and well informed by the global debate and discourse. Secondly, the idea of sovereign statehood, the Westphalian ideal, is no longer taken for granted as a given, even in its external facet, in the Chinese discourse. In other words, sovereignty has been problematised. As argued earlier, increasingly deeper integration of China into the international economic system has led to variations of its practices of sovereign statehood. China began to use the concessions of its sovereign rights as a bargaining chip to promote its perceived national interests. In a classical restatement of neo-realist and neo-liberal understanding of this changing practice of sovereignty, one prominent Chinese analyst argues that 'sovereignty

24 Yu *et al.*, *Quanqiuhua yu guojia zhuquan*.

25 Gill and Reilly, 'Sovereignty, Intervention and Peacekeeping'; Allen Carlson (2002) 'The New Sovereignty Debate', paper presented at the *International Intervention and State Sovereignty Workshop*, Shanghai, available at www.ncuscr.org/Publications/Full_Text_Booklet%20_Final_Format.pdf.

is not synonymous with national interests anymore, rather it should be subject to overall national interests, not protected at all costs'.[26]

This is a tacit acceptance that economic globalisation reconstitutes sovereignty. It is a short step from acknowledging that, as Carlson states, 'sovereignty is the product of extensive, and at times conflictual, interaction between all members of the international system'.[27] In this interpretation, the meaning of sovereignty is not static. It is negotiated out of interactions intersubjectively among states. It follows that China's changing sovereign practices are an important part of the reconstitution of the sovereignty norm.

Chinese analysts also question the validity of the idea of state's monopoly of sovereignty. They argue that there has been a gradual diffusion of sovereignty to non-state actors, ranging from multinational companies to global institutions, and to civil society. There is, they claim, a 'hollowing out' of state sovereignty.[28]

Most noteworthy perhaps is the discourse of internal (or domestic) sovereignty in terms of both rights and responsibilities of sovereign statehood. Internal sovereignty as granting supreme authority in the domestic context has never been made problematic in China's discourse before. This is no longer possible in the intensive debate within China on the questions of sovereignty, humanitarian intervention and human security, particularly after NATO's intervention in Kosovo in 1999, when an enduring discourse on the contradictory relationship between human rights and sovereign rights was entrenched. In disputing the so-called 'New Interventionism', the Chinese leadership has to accept, with great reluctance, that the state has unshakeable obligations to promote and protect human rights.[29] Although this is short of publicly acknowledging that state sovereignty is conditional on the protection of universal human rights, it is a clear recognition of the state's responsibility to its own people and to humanity.

This tentative concession is significant on two other accounts. First, it makes possible a debate on individual sovereignty within China. That individuals have claims on the state is alien to the traditional Chinese political culture. The claim of individual sovereignty in terms of fundamental freedom has also been inhibited by the existing political system in China. It is a debate fraught with political difficulties. The possibility of advancing such a debate, however, opens a new avenue for negotiation on the meaning of sovereignty in China. Second, sovereignty as an organising principle in international life, as Reus-Smit has argued, 'has always been justified with reference to particular conceptions of legitimate statehood and rightful state action'. In contemporary international society, it has been 'increasingly justified

26 Quoted in Gill and Reilly, 'Sovereignty, Intervention and Peacekeeping', 43.

27 Carlson, 'The New Sovereignty Debate', 5.

28 Yu *et al.*, *Quanqiuhua yu guojia zhuquan*.

29 Shulong Chu (2001) 'China, Asia and Issues of Sovereignty and Intervention', Pugwash Occasional Papers 2(1), available at www.pugwash.org/publication/op/opv2n1.htm; Chuang Yang (2005) 'On the Contrast Between Five Principles of Peaceful Co-existence and the Principle of Humanitarian Intervention', available at www.ciis.org.cn/item/2005–03–28/50899.html.

in terms of the state's role as guarantor of certain basic human rights and freedom'.[30] If we accept this argument, the contemporary debate on China's problematic understanding of sovereignty as a socially reconstituted norm is then likely to lead to its re-imagining the moral purpose of the Chinese state.

China and re-imagining the Westphalian ideal

Sovereignty, as embodied in Westphalia, is not only organised hypocrisy, it is also an ambivalent ideal. It is the deep-seated ambivalence of this concept and its diffusion that allows China to constantly re-imagine its meaning since its incorporation into international society in the second half of the nineteenth century. The historicity of the idea of sovereignty has been clearly demonstrated through China's discursive engagement and historical understanding of sovereign statehood. Variations and contradictions in China's interpretations and practices of sovereignty norm in international relations would not be explicable without careful considerations of the specific historical context and social environment within which China interacts with other members of international society. In this sense, meanings of sovereignty are not static but are produced and negotiated through practices and interactions among states and other intersubjectively identifiable actors in international society.

The historical transformation of the identity of the Chinese state both informs and is informed by China's discursive engagement with the Westphalian ideal of sovereignty. At the heart of each transformation, from a universal empire to a civilisational state in the nineteenth century, and from a revolutionary power to a globalised state in the twentieth, are on the one hand the diffusion of the sovereignty norm to China and on the other, China's sometimes-contradictory conceptions of the sovereignty ideal and often reluctant acceptance of changing legitimate practices of sovereign statehood. Through such transformation of state identity, China seems to have become increasingly ambivalent towards the static Westphalian conception of sovereignty. In its own fashion, China has participated since the mid-nineteenth century in the dynamic process that reproduces the meaning of state sovereignty in the changing international system. The Chinese state has been at the same time reconstituted.

China's re-imagining of the sovereignty ideal, though often idiosyncratic, reflects perpetual agony in coming to terms with sovereignty as a dynamic institution constantly reconstituted and reconstructed. This remains an open-ended discursive engagement that is at heart of China's attempts to re-build, re-invent and reconstitute the Chinese state. One fundamental and lasting challenge to China remains. If in the late nineteenth century, imperial China had no option but to accept and accommodate the rules, norms and institutions defined by the invading and alien international society based on the Westphalian model, in the twenty-first century, its re-imagining of the Westphalian ideal must become part and parcel of the global international society's efforts to redefine the moral purpose of the state.

30 Chris Reus-Smit (2001) 'Human Rights and the Social Construction of Sovereignty', *Review of International Studies* 27, 519–538 at 520.

PART 3
Transcending State Sovereignty 1: Human and Global Security

Chapter 7

Confronting Terrorism: Dilemmas of Principle and Practice Regarding Sovereignty

Brian L. Job

This chapter looks to address the dilemmas facing the state centric international system, organised around principles of hierarchy and territoriality, in confronting international terrorism,[1] a non-hierarchical and largely deterritorialised phenomena. Challenges to Westphalian notions of sovereignty are seen in two contexts: first, in matters of principle, over the assertion of the rights and responsibilities of sovereignty; and second, in matters of practice as states wrestle with the difficulties of engineering multilateral cooperation on a functional level, while at the same time holding divergent perceptions of the causes of terrorism and its longer-term remedies.

The arguments below are organised around three themes and are presented in abbreviated form. Note that this chapter takes a systemic perspective; the dynamic of interest is that involving terrorists as actors (that is, groups) and states and their agents and institutions on the global stage. This leaves for treatment elsewhere the important questions of the categorisation and treatment of individuals in matters of state sovereignty, territorial and extraterritorial jurisdiction, and the application of the Geneva and human rights conventions, as they have come to attention in the post-9/11, post-Iraq War contexts.

To start, it is necessary to get a sense of how international terrorists and terrorist actions so effectively take advantage of the resources and vulnerabilities of the contemporary state and international state system. Terrorists operate transnationally; they threaten states (that is, regimes) and their populations, separately and together, not only with physical destruction but also by undermining their legitimacy and identity.

1 As for defining terrorism, the UN High Level Panel's suggested language is sufficient: Terrorism is 'any action … that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature of context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.' International terrorism, with its transborder activities and transnational flow of message, is thus seen as distinct from domestic/internal terrorism, and also from state terrorism – both of which were not considered by the panel.

Appreciating this ideational dimension of the international terrorist agenda is critical to understanding the dilemmas that arise as states seek to justify counter-terrorist agendas. This forms the second part of the chapter. Traditional principles of sovereignty are contested as states dispute over their rights and responsibilities. The right of self-defence becomes complicated when confronting non-state, transnationally active opponents. Retaliatory actions become problematic, even more so claims of the right to pre-emptive action. In terms of responsibilities, states' responsibility for actions originating from their territories becomes problematic when dealing with failed or failing states.

However, it is the emerging norm of sovereignty as responsibility to protect that raises even more difficult questions. Particularly troublesome in this regard is the attempted cooptation of the responsibility to protect to advance the 'duty to prevent' as a right and responsibility.

But attempting to act upon on such bases creates difficult problems of policy and implementation. Four will be highlighted in the third section of the chapter: the limitations of attempting to achieve absolute security through unilateral action, the limits to achieving multilateral agreement on the ends and means of cooperation against terrorism, the 'democratic deficit' created by regimes that undertake policies contrary to public sentiment, and the counterproductive effects in counter-terrorism of taking on an ideological mission that characterise the world in good or evil terms.

Non-traditional security threats by armed, non-state actors

The UN High Level Panel identifies six clusters of threat to the peoples of today's world. Of these only interstate conflict is a traditionally defined security threat with states as the primary actors. Weapons of mass destruction are seen as a threat, less because of the holdings of weapons by the acknowledged nuclear powers, but more from the perspective of the risks associated with their being developed and controlled by irresponsible regimes who may channel materials into the hands of terrorists. The remaining four threats (poverty, disease and environmental degradation; internal violence; transnational crime; and terrorism) are transnational phenomena perpetrated by non-state actors.

The greatest concerns for states individually and collectively are acknowledged to be non-traditional security threats – so-called because they are not 'traditional' external threats to state territory and sovereignty to be addressed through standard geostrategic and military responses. Instead they arise from the challenges presented by non-state actors, operating transnationally, whose aims are not usually to attain sovereignty. Kahler, for instance, has characterised terrorism and transnational crime as striving for deterritorialisation, that is, seeking to undermine Westphalian principles of spatially defined rule, delimited borders and jurisdictional congruence.[2]

2 Miles Kahler (2004) 'Ballast or Catalyst? Domestic Politics and Transatlantic Relations After Iraq', RCAS Working Papers available at http://hdl.handle.net/1814/2751.

As a result, a 'war on terrorism' is not centred on territorial conquest and does not involve an easily locatable or identifiable enemy with realisable goals. International terrorists, by and large, are not fighting to achieve sovereignty in a traditional sense, re territory or even governance, but rather destruction of sovereignty. Their battles are temporally open-ended and often over non-negotiable, ideological demands.

Three dimensions of contemporary terrorism

Concerns about non-hierarchical networks potentially operating at odds with states in the international system have been growing over the last decade, as analysts began to realise the potential impact of the information revolution and related forces of globalisation on the state system.[3] September 2001 and the resulting attention to Al Quaeda highlighted the advantages that non-hierarchical network actors have in planning and conducting clandestine operations.[4]

Care must be taken to avoid blanket generalisations concerning terrorist organisations, their goals and the modes of operation. Analysts such as Errera speak of 'three circles' or three forms of international terrorist entities.[5]

The prototype of the first is Al Quaeda, whose effectiveness has been achieved as a hybrid organisation operating as an omni-directional, non-hierarchical network for tactical purposes but with a cohesive and centrally articulated ideology that espouses non-negotiable demands.[6]

The second are movements that share the transnational ideology of an Al Quaeda but are borne and feed off of localised conflicts. In effect, these terrorist groups, such as Hezbollah and JI, are territorialised.

Third are a set of amorphous groupings that apparently coalesce and dissolve as local acts are committed, as operatives move on, and so on. These groups may subscribe to its ideological manifesto but are not tied or at the command of Al Quaeda. 'They have autonomous leadership, they pick their own targets, they plan their own

3 See John Arguilla and David Ronfeldt (2001) 'Afterword (September 2001): The Sharpening Fight for the Future', *Networks and Netwars: The Future of Terror, Crime, and Militancy* (Washington: RAND Corporation).

4 See Ronald Diebert and Janice G. Stein (2003) 'Hacking Networks of Terror', in Robert Latham (ed.) *Bombs and Bandwidth: The Emerging Relationship between IT and Security* (New York: Free Press).

5 See Philippe Errera (2005) 'Three Circles of Threat', *Survival* 47, 71–88.

6 Analysts argue that Al Quaeda has largely reinvented itself, in terms of its organisational structure and its role within the international terrorist arena. Removal of many of the top leaders has not decapitated the hydra as had been anticipated. Bin Laden appears to have shifted his emphasis from the tactical, no longer engaged in training operatives and planning incidents, towards the ideological. His continuing contribution to the terrorist cause is through sustaining and manipulating its ideological voice, thus providing an overall rallying cry for its disparate components. In turn, there are important policy implications for states fighting terrorism, since the battle is shifted to one over hearts and minds rather than police or military action.

attacks'. They are 'redefining the threat we face' in the post-9/11 environment, simply because of their fluidity and willingness to serve a variety of causes.[7]

When viewed from the perspective of the state and state sovereignty, one sees that the Westphalian state-centric order is severely challenged. International terrorists 'attack' the state system on several dimensions simultaneously. On the one hand, they seek through spectacular acts to inflict damage and to intimidate governments and their citizens; at the same time, they advance an ideological agenda designed to engender civil society support within the populations suffering from poverty, discrimination or the negative effects of globalisation. Mobilisation to remove, punish, or to prevent terrorism on the part of states accordingly faces the dilemma that increased efficiency in counter terrorist measures to eliminate terrorists very likely has the boomerang effect of stoking the resentment that provides the ideological fuel for sustaining these movements.

Rights and responsibilities concerning international terrorists

Principles of sovereignty are challenged as states contest over their rights and responsibilities to deal with international terrorists. As these rights relate to concerns over sovereignty, they involve justifications for actions against terrorist taken according to the right to self-defence, the right to retaliate, the right to preempt, and a right to preventive action. These are listed roughly in an ascending order of controversy.

Of these rights, that of self-defence is largely noncontroversial, in so far as states are seen to act against opponents who have attacked, are identifiable, and who have threatened to attack again. Thus, the US response to Al Quaeda immediately after the 9/11 incidents was widely endorsed at the UN, through NATO's invocation of Article 5, and so on. However, when it is not possible to pinpoint who perpetrated an attack, where the responsible parties are located, and when the threat of attack is articulated in vague and non-specific terms, taking forceful action in self-defence is more difficult to justify, as increasingly has proven to be the case in the last several years.

The right to retaliate, however, becomes more problematic and, as used in response to terrorist attack, has been both controversial and of questionable impact. In practical terms this is because the mobility of terrorists and the difficulty of getting good intelligence make it difficult to target an appropriate site. But, more importantly, there are principles of sovereignty involved. Excepting the unlikely situation in which the state in question assents to the actions of the retaliating state, a violation of state sovereignty is involved. US actions against what was said to be a chemical weapons factory in Sudan, in retaliation for bombings of US embassies in Africa, provide an example.

The right to preempt exists under international law, albeit that the conditions under which it is justified are very narrow. Among other stipulations, an attack must

7 George Tenet, former Director of the CIA, as quoted by Errera, 'Three Circles of Threat', 85.

seen to be imminent, for example, actual massing of troops by Egypt as prelude to the 1973 war. But, in today's world when dealing with terrorists, critics argue that such observable warning signs are not given and indeed should not be waited for. Thus, the US and other states, for example Australia, now assert a right to unilateral preemptive action in any instance of a perceived high probability of terrorist attack.

However, the argument is being taken a step further, extending the notion of preemption to that of preventive attack, especially if there is a likelihood of the involvement in terrorist hands of weapons of mass destruction. On this, the views of the US, at least in rhetorical terms,[8] are clear. As US President Bush states, 'I will not wait on events, while dangers gather. I will not stand by as peril draws closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.' In response to criticism, Douglas Feith has argued that this is not a repudiation of the classic notion of sovereignty,[9] a claim disputed by many.

The president's statement does not refer to terrorists, per se, but rather to 'dangerous regimes', that is, state governments, thus drawing attention to the role and responsibilities of states *vis-à-vis* their affiliation with terrorists. Certainly direct state sponsorship of international terrorism is illegal; states that support or knowingly harbour terrorists can be brought to account, essentially for abusing their sovereignty – a case in point being the Taliban government of Afghanistan.

But matters become more difficult if states if a state's territory is unknowingly being used by terrorists or the state in question lacks the capacity to police its own territory. These are circumstances of the lack of effective sovereignty, characteristic of what are commonly labelled 'failed' or 'failing' states. International relations scholars have used the term 'quasi-states' in this context, referring to states that assert 'negative sovereignty', that is, rights to non-interference and so on, but lack 'positive sovereignty' in failing to meet their obligations both to their own citizens and to other states by providing order and security (safety) within their borders.[10]

Much attention has been given to such states with regard to humanitarian crises, situations in which mass killing or violation of human rights occur because the state (in this sense the regime in power) is unwilling or unable to prevent these activities, or the regime in fact is their perpetrator. The result has been the advancement of the responsibility to protect argument, in effect a reorientation of sovereignty that places the state's main responsibility as the provision of protection and security for its people.[11] Acceptance of this principle, in normative terms, has gained substantial

8 This qualification is warranted since in post-Iraq War cases, such as North Korea and possibly Iran, the US has not nor is it likely to mount a preventive attack.

9 The quoted statement by Bush and Feith's argument is found in his 'Freedom, Safety and Sovereignty', Presentation to the New York Council on Foreign Relations, 15 February 2005, available at www.cfr.org.

10 See Robert Jackson (1990) *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press).

11 The major statement of the responsibility to protect and its rationale is found in the report of the Canadian sponsored high level panel, The International Commission on Intervention and State Sovereignty (ICISS).

ground in the last several years, culminating in its consensus endorsement by the broadly representative group of experts on the UN High Level Panel.

Of particular interest for our purposes, however, is the way in which the responsibility to protect has become the fulcrum of an argument to justify preventive attack against a class of other states. The responsibility to protect involves two 'responsibilities'. The first is of the state to protect its own. If unfulfilled, this in turn creates a responsibility on the part of other states to take collective action to remedy the situation. This latter responsibility is interpreted as providing a licence for intervention, indeed preventive attack, through the following logic:

a. Each state has a responsibility to protect its own citizens.
b. Certain states fail to do so, thus creating supportive conditions for international terrorists.
c. Certain states, usually associated with repressive regimes, seek to acquire weapons of mass destruction. These states present a threat to other states directly, but also indirectly since they are seen as likely to intentionally or inadvertently supply weapons of mass destruction to international terrorists.
d. This is a prospect that states (taking their responsibility as in a. above) can not allow to develop to become a realised or imminent threat for two reasons: (i) the magnitude of the potential damage is too great, and (ii) the only time that such a threat can be headed off is in its preliminary development phases.
e. There is thus a duty to prevent, that is, to undertake preventive attack.

These arguments have gained support, not only from officials, but also from notable scholars in the US. Anne-Marie Slaughter, President of the American Society of International Law, has stated that there is a 'duty to prevent security disasters as well as humanitarian disasters – even at the price of violating sovereignty.'[12] Strategic analysts lend their support by arguing that such a position must be maintained, for without this option being left open (as George Bush does in his statements on Iran), diplomatic options and deterrence strategies will never bear results. That is, in the absence of the prospect of a serious negative outcome, a restrictive right to self-defence becomes inadequate.

Robert Keohane and David Buchanan, in their advocating of a 'cosmopolitan institutional proposal' to support the preventive use of force expand the logic of a–e above by extending its reach to encompass repressive, non-democratic regimes in more general terms. Their argument is a regime or a group that has deliberately killed civilians in the past cannot be trusted. And:

> The need to protect basic human rights supports prevent action, regardless of whether the rights endangered are those of fellow citizens or foreigners.[13]

12 See Lee Feinstein and Anne-Marie Slaughter (2004) 'A Duty to Prevent', *Foreign Affairs* 83, 136–151.

13 Allen Buchanan and Robert O. Keohane (2004) 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', *Ethics and International Affairs* 18, 1–22 at 5.

And from this point others take up the justification of engineering regime change to install democratic regimes, who by definition will not engage in such irresponsible behaviour. As Stephen Toope concludes:

> This approach seeks to draw together previously distinct normative categories – self-defence, collective security, and humanitarian intervention – and treat them all as subcategories of one overarching 'security' threat. The effect is to allow intervention in other states even when it would not be justifiable under any of the existing conditions individually.[14]

In my view, these developments are serious, not only because they threaten to undermine the principles of Westphalian sovereignty in the cause of acting against terrorism, but because they further undermine what has been the positive momentum towards the norm of contingent sovereignty as advanced in the responsibility to protect.

Policy dilemmas

In light of the above, it is not surprising that efforts to effect multilateral cooperation to fight international terrorism have been difficult to engineer. In organisational terms, international terrorist actors present a combination of deterritorialised and territorialised scope, hierarchical and non-hierarchical command and control, and forceful ideological message. They engage not only fanatics but also sophisticated operatives; their rhetoric of redressing indignities and achieving a higher moral end has potent appeal in civil societies, especially in Islamic populations in Asia, Africa, and Europe. Effectively combating terrorism thus requires a multi-dimensional approach: (a) complex coordination of law enforcement, intelligence, and military forces of many countries; (b) movements toward settlement of perceived long-standing injustices (especially regarding the Palestinians); and (c) sustained efforts to address of conditions of governance and quality of life for many people.

Except in response to the most starkly defined circumstances, that is, the attacks on New York and Washington, it remains and will continue to be difficult to achieve consensus on deviating from the principles of Westphalian sovereignty to justify action against international terrorism. We are just now inching towards a definition of terrorism. States see in any argument to justify stepping over the borders of another state the kernel of a precedent that may be mobilised against themselves. This reticence has been amplified by the advocacy of self-proclaimed exceptionalism by the world's major power. Without its support for principles and policies that apply to all states, the UN is left with little leverage to mobilise beyond rhetoric.

The dilemmas of counter-terrorist policy coordination are apparent when examining the record of the past five years.

---

14 Stephen Toope (2005) 'The Human Security Agenda and the UN', remarks to the Canada–Norway Peace Prize Forum, Vancouver, 4 February.

1. The US through its efforts to achieve the unattainable, namely absolute security through unilateral, that is, acting alone, or unilaterally, that is, setting the agenda for others, has undermined the prospects for multilateral cooperation. Other states are simply unwilling to cede components of their sovereignty when the world's most powerful state (that is, that state who can most easily violate their sovereignty) refuses to entertain voluntarily limiting itself.
2. Ad hoc coalitions of the willing have brought together states with perceived common interests to combat terrorism or activities that would support or arm international terrorists. Thus, the Proliferation Security Initiative holds promise in preventing the shipment of WMD materials to terrorist groups or regimes that may support terrorists. However, to the extent that members of such coalitions are sought simply to provide an aura of legitimacy to advancing the interests of the coalition leader, they will not provide the foundation for any longer-term multilateral cooperation. Indeed, US-led coalitions, especially that in Iraq, have tended to dissolve as members see little payoff for themselves and as their opponents effectively use their presence to gain rather than lose extremist support.
3. Multilateral cooperation to counter terrorism has proved feasible when it has been focused upon functional cooperation to facilitate mutual commercial benefit, thus avoiding the necessity to achieve consensus on any politically tinged statements or policies concerning terrorism. The best example to illustrate this is found with APEC, which as an economic organisation has been able to achieve agreements on blocking the transfer of weapons such as hand-held missiles under the rubric of ensuring the flow of commercial traffic. The ASEAN Regional Forum, the Asia Pacific's region-wide security institution, on the other hand, has achieved little agreement on any longer-term anti-terrorist agenda foundering on states' disagreements regarding the political circumstances of terrorism.
4. It is disturbing to see the normative agenda of humanitarian intervention being co-opted into a counter-terrorist rubric based on a duty to prevent logic. Doing so undermines the potential to move towards policy frameworks that would see states relax or reinterpret their stances on Westphalian sovereignty to facilitate more effective responses to humanitarian crises.
5. In many societies there is a disconnect between the political leadership and civil society concerning responses to terrorism. This has been particularly evident in countries involved in the US coalition of the willing fighting the Iraq war and occupation – a so-called war on terrorism by Washington. But, it has also been evident in other states where the government has adopted policies or allowed US forces to operate in the war on terrorism, but where the population as a whole has been opposed to such steps.
6. Finally, the success of international terrorism derives from its ideational base. Countering the powerful appeal of its message in many societies will require strategies that are sensitive to cultural and religious traditions and that emphasise long-term commitments of human resources and capital. It will involve states reinterpreting their sovereignty claims to facilitate integration into global marketplaces of commerce and of ideas. Characterising the

struggle against international terrorism in simplistic terms as a battle of good against evil, as Washington has tended to do, will stiffen the resistance of states and their societies to change, causing them to seek protection behind rigid interpretations of Westphalian sovereignty – thus frustrating movement towards advancement of popular sovereignty and human security and in effect reinforcing the conditions that in which international terrorism germinates.

Chapter 8

Sovereignty in the Twenty-First Century: Security, Immigration and Refugees

Howard Adelman

A Canadian House of Commons report entitled *Hands Across the Border* and subtitled *Working Together at our Shared Border and Abroad to Ensure Safety, Security and Efficiency*, written in the immediate aftermath of 9/11, recommended cooperation with the USA rather than security integration. In contrast, the very recent Tri-national report 'The Independent Task Force on the Future of North America', headed by former Canadian Deputy Prime Minister and Foreign Minister, John Manley, former Mexican finance minister Pedro Aspe, and former Massachusetts governor William Weld, and jointly sponsored by the US Council on Foreign Relations, the Canadian Council of Chief Executives, and the Mexican Council on Foreign Relations, among its many recommendations, called for creating a contiguous external security perimeter and a common 'security zone' by 2010.[1] The thrust of the report was both to reinforce previous moves aimed at facilitating faster movement of goods and people, while reversing the trend to tighten security *between* Canada and the USA; instead, security would be reinforced around the three countries rather than between the USA and both Canada and Mexico.

Which proposal will win out – mere cooperation or security integration? I believe we have creeping, step-by-step integration.[2] Canada already has a joint program with the USA of jointly deploying security officials to foreign countries to inspect cargos headed this way;[3] the security portions of the Tri-national report called for joint

1 Launched on 15 October 2004, in addition to enhancing security, the Task Force was given four other spheres of policy in which greater cooperation may be needed: deepening economic integration; reducing the development gap; harmonising regulatory policy; and devising better institutions to manage conflicts that inevitably arise from integration and exploit opportunities for collaboration. The Report called for the creation of a common economic community. Economic recommendations also proposed a common external tariff, joint energy and natural resources strategies, and a plan to stimulate Mexican economic development, but these are not issues of concern in this chapter.

2 Frank J. Cilluffo, currently Director of George Washington University's Homeland Security Policy Institute and former special assistant to the President for Homeland Security, in response to the Manley Report advised that the current policy was the best, cf. 'Don't Rush Toward a Tri-national Security Strategy', *The Globe and Mail*, 21 March 2005, A13.

3 Then Foreign Minister John Manley had signed the smart-border declaration with Paul Ridge, the US Director of Homeland Security, and that declaration included provisions

inspections of container traffic at ports. Canada also has over a dozen Integrated Border Enforcement Teams (IBETs) along the border, teams that have been credited with aborting 45 suspected operations in 2004 alone. Canada has an integrated terror watch list. It is working towards developing biometric border passes to facilitate freer movement across borders as an extension of the 2001 Smart Border Agreement, itself a key step towards integration. In spite of an earlier reluctance and in spite of the fallout between Canada and the USA over the Iraq War, there have been recent moves to create a common security perimeter over and above the recommendations of the commission that recently recommended more intensive efforts to create a common security perimeter around Canada, the USA and Mexico.

The common perimeter agenda has been conjoined with common entry regulations for immigrants and refugees and not just security procedures.[4] Assuming that creeping security integration has taken place, in spite of the brouhaha over Canada's refusal to join the American anti-missile program, have moves also taken place to integrate immigration and refugee policy? The Tri-national Report recommended developing unified visa and refugee regulations by 2010; in fact, the list of countries from which Canada requires a visa for entry has grown much more similar to that of the USA since 9/11 compared to the situation before 9/11. Security issues intersected with immigration and citizenship issues well before 9/11.[5] However, immigration and refugee policy have in fact diverged. The 2002 Safe Third Country Agreement displaced about half of the asylum seekers trying to enter Canada back into the United States. However, thus far, instead of thrusting Canada and the USA towards convergence on refugee policy, there have been significant divergences. One after-effect of the Safe Third Country Agreement – though not necessarily as a direct product of that Agreement – has been a growing difference between Canada and the USA on refugee policy. For example, Canada adjudicates refugee claims according to a rule that gives the benefit of the doubt to the claimant. Americans had a stricter rule and required adjudication officers to give the benefit of doubt to neither the sate nor the claimant but to adjudicate on the basis of a balance of probabilities. This approach generally meant that four per cent more of claimants got through the Canadian process than succeeded in getting through the American one. Recently, the

---

for the long-standing efforts of Canada to create joint customs pre-clearance for commercial cargos and jointly operated customs facilities at remote border points.

4 On 29 October 2001, President George Bush ordered his officials to begin harmonising customs and immigration policies with those of Canada as well as Mexico to ensure 'maximum possible compatibility of immigration, customs and visa policies.'

5 The World Trade Center bombers of 1993 used forged Canadian immigration papers to gain access to the United States. In December 1999, Ahmed Ressam was captured by US customs officials trying to enter the US with a carload of explosives as he tried to cross into Washington state on a ferry from Victoria, British Columbia in a plan to bomb the Los Angeles airport. The House of Commons Report, Refugee Protection and Border Security: Striking a Balance, was tabled in the House of Commons in March 2000. Bill C–11: The Immigration and Refugee Protection Act contains clauses related to refugees and security issues, such as provisions for condensing the security certificate protection procedure.

rules have diverged even further as the US passed the Real ID Act, putting the onus of proof on the claimant.[6]

However, have there not also been greater pressures for refugee and immigrant policy harmonisation? Will US efforts at greater securitisation of the immigrant and refugee process not also affect Canadian immigration and refugee policy as we move towards creeping security harmonisation? After all, the Real ID Act requires American states 'to establish and rapidly implement regulations for State driver's license (undocumented immigrants would be ineligible for such licenses) and identification document security standards', including standardisation that would eventually enable a national ID card to be issued to immigrants as part of sweeping changes in immigration policy. Since this is a security issue, would such a policy not flow into Canada as creeping harmonisation in security takes effect? In the Canadian 1985 Supreme Court *Singh* case, immigrants and even refugee claimants were, in effect, deemed to hold all the same rights as citizens except for voting and holding public office. The American provisions increasingly distinguish between the treatment accorded immigrants and refugees versus how citizens are treated, and even differentiates between foreign-born and native-born citizens in practice if not in law. For example, the Real ID Act makes it easier to deport long-term, lawful, permanent residents if they had donated to groups classified as terrorist organisations. Asylum seekers facing prosecution in their home countries are denied entry.[7] Immigrants would not be permitted to engage in lawful political expression.

The fact is that Bill C26, the 2001 Anti-Terrorism Bill and the 2002 Immigration and Refugee Protection Act have raised a number of questions that affect the rights of citizens as well as immigrants and refugees,[8] one of which I will explore in some detail in the next section. Harmonisation of security policy will undoubtedly affect immigration and refugee policy whenever security issues are at issue. I suggest that this will probably happen anyway. It need not affect other areas of immigration and refugee policy. The real issue is the degree to which Canadian policy will become more Draconian even if only the security aspects of immigration and refugee policy are subjected to the pressures of harmonisation, especially in an atmosphere of security fears that has a propensity to demonise immigrants and refugees as security threats.

In a paper that I presented at the University of Wollongong on 1 March 2002 called 'Canadian Borders and Immigration Post 9/11', I documented the stark incongruency between claims that immigration laws and border control had been

---

6 In fact, on the same day, on 10 February 2005, both the US House of Representatives and the UK House of Commons passed a law to tighten refugee regulations. In the USA, the bill is called the Real ID Act. It was put on the floor of the House on 26 January 2005 by Rep. James Sensenbrenner to expand the USA Patriot Act. That bill placed the onus upon refugee claimants to provide written 'corroboration' of their claims. (Cf. http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109ZgDgDu.)

7 See Bill Frelick's article in the *Milwaukee Journal Sentinel*, 27 February 2005 in which he argues that the act would not only affect terrorists, but would prevent victims of spousal abuse, sex slaves, and honour killings from receiving protection in the USA.

8 Cf. Y. Abu-Laban and C. Gabriel (2003) 'Security, Immigration and Post-September 11 Canada', in J. Brodie and L. Trimble (eds) *Reinventing Canada* (Toronto: Prentice Hall).

too lax, and the fact that the 9/11 terrorists evidently entered the United States legally as visa students and not as immigrants or even refugee claimants. Even before 9/11, there was very little incentive and many disincentives for any would-be global terrorists, that is, terrorists who target Western and not just their home states, to enter either Canada or the USA as an immigrant or refugee claimant. There are many more disincentives in place now. Certainly, foreigners have entered Canada as immigrants and refugee claimants who have been strong supporters of national as distinct from global terrorism, particularly evident in the Sri Lankan and Sikh communities. As we become more aware that national terrorism cannot be easily disaggregated from global terrorism, as I will also document in the next section, security provisions and checks have already been put in place to prevent such terrorists from acquiring immigrant or refugee status in Canada. These trends are already well underway without any overt steps at formal integration. The key issue is whether security integration trend will lead Canada to adopt unwarranted measures in the treatment of immigrants and refugees, or whether a conscious move in that direction would avert such Draconian steps.

In that Wollongong paper, I certainly alienated the security right by documenting their hysteria concerning the alleged security threat of refugees and immigrants even if I offered half-hearted support for security harmonisation that alienated my liberal and left pro-refugee friends by implying that security harmonisation was virtually inevitable and that it might be preferable to embrace the trend overtly. I reinforced the alienation of my friends by also documenting that the few non-Canadians who had been detained hardly represented an anti-Muslim stand.[9] In that way I managed to alienate both the anti-refugee and anti-immigrant policy right (they were opposed to current policies rather than to immigrants and refugees) and the civil liberty left. Further, when I argued that a common security perimeter was desirable, but need not be coupled with a common immigration and refugee policy, only a common security policy with respect to immigrants and refugees, I managed to alienate the liberal nationalist centre as well.

I say this not to try to reverse this alienation, but probably to add to it. Groups on the left, right and centre already feel uncomfortable with what I have written.

9 Ary Hussein, when he filed his refugee claim in Canada, ditched his papers before landing at Pearson airport and landed behind bars after confessing to having once participated in a kidnapping. A half-dozen other Middle Eastern people were detained: Palestinians Mohammed AlMuttan, 19, on 27 September, together with 35-year-old Ribhi Jamel Sheikha (subsequently released); Hisham Essa an Egyptian detained on 2 August trying to cross from Windsor into the US at Detroit while hidden in the back of a truck; Mohamed El Shafey, another Egyptian subsequently deported after living in Canada illegally for four years; Ziyad Hussein, a Palestinian with a Jordanian passport detained on 22 September at Pearson when an immigration official did not believe his story that he had come to attend a trade show, but wanted to remain in Canada or go to the US where he has family; and a Palestinian woman from Syria, Reema Nakhleh. The fact is, one of these individuals was detained pre-9/11 and the others would have been handled the same way whether or not 9/11 had or had not taken place. These few cases hardly substantiate the widespread charges made by civil libertarians and spokespersons for the Arab community in Canada that Arab men were being held simply because they were Arab.

I now want to argue that, with all their sound and fury and mad disagreements, underneath it all they are identical theoretically in at least two respects. Although the groups above are divided on substantive issues, as I will point out, they share identical criteria for assessing those issues. Further, though each group stresses a different theory of sovereignty that lies behind their respective positions, each of them adopts a univocal theory of sovereignty and is blind to the equivocation of the concept and the importance of that equivocation in making policy. There is no better way to make enemies than to claim that ostensible enemies are really cut from the same cloth. Characteristically, as I shall document, both sides argue for a balance between concerns for national security and the protection of human rights. They differ only the issue of how to strike that balance. On this meta level, I want to make two points. They are all trying to do what is impossible – provide a common criterion for balancing two incompatible factors. Secondly, they are trying to balance the wrong things. Both what creates the balance and what is balanced differ than what is commonly perceived to be the case. Trying to balance concerns with national security, concerns with protecting Canadian national sovereignty, and concerns with protecting civil liberties produces endless discussions without any resolution. I want to retain the breadth of the Wollongong article in discussing citizenship, immigration and security issues and their intersection, but extend the depth and reach to embrace not only political theories of sovereignty, but the meta-criteria for making decisions when conflicts appear to emerge on these issues.

Immigrants and refugees: security concerns versus civil liberties

Before I undertake this ambitious agenda, I will greatly narrow my focus empirically from the broad sweep of the various different issues discussed in the Wollongong paper to concentrate only on the issue of security certificates.[10] I had already addressed the issue of 'racial profiling' of Muslims crossing into Canada that has been such a great concern. I had thought of focusing on the inadmissibility of persons wanting

10 When Parliament passed into law an Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other acts, and to enact measures respecting the registration of charities, in order to combat terrorism in the Fall of 2001, Part 3 contained the provisions that gave the Attorney General powers to assume carriage of a prosecution and *to prohibit the disclosure of information in connection with a proceeding for the purpose of protecting international relations, national defense or security*. Cf. the criticism of this provision contained in the vast majority of essays in the volume by Ronald J. Daniels, Patrick Macklem and Kent Roach (eds) (2001) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press).

to enter Canada[11] that has exercised many Canadians,[12] but this issue lacked the clear polarity of the issue of security certificates. The practice of deporting suspects to countries that practise torture, even when they are citizens, was the subject of a Canadian public inquiry into the *Arar* case,[13] a Canadian citizen sent to Syria by American immigration authorities with the alleged complicity of CSIS.[14]

In any case, in my estimation, of these controversial items, the central issue that has preoccupied pro-refugee and pro-immigrant Canadian advocates, as well as members of the Muslim community, has been the use of Secret Trial Security Certificates.[15] A Canadian all-party consent in early March 2005 agreed to include

---

11 Cf. IP 10, 'Refusal of National Security Cases/Processing of National Interest Requests.' In section 2 of that document, national security is defined as:

protecting the safety and security of Canadians and denying access to Canada of those deemed security risks or involved in organized crime, and to ensure that Canada does not become a safe haven for those involved in war crimes or crimes against humanity. That inadmissibility decisions requires the immigration officer to consider all documents available, and, all those documents must be disclosed to the Applicant for entry, *except in cases where the document is prejudicial to national security or the safety of particular individuals.* (7.2) (my italics).

12 In the name of the right of a society to choose its own members and in defence of state security, new security measures have dramatically reduced the number of overseas travelers arriving in Canada with false passports and other fraudulent documents. In 2004, 72 per cent of travelers who attempted to board planes with false documents were stopped at airports overseas compared to only 30 per cent in 1990. The dilemma, of course, is that many refugees cannot secure passports or visas because they have fled failed states (The Democratic Republic of the Congo – DRC) or persecuting states (Sudan) from which those in flight do not want their governments to know that they are fleeing. As a consequence, many of those who arrive in this country without identification claim refugee status that gives them the automatic right to remain in the country until their case is decided. To prevent this, airlines are fined for each improperly documented traveler that arrives on that carrier. Further, the airline must also pay to return passengers who claim refugee status once they arrive in Canada but are later found to be inadmissible. 2,539 individuals arrived in Canada without the proper travel documents in 2003, compared to 4,813 in 2000 and 8,000 in 1990. 6,439 were intercepted at airports overseas. Travelers are stopped now not only because they lack a passport but if they don't have a visa, a permanent resident card, or if the name on the passport doesn't coincide with the name on the ticket. As a partial consequence, the number of people claiming refugee status in Canada has dropped since the introduction of the new overseas security measures in 2000 from 30,075 to 27,910 in 2001, 25,122 and 25,981 in 2002 and 2003 respectively.

13 The *Arar* case is not unique. There are also the cases of Abdalla alMalki, Ahmed Abou Elmati, Muayyid Nureddine and Arwad alBouchi.

14 Justice Dennis O'Connor currently heads a public inquiry into Canadian involvement in the deportation and detention of a Canadian citizen of Syrian origin, Maher Arar, by United States authorities from a New York airport on 26 September 2002, and whether an oversight or review mechanism is required when the RCMP investigates cases of alleged threats to Canadian national security.

15 Under the amended provisions of the Immigration and Refugee Protection Act, the Solicitor General and the Minister of Citizenship and Immigration may sign a security

the security certificates in the House subcommittee's review of C–36, our anti-terror legislation. The focus has been on the Secret Trial Five: Mohammad Mahjoub; Mahmoud Jaballah; Adil Charkaoui; Mohamed Harkat and Hassan Almr. All five are being held in some form of custody without being brought to trial or even charged by means of security certificates. Under a security certificate, there is an allegation that releasing these individuals into society would pose a security threat, but the Crown denies access to the evidence on which the allegations are made to both the accused and his or her lawyer. Since those charged fear that if they are returned to their home countries they would be tortured, and since Canadian law generally is wary of a forced return when there is good evidence that torture is likely to follow, these individuals end up in detention for very long periods.

Mohammad Zeki Mahjoub, 44, an Egyptian national, arrived in Canada in 1995. As stated above, based on a provision in Canadian law that came into effect on 24 December 2001, the government can detain suspects indefinitely (upon 12 month renewals) if officials can convince a judge that the individual poses a threat to Canadian security.[16] Mahjoub has been held in a Toronto jail since he was arrested as an alleged security threat in June of 2000 – well before 9/11 or Bill C-36 – using the pre-existing provision for a security certificate. The government alleges that Mahjoub was a senior member of the Vanguards of Conquest, a terrorist group subsumed by the Egyptian Al Jihad and later by Al Quaeda. An Egyptian military tribunal sentenced him in absentia to 15 years in prison because of his terrorist associations. Mahjoud has never been charged with any crime in Canada. Neither he nor his lawyers are allowed to see the evidence that CSIS claims supports the charge that he poses a

---

certificate alleging a non-citizen to be inadmissible to Canada on grounds of security or serious criminality; the non-citizen is automatically detained without a warrant (detention of permanent residents require a warrant) simply on the basis of reasonable grounds to believe the subject is a danger to national security or the safety of any person, or is unlikely to appear for removal. A review of both the security certificate and the grounds for continued detention is required by the Federal Court, but the Court may hear the government's evidence in the absence of both the subject of the Certificate and his or her counsel. There is no requirement that the Government even inform the detainee of the precise nature of the allegations. Normal rules of evidence are dispensed with, including the right to cross-examine witnesses and to challenge evidence obtained through normally unacceptable means such as hearsay, plea-bargains or even torture.

16 The investigative hearing provisions in section 83.28 and 83.29, 'for purposes of an investigation of a terrorism offence, and believing, on reasonable grounds, that a terrorist activity will be carried out' impose 'conditions for supervision or arresting a person … necessary to prevent this activity from being carried out.' Without laying charges, they allow a police officer to apply *ex parte* to a judge for an order to gather information relevant to that investigation from a material witness who may possess information regarding a terrorism offence that has been or may be committed. Their statements may not be used in any criminal proceedings against them (except for a prosecution for perjury or giving contradictory evidence). If these conditions are met, the peace officer can bring the person before a court, with a summons or alternatively by arrest with or without a warrant, so that a judge may determine whether or not to order a recognisance to keep the peace. The recognisance, which requires the person to adhere to certain imposed conditions, can be for a maximum period of twelve months.

threat to the country's security.[17] On 8 September 2004, a Canadian Federal Court judge, Madam Justice Eleanor Dawson, stayed the deportation order for Mohammad Mahjoub on the basis that he could face torture in Egypt, even though federal Justice Department lawyer David MacIntosh argued that national security had to 'trump all other considerations', including the anguish caused to his wife, Mona El Fouli, and his seven-year-old son, Ibrahim. Mahjoub also testified that he endured *emotional* abuse by prison guards at the Metro West Detention Centre in Toronto, particularly after 9/11.

Adil Charkaoui, 31, an immigrant from Morocco, was arrested in May 2003 after CSIS accused him of being one of Osama bin Laden's top lieutenants. He refuses to answer the questions put to him by the judge, but freely accuses the US of conspiring to blow up the Twin Towers on 9/11. He has been held in jail for almost two years under a security certificate. Judge Noel of the Federal Court upheld the validity of the process. Charkaoui could be freed if he agreed to be deported, but he refuses because his family is in Canada.

Mohamed Harkat, 36, arrived in Toronto in 1995 from Malaysia using a fake Saudi passport and immediately applied for refugee status claiming a fear of persecution by the Algerian government, a usual way to enter Canada for practising terrorists. He moved to Ottawa, married and worked – most recently delivering pizzas and pumping gas. His refugee status was granted in February 1997. He was arrested on 10 December 2002 in Ottawa as a terrorist threat and accusations that he was an Al Qaeda 'sleeper' trained under bin Laden's top lieutenants in Afghanistan. He purportedly operated a guest house in the 1990s in Pakistan for a Muslim charity for which he was evidently paid what would have been a very hefty salary for such work – $18,000. That guest house evidently served as a way station for *jihadis* travelling to Chechnya and associated with Abu Zubaydah, number three on America's list of most wanted terrorist suspects. He has been held on a security certificate, and, in a 76-page ruling on 22 March 2005, Justice Eleanor Dawson upheld the legality of the security certificate, rejecting Harkat's lawyer's (Paul Copeland) claim that security certificates violate the principle of fundamental justice and Canada's constitution. Harkat refuses to accept deportation back to Algeria from which he fled in March 1990 because he fears the army will kill him.

We do not know whether these three men, or Mahmoud Jaballah and Hassan Almr, are or are not terrorists.[18] What we do know is that they have never been

17 See http://www.lexisnexis.ca/lawyersweekly/front_issue.php. In the recent acquittal of two accused in the Air India bombings, Ripudaman Malik and Ajaib Bagri, the law was interpreted as permitting Satnar Kaur Reyat, the wife of one of the accused, to be forced to testify at a secret hearing in Vancouver. (Judges Ian Binnie, Louis LeBel and Morris Fish dissented, but only because the forced testimony was aimed at advancing the Malik/Bagri and not the Reyat trial. In a separate dissent, Justices Fish and LeBel warned that the new role for judges in investigative hearings, especially when those hearings are held in camera, undermines the independence of courts by making judges appear to be tools of the executive, with a consequential loss of public confidence in the justice system.)

18 For a discussion of state security issues intruding domestically, cf. the *Journal of Homeland Security and Emergency Management* (JHSEM), edited by John R. Harrald and Claire B. Rubin of the Institute for Crisis, Disaster, and Risk Management at George

charged with any terrorist activities in Canada. On 18 February 2005 in response to all the pressure, a tracking bracelet was placed on recently released trial detainee Adil Charkaoui. As of November 2007, Hassan Almei has been denied bail and is in his seventh year of detention.

What is noteworthy in all these cases is that those protesting the alleged miscarriage of justice base their case on the right to be free from arbitrary detention, the right to a fair trial, and the principle of natural justice. An accused must be informed of the charges and must be given an opportunity to respond to the charges. Critics appeal to the Charter of Rights and Freedoms, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture, and various other international and regional human rights treaties to which Canada is a party. Even Canadian domestic security law, such as section 3(3) of the Immigration and Refugee Protection Act explicitly requires that the Act 'be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory'. Since the security certificate process allows the arrest and detention of non-citizens on the basis of secret evidence, and does not permit the defence to mount an accurate and credible defence, since generally accepted procedural safeguards deemed essential to the fair administration of justice are waived, and individuals are stripped of their right to defend themselves and to challenge the grounds of their detention, the state's legitimate interest in protecting the nature and sources of its intelligence information, it is argued, do not outweigh concerns with procedural justice.[19] Further, the security certificate process holds the state to a lower standard of proof for the detention of non-citizens than for citizens.[20] The issue is whether existing criminal procedures are sufficient to combat

---

Washington University and published by the Berkeley Electronic Press. Cf. http://www.bepress.com/jhsem. See also: Sam Nunn (2004) 'Thinking the Inevitable: Suicide Attacks in America and the Design of Effective Public Safety Policies', 1(4) JHSEM, http://www.bepress.com/jhsem/vol1/iss4/401; Clyde G. Chittester and Yacov Y. Haimes (2004) 'Risks of Terrorism to Information Technology and to Critical Interdependent Infrastructures', 1(4) JHSEM, http://www.bepress.com/jhsem/vol1/iss4/402; Steven Roberts (2004) 'Tips and Trends for Homeland Security and Critical Infrastructure Protection', 1(4) JHSEM, http://www.bepress.com/jhsem/vol1/iss4/405; Keith Holtermann Dr. PH (2004) 'Terrorism and Disaster Management: Preparing Healthcare Leaders for the New Reality', 1(4) JHSEM, http://www.bepress.com/jhsem/vol1/iss4/411; Richard Sylves (2004) 'System Under Stress: Homeland Security and American Politics', 1(4) JHSEM, http://www.bepress.com/jhsem/vol1/iss4/412.

19 The Inter-American Commission on Human Rights 2000 Report on the Canadian Refugee Determination System expressed its concern with the lack of balance between protecting sources of evidence and procedural fairness, and urged Canada to enact additional safeguards to ensure that 'the person named in the certificate has the ability to know the case he or she must meet, and to enjoy the minimum procedural guarantees necessary to ensure the reliability of the evidence taken into account.'

20 In cases of non-citizen reviews, the Court is only required to assess the 'reasonableness' of the government's allegations in contrast to domestic criminal proceedings that require proof beyond a reasonable doubt, and, even in such cases, allow for an appeal. Further, in cases of non-citizens, the consequences are dire – the removal of the accused to a place where they may face torture, an action prohibited by Canadian law, since Canada is a party to the

terrorism, and there is no need to utilise extraordinary administrative procedures.[21] Virtually the entire human rights legal establishment has signed a letter addressed to the Minister arguing that security certificates breach Canadian laws and protections and are not required to combat terrorism.[22]

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. All these international laws and conventions include an absolute prohibition on torture and refoulement to torture. Mr. Manickavasagam Suresh, a 45-year-old Tamil citizen of Sri Lanka, entered Canada on 5 October 1990 and was accepted as a convention refugee on 11 April 1991. In the summer of 1991, Suresh applied for landed status. A joint certificate issued by the Solicitor General of Canada and the Minister of Citizenship and Immigration declared him inadmissible on security grounds. The application was rejected on the CSIS claim that Suresh, as a fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), was a member of an alleged terrorist organisation. On 18 October 1995, Suresh was detained for deportation, but released on bail two years later when the Federal Court of Appeal heard the case. On 29 August 1997, the Court upheld the decision of the lower tribunals on the grounds that, 'It is permissible in defined circumstances to deport a suspected terrorist to a country even though, in the words of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, … there are substantial grounds for believing that *refoulement* would expose that person to a risk of torture.' In its ruling of 18 January 2000, the Federal Court of Appeal of Canada determined that, in effect, it is permissible to send people back to potential torture under certain circumstances. Barbara Jackman, Suresh's lawyer, sought leave to appeal the case with the Supreme Court of Canada. She was granted permission to do so on 25 May 2000. The issue was whether the exclusion clauses of the International Refugee Convention trumped the Convention against Torture or vice versa. In a decision rendered after the attack on the World Trade Towers, the Supreme Court of Canada upheld the right of the government to deport Suresh as long as the government observed procedural proprieties.

21 After nine Muslims appealed being held for nearly three years under the country's Anti-terrorism, Crime and Security Act, Britain's high court, in an 8–1 decision, citing the principle of proportionality, ruled that the British government's indefinite detention of foreign suspects without bringing them to trial was 'Draconian' and a clear and present violation of the rule of the law. Similarly, the very conservative US Supreme Court by a 6–3 vote held that Guantanamo Bay prisoners were entitled to due process 'no less than American citizens' to challenge the evidence against them.

22 Fifty-one law professors at sixteen universities across Canada, the Canadian Bar Association, and Representatives of the Criminal Lawyers' Association and the International Commission of Jurists have registered their disapproval and most of them have co-signed a letter by Sherry Aiken of Queen's University to the Minister, Ann McClellan, to this effect, including Raj Anand, Chair, Minority Advocacy and Rights Council; Reem Bahdi, Assistant Professor of Law, University of Windsor; William Black, Professor of Law, University of British Columbia; Michael Bossin, Adjunct Professor, Faculty of Law (Common Law Section), University of Ottawa; Raoul Boulakia, President, Refugee Lawyers Association; Kim Brooks, Assistant Professor of Law, University of British Columbia; Bruce Broomhall, Professeur, Département des sciences juridiques, Université du Québec à Montréal; Patrice M. Brunet, président, AQAADI (Québec Immigration Lawyers Association); Karen Busby, Professor of Law, University of Manitoba; Emily F. Carasco, Professor of Law, University of Windsor; Peter Carver, Assistant Professor of Law, University of Alberta; Janet Cleveland, Research Associate, Faculty of Law, Université de Montréal; Paul Copeland & Barbara Jackman, Law Union of Ontario; Stan Corbett, Adjunct Assistant Professor of Law, Queen's

Judges certainly dislike making rulings in such cases. In a Montreal conference in December, Justice James Hugessen of the Federal Court addressed these special provisions of the Immigration and Refugee Protection Act that require judges to hear

---

University; François Crépeau, Canada Research Chair on International Migration Law, Scientific Director, Centre for International Studies and Professor of International Law, Université de Montréal; Catherine Dauvergne, Canada Research Chair in Migration Law and Associate Professor of Law, University of British Columbia; Isabelle Doray, President, Association des avocats de la Défense de Montréal; Susan Drummond, Associate Professor of Law, Osgoode Hall Law School, York University; David G. Duff, Associate Professor of Law, University of Toronto; David Dyzenhaus, Associate Dean (Graduate), Faculty of Law, University of Toronto; Don Galloway, Professor of Law, University of Victoria; Mitchell Goldberg, Co-Chair, Legal Affairs Committee, Canadian Council for Refugees; Mendel Green, Founding Chair, Canadian Bar Association, Immigration Section; France Houle, Professeure de droit, Université de Montréal; Shin Imai, Associate Professor of Law, Osgoode Hall Law School, York University; Martha Jackman, Professor of Law (Common Law Section), University of Ottawa; Rebecca Johnson, Associate Professor of Law, University of Victoria; Nicole LaViolette, Associate Professor, University of Ottawa; Sonia Lawrence, Assistant Professor of Law, Osgoode Hall Law School, York University; Douglas Lehrer, Legal Committee, Canadian Centre for Victims of Torture; Jennifer Llewellyn, Assistant Professor of Law, Dalhousie University; Michael Lynk, Assistant Professor of Law, University of Western Ontario; Patrick Macklem, Professor of Law, University of Toronto; Audrey Macklin, Associate Professor of Law, University of Toronto; Allan Manson, Professor of Law, Queen's University; Louis-Philippe Marineau, Lawyer and Member of the Board of Directors, Amnesty International, Canadian Section (francophone); David Matas, Steering Committee, Amnesty International Legal Network, Canada (English Speaking); Anne McGillivray, Professor of Law, University of Manitoba; Susan T. McGrath, President, Canadian Bar Association; Sheila McIntyre, Director, Human Rights Centre, Faculty of Law (Common Law Section) University of Ottawa; Richard Moon, Professor of Law, University of Windsor; Janet Mosher, Associate Professor, Osgoode Hall Law School, York University; David Mullan, Professor of Law, Queen's University; Delphine Nakache, Research Associate, Université de Montréal; Ken Norman, Professor of Law, University of Saskatchewan; Debra Parkes, Assistant Professor of Law, University of Manitoba; Diane Pask, Professor Emerita of Law, University of Calgary; Steven Penney, Associate Professor of Law, University of New Brunswick; Patricia Peppin, Associate Professor of Law, Queen's University; Sukanya Pillay, Assistant Professor of Law, University of Windsor; Hélène Piquet, Professor, Université du Québec à Montréal, Faculties of Political Science and Law; W. Wesley Pue, Associate Dean, Graduate Studies & Research, Faculty of Law, University of British Columbia; Ed Ratushny, Professor of Law, University of Ottawa, and President, International Commission of Jurists (Canadian Section); Sanda Rodgers, Professor of Law (Common Law Section), University of Ottawa; Elizabeth Sheehy, Professor of Law (Common Law Section), University of Ottawa; Palbinder K. Shergill, General Counsel, World Sikh Organization; Ralph Steinberg, President, Criminal Lawyers' Association; Joanne St. Lewis, Assistant Professor of Law (Common Law Section), University of Ottawa; Lorne Sossin, Associate Dean, Faculty of Law, University of Toronto; Don Stuart, Professor of Law, Queen's University; David M. Tanovich, Assistant Professor of Law, University of Windsor; Chantal Tie, Adjunct Professor, Faculty of Law (Common Law Section), University of Ottawa; Rose Voyvodic, Associate Professor of Law, University of Windsor; David Wiseman, Assistant Professor of Law, University of Windsor.

government evidence against foreign nationals accused of terrorism in the absence of both detainees and their lawyers, and declared that:

> We hate hearing only one part. We hate having to decide what, if any, sensitive material can or should be conveyed to the other party ... We greatly miss, in short, our security blanket which is the adversary system that we were all brought up with and that, as I said at the outset, is for most of us the real warranty that the outcome of what we do is going to be just and fair.[23]

In the tension between the state's obligations to protect its citizens against threats and the defence of such fundamental rights as the right of an open trial, and the right of an accused and his or her attorney to apprise the evidence behind any accusation, to mount a credible defence, to be presumed innocent until proven guilty, and not to be sent to a country that practises torture, and the general principle that state actions cannot be arbitrary or discriminatory and immune from accountability, critics allege that the balance has shifted much too far towards protecting national security. For critics, this is particularly evident in the efforts to forge common practices with the Americans related to the exchange of airline passenger information, in the Smart Border Agreement dealing with common databases, and the eventual goal of a common security perimeter around North America. Such practices make them extremely wary of security convergence creep.

Critics have also charged that the issue of security certificates affects Canadian citizens in guilt by association with those who have never been charged let alone found guilty of a crime in Canada. Mohammed Abdelhaleem, a 57-year-old consulting nuclear engineer with a security clearance who works as a contract project manager with Atomic Energy of Canada Ltd and who became a Canadian citizen in 1992 after emigrating from Britain in 1989, offered to put up $20,000 bail to get Mahjoub out of jail until he had to appear in court. A year ago, immigration authorities detained Abdelhaleem for several hours when he returned from Egypt, where, according to his account, he had gone to visit his dying mother. A second time, in February of 2005, after he had returned to Egypt once again, this time to attend his mother's funeral, once again he was detained. The detention in each case was for hours rather than days, weeks, months or years. But Abdelhaleem claimed to have been so intimidated that he no longer visits Mahjoud in jail. In court, before Justice Eleanor Dawson, Mahjoub's lawyer, Barbara Jackman, charged CSIS with, 'developing a policy of intimidating people who stand for sureties', and urged the judge to interrogate CSIS on this matter at a secret hearing from which both Mahjoub and Barbara Jackman are excluded.

To add more weight to the arguments of the critics, there has also been the case in Operation Thread that dissolved into Operation Threadbare. Even if the Secret Trial Five might possibly be security risks, the use of security certificates also taints innocents. Twenty-three or twenty-four Pakistani and Indian students (initially, the

23 J.K. Hugessen (2002) 'Watching the Watchers: Democratic Oversight', in *Terrorism, Law and Democracy. How Is Canada Changing Following September 11?*, Conference proceeding edited by D. Daubney *et al*. (Montreal: Canadian Institute for the Administration of Justice).

figure publicised was nineteen) were arrested in August of 2003 as terrorist suspects and accused of possibly being members of an Al Qaeda sleeper cell in Toronto.[24] They were incarcerated and held without charge using security certificates. It then came out that they were merely part of a student visa scam operation.[25]

Does the government hold prisoners without charging them with a crime, in some cases indefinitely, on suspicion of terrorist activities? Does the government intimidate citizens who offer to put up a surety for such individuals? Does it do so in the name of domestic and national security to the negative detriment of not only immigrants and refugees, but Canadian citizens such as Mohammed Abdelhaleem and foreigners in Canada on student visas? Once used, do they not taint those accused so that some are placed at risk if they return to their countries of origin? Are security certificates necessary or do they breach what critics claim is a proper balance between civil liberties and national security? Defenders of using such measures and even of sending even citizens to countries where they are subject to torture argue that, because of the horrible threat from terrorism, such breaches of civil liberties are justified and the balance must be weighed in favour of protection from security threats.[26]

---

24 At the detention review hearings, information slipped to the press pointed to suspicious activity: a student pilot's flight path took over the Pickering nuclear plant; unexplained apartment fires where some of the suspects lived; and some suspects' apparent interest in prominent Toronto buildings such as the CN Tower.

25 The RCMP's Operation Thread turned into Operation Threadbare as the case turned into one of immigration fraud in which a bogus school in Scarborough, called Ottawa Business College, provided false acceptance letters, transcripts or diplomas for a fee without requiring any class attendance. Upon the recommendation of the Canadian Department of Justice (DOJ), the owner of the school was never charged with fraud. (The school's director, Luther Samuel, provided a sworn affidavit that he provided fraudulent documents to the students.) In an internal report written about the joint RCMP and immigration task force operation, the conclusion was drawn that, 'All of the arrests were lawfully made for offences under the *Immigration and Refugee Protection Act* and were either pre-authorized by warrant or subsequently supported by the courts.' In other words, the operation fell within the rule of law even if that application of the law left the Pakistani students tainted with terrorist charges, a taint that could readily put them into jeopardy if they return to Pakistan. Thus, seven of the accused have applied for refugee status, arguing that the terrorist label made it dangerous for them to return home.

26 Citizens are also accused of terrorism and such cases are not only applicable to immigrants and refugee claimants. Cf. Daniel Pipes' discussion of this issue in the *New York Sun* on 1 March 2005 of Abu Ali, an American citizen (http://www.danielpipes.org/article/2434; http://www.nysun.com/article/9865). Ahmed Omar Abu Ali, now 23, was born in America to immigrant Jordanian parents, attended an American Islamic Academy with a Saudi curriculum and partly funded by Saudi Arabian money. He graduated as a valedictorian. (According to Pipes, the first-grade teachers' guide at the Islamic Saudi Academy teaches that Judiasm and Christianity are false religions.) He then continued his studies at the Islamic University in Medina. Saudi authorities arrested Ali in May 2003 in connection with a bombing in Riyadh that killed thirty-four, nine of whom were Americans, and then extradited him to the USA. In February of 2005, he was indicted for plotting the assassination of President Bush. The prosecution alleged that Ali had been in contact with Al Qaeda and, in 2002, discussed

The issue of balance

The Canadian Parliament, in its three-year review of the Anti-Terrorism Act, Bill C-36, will almost certainly revisit the issue of security certificates that pre-date Bill C-36 for they were allowed under a provision of the Immigration and Refugee Protection Act since 1991. But will the issue simply be assessed in terms of weighing the need to protect Canada and Canadians against protecting the rights of the person arraigned under this extraordinary Act? Certainly this has been the way the issue has been approached by defenders, critics and commentators.

At a conference on 'Peace, Order and Public Safety Post 9/11: Are We Getting It Right?', Robert Wright, National Security Advisor to the Prime Minister and Associate Secretary to the Cabinet, gave the keynote address and tried to answer the question raised in the name of the conference. The presumption with respect to the measure and criteria of getting it right focused on a balance between human rights/civil liberties, that are the hallmarks of Canadian democracy, and national security as exemplified domestically in our National Security Policy as expressed in the way the Canadian Security Intelligence Service (CSIS) operates to acquire and use intelligence in our law enforcement system.[27]

Michael Pearson, the Special Advisor to the Minister of Foreign Affairs who is responsible for co-ordinating the International Policy Review process, Ananya Mukherjee Reed, an Associate Professor in the Department of Political Science at York University, and the columnist, Richard Gwyn, addressed a Public Policy Forum in Toronto on Canada's International Policy Review to ask if a proper balance has been struck between foreign policy concerns (which I take to be issues of national interest and self protection) versus the protection of human rights. The tension between these two poles of the issue of protection against security threats and the protection of human rights and civil liberties sovereignty is said by the government to be in balance and subject to safeguards by requiring two and not a single minister of the Crown to make the determination, to insist that such a determination be reviewed by a judge, and that security certificates must be renewed every twelve months. In other words, the balance is maintained by placed the opposing forces upon a fulcrum of reasonable procedural safeguard.

However, my argument is that there is *no* possibility of striking such a balance. 'Reasonableness' with respect to the government's case of providing the fulcrum upon which the balance is kept is simply too low a standard of justice under any

---

eliminating Mr. Bush by getting 'close enough to the president to shoot him on the street', or by deploying a car bomb. Defenders of Ali claim the information for the charge was derived by Saudi authorities through torture. In Pipes' view the balance must favour protection against terrorism rather than a defence of civil liberties. 'Mistakes enhancing national security leave innocents spending time in jail. Mistakes enhancing civil liberties produce mass murder and perhaps a Taliban-like state (with its near absence of civil liberties).'

27 Kent Roach of the University of Toronto Law School, Martin Rudner of Carleton University, Wesley Wark of the University of Toronto, Professor Richard Aldrich of Nottingham University dealt with human rights issues while Stuart Farson of Simon Fraser University and Steven Rieber of the Sherman Kent Center focused on the use of intelligence that provided the input into the balancing act.

circumstances. The procedural safeguards only cushion the low standard as it is made to carry the weight of the competing claims of dire security threats versus horrific infringements of basic individual rights. Reasonableness simply requires that the government minister attest that he or she followed proper protocol and investigated whether confidentiality was required when requiring indefinite detention of foreign nationals based on secret evidence, and that secrecy is required to protect intelligence sources and national security.

More importantly, even if procedural safeguards and standards of reasonableness are used to provide a fulcrum on which to balance the opposing forces of countering security threats on the one hand and protecting civil liberties on the other hand, the balance is inherently unstable. In the name of balance, arguments are put forth simply to tip the balance towards one side. Defenders of civil liberties simply pile up more examples of threats to rights and call on other domestic and international human rights legislation. Defenders of giving priority to the security threat and trumping and curtailing civil liberties to some extent simply pile up more fears on their side. What results is not balance in a stable form but a teeter-totter that is inherently unstable and never in balance.

In the model of balance that is used in assessments by both the defenders of civil liberties and those who insist that the security concerns are so great that they must trump the requirement that rights be protected, we have two forces pulling in diametrically opposed directions. Perhaps the teeter-totter is the incorrect analogy. Perhaps the proper analogy is a suspension bridge such as the Macdonald Bridge or the Mackay Bridge.[28] If this were the case, cables – very strong ones at that – anchored at either end by the opposing forces provide the strength and stability. Procedural rules and vague standards such as reasonableness my provide a weak fulcrum on which to place the debate between the lovers of civil liberties and those dreading terrorists attacks, but they are not something from which any significant weight can be carried. More importantly, procedural rules and standards such as reasonableness belong to a different order. They do not link two opposing forces by a common thread. They bear no commonality whatsoever between human rights and fear of threats. In fact, I find nothing that can tie together these forces let alone provide a mode of balancing them. A suspension bridge depends on the *same* cable being anchored at opposite sides that must be paired. However, there is no singular uniting source of support – let alone a pair of them – that links human rights and the defence against terrorist threats. Nor do those who speak of balance offer a common thread. Instead, there is a quest for the proper point of balance between two opposing forces, but without the string of steel tying them together and from which the various issues can be suspended. Nor can I think of what could serve as the uniting thread.

What do the civil libertarians do? They keep piling the weight up on one side – the principle of allowing an accused to undergo a fair and transparent judicial trial, the United Nations' Convention against Torture and Other Cruel or Inhuman or

28 Other, perhaps more famous examples, are the Clifton Bridge over the Avon Gorge in Bristol, the Akashi Kaikyo Suspension Bridge between Honshu and Shikoku Islands in Japan, the famous Brooklyn Bridge, or even the wooden Capilano suspension footbridge in Vancouver made infamous when a mother dropped her baby over the side.

Degrading Treatment or Punishment, the Charter of Human Rights and Freedoms, the International Covenant on Civil and Political Rights, the principle of non-discrimination between citizens and non-citizens, the right of an accused to have charges laid against him or her and the right to be appraised of those charges and the evidence in support of them, the fundamental notion that human rights are inalienable, the principle of the viability of evidence rather than the possibility of the allegations being true, the principle of the adversarial notion of western systems of justice, a basic tenet of the rule of law permitting the right of appeal, and so on. In the name of balance, they simply load the weight on one side and then insist that, therefore, the point of balance has to be near their side. Instead of a suspension bridge, what you have is a teeter-totter in which the case is supposed to slide to your side if it is weighed down heavily. Hence the structure is, in fact, totally imbalanced.

The same thing happens in the case of those who argue that the issue of security trumps any concern with civil liberties. They heighten the fear. Whatever weight is put on abstract concerns for principles of human rights, they can always be offset by up the fear quotient. Thus, just as in the case the civil libertarians, they do not seek balance but rather to tilt the teeter-totter towards their side so that the case becomes *de facto* one of a strict concern with national security.

Is there a different model of providing balance than the teeter-totter mode used by the participants in the debate? On 10 December 2004, a three-judge panel of the Canadian Federal Court of Appeal ruled in favour of Ottawa's right to use security certificates to detain suspected terrorists without charging them or giving them full access to the evidence against them. On 22 October 2007, the Canadian government introduced modified security certificate legislation. Under the proposed legislation, special advocates can protect the interests of the individuals and challenge the government's claims of secrecy over evidence. Seven of nine members of the Supreme Court of Canada (Justices Morris Fish and Louis LeBel dissenting) upheld the constitutionality of Section 83.28 of the anti-terrorism provisions of the Criminal Code. The majority ruled that an effective response to terrorism must be balanced against the fundamental values of the rule of law. Since the law did not infringe the right against self-incrimination, information obtained in that way could be used in extradition or deportation hearings and by foreign authorities.[29] The Supreme Court ruling held that an effective response to terrorism must be balanced against

29 Further, the judges were found not to lack institutional independence or impartiality, nor were they co-opted into performing an executive function. However, the rulings provided that safeguards be applied, including a presumption that such hearings will be open to the public. In the companion *Air India* case concerning public access re the *Vancouver Sun* request that the name be made public, the Supreme Court majority ordered that Kaur Reyat's name be made public, and that the proposed judicial investigative hearing be held in public, subject to any order by the presiding judge to exclude the public, or ban publication, in order to prevent unduly jeopardising the interests of Reyat, third parties, or the investigation. The majority said the presumption of openness should be displaced only upon proper consideration of the competing interests at every stage of the process, and the existence of an order, and as much of its subject matter as possible should be made public unless, under the balancing exercise of the Dagenais/Mentuck test, secrecy becomes necessary. See the following for PDF version: http://www.lexisnexis.ca/documents/TLW_July2.pdf.

the fundamental values of the rule of law. The issue was not balancing the threat of terrorism against a respect for human rights, but rather balancing the *response* to terrorism against a respect for the rule of law. Grotius rather than Kant stood on one end. At the other end, efficaciousness stood in place of international theory based on realist principles and, hence, fear of a threat. The balance was between law and efficaciousness, between legal norms and factual expectations. This is not a balance between opposing forces but between two complementary facets of the same whole.

What the Supreme Court ruled was that the incarceration of the individual without charges did not breach any fundamental rule of law. The individual was not in prison since the individual was free to leave as long as he left the country. There was a possible expectation that the individual would be tortured if he left. There was an opposing possibility running in the other direction that, if released, the individual could contribute to a terrorist action with terrible consequences. Based on the evidence, it was necessary to weigh one expectation against the other as well as insist on certain absolute principles of the rule of law, such as the rule against self-incrimination.

What we have is neither a suspension bridge with a common cable or set of cables linking two opposite sides in balance, that the rhetoric suggests, or a teeter-totter which calls balance the imbalance of tipping everything to the side one favours. Instead, we have a cable-stayed bridge, such as the Sunshine Bridge in Tampa, Florida in which the cables are not supported by anchorages at each end. Rather independent sets of cables are carried over a singular pillar to each side to support the roadway. They are the expectations of the different possible outcomes. Those cables are tied to the structural roadway of the rule of law anchored to the base of the tower. The roadway and the supporting cables are complementary rather than opposing forces. Expected facts and the derivations of the rules of law are but the upper and lower parts of the same construction held in perfect equilibrium. The head is the tower that calculates the expectations and sends out its cables like the strings of a harp to tie to the legal norms. The base of the tower and your arms are the legal bridge in turn supported by stays that define expected outcomes and loop over your head to each arm.

My argument here is not that the judgment of the Supreme Court was correct, but the mode of making that judgment was correct *in principle* in that a proper model of balance was being employed as distinct from the one offered by the civil libertarian camp, the realist camp or the moderates claiming balance was maintained because of procedural safeguards where what we had was, in reality, a teeter-totter model of imbalance. A critique of the Supreme Court application of the model of balancing would involve ascertaining whether enough strands of the cables of expectation were being employed, and whether different aspects of the legal roadway needed to be enjoined in addition to the ones cited. My point, however, is not to determine what the balance should be, but only to endorse the model of balancing employed.

The sovereignty issue

Let us now apply the model of balancing to the issue of sovereignty involving security, immigration and refugees. If we adopt the security issue and the fear of threats as our main base for making a decision, we generally adopt or have behind us a view that the primary and perhaps only meaning of sovereignty is absolute state sovereignty. With respect to state sovereignty, the state is the ultimate source of law (formal authority) as expressed through the legislative, executive and judicial branches of government. The state gains that formal authority by the successful demonstration of the use of coercive power to govern a specific territory and protect that territory and the people on it from any threats. Coercive power does not reside simply in an established military and army, but in the individuals who pool their power and transfer it to a state authority that becomes the exclusive repository of coercion and determining when and where to use the state's instruments of might. The dominant trend in international relations (IR) in the USA focused on inter-state relations between *absolute* sovereign states that recognised each other's independence in the domestic sphere as the ultimate source of law and as the *exclusive* repository of coercion in determining when and where to use the state's instruments of might in governing and protecting its citizens and a defined land mass. Based on what Charles Sampford referred to as 'the prior successful use of force', effective domestic control became the primary basis for international recognition of sovereign legitimacy and the right to take part in the international order (Krasner; Tilly). With states, varying so radically in power, that version of IR focused on trying to establish an equilibrium or balance of power among states to avoid inter-state wars. In current security terms, those external threats have been seen to come from issues varying from international terrorism, nuclear proliferation,[30] biological and chemical weapons as well as failed states.[31] The domestic complement to this *realpolitik* or realist view of international relations entailed using the instruments of the state to guard against subversive threats from within.

The opponents of the primacy of state sovereignty make their argument on the premise of the primacy of individual sovereignty and a theory of 'natural rights'. Whatever powers the individual surrendered to the state, that individual never surrendered his or her natural or universal rights. The state may have been a necessary tool to gather and collect coercive power to protect, but the protection of individual sovereignty was always prior. Progressive versions of sovereignty were based on the rivalry of natural law and human individual rights versus divine sovereignty now vested in the state, but, in cases of dispute, always allowing the concern with individual liberties to trump concerns with state security.

If realist state sovereignists give priority to issues of security in competition with those who place primacy on individual sovereignty, the latter liberal cosmopolitans argue than any individual who lacks a state that protects his or her human rights has

30 Cf. Michael Byers of the University of British Columbia, Ron Purver of the Canadian Security Intelligence Service and Gavin Cameron of the University of Calgary.

31 Cf. Margaret Purdy, from the Canadian Department of National Defence and Cristina Rojas of Carleton University, who both focus on the threats failed states pose.

a right to receive protection from another state. That is, *de facto*, the definition of a convention refugee, a person with a well-founded fear of persecution because of his or her membership in a group that is being persecuted. That person lacks membership in a state that provides protection. Every human has a right to such a membership. Lacking such membership, that individual has the right to claim membership in another state that does provide protection. Unlike immigrants, the state does not make a choice in deciding to admit the individual. Rather, the state is obliged to admit such individuals into its protection provided the individual demonstrates that he or she has a well-founded fear of persecution in his or her home state from the organs of that state, or that the state is incapable or unwilling to provide such protection.

I now want to introduce a third dimension into this debate. The above two dimensions focus on state sovereignty (the international relations theories of realism expressed in *realpolitik*), versus concerns with civil liberties and human rights and individual sovereignty in the doctrine of liberal cosmopolitanism. Hans Morgenthau, in the heritage of Hobbes reflected in the domestic sphere, rivals individual rights theorists such as John Rawls. The third dimension is rooted in the communitarianism of Michael Walzer, who emphasised group rights and the rights of societies to determine whom to accept as new members.[32] In fact, Walzer claimed that the most important decision societies make is determining whom to admit into membership.

In the name of communitarian values, there have been pressures in most Western countries to introduce a 'values' measure in accepting new members based on whether prospective immigrants are committed to upholding some key values allegedly held by Canadians: respect for human rights and gender equality, a commitment to democratic procedures and the rule of law, a respect for differences and multiculturalism, and a respect for democratic values. In the case of Quebec, there is an additional component, the prospect of the individual being selected to contribute to the continuation and perpetuation of the Quebecois nation. The selection procedures for both English and French Canada already have a built-in value component because immigrants are selected on the basis of whether they have the skills, commitment and ambition to achieve success in a material sense rooted in a basic conception of possessive individualism. So the value strands of communitarianism and group rights stretch over the pillar of national sovereignty in a more universal material and individualistic direction and in a communal direction focused on group rights. Even in English Canada there exists a determination by most existing members to perpetuate the nation's difference from that of America, and recent evidence indicate that, on issues of identity, other than in measures of material values, the two nations are diverging. This alone provides a formidable obstacle to creating a common security zone and creating a security perimeter around Canada, the USA and Mexico.

These strands stretch out in two directions from the saddle of the tower of national sovereignty towards material individualism and, in the other direction, towards communitarian particularism. They join with the horizontal connecting roadway of the rule of law on opposite sides. On the one hand, those values require

32 Cf. Michael Walzer (1983) *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books), Chapter 2.

that citizens and non-citizens be treated equally under the law, a principle consistent with material individualistic values. On the other hand, provisions of the law subject Canadian citizens and foreigners to different legal procedures. Canadian citizens suspected of terrorist-related activities must be charged under the Criminal Code. Non-Canadians may be held under indefinite detention under a security certificate. It is not as if the privileges of citizenship and immigration must be equalised as much as possible. Rather, in most respects, they must be treated as having equal rights before the law. But members of a state have additional rights beyond merely voting and holding office and may include rights to differential treatment in cases of security concerns

It is important to re-emphasise that in a cable-stayed bridge, it is the tower that holds both the roadway and the cables tied to the roadway that are anchored to the top of the tower just as the roadway is linked to the base. In a suspension bridge, the towers merely provide the height to allow the suspension cables to arch over; it is the anchors at each end into which the cable are buried that carry the weight. Thus, the key is the weight at either end with the strength of the cables between them providing the support. In a cable-stayed bridge, however, the anchoring, weight, and height of the tower provide the strength. Both the cables roped to the saddle at the top and the roadway connected to the base may travel in opposite directions, but all the parts are anchored to the principle, in this case, of *national* (in contrast to state and individual) sovereignty that has its most important impact on the selection of immigrants.

However, there is always more than one tower. And there may be more than just two towers. There may be a series of towers each supporting a section of bridge on each side. One section of bridge then simply touches and connects with another section with similar supports. There is no common support mechanism, but there is a meeting ground connected by the use of common girders. The key is that the load is not transferred to the extreme anchorages at each end but to the tower itself over which the cables run. The strength for the cables comes from the tower saddle and not the anchorages at the extreme ends. Further, the continuity is not provided by the cable that provides the support and is linked to both ends, but by the common girders supported by both sets of cables on each end. In this case, the common girders belong to the rule of law.

As I indicated above, this lecture is more about 'finding the balance' and using the issue of security, immigrants and refugees to discuss the principle of balance as a mode of resolving tensions between opposing values. But it is also about different conceptions of sovereignty exemplified in the issue. In this case, we have a cable-stayed bridge with at least three different towers – the immigration tower in the centre based on national sovereignty, the refugee tower on one side based on individual sovereignty and cosmopolitan individual rights, the most basic of which is the right of every individual on earth to live as a member of a state that protects those rights, and the security tower of state sovereignty on the other side that enjoins creating a strong state that will protect the territory and people of the state. It is not as if the security issues must be set up as an opposing force to human rights. Rather, the rule of law unites the three different towers and three different interpretations or aspects

of sovereignty. There is never and should never be an issue of balancing individual rights and state security.

The individual as a sovereign responsible for and to him- or herself touches on a fundamental aspect of citizenship in a liberal society. On the one hand, citizenship is about the protection of the civil liberties and rights of all citizens, protections that have been extended in the last quarter century to foreigners on Canadian soil.[33] Citizenship is also about the duties an individual owes, but in this case, the duties are universal ones. The individual does have a responsibility and a duty towards all members of the human community, a notion that is captured in the notion of human security.[34] Thus, the tower of individual sovereignty supports both the cables of individual rights on one side and the cables travelling in the opposite direction towards duties and obligations, obligations that in the extreme may entail self-sacrifice in expeditions abroad to serve the rights of human beings all over the world whatever their race, nationality, colour or creed.

The second sub-topic in our title, immigration, though administered by the state, is about the principles governing a community's decisions to accept new members. Immigration concerns the sovereignty of a people, the rights of a group to secure its own continuity and the need of that community to do so by recruiting the best, the brightest and the most energetic who can contribute to the wealth and prosperity of that community. In one direction, the cables support the rights of a nation to ensure its continuity and can be anchored in both a fractionated sovereignty as between the government of Canada and the government of Quebec. In the other direction, the cables provide support for the individuals who pursue the most common values of both Anglophone and Francophone Canada, possessive materialism.

The third sub-topic, security, is generally considered to be about the responsibility of a state to protect its territory and citizens from external threats, though, given the deflation in the sense of external threats to Canada, a conception of human security and the obligation and duty to provide security for those most in need around the globe has evolved to offset national security as a primary foundation for Canadian foreign policy. Unfortunately, because there is a confusion between the voluntary obligation which each of us *as individuals* should feel and hopefully exercise towards each and every human on this planet and the responsibility and duty we owe ourselves and members of our same polity to protect and defend ourselves, the issue of balance is mistakenly located in offsetting individual rights against state security concerns. The balance that must be struck in the realm of state sovereignty is not between the obligations to others rooted in the human security doctrine and the need to protect oneself and one's group from threats from others, for the former is supported by the pillar of individual sovereignty rather than state sovereignty. Rather, the balance of cables supported by state sovereignty is between the security

33 The 1985 Singh case extended the right of a refugee claimant to an oral hearing in the presence of counsel.

34 Cf. the website of the Canadian Consortium on Human Security (CCHS), an academic-based network promoting policy-relevant research on issues relating to human security (http://www.humansecuritygateway.com/; www.humansecuritygateway.info/).

we demand of the state for our own protection and the self-sacrifice we owe that state in return for that protection.

These three towers – individual sovereignty at one end, state sovereignty at the other, both mediated by national sovereignty in the middle, with their respective concerns with individual rights and obligations, state rights and obligations, and national rights and obligations – are three different towers. Issues of security fears are not matched against human rights protection. They each belong to different towers. What connects the towers are the girders of the bridge called the rule of law that provides the roadway supported by the separate cables hung from each of the towers and going out in opposite directions.

What balance is to be struck between individual rights protections and the obligations individuals owe to every other individual in the world to ensure protection of those rights? What balance is to be struck between the rights to perpetuate a group identity and to provide particular protections for members of one's own nation versus the obligations to treat everyone equally under the law? What balance is to be struck between a state's obligations to ensure the security of its own territory and the people on it and the obligation states assume to protect others who lack the support of the states in which they are members? These are the real questions – not balancing our fear of threats against the preservation of individual liberties.

I could elaborate more, particularly on the fact that this cable-stayed bridge is anchored at both ends by self-sacrifice through duties and obligations to one's fellow members of the state at one end and through duties and obligations to all members of the human family at the other end. But perhaps it is better to end with an illustration of the cable-stayed bridge with the three towers, represented in Figure 8.1.

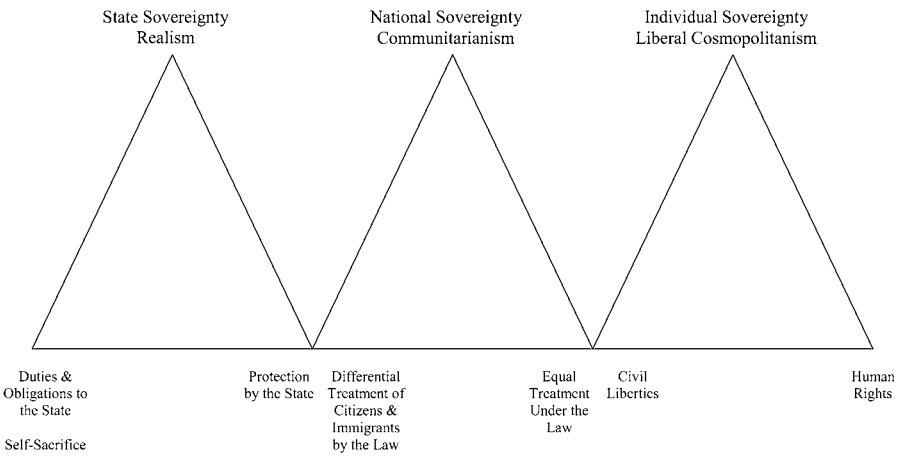

Figure 8.1 Sovereignty Diagram

Chapter 9

State Sovereignty and International Refugee Protection

Robyn Lui

The international protection regime for refugees and uprooted people is a striking example of the tension between human rights as rights of the individual (each of whom is entitled to equal moral consideration) and sovereignty as the rights of states to determine their internal affairs without external non-interference. At the core of current debates on asylum, repatriation, protracted refugee situations, and burden-sharing arrangement, to name but a few problems of protection, are questions about the moral purpose of sovereign states, our duties beyond borders, and 'saving strangers'.

In this volume, Hudson, Camerilli and Zhang have provided illuminating accounts of the historical and cultural specificities that frame understandings and practices of sovereignty.[1] Sovereignty is a social construct and like all social practices, it both persists and is transformed over time. Sovereignty never has been absolute. In this chapter, I take a different direction. While I acknowledge the historical particulars of sovereignty, my aim is to examine some of the disquieting consequences of the system of territorial sovereign states. It begins with how the cartography of sovereign states has influenced our conceptions of political community and the bounds of justice and responsibility. This leads to a brief historical outline of the refugee protection system and an examination of the role of international law. The final section of the chapter charts some of the critical challenges of refugee protection and the attempts to resolve these dilemmas.

The argument is twofold. First, the norm of state sovereignty underpins the many of the key practices of the refugee protection system. The refugee dilemma, I contend, demonstrates the power of Westphalian order and its effects in producing a regime of truth about social relations and human experience inside and outside the state. With respect to refugees, the system has contributed to the normalisation of certain forms of inequality and injustice. Second, the difficulties in establishing a humane and effective international refugee protection system are linked to, among other things, the reality that the system continues to be influenced primarily by the strategic interests of states. International protection does not take place in a political vacuum. Prosperous preponderant states have often set the policy agenda. One

1 See Chapter 1 (Wayne Hudson), Chapter 2 (Joseph Camilleri) and Chapter 6 (Yongjin Zhang) in this volume.

outcome of this situation has been a protection deficit for refugees in geographical regions of low strategic importance.

The order of borders: sovereignty and modern political life

Despite conceptual speculations about the end of sovereignty, in practice, the state and its attributes of sovereignty, territory and population anchor understandings of modern politics.[2] The fundamental social norm of international relations is still state sovereignty, which conveys a number of other norms such as sovereign equality, territorial integrity of states, non-intervention in internal affairs of states. The society of sovereign states is the cornerstone of international order. This society, with its rules of engagement, principles of legitimacy, and diplomatic machinery preserve the liberty or autonomy of states. States recognise this most basic social rule of the Westphalian system. Hedley Bull declares:

> [T]he starting point of international relations is the existence of states as independent political communities, each of which possesses a government and asserts sovereignty in relations to a particular portion of the earth's surface and a particular segment of the human population.[3]

The activities of governing the population within the state and the movement of people across state boundaries are intrinsic to what is means to be a sovereign state.

The moral geography of sovereign states maps political life inside/outside boundaries, thus distinguishing the community of citizens from the mass of non-citizens. Borders divide and connect. They raise crucial ethical issues because which side of the border people find themselves on can have profound consequences for their freedom, welfare, identity and even survival. Sovereignty is the power to decide and fix the boundaries between who or what is included and excluded.[4] It produces and normalises the chauvinistic character of modern citizenship. We have come to assume that membership boundaries of primary political communities coincide with the geographical boundaries of primary political units, that is, states. Like sovereignty, citizenship has an internal and external aspect.

National citizenship comes with legal, political, social, economic, and cultural goods and entitlement, and not surprisingly, women, indigenous peoples, ethnic minorities, migrants, and other disenfranchised and marginalised groups belief it is a status worth fighting for. Yet, national citizenship is also highly discriminatory. A citizen as a member of an exclusive political community enjoys privileges within his or her member-state that are not available to non-citizens. In other words, a person's

2 Robert Jackson (1999) 'Introduction: Sovereignty at the Millennium', *Political Studies*, 47(3), 423.

3 Hedley Bull (1977) *The Anarchical Society: A Study of Order in World Politics*, 2nd edn (London: Macmillan Press), 8.

4 Giorgio Agamben (1998) *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press).

status *vis-à-vis* a particular state defines the set of rights that they can enjoy and a state's obligation towards their wellbeing.

Each state is accountable, first and foremost, for the welfare and protection of its own citizens.[5] This is the proper relationship between a state and its citizens because according to liberal political thought, in particular its liberal-nationalism variant, state legitimacy rests on, among other things, 'popular sovereignty', that is, the 'people' as *demos* and the state's capacity to deliver some version of the good life. A state is empowered on the grounds of its capacity to advance claims about peace, justice, and liberty for its citizens. In the international context, this modern statist and exclusionary articulation of citizenship has profound effects on claims of justice and equality.

If human beings are considered equal, their equality is recognised within the bounds of the state in which they belong. We make appeals for refugees in the name of common humanity but the grounds on which claims about peace, justice and equality are advanced are not to some global cosmopolis but against a certain state which is the 'contractual guardian' of its citizens. Liisa Malkki argues that imaginaries of the *national* form and the *national* citizen provide the grid of intelligibility in contemporary discourses of 'international community' and 'humanity'.[6] Cosmopolitanism is not in opposition to the state-nation-citizen order; the cosmopolitan aspirations of 'humanity' are articulated through the discourse of national citizenship. Human rights are protected and enforced only as national rights conferred by a national state. It is when one belongs legally to a state and one's human status recognised and guaranteed by its law, does human rights have a context for their actualisation.

Refugees represent population movements of a very particular kind. Refugees are distinct from migrants because of their inability to enjoy either the formal or substantive dimensions of modern citizenship. The failure of their 'protector' states to provide the minimal conditions for political life force them to seek protection elsewhere. The refugee regime offers 'international protection', but this protection is conceivable and feasible because states have agreed to treat non-citizens in a particular way.

The concept of 'durable solutions' in the international refugee regime affirms citizenship as a form of life. A permanent solution to the refugee problem is one that transforms the refugee into the citizen and re-establishes the citizen-state regulatory bond. The three accepted durable solutions – repatriation to the country of origin, integration into the country of asylum or resettlement to a third country – all affirm the value of citizenship and states for experiencing the spectrum of goods that is

5 Admittedly, this is an idealistic picture of the state-citizen bond. The dark side, as Arendt's political analysis shows, is that the attribution of exclusive territoriality and inviolable sovereignty to each nation-state over internal matters presents states with the possibility to deprive non-citizens of basic rights and to threaten the rights of national minorities, even if they are citizens. See Hannah Arendt (1976) *The Origins of Totalitarianism* (San Diego, New York and London: Harcourt Brace).

6 Liisa Malkki (1994) 'Citizens of Humanity: Internationalism and the Imagined Community of Nations', *Diaspora*, 3(1).

often equated with human rights. The appeal to liberal internationalism has remained largely within the exclusivist modern concept of sovereignty. Similarly, the refugee protection system, for the most part, affirms rather than transforms the Westphalian order.

It is, therefore, misleading to assume that refugee movements challenge the state-centric frame of international politics because they cut across space and create a new space not subject to traditional notions of boundaries and boundedness. The refugee problem or more accurately, the problematisation of populations defined as refugees, reflects the centrality of the order of sovereign states. Refugees represent an aberrant condition in international relations where the plurality of territorial states seeks to govern the human population as national citizens. In a world of administered spaces and people, the presence of refugees is treated as abnormal.[7] What would be our understanding of refugees if states are not the political and spatial foundations of modern life and the ideas of nation and nationality have no value?

The refugee protection system

Post-1919 Europe

A refugee protection regime emerged in the aftermath of World War One in Europe. Although the language of international protection was used to describe the activities of the regime, the commitment to protect vulnerable people was secondary to the aim of managing mass population displacement. The regime was a part of a broader attempt to maintain the fragile order in Europe following the peace treaties which redefined the boundaries of political communities based on the principle of nationality and reorganised territories and populations into national states.

Prior to 1921, few international legal arrangements addressed mass refugee movements. Voluntary agencies and non-government organisations like the International Committee of the Red Cross (ICRC) met the needs of the displaced. The League of Nations took tentative steps toward a more coordinated relief effort after an appeal by Gustave Ador, President of the ICRC, who pointed out that close to two million Russians were scattered across Europe, without status and protection.[8] Between 1922 and 1946, international agreements adopted a group category approach to the definition of refugees. The instruments that determined the status of refugees were based on national origins and not a general definition of the concept or an abstract notion of individual persecution. The idea of a universal definition of a refugee was proposed by the Institute for International Law in 1936, but failed to receive support.

---

7 Leon Gordenker (1987) *Refugees in International Politics* (London and Sydney: Croom Helm), 1.

8 Eugene M. Kulischer (1948) *Europe on the Move: War and Population Changes 1917–1947* (New York: Columbia University Press), 54.

Post-1945

Historical studies of the refugee regime noted that western states dominated the intern-governmental relief efforts and the legal instruments developed after World War Two.[9] Due to a boycott by the Eastern Bloc at the United Nations, mostly western states drafted the 1951 Convention and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR).[10] Refugees outside Europe were at the margins of the protection system. In fact, their plight fell outside the mandate of refugee agencies. The United Nations established *ad hoc* 'Good Offices' for displaced Asians but they received very limited emergency assistance. One of the most glaring instances of the failure to provide relief and protection was the mass population displacement that followed the partition of India and the creation of Pakistan. Pakistan settled seven million Muslim refugees without international relief from the United Nations. The other failure to protect concerned Palestinian refugees, who constitute the world's largest and most protracted refugee situation.[11]

The current legal instrument defining the term 'refugee' is the *1951 Convention relating to the Status of Refugees*,[12] modified in 1967 to remove its explicit focus on the events of the war in Europe.[13] The Refugee Convention defines the term 'refugee' as:

> … any person who … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[14]

---

9 See Louise Holborn (1956) *The International Refugee Organization: A Specialized Agency of the United Nations: Its History and Work 1946–1952* (London: Oxford University Press); Louise Holborn (1975) *Refugees: A Problem of Our Times: The Work of the United Nations High Commissioner for Refugees, 1951–1972,* vols. 1 and 2 (Metuchen NJ: Scarecrow Press); Kim Salomon (1990) 'The Cold War Heritage: UNRRA and the IRO as Predecessors of UNHCR', in Göran Rystad (ed.) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund: Lund University Press); Göran Melander (1988) 'The Concept of the Term "Refugee"', in Anne C. Bramwell (ed.) *Refugees in the Age of Total War* (London: Unwin Hyman), 7–14.

10 Göran Melander 'The Concept of the Term "Refugee"', 9.

11 The UN Relief and Works Agency for Palestine Refugees (UNRWA) is responsible for most of the Palestinian refugees, while UNHCR is only responsible for the Palestinian refugees in Iraq and Libya. According to the US Committee for Refugees, over 1.6 million Palestinian refugees in Gaza, Lebanon, West Bank have been displaced for 56 years. There are almost half a million Palestinian refugees in Egypt, Jordan and Saudi Arabia; their situation has continued for 37 years. See USCR (2005) *World Refugee Survey* (Washington DC: USCR); Benny Morris (2004) *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge: Cambridge University Press).

12 *Convention relating to the Status of Refugees 1951*, 189 UNTS 150.

13 *Protocol relating to the Status of Refugees 1967*, 606 UNTS 267.

14 Article 1(2)189 UNTS 150.

This definition sets out three important conditions of being a refugee.[15] The first condition is alienage. Persons qualifying for refugee status must have left the territory of the state where they were nationals, or habitually resided. The second condition is persecution. Political events that led to flight from the country of origin must be accompanied by genuine risk of serious harm against them, or at least against a section of the population with which they identified themselves. Persecution applies to acts perpetrated by state and its various agencies. The third condition is failure of state protection. The root-cause of a person becoming a refugee has to do with the broken bond of trust, protection and assistance between the national citizen and the state.

Three features of the Refugee Convention and its Protocol also deserves our attention. First, the Convention does not include provisions relating to status determination procedures, thus leaving this important aspect of refugee protection largely to the discretion of host states. Second, it contains a general definition of who are to be considered a refugee, that is, refugee status is determined on the basis of individual rather than any group category. Third, stateless persons and internally displaced persons (IDPs) are outside the scope of the refugee protection system.[16] These three characteristics of the Refugee Convention have contributing factors to a number of protection challenges we are faced with today. As we shall find later in this chapter, the exiled-based definition of refugee is particularly troubling because most uprooted people today are IDPs.

International law and refugee protection

According to Benedict Kingsbury, international law expresses 'both an ethic of order between states associated since the sixteenth century with European statecraft and an ethics of rights of individuals and collectives associated with Enlightenment rationalism, the American and French Revolutions, socialism, anti-colonialism, and human rights'.[17]

Despite this tension, the principle of state sovereignty remains foundational to procedural and substantive rules of international law. International law is created

15 For analyses on the definition of refugee in the 1951 Convention and its status in international law see Erika Feller, Volker Türk and Francis Nicholson (eds) (2004) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press); Guy Goodwin-Gill (1996) *The Refugee in International Law*, 2nd edn (Oxford: Clarendon Press); Atle Grahl-Madsen (1966 and 1972) *The Status of Refugees in International Law*, vols. 1 and 2 (Leyden: A.W. Sijthoff); and James Hathaway (1991) *The Law of Refugee Status* (Toronto: Butterworths).

16 International conventions on statelessness are *Convention relating to the Status of Stateless Persons 1954*, 360 UNTS 117 and *Convention on the Reduction of Statelessness 1961*, 989 UNTS 175. In 1998, the UN Commission on Human Rights drafted *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2.

17 Benedict Kingsbury (2003) 'People and Boundaries: An "Internationalized" Public Law Approach', in Allen Buchanan and Margaret Moore (eds) *States, Nations, and Borders. The Ethics of Making Boundaries* (Cambridge: Cambridge University Press), 299.

and imposed more or less out of self-interest and common interest of states.[18] Most international law, including human rights norms and the Refugee Convention, is implemented and enforced through its incorporation in municipal law.

Therefore, it is misleading to argue that international obligations for refugees have eroded the state sovereignty. When a state becomes a signatory to the Convention, it does so as the legitimate sovereign authority. It chooses, *voluntarily*, to respect its provision. A state can assert its sovereignty by legally and politically limit the number of refugees who will be protected by the Convention. By establishing and consenting to certain standards of treatment of refugees, states are asserting their sovereign power to define, delimit, and contain those rights, and thereby domesticating their use and affirming their authority as the source from which such rights spring.[19] International legal obligations may restrict a state's capacity to exercise its 'absolute' sovereignty, but they do not deprive it of its sovereignty as a legal status.

In international refugee law, the most fundamental form of protection is not asylum but the non-refoulement provision found in article 33(1) of the Refugee Convention:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Convention prohibits refoulement to dangerous territories but does not oblige states to provide asylum to a person who satisfies its refugee definition. International refugee law is unclear whether refugees can be indirectly refouled to other countries. At present, there do not appear to be any binding legal rules that suggest a refugee cannot be relocated involuntarily, as long as the principle of non-refoulement is respected. In practice, non-refoulement as protection can be offered in the country of first asylum or in any third country capable of providing refuge.

Protection dilemmas

It is impossible to deal with the myriad of issues such as protection in regions of origin; temporary protection, statelessness, the extreme risks faced by women, children and the elderly in conflict-induced forced displacement situations; the proper relationship between humanitarian activities and peacekeeping operations, and the relief-development gap, and safe return. The following are just a few of the pressing protection challenges.

---

18 Andrew Hurrell (2003) 'International Law and the Making and Unmaking of Boundaries', in Allen Buchanan and Margaret Moore (eds) *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press), 276.

19 Martii Koskenniemi (1991) 'The Future of Statehood', *Harvard International Law Journal* 32(2), 406.

Erosion of asylum

Although article 14(1) of the Universal Declaration of Human Rights states that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution', it has not been codified in human rights treaties and therefore, it is a non-binding instrument.[20] Since the end of the post-war economic boom, the tightening of immigration controls, and the arrival of large numbers of non-European refugees at the doors of developed states in the 1970s, developed countries have been adopting narrow interpretation of the refugee definition and their protection obligations. In the name of policy harmonisation, countries in the EU have legislative and inter-state arrangements in place to restrict access to asylum and the provision of legal rights and social services to refugees. Most asylum countries today have implemented a range of deterrence and containment measures, which include the detention system; the practice of interdiction; the classification of 'safe third country' and 'country of first asylum'; and the imposition of carrier sanctions, and visa restrictions. The deterrence policy is comprehensive. Refugees in many countries, not just Western ones, increasingly face restrictive measures which limit their freedom of movement and access to education, skills training and productive livelihoods.

Paradoxically, the restrictive measures have lead to more people entering with illegal or false documents. When demands for entry exceed the opportunities, aspiring migrants make false asylum claims. The refugee-migrant nexus complicates the determination process, which in the eyes of many governments is an indication that 'illegal' migrants are posing as refugees in order to exploit the protection system. The protection dilemma becomes an issue about border protection. And governments intensify their efforts to deter and contain 'unauthorised' entry. The vicious circle continues with refugees and migrants resorting to paying traffickers in order to gain entry.

Since 9/11, the politics of fear has reinforced the perception of refugees as enormous risks to the national security of host states. One immediate and absurd reaction is the allegations that the asylum route is also the passage used by terrorists. Proper procedures for determining refugee status are in danger of being disregarded in the name of national security. There are proposals to introduce refugee-screening processes based on racial profiling. One clear danger is that governments can invoke Article 33(2) of the Refugee Convention to justify their exclusionary policies towards asylum-seekers.[21]

---

20 *UN Declaration of Human Rights*, UNGA res. 217 A (III) of 10 Dec 1948.

21 Art. 33(2) states: 'The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. See Monica Kathina Juma and Peter Mwangi Kagwanja (2003) 'Securing Refuge from Terror: Refugee Protection in East Africa after September 11' and Joanne van Selm (2003) 'Refugee Protection in Europe and the U.S. after 9/11', in Niklaus Steiner, Mark Gibney, and Gil Loescher (eds) *Problems of Protection: The UNHCR, Refugees, and Human Rights* (New York and London: Routledge), 225–236 and 237–262.

Mass refugee movements and burden-sharing

The scope and nature of displacement has changed since the 1990s. Most refugee flows are caused by conflicts that are characterised by the cynical political manipulation of ethnic and religious allegiances, the proliferation of small and affordable weaponry, and high levels of organised violence. Civilian population has become the deliberate targets of violence, and not just the consequences of hostilities. Although mass refugee flows are not recent phenomena – Algeria, Afghanistan, Angola, Bangladesh, Mozambique and Vietnam have all experienced large-scale forced migration – the recent humanitarian crises in Africa, the Caucasus, Central Asia, Afghanistan and the Balkans have been distinctive, among other things, in terms of the intensity. A protection system based on individual status determination process is not designed to handle mass refugee movements and the apparent inability of the system to provide protection for large numbers of refugees have prompted the development of innovative options such as safe havens, temporary protection and mass humanitarian evacuations as carried out in Kosovo in 1999.

A related problem to the phenomenon of mass refugee movement is the issue of burden-sharing. With the asylum debate dominating the refugee discourse in developed countries, the plight of most refugees and IDPs in developing countries has hardly registered in public consciousness (beyond as spectacle). Aggregate data collected based on variables such as the number of refugees and persons of concerns and the ratio of refugees to host population shows clearly that the 'refugee burden' falls markedly on the least prosperous countries. According to the US Committee for Refugees and Immigrants (USCRI), in 2005, there are approximately 11.5 million refugees and asylum seekers, 7.77 million refugees in protracted situations, 21.3 million IDPs.[22] Developing countries host the majority of the world's refugees. The top five host countries for ratios of refugees to host populations are Lebanon at 1:12; Syria at 1:26; Chad at 1:37; Thailand at 1:60 and Tanzania at 1:60.[23] The ratios of refugees to host country populations are 1:582 in Canada; 1:992 in Germany; 1:1,261 in US and 1:1,377 in Australia.[24] USCRI calculates that states with per capita income of less than USD 2000 host 71 per cent of all refugees, while states with per capita income over USD 10,000 host 5 per cent of the world's refugee population.[25] All protracted refugee situations and IDPs are found in developing countries, and they often find themselves competing with the local population for already scarce resources, social services and employment. Violent conflict between refugees and local population is not uncommon.

The disparity is even more alarming when one considers the imbalance between the vast sums of money spent on refugee determination (deterrence and detention) in industrialised countries and the meagre funds they contribute towards meeting the basic needs of the majority of refugees who are located near their countries of origin. The blatant inequity raises serious questions about whether developed wealthy states

22 USCRI (2005) *World Refugee Survey 2005* (Washington DC: USCRI), Table 9, 11.
23 *Ibid.*, Table 11, 13.
24 *Ibid.*
25 *Ibid.*, Table 12, 13.

are deliberately overlooking their responsibility.[26] Wealthy states are spending at least $12 billion to process refugee claims of about 15 per cent of the world's refugee population, yet contributing only $1–2 billion to meet the needs of 85 per cent of the world's refugees who are present in comparatively poor states.[27]

Internally displaced persons (IDPs)

Although the civil wars, ethnic conflict and massive human rights violations that lead to humanitarian emergencies produce mass displacement on both sides of the border, people who have not crossed international borders to seek asylum are outside the scope of the Refugee Convention. The 1951 Refugee Convention is specific on the condition of international protection: a refugee is someone who is outside his or her country of origin and who does not have the protection of the state. An exile-based definition of refugee discriminates against those persons who are internally displaced within their own countries. This 'protection gap' is a cause of great concern. The absence of robust institutional mechanisms, including an operational agency in the field to assume principal responsibility for the growing numbers of IDPs represents a gross inequality within the humanitarian system.[28] A humanitarian regime that defines protection obligations on the basis of exile from one's country is not based on greatest need, and discriminates against the most vulnerable. Many people, particularly women, children, the aged and people who suffer from intellectual and physical disabilities do not have the ability to reach borders.

The Geneva-based Global IDP Project estimates the number of people internally displaced by conflict at 25 million, with women and children making up 70 to 80 per cent of the IDP population.[29] With the average length of conflicts leading to forced displacement and preventing safe return being fourteen years, many IDPs have been displaced for a decade and longer.[30] While a legal framework for protecting

26 In 2000, the UK spent £1.5 billion on processing and providing social support to asylum seekers, while its contribution to the UNHCR is £15 million. UNHCR's budget was just over USD 1 billion in 2000. Canada spent CAD 500 million on asylum seekers, and donated CAD 14 million to the UNHCR. In 1999–2000 the cost of illegal arrivals alone in Australia spent close to AUS 370 million on 'illegal arrivals' and processing and supporting asylum seekers. Australia's core contribution to the UNHCR was AUS 14 million. See Adrienne Millbank (2000–2001) *The Problem with the Refugee Convention* (Canberra: Department of the Parliamentary Library, Information and Research Services), Research Paper 5.

27 James Hathaway (1999) 'Keynote Address: New Delhi Workshop on International Refugee Law', *Indian Journal of International Law* 39(1), 1–31.

28 See Roberta Cohen and Francis M. Deng (1998) *Masses in Flight: the Global Crisis of Internal Displacement* (Washington DC: The Brookings Institution); Roberta Cohen and Francis M. Deng (eds) (1998) *The Forsaken People*: *Case Studies of the Internally Displaced* (Washington DC: The Brookings Institution); Norwegian Refugee Council (2005) *Internal Displacement. Global Overview of Trends and Developments in 2004* (Geneva: Norwegian Refugee Council). See www.idpproject.org.

29 Norwegian Refugee Council (2005) *Internal Displacement. Global Overview of Trends and Developments in 2004* (Geneva: Norwegian Refugee Council), 6.

30 *Ibid.*, 9.

IDPs has yet to emerge, UN agencies and numerous NGOs have often appealed to human rights law and prevention as the grounds for involvement in the issue.[31] More recently, UNHCR has acknowledged that IDPs and refugees experience similar insecurities in terms of the causes and consequences of their displacement and their humanitarian needs.[32]

Protracted refugee situations

While a common definition of protracted refugee situation has yet to be developed within the international protection system, the general character of a protracted situation is when refugees have lived in exile for more than five years, and there is no immediate prospect of finding a durable solution to put an end to their state of limbo. They cannot return to their homeland, cannot settle permanently in their country of asylum, and they have little chance of being resettled in a third country. UNHCR has calculated that there were 38 protracted refugee situations worldwide at the end of 2003.[33] Approximately 7,765,700 refugees have been living in camps and segregated settlements for five years or more, and almost 7 million of them have been displaced for over ten years or more.[34] The number is an underestimation because refugees who live outside camps and segregated zones receive little or no assistance from UNHCR and other humanitarian organisations. They have survived, more or less, independently in urban and rural areas.

Different actors of the international protection system have been advocating three types of responses to protracted refugee and IDP situations: the needs-based approach; the rights-based approach and the human capacity development approach. But the major stakeholders, such as donor and host countries and UNHCR, have chosen to adopt the 'relief model' of refugee assistance rather than implementing programs that promote self-reliance amongst refugees and facilitate positive interactions between the host and refugee communities. UNHCR's own evaluation and policy analysis unit has been critical of its own policy on protracted refugee situations. Arafat Jamal argues that UNHCR operates long-term care-and-maintenance programs which are essentially static – taking no account of the evolving needs of a refugee population (or their local hosts) – and which are geared towards the maintenance of minimum, emergency-oriented standards in the face of declining resources.[35] Although he was written in context of the condition in Kakuma, Kenya, research shows that the

31 Francis Deng and Denise McNamara (2001) 'International and national responses to plight of IDPs', *Forced Migration Review*, vol. 10, 24.

32 See UNHCR (2000) *Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees* (Geneva: UNHCR), EC/59/SC/INF.2.

33 UNHCR (2004) *Protracted Refugee Situations*, Executive Committee of the High Commissioner's Program (Geneva: UNHCR), EC/54/SC/CRP.14.

34 United States Committee for Refugees and Immigrants (USCRI) (2005) *World Refugee Survey 2005* (Washington DC: USCRI), Table 2, 2.

35 Arafat Jamal (2000) *Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya* (Geneva: UNHCR, Evaluation and Policy Analysis Unit), 32.

comment is applicable in other protracted refugee situation.[36] When the conditions in camps are often below acceptable international standard, prolonged encampment condemns refugees and IDPs to extreme poverty (most do not have the freedom of movement to find work), violence, sexual exploitation and psychological traumas. At the same time, hosting refugees for protracted periods of time has a long-term economic and social impact on the host communities.

Funding of United Nations High Commissioner for Refugees

Although only about 54 per cent of all refugees receive assistance from UNHCR programs, UNHCR is one of the most important institutions in the refugee protection system.[37] The agency has three mandated protection functions: to coordinate and supervise governments in the protection of refugees; promote and create instruments that would enhance the commitment and legal obligations of governments to offer protection; and to work towards achieving one of the three established durable solutions of resettlement, integration and repatriation. But as states in the North increasingly exert their influence on international affairs through humanitarian policies, UNHCR is facing intense political and economic pressures to reformulate its terms of reference and operational mandate.

The refugee agency derives almost all of its funding from the voluntary contributions from the few relatively wealthy countries. Since the early 1990s, donor countries have preferred to allocate funds to UNHCR Special Programs at the expenses of 'unlimited' General Programs. From 1997 to 2004, around 20.875 per cent of contributions to UNHCR are unearmarked.[38] The unearmarked contributions do not have condition attached to its use and go to areas where funds are most needed. In 2004, 35.2 per cent of donor contributions are 'lightly earmarked' for use within specific geographic regions, while 44.5 per cent of funds are 'tightly earmarked' to be used only for specific countries or types of activities.[39] Both the US (the top donor country) and the European Commission (the third highest donor) made no unrestricted contribution to UNHCR in 2004.[40] Furthermore, governments often opt for unilateral and bilateral funding policies when strong political and strategic

36 See Jeff Crisp (2003) *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa* (Geneva: Centre for Documentation and Research, UNHCR), Working Paper No. 75; Nathaniel Goetz (2002) *Lessons from a Protracted Refugee Situation* (San Diego: University of California, Centre for Comparative Immigration Studies), Working Paper 74; Arafat Jamal (2004) *Camps and Freedoms: Long-term Refugee Situations in Africa* (Geneva: UNHCR – Evaluation and Policy Analysis Unit); USCR (2004) *World Refugee Survey: Refugee Warehousing* (Washington DC: USCR).

37 UNHCR (2004) *Global Report 2004* (Geneva: UNHCR), 2.

38 UNHCR (2005) Table: Level of unearmarked and earmarked contributions 1997–2004 (Geneva: UNHCR Donor Relations and Resource Mobilisation), 18 May, available at www.unhcr.ch/cgi-bin/texis/vtx/partners/opendoc.pdf?tbl=PARTNERS&id=3bcec5637.

39 UNHCR (2005) Table: Earmarking Patterns in 2004 (Top 22 Government Donors to UNHCR) (Geneva: UNHCR Donor Relations and Resource Mobilisation), 18 May, available at www.unhcr.ch/cgi-bin/texis/vtx/partners/opendoc.pdf?tbl=PARTNERS&id=42d5022b2.

40 *Ibid.*

interests exist in a particular region. This political character of refugee protection creates great inequalities in the system. It has, in many instances, lead to the double marginalisation of some groups of refugees, particularly those in developing countries.

Enhancing protection

Preventive protection

Today, prevention has become an important goal of international protection. In the search for solution, the notion of preventive protection has emerged as a novel strategy that can deal with the human security issue of refugees and relieves the pressure on asylum. It is a creative solution to the types of mass displacement that have occurred in the past decade. In-country activities constitute the core of the preventive protection strategy, and include early-warning and risk assessment mechanisms that anticipate and address root causes of displacement, civilian human rights monitoring, and development of conflict transformation mechanisms and processes.

Preventive protection aims to minimise displacement *and* maximise the return of refugees to their homes. The latter objective requires those working in the area of refugee protection to expand their domain of activities to include addressing and promoting conditions conducive to safe return. It also demands integrating the durable solution of voluntary repatriation with long-term development projects that help rebuild shattered infrastructure. The effectiveness of the preventive protection depends, among other things, developing strong collaborative partnership with the broader humanitarian community. Again the focus is on formulating in-country assistance that ensures the political and economic situation will not deteriorate to an extent that the population is compelled to flee once more.

UNHCR and the Comprehensive Protection Strategy[41]

According to its statute, the protection functions of UNHCR are: to coordinate and supervise governments in the protection of refugees; promote and create instruments that would enhance the commitment and legal obligations of governments to offer protection; and to work towards achieving one of the three established durable solutions of resettlement, integration and repatriation. But since the 1990s, the agency has expanded from its non-operational function of protecting refugees through supervising and monitoring states' compliance to their treaty obligations to include wide-ranging operational activities, particularly providing assistance on the

41 For analyses of recent shifts in UNHCR protection activities see the contributions in Niklaus Steiner, Mark Gibney, and Gil Loescher (eds) (2003) *Problems of Protection: The UNHCR, Refugees, and Human Rights* (New York and London, Routledge); Special Issue: 'UNHCR at 50?', *International Migration Review*; Robyn Lui (2003) 'World Order and UNHCR's Comprehensive Solution', *Revue québécoise de droit international*, 14(1), 91–113.

ground. The agency distinguishes its previous 'reactive, exile-oriented and refugee specific' activities with the 'proactive, home-land oriented and holistic' activities of recent times.[42]

For UNHCR, the challenge of protection is no less than tackling the conditions that compel people to flee. With this new approach, the organisation's activities has expanded enormously from supervising legal protection in receiving countries to include other three forms of action: mechanisms to defuse tensions; human rights measures to protect the people for whom flight is the only option, and development strategies to promote better governance and to tackle poverty. The agency justifies its policy shift by claiming that it has an obligation to adapt its own system and structure in such a way as to ensure maximum effectiveness in responding to the complex challenges, and its willingness 'to engage in activities aimed at preventing human rights abuse and situations which give rise to the displacement in the first place'.[43]

The Global Consultations and Convention Plus

When the Global Consultations on International Protection concluded at the end of June 2002, equitable responsibility-sharing and sustainable durable solutions emerged as the critical challenges for the protection system.[44] *The Agenda for Protection*, the key document resulting from the process, outlined core activities to, among other things, achieve durable solutions for refugees and IDPs through improved burden-sharing between donor states and refugee-hosting states.[45] It called on donor states to allocate development funds to programs simultaneously benefiting refugees and the local population in host countries and on host countries to include refugees, IDPs, and returnees in their national development plans. Ruud Lubbers, the High Commissioner for Refugees at the time, introduced the concept of Convention Plus at a meeting of the European Union Justice and Home Affairs Council in September 2002 to advance the goals of the Agenda for Protection through special multilateral arrangements.

There are three strands of Convention Plus: (1) Strategic Use of Resettlement; (2) Irregular Secondary Movements of Refugees and Asylum-Seekers and (3) Targeting Development Assistance to Achieve Durable Solutions.[46] Under Convention Plus, resettlement – one of the three durable solutions for refugees – is advanced as an important tool for ensuring the protection of refugees and a vital instrument of international responsibility-sharing, particularly for large-scale and protracted refugee situations.[47] Though *Agenda for Protection*, endorsed by the Executive Committee

42 UNHCR (2000) *The State of the World's Refugees. Fifty Years of Humanitarian Action* (Oxford: University of Oxford), 4.

43 *Ibid.*

44 See www.unhcr.ch.

45 UNHCR (2003) *The Agenda for Protection* (Geneva: UNHCR).

46 See www.unhcr.ch/convention-plus.

47 See *Convention Plus Core Group on the Strategic Use of Resettlement: Multilateral Framework of Understandings on Resettlement, agreed in June 2004*; and *High Commissioner's forum: Multilateral Framework of Understandings on Resettlement. 16 Sept 2004.*

of the High Commissioner's Program and welcomed by the United Nations General Assembly in 2002, recognised the need to expand resettlement opportunities, in practice this strategy could only work in very limited cases. Few countries would allow extensive resettlement programs. Irregular secondary movement refers to refugees who have already found protection in the first asylum country and seek to move to a third country in an irregular manner, which often involves the use of human smugglers. At issue is identifying the scope of responsibility of first asylum and third country to these refugees.[48]

At this early stage, the initiative to target development assistance to achieve durable solutions looks the most promising for displaced persons and host countries. Donor countries are asked to redirect aid from emergency relief and subsidising camps to strategies that contribute to sustainable durable solutions. Receiving countries are asked to incorporate refugees, returnees and IDPs in the national development and poverty reduction programs, particularly their Millennium Development Goals (MDGs). The Framework for Durable Solutions for Refugees and People of Concern outlines the major activities of this initiative, which are: Development Assistance for Refugees – particularly for protracted refugee situations (DAR); Repatriation, Reintegration, Rehabilitation and Reconstruction (4Rs), and Development through Local Integration (DLI).[49] This strategy will allow refugees to become self-reliant and prepare them for a durable solution. It could prevent marginalisation and destabilisation of hosting communities and return areas. The targeting of development assistance for returnees could also narrow or closing the gap between humanitarian assistance and development aid, with the potential to prevent back-flows that often occur in post-conflict situations. The integration of humanitarian and development programs to achieve sustainable solutions for refugees is not new. The Arusha Conference (1979) and the subsequent International Conference on Assistance to Refugees in Africa (ICARA I and II) are earlier attempts to link burden-sharing, development assistance with durable solution.[50] No doubt the failure of these past

48 The background document, *Issues Paper on Addressing Irregular Secondary Movements of Refugees and Asylum-seekers* (Dec 2003) and the document from the Core Group meeting in Geneva in May 2004, *Basic Propositions on Irregular Secondary Movement*, is available at www.unhcr.ch/convention-plus.

49 See *Framework for Duration Solutions for Refugees and People of Concern*, www.unhcr.ch.

50 The 1981 and 1984 ICARA conferences were attempts by Sub-Saharan African countries to leverage more international assistance for their refugee burden. The result of the ICARAs and their follow-up process, known as 'Refugee Aid and Development' were disappointing. The lack of clearly articulated connection between solutions and burden-sharing led to the failure of funding for the refugee aid and development approach. See Alexander Betts (2004) *International Cooperation and the Targeting of Development Assistance for Refugee Solutions: Lessons from the 1980s* (Geneva: UNHCR, New Issues in Refugee Research), Working Paper No. 107; Robert F. Gorman and Gaim Kibreab (1997) 'Repatriation Aid and Development Assistance', in James C. Hathaway (ed.) *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers), 35–82; Robert F. Gorman (1993) *Refugee Aid and Development: Theory and Practice* (Westport CT: Greenwood Press); Robert F. Gorman (1986) 'Beyond ICARA II:Implementing Refugee-Related Development Assistance',

initiatives provides important lessons for the latest attempt to target development assistance to achieve durable solutions.

Humanitarian intervention and the responsibility to protect

The attention on the conditions of refugee-generating countries has challenged the primacy of the principle of sovereignty in international relations. On the one hand, there is a tradition in international political thought that claims an international order of states, governed by the principle of sovereignty and non-interference, and provides the preconditions for the attainment of human security and human rights. On the other hand, there is growing support for the argument that human dignity is more fundamental than the adherence to the norm of sovereignty and non-interference. The domestic affairs of states are legitimate concerns of the international community. From this perspective, sovereignty does not preclude intervention and certainly cannot compromise the 'responsibility to protect'.[51] The full recognition of state sovereignty is conditioned upon the full recognition of human rights for the citizen-population within its territory. In an interconnected world, the domestic affairs of states are of legitimate international concern. And in some circumstances the international community has a duty to militarily intervene in order to address situations of extreme human suffering.[52] At stake is the responsibility of states to their citizens. For human rights advocates, the growing acceptance of human rights values as enshrined in Article 1(3), 55, and 66 of the UN Charter is weakening the hegemonic status of state system values of Article 2(4) and 2(7).

Refugees and global justice

At a time when the language of justice and democracy is taking on an increasingly important rhetorical role in a global context, it seems appropriate to conclude with a brief reflection on the connection between refugees and global justice. Even James Wolfensohn, the former president of the World Bank, acknowledges that 'if we do not have greater equity and social justice, there will be no political stability'.[53] The sovereignty and state-system have framed how we think about ethical dilemmas

International Migration Review 20(2), 283–298; Barry Stein (1987) 'ICARA II: Burden-Sharing and Durable Solutions', in John R. Rogge (ed.) *Refugees: A Third World Dilemma* (Totowa NJ: Rowman and Littlefield).

51 See The International Commission on Intervention and State Sovereignty (ICISS) (2001) *The Responsibility to Protect* (Ottawa: International Development Research Centre (IDRC)).

52 The use of force to protect persons against gross human rights violations by their government remains a contentious issue in international affairs. There are no unambiguous rules of engagement which set out how humanitarian intervention should be conducted, what the ultimate objective should be sought (regime change or the cessation of violence), and who are the legitimate actors.

James Wolfensohn (1998) Address to the Board of Governors of the Bank (October 6–8), available at http://www.imf.org/external/am/1998/speeches/PR03E.pdf.

53

such as humanitarian intervention, global poverty, human trafficking and refugees in international affairs. The Westphalian order creates a hierarchy of duties and obligations. Our project to re-envision sovereignty must include the reappraisal of citizenship and the bounds of justice. We urgently need conceptual and institutional developments that allow for the universalistic principles of justice (equal concern and respect for every individual) and the principle of democracy (representation and participation in public life) to be mutually reinforcing and to inform everyone's conception of the good. We need a new paradigm of sovereignty that is normatively justifiable in the twenty-first century. We need a definition of legal personhood that avoids the illiberal thrust of citizenship understood as membership in a territorially based, culturally specific discrete state or polity.

The massive increase in the number of refugees and IDPs in past fifteen years has prompted various attempts to modify the international protection system. In whose interest do the changes serve remain an open question. In principle, refugees should receive equal protection, wherever they are, from the international community. But this is not the case. UNHCR, donor countries and other international actors have tended to focus their attention and resources on conflicts with high strategic interests. Countries like Angola, Burundi, Burma/Myanmar, Chad, Rwanda, Somalia and Sudan are of low and geopolitical and economic interests for the major donor countries, and as a result armed conflict have been allowed to persist and large numbers of refugees have been languishing in camps for years. Moreover, although focussing on the conditions within refugee-generating countries is crucial, it is also an oversimplification of the nature of population displacement. This sort of explanatory framework erases *Realpolitik* and distances the actions of developed countries from any clear responsibility for human suffering in usually faraway lands.

The preference for policy-oriented research in refugee studies has obscured the deeper meaning of responsibility-sharing for refugee protection. Refugees and IDPs are people whose conditions are connected to a global structure that creates great economic and political inequalities. We, in refugee studies, have yet to present a strong case for global justice as the one of the core values in refugee protection. Enquiry into the ethics of international refugee protection is both desirable and urgent. But doing is not the same as thinking; behaving morally is always more difficult than thinking about morality. It would also be prudent to resist naive optimism about the prospects for humanity or the world of politics. Even if we can arrive at an agreement on what constitutes global justice, there is no guarantee that we can create the institutions to deliver it. But the alternative is indifference, and the human costs are only too apparent in too many places.

PART 4
Transcending State Sovereignty 2: Transnational Issues

Chapter 10

Do No Harm: Towards a Hippocratic Standard for International Civilisation

Neil Arya[1*]

We live in an age of insecurity and of fear. While the role of the modern nation-state has been expanded beyond dealing with territorial security to providing such diverse services as health care, education, social welfare, environmental and resource management, in function, it seems incapable of even addressing the challenges to physical security and territoriality for which it was designed under the Treaty of Westphalia.

For a non-specialist practising family physician, current concepts of state sovereignty seem outdated, paralleling medical thinking of a couple of hundred years ago. In medicine, we have largely resolved such analogous questions of individual sovereignty as: How far do we respect a patient's autonomy? How do we deal with self-destructive behaviour or urgent surgery? How do we deal with minors who are unable to truly consent? How do we manage parents who are abusive or may not have the child's interest at heart? We also take a more positive approach looking at prevention and health promotion and try to view the patient holistically.

In the domain of health, peoples are leaving behind the values of state protectionism, dominance, acquisition and expansion and managing to get together to deal with deadly global menaces such as Aids, Sars and avian influenza. In ideal practice, we use a combination of early and rapid detection, reliable data collection and developments of standards of treatment or care, sometimes quick reaction, at others isolation, quarantine or universal immunisation, each of which requires substantial international cooperation and trust. Globally, this is what has allowed us to eradicate smallpox.

In reference to the nuclear age, Albert Einstein stated:

> The splitting of the atom has changed everything except the way we think. Thus we drift toward unparalleled catastrophe. We shall require a substantially new manner of thinking if mankind is to survive.[2]

---

1 * The author would like to thank Joanna Santa Barbara and Mary Wynne Ashford for help with development of concepts in this article. Amelie Baillargeon did the lion's share of editing but I was also helped at various stages by Peter McCullough, Mary Louise McAllister and Erin Rogozinski.

2 A. Einstein in R.D. Neligh (1997) *The Grand Unification: A Unified Field Theory of Social Order* (New Constellation Press), at http://www.nature-of-nature.com/natwholeness66a.html.

In this new era of fear, the paradigms under which we in the health sector operate may be useful as we look at concepts of sovereignty, security and state responsibility.

This chapter is meant to show a new way of thinking for those in traditional field of international affairs with lessons from the realm of medicine and public health, but also will include some aspects of environmental studies, human rights and peace studies, with which I am most familiar. I will suggest that the failure of the current international order is the failure of the state system to adequately manage the health needs of the global population and finally propose a new social contract where states' responsibility is to the health and well-being of its citizens, not just military security.

Alternate guiding principles – medical ethics

Prevention and healing on a global scale require clear ethical principles for action, just as they do in the personal practice of medicine. On which principles might we build this alternative health-based security? Here are some building blocks in terms of respecting individual and group sovereignty and rights.

Medical ethics

The first rule of medicine is *primum non nocere* – first of all, do no harm. Doctors may sometimes have to jeopardise the health of patients by our actions, but when there are significant risks, the chances that we will benefit patients must be substantially higher than our harming them.

Hippocratic Oath (400 BC)

The Hippocratic Oath,[3] written when the Greek father of medicine was sixty years old, forms the basis of medical ethics today. Its primary tenets include the concepts of beneficence and non maleficence:

> I will follow the system of regimen which according to my ability and judgement I consider for the benefit of my patients and abstain from whatever is deleterious and mischievous. … In whatever houses I shall enter benefit of sick and abstain from voluntary acts of mischief and further from the seduction.

Furthermore, Hippocrates proscribed action where one did not have proper expertise or the right skills:

> I will not cut persons labouring under the stone but will leave this to be done by men who are practitioners of this work.

3 Hippocratic Oath (1999), available at http://members.tripod.com/nktiuro/hippocra.htm.

Right authority

Thomas Percival expanded on Hippocrates' ideas of service to patients, publishing a code of medical ethics for physicians in 1794 based in part on principles of gentlemanly honour. The American Medical Association's Code of Ethics, adapted from Percival, became the first code of ethics or standards of behaviour to be adopted by a professional organisation. Physicians were finally held to account by a standard of their peers. In most countries, physicians have become self-regulating based on such principles.

Experimentation, autonomy and consent

Under the guise of scientific research, German doctors, including the infamous Josef Mengele, engaged in medical experimentation in Nazi concentration camps, using and discarding prisoners at will. The resulting trial was for twenty-three Nazi doctors at Nuremberg for crimes against humanity, which helped give rise to the Nuremberg Code,[4] outlining the ethics of medical research and ensuring the rights of human subjects.

Forty years of notorious experimentation in Tuskegee, where US prisoners, often less educated and African American, were denied standard treatment for syphilis, ended when information finally came to light in the 1970s. This led to further refinement of the concept of consent: It must be entirely voluntary and given by a fully autonomous individual; there must be full disclosure; consent cannot be manufactured with deceptive or secret information; if it turns out that the patient does not agree with our recommendation, we have no mandate to defy the patient's wishes. We are not allowed to lie, mislead or withhold information (as for example in the case of terminal illness) for 'her/his own good'. This may have been considered acceptable at one time in many cultures, but is now considered paternalistic.

Investigators must be scientifically qualified. There must be avoidance of, and protection from, injury, allowing no unnecessary physical and mental suffering; the subject may terminate the experiment at any time. Extreme caution needs to be exercised with new therapies.

Informed consent and incapacitance

This consent applies, not only to situations of experimentation, but in the real world for each medical decision. We must give all relevant details to patients so that they can make their own decisions about our proposed interventions. We are not expected to have a crystal ball, but to define risk in a forthright, unbiased and compassionate way.

4 Nuremberg Code, 1949 from *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. 2, Nuremberg, October 1946–April 1949 (Washington DC: US Government Printing Office), 181–182 available at http://www.dreamscape.com/morgana/nurmberg.htm.

Though some patients may make decisions which do not seem medically wise, in the longer term patients are more likely to accept the consequences of their decisions. The trust we earn from operating within these ethical boundaries increases our long-term credibility. In such an environment, patients often entrust us with making such decisions when they feel that we have expertise. In an emergent situation or prior to surgery, the patient may give blanket consent to deal with the unforeseen.

The only exception to autonomy is when a patient cannot be considered autonomous (as in a child when the parent makes decisions) or is incapable of making a decision due to mental handicap (when a substitute decision-maker is found). When a patient's guardian fails to protect his or her health, as in child abuse or denial of their basic health needs, society can step in through the courts, to protect the child.

Getting the diagnosis right

In medicine, before we attempt to treat we feel that we must at least get the diagnosis right. We take a good history, looking at antecedents, risk factors, family history, social history, cultural background and values as well as looking at the current problem and its effects. In international affairs, the field of peace studies has advanced the field of diagnosis considerably. Conflict analysis examines the general nature of conflict (the different levels and types of conflict); the parties involved in a particular conflict directly and indirectly, the causes and motivating forces of a conflict including stated and un-stated goals; the history of conflict (how it begins, develops and when it turns violent, what the natural course of conflict is), what forces keep it going, relationships between the players, their goals, and previous attempts to resolve the conflict. At a very basic level we must know who, what, why and how.

Any conflict may be manifest or latent. Resource conflicts are conflicts about territory or other valuable resources, whether natural, economic, political or social. Values conflicts arise from incompatible views, visions or norms sometimes based on perceptual and cognitive distortions. Further, we would be interested in social, economic, political, geographic and military resources available to the conflicting parties, which would help determine power and power differentials. As such, to fully understand complex, large scale conflicts may require the knowledge and insights of many different disciplines – history, religious studies, political science, military strategy, geography, sociology, anthropology and psychology.[5]

As good physicians, we must listen, appreciate, empathise and learn from our patients. Often those central to a conflict provide the basis for much more creative, relevant and sustainable solutions than those who seek to provide them from the outside. Diagnosis and action should always be at a local level, involving local players and experts at any stage of conflict.

5 Joanna Santa Barbara (2001), 'Conflict Analysis Chapter, Dealing with Conflict', 'Reconciliation', Afghan Peace Manual Reference, available at http://www.humanities.mcmaster.ca/%7Empeia/peacemanual.pdf, 1–34; 98–119.

Health promotion

Ethical principles provide some of the foundations of action for government. Others might be found in the field of health promotion. To make this assignment the primary task of government may appear like a radical step. However if we wish to think ultimately about why human beings give up their autonomy, it is to safeguard a better life or, in other terms, health and well-being.

In the World Health Organization's (WHO) Alma Ata Declaration[6] of 1978, health is described, not just narrowly in a curative or symptom relief manner, but in a holistic way as:

> a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity: [Health] is a fundamental human right and the attainment of the highest possible level of health is a most important world-wide social goal whose realisation requires the action of many other social and economic sectors in addition to the health sector.

The landmark Ottawa Charter for Health Promotion[7] similarly seeks a transformation in the way health is perceived, defining health as a resource, and considering the fundamental conditions to provide a 'secure foundation' for health to be 'peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity'. The Charter adds that 'political, economic, social, cultural, environmental, behavioural and biological factors can all favour health or be harmful to it'. Health promotion is defined as 'the process of enabling people to increase control over, and to improve, their health', and its actions 'aim at making these conditions favourable through advocacy for health' to be able to identify and to realise aspirations, to satisfy needs, and to change or cope with the environment. The above roles have largely been those taken over by the modern nation-state. To look at health promotion of their populations in thus broader context as the responsibility of states would radically change their perceived role in the social contract accepted by many political theorists.

Applying a disease prevention model of public health to conflicts and threats to nation-states

Once we arrive at a proper diagnosis we can then look at treatment. In public health, we look at preventing disease at various phases. Conventional understanding in international affairs only seems capable of examining prevention immediately before conflict and then at peacemaking, peacekeeping and peacebuilding. Yusuf *et al*.[8] go

---

6 Alma Ata Declaration (1978), available at www.who.int/hpr/archive/docs/almaata.html.

7 Ottawa Charter for Health Promotion, presented at the First International Conference on Health Promotion, Ottawa, 21 November 1986, available at http://www.who.int/hpr/archive/docs/ottawa.html.

8 S. Yusuf, S. Anand, G. MacQueen (1998) 'Editorial: Can Medicine Prevent War?', *British Medical Journal* 317, 1669–1670.

much further, describing how war may be viewed analogously, as a disease. As such, interventions during pre-major conflict, active conflict and post-conflict stages are explored, allowing preventive manoeuvres at the primordial, primary, secondary and tertiary stages. Threats to international body politic may also be viewed in this way and strategies to deal with these may use the same model.

Primordial prevention involves looking at root causes, the underlying disease processes, not just proximate causes of death. It refers to what would normally be termed 'risk factors' for conflicts developing in the first place. Primary prevention concerns prevention of war from breaking out when a situation of conflict already exists, or from escalating to dangerous levels. Limitation of arms, combating propaganda and diplomacy are examples of such efforts. Secondary prevention refers to the situation where war has already broken out (the disease has manifested itself) and methods to make peace are sought (peacemaking and peacekeeping). Tertiary prevention, analogous to rehabilitation in medicine and ecological restoration for environmentalists, would be post-'hot' war peace-building.

Primordial prevention

Though a health model has been used to describe prevention, the health care sector and public health, it really has little to do with actually preventing global illness. Instead, for primordial prevention, it is civil society, education, social services and those who maintain civil infrastructure who will be the real global doctors.

'Root causes' might include human rights violations such as political exclusion, suppression of identity and lack of equity or land. Frances Stewart[9] differentiates risk factors as group motivation (inter or intrastate resentments, divisions along cultural or religious lines, by geography, or by class), private motivation (young uneducated men, with no alternatives: little income and no hope for gainful employment, may seek the opportunity to profiteer), failure of the social contract (with economic stagnation the state fails to deliver services and provides reasonable economic conditions – employment and incomes), and environmental degradation (for example, rising population pressure and falling agricultural productivity may lead to land disputes; growing scarcity of water).

The recent Arab Human Development Reports[10] give evidence to this. US ally Saudi Arabia, though wealthy, provided the majority of 9/11 hijackers.[11] Could it be that not supporting health and well-being has led to greater instability in the region and threat to the outside world? The first-order answer is poverty and lack of education: Almost half of Arabic-speaking women are illiterate. Few books are translated and

9 Stewart Frances (2002) 'Root Causes of Violent Conflict in Developing Countries', *British Medical Journal* 324, 342–345, available at http://bmj.bmjjournals.com/cgi/content/full/324/7333/342.

10 United Nations Development Programme, Arab Human Development Report (2002), on annual basis, available at http://www.undp.org/rbas/ahdr/.

11 Gwynne Dyer (2004) 'Why Tyrants Rule Arabs – For 60 Years, the West has Propped up Arab Despots, Creating Poverty and Illiteracy where Education Once Thrived', *Toronto Star*, 20 July.

little money is devoted to public health and education. Values of democracy have not been supported but instead autocratic regimes continue to be propped up to buy weapons from the West and to sell oil. The situation in superpower playing field of Afghanistan was far worse, allowing the rise of the Taliban.[12]

Economic system investor and philanthropist, George Soros, sees major threats with allowing unbridled capitalism. In 'Toward a Global Open Society' and 'The Capitalist Threat', Soros argues:

> Global integration has brought tremendous benefits: the benefits of the international division of labor, which are so clearly proved by the theory of comparative advantage; dynamic benefits such as economies of scale and the rapid spread of innovations from one country to another … and such equally important non-economic benefits as the freedom of choice associated with the international movement of goods, capital, and people, and the freedom of thought associated with the international movement of ideas.[13]

> Although I have made a fortune in the financial markets, I now fear that the untrammelled intensification of laissez-faire capitalism and the spread of market values into all areas of life is endangering our open and democratic society. The main enemy of the open society, I believe, is no longer the communist but the capitalist threat.[14]

> Too much competition and too little cooperation can cause intolerable inequities and instability.[15]

Failure to address environmental challenges may be a cause of war. The UN Intergovernmental Panel on Climate Change[16] has determined that unmitigated production of greenhouse gases would not only warm the global climate, but have various other consequences, direct and indirect, which would impact on conventional security and on human health and well-being. For example, the melting polar ice cap would increase sea level, causing increasing flooding of low-lying areas, particularly in Third World countries which would not have the infrastructure to adapt. Much of Bangladesh and China is expected to be submerged, with 140 million environmental refugees forced to migrate. According to the insurance industry,[17] extreme weather events including El Niños, heat waves, droughts and forest fires, but also winter storms and ice storms are increasing in number and severity as predicted by the Intergovernmental Panel. Migration of disease such as malaria, dengue fever, West

---

12 Dr. Neil Arya (2001) 'Bombs Are Not the Answer', *The Record*, 3 November, A19.

13 George Soros (1998) 'Toward a Global Open Society', *The Atlantic Monthly*, 281(1), 20–32.

14 George Soros (1997) 'The Capitalist Threat', *The Atlantic Monthly*, 279(2), 45–58, available at http://www.theatlantic.com/issues/97feb/capital/capital.htm.

15 *Ibid*.

16 Intergovernmental Panel on Climate Change (1996) *Climate Change 1995, The Science of Climate Change*, Summary for Policymakers and Technical Summary of the Working Group I Report (Geneva: IPCC).

17 Environment Canada (2002) 'Implications of an Increase in Weather Extremes', available at http://www.smc.ec.gc.ca/saib/climate/Climatechange/ccd_9801/sections/5_e.html.

Nile Virus, schistosomiasis and cholera outside of equatorial areas is also occurring. Food security will be compromised by each of these and reversal of global currents such as the Gulf stream as damaged fragile ecosystems have no time to react to such changes. The resultant social instability and possible violence would certainly be a threat to the state system. We have already seen the tsunami exacerbating some tensions as conflicting parties dispute aid allocation and obtain resources allowing the conflict to continue.

Operationalising primordial prevention: human rights, democracy and economic justice, and the biophysical environment

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the fledgling United Nations in the aftermath of the Second World War,[18] not by starry-eyed idealists but people who had recently witnessed the Nazi war of aggression, the Holocaust, the use of nuclear weapons and the greatest loss of life in human history.

These rights seem to correspond to the fundamental determinants of health cited by the Ottawa Charter and violation of these rights to the non-direct (structural, cultural and ecological violence) of peace studies pioneer, Johan Galtung. Providing these rights reduces grievances that lead to war. Such support may help meet other health needs. It should be noted that from a medical model, preventing these problems and promoting health are fundamental ends in their own right; it is not just that respecting these rights reduces the chance of direct violence.

Amartya Sen, the Nobel Prize-winning economist who found that independent and democratic countries with a relatively free press do not have famines,[19] also observed that liberal democracy and democratic values are not foreign to any culture.[20] Democratic development is rarely conferred by outsiders through war. Supporting human rights monitors, tribunals for violations of political, social, economic and religious freedoms and rewarding progress by allowing progressive reintegration of violators into the international community are ways of encouraging democracy. Democratic movements within countries and civil society opposition to dictatorship may be nurtured through non-violent regional and international non-governmental organisations.

---

18 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, available at http://www.un.org/Overview/rights.html.

19 Amartya Sen (1981) *Poverty and Famines* (Oxford: Clarendon Press), and (1987) *Hunger and Entitlements* (Helsinki: World Institute for Development Economics Research). See also Tanco Memorial Lecture 1990.

20 Amartya Sen (1999) *Democracy as a Universal Value* http://muse.jhu.edu/demo/jod/10.3sen.html.

Now nations are prioritising health rights (for example, People's Health Charter)[21] and common millennium development goals.[22] These goals include eradicating of extreme poverty and hunger, promoting debt relief, ensuring that all boys and girls complete a full course of primary schooling, promoting gender equality, reducing child mortality, improving maternal health, combating infectious diseases, ensuring environmental sustainability, providing safe drinking water, developing a global partnership for development and promoting good governance. The United Nations Development Programme (UNDP) has been entrusted with coordinating such global and national efforts but might benefit from investment of a small fraction of the $900 billion annually devoted to militaries.

As a Pentagon commissioned report[23] has recognised, addressing environmental threats to mitigate their effects makes sense both in terms of conventional as well as a health-based model of security.

Such long-term thinking (addressing democratic deficits, human rights, health, education and the environment) is not popular among many political or military leaders who define security narrowly. Remember the aphorism: 'When I gave food to the poor, they called me a saint; when I asked why the poor had no food they called me a Communist'.[24] Unless we address challenges that impact the health and well-being of the planet by searching for root causes rather than applying the scalpel or bandage at first instance, the global system will continue to suffer.

Primary prevention

Early reaction in regions of risk might be for example, by peace brigades under international authority. Strengthening efforts to manage conflict, for example, the use of the Organization of Security and Cooperation in Europe, which had observers in Yugoslavia who seemed to have controlled any major direct violence or ethnic cleansing in Kosovo in the year prior to the 1999 war, could decrease nations' resorting to wars with their economic, social and environmental impacts on health. Signs of disapprobation, such as military, diplomatic and targeted sanctions (unlike those imposed on Iraq) each may contribute to pressures on states that violate international norms. Increased international control of money supply networks and border controls may be necessary, but must be balanced with respect for civil liberties, or risk creating resentment within or without our borders. While not as effective in politics as in medicine, managing diseases in the early stages before the

---

21 People's Health Charter (2000), available at http://phmovement.org/charter/pch–english.html.

22 Millennium Goals (2000), available at http://www.developmentgoals.org/, http://www.un.org/millenniumgoals/, http://www.undp.org/mdg/.

23 Peter Schwartz and Doug Randall (2003) 'An Abrupt Climate Change Scenario and Its Implications for United States National Security', available at http://www.ems.org/climate/pentagon_climatechange.pdf.

24 Quotation from Dom Helder Camara, Brazilian Bishop, available at http://www.hungernomore.org/quotations.html, http://www.domhelder.com.br/ingles/.

disease has major symptoms, in this case loss of life from war, is usually preferable to trying to stop war itself.

A second method of primary prevention is by removing the means through which war is waged – the arms, including the most devastating, nuclear arms.

Primary prevention: the question of nuclear arms

Perhaps the greatest threat for which hard power is considered essential by realists are those of nuclear weapons and terrorism. The realists extol the virtues of nuclear weapons, which have created a fine balance. Deterrence is felt to be the best and possibly only strategy.

As I wrote in a response to a *Time* magazine article by Charles Krauthammer on deterrence,[25] when nations continue to try to balance one another, we have proliferation. For deterrence to truly work, the threat must be credible (that is, the country threatening must be capable of delivering, it must demonstrate a willingness to follow through, and such a threat must be communicated and believed). A nation must be simultaneously crazy and immoral, willing to commit genocide if attacked and rational enough to be deterred by the threat of the opposing side. As such, North Korea is practising deterrence in spades today.

Rather than seeing nuclear weapons as a major threat to US interests, the US has promoted them as a cornerstone of defence, obstinately refusing to rule out first strikes, including using small nuclear weapons in the war on Iraq even if Iraq never used weapons of mass destruction. Russia and the US keep their weapons on alert status, targeted against each other, even when they are allies. The US, with overwhelming nuclear and non-nuclear superiority, has refused a comprehensive test ban treaty, let alone to follow the concrete steps toward nuclear abolition as mandated by Article VI of the Nuclear Non-Proliferation Treaty (which they try to get India and Pakistan to sign and Iran to honour). Instead, it hopes to rely on bilateral or regional party talks to persuade other nations to not develop those weapons they consider essential for their own security.

Primary prevention from a medical point of view would involve removing the instruments of damage: reducing stockpiles; bans on fissile materials, diminishing the opportunities for terrorists to acquire materials for suitcase and backpack dirty bombs; and alleviating the pressures behind the spread of nuclear weapons to unstable or even hostile powers.

---

25 Neil Arya (2002) Letter to *Time* magazine re Charles Krauthammer's argument for invading Iraq in 'The Terrible Logic of Nukes' (Essay, 2 September) is just that: terrible logic. Iraq wants nuclear weapons to balance Israel's, which built them to balance Arab conventional superiority. Pakistan wanted to balance India, which had to balance China, which had to balance Russia, which had to balance the US and its allies, which had to balance Russia's presumed European-theatre superiority. Throughout this balancing act, the world has been no more than thirty minutes away from Armageddon. The only logical way to keep nuclear weapons out of the hands of madmen is to renounce them ourselves; available at http://www.time.com/time/magazine/article/0,9171,1101020923-351218-2,00.html, http://www.time.com/time/magazine/article/0,9171,1101020902-344059,00.html.

To those who argue that the nuclear genie is too big to be put back in the bottle, the examples of such countries as Brazil, Argentina and Libya and, earlier, Canada, which gave up advanced nuclear programmes; and South Africa and the Ukraine, which have given up actual weapons, provide an answer. The rationale for these decisions was varied – from financial incentives, protection under another's nuclear umbrella, a change of government with a different ideology or non-tangible rewards, integration and acceptance among neighbours and the international community. However, with the active support (politically, economically, militarily and morally) rather than the opposition of the world's powers, in a world where nuclear weapons were as abhorred as landmines have become, who knows what is possible? In medicine, we have managed to put smallpox back in the bottle.

Secondary prevention: mitigating the effects of war

In terms of reaction to war, the international community must always weigh costs and benefits of action, inaction (or the *status quo*), or alternative action. Once again, before deciding on action we might look at principles from peace studies.

Conflict may be defined as 'a social interaction in which the participants believe that they have incompatible goals.' It can be one of the most complex forms of human interaction, especially when it moves from the interpersonal to the international and from the short term to the long term. Conflict in itself is not negative but can be a stimulus for positive development and action.

Conflict resolution traditionally involves arbitration and adjudication or mediation with the possibility that one side wins and the other loses; one or both sides withdraw or the two sides compromise. Conflict Transformation is a process of enabling the conflict parties to handle the conflict peacefully 'involves systemic change, catalysing changes at deepest level of beliefs, assumptions and values as well as behaviour and structures'.[26] When parties enter into a creative process of collaborative problem-solving, of working through the conflict, at the end of which each gets what it wants, and possibly even more than it originally desired, this is called a 'transcending' solution because it goes beyond, or transcends, what seemed possible before. 'Reconciliation' is the term we use for the task of restoring social relationships to a state of sustainable peace.[27]

Conflict, even violent conflict and human rights abuses, are likely to persist. What do we live with? Which battles do we fight principles for as a last resort? We may need to develop capacity to triage priorities for action. Sometimes we have to choose the lesser of two evils but at other times we created threats supposedly to wipe out other menaces such as bin Laden, Noriega and Saddam who boomerang on us.

Sometimes, as medicine requires radial surgery in international affairs, military action or credible threat of action is necessary. When considered and employed, it must be used minimally, judicially, in accordance with universal values, where each

26 IMTD Institute for Multitrack Diplomacy, available at www.IMTD.org.

27 Graeme MacQueen and Joanna Santa Barbara (2001) '"Health and Peace": An Opportunity to Join Forces', *The Lancet* 358(9288), 1184.

action is considered a police action where the onus on them is the preservation of life, particularly of innocent civilians**.** The police sometimes do have to use measures which violate civil rights and endanger the innocent in pursuing terrorists in hot pursuit of criminals. However, if societies allow these to become too widespread, or use them to terrorise families, to deny the accused the right to a fair trial, to humiliate those accused in custody, to endanger their physical security, or use them indiscriminately, then we risk losing our moral compass and running down a slippery slope where our values become not worth defending. How can we determine when hard power may be applied and sovereignty violated?

Secondary prevention: judiciously expanding the bounds of intervention – the responsibility to protect

'The Responsibility to Protect'[28] was produced by the International Commission on Intervention and State Sovereignty, comprised of former military, political and diplomatic leaders from around the world, including former heads of states, international legal experts, NATO generals and UN officials. Sponsored by the government of Canada and supported by many others, the document was intended to respond to the question posed by people in the West: with all of our military power, why did our governments and the UN fail to prevent genocides in, for example, Rwanda and Sierra Leone? With current concepts of state sovereignty, could the international community have acted earlier in these cases, or in those of Bosnia and Herzogovina, Kosovo or East Timor?

The international community is charged, not just with responsibility to react, but to prevent, and rebuild – 'prevention being the single most important dimension of the responsibility to protect'.[29] These elements correspond very directly to preventive health care, curative treatment and rehabilitation, with a strong emphasis on prevention (primordial and primary).

While this model would therefore correspond to each of primary, secondary and tertiary prevention, it is the secondary prevention aspect that interests me here and it is indeed that which interests, for example, the British government as it looks at intervention by military means to prevent worse problems in the future. As with a minor who cannot consent to treatment, but whose parents are not acting in her/his interest, it allows intervention without consent, greatly expanding in international law the criteria it offers, under which a military response may be countenanced beyond self-defence and explicit Security Council authorisation. However, 'Responsibility to Protect' creates a high bar for the launch of war to protect people; much as taking a minor out of the control of parents is a last resort in cases of abuse, neglect or for provision of life threatening care (for example, when parents refuse cancer treatment or blood transfusions).

---

28 Gareth Evans and Mohamed Sahnoun (2002) 'The Responsibility to Protect', Foreign Affairs, November/December, available at http://www.foreignaffairs.org/20021101faessay9995/gareth-evans-mohamed-sahnoun/the-responsibility-to-protect.html, http://www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp.

29 *Ibid*.

These cautions, caveats and limitations of the ICISS Commission are reflected in the 'just war theory' used to define rules of engagement in war, but are startling in their parallels with the new health-based model described above. Instead of beginning with the question of intervention, the Report begins with the primary responsibility of the nation-state: to protect all of its people. When the state is unwilling or unable to do so, then that responsibility falls to the international community. 'Patient' (or state) autonomy must only be overridden with proper safeguards and this must be done rarely. This appears analogous to a parental obligation to children and the obligation of society, and in particular the responsibility of health and social services professionals to intervene, when parents fail to act in the interests of a child.

A 'just cause threshold' must be present – serious and irreparable harm must be occurring to human beings, or be imminently likely to occur. This would include large-scale loss of life or large-scale ethnic cleansing, killing, forced expulsion, acts of terror or rape.

Much as physicians must have the right intention (beneficence), holding the welfare of the patient above self-interest or goals of the state, the primary goal of the intervention must be the protection of the people, to halt or avert human suffering, not to secure of the interests of another state. There must be full disclosure of all intentions.

It must be under 'right authority', conforming to international law; the UN being the most appropriate body. Further, it states that this would be 'better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.'[30]

There should be reasonable prospects of success in halting or averting the suffering that has justified the intervention, and as in medicine, '*primum non nocere*' the consequences of action should not likely be worse than the consequences of inaction. The planned military intervention should be the minimum necessary to secure the defined human protection objective, and the means are to be proportional in scale, duration and intensity.

How do we determine when this threshold has been reached? Only after all non-military means have been exhausted (these might include economic incentives, political and diplomatic measures, human rights observers, trade missions, cultural exchanges and education, all to promote compliance and integration of the offending party), as a 'last resort', should the most radical and destructive measure, a military response, be considered. In 'A Duty to Prevent',[31] Anne-Marie Slaughter and Lee Feinstein argue that these principles could be used to define actions on WMD, preferably by the Security Council. Barry Buzan defines 'failed states' as those with high levels of political violence, a conspicuous role for political police in the everyday lives of citizens, major political conflict over what ideology will be used to organise the state, lack of a coherent national identity, or the presence of contending

30 *Ibid*.

31 Lee Feinstein and Anne-Marie Slaughter (2004) 'A Duty to Prevent', *Foreign Affairs*, January/February, 136–150.

national identities within the state, lack of a clear and observed hierarchy of political authority, a high degree of state control over the media.[32]

Any of these situations could define a role for outside intervention. I would argue that all of these rights violations are fundamentally violations of health and well-being. But in very few cases would these situations lead to a justification of a military solution with the caveats introduced above.

Democracy was restored and dozens of dictatorships in southern Europe, Latin America and Southeast Asia were overthrown by internal societal forces in the last four decades. We must rely on a society's internal resilience or use international civil society to mitigate negative effects and to promote social change. Outsiders can sometimes reinforce these by facilitating informational exchange, providing solidarity and shaming.

Harm reduction

What other strategies might be applied? Where a cure cannot be achieved, sometimes in medicine a harm reduction model is employed. Recognising, for example, that most drug abusers have trouble controlling their behaviour and a 'just say no' approach may not be the best. The same may be true for teenage pregnancy. The US (with a 'just say no' policy) has numbers far inferior to more liberal Western countries in both drug abuse and teenage pregnancy. Harm reduction models to give heroin abusers heroin, substitute another narcotic (methadone) or exchange needles, on the other hand, have sometimes had some success.

Such an approach in international affairs would not mean turning a blind eye to human rights abuses or 'constructive engagement' of regimes practising genocide and torture, but helping other regimes manage their major social issues one step at a time, in their own cultural context within their resource limitations.

So, simultaneously, the new model allows for the expansion of the legal ability to launch a war, but with such caveats as just cause, right intention, right authority and chances of doing more good than harm; and seeing war as last resort, therefore in practice setting such a high bar for intervention, that it rarely would sanction war.

Tertiary prevention: rehabilitating society

In the aftermath of war general violence (including domestic) remains high, infrastructure is destroyed and health needs are not met. Empowering civil society, promoting rights and rebuilding the social fabric is essential to prevent a renewal of violent conflict-mechanisms similar to primordial and primary prevention. Devoting

32 Buzan Barry (1991) *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd edn (Boulder CO: Lynne Reinner), quoted in 'Failed States and International Security: Causes, Prospects, and Consequences', Purdue University, West Lafayette 25–27 February 1998; Michael Stohl and George Lopez (1998) 'Westphalia, the End of the Cold War and the New World Order: Old Roots to a "NEW" Problem', paper presented to *Failed States and International Security: Causes, Prospects and Consequences* Conference, 23–27 February 1998, Purdue University.

resources to rebuilding societies may prevent more costly conflicts from resuming. I will refer to only one mechanism for rebuilding society.

Promoting social capital: an example of tertiary prevention

Promotion of Social Capital[33] refers to features of social organisation (from family community to nation) such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit. In ecological analyses, US states with low levels of social capital have been shown to have higher mortality rates and worse health status.[34] Promoting social capital promotes health via stress-buffering and the provision of social support through extra-familial networks, as well as informal social control over deviant health behaviours such as underage smoking and alcohol abuse. At higher levels of social organisation, for example, states and nations, social capital may enhance health through indirect pathways, such as encouraging more egalitarian patterns of political participation that in turn ensure provision of adequate health care, income support for the poor, and other social services.[35] Social capital would therefore be associated, on the one hand, with social networks and the norms they promote (horizontal associations) and, on the other, with values and links, such as religion, ethnicity or socio-economic status (vertical associations), that transcend a community's social divisions. A broader vision of social capital takes into account the two types of associations mentioned, as well as the social and political environment that shapes social structure and helps in the development of norms. Enhancing health in these ways reduces the chance of violence.

Using health to determine risk/benefit: the case of Iraq

Let us look at the recent US war on Iraq. I will not examine this from a 'just war' or ethical point of view, as many leading figures from Jimmy Carter[36] to theologians have shown how the war could not be considered 'just'. But was it right and could the outcome have been predicted?

---

33 Robert Putnam (1999) from John D. and Catherine T. MacArthur, 'Research Network on Socioeconomic Status and Health', UCSF, revised 13 November 2000, available at http://www.macses.ucsf.edu/Research/Social%20Environment/notebook/capital.html.

34 I. Kawachi, B.P. Kennedy, K. Lochner, *et al.* (1997) 'Social Capital, Income Inequality, and Mortality', *American Journal of Public Health* 87(9), 1491–1498; Robert D. Putnam (2000) *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster).

35 James S. Coleman (1988) 'Social Capital and the Creation of Human Capital', *American Journal of Sociology*, S95–S121; Francis Fukuyama (1995) 'Social Capital and the Global Economy', *Foreign Affairs* 74(5), 89–103; Francis Fukuyama (1995) *Trust, the Social Virtues and the Creation of Prosperity* (London: Hamish Hamilton).

36 J. Carter (2003) 'Just War Theory', *New York Times*, 9 March, available at www.nytimes.com/2003/03/09/opinion/09CART.html.

Assessing diagnosis and therapy – applying the medical model to Iraq

As physicians, not only must we get the diagnosis right, we must evaluate risk versus benefit before any action – be it drug therapy, surgery or radiation. At the very least, let us use epidemiological knowledge to allow the public to rationally weigh the pros and cons of war from a health perspective. At best this allows us to evaluate the consequences of 'pre-emptive war' and engage in primary prevention by choosing non-military means to deal with perceived threats. These are often cheaper, more effective and sustainable alternatives to war.

The devastating effect of sanctions[37] was predictable from work of the Harvard Study Team immediately after the first Gulf War,[38] and published in the *New England Journal of Medicine.* It turned out to have caused severe damage and killed 1.5 million people[39] for weapons that did not exist – an abstraction for policy makers.

As the military says it does not do 'body counts', several groups have sprung up to fill the void. The direct civilian casualties from the second Gulf War have been documented by a group from the UK, Iraq Body Count.[40] A retrospective study by Johns Hopkins University[41] shows ten times the number of indirect casualties, about 100,000, with general mortality being 2.5 times greater than pre-war and violent death 58 times greater. One year prior, the report 'Collateral Damage',[42] a medical report by Medact and International Physicians for the Prevention of Nuclear War, predicted between 48,000 and 250,000 deaths, though was unable to predict the conduct of the war. The International Study Team and the World Health Organization published similar figures and attracted the attention of medical and mainstream media.[43] Though shortly after the war, the Coalition Provisional Authority set up by occupying US forces put a halt to a Health Ministry survey of civilian casualties and prevented release of any data collected, sixty per cent of both conflict related deaths and injuries in Iraq in the last half of 2004 were each by the US-led coalition and Iraqi security forces.[44]

---

37 J. Mueller (1999), 'Sanctions of Mass Destruction', *Foreign Affairs*, May–June, 43–53.

38 A. Ascherio, R. Chase, T. Cote, *et al*. (1992) 'Effect of the Gulf War on Infant and Child Mortality in Iraq', *New England Journal of Medicine* 327(13), 931–36, available at http://content.nejm.org/cgi/content/abstract/327/13/931.

39 N. Arya and S. Zurbrigg, 'Operation Infinite Injustice: The Effect of Sanctions and Prospective War on the People of Iraq', *Canadian Journal of Public Health* 94(1), 9–12, available at http://www.humanities.mcmaster.ca/peace-health/Iraqcomm.pdf.

40 Available at www.iraqbodycount.org.

41 L. Roberts, R. Lafta, R. Garfield, *et al.* (2004) 'Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey', *The Lancet* 364(9448), 1857–1864.

42 Medact (2002, 2003, 2004) Collateral Damage Reports, available at http://www.ippnw.org/CollateralDamage.html.

43 J. Clark (2002) 'War on Iraq Could Produce a Humanitarian Disaster, Health Professionals Warn', *British Medical Journal* 325(1134), available at http://bmj.com/cgi/content/full/325/7373/1134.

44 AP (2005) 'Coalition, Not Insurgents, Killed Most Civilians: BBC'*, Toronto Star*, 29 January, from on-line edition:

Even a simple family doctor could predict the consequences of war. In an article[45] before the second Gulf War I asked, 'How imminent and credible is the threat? What will it do for our own safety? What will this do to the economy? What will it do to international institutions? What will this do to the Iraqi people? What will this do for countries and peoples in the region?' And each of my conclusions have turned out to be true.

For the region, nothing could have benefited Osama bin Laden more than a US military bogged down in one country and a ready supply of recruits, stimulated by anti-American feeling in response to the chaos and suffering of the Iraqi people. The US pact with the devil, support for dictatorships in Pakistan, Saudi Arabia, Uzbekistan as the lesser evil, recalls previous support for Saddam Hussein and Osama bin Laden and certainly will not hurt bin Laden in his recruiting drive.

The $200 billion price tag of the war[46] was also predicted, as was that there were no weapons of mass destruction or connection with 9/11. It was backed up by substantial evidence of weapons inspectors, Hans Blix and Scott Ritter (not one of Donald Rumsfeld's known unknowns). The evasion of accountability with the argument that absence of evidence is not evidence of absence would not be tolerated in a medical forum. The US manipulation of intelligence (or in a more charitable interpretation, incompetence) will affect US credibility the next time the US tries to convince the world community to act. Torture stories and lack of process from Abu Gharib and Guantanamo will haunt the US when it tries to cite Geneva Conventions.

For international order, I wrote of the dangers of unilateralism potentially undoing 150 years of development of international laws and the UN:

> Having alienated allies and the UN, the US, without a plan to establish law and order, now invites the international community to help mop up. The dangers of this precedent will haunt the US for decades to come as other countries launch preventive wars ... unless deterred by threat of US force. And the mobilisation of civil society and religious leaders against the US administration cannot help US interests either.

Shortly after the invasion in April 2003 I wrote:

BAGHDAD—Coalition troops and Iraqi security forces may be responsible for up to 60 per cent of conflict-related civilian deaths in Iraq – far more than are killed by insurgents, the BBC reports. Data from the beginning of July, 2004, through the end of the year covers all conflict-related civilian deaths and injuries recorded by Iraqi public hospitals. The figures exclude, where known, the deaths of insurgents, the BBC says. The figures reveal that 3,274 Iraqi civilians were killed and 12,657 wounded in conflict-related violence during the period. Of those deaths, 60 per cent – 2,041 civilians – were killed by the US-led coalition and Iraqi security forces. A further 8,542 were wounded by them. Insurgent attacks claimed 1,233 lives and wounded 4,115 people in the same period. Official figures compiled by Iraq's Ministry of Health break down deaths according to insurgent and coalition activity, according to the BBC website. The figures are normally available only to Iraqi cabinet ministers, it says.

45 N. Arya (2003) 'Editorial Ask the Right Questions!', *Ottawa Citizen*, 7 March, 6.

46 National Priorities Project (2005), available at www.costofwar.com.

> Balancing desires of the majority Shias, with Kurds, Sunnis, and other ethnic and religious minorities, together with concerns of neighbouring Iran and Turkey will be challenging. In the current chaos, with electricity, water supply and sewage systems destroyed, hospitals looted and aid workers unable to enter many towns with security concerns, the humanitarian situation is guarded.[47]

With Iraqis dependent on food handouts, with fewer jobs and civilian infrastructure un-repaired, there remains strong opposition to US occupation.

A system approach would go beyond thinking of US military casualties as the true cost of the Iraq War, looking at Americans' unmet health needs against the massive investment on the Iraq war.[48]

If politicians and generals are incapable of doing accurate calculations or will not even try, particularly for wars of choice, perhaps war is too serious a matter to be solely left in their hands and they should not be allowed to launch battles.

What if we had applied the medical model, in particular the caveats of Responsibility to Protect?

The war worked neither on humanitarian grounds nor on practical grounds. But further it failed to meet the very logical bar set by responsibility to protect. Short of an immediate attack, *right authority* would have had to be conferred by the UN, which denied sanction. It certainly did not appear to be a *last resort.* Though *right intention* is claimed retrospectively, as other arguments fall like a house of cards, was this the only, or even best way to get rid of dictator? As I wrote prior to the war applying a health model, the right question was not 'Was Saddam Hussein a bad guy?'; rather, it was 'Was Saddam Hussein dangerous to his people or the outside world?'.[49] Alternatives to war even in the case that Iraq defied international order and

---

47 N. Arya (2003), 'Winning the Peace (letter) US Offers Little Hope for Winning Iraq Peace', *Ottawa Citizen*, 4 May, available at http://www.canada.com/ottawa/ottawacitizen/letters/story.asp?id=3B5CC8F9-CEC1-44BB-90F5-787616602F1F.

48 Nicholas D. Kristof (2005) 'Health Care? Ask Cuba', *New York Times*, 12 January, available at http://www.nytimes.com/2005/01/12/opinion/12kris.html?oref=login&th:

> Here's a wrenching fact: If the US had an infant mortality rate as good as Cuba's, we would save an additional 2,212 American babies a year. According to the latest C.I.A. World Factbook, Cuba is one of 41 countries that have better infant mortality rates than the US. Even more troubling, the rate in the US has worsened recently. And their mothers, because women are 70 percent more likely to die in childbirth in America than in Europe. Bolstering public health isn't as dramatic as spending $300 million for a single F/A–22 Raptor fighter jet, but it can be a far more efficient way of protecting Americans. For example, during World War II, the employment boom meant that many poor Americans enjoyed regular health care for the first time. So even though 405,000 Americans died in the war, life expectancy in the US actually increased between 1940 and 1945, rising three years for whites and five years for blacks. Last year, a study by the Institute of Medicine, a branch of the National Academy of Sciences, estimated that the lack of health insurance coverage causes 18,000 unnecessary deaths a year.

49 Feinstein and Slaughter, 'A Duty to Prevent'.

had weapons of mass destruction were multiple, and included regular inspections inside the country and at its borders, arms control measures, political and military sanctions. Support for regional peace processes and in particular a just solution to the Israeli–Palestinian question could have helped in the court of Arab public opinion. Any sort of urgency was only with an eye on the US electorate. And if the threshold were reached to get rid of Saddam Hussein the possibility of promotion of civil society institutions and other non-military support was far from exhausted.

What about Saddam targeting his own people? What should be the threshold for action?

It is apparent that Saddam was largely in compliance with UN resolutions in the years leading to 2002. But what if the rules of responsibility to protect had been in place and Saddam had chosen to attack the Marsh Arabs, those Shias that he thought might favour Iran or the Kurds (at times when the West actively supported him or considered intervention not worth the price), as he did at various times in the last quarter century? Under these circumstances, intervention, through an empowered UN (hopefully supported by the major powers), might have been justified. It appears from observation of Saddam's actions that credible threat and fear of internal rebellion, intervention of neighbouring states and the Arab street would have deterred such action.

But beyond this, an argument against secondary prevention is the health promotive aspects, the primordial and primary prevention. As Iraqi society was becoming more prosperous, with a rising, educated middle class, with its health standards and rights of women improving, Iraq's threats to its neighbours were diminishing. Beyond the colonial map-drawing, irrespective of ethnic, religious and cultural ties, the war against Kuwait (which led to the first Gulf War) occurred as Iraq sought to find cash for its massive debt repayments. Saddam counted on the Arab street to support his wars. Even this might have been reduced had their been promotion of Kuwait as a free, democratic society and promotion of a more just settlement for Palestinians.

Is this health-based model or collective action on global threats realistic?

'Yes', the realist answers, 'but can the real world function with such principles?' My answer would be that it already has. In the name of the collective security nations of the world community have been able to work together to respond to many current global threats.[50] Some of these coerced by economic means of Western powers or military threat, but mostly countries, through public pressure, are willing to give up short-term individual economic or strategic gain for the greater good. Sometimes it takes tragedies such as the 2004 tsunami disaster relief to get nations to cooperate; Greece and Turkey had a thaw in relations in response to the 1999 Turkish earthquakes.

With specific health challenges, nations too, have been willing to give up sovereignty, to cooperate to deal with common threats, to trust their neighbours to

50 Available at http://www.fortunecity.com/bally/waterford/96/append05.htm.

do the right thing. In these cases, the external threat may be even more lethal, and less amenable to negotiation than any threat in international affairs. Sars is only the most recent example of a possible epidemic that may have been thwarted by superb international cooperation through the World Health Organization (WHO). The WHO's new regulations governing the control of infectious disease[51] focus on strengthening global surveillance, improving communication between WHO and member states, and ensuring that each country has the laboratory capacity to rapidly identify outbreaks and specific measures to prevent disease spread at airports, ports, and other points of entry. States are required to notify the WHO of 'all events potentially constituting a public health emergency', regardless of cause. Smallpox has been eradicated despite a few countries choosing to keep samples of the virus for defensive purposes.

How about purely military affairs? Limited success was achieved with the signing of the Partial Test Ban Treaty in 1963, which banned nuclear tests in the atmosphere, underwater and in space. However, neither France nor China, both nuclear weapon states, initially signed the PTBT in 1963.[52] Yet in response to international pressure these countries later respected the provisions of the treaty. With a bit more support from the United States there could have been a comprehensive test ban treaty (CTBT). Norms are changed and hard power no longer is the only currency. The International Criminal Court (ICC) and Ottawa Landmines Treaty have had their effects even on powerful non-signatories such as the US as allies are reluctant to offer exemptions. The support of health organisations was critical in the ICBL. International Physicians for the Prevention of Nuclear War has also succeeded in making nuclear weapons not just a military strategic issue, but an ethical, environmental and health one.

Ultimately our own health and well-being is important to us and we extend that to those we value as family and community. The further removed people are, the less value less we place on the lives of others, but the 2004 tsunami response showed that concern for those very remote is still significant. Enforcing these rules and working with other countries will not mean that the US (or the Global North) will win every battle or be able to enforce its will or even universal values each time, but it will be a lot more successful than now. With support and resources, including military and economic, rather than defiance think of how much more potential it has to get what it needs.

Robert Kaplan[53] shows that if the Global North does not work to reduce tensions in all phases, that conflict will come to our doorsteps:

---

51 Editorial, 'Public-Health Preparedness Requires More Than Surveillance', *The Lancet*, 364(9446), available at http://www.thelancet.com/journal/vol364/iss9446/full/llan.364.9446.analysis_and_interpretation.31170.1.

52 David Krieger (2005) 'Nuclear Arms Control Treaties', available at http://www.nuclearfiles.org/hictbt/ctbt-docs.html, http://www.nuclearfiles.org/redocuments/1963/631010-ptbt.html.

53 Robert D. Kaplan (1994) 'The Coming Anarchy', *Atlantic Monthly* 273(2), 44–76; 'How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet', available at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1090275619198&call_pageid=968256290204.

> The cities of West Africa at night are some of the unsafest places in the world. Streets are unlit; the police often lack gasoline for their vehicles; armed burglars, carjackers, and muggers proliferate. 'The government in Sierra Leone has no writ after dark,' says a foreign resident, shrugging.

West Africa is becoming the symbol of worldwide demographic, environmental, and societal stress, in which criminal anarchy emerges as a real 'strategic' danger. Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms, and international drug cartels are now most tellingly demonstrated through a West African prism. West Africa provides an appropriate introduction to the issues, often extremely unpleasant to discuss, that will soon confront our civilisation.

And these threats can reach the shores of countries of the North. Hurricane Katrina in Mississippi and Louisiana may be a portent of things to come in societies that fail to meet global challenges in an interdependent world. The localised violence in New Orleans following Hurricane Katrina, as a result of desperation and profiteering, in an environment of extreme inequality, lack of social cohesion, chronic neglect and mistrust made even the offering of aid impossible. The resulting panic over oil prices even sparked minor incidents of violence in my province of Ontario in Canada. Denying science of climate change failing to meet the basic needs of its citizens, maintaining economic disparity, allowing the proliferation of small arms, having its National Guard underfunded and bogged down in Iraq all may have put the US at higher risk when it came to this 'unforeseen' event.

Getting to the new social contract

In psychiatry, we see people in denial, engaging in self-destructive behaviour with all sorts of defence mechanisms to change. When people have distorted perceptions based on past experience, which leads to irrational feelings or conclusions and self-destructive actions, cognitive behavioural therapy may be employed to restore health to the individual. In the current climate of fear, such techniques might be applied to the collective. We must explain the cognitive distortions –forgetting that human health and well-being is the primary goals – that overreaction to fears can make us insecure and threaten others and make our behaviour congruent with our goals.

In family medicine, we see that to move from stages of change, from pre-contemplation to action, requires time. Even in medicine, many are unwilling to give up biomilitary thinking. Thus far the global body politic has not seen it fit to speak with a common voice in international political affairs as it can about health. Those who hold military and economic power, the ones who have the most to lose, have not seen it in their interests to share that power.

To move to a system where a state's ultimate responsibility is the health and welfare (and human rights) of all of its citizens is a leap for many. To define state failure as the unwillingness or incapability to do so and to put the responsibility then on the international community to react may seem radical. To have right authority conferred on a reconceived UN whose mandate is to be responsive to the needs of

world citizens and to apply military power, only with the caveats of ICISS and as a last resort, to be operating on the principle of doing no harm, to and to persuade those in power that is in their long-term self-interest may be a difficult sell.

I will end with the immortal words of the German anatomist, physician, social scientist and bureaucrat, Rudolf Virchow:

> 'If medicine is to fulfill her great task, then she must enter the political and social life … . Politik ist weiter nichts als Medizin im Grossen' [Politics is nothing more than medicine on a grand scale].[54]

54 Rudolf Virchow (1848) Die medicinische Reform 3. November. Die medicinische Reform. Wochenschrift, herausgegeben von R. Virchow und R. Leubuscher. Berlin. Available at http://www.uni-heidelberg.de/institute/fak5/igm/g47/bauervir.htm. ('Wer kann sich darüber wundern, dass die Demokratie und der Socialismus nirgend mehr Anhänger fand, als unter den Aerzten? dass überall auf der äussersten Linken, zum Theil an der Spitze der Bewegung, Aerzte stehen? die Medicin ist eine sociale Wissenschaft, und die Politik ist weiter nichts, als Medicin im Grossen'.)

Chapter 11

Sovereignty and the Global Politics of the Environment: Beyond Westphalia?

Lorraine Elliott

The transboundary and global dimensions of environmental change, and the demands for effective political and institutional responses, have raised questions about the ability of state actors to manage problems that cross borders or affect areas beyond national jurisdiction and the relevance of sovereignty as a fundamental organising principle of the world order of states. Biermann and Dingwerth suggest that the mutual dependence that characterises ecological interdependence 'undermin[es] the idea of sovereignty as enshrined in the traditional Westphalian system'.[1] If the sovereign borders associated with the Westphalian system are no longer 'sovereign', or at least no longer 'environmentally' sovereign, then what is the condition of Westphalian sovereignty? This chapter investigates the relationship between sovereignty and environmental change. In doing so, it seeks to shed some light on whether environmental issues take us 'beyond Westphalia' and what being 'beyond Westphalia', at least from an environmental perspective, might look like. This is in part an empirical investigation. How (and to what extent) does environmental change affect the idea and the practice of sovereignty? Such an investigation also requires attention to the consequences of those sovereign practices for the state of the environment. It is impossible to escape a normative purpose as well. This is not simply about asking whether sovereignty is being challenged or re-envisioned in some way, but to consider whether it *should* be re-envisioned. This investigation leads to a number of conclusions. The re-envisioning of sovereignty as something other than Westphalian is uneven and embryonic and it is easier to identify what is being unbundled rather than what is being reconstructed. The usually accepted attributes of Westphalian sovereignty – internal authority and external independence – are being challenged and disrupted by environmental degradation. The process is uneven and the end-point is uncertain.

1 Frank Biermann and Klaus Dingwerth (2004) 'Global Environmental Change and the Nation State', *Global Environmental Politics* 4(1), 1–22 at 2.

Sovereignty

The theory, practice and contestations of sovereignty have been explored in more detail elsewhere in this collection and therefore a detailed review of those arguments is not reproduced here. However, what we think sovereignty is will have some influence on how we understand the relationship between environmental change and sovereignty and whether we think that we are 'beyond Westphalia' (or, indeed, what it means to be thus located). Almost all discussions of sovereignty point to the fact that it is difficult to define in any comprehensive way, that it is a contested concept, and that in any case the practice of sovereignty has never matched the theory. The approach that informs this chapter is that sovereignty is not immutable. Rather it is the 'product of specific historical and political forces'[2] and is therefore open to change. While the 'Westphalian' baseline for sovereignty is explored here in terms of its conceptual and empirical ties to the state, neither the concept nor the practice of sovereignty are synonymous with or inextricably tied to the state. Thus it is possible to re-envision sovereignty rather than assume that being 'beyond Westphalia' means also being 'beyond sovereignty'.

Sovereignty is usually characterised as having four inter-connected dimensions that are embedded in empirical (or material) and normative (or ideational) practices – internal, external, formal and effective. Internal sovereignty defines and identifies the ultimate authority within the state and the relationship between rulers and ruled. In this sense, sovereignty is the juridical principle that establishes the 'entitlement to rule over a bounded territory'[3] and determines that 'only one sovereign power can prevail within any single territory'.[4] External sovereignty means that states are subject to no higher or other authority, that they are 'free of external authority structures'.[5] It inscribes a state as equal with all others, and generates the principle of political independence and autonomy. External and internal sovereignty are connected, as Chris Brown points out, in the 'refusal to recognise that there is any external person or body who may legitimately exercise authority within a particular realm'.[6] Jackson refers to this as negative sovereignty – the right to be 'legally protected from outside interference'[7]. Formal sovereignty can be taken to mean the legal possession of sovereign status – a *de jure* sovereignty – established by international law and acknowledged through recognition by other, equally juridical sovereign states. In effect, states constitute each other as formally sovereign. Formal sovereignty is an

2 Steve Smith (2001) 'Globalisation and Governance of Space: A Critique of Krasner on Sovereignty', *International Relations of the Asia Pacific* 1, 199–226 at 206.

3 Held cited in Smith, 'Globalisation and Governance', 220.

4 Andrew Linklater (1998) 'Citizenship and Sovereignty in the Post-Westphalian European State', in Daniele Archibugi, David Held and Martin Kőhler (eds) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity), 129.

5 Robert O. Keohane (2002) 'Ironies of Sovereignty: The European Union and the United States', *Journal of Common Market Studies* 40(4), 743–65 at 744.

6 Chris Brown (2002) *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity), 4.

7 Cited in Wouter G. Werner and Jaap H. de Wilde (2001) 'The Endurance of Sovereignty', *European Journal of International Relations* 7(3), 283–313 at 301.

absolute category – a political entity (in this case a state) is either sovereign or it is not. Effective (or *de facto*) sovereignty, on the other hand, refers to the 'capacity to exercise those rights'[8] and includes the ability of states to regulate and maintain authority over transactions across their borders, to control what comes in and what goes out. A state may have formal sovereignty but little effective sovereignty. For Jackson, this can be described as positive sovereignty by which the state 'possesses the wherewithal to provide political goods for its citizens',[9] a requirement that also defines the content of sovereign legitimacy.

The norms associated with sovereignty as an organising principle of international relations – the bundle of rights, entitlements and obligations that accrue to states by the very virtue of being 'sovereign' – are equally as important as the formal and legal definitions of what constitutes sovereign practice. The norm of non-intervention or non-interference in the internal affairs of other states is a central to mutual recognition between states. It relies on accepting the inviolability of borders and the territorial integrity of states. The related norm of reciprocity requires that states respect the sovereignty of others. In this sense, sovereignty is relational rather than atomistic. Sovereignty exists only with a sovereignty system. Without reciprocity, the international society within which sovereign states are able to be sovereign would be destabilised and undermined.

Sovereignty propositions

To summarise thus far, sovereignty possesses 'five properties: territory, recognition, autonomy against external interference, control of borders and legitimacy'.[10] Environmental degradation challenges all five. There is disagreement on the extent of that challenge and whether sovereignty is being weakened by it or whether environmental degradation means that sovereignty (or the sovereign state) should be reclaimed or strengthened. Six propositions that characterise the debate on sovereignty and the environment are explored here. They are neither mutually exclusive nor entirely commensurable.

Proposition 1: Environmental degradation undermines sovereignty through the transgression of borders

This proposition reflects the most common perception of the 'dangers' that environmental degradation offers to the sovereign state and to the exercise of sovereignty. As Sassen observes, pollution and environmental degradation has the capacity to 'undo the particular form of the intersection of territory and sovereignty

8 Marc Williams (1996) 'Rethinking Sovereignty' in Eleonore Kofman and Gillian Youngs (eds) *Globalisation: Theory and Practice* (London: Frances Pinter), 113.

9 Cited in Werner and de Wilde, 'The Endurance of Sovereignty', 301.

10 Takashi Inoguchi and Paul Bacon (2001) 'Sovereignties: Westphalian, Liberal and Anti-Utopian', *International Relations of the Asia Pacific* 1, 285–304 at 288.

embedded in the modern state and the modern state system'.[11] The bundle of rights associated with sovereignty includes as a settled norm that frontiers, or borders, are inviolable (even if they have been often violated in practice). Environmental degradation, on the other hand, often transgresses the borders that are the containers for the sovereign state and for the exercise of internal sovereignty. The borders over which sovereign states are assumed to have authority are revealed as porous and, potentially, as irrelevant. What happens 'inside' territory – the realm of the sovereign – is increasingly affected by what happens 'outside'. The experience of environmental harm is not territorially contained. Rather it is displaced across frontiers. Boundaries are not only 'transgressed'; they are also blurred. This inside/outside disjuncture is further compromised because ecosystems and bio-regions rarely conform to territorial borders and individual species are notorious for migrating across borders. The 'sovereignty of nature' is at odds with a constructed state-centric sovereignty. Control over territory and autonomy over policy choices are therefore challenged and the ability to regulate activity across borders is brought, in part at least, into dispute.

The problems of the global commons – areas defined either as beyond national jurisdiction, or as open-access or common-pool resources because they are non-exclusive and indivisible – are the most obvious. The pollution of the global atmosphere for example – outside the effective jurisdiction of any one state – affects all countries, regardless of whether any particular country contributed very much to the problem or not. Indeed, it is most likely to be those peoples and states who have contributed least to global problems such as climate change who will suffer most when it comes to the environmental, economic and social consequences. In some cases – those of the low-lying island states of the Pacific, for example – deterritorialisation takes on a more fundamental meaning as actual territory is lost to rising sea-levels.

Global environmental change is, of course, not the only problem for sovereign practice. Pollutants and waste are transmitted or dispersed over long distances and across borders – through long-range transboundary air pollution, through downstream pollution of transboundary river systems, through coastal pollution. Sulphur emissions from the UK and central European countries, for example, were the source of acid rain depositions in Scandinavia. Transboundary emissions from China are cause for environmental concern in Japan and South Korea. Between 70 and 80 per cent of oceanic and coastal pollution is from land-based sources, often crossing the borders of territorial seas. Environmental harm within territorial boundaries can also be a consequence of the 'border-crossing' transactions associated with economic globalisation, through the displacement of the resource and environmental inputs as well as the waste and pollutant outputs of economic activity. Pollution and waste are transmitted across borders through the trade in waste or through dumping. While this might take on the appearance of sovereign choice on the part of receiving countries, it is often characterised by ineffective sovereignty. The technical and political ability of many weaker (often poorer) states to exercise full choice over what waste comes

11 Cited in Bradley C. Karkkainen (2004) 'Post-Sovereign Environmental Governance', *Global Environmental Politics* 4(1), 72–96 at 73.

in and, indeed, what resources go out is often limited. This is a matter not simply of autonomy (internal sovereignty) but also capacity (effective sovereignty). Effective sovereignty can also be compromised by illegal environmental activity. Practices such as waste dumping, smuggling endangered species, illegal resource extraction (logging and fishing, for example) and the black market in ozone-depleting substances constitute one of the most lucrative of the illegal transnational trades, close to drugs and arms in the monetary value of the goods and materials that are transported globally across borders and outside the control and authority of states each year.[12]

Internal sovereignty is therefore challenged in two, related ways. First, environmental degradation within territory and environmental damage to territory may be the consequence not of what the 'sovereign' state decides, but of policy choices or economic choices elsewhere. Global and transboundary environmental degradation contravenes the norm of non-intervention, particularly because the extent of our scientific knowledge about environmental change makes it increasingly difficult to claim that the intervention was unintended or un-anticipated. Second, environmental policies that *are* designed to manage and mitigate environmental degradation within a state may be undermined or made ineffective in the face of pollutants and waste that are transmitted across boundaries or that affect the global commons. It is difficult for governments to maintain authority over territory and environmental policy when harm is externally sourced.

Proposition 2: *The exercise of sovereign rights is a fundamental cause of environmental degradation*

Under international law, states have the sovereign right to 'possess and determine freely the use of natural resources'.[13] The denial of such a right is considered to be contrary to the principles and spirit of the Charter of the United Nations. Internal sovereignty is therefore understood as a form of property rights, 'with all that this entails in terms of exclusive use, disposition and control'.[14] Sovereignty and the attachment to borders and territory can also militate against cooperative and common management of ecosystem spaces that exist across frontiers. Sovereign concerns with policy autonomy and non-interference have also impelled many governments to seek to minimise verification or compliance mechanisms in multilateral environmental agreements, or to limit compulsory dispute resolution procedures, or to take certain

12 There is also very strong evidence that in some parts of the world the agents of the sovereign state – including the military – are heavily complicit in transnational environmental crime.

13 United Nations Commission on Sustainable Development (1995) *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* (Geneva), 26–28 September, para 53.

14 Veronica Ward (1998) 'Sovereignty and Ecosystem Management: Clash of Concepts and Boundaries?', in Karen Litfin (ed.) *The Greening of Sovereignty in World Politics* (Cambridge MA: The MIT Press), 79.

'sovereign' matters out of the realm of international negotiation.[15] The consequence is that many environmental agreements represent minimal compromises of sovereignty (a matter addressed further in the discussion of proposition 3).

The consequences of this self-regarding sovereign rationality are expressed in the concept of the tragedy of the commons. As each state pursues its national interests (and property rights) in using its territory and resources as it will, planetary resources are drawn down, and environmental integrity is compromised not simply within the state but across borders. The problem, according to the World Commission on Environment and Development, is that 'the earth is one but we are not'.[16] Deforestation provides one useful example. The use of timber resources within a state is a sovereign right. Yet forests are not simply a collection of trees and the consequences of forest extraction and deforestation may well be transboundary and global – in land degradation that affects transboundary ecosystems, in the loss of soil fertility, siltation in watersheds and downstream ecosystems, changes in local and regional weather systems, in contributions to climate change in the loss of carbon sinks. Fishing provides another example (although one that is now guided by some regulation in international law). Fish stocks within territorial waters are 'sovereign' resources. Yet over-fishing within territorial waters has consequences for what are known as straddling and highly migratory fish stocks, with flow-on effects for the robustness of the marine food chain and marine ecosystems and the resources available to other states and their peoples.

The principle of sovereign rights over resources and natural wealth, and over environmental policy, remains a firm principle in international law. The concept of permanent sovereignty over natural resources was initially associated with the demands of anti-colonialism and self-determination, expressed through a series of UN General Assembly resolutions in the 1950s and 1960s.[17] Resolution 626 (VII) of December 1952 confirmed the 'right of peoples freely to use and exploit their natural wealth and resources' and determined that this right was 'inherent in *their* sovereignty'.[18] This could be better understood as national rather than state

15 For example, this is offered as the reason that international negotiations on oceans pollution focused for a long time on pollution from ships at sea rather than from land-based sources, which are far worse in their contribution (see Karen T. Litfin (1997) 'Sovereignty in World Ecopolitics', *Mershon International Studies Review* 41, 167–204 at 186).

16 World Commission on Environment and Development (1987) *Our Common Future* (Oxford: Oxford University Press), 27.

17 See Nico Schrijver (1995) *Sovereignty Over Natural Resources: Balancing Rights and Duties in an Interdependent World*, PhD Dissertation, Online Resource, Groningen University Schrijver for a detailed history.

18 See United Nations General Assembly (1983) *Implications, Under International Law, of the United Nations Resolutions on Permanent Sovereignty Over Natural Resources, on the Occupied Palestinian and Other Arab Territories and on the Obligations of Israel Concerning Its Conduct in these Territories: Report of the Secretary-General*, A/38/265; E/1983/85, 21 June, para I.3.

sovereignty and this initial meaning, with its emphasis on the rights of peoples, has been reclaimed to support indigenous rights against and within sovereign states.[19]

In most multilateral environmental agreements, however, permanent sovereignty is expressed in terms of a state's sovereign right.[20] Principle 21 of the 1972 Stockholm Declaration provides that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies'. This was reinforced in Principle 2 of the 1992 Rio Declaration with the addition of development policies. Similar statements are found in all major multilateral environmental agreements. Thus both the *physical* rights of states to resources and the *authority* rights to determine how those resources will be used are reinforced. Indeed, some environmental agreements have extended the boundaries of the territorial jurisdiction of states. As Peter Sand points out, the 1982 United Nations Convention on the Law of the Sea 'formally *extended* the sovereign rights of coastal states to the vast new areas of exclusive economic zones' and the 1992 Convention on Biological Diversity 'extended sovereign rights to the even vaster range of plant and animal genetic resources'.[21]

Two caveats are warranted here. The first is that there is no necessarily inherent tension between sovereignty and environmental protection. Notwithstanding the problems raised under proposition 1, states can exercise their sovereign rights in the *interests* of the environment, to implement domestic policy that seeks to protect the environment and to do so in a way that is more stringent than any relevant multilateral agreement that might be in force. They may do so individually or they may do so collectively, as African countries did for example when they signed the Bamoko Agreement to prevent, on sovereignty grounds, the import of hazardous waste into their countries (in the face of what was seen to be a weakness in the Basel Convention). Problems do arise, however, when domestic (sovereign) environmental policy is 'extra-territorialised' unilaterally and comes up against the demands of competing international law such as trade law. This has been the problem with the US Marine Mammal Protection Act, under which successive US governments have attempted to place import restrictions on tuna caught without regard to dolphin safety, or shrimp caught with the use of turtle excluder devices. Similar problems characterised attempts by European countries to place restrictions on imports of tropical timber that has not been harvested from sustainably managed forests.

The second caveat is that sovereign rights to resources and over environmental policy are also being constrained through the development of countervailing norms. The development of international environmental law has generated principles that

---

19 See, for example, the working paper prepared by Erica-Irene A. Daes, Chairperson-Rapporteur of the Working Group in Indigenous Populations; UN Commission on Human Rights (2002) *Indigenous Peoples' Sovereignty Over Natural Resources*, E/CN.4/Sub/2002/2, 30 July.

20 Reports for the UN have attempted to show that the principle of sovereignty over resources is at the same time a 'right of both States and peoples' (United Nations General Assembly 1983, para 15(b)).

21 Peter H. Sand (2004) 'Sovereignty Bounded: Public Trusteeship for Common Pool Resources', *Global Environmental Politics* 4(1), 47–71 at 47–8; emphasis added.

would seem to place restrictions on the exercise of sovereign rights – of both the physical and authority kind. In effect, as Werner and de Wilde point out, 'two competing sovereignty claims are at stake'.[22] The first rests on the demands for autonomy and authority over the 'inside' of territory. The second is that sovereignty demands (and exists in) conditions of mutual recognition and respect. The act of recognition is necessary in order for states to function as sovereign entities.[23] Principles that reinforce state sovereignty over resources and over environmental and development policy also impose on states the obligation that they should not cause harm to the environment of other states, and nor should they cause harm to the environment of areas beyond national jurisdiction (although it is clear that this obligation is often poorly observed, particularly with respect to the global commons). States are required to be 'good neighbours'. Principles 18 and 19 of the Rio Declaration require states to notify other states of any 'natural disasters or other emergencies that are likely to produce sudden harmful effects', to 'provide prior and timely notification … to potentially affected States on activities that might have a significant adverse transboundary effect' and to 'consult with those States at an early stage and in good faith'. The implication is not simply that other states should be told that they might expect transboundary environmental consequences but that the source state should do something to prevent it! Other principles, such as the precautionary principle or the polluter pays principle, also impose limits on the ways in which states may exercise their sovereign rights to use their resources and natural wealth, in the interests of protecting the environment and in the interests of other states.[24]

Proposition 3: The exercise of sovereign authority within the state is crucial for the implementation of international environmental law and for environmental management

This is the 'strong state' argument. Environmental degradation and global environmental change 'increase the demand for mitigative and adaptive action'.[25] Internal sovereignty is assumed to be necessary if international environmental agreements are to be implemented effectively. Martin Jänicke and Klaus Jacob also perceive internal sovereignty and the effective state as important in providing lead markets for technological innovation which is then often diffused horizontally across borders.[26] The state has the resources to enforce domestic implementation of international commitments (even as those commitments are seen to constrain sovereign choice and actions). Further, the requirements of international environmental law are

22 Werner and de Wilde, 'The Endurance of Sovereignty', 296.

23 Inoguchi and Bacon, 'Sovereignties', 287.

24 See Lorraine Elliott (2004) *The Global Politics of the Environment*, 2nd edn (Basingstoke: Palgrave Macmillan), 143–145.

25 Frank Biermann and Klaus Dingwerth (2004) 'Global Environmental Change and the Nation State', *Global Environmental Politics* 4(1), 1–22 at 2.

26 Martin Jänicke and Klaus Jacob (2004) 'Lead Markets for Environmental Innovations: A New Role for the Nation-State', *Global Environmental Politics* 4(1), 29–46.

argued to strengthen internal sovereignty because the 'menu of choices available to states' is expanded.[27] Internal sovereignty can be therefore be used to strengthen and embed environmental values and practices. This is a version of the protective role of the sovereign (the state): the provision of public goods and the control of the more damaging consequences of the market, or what Liftin refers to as the 'bulwark against opportunistic economic forces'.[28] If environmental protection requires that externalities be internalised, then it is the state, in this view, that has the authority to enact the kinds of policies that will ensure that this happens. In her revisioning of the state as a green state, Eckersley also suggests that the 'sovereignty discourse can be enlisted in environmentally defensive ways' by resisting 'flows of unwanted and unwarranted incursions of pollution or environmentally unsafe products' on the grounds that they 'undermine the territorial integrity and right of self-determination of national communities'.[29] Yet global and local demands for states to take action are unevenly distributed. Those states that face disproportionately greater demands for more effective exercise of internal sovereignty may also be those states whose capacity to do so is precarious. They have less effective sovereignty.

Sovereignty here becomes caught up also in the legitimacy issue (addressed further under proposition 5). Effective internal sovereignty – positive sovereignty – is expected to reflect not simply the capacity for governance, but for *good* environmental governance. French suggests that this is a 'sovereignty derived and legitimised not through abstract juridical principle but constituted with reference to a new normative framework … to accomplish … objectives deemed to be for the public good'.[30] This is sovereignty based not on analogy with private ownership of territory and resources. Rather, sovereignty becomes re-envisioned as a 'public trust' by which states exercise sovereignty to manage resources in the interests of the beneficiaries of the trust – that is 'the world's peoples'.[31]

Proposition 4: *International environmental law demonstrates the condition of relinquished or pooled sovereignty*

The burgeoning of global and regional multilateral environmental agreements point to the paradox of what Chayes and Chayes call the 'new sovereignty' – that 'the only way most states can realise and express their sovereignty is through participation in the various regimes that regulate and order the international system'.[32] The transboundary and global nature of environmental degradation and awareness of ecological interdependence means that the principle of sovereign self-help is inadequate and insufficient. States cannot manage global or transboundary

27 Robyn Eckersley (2004) *The Green State: Rethinking Democracy and Sovereignty* (Cambridge MA: The MIT Press), 29.

28 Litfin, 'Sovereignty in World Ecopolitics', 168.

29 Eckersley, *The Green State*, 248–9.

30 Duncan A. French (2002) 'The Role of the State and International Organisations in Reconciling Sustainable Development and Globalisation', *International Environmental Agreements* 2(2), 135–50 at 141.

31 Sand, 'Sovereignty Bounded', 58.

32 Cited in Keohane, 'Ironies of Sovereignty', 748.

environmental challenges on their own. Cooperation and agreement among them, which includes accepting restrictions on their own behaviour, is required. Sørensen characterises this as a form of post-modern – or more accurately, late-modern – sovereignty in which the game of sovereignty is characterised by 'an intense cooperation between sovereign states'.[33]

The array of environmental agreements (declarations, resolutions, conventions and protocols) and the network of commissions, programmes, funds, advisory bodies, intergovernmental panels, forums and other working groups that have been established to manage environmental collective action problems are perceived either as evidence that states have relinquished their sovereignty to 'interest groups and international bureaucrats'[34] or that they have developed 'new and effective means … [of exercising] sovereignty collectively where they can no longer exercise it effectively alone'.[35] Either way, something is supposedly happening to sovereignty. If sovereignty is being exercised 'collectively', then this re-envisions the assumption that sovereignty can only be attached to individual states (in the Westphalian tradition). What, for example, would constitute the territory or the boundaries of 'collective' sovereignty? On the other hand, if sovereignty is being 'relinquished' the question must be asked, to whom or to what?

One could argue that there has been little change to the principle and exercise of external sovereignty. Negotiating and ratifying treaties remains the prerogative of the sovereign state and states have the right to determine their own external or foreign policies. The legal status of states as sovereign does not change because of multilateral environmental agreements. In formal terms, no environmental treaty (yet) involves a supra-national body with powers over the state. Neither UNEP nor the Commission on Sustainable Development comes anywhere close to having such powers. Nor do any of the treaty secretariat or their advisory bodies.[36] There is, however, growing pressure for some form of more effective intergovernmental body for the environment, possibly even some form of world environment organisation. The 1989 Hague Declaration (signed by the governments of twenty-four sovereign states) called for such a body to have effective decision-making authority even in circumstances where 'unanimous agreement has not been reached', suggesting that states could be bound without their sovereign consent.

As noted above, the sovereignty principle remains a central feature of international environmental law. States can exercise their sovereign rights to withdraw from environmental agreements (or threaten to do so as the whaling states have done with the International Whaling Convention), or they can refuse to be parties to them, as

---

33 Georg Sørensen (1999) 'Sovereignty: Change and Continuity in a Fundamental Institution', *Political Studies* CLVII, 590–604 at 602.

34 Roger Bate (1999) 'Greens versus Sovereignty', *IEA Economic Affairs*, March, 53.

35 Maurice Strong (1973) 'Introduction' to Wade Rowland, *The Plot to Save the World: The Life and Times of the Stockholm Conference on the Human Environment* (Toronto: Clarke, Irwin & Co).

36 This did not stop an attempt by some US legislators to propose an 'American Land Sovereignty Protection Act' in 1996, in partial response to what was perceived to be 'intervention' on the part of the UNESCO World Heritage Committee (see Sand, 'Sovereignty Bounded', 57, fn. 103).

the US has done with the Convention on Biological Diversity and the Kyoto Protocol on Climate Change. Levy *et al*. argue that institutions will 'necessarily follow the principle of state sovereignty'[37] and that they can therefore do little more than 'nudge countries further along [the] continuum of commitment'.[38] Yet environmental regimes are constitutive as well as regulative – they constrain state behaviour, encourage 'learning' and redefinition of supposedly sovereign interests, establish a 'path dependency' for policy-making, and place conditions and limitations on what states may do with respect to economic and other policy in order that environmental problems can be mitigated.

The sovereign right to policy autonomy is therefore constrained by international environmental agreements, although those agreements were entered into as a sovereign act. In other words, the sovereign principle that states cannot be bound without their consent would seem to be sustained. For example, decisions by states parties under the CITES agreement (on the international trade in endangered species) to list and therefore restrict trade in endangered species are binding on states only if they are also parties to the Convention. But restrictions on trade in endangered species (or parts thereof) also have consequences for states that are *not* parties because states parties are restricted in their trade with non-parties. The Montreal Protocol on ozone-depleting substances also places restrictions on trade in such substances with non-parties. MEAs can therefore have consequences for states that exercise their sovereign right not to commit to particular international agreement. Liftin characterises MEAs as sovereignty bargains by which states might increase their sovereignty in some dimensions even as they suffer losses in others.[39] But the consequences for states outside the bargain constitute what Jackson calls an 'unprecedented form of international *non*-reciprocity'.[40]

The question of compliance is beginning to make inroads into sovereign freedom from external authority, although disputes over whether strategies should be punitive or commentary remain unresolved. For example, the *UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Stocks* (to give it its full title) includes a comprehensive 'board and inspect' enforcement regime which means that vessels flagged by sovereign states cannot claim sovereign immunity. Decision-making functions are also being transferred to intergovernmental and non-governmental bodies. Policy-making under treaty COPs (conferences of the parties) relies in many cases on best scientific evidence which is the realm of independent scientific and technical advisory bodies, actors that are not formally under the control of states. Under the 1998 Rotterdam Convention (on Prior Informed Consent for hazardous chemicals and pesticides) and

37 Marc A. Levy, Peter M. Haas and Robert O. Keohane (1992) 'Institutions for the Earth: Promoting International Environmental Protection', *Environment* 34(4), 12–17, 29–36 at 13.

38 Levy, Haas and Keohane, 'Institutions for the Earth, 14.

39 Litfin, 'Sovereignty in World Ecopolitics'.

40 Cited in E.N. Kurtulus (2004) 'Theories of Sovereignty: An Interdisciplinary Approach', *Global Society* 18(4), 347–371 at 364; emphasis added.

the 2001 Stockholm Convention on persistent organic pollutants, for example, expert review committees are responsible for making recommendations and preparing decision guidelines documents for including new chemicals to the restricted lists. CITES relies on the 'red-list' of endangered species prepared by the IUCN (part governmental, part non-governmental) and on the non-governmental organisation TRAFFIC.[41] While final decisions on whether to list chemicals or species are still taken at COP-level, the expertise and policy advice is increasingly independent of state authority. The consequences – and this is addressed below under proposition 5 – is that global environmental governance is no longer the preserve just of sovereign states, whether collective or not.

Proposition 5: *The sovereign state is losing its exclusive competence and normative appeal in the face of environmental degradation*

There are two, connected themes here. The first is that the assumption that 'only one sovereign power can prevail within any single territory'[42] is increasingly fragile. As suggested above, the global politics of the environment is characterised by a 'differentiated division of labour'[43] in which actors besides sovereign states have independent authority and contributions. Power is shared and governance is increasingly diffuse, located in both public and private spaces, characterised by authority in multiple institutional arenas. Morgan identifies this as a process whereby sovereignty is being reconstructed 'from state actors to other units of rights and responsibilities'.[44] This is not just about the visibility of other actors (civil society movements, NGOs, business and corporate actors, the scientific community) but about their power and agency. James Rosenau refers to these as the 'criss-crossing flow of transformed authority'[45] and Bradley Karkkainen characterises it as a 'nascent polycentric substitute for the more familiar forms of sovereign authority'.[46] Biermann and Dingwerth identify in this the realm of 'vertical global decision-making' in which 'nongovernmental organisations, the scientific community and business associations have either joined states in devising transnational rules or circumvented the state altogether in setting global standards among their own'.[47] The state's sovereign claims to 'exclusive competence' are therefore being re-envisioned. As Martin Kőhler suggests, the development of cross-level coalitions 'strain yet another principle of state sovereignty: that is, its upholding of institutional

41 TRAFFIC, for example, manages the Elephant Trade Information System for the CITES Secretariat.

42 Linklater 'Citizenship and Sovereignty', 129.

43 Peter M. Haas (2004) 'Addressing the Global Governance Deficit', *Global Environmental Politics* 4(4), 1–11 at 9.

44 Matthew J. Morgan (2003) 'The Devolution of Political Being: From State Sovereignty to Individual Rights', *The Review of International Affairs* 3(1), 29–40 at 30.

45 James Rosenau (1998) 'Governance and Democracy in a Globalising World', in Archibugi, Held and Kőhler (eds) *Re-Imagining Political Community*, 35.

46 Karkkainen, 'Post-Sovereign Environmental Governance', 74.

47 Biermann and Dingwerth, 'Global Environmental Change', 11.

coherence in relation to the outside'.[48] For Karkkainen, this is more than a constraint on the exercise of state sovereignty. Rather it implies the 'partial disaggregation or unbundling and reassignment of powers traditionally thought to be among sovereignty's most essential attributes'.[49]

To some extent, the activism of civil society and environmental NGOs has been a response to the inadequacies and incapacities of the state, with NGOs filling the gaps in environmental governance where states have been unwilling or unable to do so. Civil society does more than 'assist' the state, or attempt to influence state policy, or step in when state capacity is found wanting. Rather it exists as a sphere of politics and authority independent of the sovereign state[50] or what Rosenau refers to as 'sovereignty-free' zone.[51] For others, civil society is a countervailing force, a 'check and balance on unbridled state sovereignty'.[52] If the purpose of the Westphalian system was, as Deudney argues,[53] to empower states and constrain non-state actors then 'Westphalia' is being challenged by the multiple and competing sources of authority in the global politics of the environment (as it is in other issues areas).

The second theme under this proposition relates more to assumptions about legitimacy and the ways in which sovereignty is constituted in the relationship between the ruler (the sovereign) and those who are ruled. The normative strength of Westphalian sovereignty relies on the state as a bounded political community that determines its own fate and forms 'its own agenda and life conditions'.[54] Environmental change challenges this version of the sovereign, political community. The deterritorialising of environmental degradation (through its various transboundary and global manifestations) is serving to challenge the 'social bond which has linked the members of each modern … state together' and to question 'the exclusionary nature of sovereignty and traditional ideas about community and citizenship'.[55] The legitimacy of the exercise of internal sovereignty – that there is only one sovereign – has come to rely on the social contract. Yet doubts about the ability of the state to fulfil the social contract to provide security for its citizens by defending them against

48 Martin Kőhler (1998) 'From National to Cosmopolitan Public Sphere', in Archibugi, Held and Kőhler (eds) *Re-Imagining Political Community*, 236.

49 Karkkainen, 'Post-Sovereign Environmental Governance', 77.

50 See, for example, Ronnie D. Lipschutz (1993) 'Learn of the Green World: Global Environmental Change, Global Civil Society and Social Learning', paper presented at the Annual Conference of the International Studies Association, 23–27 March.

51 James Rosenau (1990) *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press).

52 Catherine J. Tinker (1993) 'NGOs and Environmental Policy: Who Represents Global Civil Society?', paper presented to the Annual Meeting of the International Studies Association, Acapulco, Mexico, 14.

53 Daniel Deudney (1998) 'Global Village Sovereignty: Intergenerational Sovereign Publics, Federal-Republican Earth Constitutions and Planetary Identities', in Karen Litfin (ed.) *The Greening of Sovereignty in World Politics* (Cambridge MA: The MIT Press), 301.

54 David Held (1998) 'Democracy and Globalisation', in Daniele Archibugi, David Held and Martin Kőhler (eds) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity), 21.

55 Linklater, 'Citizenship and Sovereignty', 114

externally sourced environmental 'threats' create ambivalence about its normative appeal as the basis for political community and for the legitimacy of the sovereign rights that it claims. This is further compounded because the sovereign right of the monopoly of violence and coercive power is ineffective and ineffectual against the consequences and challenges of transboundary and global environmental change. Civil society is therefore identified as an alternative source of legitimacy as well as of authority.

This suggests a re-visioning of sovereignty embedded in citizens or citizenship rather than in statehood – the 'ultimate authority' within a territory (and perhaps even globally) is not the state but people, returning the pendulum to the requirement that the state, acting as sovereign, is the product of demands for the right to self-determination and is sovereign only at the will of the people. As Barkin and Cronin put it, national sovereignty 'stems not from boundaries but from the community of sentiment'.[56]

Proposition 6: Sovereignty is counter-productive to the pursuit of global environmental justice

Chris Brown asks whether the Westphalian system 'is now … an obstacle to the realisation of a just and functioning world'.[57] This is partly a variation on proposition 2 but it raises the question more specifically about the boundaries of moral inclusion and exclusion associated with the assumptions about and the exercise of Westphalian sovereignty. This proposition also speaks to the expectation that the sovereign 'legitimacy of states has come to rest as much on the justice of their rule as on their *de facto* hold on power'.[58] The sovereign state is morally parochial. The assumptions about the inviolability of borders, the relationship between the sovereign state, territory and political community has meant that 'the bond between citizen and sovereign necessarily excludes aliens'.[59] Sovereignty assumes an 'inside' that is protected against the 'outside', and it assumes that discourses of justice and interest are the legitimate and authoritative responsibility of and properly located within the state. Dialogue and debate regarding issues affecting the vital interests of citizens are to be confined within the authoritative boundaries of the sovereign state.

However, transboundary and global environmental degradation – by which the experience of environmental harm is displaced across borders – creates moral obligations that cross boundaries. As Sørensen puts it, globalisation is making 'the world hang closer together'.[60] Under conditions of environmental degradation, the political community (and the moral community) is increasingly difficult to sustain in territorially confined terms. The transactions by which environmental harm is

56 Cited in Liftin, 'Sovereignty in World Ecopolitics', 191.

57 Brown, *Sovereignty, Rights and Justice*, 232.

58 Richard Bellamy and Dario Castiglione (1998) 'Between Cosmopolis and Community: Three Modes of Rights and Democracy', in Archibugi, Held and Kőhler (eds) *Re-Imagining Political Community* (Cambridge: Polity), 156.

59 Linklater, 'Citizenship and Sovereignty', 129.

60 Sørensen, 'Sovereignty: Change and Continuity', 590.

displaced extend the bounds of those with whom we are connected, against whom we might claim rights and to whom we owe obligations within in the moral community.[61] The lives of 'others-beyond-borders' are shaped without their participation or consent and therefore the dialogic process about vital interests also cannot be confined with the boundaries of the territorially sovereign state. This is a cosmopolitan morality of distance. It creates and is created in a cosmopolitan community of duties as well as rights that extends beyond the state. This community of fate (or what Beck calls a 'world risk society')[62] is defined by 'sameness' as well as by 'otherness'.[63] Transnational environmental harm therefore affects not just distant others even if it does affect them disproportionately.[64] Indeed, Beck goes so far as to suggest that with ecological threat, which 'eliminates all the protective zones and social differentiations within and between nation-states', comes 'the 'end of the Other', the end of all our carefully cultivated opportunities for distancing ourselves',[65] practices that are constitutive of as well as the consequences of the Westphalian system of sovereignty. This is a kind of 'global village sovereignty'.[66] Risk society reflects a deterritorialised ecological community of fate. If, in turn, the demands for a community of fate are that it rightly governs itself and recognises peoples as equal co-legislators in the moral community then this implies a form of global citizenship. And, as Linklater points out, 'further extensions of citizenship necessarily involve a significant break with the Westphalian principle of state sovereignty'.[67] Further, if global environmental justice requires dialogic encounters so that those who are affected by transnational environmental harm are empowered to refuse, negotiate and contest, the exercise of internal sovereignty by the state becomes increasingly irrelevant, at least from a normative point of view.

---

61 For more, see Lorraine Elliott (2004) 'Cosmopolitan Environmental Harm Conventions', paper presented at the BISA Special Workshop on Cosmopolitan Institutions: Justice, Governance and Political Economy, University of Birmingham, 16–18 June.

62 Ulrich Beck (1999) *World Risk Society* (Cambridge: Polity Press).

63 Risk society defines the ecological crisis in part as a product of the institutional practices associated with the technological advances of industrial modernity. As Marshall summarises it, 'the risk society becomes gripped by the hazards and potential threats unleashed by the exponentially growing productive forces in the modernisation process'; Brent K. Marshall (1999) 'Globalisation, environmental degradation and Ulrich Beck's risk society', *Environmental Values*, 8 (2), 253–75 at 264. In turn, the risks associated with modern society impel the transformation of that society.

64 . The idea of distant others invokes not simply a geographic interpretation. Rather the distant others may be geographically proximate but 'socially' distanciated. This has been the basis of the environmental justice movement within industrialised countries, particularly, the United States.

65 Beck, *World risk society*, 62.

66 See Deudney, 'Global village sovereignty'.

67 Linklater, 'Citizenship and sovereignty', 129.

Some concluding thoughts

If Westphalian sovereignty assumes and indeed requires five properties – territory, recognition, autonomy against external interference, control of borders and legitimacy – then the propositions here would suggest that each is being in some way challenged or potentially undermined or reconfigured by the political, social, economic and normative features and consequences of environmental degradation.[68] Human activities give rise to environmental, resource and waste flows that are increasingly difficult to regulate within the boundary-making logic of the sovereignty system. Agnew suggests that modern state sovereignty 'requires clearly bounded territorial spaces'.[69] Environmental degradation does not necessarily change the physical 'fact' of boundaries as lines on a map (although those lines rarely make ecological sense) but it does challenge what those bounded spaces represent and how they are constituted in practice. Internal sovereignty, authority over territory, capacity to establish the content of and manage the delivery of policy objectives, are all made more difficult and at times impossible by the transboundary and globalised nature of environmental transactions. States can control the environmental and resource flows across borders only with difficulty. Environmental intervention has become the rule rather than the exception. As well as deterritorialising sovereign space, this also undermines the external demands of recognition on which the Westphalian system relies. The 'space' to which the lives of citizens are connected and by which they are bounded is increasingly global, functioning outside as well as inside territorial borders. While states may have legal entitlement as sovereign authorities in international relations, they are unable to control their 'global space'.[70]

In this sense, one could argue that 'the internal dimension of state sovereignty has been transformed more thoroughly than the external one'[71] as a consequence of environmental degradation. Yet states are increasingly subject, very unevenly and not always, to other forms of authority structures including that constituted by civil society itself.[72] The monopoly powers that were assumed to be the right of and unique to the modern state are being undermined by a range of processes associated with globalisation, including environmental degradation, resulting in 'alternative sites of power and competitors for human loyalty'.[73] Levy *et al*. suggest that ecological

68 Although it has been beyond the scope of this paper, I am mindful of the fact that these characteristics are also highly gendered in their assumptions about borders, about power, and about the nature of the Other (see, for example, Franke Wilmer (1998) 'Taking Indigenous Critiques Seriously: The Enemy "R" Us' in Karen Litfin (ed.) *The greening of Sovereignty in World Politics* (Cambridge MA: The MIT Press)).

69 Cited in Smith, 'Globalisation and Governance', 204.

70 See Smith, 'Globalisation and Governance', 223.

71 Väyrynen cited in Takashi Inoguchi and Paul Bacon (2001) 'Organising Hypocrisy and Transforming Sovereignty', *International Relations of the Asia Pacific* 1, 167–72 at 170.

72 Mary Robinson expressed something of this view when she argued that public opinion now constituted the world's second superpower.

73 Linklater, 'Citizenship and Sovereignty', 118.

interdependence is changing 'the relationship between operational sovereignty [the legal freedom of action under international law] and effectiveness'.[74]

There seems little doubt that while we may not be entirely 'beyond' Westphalia – this is hardly a linear journey – the environmental dysfunctions and inadequacies of the sovereignty system and of sovereignty as practiced by the state mean that settled assumptions and practices of sovereignty are undergoing change. This does not mean being beyond the state (although it may mean being beyond the Westphalian state) and nor does it mean that states are 'disappearing' or becoming 'irrelevant'. Further, as also demonstrated here, the discourse of sovereignty remains powerful. Indeed, Sørensen suggests that 'the rules of sovereignty exist irrespective of the fact that many states have not always enjoyed the autonomy implied in the notion of constitutional independence'.[75] I think that this is doubtful – the rules of sovereignty *are* being revisioned in something other than Westphalian terms, although this is embryonic and uneven. We find this in the demands explored here that sovereign rights be understood as fiduciary not proprietary;[76] in the recognition that sovereignty can no longer mean unitary and exclusive state competence, and that real and legitimate sovereignty is (or at least should be) constituted by and made meaningful for citizens including non-territorially bounded forms of political community.

74 Marc A. Levy, Robert O. Keohane and Peter M. Haas (1993) 'Improving the Effectiveness of International Environmental Institutions', in Peter M Haas, Robert O Keohane and Marc A Levy (eds) *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge MA: The MIT Press), 416.

75 Sørensen, 'Sovereignty: Change and Continuity', 595.

76 See Sand, 'Sovereignty Bounded'.

Chapter 12

Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept

Jackson Nyamuya Maogoto

The modern independent nation-state that emanated from the Peace of Westphalia of 1648 was based on an 'iron curtain-like' conception of the state that enshrined the external and internal autonomy of the state.[1] From the seventeenth century to the early part of the nineteenth century, state sovereignty was sacred and retained its conception as supreme authority, granting a state exclusive jurisdiction and control over all objects and subjects in its territory, to the exclusion of any other influence. However, during the later part of the nineteenth century, industrialisation and market expansion required the post-Westphalian nation-state to forego self-sufficiency and to cooperate internationally to maintain domestic sustainability.[2]

As the modern international system developed in the nineteenth century and multilateralism found its voice, efforts began to be made to increase the level of *voluntary compliance* and to hold states responsible to the international community for violations of certain international obligations.[3] It was the failure of this informal voluntary international enforcement mechanism during the 1870 Franco-Prussian War and the resulting humanitarian horrors that led Gustave Moynier – one of the founders of the International Committee of the Red Cross (ICRC) – to present a proposal to the ICRC on 3 April 1872. The proposal called for the establishment by treaty of an international tribunal to enforce laws of war and other humanitarian

1 The Peace of Westphalia ended the wars of religion between the Protestant and Catholic states and focused upon the establishment of single overriding authorities in the growing national areas of Europe. Despite the promise of the Westphalian Peace, the advent of the sovereign independent nation-state did not usher in a new era of peace and stability. If anything, nation statehood has been characterised by conflict resulting in widespread death and destruction.

2 John R. Worth (2004) 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-Signing" of the Rome Statute and the Legacy of Senator Bricker', *Indiana Law Journal* 79, 245–265 at 260.

3 Unilateral political or military retaliation and economic sanctions continued to be the main vehicles through which states were censured for offensive conduct.

norms.[4] Moynier's proposal, which was counter to recognised sovereign principles of the time, was received coldly by international scholars and governments of the day and went no further.

The emerging trend to multilateralism was, however, unstoppable as the state continued to metamorphose from a state of independence to a position of interdependence in which many political, economic and social activities increasingly become transnational in character.[5] By the twentieth century, the maturity of an international system underpinned by recognised international norms was increasingly breaking the Westphalian triangle of government, territory and people. The redefinition of the nation-state identity, the reshaping of the fixed and firm Westphalian boundaries between the national and international spheres and the fracturing of the statist-centred monistic order provided an avenue for chiselling away of sovereignty by decentralising national authority and wrestling control from the state. It is this constant struggle to balance the empowering with the limiting aspects of sovereignty, exemplified by the gradual transition from 'independence' to 'interdependence' that lies at the heart of the development of international criminal law.

Though the international community has consistently recognised sovereignty as the most fundamental right a nation can assert, complete autonomy of the sovereign state in managing its own internal affairs and its freedom from outside interference and unsolicited intervention has changed over time. Inherent in the discourse on sovereignty is the tension that arises when an area of international law, traditionally understood to fall within the exclusive dominion of the nation-state, begins to transcend that rigid framework. Although state sovereignty in its international context continues to play a vital role, the powers, immunities and privileges of sovereignty are now subjected to increased limitations. These limitations are the result of the need to balance the recognised rights of sovereign states against the greater need for international justice, spawned by a concern for human rights and humanitarian norms – a trend evident from the *ad hoc* international penal processes of the twentieth century.

The development of a corpus of human rights law, particularly in reaction to the revulsions of World War II, accelerated the reconceptualisation of sovereignty to transcend the responsibility of the territorial nation-state and to become an international legal concern.[6] The importance of strengthening human rights and

4 The proposal was published in the *Bulletin International des Sociétés de Secours aux Militaires Blessés* (the predecessor of the *International Review of the Red Cross*), under the title 'Note sur la Création d'une Instituition Judiciaire Internationale Propre a Prevenir et a Reprimer les Belowctions à la Convention de Geneve'. For a text of the draft convention, see Christopher Keith Hall (1998) 'The First Proposal for a Permanent International Criminal Court', *International Review of the Red Cross* 322, 57–74 at 72–74.

5 Jost Delbrck (2001) 'Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization', *Swiss Review of International and European Law* 1, 1–36 at 16.

6 See David A. Nill (1999) 'National Sovereignty: Must It Be Sacrificed to the International Criminal Court?', *Brigham Young University Journal of Public Law* 14, 119–150 at 120, 121.

humanitarian law is evident in light of the propensity of governments to resort to violence to resolve international and internal conflicts. The blood-soaked legacy of the twentieth century, stretching from the start to the close of the century without any seeming loss of momentum, generated impetus for international law to take an active interest in the conduct of the state towards individuals.

Sovereign excesses in the twentieth century resulted in the murder of approximately 170 million persons by their sovereign.[7] This statistic, a potent testimony of sovereign excesses through gross and systematic human rights violations, firmly places human rights and humanitarian problems on the international plane. This reality (identified and articulated in the R*eport of the Secretary General's High-Level Panel on Threats, Challenges and Change*)[8] firmly places human rights problems on the international plane and mandates a fundamental rethinking about the basis of political and associational organisation in the new millennium.

This chapter has as its modest aim a critical examination and analysis of the role of the development of human rights and humanitarian norms in reshaping the content and contour of Westphalian sovereignty. In particular it seeks to espouse paradigms based on the impact of human rights and humanitarian norms through which sovereignty should be viewed and understood in contemporary times.

The world wars: Challenging Westphalian sovereignty

World War I was a watershed conflagration. The devastation of the war provided a catalyst for the first serious attempt to crack the Westphalian notion of sovereignty. Apart from inaugurating total war, the end of the war saw an unsuccessful attempt to prise open the 'iron curtain' of Westphalian sovereignty by individualising criminal responsibility for violations of the emerging law of war. This dramatic new attitude was encapsulated in the enthusiasm for extending criminal jurisdiction over sovereign states (Germany and Turkey) with the aim of apprehension, trial and punishment of individuals guilty of committing atrocities through supranational trials.[9] The punishment provisions of the peace treaties of Versailles and Sèvres sought to limit the scope of the principle of sovereign immunity by punishing military and civilian officials, while at the same time extending universal jurisdiction to cover war crimes and crimes against humanity.[10]

---

7 Rudolf J. Rummel (1994) *Death by Government* (New Brunswick NJ: Transactions Publishers), 9.

8 Panyarachun, Anand *et al*. (2004) *Report of the Secretary General's High-Level Panel on Threats, Challenges and Change*, Executive Summary available at http://www.un.org/secureworld.

9 The peace treaties of Versailles and Sèvres envisaged liability for individuals even if their crimes were committed in the name of their states: see below, note 10.

10 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919, [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles'); *Treaty of Peace Between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919, [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration

However, the emerging commitment to criminalise and punish serious violations of human dignity was to be first derailed, and then swept aside, by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics. The 'iron curtain' of Westphalian sovereignty was the primary objection advanced by both Germany and Turkey, against Allied calls for the establishment of supranational tribunals to try the officials and personnel of these countries implicated in wartime atrocities. Both nations, in the light of these international efforts, strongly advocated against such a move, arguing that sovereignty over territory and authority over nationals, a sacrosanct principle of international law, was threatened if the proposed supranational tribunals proceeded.

The efforts to extend international criminal jurisdiction beyond national frontiers, in a bid to enforce international criminal law norms, presented a challenge to the traditional scope of national sovereignty, which precluded an extension of international norms into the domestic sphere absent a state's consent. Largely due to their seemingly radical innovation of individual criminal responsibility and disregard for sovereign immunity, the provisions of the treaties dealing with individual criminal responsibility were never implemented. Ultimately, perceptions of the significance of these provisions to threats against sovereignty proved sufficiently strong to prevail over the imposition of supranational trials against both German and Turkish defendants.

The anticipated international penal process yielded to the demands of national sovereignty, leading to sham domestic trials in Germany and Turkey after a major revision and scaling-down of the defendant list in both countries. Subsequently, the German and Turkish regimes that gained power in the post-war era successfully relied on principles of national sovereignty to reject the authority of the European powers to intervene in the domestic trials held in lieu of anticipated supranational trials. While the envisaged international efforts to secure international criminal liability failed to materialise, important principles were established. First, the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties articulated crimes against humanity, and attempted to limit the previously solid conception of sovereign immunity that shielded heads of state, as well as officials, from the reach of international law.[11] Secondly, for the first time, the idea that the state did not hold exclusive criminal jurisdiction was challenged. Lastly, the recognition of the need of international penal institutions to repress violations

---

and Special Declaration entered into force 10 September 1919); and *Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres'). The peace treaties of Versailles and Sèvres were seen by many (including some of their architects) as contrary to the general nationalistic, statist and positivistic philosophies generally ascendant in the nineteenth century and early part of the twentieth century.

11 The final Report of the 1919 Allied Commission on the Responsibility of the War and on the Enforcement of Penalties detailed hundreds of war crimes and identified many hundreds of German, Turkish and Bulgarian war criminals. See Paris Peace Conference (1919) 'Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919' (Oxford: For the Carnegie Endowment, at the Clarendon Press).

of international criminal law in the face of state recalcitrance questioned the state's exclusive right to legal competence over management of its affairs.

It was to take another round of state-orchestrated carnage about two decades later to spur states into giving international criminal law life and vitality. The resultant economic and political chaos of World War II, reinforced by increasing moral disquiet over the idea that states had a right to go to war whenever they wished, provided the basis for focusing on international accountability through penal process. The Nuremberg and Tokyo Trials[12] are the visible symbols of the transition from the classical Westphalian system of state sovereignty to an international system based on the credo of 'common interest' that took place in the middle of the last century. The Nuremberg and Tokyo Trials of major war criminals were a landmark event in the development of international law. Besides infusing international law with fundamental moral principles in a manner not seen for centuries and giving birth to the modern international law of human rights, the trials also gave clear notice to the nations of the world that, henceforth, claims of absolute sovereignty must yield to the international community's claim on peace and justice.

Nuremberg and Tokyo marked a paradigmatic shift from the externalisation of domestic norms under the statist Westphalian system of sovereignty to an international system determined to increasingly internalise international norms within the national sphere. It was at these post-World War II trials that unabashed claims of national sovereignty, stimulated by the nation-state system recognised at Westphalia, were subjected to the test of international standards and universalist claims for peace and the sanctity of human rights. At Nuremberg and later Tokyo, for the first time in history, individuals who had abused power in violation of international law were held to answer in international courts of law for crimes committed during war in the name of their state. The Nuremberg judgment (echoed subsequently by the Tokyo judgment) clearly brought crimes against humanity from the realm of vague exhortation into the domain of positive international law spawning the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual state.

12 See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* ('Nuremberg judgment'), available at http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm; *Decision of the International Military Tribunal for the Far East* ('Tokyo judgment'), in Bernard V.A. Röling, and C.F. Rüter (eds) (1977) *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE), 29 April 1946–12 November 1948* (Amsterdam: APA-University Press). In 1950, the International Law Commission of the United Nations adopted the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal: *Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950*, Doc. A/1315, 11–14.

The world after Nuremberg and Tokyo: Common values, common interests

Internationalisation of the individual

The post–World War II international military trials revived the commitment to protect individual rights, infusing international law with naturalistic doctrines that had earlier been eclipsed. It was primarily normative concerns that reintroduced and reinforced naturalistic doctrines into international law. Individuals suffered horribly at the hands of the Axis war machine, and the Allies resolved to include serious violations of human dignity as crimes in the Tribunals' jurisdiction. The international trials cast in stone the important principle that, if individuals are directly subject to international legal obligations, they are also directly entitled to international legal rights. This principle was implied in the post–World War II international trials in two ways. First, the victim had rights that international law could protect collectively through criminal law. Second, in the same manner that the rights of individuals would henceforth be a concern of international law, the conduct of individuals under the colour of official state action would no longer be immune from the reach of international law. In holding that individuals have obligations under international law which are over and above the obligations to the sovereign states of Germany and Japan, the post–World War II international trials pierced the Westphalian veil of sovereignty by directly challenging and trumping the dictates of national law.

The message was clear: those who authorised and committed crimes against peace, war crimes and other humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct. To hold the perpetrators of these proscribed forms of conduct accountable signifies that terrible things cannot be done to people without a resulting meaningful international sense of responsibility. This infusion of morals and concern for individual rights into international law launched the modern doctrine of international human rights law.

By establishing individual accountability for violations of international law, the Nuremberg and Tokyo judgments explicitly rejected the argument that state sovereignty was an acceptable defence for unconscionable violations of international criminal law. The previously conflicting demands of sovereignty and global order that crippled the post–World War I attempts at international penal process were overcome by the viability of individual accountability. Henceforth, citizens were firmly a concern of international regulation instead of internal state prerogatives, and the state's law-making competence in certain aspects was to be limited by the requirements of international law.[13]

Externalising the state and its sovereignty

The post–World War II international trials impacted the state in two ways. First, the right of the state to act was challenged through the 'crimes against humanity' and the 'crimes against peace' counts, alluding to a limitation in the law-making competence

13 See Katherine B. Fite (1946) *The Nuremberg Judgment, A Summary* (New York: Harper & Row), 110–111.

of the state. The crimes against humanity count reached behind the iron curtain of Westphalian sovereignty and held that individuals have international human rights, which state action cannot jeopardise, and that state authorisation provides no cover for individuals who violate the human rights of others. The violations committed by these individuals are punishable under international law. This principle is the explicit recognition that a nation's sovereignty is limited by the demands of international law.

Secondly, Nuremberg and Tokyo represented practical manifestations of the authority of the international community under international law to question, assess and pass judgment on the internal activities and laws of the state. In holding that the local municipal law of the sovereign states of Germany and Japan provided no cover for individuals who had violated international rules governing the conduct of warfare, the post–World War II international trials upheld the notion that a state was bound by international law, even when its government had chosen not to be so bound.

Supranational jurisdiction for international law violations

'Until the 1920s the practice of States, both with respect to the power to prescribe and the power to enforce, preserved the connection between State sovereignty in its territorial context and the judicial exercise of national criminal jurisdiction.'[14] The progressive trends in certain judicial opinions as well as legal writings in the inter-war period buoyed by post–World War I efforts at international criminal accountability contributed in paving the way for the Nuremberg and Tokyo tribunals to extend universal jurisdiction to cover several offences other than piracy and slave trading. The doctrine was expanded to include crimes against peace, war crimes and crimes against humanity.

Until Nuremberg and Tokyo, it was only national courts that would prosecute criminals for crimes committed in a particular country, provided that there was either a territorial or nationality nexus. This concept was first bypassed at Nuremberg when, in articulating for the first time the concept of crimes against humanity, it obliterated traditional aspects of national sovereignty in its approach towards crimes against peace and war crimes.

Universal jurisdiction, together with the post–World War II international trials' multilateral recognition of international human rights extending beyond the borders of individual countries, pointed to the need for supranational judicial process to implement international law, particularly where leaders with immense military and political power are involved in international law violations. Enforcement of international criminal law at the post–World War II international trials was the first modern international adjudication of crimes extending beyond the reach of a national sovereign in modern times. If we view the operational state of international criminal law as constitutionally allocated to sovereign states by custom, practice and treaty law, then the post–World War II international trials were an important

14 *Ibid.*, 92.

constitutional allocation of competence to the international community and away from the sovereign nation-state.

The Cold War: Preserving a statist international order?

The post–World War II international trials constituted an unprecedented inroad into the great barrier of sovereignty – exclusive territorial and national jurisdiction – and set a lasting precedent in relation to the extension of international criminal jurisdiction beyond national frontiers. This was previously impossible in view of the 'iron curtain' cast by the Westphalian notion of sovereignty. The mantle of legal protection against the worst forms of violent abuse was to be a central feature in the drive to clip state sovereignty, by subjecting the state to external restraints and controls. The 'internationalisation' of the legal status of the human being became one of the most prominent features of the post–World War II period after the Nazi and fascist violations of elementary human rights.[15] The post–World War II era was a period in which the freedom and independence of the state in law-making was subjected to limitations by international law in respect of certain international interests. The dozens of human rights and humanitarian instruments adopted after the post–World War II trials are based on the premise that sovereign states are not free to abuse their own citizens with impunity. The instruments are designed to secure adherence to the international human rights recognised at the post–World War II international trials.

Even as international human rights and humanitarian law instruments marked the important steps by the international law to limit sovereignty, the Cold War was to tie the issue of sovereignty to ideological and revolutionary agendas. The world experienced the third struggle for hegemonic domination of the twentieth century hot on the heels of the conclusion of the second. With sovereignty viewed as a vital element of global international society, the power politics of the Cold War era served to curtail the expected benefits from the limitation of sovereignty articulated at the post–World War II trials. Consequently, an increasingly evident contradiction in the Cold War appeared. International law continued to pursue its original, and still topical, ambition to regulate the relations between states in their international dimensions while at the same time tending more and more to defer to the municipal dimension of states and their domestic affairs. The interpenetration between international dimensions and national aspects in inter-state relations, against a background of rivalries in a divided world, was a feature of the Cold War that threatened to expand and strengthen state sovereignty, which had undergone a major battering at Nuremberg and Tokyo.

Many states were reluctant to enthusiastically embrace any form of international penal process and displayed a great deal of ambivalence in the normal conduct of their foreign affairs. Though a series of conflicts in the Cold War era set the arena for violations of international criminal law, the lack of a systematic international

15 See Professor Bedjaoui's general introduction in Mohammed Bedjaoui (ed.) (1991) *International Law: Achievements and Prospects* (Paris: UNESCO).

enforcement regime contributed to the lack of respect for the legitimacy of the international justice and even to a degree of cynicism about it. With lack of state cooperation, the blood-soaked Cold War era was characterised by impunity. The *ad hoc* international criminal tribunals in the 1990s represented an international effort to put in place an international enforcement regime, the lack of which had helped ensure impunity during the Cold War era. The war crimes and crimes against humanity courts at Nuremberg were the forerunners at the heart of the United Nations Security Council resolutions of the 1990s, which created the two *ad hoc* international criminal tribunals.

Post–Cold War: Old sovereignty, new sovereignty – an ageing ideology facing a new, youthful reality

The creation of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda raised questions concerning the appropriate relationship between these international *ad hoc* penal institutions and national courts. This occurrence is in view of the fact that, traditionally, sovereignty over territory and authority over nationals are two of the most basic aspects of statehood, and therefore the territorial and nationality principles are more fundamental than other competing principles of jurisdiction. While the statutes of the *ad hoc* international criminal tribunals recognise that national courts have concurrent jurisdiction, they clearly assert the primacy of the international tribunals, an extraordinary jurisdictional development. Though states, by definition, have international independence, 'combined with the right and power of regulating [their] internal affairs without foreign dictation',[16] the weakening of its denotation of full and unchallengeable power over territory, and all the persons therein, is illustrated by the establishment of the two *ad hoc* international criminal tribunals. It was not lost on the international community that concessions to the ideals of international justice were necessary to create effective international mechanisms, necessitating trumping the wishes of many states insisting upon preserving the totality of their sovereign prerogatives.

The new balance achieved between the jurisdiction of national courts and that of the *ad hoc* international criminal tribunals marks the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign state. Though the Security Council created each of the two existing international criminal tribunals *ad hoc* as an extraordinary response to a specific and narrowly defined threat to international peace and security, to enable them to address these threats, it granted them unprecedented primacy over the jurisdiction of all national courts. The lessons derived from limiting sovereignty as seen in the UN response to human rights violations in the former Yugoslavia and Rwanda provided the impetus for the international community to establish the ICC to prevent recurrence of such atrocities. Those sovereign rights forfeited through submission to the jurisdiction of the ICC are regained by the protection it provides.[17]

16 *Black's Law Dictionary* (abridged 6th edn, 1993), 971.

17 Rupa Bhattacharyya (1996) 'Establishing a Rule-of-Law International Criminal Justice System', *Texas International Law Journal* 31, 57–99 at 75; Jules Deschenes (1994)

Sovereignty and international criminal law: New oil for an old engine

Sovereignty has several basic difficulties – some of a conceptual and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous.[18] All too often though, the sovereignty doctrine is an 'impenetrably rigid juridical artefact as States incant the ritual of brooking no interference with their internal affairs'.[19] The constitutional position of the extant *ad hoc* international criminal tribunals, as well as the international criminal court, is instructive. As Anthony Sammons notes:

> Since the end of the Cold War, international law has come to recognise the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human rights norms as a basis for intervention.[20]

Current consensus indicates that a state's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, 'international law today recognises, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorised by the Security Council for the purpose of remedying serious human rights violations'.[21]

State sovereignty, which for centuries was conceptualised as 'the absolute power of the State to rule',[22] has become delimited by recognition that the state may be responsible for its breach of certain international obligations. Among these obligations, a state must provide for the general safety of the human person and may not permit widespread human rights violations against its citizens, such as the commission of genocide, crimes against humanity, slavery and apartheid.[23] Though state responsibility and individual criminal responsibility are separate concepts under international law,[24] a state that undertakes the prosecution of a foreign citizen for crimes committed in a foreign state assumes that state's domestic jurisdiction. In this regard, the author concurs with Sammons' postulation that:

'Toward International Criminal Justice', *Criminal Law Forum* 5, 249–278 at 253.

18 Winston P. Nagan (1995) 'Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the *ad hoc* Tribunal for the Former Yugoslavia', *Duke Journal of Comparative and International Law* 6(1), 127–165 at 135.

19 *Ibid.*, 137.

20 Anthony Sammons (2003) 'The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', *Berkeley Journal of International Law* 21, 111–143 at 120.

21 Fernando R. Tesón (1996) 'Changing Perceptions of Domestic Jurisdiction and Intervention', in Tom Farer (ed.) *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (Baltimore: John Hopkins Press), 29–44.

22 Kriangsak Kittichaisaree (2001) *International Criminal Law* (Sydney: Oxford University Press), 5.

23 *Ibid.*, 7 (citing art. 19, §3(c) of the *Draft Articles on State Responsibility for Internationally Wrongful Acts,* adopted by the International Law Commission at its fifty-third session, 2001).

24 *Ibid.*, 9.

> [T]he valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the State of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.[25]

Sammons' postulation is especially relevant in view of the fact that classical Westphalian sovereignty hinders the development of a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviour that requires effective international community intervention. Further elaboration of Sammons' view is encapsulated in Professor Winston P. Nagan's concise observation that:

> From an operational perspective, the practical question generally has been how far a State may go in establishing the external reach of its criminal jurisdiction under international law. The phrase 'under international law' suggests some accommodating prudential limit of the reach of a state's competence from the perspective of other States whose interest may be compromised when a State allocates for itself the right to try the nationals of other States under its own criminal justice standards.[26]

The impact of massive and systematic human rights violations impinges directly on important world order values which no state has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, then effective policing is required from local to global levels in the name of the world community as a whole.[27] A complete denial of the principles of human rights and humanitarian law, especially when grave breaches of that law are involved, represents a rejection of fundamental human rights precepts and may point to an alternative normative order that essentially bolsters the precept of human dignity.

Though distinguished international law publicists recognise what they regard as the 'inescapability of the concept of sovereignty as a quality of the State under present-day international law',[28] even the strongest proponents of this positivist view of international law assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law.[29] Since sovereignty is not absolute, the author argues that the allocation of a lawmaking competence to the international community over criminal law concerns of inclusive importance is permissible in certain circumstances. This divestiture of a sovereign lawmaking

---

25 Sammons, 'The "Under-Theorization" of Universal Jurisdiction', 115.

26 Nagan, 'Strengthening Humanitarian Law', 137.

27 *Ibid.*, 145–146.

28 Marek Stanislaw Korowicz (1961) *Some Present Aspects of Sovereignty in International Law* (The Hague: Kluwer International Law Publishers), 16–17; cf Arthur Larson *et al*. (1965) *Sovereignty Within the Law* (Dobbs Ferry NY: Oceana Publications).

29 Surveys of the writings of diverse authors such as Korowicz, Larson and Jenks indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny: A. Larson and C. Wilfred Jenks *et al*. (1965) *Sovereignty Within the Law* (New York: Dobbs Ferry; London: Oceana Publications Inc. and Stevens and Sons Ltd.).

competence from the state to the general international community is based on the reality that:

> [T]he pressures of international life, and the perception of self-interest, have conspired to generate a porous conception of the doctrine of sovereignty in many areas of criminal law and procedure. The imperative facts of interdependence and interdetermination have revealed a credible corpus of substantive international criminal law, and even more an impressive code of human rights precepts vested with a criminal law character.[30]

In this regard, John R. Worth postulates that:

> Rather than eliminating sovereignty as a political ideology, a more productive enterprise would be to refocus the discourse away from the traditional structural understanding of the term, which only serves to accentuate the level of discrepancy between the theological and the political definitions of the term and which ultimately leaves the false impression that absolute sovereignty is somehow realizable in the international political sphere.[31]

Brian F. Havel further argues that sovereignty now 'expresses a reanimated sense of autonomy, it does so in the guise of a perfectly rational paradox: its existence also is defined by its capacity to be given away'.[32] He goes on to note that truly transnational concerns would no longer simply be tolerated derogations of sovereignty; rather, they would become emanations of that sovereignty.[33] Sammons reinforces this position with his observation that:

> Since global interdependence creates a functional necessity for transnational cooperation, this reformulation of sovereignty would suggest that in areas of law where the traditional Nation-State is deemed ill-equipped to regulate, deference to global governance would paradoxically bolster that state's sovereignty. This reformulation would replace the misguided structural balance between the empowering and limiting aspects of sovereignty, which posited international cooperation as a tolerable concession, with a functional understanding of sovereignty strengthened by cooperation.[34]

No longer is state conduct immune from international scrutiny, or even from sanction. Mechanisms are being created through which 'sovereign' conduct is held accountable to international norms – without the ability simply to claim lack of continuing consent to those norms. These mechanisms demonstrate that the nineteenth-century notion of a second-tier social contract is no longer appropriate to the conduct of international relations. International criminal law runs directly to the individual.

The legitimate assertion of international jurisdiction must begin with the state itself, which remains the 'foundation-stone' of the international system, both

30 Nagan, 'Strengthening Humanitarian Law', 141.

31 Worth, 'Globalization and the Myth of Absolute National Sovereignty', 261.

32 Brian F. Havel (2000) 'The Constitution in an Era of Supranational Adjudication', *North Carolina Law Review* 78, 257–370 at 328.

33 *Ibid.*, 330.

34 Worth, 'Globalization and the Myth of Absolute National Sovereignty', 262.

politically and legally.[35] A state has the authority to exercise 'sovereignty over its territory and general authority over its nationals.'[36] With the rights that accompany this internal sovereignty, a state also acquires obligations to its citizenry. These obligations include the duty to provide a system for the codification, prosecution and punishment of crimes.[37] The occurrence of continuous or multiple violations of peremptory norms, *ipso facto*, demonstrates the absence of a fully competent sovereign.[38]

> When violations of a jus cogens norm occur, a State no longer possesses its full sovereignty. The state's otherwise exclusive right to exercise criminal jurisdiction over its citizens transfers to the international community, and any State that acquires custody of an individual perpetrator of such crimes may try and punish the offender.[39]

States should 'regard egregious violations of human rights as subject to individual criminal responsibility instead of only State liability'.[40] Lynn S. Bickley extrapolates and substantiates this point thus:

> Consistent with a sovereign responsibility to protect its citizens, the increasingly active role of the international community in human rights protection enhances rather than diminishes the notion of sovereignty. Although a nation sacrifices some sovereignty when it becomes a party to an international agreement, it also gains certain protections that broaden and enhance its sovereignty. The interdependence of the international community assists and fortifies sovereignty as the power of a nation to protect its citizens.[41]

Since one of the main roles of a sovereign state is to provide security and protection for its own people,[42] the author concurs with Patricia A. McKeon's view that a state forfeits its sovereignty when its actions are universally condemned.[43] From a legal perspective, each instance of enforcement serves to legitimise norms of

---

35 Boutros Boutros-Ghali (1995) *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* 2nd edn (New York: United Nations), 44 ('The foundation-stone ... is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress').

36 American Law Institute (1986) *Restatement (Third) of the Law, Foreign Relations Law of the United States*, at 206.

37 See Alexander Orakhelashvili (2001) 'The Position of the Individual in International Law', *California Western International Law Review* 31, 241–276 at 271–272.

38 Sammons, 'The "Under-Theorization" of Universal Jurisdiction', 133.

39 *Ibid.*, 133.

40 Lynn Sellers Bickley (2000) 'US Resistance to the International Criminal Court: Is the Sword Mightier than the Law?', *Emory International Law Review* 14(1), 213–276 at 265.

41 *Ibid.*, 261.

42 See Ronald A. Brand (1995) 'External Sovereignty and International Law', *Fordham International Law Journal* 18, 1685–1697 (describing a sovereign state's obligation to protect and provide security for its citizens).

43 See generally Michael Ross Fowler and Julie Marie Bunck (1995) *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park PA: Pennsylvania State University Press) at 41–45 (explaining that a sovereign state's

international criminal law. These norms reflect a collective judgment by all countries that certain acts are, by their very nature, criminal. The enforcement of criminal law is innately tied to a nation's sovereignty and it can be argued that, by enforcing international criminal law, governments are not ceding sovereignty but instead are exercising sovereignty.

> [I]f the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so.[44]

If international law is to be contemporary in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the state for purposes of defining sovereignty in both national (internal) and international (external) relations. In place of a social contract of states, this redefinition of sovereignty recognises that international law has developed direct links between the individual and international law. Consequently, an active role on the part of the international community in promoting human rights and humanitarian norms is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty.[45] McKeon notes that:

> Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself with the aid of the international community only enhances this objective.[46]

McKeon's observation is echoed and amplified by the *Report of the Secretary General's High-Level Panel on Threats, Challenges and Change*. The Report firstly endorses the emerging norm of a *responsibility to protect* civilians from large-scale violence – a responsibility that is held, first and foremost, by national authorities.[47] However, it goes on to note that:

---

failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

44 Brand, 'External Sovereignty and International Law', 1696.

45 See Magdalena M. Martin Martinez, (1996) *National Sovereignty and International Organizations* (The Hague: Kluwer Law International) at 66; see also Nancy Arniston, (1993) 'International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?', *Fletcher Forum of World Affairs* 17, 199–211 at 207; Ravi Mahalingam (1999) 'The Compatibility of the Principles of Non-Intervention with the Right of Humanitarian Intervention', *UCLA Journal of International Law & Foreign Affairs* 1, 221–263 at 253 (pointing out consistency between sovereignty and international protection of human rights).

46 Patricia A. McKeon (1997) 'An International Criminal Court: Balancing the Principle of Sovereignty Against Demands for International Justice', *St. John's Journal of Legal Commentary* 12, 535–564 at 542–543.

47 Anand *et al*., *Report of the Secretary General's High-Level Panel*.

> When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure – and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.[48]

Support for the Report is found in the reality that the UN Charter is part of a world constitutional instrument and hence the formal basis of an international rule of law. One of the Charter's primary purposes is to constrain sovereign behaviours inconsistent with its key precepts. Professor Nagan notes that '[t]he term "sovereignty" in the UN Charter is most visible in the context of sovereign equality'.[49] However, he goes on to observe that: 'outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2(7) uses the term "domestic jurisdiction" as a precept that seems intentionally less inclusive than the term "sovereign" suggests.'[50] This particular interpretation provides the basis for the author to contend that it seeks to demonstrate de-linkage of the external nature of sovereignty from its internal contours and thus shed the all-encompassing conception that is frequently and regularly attributed to Wesphalian sovereignty:

> Commentaries that disregard State sovereignty as an eradicable hindrance to denationalization fail to recognise the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects.[51]

Recent international legal theory supports the view of sovereignty as an 'allocation of decision-making authority between national and international legal regimes'.[52] A state's total 'bundle' of sovereign rights remains extensive, as sovereignty remains the pre-emptive international norm. However, the international legal regime obligates all states to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a state must meet continuously in order to maintain legitimacy under the international system. Elaborating on this new sovereignty reconceptualisation, Kurt Mills asserts that:

> [A state's] rights and obligations come into play when a State, or at least certain actions of a State, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a State violates human rights or cannot meet its obligations *vis-à-vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular

48 *Ibid.*

49 Nagan, 'Strengthening Humanitarian Law', 146.

50 *Ibid.*

51 Worth, 'Globalization and the Myth of Absolute National Sovereignty', 261.

52 Gregory H. Fox (1997) 'New Approaches to International Human Rights', in Sohail H. Hashmi (ed.) *State Sovereignty: Change and Persistence in International Relations*, 107.

> situation, which may involve ignoring the sovereignty of the State in favour [*sic*] of the sovereignty of individuals and groups.[53]

The import of the above assertion is captured in Sammons' observation that: 'when a State instigates or acquiesces in the commission of serious violations of international human rights and humanitarian norms, it exceeds its allocation of authority as a matter of law'.[54] Sammons goes on to note that this position recognises that a state's sovereign rights with 'regard to the internal treatment of its population are not absolute and, by implication, States are subject to international oversight'.[55] It would appear, then, that the evolution of sovereignty and the increasing need for international justice have now converged. This, in turn, means that the future development of international criminal law hinges upon the continuing evolution of this paradigm.

Conclusion

It is incontrovertible that the traditional Westphalian notions of the independent state and sovereignty have changed irrevocably, particularly in the course of the twentieth century. The traditional notion of national sovereignty has been eroded, to a large extent through the development of the concept of international penal process. Throughout the twentieth century, the international community has grappled with the problem that national sovereignty poses for mankind in the quest for a better world in which peace and the respect for human rights reigns. Unabashed claims of national sovereignty, stimulated by the nation-state system recognised at Westphalia, have gradually been modified by universalist claims for peace and respect for human rights through limitations on the state's use of its power and law-making competence.

Although the state has expanded its capabilities for control and involvement in some areas, the overall trend in international criminal law has been toward the 'diminution of state authority', with authority being relocated both upward to international penal institutions and downward as individuals and groups assert themselves as subjects of international law. The international penal process represents a shift in authority from states to the international community. Sovereignty has been chipped away, both from the outside and from within, as the concept of an international penal process has been increasingly recognised as trumping the right of states to hold sole rights in the exercise of certain prerogatives. We can conceive of any reconceptualisation of sovereignty as moving both downward (inward) from the state incorporating both human and 'peoples'' rights and upward (outward) from the state as we look for ways to respond to the need to protect these rights within a global framework as well as respond to the increasing permeability of borders. International criminal law

53 Kurt Mills (1998) *Human Rights in the Emerging Global Order: A New Sovereignty?* (New York: St. Martin's Press) at 163–164.

54 Sammons, 'The "Under-Theorization" of Universal Jurisdiction', 121.

55 *Ibid.*, 122.

norms have been thoroughly internationalised. But the internationalisation of norms does not necessarily entail the internationalisation of implementation procedures.

Though state sovereignty remains very much alive, much satisfaction is derived from the fact that its content has changed and continues to change. Much dissatisfaction, however, persists in the fact that few states ascribe fully and enthusiastically to the gains of international justice. Much work still remains in convincing states that the necessary concessions needed in order to have an efficient system of international justice are the only way in which the gains spawned by international penal process can be both safeguarded and utilised. The notion of international justice now points towards a sphere that, though controlled by states, is ineffaceably external to power. The far-reaching transformation of the social and political landscape in the last century has been accompanied by a correlative transformation of the concept and practice of sovereignty through the development of an international penal process.

Whether or not the power structure of nation-states ever accurately reflected textbook characteristics, sovereignty is subject to a greater range of qualifications. The exclusivity and inviolability of state sovereignty are mocked by increasing percolation of international norms and processes into the domestic sphere. Eliminating sovereignty from the lexicon of international relations in the foreseeable future is unlikely; state-centric structures will not agree easily to part with the basis for their *status quo*. But it seems likely that the trend to greater qualifications on the scope of sovereign authority is irreversible.[56]

56 As the author has noted elsewhere:

> In the evolving international environment, concepts such as State inviolability and sovereign immunity, which were formerly taken for granted in international relations and international law, have increasingly been subjected to scrutiny and to contextual qualification. While it is true, that States still drive the elaboration and entrenchment of international legal standards, the expansion and maturation of international criminal law and the penetration of domestic legal and political systems by international norms has influenced the environment in which States operate. Thus, in both formal and informal terms, States now face a new game or, at least, a less predictable one. Limitations on State action are implicit in the very recognition of the Nuremberg principles and their subsequent manifestation in the *ad hoc* international criminal tribunals of the 1990s and the *Rome Statute of an International Criminal Court.*

See Jackson Maogoto (2003) *State Sovereignty and International Criminal Law: Versailles to Rome* (Ardsley NY: Transnational Publishers), 285.

PART 5
Sovereignty and Development

Chapter 13

Development Assistance and the Hollow Sovereignty of the Weak

Roland Rich

… sovereignty is our best defence in an unequal world.

President Abdelaziz Bouteflika of Algeria[1]

Official Development Assistance (ODA) highlights the problematic nature of sovereignty in the modern world. As a relatively new phenomenon tracing its origins to the Marshall Plan in the aftermath of World War II, ODA has been developed in consonance with international law in the era of the United Nations Charter. ODA does not directly challenge the concept of sovereignty. Instead, it introduces a subtle political dynamic, one that upholds the façade of sovereignty on one hand while it hollows out its substance on the other.

Two important riders need to be added to this description of the relationship between ODA and sovereignty. The first is that a state's vulnerability is commensurate with its economic, political or strategic weakness. While all ODA recipients have to deal with the various objectives of their donors, strong states like China and India are less susceptible than those states relying heavily on foreign aid to having policy positions imposed on them. The other qualification is that the hollowing out of sovereignty and the substitution of donor values for local decision-making does not necessarily lead to negative results. In many ways, it is the institution of sovereignty that is ahistorical, unnatural and even perverse in its impact on policy making. The ODA phenomenon is one means of encouraging the dissemination of universal values, the protection and promotion of human rights and the adoption of coherent policy choices.

This chapter examines the intersection between sovereignty and ODA. The point of intersection stands out most starkly when examining the vexed issue of conditionality accompanying ODA. The discussion covers the types of conditionality, their rationale, impact and how they are dealt with by recipients. The discussion touches on both the International Financial Institutions (IFIs) and bilateral programs. In doing so, it explores the impact of global civil society on ODA because NGOs insist on being a party to decisions on ODA disbursement and direction and are clearly also competing for influence in decision-making. The chapter concludes with a reflection on the way ODA influences the process of the global dissemination of ideas.

1 Quoted in Devesh Kapur and Richard Webb (2000) 'Governance-Related Conditionalities of the International Financial Institutions', UNCTAD G–24 Discussion Paper Series 6, 18.

The myth of sovereign equality

It is commonplace to criticise the concept of sovereign equality by looking at votes in the UN General Assembly and noting, as does Gupta, that while China and Kiribati both hold a single vote, they are in no other way equal or even comparable.[2] But this is to overestimate the importance of a vote in the UNGA and to misunderstand the underlying rationale of sovereign equality. The concept does not mean that states are equals. It means that each state's sovereign has equal powers within that state. Each sovereign has the exclusive power to tax, to conscript and to imprison within that state and this applies as much to Kiribati as it does to China. The myth of sovereign equality does not spring from the quixotic practice of holding equal hortatory votes in the UNGA; it arises because, regardless of the position at international law, in reality sovereigns cannot equally and independently exercise the same powers within their own jurisdictions. That capacity, unsurprisingly, flows from the political, strategic and economic strengths of the state.

The world has accepted the Westphalian notion of sovereignty. The concept made every sense in a Europe embarking upon the age of reason, industrialisation and nationalism and an argument can surely be mounted that the independence of and competition between European polities, as facilitated by the 1648 Treaty of Westphalia, were key contributing factors to the phenomenal growth in European power thereafter. That power was well demonstrated by Europe's colonisation or settlement of virtually the entire planet. Upon decolonisation, the club of colonisers and their friends, having previously established the League of Nations on the basis of sovereignty and then the United Nations on the same basis, extended the concept to the newly independent entities. For established nations, the process had the advantages of convenience and consistency. For the newly independent states, the concept bestowed legitimacy and status. And so the figurehead leading a new country, known more to map makers than to its subjects, often without a common language let alone a similar political culture, and in reality no different the day after independence than the day before, was instantly transformed into a sovereign with internal powers equal to those of the President of the United States or the Party Secretary of the Soviet Union. That is the myth of sovereign equality.

History has bequeathed us the concept of sovereignty and thus tends to imbue it with a sense of teleological inevitability. Examining other societies, however, makes clear that there are alternatives to the organisation of the world on the basis of national sovereignty. The Australian Aborigines believe the land is sovereign and the people its servants. Islamic society imagines a community of believers subject to the laws of Islam regardless of where they are situated. Imperial China had no place for the concept of equality, seeing the world in hierarchical terms evidenced by a system of tribute. The purpose of this comparison is simply to deny any claim of sovereignty as the only possible system of governance and to contextualise sovereignty as the

2 Joyeeta Gupta (2001) 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organisations, and Climate Change', in Jean-Marc Coicaud and Veijo Heiskanen *The Legitimacy of International Organisations* (Tokyo: United Nations University Press), 494.

system that emerged from the geo-strategic power plays of the day. It is a system that made theoretical sense and that proved to be most useful to ruling elites in both North and South. But it is also a system that disguises the true power relations between nations.

The principle of sovereign equality is enshrined in Article 2(1) of the UN Charter and Article 2(7) deepened the substantive meaning of the principle by introducing the idea of 'matters which are essentially within the domestic jurisdiction of any state'. The combination of the two are seen by many in the South, as so crisply articulated by President Bouteflika, as a necessary shield against the vagaries of global power politics. Sovereignty would not only become a shield against the outside world but also a powerful force domestically. It acted as an indirect legitimiser of power domestically as rulers exhibited for their people the various international insignia of sovereignty: diplomatic missions; state visits in both directions; and the glittering prize of foreign aid. With the occasional exception in the post–Cold War period of the international community's resort to Chapter VII of the Charter, sovereignty also allowed domestic rulers a monopoly on coercive force. The blessing of international legitimacy, the monopoly on the use of force internally and the doctrine of non-interference in essentially domestic matters created a powerful weapon in the hands of political leaders. Without any leavening notions of democratic accountability or respect for human rights, sovereignty sanctified autocracy.

In dealing with their sovereign equals, including the various autocrats around the world, powerful nations had a number of tools at their disposal. The old-fashioned threat or use of force was no longer countenanced in the era of the UN Charter and has thus become very much the exception rather than the rule. More subtle means were required, including diplomacy, trade relations, arms sales and a new tool, official development assistance.

Deconstructing official development assistance

According to the Development Assistance Committee of the OECD, ODA in 2002 stood at over USD55 billion with an expectation that the total would reach USD75 billion by 2006.[3] This figure may be compared to other flows such as private capital to developing countries, which was approximately USD200 billion in 2003.[4] The figure has still not recovered from the 1997 East Asian financial crisis when the flow was USD270 billion, five times the ODA flow.[5] The total flow of government domestic agricultural subsidies in Europe, Japan and the United States is estimated at USD310 billion or nearly six times the ODA flow, which means that the average European cow receives USD2.50 a day in subsidies while 75 per cent of people in sub-Saharan Africa live on less than USD2 a day.[6] And we should also note that

3 OECD (2004) *The DAC Journal Development Cooperation Report 2003* 5(1), 21.

4 Global Development Finance (2004), available at http://web.worldbank.org.

5 Global Development Finance (2000), available at http://web.worldbank.org.

6 Edmund L. Andrews (2002) 'Rich Nations Criticized for Barriers to Trade', *New York Times*, 30 September.

global military expenditure is around USD700 billion.[7] ODA is therefore not nearly as significant a sum as many people imagine.[8]

Having situated ODA among the major financial flows, it is instructive to examine its various explanations. The donors give three basic rationales:[9] fundamental humanitarianism, enlightened self-interest and international solidarity.

Fundamental humanitarianism

Fundamental humanitarianism is a compassionate response to extreme poverty. This responds to the wishes of a significant part of the electorates of Western democracies. Evidence of individual humanitarianism can be found in the statistic of transfers from OECD NGOs to developing countries of over USD12 billion in addition to ODA in 2002.[10] This rationale resembles that of charity in domestic situations and has similar problems. While it is a rationale for relief in an emergency, it is not a rationale for economic development.

Enlightened self-interest

Enlightened self-interest is the 'hard-headed' rationale as opposed to the 'soft-hearted' humanitarian rationale. Increased prosperity in developing countries expands markets for goods and services of the industrialised countries. Increased prosperity should also have an impact on increasing human security and stability while decreasing transnational crime and illegal migration. The question to be posed here is just how enlightened is the self-interest? The less enlightened it is, the more aid there is in the form of trade credits and tied aid; further, concessional loans for projects are devised with the interest of the donor instead of the recipient in mind, and aid for programs generally push the donors' culturally specific values. The more enlightened the self-interest the more will the aid be in grant form, untied, supporting universal values and under the democratic 'ownership' of the recipient to the largest degree that donor accountability can allow.

International solidarity

International solidarity is given as the third reason for ODA. Development co-operation is one way all people can work together in pursuit of common aspirations such as combating epidemic diseases, protecting the environment, controlling population growth and pursuing universal values such as support for democracy and human rights. ODA has become an important tool for a coherent approach to global

7 Lawrence Kolb (2002) 'Arms Spending Instead of Basic Aid', *International Herald Tribune*, 22 August.

8 See OECD Report on International Development, Co-operation in OECD Countries: Public Debate, Public Support and Public Opinion, CD/R (2001) 5 of 29 November.

9 OECD (1996) *Shaping the 21st: The Contribution of Development Co-operation* (Policy Brief), May.

10 OECD (2004) *The DAC Journal Development Cooperation Report 2003* 5(1), 134.

problems. One difficulty with this approach is that the development aspect may be secondary. Addressing global issues is ultimately an intensely political activity and ODA is thus one tool in that political process.

While these are the official reasons for ODA, other rationales could be posited:

Reparation for colonialism

Reparation for colonialism has been suggested by former President of the International Court of Justice, Mohammed Bedjaoui, as the key reason for ODA.[11] Bedjaoui points out that the first conference of non-aligned countries meeting in 1961 in Belgrade called for a 'right to reparation' and this was echoed in two resolutions of the UN General Assembly in 1974:

> Resolution 3201 (S-VI) proclaiming the Declaration on the New International Economic Order affirms 'the right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories or peoples.'

Resolution 3281 (XXIX) proclaiming the Charter of Economic Rights and Duties of States refers to 'the remedying of injustices brought about by force and which deprive a nation of the natural means necessary for its normal development'.

These resolutions were passed after the oil embargo had given the South the confidence to challenge the economic dominance of the industrialised world. The 1974 instruments were never accepted by the West and therefore have little weight in international law, which requires consent of affected parties. The OECD countries have never conceded any formal connection between ODA and colonialism. The nations of the developing world have not actively pursued this line of argument.

The actions of the OECD countries, however, tell a different story. A 2000 study by Langhammer of the Kiel Institute of World Economics examined what factors determine the direction of ODA.[12] The study found that the colonial relationship was the general factor that had the most influence on the direction of aid – 'a country that has a relatively long colonial past receives up to 72% more aid than a country without a colonial past'.

There may also be other factors to explain French concentration on West Africa and Australian concentration on Papua New Guinea. Without articulation by the donor of a motive based on reparations, no such conclusion can be reached in international law. Yet that conclusion is hinted at in a decision of the International Court of Justice in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)* in which the Court, by deciding it had jurisdiction over the case, 'seems to have accepted the principle of review of the acts of a trustee affecting the beneficiary prior to the

11 Mohammed Bedjaoui (1991) 'The Right to Development', in M. Bedjaoui (ed.) *International Law: Achievements and Prospects* (New York: UNESCO), 1190.

12 Rolf D. Langhammer (2000) *Foreign Aid Recipients: Who Gets the Money, Who Should Get the Money* (Kiel Institute of World Economics), available at http://www.bwl.uni-kiel.de/gwrp/german/publ/ifw_papers/foreignaid.pdf.

independence of the territory concerned'.[13] Australia quickly settled the case before the Court could pronounce an adverse judgment on the merits, a judgment which would have given Nauru a remedy for the loss of its resources. The settlement was funded under the Australian aid program.[14]

Neo-colonialism

Neo-colonialism may provide another explanation of ODA. According to this view, ODA plays a Trojan horse role pretending to be a gift but instead containing one of the means of control the industrialised world is bent on using to exploit the resources of the developing countries while imposing its cultural and moral values. Supporters of this view are able to point to the many means whereby the industrialised world retains economic dominance; favourable terms of trade, control of financial markets, flows of speculative 'uncommitted' investment, as well as cultural dominance; hegemony of English, Hollywood-led culture, and the portrayal of what they might consider as Western values (such as individual rights and electoral democracy) as universal values.

The concept of neo-colonialism as a means of explaining the world's economic imbalances has certain attractions, including historical continuity. But it does not account for the fact that the industrialised world happily welcomes into its ranks new members, such as the various Asian tigers, seeing in them economic partners with whom far greater profits are on offer than are available in simply 'exploiting' their resources. Further, the neo-colonial approach must discount the significant achievements of ODA over the past half-century (eradication of certain diseases, dramatic falls in child mortality, huge increase in literacy, the green revolution). Finally, it is important to acknowledge the influence of the liberal elites of the developing world that have, particularly since the eclipse of communism, by and large accepted the universal applicability of values such as human rights and democracy as well as open markets and free trade and consider the application of these values in their own countries as the best means of fostering development.

The reason for examining the rationale for ODA is that the view one takes will greatly influence one's perspective on ODA's relationship with sovereignty and conditionality. If motivated by the OECD's stated reasoning then the receiving country welcomes ODA while conditionality may be seen as a valid tool in the ODA process. If, however, one adopts the colonial approach, then ODA is reparations owed to the recipients without strings attached. And the neo-colonial perspective would paint ODA and any associated conditionality as yet another instrument of repression eating away at developing countries' hard won sovereignty. Arguments can be advanced for the neo-colonial approach but they are difficult to sustain. The donor/industrialised countries are exporters of intellectual property, elaborately

13 James Crawford (2000) 'Democracy and the Body of International Law', in Gregory Fox and Brad Roth (eds) *Democratic Governance and International Law* (Cambridge: Cambridge University Press), 110.

14 Department of Foreign Affairs and Trade (Australia), http://www.dfat.gov.au/geo/nauru/nauru_brief.html.

transformed manufactures and sophisticated services that require foreign consumers with disposable income. It is therefore in their interests to see the economic development process succeed and the numbers of importers of these products grow. It is in their quest to see economic development succeed that they have insisted on certain policy settings. They do this through the power of the financial markets, trade rules and ODA conditionality.

Applying conditionality to development assistance

Regardless of one's views on the motives behind aid, the formal procedures of ODA pose no challenge to sovereignty in that the donor programs are based on discussions with recipients that are often formalised in international legal instruments in which the recipient agrees to the program. This approach then looks like an exercise in sovereign decision-making by both parties. Behind this façade are the power relations between the parties in which the donors hold the winning hand of which a trump card is conditionality.[15]

If the Marshall Plan is the intellectual forebear of ODA then it should only be natural that conditionality became a part of the ODA package because the Marshall Plan was accompanied by what has been described as 'severe conditionality'.[16] European recipients had to sign a bilateral agreement binding them to balance budgets, restore financial stability and stabilise exchange rates at realistic levels, as well as to set aside counterpart funds from government budgets and put them at the disposal of the American administrators to underwrite further investment.[17] Conditionality applied equally to the European allies and enemies[18] while the various bilateral agreements with the United States authorising the severe conditionality saved sovereignty's blushes.

Today conditionality has a central place in ODA. It is best known in the overt conditions placed as part of the International Monetary Fund's (IMF) loan packages, but conditionality also comes in other explicit forms as well as implicitly in the donor values embedded in ODA. In the minds of the donors these are the values of successful societies whose economic and political achievements qualify donor experts and legitimise their advice. The inculcation of donor values is rarely put in the form of overt conditionality. It is simply part of the package, and it is usually not articulated by the donor or perhaps even understood as embedded in the process. Yet all aspects of the ODA phenomenon, from choice and design of projects to delivery and evaluation, have the imprint of donor values. Donor values may support universal values in the fields of human rights and democracy but they will also support more

15 This examination of the application of conditionality to ODA draws on Roland Rich (2004) 'Applying Conditionality to Development Assistance', *Agenda* 11(4), 321–324.

16 Peter Waller (1994) 'Aid and Conditionality', *D + C Development and Cooperation*, 1, January–February, 4–5.

17 Michael J. Hogan (1985) 'American Marshall Planners and the Search for a European Neocapitalism', *The American Historical Review*, 90(1), 44–72.

18 As Article 107 of the UN Charter calls them.

particularistic values such as individuality, punctuality and meritocracy that may not be practiced locally.

The overt conditions can be seen as contractually undertaken. The conditions tied to loans by the IMF and other International Financial Institutions (IFIs) have been described as 'a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of aid'.[19] Conditions have evolved over the years reflecting changes in economic theory as well as lessons learned from previous experience. Conditions concerning demand restraint and interest rates were soon enlarged to cover government expenditure and public sector employment, then began to deal with opening up the economy to greater competition, and finally, currently, to deal with the design and workings of the institutions of government. It follows that the borrowing nations have been the 'guinea pigs'[20] in this vast economic experiment. I will deal in greater detail with examples of contractual conditionality in the next section to examine how strong and weak recipients have reacted to these overt conditions.

The IFI form of contractual conditionality ostensibly deals with the subject matter of the loan and the best way of making the loan effective. Bilateral donors, on the other hand, have resorted to a more political formula in denying or withdrawing aid because of a recipient's behaviour. This took the form of negative or punitive conditionality in a well-known example when some donors, at the behest of the Association of South East Asian Nations (ASEAN), pulled their aid programs out of Vietnam after its 1979 invasion of Cambodia had ousted the genocidal Pol Pot regime. This form of negative conditionality has been applied by a number of countries. Wickramasinghe argues that in the 1980s the pressure donors placed on Sri Lanka though the aid program 'resulted in an improvement in the human rights situation' but that this does not amount to a loss of sovereignty because states parties to the major human rights treaties have already voluntarily ceded part of their sovereignty and can be held accountable by other states parties.[21]

Another example in which an advance in human rights seemed to be achieved through conditionality is described by Glassius.[22] In 1990, the Netherlands decided to suspend a part of its aid program to Indonesia in response to the execution of four political prisoners (bodyguards of President Sukarno who had already spent some twenty-five years in prison). Whether as a consequence of this initiative or not, the executions of 1965 era prisoners came to an end in Indonesia thereafter.

---

19 Tony Killick (1998) *Aid and the Political Economy of Policy Change* (London: Overseas Development Institute), 6.

20 Kapur and Webb, 'Governance-Related Conditionalities of the International Financial Institutions', 11.

21 Nira Wickramasinghe (1996) 'Form Human Rights to Good Governance: The Aid Regime in the 1990s', in Mortimer Sellers (ed.) *The New World Order: Sovereignty, Human Rights and Self-Determination of Peoples* (Washington, Berg: Oxford University Press), 310.

22 Marlies Glasius (1998) 'Human Rights Conditionality Between the Netherlands and Indonesia: Two Cases Compared', *Studie en Informatiecenrum Mensenrechten*, SIM Special No. 21, Netherlands Institute of Human Rights, 249–270.

But within two years, in response to the Dili massacre in 1991, the suspension of Dutch aid programs, as well as some of those of Denmark and Canada, brought a far more belligerent response from Jakarta. Indonesia announced the refusal of all aid from the Netherlands, while at the same time announcing an internal inquiry into the massacre. In 1992, the Netherlands and Indonesia quietly mended fences and the aid relationship resumed.

An important precedent had been set, in that aid and human rights had been linked through this form of negative conditionality. Since that time the concept of negative conditionality has been refined, and its most formal expression is in the aid relationship between the European Union and its African, Caribbean and Pacific recipients, who recently concluded a twenty-year partnership agreement in which respect for human rights, democratic principles and the rule of law are essential elements. Parallel to the multilateral negotiations, the EU adopted a policy of including democracy clauses in its various bilateral agreements making democracy and human rights part of the bilateral dialogue. More pointedly, the recent bilateral treaties regard serious and persistent human rights violations and serious interruptions of democratic process as a 'material breach' of these bilateral treaties. Article 60 of the Vienna Convention on the Law of Treaties states that 'a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating or suspending its operation in whole or in part'. The EU has thus armed itself with the power at international law to suspend or terminate bilateral aid agreements in the event of human rights abuses or extra-constitutional attacks on democratic government.[23] Suspension of EU aid for non-respect of democratic principles and interruption of the democratic process has occurred in at least ten cases: Niger, Sierra Leone, Togo, Cameroon, Haiti, Comoros, Cote d'Ivoire, Fiji, Liberia and Zimbabwe.[24] But the EU has far greater difficulty in dealing with strategic or nuclear powers like Pakistan or Russia, who may well have breached democracy and human rights processes, but being strong states, need more careful handling.

Criticism of this form of negative conditionality has resulted in more emphasis being placed on positive conditionality; rewarding countries that achieve good results in the development field. Its latest manifestation has come in the United States' Millennium Challenge Account that determines aid flow on the basis of a formulaic application of certain statistical comparators.[25] This form of disbursement is hostage to the accuracy and applicability of the statistics employed and even the devisers of some of the key comparators employed warned against their use in this way because they contained significant margins of error.[26] And, of course, when a

23 European Union (2000) INFORMATION MEMO No. 10, Conclusions of the Brussels Ministerial Conference Held on 2 and 3 February, European Union, Brussels.

24 Carlos Santiso (2002) 'The Reform of the EU Development Policy – Improving Strategies for Conflict Prevention, Democratic Promotion and Governance Conditionality', *Centre for European Policy Studies, Working Document No. 182*, March.

25 Steven Radelet (2004) 'The Millennium Challenge Account: Transforming US Foreign Assistance Policy?', *Agenda* 11(1), 51–67.

26 Daniel Kaufmann and Aart Kraay (2002) 'Governance Indicators, Aid Allocation and the Millennium Challenge Account: A Summary' (Washington: World Bank Institute), available at http://www.worldbank.org/wbi/governance/pdf/mca_summary.pdf. See also

country like Vietnam, seen in Washington as politically inappropriate, wins out on the statistical calculation, it can always be disqualified without recourse to appeal.[27] Having made the rules, the donor is at liberty to break them.

Conditionality thus becomes a means to change 'the sovereign' making the policy decisions. Dressed up elegantly as a bilateral agreement, no problem arises in the formal sense. But few are fooled by the disguise and it did not take too long before the conditionalities devised by the IFIs became lightning rods for protesters throughout the developing world.

Bretton Woods: from *wunderkind* to whipping boy

Established at the Bretton Woods meeting in 1944, the World Bank basked in the success of the post–World War II European reconstruction effort and steadily grew in the Cold War years as a showpiece for the capitalist world. Dividing the task with the IMF, which concerns itself with monetary stability, the World Bank grew in size and prestige, dealing with the issues of global economic growth, development of the South, investment guarantees and settlement of investment disputes. Whereas its first loan in 1947 was for USD250 million, accounting for one-third of the Bank's loanable funds, by 2004 the Bank was lending out USD20 billion.[28] This spectacular growth in size and influence has attracted many critics, the most vitriolic of whom call for its dismemberment.[29] Indeed the perfidy of the Bretton Woods institutions has achieved the equivalent of urban myth status in some quarters where the indictment includes the usurpation of the sovereignty of defenceless borrowers. A look at the record, however, discloses a far more complex picture.

The Global Exchange indictment against the IFIs charges that they 'have advanced a form of economic "development" that prioritizes the concerns of wealthy lenders and multinational corporations while neglecting the needs of the world's poor majority … exerting enormous influence over the economies of more than 60 countries … setting conditions under the guise of promoting "free trade", market liberalization and financial stability … thereby deepening poverty and increasing inequality'.[30] An irrefutable piece of evidence employed to back these charges of partiality is the voting system. In the Bretton Woods institutions there is no place for the myth of sovereign equality; voting is based on shareholding. Thus in the World

---

Roland Rich (2004) 'Applying Conditionality to Development Assistance,' in *Agenda – A Journal of Policy Analysis and Reform* (Canberra: Centre for Applied Economics, Australian National University), 11(4), 321–334.

27 Steve Radelet (2004) 'Qualifying for the MCA: An Update,' *Center for Global Development*, available at http://www.cgdev.org/Publications/?PubID=100.

28 World Bank (2004) *Annual Report 2004*, available at http://www.worldbank.org/annualreport/2004/highlights.html.

29 Global Exchange (2001) 'How the International Monetary Fund and the World Bank Undermine Democracy and Erode Human Rights: Five Case Studies,' September, available at http://www.globalexchange.org/campaigns/wbimf/imfwbReport2001.html.

30 Global Exchange, 'How the International Monetary Fund and the World Bank Undermine Democracy and Erode Human Rights', 1.

Bank, the number of shares a country has is based roughly on the size of its economy. The United States is the largest single shareholder, with 16.41 per cent of votes, followed by Japan (7.87 per cent), Germany (4.49 per cent), the United Kingdom and France (both with 4.31 per cent).[31] A similar scheme is used at the IMF where the United States has 17.1 per cent, Japan 6.15 per cent, Germany 6.01 per cent, France and the United Kingdom both with 4.96 per cent.[32] The OECD countries, in other words the aid donors, thus clearly dominate the decision making within the IFIs. But this only proves the tautology that aid donors control their donations. One would therefore need to return to the arguments about the rationale for ODA before any conclusion can be drawn from the fact of donor control over the IFIs.

Partisans may hold on to their arguments, either accusing the IFIs of perfidy or congratulating them on their successes, but this is of little value to analysis. The process of giving aid, providing loans and attaching conditions to them is ultimately based on an underlying logic of values transfer. The rhetoric concerns fighting poverty, stimulating growth and achieving sustainable development but the means of doing so are heavily value-laden. The donors are promoting a market system with a restricted role for governments in the economy and supporting prices that reflect product costs and interest rates that reflect money costs. Donors tend to favour the *status quo* because of the stability it apparently brings but they temper this with calls for reform. The result is a system that deals with incumbent power holders and a reliance on fairly standard economic policy settings, privatisation, capital market liberalisation, market based pricing, and free trade.[33] None of this is particularly surprising. These policy settings have served the donor economies well even though they have at times been ignored for domestic political imperatives such as shoring up the European farm sector with massive subsidies or putting up barriers to protect the uncompetitive American steel industry. In short, those countries seeking the help of the capitalist world should expect that help to come in a package that supports the key principles of a market economy.

Of greater interest in the context of an examination of sovereignty are the reactions and tactics of recipient countries in dealing with the donor's aid and policy package. This tends to boil down to the issue of when can policy advice in the aid packages be ignored in response to the recipients' domestic political imperatives. Formally, there is no doubting the sovereign right of countries not to seek IFI assistance, or to reject it when offered or to reject the conditions associated with it. The Bretton Woods institutions do not have the equivalent of the Security Council's Chapter VII of the UN Charter to enforce these policy settings. Instead, the compulsion to seek IFI involvement in their economies faced by recipients comes from the remorseless pressure of the international markets. Commodity processes have crashed, foreign investment is escaping, foreign exchange reserves are low, currency value is ebbing away, the cost of essential imports is prohibitive, debt servicing is becoming difficult – these are the ingredients of a financial crisis sadly common to many developing

31 World Bank, http://web.worldbank.org.

32 International Monetary Fund, http://www.imf.org.

33 Interview with Joseph Stiglitz (2001), in Gregory Palast 'IMF's Four Step Damnation', *The Guardian*, 21 April.

countries. In these circumstances, the IMF is the lender of last resort. Private lenders are looking to the IMF for a lead. Private investors need guarantees from the World Bank. What choice does a country have but to accept IFI money and the strictures accompanying it?

Nigeria was faced with this dilemma in the early 1980s.[34] Mindful of the bread riots in Egypt and Sudan, the Nigerian government was reluctant to turn to the IFIs. But when the international financial markets lost confidence in Nigeria, it had little alternative. The advice it received was unpalatable, as the proposed market reforms would undercut the system of patronage politics that kept the government in power. Public sentiment spurred by nationalism turned against the IFIs leaving only the local technocrats as allies. The crisis deepened and the military took power from the elected government and began negotiating with the IMF. But nationalist sentiment remained strong against the adoption of outside conditionalities. The response was to refuse to accept the IMF loan but to adopt the reforms repackaged in domestic livery. This defused the crisis and soon both private and IFI money began flowing back to Nigeria.

Papua New Guinea (PNG) had a relatively positive experience with the IFIs in its 1990 crisis, triggered by the rebel closure of the Bougainville copper mine.[35] It had demonstrated a grudging willingness to swallow bitter medicine though it was no more competent in following through on reforms after the IFI advice than before. But when PNG needed to return cap in hand to the IFIs in the mid-1990s, developments took some rather bizarre twists.[36] The IFI's response to poor execution of previous conditions was to increase substantially their number and complexity. Larmour counts 266 conditions attached to five loans between 1995 and 2000. The then prime minister told the World Bank to 'go to hell' and the Parliamentary Privileges Committee found the bank guilty of contempt. In 1998 the World Bank representative changed sides and offered his services to PNG at a substantial cost. His influence was short-lived as not only did the World Bank refuse to deal with him but also his new employers soon arrested him for tax evasion. Still fuming at the impositions of onerous conditions, the PNG government cancelled the visa of the World Bank negotiator. An unsuccessful army mutiny called for the removal of all IMF and World Bank representatives. Ultimately Waigani backed down and accepted the inevitable and the loans and conditions were negotiated.

---

34 Jeffrey Herbst and Adebayo Olukoshi (1994) 'Nigeria: Economic and Political Reforms at Cross Purposes', in Stephen Haggard and Steven B. Webb (eds) *Voting for Reform – Democracy, Political Liberalization and Economic Adjustment* (New York: A World Bank Book, Oxford University Press), 452–502.

35 David Kavanamur (1998) 'The Politics of Structural Adjustment in Papua New Guinea', in Peter Larmour (ed.) *Governance and Reform in the South Pacific*, Pacific Policy Paper 23 (Canberra: National Centre for Development Studies), 99–120.

36 Peter Larmour (2002) 'Conditionality, Coercion and Other Forms of "Power": International Financial Institutions in the Pacific', Australian National University eprints series, available at http://eprints.anu.edu.au/archive/00001676/.

Thailand's experience shows another way of dealing with the IFIs.[37] Having developed a successful export industry and achieved steady growth in the 1980s, Thailand was not as dependent on IMF bailouts or World Bank reassurances. Nevertheless, it came under strong pressure from the IFIs to liberalise the trade sector and lower the effective rate of protection offered to Thai industry. The response was to comply and cut tariffs. Unbeknownst to the World Bank economists, these superficial tariff cuts were cancelled by other measures such as surcharges that never appeared on any tariff schedule. Thailand eventually tackled the protection issue but at its own pace and subject to its own politics.

These three examples demonstrate the existence of what Larmour calls 'weapons of the weak'.[38] Thailand pretended to comply but went on its merry way. Nigeria delayed and bluffed, strengthened by the moral authority of popular anger against the foreign advisors. PNG adopted more confrontational tactics. These weapons of the weak are ultimately attributes of sovereignty. Thailand's executive is in control of its financial regulations. Nigerian leaders are free to address their people and listen to the response. PNG has the sovereign right to refuse a foreigner entry onto its territory. None of this alters the fundamental weakness in the recipients' bargaining position. But a recipient government may, if skilful, have some influence on the eventual outcome by deploying the various attributes of sovereignty to negotiate a better deal.

When it comes to the strong, their weapons carry far more weight. India, for example, is an aid recipient but it is also a country with a middle class of 200 million and foreign reserves of USD82 billion. In 2003, India decided to stop receiving aid from 22 small donors because the transaction costs were too high, the benefits were too small and it did not fit India's self-image as a candidate for a permanent member of the Security Council. The six countries with which India announced it is prepared to have a government-to-government development assistance relationship are, not co-incidentally, all current or aspirant permanent members of the Security Council.[39]

The reach of international civil society

The attributes of sovereignty have some currency when dealing with an international organisation. While international organisations have personality in international law, they are largely under the tutelage of their member states. Sovereignty is a powerful concept among the members of the club of nations and even the most powerful nations will uphold the basic principle in their dealings with weaker countries by

37 Richard F. Donner and Anek Laothamatas (1994) 'Thailand: Economic and Political Gradualism', in Stephen Haggard and Steven B. Webb (eds) *Voting for Reform – Democracy, Political Liberalization and Economic Adjustment* (New York: A World Bank Book, Oxford University Press), 411–452.

38 Peter Larmour (2004) 'Institutional Transfer and Aid Delivery', *Pacific Economic Bulletin* 19(2), 109.

39 Ray Marcel (2003) 'India Opts to Decline Aid from All but Six Countries', *Financial Times*, 8 July.

allowing national dignity to be maintained with the fig leaf of sovereignty. But the international civil society movement will show no such courtesy when a campaign issue is in its sights. They will have little patience with arguments about states' rights based on what they see, in Tarullo's words, as 'that old bugaboo of sovereignty'.[40]

International civil society flexed its muscles in the mid-1990s when, through the power of argument and lobbying, it thwarted the will of the powerful OECD countries by scuttling their proposed Multilateral Agreement on Investment (MAI). I have previously pointed out the irony involved in the case of the MAI was that civil society activists were in effect standing up for the sovereign right of small countries to refuse to grant equal treatment to foreign investors when the same activists' default position is to insist that all countries cede part of their sovereignty to international regimes in the fields of human rights, environment protection and disarmament.[41] Over the last two decades the power and influence of international NGOs like Amnesty International and Greenpeace has grown enormously. In their eyes, issues like human rights and environment protection cannot be contained within national borders. The subject matters for international regulation are growing and now also include health matters and even corruption, to which Transparency International's work is testimony. Global civil society has demonstrated a capacity to set at least part of the agenda for the strong and the weak, the donors and the recipients, the North and the South. Sovereignty has been a flimsy defence against the juggernaut of global public opinion insisting on safe tuna fishing, sustainable harvesting of tropical timber or the criminalisation of international bribery. Sovereign states have little option but to adopt global regimes in these fields if they wish to benefit from global trade, aid and investment. They then only have at their disposal the weapons of the weak – duplicity, poor enforcement and perhaps appeal to domestic populism or xenophobia.

Influence over the agenda and competence at marshalling argumentation and conducting lobbying have seen civil society win a place at the ODA table. Virtually every bilateral and multilateral donor agency has regular consultations with national and international NGOs represented by sophisticated and knowledgeable people who are quite assertive in putting forward their views on the direction and quality of aid programs.[42] The role of NGOs extends beyond giving advice, to the delivery of part of the ODA product. In 2002 grants by NGOs from OECD countries totalled USD12 billion with a further USD1.25 billion of ODA provided directly to NGOs.[43] Grants made directly to NGOs in recipient countries pose a particular problem for countries sensitive to foreign influence. Those, like India, who are strong enough to assert their sovereign rights, simply adopt regulations disallowing or requiring official

40 Daniel K. Tarullo (1985) 'Logic, Myth, and the International Economic Order', *Harvard International Law Journal* 26(2), 533.

41 Roland Rich (2001) 'Democracy as Comparative Advantage', in Charles Sampford and Tom Round (eds) *Beyond the Republic* (Sydney: Federation Press), 93–106.

42 See for example the Canadian experience in *Summary Report of CCIC/CIDA Consultations, April 17–18 2002*, at http://www.ccic.ca/e/docs/002_aid_2002_06_ccic-cida_consultation_summary.pdf.

43 OECD (2004) *The DAC Journal Development Cooperation Report 2003* 5(1), 134, 154.

permission for foreign contributions to domestic NGOs.[44] But most recipients simply accept the donor's insistence that a part of the ODA package be delivered through NGOs. Of course they retain the sovereign right to expel foreign NGO visitors, arrest local activists and even confiscate the funds in question but they are well aware that to do so would probably lead to a diplomatic dispute in which the threat of shutting down the aid flow would surely figure.

The influence of civil society through the processes of national and international politics poses a challenge to the traditional notions of sovereignty. Even some decisions on domestic development projects now face the hurdle of having to convince influential NGOs of their benefits. Large dams have become something of a line in the sand. The World Bank in particular continues to have great difficulty in supporting dam projects. In India, few large dams have aroused as much controversy or such a bitter campaign of hatred as the Sardar Sarovar Project. Pressure was brought to bear on the World Bank to step back from this project, virtually terminating the approved loan.[45] The Sardar Sarovar Project is not an isolated case; there are many others that are the targets of virulent criticism. There is still considerable criticism in Thailand over the World Bank–approved Pak Mun dam, built in the 1990s.[46] Pakistan continues to have sustainability and equity concerns over the Tarbela Dam Project over which the World Bank laboured for a decade to obtain cooperation between India and Pakistan before the first sod was turned.[47] The World Bank is currently entering the second decade of reviews and consultations over the proposed Nam Theun 2 dam in Laos for which 1,000 households will need to be resettled.[48] As always the issues are particularly complex covering technical feasibility, financial viability, ecological sustainability, resettlement equity and income utilisation planning. So if the World Bank gives the go ahead for the project, nearly all aspects of the construction, management and benefits will first have been approved by a raft of foreign organisations and experts.

The World Bank's major civil society critic in this project is the International Rivers Network (IRN), a powerful NGO based in California claiming to support local communities working to protect their rivers and watersheds. It has rejected the

---

44 The Government of India has adopted the Foreign Contribution (Regulation) Act of 1976 (FCRA) requiring NGOs to obtain the Ministry of Home Affairs' prior permission before receiving any foreign contributions, South Asian Human Rights Documentation Centre, New Delhi, *Human Rights Features 9*, 26 October 1999.

45 R. Rangachari *et al.* (2000) *Large Dams: India's Experience, Final Report: November 2000 Prepared for the World Commission on Dams (WCD)* New Delhi, available at http://www.dams.org/docs/kbase/studies/csinmain.pdf.

46 Sakchai Amornsakchai *et al*. (2000) *Pak Mun Dam – Mekong River Basin, Thailand: Final Report: November 2000 Prepared for the World Commission on Dams (WCD)*, Bangkok, available at http://www.dams.org/docs/kbase/studies/csthmain.pdf.

47 Asianics Agro-Dev. International (Pvt) Ltd. (2000) *Tarbela Dam and related aspects of the Indus River Basin Pakistan Final Report: November 2000 Prepared for the World Commission on Dams (WCD)*, Islamabad, available at http://www.dams.org/docs/kbase/studies/cspkmain.pdf.

48 See http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/LAOPRDEXTN/0,,contentMDK:20172670~pagePK:141137~piPK:217854~theSitePK:293684,00.html.

Nam Theun 2 project stating, 'Civil society organizations have no confidence that the Nam Theun 2 project will deliver its promised benefits or that the project's risks can be managed'.[49] A journalist recently investigated IRN's claim to speak for the Ugandan environment movement in relation to its opposition to another World Bank supported dam, at Bujagali.[50] Mallaby found the local people largely in support of the project and 'the Ugandan environment movement' was an NGO of 25 persons supported by the Swedish Society for Nature Conservation. Yet by claiming to speak for 'civil society' governments and international organisations have to take these views on board and may well have to abandon the Ugandan project.

China, on the other hand, has been building dams and irrigation systems for millennia. It is able to finance its own capital works and its domestic market is an enormous consumer of water and electricity. China has built almost half of the world's estimated 45,000 large dams including a series of dams on the Mekong and another at the Three Gorges. With the exception of a handful of projects built with IFI support, the vast majority of capital works are domestically funded. Accordingly, China has full decision-making value for its sovereignty, otherwise it would not have been supported in its resettlement of over 12 million people for dam construction over the past five decades.[51]

Sovereignty is a porous shield in an age of globalisation

In examining the issue of dam construction, the hollow nature of sovereignty is clear. China can construct its dams with minimal interference even though huge numbers of people are dislocated and the consequences for downstream nations are far from clear. Laos, a poor country of mountains and rivers and precious little else by way of resources, has to dance to the tune played by the international market system. It cannot build the dam itself, so its needs to borrow and thus subject itself to the strictures, advice and oversight of the World Bank. For the Laos government, it is not simply a matter of lobbying other members of the sovereignty club; the main opponent is an NGO that puts no store in sovereignty. It is not the institution of sovereignty that in and of itself allows nations to decide how to deploy their resources; it is the strength and ability of that nation to implement its will that is the critical factor.

One of the problems with this loss of decision-taking capacity on the part of the less powerful nations is the dilemma, highlighted in a number of studies, that without 'ownership' of the decision, governments will not implement and enforce them to

---

49 IRN Press Backgrounder, 8 September 2004, available at http://www.irn.org/programs/mekong/index.asp?id=PressTechWksp09.10.04.html.

50 Sebastian Mallaby (2004) 'NGOs: Fighting Poverty, Hurting the Poor', in *Foreign Policy*, September/October.

51 R. Fuggle and W.T. Smith (2000) *Experience with Dams in Water And Energy Resource Development In The People's Republic Of China Final Paper: November 2000 Prepared for the World Commission on Dams (WCD)*, Capetown, available at http://www.dams.org/docs/kbase/studies/cscnmain.pdf.

the best of their ability.[52] The World Bank's response has been the development of the Comprehensive Development Framework (CDF), which is described as 'a holistic long-term strategy; the country in the lead, both "owning" and directing the development agenda, with the Bank and other partners each defining their support in their respective business plans; stronger partnerships among governments, donors, civil society, the private sector, and other development stakeholders in implementing the country strategy; and a transparent focus on development outcomes to ensure better practical success in reducing poverty'.[53] The need to articulate the 'ownership' by the recipient country of its own development plans is a telling point. It speaks eloquently of the fact that the practice to date has been moving in the other direction, with development plans largely owned by lenders, donors and investors. The CDF may indeed play a helpful role in widening domestic consultations and increasing transparency. But there are at least two reasons why it is difficult to see it genuinely changing the ownership status of the policies in question.

The first reason is the increasingly intrusive nature of conditionalities, especially as they relate to governance. Collier describes the growth of conditionality from a crisis instrument to a continuous process of general economic policy making as tantamount to a 'transfer of sovereignty'.[54] Kapur and Webb point out that if there were true 'ownership' then conditionality would be unnecessary, as the implementing country would have every intention of fulfilling its tasks under any lending agreement.[55] Instead of reliance on ownership, conditionality has become ever more intrusive as it attempts to shift from the construction of capital infrastructure to the redesign of dysfunctional governance infrastructure of recipient countries. This process tends to involve donors in virtually all aspects of governance from civil service reform to support for rule of law programs to democracy promotion work. This is particularly ambitious because of the reality that 'institutional development is usually needed most where it is hardest to achieve'.[56] The mere signature of a minister for planning on a CDF will therefore not amount to ownership. Ownership may, however, be strengthened if the policies emerge from a deliberative debate within a democratic framework. If people 'vote for reform', to borrow Haggard and Webb's phrase, and governments are accountable for the policies that saw them voted in, there is far more likely to be a sense of ownership and far more chance of urgency in implementation.

The other reason is that the planners, whether in World Bank headquarters in Washington or in the ministry for planning of the recipient country, are all working with virtually the same pool of ideas. We may not have quite come to the end of

---

52 For example Ndiva Kofele-Kale (2001) 'Good Governance as Political Conditionality: An African Perspective', in Julia Faundez, Mary Footer and Joseph Norton (eds) *Governance, Development and Globalization* (London: Blackstone Press), 151.

53 World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,pagePK:60447~theSitePK:140576,00.html.

54 Paul Collier (1999) 'International Financial Institutions in Africa,' in A. Schedler *et al*. (eds) *The Self-Restraining State* (Boulder: Lynne Reinner), 319.

55 Kapur and Webb, 'Governance-Related Conditionalities of the International Financial Institutions', p. 8.

56 *Ibid*., 9.

world history but there is a dominant set of ideas in the field leaving little room for indigenous input. Locals may be able to provide useful input on questions of sequencing and emphasis but unless they stick to broad orthodoxy, the financial flows will be put in jeopardy. This message underlies the decision-making process. Sometimes it is a foreign emissary that delivers it. Bello describes the internal debate in the early days of the Aquino government on repudiation of the Marcos debt, in part generated by large projects that were of little benefit to the people of the Philippines, being settled when the government heeded the warning from visiting Citibank president John Reed that debt repudiation 'would produce immense suffering and difficulty for the people'.[57] The orthodoxy need not necessarily be propagated by visiting foreign experts. Local leaders may well have adopted these views as their own, often in the course of foreign studies or employment. The World Bank's influence over Turkish economic policies in the 1980s can to some extent be traced to Prime Minister Tugut Özal's stint at the World Bank and the Central Bank's Rűşdű Saracoğlu's work at the IMF in the 1970s.[58] Similar examples exist for Chile, Mexico and Spain.[59]

Kapur criticises Northern and in particular the North American bias in the production of knowledge in development economics.[60] Looking at papers delivered at the Annual World Bank Conferences on Development Economics from 1995–2000, he notes that of the seventy-six authors, only three came from developing countries, and of the other seventy-three, fifty-eight came from the United States. At the Annual IMF Research Conferences in 2000–2001, four of the fifty-seven authors were from developing countries and forty-six were from the United Sates. This is not to deny the scholarly worth generated by the powerhouse that is the American research academy, but it does emphasise the dominance of a specific worldview in the field.

Is there an alternative? What if a country insists on doing things its way, applying its own rules and ignoring universal norms? Can sovereignty operate to allow this option? The answer is in the affirmative though with a possible qualification concerning the doctrine of humanitarian intervention, which I will leave to other contributors to examine. Leaving the example of Kosovo aside, a nation may use its borders as a barrier to all outside influences. It can ignore trade, refuse to accept foreign investment, reject aid and close its doors to visitors while keeping its own population imprisoned. The only example that comes close to this option is the Democratic People's Republic of Korea, with Burma and Zimbabwe not far behind. North Korea's *juche* philosophy is one of self-reliance and xenophobia. The result

57 Walden Bello (2004) *The Political Economy of Permanent Crisis in the Philippines* (Manila: University of the Philippines), 14.

58 Ziya Öniş and Steven B. Webb, 'Turkey: Democratization and Adjustment from Above', in Haggard and Webb, 'Governance-Related Conditionalities of the International Financial Institutions', 153.

59 Stephen Haggard and Steven B. Webb, 'Introduction', in Haggard and Webb, 'Governance-Related Conditionalities of the International Financial Institutions', 28.

60 Devesh Kapur (2003) 'Do As I Say Not As I Do: A Critique of G–7 Proposals in Reforming the Multilateral Development Banks', UNCTAD G–24 Discussion Paper Series No. 20, 11.

is tragic proof of the corollary to Amartya Sen's famous insight that democracies do not have famines.[61] But if a nation wishes to have the advantages of trade with the outside world, to attract foreign investment and tourists and to receive aid, it will need to play by a certain set of rules. These rules may not always be fully enforced. At other times the market may enforce its own set of rules quite savagely. But whether they flow from treaties, conditionalities or the laws of supply and demand, the rules provide a global framework in which countries wishing to participate in global exchanges need to operate. The conclusion we can therefore reach on the question of realistic alternatives is that in a world of globalisation, the only long-term alternative to managing one's affairs within global rules is autarky, even though it will lead to penury. Sovereignty can protect autarky in the same way as it can sanctify autocracy.

Returning to President Bouteflika's comment introducing this chapter, it seems clear that countries relying on sovereignty as a defence to the demands of living in a global community are placing their faith in a rather porous shield. Those demands can be seen in many fields including ODA. Whether one looks at the process as ceding or pooling an element of sovereignty through international agreements, or voluntarily accepting the explicit and implicit conditions that come with aid or concessional loans, or ownership of development plans that others have a role in carrying out, sovereignty will be protected in name but not in substance. A nation's welfare flows from its various strengths and a legal doctrine alone cannot alter this common sense reality.

61 Amartya Sen (1999) 'Democracy as a Universal Value', *Journal of Democracy*, July, 8.

Chapter 14

Corruption and Transparency in Governance and Development: Reinventing Sovereignty for Promoting Good Governance

C. Raj Kumar*

Much has been said and written about sovereignty in international law and international relations.[1] However, there is continuing interest in understanding the diverse facets of the concept of sovereignty and its contemporary relevance.[2] The concept has been interpreted and re-interpreted. Anne-Marie Slaughter has observed:

> Theorists, pundits, and policy makers all recognise that traditional conceptions of sovereignty are inadequate to capture the complexity of contemporary international relations. The result is a seemingly endless debate about the changing nature of sovereignty: what does it mean? Does it still exist? Is it useful? Everyone in this debate still assumes that sovereignty is an attribute borne by an entire state, acting as a unit. Yet if states are acting in the international system, through their component government institutions – regulatory agencies, ministries, courts, legislatures – why shouldn't each of these institutions exercise a measure of sovereignty as specifically defined and tailored to their functions and capabilities?[3]

The author also questions why each of these institutions does not exercise a measure of sovereignty as specifically defined and tailored to its functions and capabilities.[4]

---

1 See generally, Stephen D. Krasner (1999) *Sovereignty: Organized Hypocrisy* (Princeton NJ: Princeton University Press), 264; Chris Brown (2002) *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge UK: Polity; Malden MA: Blackwell Publishers), 276.

2 Ruth Lapidoth (1995) 'Redefining Authority', *Harvard International Review* 17(3), 8–13.

3 Anne-Marie Slaughter (2004) *A New World Order* (Princeton and Oxford: Princeton University Press), 266–267.

4 Slaughter, *A New World Order*, 266–267. See also Kenneth Anderson (2005) 'Squaring the Circle: Reconciling Sovereignty and Global Governance through Global Government Networks' (Review of Anne-Marie Slaughter, *A New World Order*), *Harvard Law Review* 118, 1255–1312

The Westphalian notion of sovereignty has dramatically changed in the post–Second World War world.[5] The formation of the United Nations (UN) and passing of the UN Charter and Universal Declaration of Human Rights gave hope for new understandings and development of the discourse on sovereignty. However, the Cold War rivalry among super powers further legitimised sovereign a regime of special sovereign prerogatives, even though the human rights discourse has continuously challenged it. The human rights challenge to sovereignty was borne out of a moral response to the massive human rights violations that were committed a number of times in different parts of the world. The UN Security Council (UNSC) became the forum in which issues relating to international peace and security were discussed and responses were formulated. Notwithstanding the fact that the permanent members of the UNSC have continuously cited sovereignty arguments at different points of time to choose non-intervention over other methods, there have been a number of cases in which intervention was authorised as a response to massive human rights violations or breach of peace.[6]

The collapse of the USSR and the end of the Cold War loosened the sacredness of state sovereignty further, as doctrines like 'individual sovereignty' and 'human security' grew in popularity. In the absence of tit-for-tat vetoes in the UNSC, post-1991 world affairs have witnessed more multilateral peacekeeping missions and military interventions to correct crimes against humanity. Sovereignty, which used to earlier guarantee complete internal freedom for governments to rule or misrule their citizens, was no longer considered a technical hurdle if there was consensus at the UN or if the sole superpower cobbled together a 'coalition of the willing'.[7]

Globalisation has posed new challenges to sovereignty. The world has become a much more integrated place with international institutions in the fields of trade and investment exercising powers to adjudicate matters that affect the lives of people in multiple countries, often bypassing national governments. There is no serious challenge to globalisation. The discourse has now moved to accepting globalisation as a reality and to ensure checks and balances so that globalisation does not result in marginalisation of people leading to disempowerment. Globalisation has also brought scrutiny to the concept of 'global governance' and its importance in understanding sovereignty.[8]

Terrorism, the war on terror and issues relating to national security have recently added another new dimension to the discourse on sovereignty.[9] While what was earlier justified as being a case of humanitarian intervention in certain circumstances

---

5 See generally, Gerard Kreijen *et al.* (eds) (2002) *State, Sovereignty, and International Governance* (Oxford: Oxford University Press), 643.

6 See Bruno Simma (1999) 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law* 10, 1–22, available from http://www.ejil.org/journal/Vol10/No1/100001.pdf.

7 See Richard Falk (2003) *After Iraq is there a Future for the Charter System: War Prevention and the UN*, available from http://www.counterpunch.org/falk07022003.html.

8 See generally, Rorden Wilkinson (ed.) (2005) *The Global Governance Reader* (London: Routledge).

9 See Michael Davis *et al*. (eds) (2004) *International Intervention in the Post-Cold-War World: Moral Responsibility and Power Politics* (New York: M.E. Sharpe).

has now acquired a much more controversial twist through the doctrine of pre-emptive action.[10] What is now often neglected in a sovereignty debate focused on international security are the concerns of the much earlier debates on internal sovereignty, debates that address the domestic authority of the sovereignty claim. These aspects continue to have profound implications for the broader debate.

This chapter firstly provides an understanding of the concept of sovereignty from a governance perspective, what is often referred to as 'internal sovereignty'. What this means is that sovereignty is about the state taking responsibility to govern. Sovereignty ought to ensure that the state has the capacity to govern and is able to exercise its powers and use its resources for the benefit of its people. This notion of sovereignty recognises that the sovereignty of a state rests with its people. This framework provides a useful understanding of the role of the contemporary state to fulfil the development goals of a society. Secondly, the chapter provides an overview of the problem of corruption with reference to developing and developed countries in general. This section discusses the consequences of corruption and how it violates human rights, undermines the rule of law and the development process and derogates sovereignty. If the state and its apparatuses are corrupt, it will not be able to exercise its powers and functions in an efficient and effective manner. Thirdly, the chapter discusses the issue of transparency in governance as a facet of the state exercising its sovereign powers. Once corruption is recognised as an issue that undermines sovereignty, it is important that the steps taken to ensure corruption-free governance will help provide greater impetus to develop a more liberal notion of the state becoming accountable. Transparency in governance and accountability in administration are important for sovereignty to become a meaningful exercise of power by the state and its apparatus.

Fourthly, the chapter discusses issues relating to development as a fundamental goal of society. If sovereignty is about the state exercising responsibility towards its citizenry, then this notion of development becomes the core objective of state responsibility. Corruption undermines this objective in innumerable ways and, in particular, violates the protection and promotion of civil, political, economic and social rights. Fifthly, the chapter argues that the contemporary worldwide discourse on anti-corruption has largely focused itself on dealing with corruption as a criminal law and law enforcement issue and at best internationally, has focused on issues relating to corruption like transnational bribery, organised crime and money laundering. While these recognitions help in providing a certain regulatory framework for anti-corruption policy, they do not fully understand and appreciate the problem of corruption from the perspective of state capacity. Corruption is a

---

10 See generally, Prem Shankar Jha (2004) *The End of Saddam Hussein: History Through the Eyes of the Victims* (New Delhi: Rupa & Co). He has argued that the Bush doctrine of 'pre-emption' is actually 'prevention'. Pre-emption is when you know that the enemy is about to strike you and has ammunition to hit. Prevention is more open-ended and subjective, not based on the enemy's intentions or capabilities. See Chanakya Sen (2004) 'Tomorrow Never Dies' (Book Review), *Asia Times*, 6 May; see also Michael C. Davis (2005) 'Human Rights and the War in Iraq', *Journal of Human Rights* 4, 1–8, available from http://www.atimes.com/atimes/Middle_East/FE06Ak03.html.

problem that undermines the state's capacity to govern and negates the fundamental notion of popular sovereignty.

Finally, the chapter argues that it is important to develop new understandings of sovereignty on the basis of three important challenges that have taken in place in more than half a century. First, the human rights discourse has successfully posed a formidable challenge to sovereignty and states very rarely now justify human rights violations that take place within the state on the ground of sovereignty. This means that it is no longer acceptable civilized conduct to torture one's own citizens. At least publicly, states cannot acknowledge that their operatives crush civilians mercilessly. Second, globalisation has posed a different type of challenge to sovereignty. This challenge is in the form of states coming together and accepting certain institutions to be arbiters of disputes and, to that extent, ceding their powers to decide matters that will have significant domestic impacts. The working of the WTO is telling as to how this supranational rules-based system functions, but these matters are clearly in the domain of trade and commercial disputes and not in relation to issues like peace and security, territorial and other political disputes.[11] However, the globalisation challenge is a legitimate challenge and states ought to be equipped suitably to face this challenge. The third challenge is posed by terrorism and issues relating to national security. Terrorism has come to occupy centre-stage in the post-9/11 world and with the war on terror extending its tentacles to Iraq and Afghanistan, issues relating to intervention and state sovereignty will be seriously debated worldwide.

Interestingly, corruption and good governance fall at the centre of this trajectory. Corruption is a serious human rights issue and globalisation has provided newer avenues for corruption to take place. One only has to recall the Enron collapse or other serious malfeasances involving multinational corporations. Issues relating to terrorism and national security have an important bearing on corruption and compromise of integrity. The national security system is based upon certain trust and belief in the people who operate it. If the security systems, including the military and civil establishments, can be bribed to compromise security, we have a potentially major problem. So, developing integrity by way of ensuring transparency in governance and corruption-free administration becomes the means and goal of exercising sovereignty.

Sovereignty from a governance perspective

The literature on sovereignty has expanded to include different dimensions. Much has been written to challenge the traditional notion of sovereignty. Stephen Ratner has observed that conventional sovereignty is based on two principles:

> a. International legal sovereignty, which include mutual recognition of juridically independent territorial entities (sovereign states) with rights of membership in international

11 It may be useful to refer to the European Constitution, which recently suffered serious body blows, as one rare instance of an external centre of power that could have impacted on domestic laws and politics of member countries.

organisations, diplomatic immunity along with the right to enter into mutually acceptable agreements or treaties;

b. Westphalian sovereignty, which relates to the non-intervention in the internal affairs of other states. This means that the domestic authority and governmental structures of every state is autonomous or independent and this ought to be determined by local actors within the state.[12]

The second notion of sovereignty is based on the principle of non-intervention and, as already mentioned, it has faced significant challenges. Discussing the failure of conventional sovereignty, Stephen Ratner says:

> Conventional sovereignty has never worked perfectly, and its principles especially Vatellian/Westphalian sovereignty, have frequently been violated. The inconsistency of conventional sovereignty with stability, peace, and prosperity has become particularly acute in the contemporary environment….[13]

He gives five reasons for this failure:

1. collapse of domestic authority structures;
2. weapons of mass destruction and rogue states;
3. ungoverned regions;
4. human rights abuses;
5. governance failures.

There is little doubt that all the above five reasons have contributed to the failure of the conventional notion of sovereignty. But I would argue that Steven Ratner's reasoning for failure of sovereignty can be solely attributed to the failure of governance system in states.

It is important to interpret governance in the context of renewed understanding of sovereignty. If states exercise powers to assert their sovereignty, these powers cannot be exercised in an isolated and value-neutral manner. These powers ought to be exercised with a view to creating a governance system that will ensure that sovereignty rests with the state and its actors and is exercised in a responsible manner. The *New Webster's International Dictionary* defines the term governance as 'act, manner, office, or power of governing; government', 'state of being governed', or 'method of government or regulation'.[14] However, these explanations do not fully capture the contemporary understanding of governance and its relationship to sovereignty. It is useful to refer to the report of the Council of Rome in which it was observed:

---

12 Stephen D. Ratner (2003) 'The Exhaustion of Sovereignty: International Shaping of Domestic Authority Structures', paper presented at Taking the Initiative on Global Governance and Sustainable Development Conference, Paris, 13–14 April (unpublished).

13 *Ibid.*

14 This was referred to in Thomas G. Weiss (2005) 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges', in Wilkinson (ed.), *The Global Governance Reader*, 68.

> We use the term governance to denote the command mechanism of a social system and its actions that endeavour to provide security, prosperity, coherence, order and continuity to the system … Taken broadly, the concept of governance should not be restricted to national and international systems but also should be used in relation to regional, provincial and local governments as well as to other social systems such as education and the military, to private enterprises and even to the microcosm of the family.[15]

In order to understand the conceptual underpinning of sovereignty from a governance perspective, it is important to recognise that sovereignty is about state responsibility. The 2001 report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect (the Report),* tackles the question of when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk of a humanitarian crisis in that other state. The Report advances the principle of sovereignty-as-responsibility – the idea that the obligation to protect civilians is inherent in state sovereignty. It argues that, in extreme cases when states are unable or unwilling to protect their own population that responsibility must be borne by the broader community of states. The Report has observed the following to be basic principles of *The Responsibility to Protect*:

> a. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
>
> b. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect. Further, *The Responsibility to Protect* has three elements: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.

While this concept was discussed in the context of humanitarian intervention, I find it extremely useful to relate it to governance as a core responsibility of sovereignty. It is in this context that the issue of corruption comes as a serious obstacle to governance that undermines sovereignty of a state. Under the basic principles of sovereignty, a population can suffer serious harm due to corruption and lack of transparency, not necessarily physical harm, but a number of other harms that hinder the full and complete exercise of human potential. Corruption violates the basic principles of sovereignty as responsibility, as the powers of the state are exercised in an irresponsible way due to misallocation of resources resulting in micro- and macroeconomic problems.

---

15 Alexander King and Bertrand Schneider (1991) *The First Global Revolution: A Report of the Council of Rome* (New York: Pantheon Books), 181–182. This was referred to in James N. Rosenau (2005) 'Governance in the Twenty-First Century', in Wilkinson (ed.), *The Global Governance Reader*, 46.

Overview of corruption and its impact on the execution of sovereign responsibility

Corruption is a serious issue that undermines the governance process in developed and developing countries alike. While the nature and type of corruption in developed and developing countries may vary, there is little difference in the impact of corruption on the social, economic and political fabric of these societies. Corruption violates human rights, undermines the rule of law, distorts the development process and disempowers the state. This leads to the state losing its capacity to govern. Firstly, corruption violates the prevailing legal and regulatory framework in a society. Most countries have laws against corruption. But corruption is one aspect of public policy where the gap between law on the books and the law in practice is wide. Secondly, corruption violates human rights as it hinders the process of fulfilling civil, political, economic and social rights of the people of a society. The unequal application of law leading to selective enforcement due to corruption creates an environment of scant regard for law and legal institutions. Gradually, the state loses its legitimacy to govern as corruption permeates all state activity.

The human rights implications of corruption are grossly demonstrated as it has greater consequences on the poor. Corruption affects the poor disproportionately as they cannot afford to pay bribes with the result that they are not able to receive the benefits that they are otherwise entitled to. Thirdly, corruption is an important issue that rule of law is based upon. Rule of law means that a society is governed on the basis of laws that are enforced equally.

Corruption creates an environment whereby some people are given privileges due to their ability to pay bribes. The matter becomes even more serious when corruption prevails in the judiciary and other law enforcement agencies. A rule-of-law society is based upon the trust and faith of the people in society that they are governed on the basis of laws, rules and regulations, which are enforced in a fair, just and reasonable manner. Corruption undermines this basic trust. This especially weakens sovereignty in democratic polities, where legitimacy and popular will are essential requisites for an authority to call itself 'sovereign'.

Traditionally, corruption is recognised as a law enforcement and a criminal law issue. The laws against bribery are part of the criminal law enforcement mechanisms of a state. Even the institutional mechanisms that are available within the state are largely based upon the police and other law enforcement machinery directly or indirectly involved in investigating allegations of corruption and the prosecution of the wrongdoers. But this approach puts corruption along with other crimes which the criminal law attempts to punish. However, corruption, if understood from the standpoint of its consequences for the rule of law, human rights and development, has a profound impact on state sovereignty. Earlier, the chapter discussed the concept of sovereignty from a governance standpoint. Transparency in governance is crucial to ensure that the state is exercising its powers in a responsible manner. Corruption of the institutions of the state does not allow the state to exercise its sovereign powers. In fact, corruption of the state and its institutions means that the state is not functioning in its required capacity and that the law enforcement machinery is weak. Sovereignty and its impact on corruption has five dimensions: security, law

enforcement, good governance, development and human rights. These are detailed below.

Security

The goal of every sovereign state is to ensure national security for its people so that peace and stability prevail in the society. Corruption has the potential to threaten national security, thereby adding to the threats faced by a society. Human security is another dimension of sovereignty. This is to ensure that people of a state are empowered to face a wide array of threats, including threats from terrorism, weapons of mass destruction, natural disasters, deadly diseases like Aids and infectious disease like Sars; and other environmental disasters due to global warming and climate change. It is important to recognise the connections between corruption and sovereignty from national and human security standpoints so that all issues of public policy and governance that a state is engaged in by way of its sovereign functions are pursued on the basis of transparency in governance. Corruption is an all-pervasive phenomenon that affects the exercise of the functions of the state in a wide manner.[16]

Law enforcement

A sovereign state ought to ensure that laws are enforced in non-discriminatory manner. Corruption does not allow the laws to be enforced properly or if they are enforced, the enforceability is biased and is based upon irrational criteria. Due to discriminatory enforcement of law because of corruption, criminalisation of politics and politicisation of crimes becomes common in the society. The sovereign state becomes too weak to enforce the law and all institutions of governance suffer from a legitimacy crisis as well as autonomy and independence that is required to enforce the law, including laws against corruption.

Good governance

A sovereign state ought to ensure that the state is administered on the basis of the best practices of good governance.[17] A corrupt state is an example of bad governance and cannot ensure that its legal and political existence is duly supported by the governance process.[18] The national human rights institutions which have been established in numerous countries can play an important role in ensuring good governance.[19] Efforts

16 For example, there are allegations of corruption of handling of the aid that was distributed to some countries in South and South East Asia after the tsunami disaster.

17 See C. Raj Kumar (2004) 'Institutionalisation of Human Rights in Asia: Developmentalizing Rights to Promote Good Governance', *Asia Pacific Law Review* 12(2), 143–159.

18 See Thomas M. Franck (1992), 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86(1), 46–91.

19 See C. Raj Kumar (2003) 'National Human Rights Institutions – Good Governance Perspectives on Institutionalization of Human Rights', *American University International*

have been taken to include issues relating to corruption within the human rights mandate of these commissions, but these initiatives have not been institutionalised, so far. One of the main reasons for this is that human rights commission have largely preoccupied with issues relating to civil and political rights and very little attention has been given to violations of economic and social rights.[20]

Development

The goal of any sovereign state is to ensure that there is social and economic development. Contemporary international initiatives in the form of the Millennium Development Goals (MDGs) underline the need for ensuring development of the people in states. The UN Declaration on the Right to Development also emphasises this point. It is the responsibility of a number of players, the most important being the state itself, to ensure that the MDGs are achieved. The fulfilment of the MDGs is inextricably related to the state exercising its sovereign functions. However, it is seldom recognised that corruption plays a very important role in the state not fulfilling its functions. Often, the resources that are allocated from domestic sources or development aid that comes from international sources are diverted in the form of corrupt transfer of wealth to a few persons who are governing the country. There is a significant negative impact due to corrupt transfer of wealth to the few powerful persons. Development aid becomes a source of huge internal conflict and improper use of resources, thereby undermining the sovereignty of the state. These actions delay and undercut the development process.

Human rights

The relationship between human rights and state sovereignty is well established.[21] However, the recognition of corruption to be a serious human rights issue and consequently a reason for undermining sovereignty is a new perspective of understanding corruption. This is based upon the recognition that corruption of a state and its institutions hinders the full realisation of civil, political, economic and social rights, which are all related to the exercise of the right to development. Sovereignty as a facet of state responsibility demands that the state exercise its powers in such a manner that not only does not result in corruption, but also ensures that corruption-free governance prevails. This will ensure better protection and promotion of human rights. Further, the recognition of corruption as an undermining factor for the sovereign exercise of powers means that our efforts to prevent and fight against corruption leads to empowerment of the people. Empowered people will have a greater commitment to ensuring good governance and development,

---

Law Review 19(2), 259–300.

20 See C. Raj Kumar (2006) 'National Human Rights Institutions (NHRIs) and Economic and Social Rights: Towards Institutionalization and Developmentalization of Human Rights', Human Rights Quarterly 28(3), 755–779.

21 See generally, Richard Falk (2000) *Sovereignty and Human Rights: The Search for Reconciliation*, available from http://www.globalpolicy.org/nations/future/0312falk.htm.

while the sovereign state exercises its functions. It is important to recognise that sovereignty is about the state exercising its responsibility with regard to ensuring respect for human rights. Commenting on the UN Human Rights Committee's recent General Comments No. 31, Philip Alston has observed:

> … states are required to do their utmost to ensure that private actors do not violate human rights, but the Committee is not prepared to go so far as to say that, in the absence of effective action by the state, international law imposes direct obligations on private actors such as private health care or water service providers, or transnational corporations …[22]

Transparency and accountability in governance and sovereignty

Transparency in governance is about the functions of the state being exercised in a lucid manner so that corruption of any kind is nipped in the bud. Transparency in governance helps promote democratic governance so that people are aware that government is making available all information pertaining to governance. There are many ways by which transparency in governance can be ensured. The development of right to information as a constitutional or legal right is a typical approach adopted by many countries. These laws ensure that the government is under an obligation to provide all information to the public on the basis of certain determinable criteria. In all free societies, certain information is within the prerogative of the government to make it available to the public and is not made public for a certain period of time for reasons relating to national security or other similar reasons. Even with official secrets, the strictures ought to be constantly examined to balance the citizen's right to information and national security.

Corruption-free governance is one important aspect of transparency and ensuring accountability. Corruption typically prevails when there is little or no information available and there is too much discretion vested with the government officer or department to decide a case. The objective of transparency in governance is to ensure that the information relating to the particular process, including the objective and determinable criteria for selection is made public in advance. This can reduce the incidence of corruption. A related point is to ensure protection of rights of the media as a part of freedom of speech and expression. The media has played a very important role in the fight against corruption in many societies by exposing acts of corruption of public officials to the people. This has further generated greater civic activism and civil society initiatives. Corruption creates a gap between the sovereign state and its people. Transparency in governance provides for a framework by which the government and the people can come together in formulating policies that are in the best interests of society as a whole. While corruption undermines state sovereignty, efforts to promote transparency in governance ensure that powers of the sovereign are exercised in a transparent and accountable manner. Lack of transparency is also an inefficient approach to governance. The legal, judicial and

22 Philip Alston (2005) 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly* 27, 755–829.

institutional framework that a sovereign state formulates to ensure transparency in governance for corruption-free administration strengthens the social compact between the state and its people.

Development and state sovereignty

It is useful to better understand the concept of sovereignty by asking what its purpose is. The purpose of sovereignty is to ensure that the state and its instrumentalities exercise powers to engage in the process of development. There will of course be debates about different conceptions of development and even as to what constitutes 'development'. But there will be little controversy as to the importance and the necessity of the state exercising its sovereign powers for ensuring development. In this regard, it is useful to refer to the MDGs,[23] which are probably the most serious international efforts to promote human development and significantly reduce poverty.[24] While the responsibility for achieving the MDGs is broad-based and includes many actors, the individual states themselves play an important role. Corruption affects development in a number of ways. The development process involves individuals and institutions acting on the basis of formulating policies and taking efforts to implement them. It also involves allocation of resources for development efforts. It is here that both corruption within the state as well as transnational bribery come into play. Multilateral lending institutions have emphasised time and again that transparency in governance ought to be strengthened and that the borrowing countries are accountable to ensure that there is no corruption. Domestically, in a number of countries, there is discussion as to whether institutions like the World Bank and IMF are intruding into individual country's sovereignty by insisting on transparency.

The United Nations Development Programme (UNDP) views governance as:

> [T]he exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes, and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.[25]

---

23 UN Millennium Development Goals, available from www.un.org/millenniumgoals/. Philip Alston has mentioned that, 'In brief, the eight MDGs aim to: (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria, and other diseases; (7) ensure environmental sustainability; and (8) develop a global partnership for development. In order to make these goals more precise and their achievement more measurable they have been accompanied by eighteen targets and forty-eight indicators'. This was referenced in Philip Alston (2005) 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly* 27, 755–829.

24 Philip Alston (2005) 'Ships Passing in the Night'.

25 Sakiko Fukuda-Parr and Richard Ponzio (2002), Governance: Past, Present, Future – Setting the Governance Agenda for the Millennium Declaration, UNDP Paper.

The exercise of such authority is not possible in a society that has high levels of corruption. The development process ought to be based upon principles of transparency in governance and accountability of the administration. However, due to corruption, there is inefficiency and inequity in resource allocation. Tunku Abdul Aziz, Vice Chairman, Transparency International has observed:

> Corruption, however it is defined, widens the already yawning gap between the rich and the poor in many of the countries represented here at this conference. It inhibits social and economic development, impacting negatively on attempts by international as well as regional development institutions … to fight hunger and famine coherently and systematically. It distorts market operations. It deprives ordinary citizens of the benefits that should accrue to them such as freedom from hunger in an age of plenty.[26]

To understand the impact of corruption on development, it will be useful to examine the role of the different institutions of governance in a society and how their role is impinged by corruption. Reif has observed that good governance includes a number of practices such as:

> [P]rofessional civil service, elimination of corruption in government, a predictable, transparent and accountable administration, democratic decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of government, appropriate levels of military spending, and so on.[27]

This will clearly demonstrate the various actors of development who are responsible for fulfilling the goals of development and implementing the policies of the government, if corruption can result in complete breakdown of the governance machinery in a state.

But if we recognise that sovereignty is about the state exercising its powers in a responsible manner, it is not only important but necessary for multilateral lending institutions to seek a certain degree of transparency and accountability from the borrowing countries. This will ensure that the state will formulate appropriate checks and balances domestically to ensure corruption-free governance and that the resources allocated are used for the purpose for which they are allocated. Development should be output and goal-oriented, not directed to spending that goes down the drain. Also, the sovereignty of the state, particularly on matters relating to taking of loans, is based upon the implicit understanding that it is for the benefit of its people. If this benefit is not realised due to corruption and improper use of resources, then the sovereignty is undermined and the development process derailed.

---

26 Tunku Abdul Aziz (2001) 'The Impact of Corruption on Food Security', Summary Note, Sustainable Food Security for All by 2020 Conference, Bonn, Germany, 4–6 September.

27 See Linda C. Reif (2000) 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', *Harvard Human Rights Journal* 13, 1–69.

Need for re-examining global anti-corruption initiatives

Corruption has come to occupy an important place in the global agenda. A number of factors have contributed to this development. The work of Transparency International (TI) can be specifically pointed to, to demonstrate that the international community has recognised corruption to be a serious issue that hinders development, undermines the rule of law and negates all principles of good governance. The TI's Corruption Perception Index (CPI) has provided a unique opportunity for domestic and international civil society initiatives in the fight against corruption. This has to a large extent overcome the difficulty of measuring corruption in a given society, although TI's own approaches are occasionally challenged for its scientific inaccuracy and methodological incoherence. There have been a number of developments internationally that have ensured that corruption remains an important issue in the international agenda. The passing of the Global Anti-Corruption treaty has further reinvigorated the international consensus on the issue of corruption. But a closer examination of this global consensus demonstrates that there is a wide gap between the normative framework of anti-corruption laws and the actual implementation of the obligations of states. Unlike issues like terrorism, transnational crime and drug trafficking, the problem of corruption does not invite urgent international attention.

The psychology behind this relative neglect of corruption is explained by lopsided prioritisation. States jealously guard their monopolies over violence and hunt down non-state actors who challenge it, but when it comes to a more insidious form of cancer like corruption, states mistakenly believe that corruption benefits them. In reality, agents of state (bureaucracy and the political class) and not the state *per se* gain from corruption. Agents of state either assume that their individual and clique prosperity translates into state prosperity and sovereignty or simply do not care for anything beyond personal enrichment. In both cases, the example of Louis XIV who claimed, 'I am the state', serves as a sensible reminder. Such attitudes fail to foresee revolution and violent threats to the existing order.

Corruption has still not been understood to be a rule of law and human rights issue. The expansion of human rights movement worldwide has been based on the concept of human dignity. Corruption violates human dignity as it undermines the proper fulfillment of basic rights. The right to a society free of corruption is an inherent human right because life, dignity, equality, and other important human rights and values significantly depend upon this right. That is, it is a right without which these essential rights lose meaning, as well as their actualisation. Kale has argued that the right to a corruption-free society originates and flows from the right of people to exercise permanent sovereignty over their natural resources and wealth, that is, their right to economic self-determination, recognised in the common article of the ICCPR and ICESCR.[28] Thus, the state would be in violation of the right to economic self-determination if it engages in the corrupt transfer of ownership of

28 Ndiva Kofele-Kale (2000) 'The Right to a Corruption-Free Society as an Individual and Collective Human Rights: Elevating Official Corruption to a Crime under International Law', *International Lawyer* 34, 149.

national wealth to those selected power holders.[29] It is here that the concept of transparency and accountability fits in well with an integral understanding of the need for ensuring corruption-free governance and protection of human rights. When the government engages in corrupt activities, it is abusing power, disrespecting law and thereby violating the human rights of its citizenry.[30] This violation by the state also results in a situation where people are denied, both individually and collectively, their right to freely use, exploit and dispose of their national wealth in a manner that advances their development.

It has been argued earlier that corruption undermines sovereignty and that corrupt individuals and institutions in a state affect the capacity of the state to discharge its responsibilities. But the crucial problem in relation to corruption is that if the key members of the sovereign state are themselves corrupt and are engaged in the process of illegal transfer of public funds for private gain, what are the options that a society has? This question is directly related to whether sovereignty is absolute. Obviously, sovereignty is not absolute and will depend upon the state exercising its powers. But does a corrupt state lose its powers to govern because of its failures to govern without corruption? The best way to answer this question is emphasise that sovereignty is the responsibility of the state to govern. If corruption is so rampant in a given society that all individuals and institutions are corrupt and that rule of law is absent, where human rights and fundamental freedoms are violated due to corruption, then the case is being made for the state failing in its responsibility to protect. Of course, the question remains as to who determines which state has failed the responsibility and what the penalty thereof would be. Global lending agencies like the World Bank act informally as whistle blowers on egregiously corrupt developing countries, but have also been guilty of lending under great power pressures to most undeserving cases.[31] Civil society is the most legitimate forum in any country to determine whether the responsibility to protect has been derogated by the state, but we then face the dilemma of the former's lack of power to enforce change. As long as the balance-of-power between civil society and the state remains tilted against the former, or in other words, accountability of government is low, the problem of bringing corrupt states to book remains insoluble.

---

29 See *ibid*.

30 For further reading, see Balakrishnan Rajagopal (1999) 'Corruption Legitimacy and Human Rights: The Dialectic of the Relationship', *Connecticut Journal of International Law* 14, 495; Nihal Jayawickrama (1998) 'Corruption – A Violator of Human Rights?', Transparency International Working Paper, available from http://www.transparency.de/documents/work-papers/index.html; Lawrence Cocksroft (1998) 'Corruption and Human Rights: A Crucial Link', Transparency International Working Paper, available from http://www.transparency.de/documents/work-papers/index.html; see also United Nations Development Programme (UNDP) (1999) 'Fighting Corruption to Improve Governance'; C. Raj Kumar (2002) 'The Benefit of a Corruption-Free Society', *Hong Kong Lawyer*, 39–46.

31 See generally Michela Wrong (2001) *In the Footsteps of Mr. Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (New York: HarperCollins), 336. See also Thomas M. Callaghy (2001) 'Life and Death in the Congo' (Book Review), *Foreign Affairs*, September-October, available from http://www.foreignaffairs.org/20010901fareviewessay5576/thomas-m-callaghy/life-and-death-in-the-congo.html?mode=print.

The anti-corruption discourse should recognise the problem of corruption to be one of the state losing its capacity to govern. Goals, measurements and indicators could be formulated to ensure that there is a constant effort to keep corruption under check. However, the inherent capacity of the state needs to be increased for its institutions to come to terms with integrity deficits in the governance system. The relationship of corruption to human rights and development is beginning to be established.[32] But this recognition inevitably ought to understand the need for re-examining the problem of corruption. This re-examination needs to look into the fundamental principles of sovereignty and the ways by which corruption undermines the power of the state.

The way forward

I have argued in favour of a humanistic and liberal reinterpretation of 'sovereignty' in the wake of new thinking and new developments in world affairs. Sovereignty exercised as untrammelled power and irresponsibility of ruling classes to exploit and to dis-empower the citizens is an anachronistic idea that sadly prevails in many countries. Sovereignty exercised as responsibility of the governing with human development as the end is the wave of the future that sadly has not yet gained prevalence. Despite this ideal–reality paradox, the realisation that corruption ultimately hurts the state and its legitimacy is bound to dawn upon the majority of states that are pursuing short-sighted agendas.

The way forward is to spread the notions of responsibility and accountability as imperatives for strengthening, not weakening sovereignty, simultaneous to large-scale efforts of increasing the say of civil society in governance issues. A corruption-free state enhances its chances of perpetuation, reduces possibilities of unwarranted external interference, and raises its international stature. A non-discriminated, content and well-governed population confers internal stability, a key requisite for projecting power externally. Roping local civil society into this endeavour, in tandem with non-politicised international interventions, will produce a win–win situation.

32 For further reading on human rights based approaches to developing corruption-free governance, see C. Raj Kumar (2003) 'Corruption and Human Rights – Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India', *Columbia Journal of Asian Law* 17(1), 31–72; C. Raj Kumar (2004) 'Human Rights Approaches of Corruption Control Mechanisms – Enhancing the Hong Kong Experience of Corruption Prevention Strategies', *San Diego International Law Journal* 5, 323–351; C. Raj Kumar (2004) 'Corruption in Japan: Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance', *New England Journal of International and Comparative Law* 10(1), 1–30.

Chapter 15

Re-Envisioning Economic Sovereignty: Developing Countries and the International Monetary Fund

Ross P. Buckley

Developing countries in financial difficulties routinely enter into arrangements with the International Monetary Fund (IMF). Such arrangements reduce the economic sovereignty of the developing country markedly. This chapter analyses this reduction in sovereignty and seeks to assess whether it is warranted given the IMF's performance in the past fifteen years and the proven capacity of some developing countries in policy development and implementation. It concludes by considering ways forward for the IMF.

Economic sovereignty

The sovereignty of a nation-state encompasses political autonomy, freedom to regulate movement of goods and people, control over foreign policy and the right to govern free from the interference of other states. Sovereignty is commonly seen as a fundamental tenet of international law that cannot be discarded except at the risk of undermining the international legal system. One of its key features is the ability to make decisions concerning economic policy, namely 'economy sovereignty'.

The process of increasing globalisation is commonly perceived to erode national sovereignty. However Barry Hindess argues most persuasively to the contrary in this volume that sovereignty in its contemporary form is, in fact, a product and instrument, of the process of globalisation.[1] This chapter commences by examining the ways the practices of the IMF diminish the sovereignty of states that have agreed to an IMF program.

The role and impact of the IMF

The IMF plays a pivotal role in shaping the interaction between developing countries and global capital. The Fund is a supra-national organisation with 184 member states.

1 Barry Hindess, 'Sovereignty as Indirect Rule', Chapter 17 in this volume.

Surveillance, financial assistance and technical assistance are cited as the Fund's three main functions.[2]

The IMF advises countries upon when and how to liberalise their financial systems and open up to global capital. In addition, for countries with an IMF program in place, the Fund has direct input into the fiscal and monetary policy settings of the country. This was not part of the IMF's original role. The IMF was founded to assist countries in managing their fixed exchange rates by providing funds and technical advice.[3] However, as developed nations moved away from fixed exchange rates in the 1970s, much of the IMF's original mission disappeared. Since the inception of the Debt Crisis in 1982 the Fund's role has evolved so that today its role is managing crises in emerging markets countries and conducting the surveillance, financial assistance and technical assistance that aims to avert these crises.[4]

More than ninety IMF member states have sought loans or technical assistance from the IMF.[5] In the Debt Crisis that commenced in 1982, most African and Latin American countries sought IMF assistance.[6] In recent years the IMF arranged bailout packages in the wake of the Asian crisis of 1997 and offered assistance following crises in Russia, Brazil, Turkey and Argentina.[7] Countries that approach the IMF for assistance are often already in considerable financial difficulty and suffering from macroeconomic mismanagement.[8] The IMF provides loans to states to seek to correct balance of payments problems and promote economic growth by implementing adjustment policies and reforms. The IMF also offers technical assistance, aiding states in formulating and managing economic policy, and advising upon domestic banking systems, fiscal policy and management of public finances. Technical assistance is usually implemented by placing IMF staff in the relevant government departments of the recipient country and by training nationals of the recipient country

2 International Monetary Fund (2004) 'About the IMF', available from http://www.imf.org/external/about.htm.

3 Joseph Stiglitz (2002) *Globalisation and Its Discontents* (New York: Norton Press), 15.

4 The full text of the Purposes of the IMF can be found in Article I, Articles of Agreement of the International Monetary Fund, available from http://www.imf.org/external/pubs/ft/aa/aa01.htm.

5 See International Monetary Fund (2004) 'Country's Policy Intentions Documents', available from http://www.imf.org/external/np/loi/mempub.asp?view=loi&sort=ctyAfghanistan; and International Monetary Fund, (2004) 'How the IMF Helps to Resolve Economic Crises', available at http://www.imf.org/external/np/exr/facts.crises.htm.

6 John Quiggan (2003) 'Global Crisis and Australia's Options', paper presented at the Now We The People conference, University of Technology, Sydney, 24 August, available from http://www.nowwethepeople.org/conference/2003/conference%20papers/john_quiggin.html.

7 John W. Head (1998) 'Lessons from the Asian Financial Crisis: The Role of the IMF and the United States', *Kansas Journal of Law & Public Policy* 7(70), 70; Joseph P. Joyce (2002) 'Through a Glass Darkly: New Questions (and Answers) About IMF Programs', Wesley College Working Paper 2002–2004, available from http://www.stern.nyu.edu/globalmacro/, 2.

8 Kenneth Rogoff (2003) 'The IMF Strikes Back', available from http://www.imf.org/external/np/vc/2003/021003.htm; and Joyce, 'Through a Glass Darkly', 2–3.

in Washington DC or via the Internet. Additionally, the IMF has established regional training centres in Africa, the Caribbean and the Pacific. Countries that adhere to IMF policy recommendations are eligible for assistance from the Fund's Poverty Reduction and Growth Facility.[9]

The IMF's financial support is contingent upon entering an 'arrangement' with the Fund.[10] The arrangement requires that policies designed to restore financial balance be implemented. The country seeking assistance must provide the IMF with a 'Letter of Intent' that outlines the policies it intends to implement.[11] The IMF website states that the policies are formulated by the country seeking financial assistance 'in consultation with the IMF'.[12] However, the policies and procedures are often effectively imposed upon member states, leaving domestic governments with little scope for input. A government must demonstrate its commitment to the implementation of these economic policies.[13] The recommended policies are intended to reduce public debt and bring about economic stability. The prescriptions are well-intended; however they take decision-making out of the domestic realm. Domestic policymaking is replaced by policies imposed by IMF economists.[14] The UK government has criticised this form of policy conditionality, and has moved to make its aid dependent on outcome-based conditionality.[15]

Stiglitz suggests the IMF has overstepped its mandate by viewing all matters of domestic policy as factors that potentially contribute to economic instability, and thereby claiming input into a very wide range of domestic structural issues.[16] These policies invariably impose the 'harsh fiscal austerity'[17] of the 'Washington Consensus'. The 'Washington Consensus' describes the policies advocated by the IMF, the World Bank and the United States Treasury, which include reduction of public expenditure, privatisation of public enterprises, deregulation of financial systems and removal of barriers to trade.[18] These policies reflect the free market ideology popular in the 1980s.[19] He further suggests these policies do not address the root causes of financial

9 International Monetary Fund (2004) 'IMF Lending', available from http://www.imf.org/external/np/exr/facts/howlend.htm; International Monetary Fund (2001) 'Policy Statement on IMF Technical Assistance', available from http://www.imf.org/external/pubs/ft/psta/index.htm; and Joyce, 'Through a Glass Darkly', 4.

10 International Monetary Fund, 'IMF Lending'.

11 Joyce, 'Through a Glass Darkly', 2.

12 International Monetary Fund, 'IMF Lending'.

13 International Monetary Fund (2004) 'IMF Conditionality: A Factsheet', available from http://www.imf.org/external/np/exr/facts/conditio.htm.

14 Carlos Santiso (2002) 'Good Governance and Aid Effectiveness: The World Bank and Conditionality', *Georgetown Public Policy Review* 7, 1.

15 Department for International Development (2005) 'Partnerships for Poverty Reduction: Rethinking Conditionality', available from http://www.dfid.gov.uk/pubs/files/conditionality.pdf.

16 Stiglitz, *Globalisation and Its Discontents*, 14.

17 Rogoff, 'The IMF Strikes Back'.

18 Quiggan, 'Global Crisis and Australia's Options'.

19 Stiglitz, *Globalisation and Its Discontents*.

strife, which vary among countries.[20] IMF policies regularly fail to address human rights issues such as healthcare and food shortages. Nonetheless, less-developed countries accept IMF prescriptions due to their weak bargaining power and acute financial need. IMF policies attract vigorous and increasing criticism regarding their formulation, implementation, lack of transparency and lack of accountability.[21] Furthermore, if a country rejects IMF policies it will forfeit its right to assistance from the World Bank. The World Bank does not offer credit to countries that do not comply with IMF policy prescriptions.[22]

Nonetheless, over the years several developing countries have chosen not to follow IMF prescriptions. China has enjoyed strong economic growth for two decades by charting its own, unique, economic course. China has a high degree of autonomy in setting its own policies due to the capital controls that isolate its financial system from the vagaries of global capital, the domestic ownership of its financial system, and the strong desire of foreign corporations to do business in China irrespective of the policy environment.[23] Malaysia, Hong Kong, Chile and Colombia have also effectively implemented locally determined policies.[24] These countries have all implemented policies the IMF would have opposed, such as capital controls, restrictions on speculative trading, and the retention and development of state-owned assets.

In international law, nations have authority to determine their own economic policies. If the IMF is going to require nations to cede most of this authority to the Fund as the price of receiving assistance, the Fund must at least be able to demonstrate that it is better placed than the nations themselves to exercise that authority wisely.

This chapter analyses four developments in the past fifteen years to assess whether the Fund or the developing countries themselves are better placed to exercise this economic sovereigntyThese are:

1. The Brady Plan implemented in the early 1990s to address the Latin American

---

20 *Ibid*.

21 James Gibb Stuart (1998) 'Defending National Economic Sovereignty', available from http://www.prosperityuk.com/prosperity/articles/jgs1.html; Susan George (1999) 'A Short History of Neo-Liberalism: Twenty Years of Elite Economics and Emerging Opportunities for Structural Change', paper presented at the Conference on Economic Sovereignty in a Globalising World, Bangkok, 24–26 March, available at http://www.zmag.org/CrisesCurEvts/Globalism/george.htm; Joyce, 'Through a Glass Darkly'; and Kunibert Raffer (2004) 'International Financial Institutions and Financial Accountability', *Ethics and International Affairs*, 18, 61.

22 World Bank Group (2004) 'About Us', available from http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html.

23 Mark Weisbrot (1999) 'Think Globally, Act Nationally: The Case for National Economic Sovereignty', *The Nation*, 21 June, available from http://lists.essential.org/stop-imf/msg00138.html.

24 See R. Buckley and S.M. Fitzgerald (2004) 'An Assessment of Malaysia's Response to the IMF During the Asian Economic Crisis', *Singapore Journal of Legal Studies*, 96.

debt crisis;
2. Chile's response to increasing capital inflows in the early 1990s;
3. Malaysia's response to the Asian Economic Crisis that commenced in 1997;
4. Argentina's ongoing economic crisis.

The Brady Plan

The debt crisis that commenced in 1982 was initially seen as a liquidity crisis that sufficient fresh capital would remedy. However, by early 1989 the banks had wearied of advancing new funds and countries had wearied of their ever-rising debt levels. IMF austerity programmes were endangering democratic governments in Latin America.[25] A new innovative approach was needed, and in March 1989 US Treasury Secretary Nicholas Brady announced the plan.[26] The first Brady-style restructuring was of Mexico's medium and long-term debt to commercial banks.[27]

The banks were offered a choice between converting their loans into two types of thirty-year bonds or of advancing new money equal to twenty-five per cent of their exposure to Mexico. The bonds had sufficient collateral to cover the repayment of principal upon maturity and provide a rolling guarantee of eighteen months of interest payments. One type of bond paid a market floating interest rate on principal reduced thirty-five per cent. The other paid a reduced, fixed interest rate on the full principal amount of the loans. The restructuring was said to be 'voluntary' but the banks were not given the choice of doing nothing.[28]

The options allowed banks to accommodate their views on interest rates and debtor prospects and their individual tax, regulatory and accounting situations. Nonetheless, banks were reportedly 'disgusted' with the Plan and many had to be forced to comply by their respective central banks.[29] Yet, in hindsight the banks benefited enormously from the Plan, as it gave them liquid bonds, rather than relatively illiquid loans, triggered a turn-around in secondary market prices of these assets, and signalled the end of the debt crisis from the perspective of the banks.[30] In the following years the commercial banks negotiated Brady restructurings with the

25 Professor Luiz Carlos Bresser Pereira (1989) *Solving the Debt Crisis: Debt Relief and Adjustment*, statement delivered before the House Committee on Banking, Finance and Urban Affairs hearings on the 'Lesser Developed Countries' Debt Crisis', 101st Congress First Session, 5 January, 330, 332.

26 Nicholas Brady (1989) 'Remarks to a Third World Debt Conference', *Department of State Bulletin*, May, 53–56.

27 A. Gonzalo Santos (1991) 'Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors', *New York University Law Review*, 66, 79.

28 'The Debt Agreement' (1989), *Mexico Service* (Mexico), 27 July; Santiso, 'Good Governance and Aid Effectiveness'.

29 (1989) 'Hurricane Heading for Brady Plan', *International Financing Review*, 794, 23 September, 12; (1989) 'Commercial Bankers Say Brady Plan Is a Non-Starter', *International Financing Review*, 30 September, 795, 8.

30 For a detailed consideration of the benefits to the banks of the Brady Plan, see R. Buckley (2004) 'Turning Loans into Bonds: Lessons for East Asia from the Latin American Brady Plan', *Journal of Restructuring Finance* 1, 185.

Philippines, Costa Rica, Venezuela, Morocco, the Philippines, Venezuela, Uruguay, Argentina, Brazil, Bulgaria, the Dominican Republic, Ecuador, Jordan and Poland.

The architect of the Brady Plan is generally considered to be David Mulford, then Assistant Secretary of the US Treasury. The view that the Plan was conceived in Washington DC is buttressed by it being named after the US Treasury Secretary. Yet the genesis of the Brady Plan was in Latin America not Washington: in the Aztec bonds, developed at Mexico's request and with the input of JP Morgan, in 1988, and in even earlier proposals by Brazil to convert its foreign debt into thirty-five-year bearer bonds with the same face value as the loans and below market fixed interest rates.[31]

David Mulford played a role – he was willing to listen. His was the ear in Washington that was receptive to Mexico's and Brazil's ideas, and when Nicholas Brady became Treasury Secretary, Mulford had a superior who was also willing to listen. But the critical policy lesson is that the creative conceptual thinking behind the Brady Plan was done in São Paulo and Mexico City, not Washington. As Professor Luiz Carlos Bresser Pereira has noted, these ideas had been developed and refined in Brazil and Mexico for some years before they were shared with David Mulford.[32] The critical conceptual work was done by the debtor nations, and for the purposes of our present enquiry stands as testament to the capacity of at least some middle-income developing countries to develop sophisticated and innovative policy responses to unprecedented problems.

Chile's response to increasing capital inflows in the early 1990s

By the end of the 1980s foreign capital was starting to flow again into Chile in increasing amounts. The damage caused to Chile in 1982 was still fresh in the mind when Chile's capital account surplus reached ten percent of GDP in 1990, with short-term flows representing one-third of this amount. Fearing a repeat of 1982, Chile introduced capital inflow controls in 1991. The capital controls had a number of elements, the most important being an unremunerated reserve requirement: a set proportion (initially twenty per cent) of portfolio inflows had to be put on deposit with the Central Bank for one year, without attracting interest, irrespective of the duration of the inflow.[33] The proportion was increased to thirty per cent in May 1992, and then reduced to ten per cent in June 1996.

Chile's controls effectively lengthened the average maturity of the capital it received.[34] There is strong evidence that the ratio of short-term debt to foreign

31 (1987) 'LDC Debt – The deep discount bushfire', *IFR* 690, 12 September, 2947.

32 Pereira, *Solving the Debt Crisis*.

33 R.S Rajan (1998) 'Restraints on Capital Flows: What Are They?', *The Institute of Policy Studies Working Paper 3*, Table 3.

34 J. Habermeier and A. Ariyoshi *et al.* (2000) 'Country Experiences with the Use and Liberalization of Capital Controls', available from http://www.imf.org/external/pubs/ft/capcon/index.htm; Sebastian Edwards (1999) 'How Effective Are Capital Controls?', NBER Working Paper No. W7413, 11, available from http://www.nber.org/papers/w7413; Barry Eichengreen and Michael Mussa (1998) 'Capital Account Liberalization: Theoretical

currency reserves is a powerful predictor of financial crises, and that higher short-term debt levels are associated with more severe crises.[35] Short-term financing is simply not suitable, in the main, for the needs of developing countries. There is accordingly a strong argument for capital controls along Chilean lines that fall most heavily on short-term inflows.

Views are more divided over whether Chile's controls also served to reduce the volume of capital inflows, although there was a strong initial effect: the capital account surplus fell from ten per cent of GDP in 1990 to 2.4 percent in 1991.[36] When capital inflows surged again in 1992, the proportion of the non-renumerated reserve requirement was increased successfully. Eventually the controls were lifted in 1998 when, in the aftermath of the Asian crisis, global capital flows to emerging markets nations declined precipitately and there was no longer a need to regulate inflows.[37] The controls altered the mix of incoming foreign capital in favour of long-term debt and away from instability-inducing short-term debt, and they served to reduce rapidly increasing levels of inflows in 1991 and again in 1992.[38] As against these factors, they also increased the cost of credit within Chile considerably.

In conclusion, for a developing nation with a thin financial market, unsophisticated private sector risk management techniques and an unsophisticated and under-resourced capital market regulator, there are very strong arguments for capital controls, from time to time, on in-flows.[39] This is particularly so in Asia, where high local savings rates diminish significantly the need for completely open capital markets. As an economy's own capital markets deepen, and its regulatory systems mature, then it can safely liberalise its capital account. Many developing nations are decades away from that position.

---

and Practical Aspects', IMF Occasional Paper No. 172, 49–52 (and the sources there cited); Martin Feldstein, (1999) 'A Self-Help Guide for Emerging Markets', *Foreign Affairs*, 93; Rajan, 'Restraints on Capital Flows', Table 3.

35 Dani Rodrik and Andres Velasco (1999) 'Short-Term Capital Flows', NBER Working Paper No. W7364.

36 Eichengreen and Mussa 'Capital Account Liberalization', 49–52; Carmen M. Reinhart and R. Todd Smith (1997) 'Temporary Capital Controls', National Bureau of Economic Research Draft Paper, 8; Rajan, 'Restraints on Capital Flows', Table 3.

37 Francisco Gallego, Leonardo Herdanez and Klaus Scmindt-Hebbel (2000) 'Capital Controls in Chile: Effective? Efficient?', paper presented at the Latin American and Caribbean Economic Association 2000 Annual Meeting, Rio de Janeiro, 12 October, 4, available from http://www.lacea.org/meeting2000/FranciscoGallego.PDF.

38 The conclusion of Ariyoshi, Habermeier *et al*., 'Country Experiences with the Use and Liberalization of Capital Controls', is that inflow controls were partly effective in reducing the level and increasing the maturity of inflows in Malaysia and Thailand, and in affecting the composition of the inflows in Colombia and Chile but were largely ineffective in Brazil.

39 P. Bustelo, C. Garcia and I. Olivie (1999) 'Global and Domestic Factors of Financial Crises in Emerging Economies: Lessons from the East Asian Episodes (1997–1999)', Instituto Complutense De Estudios Internacionales Working Paper No. 16, 78. This was a recommendation of the Council on Foreign Relations in the US: see 'The Future of the International Financial Architecture; A Council on Foreign Relations Task Force' (1999) *Foreign Affairs*, 169.

As the above case study suggests, inflow controls can play a real role in stabilising an economy during periods of high and increasing inflows of global capital, and, as we shall see next, outflow controls can play a similar role in periods of great instability in which capital flight is a major problem. Yet capital controls are a policy option that is unlikely to ever be advocated by the IMF because the US is the world's largest importer of capital and the strategic interests of the US and of its banking sector require free capital mobility. The strategic direction and policies of the IMF are set in the twice-yearly meetings of their Board of Governors over which the US has enormous influence. Controls are a policy option that developing nations need to have, but they are an option that is unlikely to be available if economic sovereignty has been ceded to the IMF.

Malaysia's emergence from the Asian economic crisis

Malaysia was the only severely affected crisis country not to adopt an IMF program during the Asian crisis that began in 1997. Malaysia's policies saw it recover from the crisis at least as fast as those countries that implemented IMF policies.

Malaysia's initial response to the crisis was an IMF package without the IMF. In consultation with the IMF, Finance Minister Anwar Ibrahim made sharp spending cuts. This policy was subsequently altered on an *ad hoc* basis, until Prime Minister Mahathir announced a complete change of policy with the introduction of the National Economic Recovery Program in July 1998.[40] This decisive departure from IMF orthodoxy involved an increase in government spending to stimulate the economy, and capital controls to allow the government more control over Malaysia's economy and to prevent the outflow of foreign capital that would have ensued. Malaysia's two unique responses to the crisis were the introduction of capital outflow controls and the pegging of the ringgit to the US dollar. The government could then ease monetary policy unhampered by concerns about the impact on the exchange rate of capital outflows.[41]

The outflow controls blocked all avenues for the transfer of the ringgit outside Malaysia and stopped non-residents removing portfolio capital from Malaysia for a period of twelve months.[42] After six months, the twelve-month restriction was replaced with a variable exit levy on principal or profit from investments in Malaysian securities. The ringgit was pegged to the US dollar in an attempt to prevent speculation in the ringgit.[43] It has since been widely acknowledged, even by the IMF, that the

40 Prema Chandra Athukorala (2001) *Crisis and Recovery in Malaysia: The Role of Capital Controls* (Cheltenham: Edward Elgar), 66.

41 *Ibid*., 17; and International Monetary Fund (1999) *Malaysia: Recent Economic Developments*, 16.

42 International Monetary Fund, *Malaysia: Recent Economic Developments*, 23; and Ross Buckley (1999) 'The Role of Capital Controls in International Financial Crises', *Bond Law Review*, 11, 231.

43 International Monetary Fund, *Malaysia: Recent Economic Developments*, 23.

introduction of the exchange controls and the currency peg was sound policy.[44] The Malaysian response also involved significant financial sector reform, which the IMF notes 'led to substantial improvement in the sector's performance'.[45]

Malaysia's expansionary fiscal policy stimulated the economy, which improved confidence and domestic demand.[46] However, to be able to adopt these policies, Malaysia had to impose capital controls. Otherwise the policies would have provoked an exodus of foreign capital that would have more than counteracted any stimulative effect the expansionary policies could have delivered.[47]

Paul Krugman has stressed that capital controls:

1. should only be temporary because they distort the economy;
2. should never be used to defend an over-valued currency; and
3. must 'serve as an aid to reform, not an alternative'.[48]

Malaysia's use of controls met all of these principles. After three years the controls were all but gone.[49] Malaysia exercised monetary discipline and did not use the controls to inflate the currency or the economy or bail out companies. It used the breathing space afforded by the controls to implement financial and corporate reforms.[50] The IMF notes that the 'successful experience of the 1998 controls so far is largely due to the appropriate macroeconomic policy mix that prevailed at that time'[51] and that the controls were effective because they 'were wide ranging, effectively implemented, and generally supported by the business community'.[52]

Whilst capital controls of the type implemented in Malaysia can be circumvented in various ways (principally through under or over invoicing) there was limited circumvention in Malaysia because of its design and enforcement of the controls. The

---

44 Ariyoshi, Habermeier *et al*., 'Country Experiences with the Use and Liberalization of Capital Controls'; Ramon V. Navaratnam (2002) *Malaysia's Economic Sustainability: Confronting New Challenges Amidst Global Realities* (Subang Jaya: Pelanduke Publications).

45 International Monetary Fund, 'Policy Statement on IMF Technical Assistance', 71.

46 Mohammed Ariff and Azidin Wan Abdul Kadir (2000) 'The Near-Term Outlook for the Malaysian Economy', paper presented at the ISEAS Regional Conference, Singapore, 6 January, 2.

47 International Monetary Fund, 'Policy Statement on IMF Technical Assistance', 13; Giancarlo Corsetti, Paolo Pesenti and Nouriel Roubini (1998) *What Caused the Asian Currency and Financial Crisis? Part II: The Policy Debate*, National Bureau of Economic Research Working Paper 6834, available from http://netec.mcc.ac.uk/WoPEc/data/Papers/nbrnberwo6834.html; Barry Eichengreen (1999) *Toward a New Financial Architecture: A Practical Post-Asia Agenda* (Washington DC: Institute for International Economics), 56.

48 Paul Krugman (2003) *An Open Letter to Prime Minister Mahathir*, available from http://web.mit.edu/krugman/www/mahathir.html.

49 K.S. Nathan (2001) 'Economic Slowdown and Domestic Politics: Malaysia Boleh?', *Trends in Southeast Asia*, 12, 4.

50 International Monetary Fund, 'Policy Statement on IMF Technical Assistance', 54.

51 *Ibid*., 6.

52 *Ibid.*, 18.

controls were designed to affect all channels for the movement of the ringgit offshore, whilst allowing current account transactions and foreign direct investment.[53]

The decisive and unorthodox crisis policy of pegging the ringgit to the US dollar gave the government more control over its economic policy and prevented speculation in the ringgit. The danger of a pegged exchange rate is that it may become overvalued, as was to happen in Argentina. Malaysia avoided this danger by pegging the ringgit at an undervalue, which boosted exports. This undervaluing also served as 'an incentive for retaining funds in the country'. The peg reportedly 'reduced uncertainty and made it easier for business to plan'.[54] There has been widespread acknowledgment of the efficacy of Malaysia's currency peg.[55] In Kaplan and Rodrik's words, 'compared to IMF programs, we find that the Malaysian policies provided faster economic recovery … smaller declines in employment and real wages, and more rapid turn around in the stock market.'[56]

Reasons for the success of Malaysia's policies

There are a number of possible reasons for the success of Malaysia's policy response to the crisis. These include Malaysia's experience as an economic policy maker and knowledge of its economy; the appropriateness of capital controls as a response to a crisis of confidence; and the rigor of the enforcement of Malaysia's homegrown policies. Each will be considered.

Malaysia had experience in imposing temporary capital controls in 1994 in response to speculative short-term capital inflows[57] and economic recovery is best achieved with policies that suit the condition of the economy in question.[58] Pre-crisis economic policy in Malaysia involved extensive affirmative action to improve the position of the native Malays (*Bumiputras*).[59] The Malaysian government was experienced in using economic policy to support social policy. The Malaysian

53 *Ibid.*, 54.

54 *Ibid.*, 50.

55 Navaratnam, *Malaysia's Economic Sustainability*, 35.

56 Ethan Kaplan and Dani Rodrik (2003) 'Did the Malaysian Capital Controls Work?', National Bureau of Economic Research Working Papers, available from http://papers.nber.org/papers/W8142.

57 Reinhart and Smith, 'Temporary Capital Controls', 10; Prema-Chandra Athukorala (2001) 'Capital Mobility, Crisis and Adjustment: Evidence and Insights from Malaysia', in Dipak Dasgupta, Marc Uzan and Dominic Wilson (eds) (2001) *Capital Flows Without Crisis? Reconciling Capital Mobility and Economic Stability* (Cheltenham, UK: Edward Elgar), 255, 257.

58 Mahani Zainal Abidin (1991), 'Malaysia's Economy: Crisis and Recovery', in Mahani Zainal Abidin and Zakaria Haji Ahmad (eds), *The Financial Crisis in Malaysia: The Economic and Political Consequences* (Singapore: Institute of South East Asian Studies), 1, 6.

59 Mahatir bin Mohamad (1998) *The Way Forward (Malaysia)* (London: Weidenfeld and Nicholson), 85.

government's policies did not affect the poor as harshly as IMF policies did in other crisis countries.[60]

One cause of the Asian crisis was a self-fulfilling panic by investors.[61] In Alan Greenspan's words, the reaction of the markets to Asia's problems was based on a 'visceral engulfing fear'.[62] Jeffrey Sachs went so far as to say that there was no reason for the financial panic except panic itself.[63] This panic took the form of 'a self-fulfilling withdrawal of short-term loans'.[64] In the face of such rapid capital outflows, unconventional tactics may be the only thing that can protect an economy.[65] Because Malaysia implemented its own reform program, the program was implemented more rigorously than were the reforms in IMF program countries.[66] In other countries political will was absent in implementing reforms. For instance, within days of signing the US$40 billion accord with the IMF, 'economic reforms seemed to disappear from the [Indonesian] government's agenda'.[67]

Conclusions on Malaysia's experience

Malaysia's economic policies during the Asian crisis delivered slightly better economic results than those in countries under IMF programs. Furthermore, Malaysia's policies were better suited to its specific circumstances than those in IMF-program countries were suited to their circumstances. Malaysia's policies had a more benevolent impact on the poor. IMF-mandated austerity almost inevitably takes money from programs that benefit the poor. Malaysia's approach did not punish the poor to repay capital that had principally benefited the rich when it had flowed into the country.

Malaysia's refusal to adopt IMF policies allowed it to control its own economic destiny. Malaysia could act solely in its own best interests, and decision-making power in Malaysia remained with the elected representatives of its citizens.

A positive postscript: The avoidance of moral hazard

A further bonus of Malaysia's approach was the avoidance of the substantial moral hazard occasioned by the IMF-organised bailouts of Indonesia, Korea and Thailand.

---

60 Chris Nyland *et al.* (2003) 'Economic and Social Adjustment in Malaysia in the "New" Business Era' in Chris Nyland *et al*. (eds) *Malaysian Business in the New Era* (Cheltenham, UK: Edward Elgar), 2.

61 Ross Buckley (2000) 'An Oft-Ignored Perspective on the Asian Economic Crisis: The Role of Creditors and Investors', *Banking and Finance Law Review* 15, 431–454 at 431.

62 Quoted in Paul Kelly (1998) 'IMF Tightens the Screws on Suharto', *The Australian*, 11 March, 13.

63 Quoted in Jean Tirole (2002) *Financial Crises, Liquidity, and the International Monetary System* (Princeton NJ: Princeton University Press), 44.

64 *Ibid*.

65 Eichengreen, *Toward a New Financial Architecture*, 56.

66 International Monetary Fund, 'Policy Statement on IMF Technical Assistance', 15.

67 David E. Sanger (1998) 'IMF Reports Plan Backfired, Worsening Indonesia Woes', *The New York Times*, 14 January.

A central tenet of IMF policies is that markets allocate resources best. However, the IMF is inconsistent – it often does not allow markets to allocate losses in bad times. This engenders moral hazard, which arises whenever a financial actor does not bear the full risks of its actions.[68]

Indonesia, Korea and Thailand were required to use the bailout loans arranged by the IMF to repay the credits that were then due, that is, the debts owed to short-term creditors. This encouraged the extension of short-term debt, the very type of debt that renders an economy more vulnerable to volatility. In the following year, 1998, short-term creditors pumped massive amounts of credit into Russia to claim returns as high as fifty per cent or sixty per cent per annum on short-term Russian government bonds while relying for the repayment of principal on an IMF arranged bailout.[69] Russia's geo-political significance meant investors were confident it would not be allowed to default on its financial obligations.[70] Ironically, given the IMF's responsibility for the stability of the international financial system, Malaysia's policies destabilised the system far less than did those of the IMF.

The Argentine experience

For a decade following the debt crisis of 1982, Latin American countries were net capital exporters. They repaid more than they were able to borrow, living standards plummeted, and infrastructure crumbled.[71]

In contrast, between 1991 and 1998 Argentina prospered as the partial resolution of the debt crisis through the Brady Plan encouraged the resumption of net capital flows into the country. Argentina's economy performed strongly with GDP per capita increasing an exceptional forty-four per cent between 1991 and 1998. Argentina enjoyed its highest rates of growth since the 1920s and inflation was completely under control.[72] Argentina has a strong base for an economy: a high literacy rate,

---

68 For a consideration of the moral hazard engendered by the IMF-organised bail-outs of Indonesia, Korea and Thailand in 1997 and the ways in which it contributed to Russia's economic meltdown in 1998, see Buckley, 'An Oft-Ignored Perspective on the Asian Economic Crisis', 431.

69 IMF Economic Forum (1999) *Financial Markets: Coping with Turbulence*, available from http://www.imf.org/external/np/tr/1998/TR981201.HTM.

70 'Many [investors] refused to believe the United States and the International Monetary Fund would allow Russia to collapse until it actually happened.' Jonathon Fuerbringer (1999) 'After Russian Lesson, Bond Prices Remain Stable in Latest Crisis', *The New York Times*, 14 January.

71 See Statement of Per Pinstrup-Andersen (1989) 'Food Security and Structural Adjustment' (statement delivered before the House Committee on Banking, Finance and Urban Affairs hearings on the 'International Economic Issues and their Impact on the US Financial System', 101st Congress First Session, 4 January 1989), 165, 181; Testimony of Dr. Richard Jolly, before the same House Committee hearings, at 14; and Jerry Dohnal (1994) 'Structural Adjustment Programs: A Violation of Rights', *Australian Journal of Human Rights* 1, 57.

72 Miguel Kiguel (2002) 'Structural Reforms in Argentina: Success or Failure?', *Comparative Economic Studies* XLIV(2), 83, 84; percentage calculated from Figure 1. There

a strong educational system and rich natural resources. Between 1991 and 1998, Argentina significantly improved its banking system, more than doubled its exports, increased infrastructure investment through privatisations, enjoyed significant growth in oil and mineral production and achieved record levels of agricultural and industrial output.[73]

Nonetheless, at the end of 1998 Argentina entered a severe recession, due in part to the 1997 Asian economic crisis and the August 1998 Russian crisis. Together these crises severely limited capital flows to emerging markets economies. Argentina accordingly had very limited access to new capital to finance budget deficits and service its debt. However, while the external factors dictated the precise timing of the crisis they were not its cause.[74] The recession deepened into a severe crisis in late 2001 when the IMF refused to extend further credit to the nation, believing its economic programs to be unsustainable. Argentina was denied access to capital by commercial lenders and defaulted on its external debt of some US$132 billion. The government was forced to float the peso, which more than halved in value overnight. In April 2002 the government was forced to order the indefinite closure of all banks in Argentina.[75] Widespread poverty followed the crisis and UNICEF is concerned that stunted growth and reduced mental capacities in millions of children will be the long-term consequence of this economic crisis.[76]

The peso-dollar peg

The principal causes of this crisis were the one-to-one peg of the peso to the US dollar, the massive inflows of foreign capital[77] and Argentina's endemic corruption. The first two causes were promoted or supported by the IMF. The peg was an effective means of stabilising inflation, which was critical in promoting local economic activity and in rendering Argentina an attractive destination for foreign capital. However by making one peso equal to one US dollar, Argentina gave up the principal means by which a nation's balance of payments remains in balance and its exports remain competitive: adjustments in its exchange rate. When, in the wake of the East Asian and Russian crises in 1997 and 1998 capital flows to Mexico declined sharply, its

---

was a brief hiatus in growth during 1995 because of the contagion from Mexico's crisis in late 1994: *ibid.*, at 94–95.

73 *Ibid.*, 100–101.

74 *Ibid.*, 84; and Ross Buckley (1999) *Emerging Markets Debt* (The Hague: Kluwer Law International), 21.

75 Andres Gaudin (2002) 'Thirteen Days that Shook Argentina – and Now What?', *NACLA Report on the Americas* 35, 6; David Teather (2002) 'Argentina Orders Banks to Close', *The Guardian*, 20 April; and Mark Tran (2002) 'Argentina Scrambles to Avoid Financial Collapse', *Guardian Unlimited*, United Kingdom, 22 April, available at www.guardian.co.uk/argentina/story/0,,688862,00.html.

76 Sophie Arie (2002) 'Rich Argentina Tastes Hunger', *The Observer*, May 19.

77 Martin Feldstein (2002) 'Argentina's Fall', *Foreign Affairs* 81, 8; and Interview with Lance Taylor (2001) 'Argentina: A Poster Child for the Failure of Liberalized Policies?', *Challenge*, November–December, 28.

currency decreased in value, thereby improving the competitiveness of its exports.[78] Similarly when these and other factors affected Brazil, its government was able to devalue the real forty per cent in January 1999, and thus neatly sidestep an incipient crisis.[79] No such exchange rate flexibility was available to Argentina.

The Brazilian devaluation was particularly problematic for Argentina. Brazil is Argentina's major trading partner and overnight Argentine products became much more expensive in Brazil.[80] The unavoidable consequence of the peg, over time, was that, unless either productivity growth in Argentina exceeded the relative appreciation of the US dollar, or private and public sector wages decreased in Argentina, the peso would inevitably become overvalued.[81] The Argentine tragedy is that, once hyperinflation was defeated in 1994, if the peso had been allowed to gradually depreciate, the growth in the nation's exports and economy might have been strong and sustainable.[82]

Excessive indebtedness

The second cause of the crisis was the Argentinean government's reliance on international capital to finance budget and current account deficits throughout the 1990s.[83] During the boom from 1991 to 1997, Argentina was thriving on borrowed money.[84] Borrowing to finance budget deficits is particularly problematic because this use of the funds will not generate the foreign exchange to service and repay the debt.

In the early-to-mid 1990s, the IMF encouraged the contemporaneous development of a nation's prudential regulation and the liberalisation of its capital account. Its removal of capital controls permitted strong flows of foreign capital into Argentina in these years. For the IMF to promote the simultaneous, rather than sequential, adoption of these measures proved to be a recipe for disaster first in Indonesia, Korea, and Thailand and then in Argentina. A recent audit by the Independent Evaluation

78 Liliana Rojas-Suarez (n.d.) 'Toward a Sustainable FTAA: Does Latin America Meet the Necessary Financial Preconditions?', unpublished paper.

79 William Gruben and Sherry Kiser (1999) *Why Brazil Devalued the Real*, Federal Reserve Bank of Dallas, available at http://www.dallasfed.org/eyi/global/9907real.html; Edmund Amann and Werner Baer (2002) *Anchors Away: The Costs and Benefits of Brazil's Devaluation*, University of Illinois at Urbana-Champaign College of Business Working Papers, available at http://www.business.uiuc.edu/Working_Papers/papers/02-0122.pdf.

80 Rojas-Suarez, 'Toward a Sustainable FTAA'.

81 Kiguel, 'Structural Reforms in Argentina', 85; Anne Krueger puts it this way: 'under a firmly fixed exchange rate, you need other sources of adjustment to maintain competitiveness'. See Krueger (2002) 'Crisis Prevention and Resolution: Lessons from Argentina', paper at the NBER Conference on 'The Argentina Crisis', Cambridge, 17 July, available at www.imf.org/external/np.speeches/2002/071702.htm.

82 Jeffrey Sachs (2002) 'A Crash Foretold: Argentina Must Revamp Its Society and Economy for a High-Tech World', *Time International* 159, 17.

83 Kiguel, 'Structural Reforms in Argentina', 101.

84 Rojas-Suarez, 'Toward a Sustainable FTAA'.

Office of the IMF into the Fund's role in Argentina in the 1990s found that Argentina borrowed too much, and the IMF acquiesced in this error.[85]

The clearest lesson of the Asian economic crisis that commenced in 1997 is that stringent prudential regulation must precede the liberalisation of a nation's capital account.[86] Unfortunately the IMF did not learn this lesson in time to avert a calamity in Argentina.

IMF policies

Throughout the 1990s the Argentine government was a model IMF pupil. In liberalising its capital account by relaxing capital controls, Argentina was implementing IMF policy, and the pegging of the peso to the US dollar was supported by the Fund.[87] Argentine compliance continued even through changes of government during the severe recession. Upon becoming president in late 1999, Fernando de la Rua raised taxes and made massive cuts in government expenditure, including deep cuts in state workers' wages and pensions.[88] These policies were so unpopular Mr. de la Rua was forced out of office halfway through his term after violent street protests in late 2001.[89] Fiscal contraction is bad policy in any recession yet it was the IMF's first policy prescription for the East Asian crisis in 1997, and an error repeated in Argentina in 1999.

Many economists believe Argentina's troubles stem directly from its implementation of IMF policies.[90] Certainly, IMF policies provide no insurance against ruinous crises. The IMF lauded Argentina's policy settings throughout the 1990s, and yet its economy still imploded: Argentina stands as testament to the fact that the IMF can get policy settings very wrong indeed.

Conclusion

The four case studies considered here suggest that the IMF fails to meet the threshold test for claiming economic sovereignty over developing countries: that it can do the job better than the countries themselves. There are a number of reasons for this. The

85 See Independent Evaluation Office (IEO) of the International Monetary Fund (2004) *Report on the Evaluation of the Role of the IMF in Argentina: 1991–2001*, available at http://www.imf.org/External/NP/ieo/2004/arg/eng/index.htm.

86 Buckley, 'An Oft-Ignored Perspective on the Asian Economic Crisis', 439–440.

87 Martin Feldstein, 'Argentina's Fall', 8; Charlotte Denny (2002) 'Firefighters Turn on Tap Again', *The Guardian*, 12 August.

88 Simon Jeffery (2002) 'Crisis in Argentina', *Guardian Unlimited*, 4 January, available at http://www.guardian.co.uk/argentina/story/0,,623075,00.html.

89 Uki Goni (2001) 'Argentina Collapses into Chaos', *The Guardian*, 21 December; and Mark Healey and Ernesto Seman (2002) 'Down, Argentine Way', *The American Prospect* 13, 12. And the protests have not stopped since: see (2002) 'Argentine Crisis Fuels Protests', *Assoc Press Online*, New York, 26 August; and (2002) 'Argentines Protest Against Government Economic Policies', *Xinhua News Agency*, 30 August.

90 Larry Rohter (2002) 'Giving Argentina the Cinderella Treatment', *The New York Times*, 11 August, 14.

domestic Treasury and Ministry of Finance are more likely to understand their own economy. Policies crafted without a deep understanding of the culture and local institutions are less likely to succeed. Homegrown policies are more likely to be implemented and enforced rigorously than those imposed by the Fund. IMF programs in Thailand, Indonesia and elsewhere were hampered by ineffective implementation and enforcement.

The model under which a strong IMF directs and guides the debtor nation's economy does not necessarily promote the development of the skills and confidence needed in the local finance ministry. Self-confidence in economic policy setting should be nurtured within developing country governments. The developing nation as policy maker has a narrower responsibility than does the IMF. The national government's job is to do the best for its people. The IMF strives to implement policies aimed at developing a healthy and stable international financial system. The IMF is subject to the direction and instruction of its member governments, particularly the larger OECD nations. It is wrong to think of the IMF as an autonomous, supra-national institution. The Fund is governed by a Board of Governors upon which all member nations have a seat, but on which their voting rights are directly proportional to their special drawing rights (broadly their GDP).[91] Accordingly the direction of the IMF is set, overwhelmingly, by the rich countries. As one IMF staffer once said to me: 'When the leading industrial nations tell the Fund to jump, we ask how high'.[92] If economic mismanagement is one reason a nation needs IMF assistance, it is understandable the Fund wishes to reshape the economic policies of that nation. However, the IMF is very heavy-handed in how it wrests control from the Finance Ministry and Treasury Department of its client nations. The focus of this chapter has been on whether the IMF is justified in assuming the economic sovereignty of its client nations, and the answer, from these case studies, has been no. If the IMF wishes to be entrusted with this power it should earn it.

It is therefore worth noting some potential ways forward for the Fund. There are a number of changes the IMF could implement that would, in time, improve significantly the quality of its policies, and their appropriateness for specific developing countries. These changes include:

1. The Fund needs to study the lessons of institutional economics and the school of economists of which Douglass C. North is perhaps the pre-eminent member.[93] The biggest problem with the Fund's policy prescriptions is that they give far

91 SDR's are allocated as a result of a member's Quota, which is broadly determined by its economic position relative to other members. Various factors are considered in determining the quota, including GDP, current account balances, and official reserves. See International Monetary Fund (2004) *IMF Quotas: A Fact Sheet 2004*, available from http://www.imf.org/external/np/exr/facts/quotas.htm.

92 This anecdotal evidence has been supported by recent research into the extent to which IMF and World Bank lending patterns support the interests of the major OECD countries. See Riccardo Faini and Enzo Grilli (2004) 'Who runs the IFIs?', CEPR Discussion Paper No. 4666. Available from http://ssrn.com/abstract=631010.

93 Douglass C. North (1990) *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press).

too little weight to the institutional environment of the recipient country. The Fund needs to pay much more attention to the strength of the rule of law, and of other economic institutions in the countries for which it is setting economic policies. For instance, it is arguable that privatisation of state-owned assets offers considerable efficiencies in the use of those assets, and may serve to enhance the economy of the nation that owns the assets. However, this can *only* be true if the institutional framework of that nation includes a strong rule of law, a free and active media, and a sophisticated financial and professional infrastructure able to price such assets accurately. In most developing nations, the range of potential purchasers is not wide and if these factors are missing it is virtually impossible to realise appropriate prices for the privatisation of major assets. In the absence of these important economic institutions, a policy that may be welfare enhancing in the US, Britain or Australia will only lead to knock-down prices for well-connected purchasers, as was seen in Russia in the early to mid-1990s. Thus, a potentially good policy in one institutional environment will *always* be the wrong policy in the environment prevailing in most developing countries.

2. The Fund's officers need to approach in-country assignments with the attitude that the local Ministry of Finance or Treasury Department is the best source of advice on the local economy and such officers need to have far more training in the realities of the local economy than is today the case. Too often today Fund officers arrive with a 'we-know-best' attitude. This has to change. It alienates the local people with whom they will be working, and it denies the Fund's staff the very knowledge they need to craft policies that will have a good chance of working. The Fund needs to undergo a cultural and attitudinal change.
3. Finally, and most importantly, the entire Washington Consensus needs to be reconsidered and revised, radically.[94] The Washington Consensus, ironically given its name, does not reflect the policies formulated in Washington DC for the US economy. It is far more laissez-faire and admits of far less government involvement in an economy than the US government has in its own. Indeed, I know of no rich country government that applies such rigorous policies to its own economy. The arguments for government intervention in poor countries are stronger than they are in rich ones. The IMF's Board of Governors impose policies on poor countries they will not tolerate in their own countries. This approach has to change.

94 Refer to discussion of the financial markets and the Washington Consensus, note 18.

PART 6
Reconceiving the State

Chapter 16

Trust, Legitimacy and the Sharing of Sovereignty

William Maley

The 1990s was a decade of striking turmoil, marked by the unravelling of two major autocratic federations, namely the Soviet Union and Yugoslavia, and by an early upsurge of mass ethnic conflict in the aftermath of the substantial abandonment by the superpowers of the Third World states on which much of their competitive energy had been focused in the 1970s and 1980s.[1] It was also a decade in which forces of globalisation – political, economic, cultural – unsettled some of the understandings upon which the character of world politics had depended. And it was a decade in which the unprecedented prosperity of developed countries in Europe, North America and Australasia, and the surging economies of China and India, contrasted sharply with the wretched experiences of peoples condemned to eke out a miserable existence in disaster areas such as Afghanistan, Somalia and Rwanda. It is hardly surprising that the events of the decade prompted renewed debate over both the concept of sovereignty and the future of the 'sovereign state'.[2] One of the most fruitful elements of this debate was fresh attention to the various dimensions of 'sovereignty'', and this led Robert H. Jackson in a penetrating study to deploy a new term, 'quasi-states', to refer to those territories with a high degree of 'juridical sovereignty', and a low degree of 'empirical sovereignty'.[3] This insight – that a high level of acceptance as a state within a system of states could go hand in hand with an erosion of what might be seen as key functions of 'the state' as an administrative structure – was not on close examination especially surprising, but it did serve to focus attention on the very real problems which disrupted states could confront. It is with such problems and their management that this chapter is concerned.

---

1 See Daniel S. Papp (1986) *Soviet Perceptions of the Developing World in the 1980s: The Ideological Basis* (Lexington KY: Lexington Books); Jerry F. Hough (1986) *The Struggle for the Third World: Soviet Debates and American Options* (Washington DC: The Brookings Institution).

2 See, for example, Joseph A. Camilleri and Jim Falk (1992) *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Aldershot: Edward Elgar); Martin van Creveld (1999) *The Rise and Decline of the State* (Cambridge: Cambridge University Press).

3 Robert H. Jackson (1990) *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press). See also Michael Barnett (1995) 'The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty', *Global Governance* 1(1), 79–97.

In severely disrupted states, two major problems present themselves. One is the problem of the erosion of trust. This can arise at the mass level, but is most corrosive when members of a political elite are so suspicious of each other that politics assumes a zero-sum form. Another is the problem of legitimacy, which occurs when no obvious mechanism exists for securing generalised normative support for new political arrangements. Scholars in the past have pointed to the value of neutral security forces in facilitating transitions in such circumstances. However, there may also be virtue in exploring new conceptions of sovereignty as a way of confronting these problems. These involve not short-term trusteeships, but rather a weaving together of institutions of local state and international society. This chapter examines some historical examples of rudimentary shared sovereignty in the legal sphere, and goes on to argue that this approach is compatible with the operational requirements of states in an increasingly globalised world, although not always easy to bring about. This is *not* to suggest that shared sovereignty models offer a panacea for the world's political ills, but simply that in certain circumstances, institutions of shared sovereignty should be added to the options of those concerned with creative institutional design.

This chapter is divided into five sections. The first section examines the ways in which state disruption can undermine or destroy the bases for cooperation amongst political actors, and shows why this is an obstacle to the reconstitution of political authority. The second identifies a range of measures that can be taken to advance this end, of both a general and a specific kind. The third section elaborates the sense in which I use the term 'shared sovereignty', and gives some historical examples of its rudimentary form, taking legal relations within the Commonwealth as a starting point. The fourth examines the ways in which the wider world has engaged with disrupted states, and makes the point that 'shared sovereignty' is distinct from colonial occupation, subordination within a sphere of influence, trusteeship under the UN Charter, short-term occupation pursuant to a Security Council enabling resolution with a UN Assistance mission in place, or regional integration through such mechanisms as the European Union. The fifth identifies a range of factors which can militate against the adoption of shared sovereignty models, and offers some brief conclusions.

State disruption and co-operation

Order and stability in a well-functioning country are not the only political values worth pursuing, but other things being equal, they have much to commend them. To see the virtues of a well-functioning and properly-accountable state,[4] it is necessary only to spend some time in a country where the capacities of a well-functioning state have been degraded, where military capacity, rational bureaucratic organisation and

4 The adjectival qualifications here are important, because tremendous sorrow has been caused by efficient totalitarian states (such as Nazi Germany and the USSR under Stalin), as well as regimes devoted to the promotion of ethnic ideology, such as the *génocidaires* in Rwanda.

territorial control have been compromised.[5] The Hobbesian argument for a common power to keep others in awe can carry a certain weight when the erosion of the state creates space for a range of unappetising actors to occupy. In a range of territories where the instrumentalities of the state cannot be properly resourced, have fractured on geographical lines, or have lost their legitimacy, new forces have emerged which can differ markedly in terms of their local legitimacy and distributive capacity. On occasions local institutions of governance provide a degree of local order, but very often predatory warlords embark on a path of extraction of resources from vulnerable ordinary people which are then redistributed to sustain armed groups which accord prudential and sometimes normative loyalty to their leader. The reconstitution of an effective state is from the point of view of such actors a dangerous threat. This is not simply a little local difficulty. One of the dangers of warlords is that they may have little understanding of the norms of international society which the occupants of the commanding heights of well-functioning states can scarcely avoid encountering as they interact with the wider world. As a result, all sorts of actors may flourish under their patronage: a classic and very sobering example is the nurturing of al-Qaeda by the Taliban in Afghanistan.[6] However, terrorist groups are not the only kinds of actors that can thrive under such circumstances, and it is no surprise that opium production boomed in Afghanistan as well, creating a problem which is now proving dangerously intractable. In such circumstances, constructive engagement across state boundaries can prove extremely difficult to orchestrate. The kaleidoscope of actors makes political outcomes highly unpredictable, and the temptation for neighbouring regimes to protect their own interests by supporting particular clients may be very strong. Pakistan did this in Afghanistan, first with the Hezb-e Islami of Gulbuddin Hekmatyar and then with the Taliban, and the long-run consequences proved disastrous.[7] Thus, while states are capable of treating their own citizens brutally, and conflict between states has spilt oceans of blood, anarchy is not a happy solution.

One possible consequence of the erosion of state capacity and the liberation of new political forces is a breakdown of trust. Trust is a property of social relations, and is integrally related to predictability: 'to trust means to hold some expectations about something future or contingent or to have some belief as to how another person will perform on some future occasion. To trust is to believe that the results of somebody's intended action will be appropriate from our point of view'.[8] The consequences of a breakdown in trust can be wide-ranging. While a healthy scepticism about government may be no bad thing,[9] rebuilding political legitimacy once it has broken down is extremely difficult, since there may be no single strategy of legitimation

5 See Ann Hironaka (2005) *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War* (Cambridge MA: Harvard University Press), 70–76.

6 See William Maley (2000) *The Foreign Policy of the Taliban* (New York NY: Council on Foreign Relations).

7 See Rizwan Husain (2005) *Pakistan and the Emergence of Islamic Militancy in Afghanistan* (Aldershot: Ashgate).

8 Barbara A. Misztal (1996) *Trust in Modern Societies* (Oxford: Polity Press), 24.

9 See Russell Hardin, 'Do We Want Trust in Government?', in Mark E. Warren (ed.) *Democracy and Trust* (Cambridge: Cambridge University Press), 22–41 at 23.

which works for all salient forces within a society. Rousseau's comment in 1762 that the 'strongest is never strong enough to be always master, unless he transforms strength into right, and obedience into duty' provides a chastening reminder of the virtues of power exercised on legitimate rather than non-legitimate grounds.[10] Two forms of interpersonal trust are particularly important. One is 'face to face' trust, and refers to trust between persons who actually know each other. Another form is 'anonymous' trust, which refers to trust which arises not because persons know each other, but simply because they are members of some community, be it social or political. Interpersonal trust is a core element of 'social capital', a term popularised by Robert D. Putnam as a label for a propensity to act cooperatively in the pursuit of jointly held goals.[11] 'Social capital', Fukuyama has argued, 'pervades organizations and is critical to their proper functioning'.[12] A well-functioning state that can enforce general rules of justice increases the predictability of political life and serves to reduce the possible costs of misplaced trust. The breakdown of the state tends to narrow the bounds of 'community' within which trust is accorded, so that anonymous trust on civic grounds is succeeded by anonymous trust within social communities such as the ethnic group. The consequences of such an accentuation of ethnic identifications can be devastating, as the Rwandan genocide and the Srebrenica massacre demonstrated.

A breakdown in face-to-face trust can also be grossly detrimental to political stability. This is because of the role of elites in political life. As Gaetano Mosca famously put it:

> In all societies … two classes of people appear – a class that rules and a class that is ruled. The first class, always the less numerous, performs all political functions, monopolizes power and enjoys the advantages that power brings, whereas the second, the more numerous class, is directed and controlled by the first, in a manner that is now more or less legal, now more or less arbitrary and violent.[13]

While this is in some respects a significant oversimplification, it contains a solid core of truth. One need not venerate political elites in order to recognise that elite disharmony can be a major source of instability. Elite disunity makes cooperative politics very difficult, as the following description of disunified elites suggests.[14]

---

10 See Jean-Jacques Rousseau (1973) *The Social Contract and Discourses* (London: J.M. Dent), 168. For further discussion of this issue, see Rodney Barker (1990) *Political Legitimacy and the State* (Oxford: Oxford University Press).

11 Robert D. Putnam (2001) *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton NJ: Princeton University Press). See also Francis Fukuyama (2001) 'Social Capital, Civil Society, and Development', *Third World Quarterly* 22(1), 7–20.

12 Francis Fukuyama (2004) *State-Building: Governance and World Order in the 21st Century* (Ithaca NY: Cornell University Press), 63.

13 Gaetano Mosca (1939) *The Ruling Class* (New York: McGraw-Hill), 50. While Mosca refers to classes rather than elites, it is clear from the context of his observation that he uses the term to mean 'category', rather than class in a Marxian sense.

14 Michael Burton, Richard Gunther and John Higley (1992) 'Introduction: Elite Transformations and Democratic Regimes', in John Higley and Richard Gunther (eds)

Communication and influence networks do not cross-factional lines in any large way, and factions disagree on the rules of political conduct and the worth of existing political institutions. Accordingly, they distrust one another deeply; they perceive political outcomes in 'politics as war' or zero-sum terms; and they engage in unrestricted, often violent struggles for dominance. These features make regimes in countries with disunified elites fundamentally unstable, no matter whether they are authoritarian or formally democratic. Lacking the communication and influence networks that might give them a satisfactory amount of access to government decision making, and disagreeing on the rules of the game and the worth of existing institutions, most factions in a disunified elite see the existing regime as the vehicle by which a dominant faction promotes its interests. To protect and promote their own interests, therefore, they must destroy or cripple the regime and elites who operate it. Irregular and forcible power seizures, attempted seizures, or a widespread expectation that such seizures may occur are thus a by-product of elite disunity.

This vivid picture is striking in one other respect: it brings out the vicious circle which elite disharmony can trigger. Serious fracturing within a political elite can debilitate the states; this debilitation can then encourage further fracturing within the elite, and so on. In disrupted states, measures to facilitate the re-establishment of a consensually unified elite are very important, but also very difficult, because past experience may have given key political leaders very good grounds for rationally distrusting their fellows. For this reason, the reconstitution of trust is closely linked to the implementation of measures with the potential to minimise the harm which aspiring members of a new elite might be able to wreak upon each other.

Measures to advance trust

When dealing with severely disrupted states, one possible solution might be to encourage the emergence of an authoritarian or autocratic regime, charged with imposing order as rapidly as possible. However, this approach has a number of flaws. First, where the instrumentalities of the state have been severely compromised, even the most enthusiastic autocrat is likely to lack the tools necessary to impose order. Second, autocracies can be quite fragile, are likely to require costly ongoing support, and simply mask, rather than overcome, interpersonal distrust and elite disunity.[15] Third, a favouring of autocracy would be at odds with any emerging right to democratic governance, and is hardly a viable strategy for international organisations or states whose soft power derives from their known commitment to ethical standards. For all these reasons, the principal focus of efforts at state rebuilding has been on mechanisms which can foster the re-establishment of trust and legitimacy within a broadly democratic framework – although sophisticated

Elites and Democratic Consolidation in Latin America and Southern Europe (Cambridge: Cambridge University Press), 1–37 at 10.

15 See Roland Paris (2004) *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press), 180.

variants of this approach warn against a hasty rush to the polls and to the market,[16] since elections and markets depend for their efficacy on an overarching framework of norms, rules and understandings to ensure that they operate as intended.

When state disruption has led to internal armed conflict or wholesale civil war, there may be a very large gap between, on the one hand, the ground realities at a point where exhaustion brings fighting to a halt, and on the other, some kind of stable, institutionalised political order. Some 'peace mechanisms' that have been mooted as devices for ensuring the durability of cease-fires in interstate conflicts may potentially be of use, such as various sorts of third-party involvement,[17] confidence-building measures, short-term dispute-resolution procedures, and formal agreements to address political concerns[18] (of a kind which some scholars have labelled 'pacts' or 'elite settlements').[19] But more generally, there are at least three broad strategies to consolidate a process of transition towards a legitimate polity marked by high levels of trust: socialisation, the supply of neutral security and institutional development.[20]

Socialisation is a long-term strategy of considerable importance. Anonymous trust is a product of environmental factors, and if people are encouraged through a range of social influences – families, educational institutions, religious networks and media of communication – to act cooperatively as a way of earning approval, they may feel obliged to do so even though there is some risk associated with trusting others. When enough people share this orientation, we can speak of the emergence of a 'democratic political culture'. This is always an important development, for as Larry Diamond puts it:

> [T]he development of a pattern, and ultimately a culture, of *moderation*, *accommodation*, *cooperation*, and *bargaining* among political elites has emerged as a major theme of the dynamic, process-oriented theories of democratic transition and consolidation.[21]

---

16 *Ibid*.; also Jack Snyder (2000) *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W.W. Norton).

17 See Fen Osler Hampson (1996) *Nurturing Peace: Why Peace Settlements Succeed or Fail* (Washington DC: United States Institute of Peace Press), 205–234.

18 Virginia Page Fortna (2004) *Peace Time: Cease-Fire Agreements and the Durability of Peace* (Princeton NJ: Princeton University Press), 10–38.

19 On pacts, see Guillermo O'Donnell and Philippe C. Schmitter (1986) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: The Johns Hopkins University Press), 37–39; Giuseppe DiPalma (1990) *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley & Los Angeles: University of California Press), 86–90. On elite settlements, see Michael Burton and John Higley (1987) 'Elite Settlements', *American Sociological Review* 52(3), 295–307.

20 See William Maley (2003) 'Institutional Design and the Rebuilding of Trust', in William Maley, Charles Sampford and Ramesh Thakur (eds) *From Civil Strife to Civil Society: Civil and Military Responsibilities in Disrupted States* (Tokyo and New York: United Nations University Press), 163–179 at 165–167.

21 Larry Diamond (1999) *Developing Democracy: Towards Consolidation* (Baltimore: The Johns Hopkins University Press), 165–166.

However, resocialisation is not and cannot be a short-term palliative, for after trust has broken down, any process of resocialisation is likely to be fighting an uphill battle against very negative discourses, myths, and truths arising from the period in which relations between different parties were at their nadir. This is especially the case in the wake of serious ethnic conflict. As Brian Barry has reminded us: 'once ethnic feeling has been whipped up, it has a terrifying life of its own'.[22]

The supply of neutral security is a much more important short-term strategy. In the aftermath of severe state disruption, the hostilities between different internal actors, and the fears which they entertain of each other, may be considerable. Where a civil war has occurred, the path to internal order may involve not just negotiation between parties to reach an agreement, but also the implementation of the agreement. It is during the implementation phase that the perils for any agreement are likely to be highest: armed groups may be expected to relinquish their arms, thereby exposing themselves to the risk of attack by perfidious opponents.[23] The same applies to some degree even where internal actors have not been involved in direct armed conflict with each other; an international security force can disincline actors to attempt an extra-constitutional seizure of power, since they cannot be certain that the force would not move to thwart their objectives. However, in the long run such deployments do not of themselves provide the foundation for political order; this can come only with the development of consolidated institutions which channel political tensions into forums in which they can be managed peacefully.

Institutional development has been a central focus of virtually every 'managed' political transition. The lengthy post-war occupations of Germany and Japan led to the establishment of democratic institutions of a kind which neither country had known before. Decolonisation in the 1950s and 1960s for the most part involved the design of new constitutions to shape politics once independence was achieved; sometimes the United Nations was involved in organising popular votes to judge proposals for political change.[24] And more recently, the United Nations in places as diverse as Namibia, Cambodia, East Timor, Afghanistan and Iraq has been involved in the organisation of electoral processes to choose new leaders or to set up popular assemblies c`city of Jerusalem to be a *corpus separatum* under United Nations administration. Jerusalem's status was of unique concern because it housed notable religious sites such as the Western Wall (of significance to Jews), the Dome of the Rock (of significance to Muslims) and the Church of the Holy Sepulchre (of significance to Christians). The April 1948 draft Statute of Jerusalem provided for a governor appointed by the UN Trusteeship Council with wide-ranging powers.[25] The events of 1948 saw Jerusalem instead being divided between Israel and Jordan,

---

22 Brian Barry (1990) *Democracy, Power and Justice: Essays in Political Theory* (Oxford: Oxford University Press), 135.

23 See Barbara F. Walter (2002) *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton NJ: Princeton University Press).

24 See Lawrence T. Farley (1986) *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder CO: Westview Press).

25 Simon Chesterman (2004) *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press), 53.

and following the 1967 Six-Day War, Israel secured physical control of all the city and subsequently declared it to be its eternal and indivisible capital. The 1948 draft statute nevertheless represents a further example of what a shared sovereignty model might resemble.

Second, regimes have existed in which a single institution has performed constitutional functions in more than one state. The classic modern example is the arcane body known as the Judicial Committee of the Privy Council. The Privy Council, established in 1679, lies at the heart of the structure of executive government in the United Kingdom, and the Lord President of the Privy Council is a senior cabinet minister. However, Privy Council membership is not limited to citizens of the United Kingdom; for example, the present Prime Minister of Papua New Guinea is a Privy Councillor. Furthermore, its 'Judicial Committee' has historically consisted not just of Lords of Appeal in Ordinary (that is, the senior judges in the British House of Lords), but also distinguished jurists from Commonwealth countries. For most of the twentieth century, appeals (technically to the King or Queen 'in Council') could be taken from Australian courts to the Judicial Committee in London. It was only in 1973 that initial steps were taken in Australia to abolish general appeals from the High Court of Australia to the Judicial Committee, and it was only pursuant to section 11(1) of the *Australia Act 1986* that all appeals from Australian courts were finally abolished.[26] (This measure had become necessary because the 1973 abolition of High Court appeals had created the perverse consequence that an unsuccessful litigant before a state supreme court could choose which of *two* possible 'final' courts of appeal to approach – the High Court of Australia or the Judicial Committee – and in effect could approach the court which seemed to offer the more favourable jurisprudence on the issues in point.) The Judicial Committee remains a final court of appeal for some Commonwealth countries. This integration of judicial organs reflected a particular form of decolonisation.

However, such integration can also be produced by intergovernmental agreement. The Republic of Nauru provides one example. Once a UN trust territory, Nauru became independent on 31 January 1968; in Australia, the Nauru Independence Act 1967 had provided in section 4(2) that 'On and after Nauru Independence Day, Australia shall not exercise any powers of legislation, administration or jurisdiction in and over Nauru'. However, on 6 September 1976, an agreement was signed between Australia and Nauru that was subsequently incorporated as a schedule to the Nauru (High Court Appeals) Act 1976.[27] This gave effect, in the words of the agreement, to 'the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru'. The agreement could be terminated on ninety days' notice, and did not permit appeals

26 See Peter C. Oliver (2005) *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press), 243–248.

27 The constitutional validity of this act as an exercise of the legislative power of the Commonwealth Parliament was upheld by the High Court of Australia in *Ruhani v. Director of Police* [2005] HCA 42.

'in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court'. Further, an appeal is not to lie 'where the appeal involves the interpretation or effect of the Constitution of Nauru'. Nauru, unfortunately, is now a sadly debilitated state, and the scope of its effective independence is open to real doubt given its susceptibility to Australian pressure, which was ruthlessly applied in 2001 to secure the location on its soil of a refugee detention camp as part of Australia's so-called 'Pacific Solution'.[28] Nonetheless, as an example of how the formal sharing of sovereignty can be effected, this example is quite striking.

The lesson of these examples is straightforward. There are rarely legal obstacles which block creative formal integration of institutions across territorial boundaries. The consent of states is a powerful tool, and if states through their own processes agree to share sovereignty, sovereignty can be shared. Problems arise not at the conceptual level, but rather at the political level, where issues of desirability and viability remain potent.

Global engagement with disrupted states

In this section, I distinguish the shared sovereignty model from a range of other ways in which Westphalian sovereignty can be compromised. It is only very recently indeed that anything realistically approaching 'a world of sovereign states' has materialised, essentially in the period since the Second World War. When the United Nations organisation was founded in 1945, it had only 51 original members. With the admissions of Switzerland and Timor Leste in 2002, its membership reached 191 members. Before this, large tracts of the earth's surface and millions upon millions of people lived in territories which could not meaningfully claim to be 'sovereign states'.

A first point of distinction is between shared sovereignty and *colonial occupation*. Colonial occupation is both asymmetrical and substantially involuntary. In a case of colonial occupation, one does not witness structural integration of institutions from distinct states, but rather institutions in the colony which are an outgrowth of institutions in the colonising state. (Sometimes this can translate into a situation in which nationals of the former colonial power continue to serve as individuals within institutions of a post-colonial state.) While customary law of indigenous peoples may receive some recognition, this is by virtue of the law of the occupying power.[29] Shared sovereignty can, however, arise when an occupation has come to a peaceful conclusion, but territories remain linked in a formal sense to the former occupier. Of course, at this point, the extent to which sovereignty may be shared can vary. From Australia's point of view, the Statute of Westminster 1931 marked a significant stage in the diminution of shared sovereignty by providing in section 4 that:

28 See William Maley (2003) 'Asylum-Seekers in Australia's International Relations', *Australian Journal of International Affairs* 57(1), 187–202.

29 On this dimension of colonial occupation, see Paul Keal (2003) *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press).

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

And as noted earlier, the Australia Act 1986 marked another shift, with a heavy air of finality about it. In formal terms, the much-discussed 'sovereignty' of the British Parliament[30] was undermined, as time passed, by a shift in the rule of recognition, existing, in H.L.A. Hart's famous formulation, 'only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria'.[31]

A second point of distinction is between shared sovereignty and *spheres of influence*. Captured in notions such as the Brezhnev Doctrine, spheres of influence imply limited sovereignty in the face of political threats.[32] As Paul Keal has put it, a sphere of influence 'is a determinate region within which a single external power exerts a predominant influence, which limits the independence or freedom of action of political entities within it'.[33] It is essentially influence, rather than structural integration, that limits the autonomy of the subordinate party, although through mechanisms such as the Warsaw Treaty Organisation and the Council for Mutual Economic Assistance (known as COMECON), the Soviet Union sought to position itself at the centre of a range of formal interstate organisations. What compromised the autonomy of states within the Soviet sphere of influence was fundamentally a fear that if they strayed from the path laid down by the Soviet leadership, they would be invaded and their local 'leaderships' overthrown: the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968 clearly established that this could happen,[34] and it was the credibility of the Soviet threat which long influenced East European opinion. The Eastern Bloc collapsed in 1989 because in the light of the changes in the USSR under Mikhail Gorbachev's leadership, and the quagmire which the Soviet leadership had entered with the invasion of Afghanistan in December 1979, the threat of a Soviet invasion of an Eastern European state had ceased to be credible.

A third distinction is between shared sovereignty and *trusteeship* under Chapters XII and XIII of the UN Charter. Trusteeship was a directed descendant of the mandate system established by Article 22 of the Covenant of the League of Nations

---

30 See Jeffrey Goldsworthy (1999) *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press).

31 H.L.A. Hart (1994) *The Concept of Law* (Oxford: Oxford University Press), 110. See also William Maley (1985) 'Laws and Conventions Revisited', *Modern Law Review* 48(2), 121–138.

32 See Robert A. Jones (1990) *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev: The Brezhnev Doctrine* (London: Macmillan).

33 Paul Keal (1983) *Unspoken Rules and Superpower Dominance* (London: Macmillan), 15.

34 On Hungary, see Charles Gati (1986) *Hungary and the Soviet Bloc* (Durham NC: Duke University Press). On Czechoslovakia, see Karen Dawisha (1984) *The Kremlin and the Prague Spring* (Berkeley & Los Angeles: University of California Press).

to deal in the aftermath of the First World War specifically with former German and Turkish colonies.[35] The United Nations carried this burden for much longer than is often appreciated, with the new states emerging from trusteeship and securing admission to the United Nations well into the 1990s; but it is a phase which has now ended. Trusteeship differs from shared sovereignty in that trust territories were avowedly *not* sovereign; their subordinate status was inherent in the very nature of trusteeship.

A fourth distinction is between shared sovereignty and transitional control by UN missions acting with Security Council authorisation, such as UNTAC in Cambodia.[36] Here, the 'sovereignty' of the state may be symbolically embodied in a local institution (in Cambodia's case the 'Supreme National Council'), but the exercise of effective power is delegated to a greater or lesser degree to an international mission. Such control is typically a prerequisite to the restoration of full and *un*shared sovereignty. That said, confronted with the problems of weak states, some scholars have recently put forwarded a notion of 'neotrusteeship', to refer to 'the complicated mixes of international and domestic governance structures that are evolving in Bosnia, Kosovo, East Timor, Sierra Leone, Afghanistan and, possibly in the long run, Iraq'.[37] This may indeed lead to 'a state embedded in and monitored by international institutions',[38] which in practice would amount to shared sovereignty.

Finally, there are obvious similarities between shared sovereignty and supranational organisation. This is no more apparent than in Europe where the institutional developments arising from the 1957 Treaty of Rome and the 1992 Maastricht Treaty, associated initially with the formation of the European Economic Community (EEC) and the European Union (EU) have fundamentally altered the shape of the continent. Yet the 2005 debacle over a European Constitution, decisively blocked by French voters, highlights the ongoing significance of national policy and identity, and raises real questions about the depth of structural integration. As Richard Rose has pointed out, 'EU institutions appear similar in name to those of national governments, but they are very different in what they can and cannot do in relation to each other and to member states.'[39] It is notable that European integration has been a product of very specific historical factors,[40] and has not been closely replicated in other regions such

35 See P.J. Noel Baker (1928) *The League of Nations at Work* (London: Nisbet & Co.), 88–96.

36 See Michael W. Doyle (1995) *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder CO: Lynne Rienner); Trevor Findlay (1995) *Cambodia: The Legacy and Lessons of UNTAC* (Oxford: Oxford University Press); Sorpong Peou (1997) *Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box* (Kuala Lumpur: Oxford University Press); MacAlister Brown and Joseph J. Zasloff (1998) *Cambodia Confounds the Peacemakers 1979–1998* (Ithaca NY: Cornell University Press).

37 James D. Fearon and David D. Laitin (2004) 'Neotrusteeship and the Problem of Weak States', *International Security* 28(4), 5–43 at 7.

38 *Ibid*., at 42.

39 Richard Rose (1996) *What is Europe? A Dynamic Perspective* (New York: HarperCollins), 263.

40 See Ian Clark (1997) *Globalization and Fragmentation: International Relations in the Twentieth Century* (Oxford: Oxford University Press), 136–140.

as Africa, the Arab world, or South or Southeast Asia. Perhaps the most significant difference between this type of integration, and the 'shared sovereignty' model with which this chapter is concerned, is that regional integration is an organic outgrowth of accumulated interstate interactions which have led to high levels of trust between leaderships, whereas the 'shared sovereignty' *model* is a device for attempting to overcome a significant deficit of trust.

Factors against adoption of shared sovereignty

In this section, I identify some of the considerations that may militate against the use of shared sovereignty as a way of facilitating the rebuilding of trust and the relegitimation of the state. All are potentially significant, but the scale of the challenge that they offer will vary from case to case.

First, *language* may be a significant problem, in two respects. Even within states, the choice of language of interaction can be controversial in multilingual polities, since those forced to operate in a language other than their mother tongue may feel significantly disadvantaged by the requirement.[41] Tensions over language have fed political conflict in countries as diverse as Canada and Pakistan. In one case, that of India, the availability of an entirely foreign language – English – has arguably defused a potentially serious problem of official language choice and helped link a burgeoning new middle class to the wider world; this case, however, is a product of centuries of engagement, rather than the application of a particular model of structural integration. To those who feel linguistically disabled, the sharing of sovereignty across language groups could be a powerful affront. There is a further respect in which differences in language may be a barrier to the sharing of sovereignty. Cross-cultural communication is considerably more challenging than is often realised,[42] particularly where high levels of subtlety are required, and the costs of confusion could be large.

Second, the *cost* of 'shared sovereignty' arrangements could be considerable, and it is not clear who would bear them. In an environment in which many potential donors are on hand, a perennial problem is that each may withhold an immediate contribution in the hope that some other will step in to fill the gap, allowing most 'donors' to be free riders. Furthermore, scarce resources have alternative uses, and in democracies, political leaders are understandably responsible to what they see as demands from voters for funds to address problems at home. Foreign aid is a poor cousin at this table. Securing funding even to address emergency requirements in a high-level crisis can be quite difficult, and there is every reason to fear that contributions to support a political framework for the long-term rebuilding of trust in faraway places could be even more difficult.

Third, availability of capacity may be a problem. Staffing agencies even in developed countries may be a problem. To position trained staff, appropriately

41 See Jonathan Pool (1991) 'The Official Language Problem', *American Political Science Review* 85(2), 495–514.

42 See Anna Wierzbicka (1997) *Understanding Cultures Through Their Key Words: English, Russian, Polish, German, and Japanese* (New York: Oxford University Press).

equipped, at points where they can directly help a disrupted state is likely to be difficult. Kabul and Phnom Penh have their charms, but they are markedly different from those of Paris, New York, or London. To induce the best and the brightest from the latter to work in the former may require substantial salaries, fuelling resentment on the part of gifted locals who can attract only a tiny fraction of what their international counterparts receive. This is already an intractable problem in short-term transitional administrations, and there is every reason to think that it would be equally troublesome in the management of at least some elements of a shared sovereignty model.

Fourth, spoilers can pose a significant challenge.[43] The Danzig and Jerusalem models unravelled because the structures that they ordained cut across the interests of uncompromising actors with interests of their own to pursue. Spoiling is not so serious a problem where institutions are safely located in remote places (such as the Judicial Committee of the Privy Council in London), but it is a distinct problem when they have a physical presence in a disrupted state, as the August 2003 attack on UN premises in Baghdad which killed the Special Representative of the Secretary-General and many other fine people made clear. Fortunately, not all disrupted states are equally supplied with spoilers, but the spoiler problem does highlight that a shared sovereignty model has its time as well as place, and there is not much use in promoting it when violent conflict is still a feature of the daily life in war-torn territory. On occasion it pays to sit and wait.

Fifth, policy differences between states may be severe and intractable. An interesting example involved the attitude of the Judicial Committee of the Privy Council to capital punishment. In a number of countries from which appeals can be made to the Judicial Committee, notably Commonwealth states in the Caribbean, capital punishment for certain crimes remains extremely popular with some elements of the broader population. Yet the Lords of Appeal in Ordinary who do the bulk of the Judicial Committee's work are now products of a legal culture shaped by the abolition of capital punishment in the United Kingdom, and in a number of cases they have declined to accept capital sentences imposed by lower Caribbean courts.[44] This divergence of perspective had prompted Caribbean leaders at a summit in 2001 to propose the abolition of Privy Council appeals, and the establishment of a Caribbean Court of Justice to take the Judicial Committee's place.[45] However, this move encountered stern and effective opposition from local abolitionists, and while the Caribbean Court of Justice has now been constituted, and held its first sitting on 8–9 August 2005, the Judicial Committee has so far retained its role as final arbiter in cases involving capital sentences.

Sixth, there may be significant tensions between local and global norms. In states such as Afghanistan and Somalia, the ways of life of ordinary people can

43 See Stephen John Stedman (1997) 'Spoiler Problems in Peace Processes', *International Security* 22(2), 5–53.

44 See, for example, *Patrick Reyes v. The Queen* [2002] UKPC 11 and *Berthill Fox v. The Queen* [2002] UKPC 13.

45 Owen Bowcott (2001) 'Caribbean Severs Link to Privy Council', *The Guardian*, 15 February.

differ significantly from those in more developed countries, and a key issue that can arise is the degree to which local norms should be respected, particularly if they appear to be at odds with programmatic normative texts relating to civil and political rights, economic, social and cultural rights, and gender rights. On the one hand, local norms may be little more than 'norms of partiality',[46] protecting and entrenching the positions of those who for reasons of no moral significance happen to have been dominant in the past. But on the other, it can be argued that a liberal order should be able to encompass a range of different social formations – not all of them liberal – as long as individuals have a right of exit from specific situations which they find intolerable.[47] In a situation of 'shared sovereignty', these tensions can give rise to significant political problems.

Finally, there may be tensions between the sharing of sovereignty and the perceived requirements of 'democracy'. Where demands for autonomy and self-government have been central to an internal struggle, the last thing that some actors may wish to see is the development of political institutions that locate some forms of state activity beyond the control of themselves and their supporters. This approach mirrors a deeper tension between democracy and constitutionalism with which political theorists have long been familiar, and there is no reason to expect that this will be comfortably confined to developed Western states.[48] It is perhaps no surprise that the most obvious examples of shared sovereignty have been in the judicial sphere, where the occupants of key offices are not usually selected by popular vote, and the sharing of sovereignty does not directly challenge democratic expectations.

In conclusion, therefore, it is important to recognise that shared sovereignty proposals are ultimately of modest scope, although at a conceptual level they might appear quite radical. The sharing of sovereignty, as Krasner has recently argued, is not a panacea and should not be seen as such.[49] The problems of severely disrupted states are complex, often intractable, and multidimensional. The erosion of trust is only one of these, and not necessarily the most significant in all cases. But where it *is* a pressing problem, sharing of sovereignty should certainly figure on the menu of devices that might be employed to address it.

---

46 See Edna Ullmann-Margalit (1977) *The Emergence of Norms* (Oxford: Oxford University Press), 134–197.

47 See Chandran Kukathas (2003) *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press).

48 See Chandran Kukathas, David W. Lovell and William Maley (1990) *The Theory of Politics: An Australian Perspective* (Melbourne: Longman Cheshire), 9–59.

49 Stephen D. Krasner (2004) 'Sharing Sovereignty: New Institutions for Collapsed and Failing States', *International Security* 29(2), 85–120 120.

Chapter 17

Sovereignty as Indirect Rule

Barry Hindess

Globalisation is often seen as a recent development which threatens to undermine state sovereignty, and thus the international order of which sovereignty is a fundamental component. This perception misleads. However, unlike many of those who resist it, I do not rely on the contrary view that its supporters have greatly exaggerated the extent and effects of globalisation.[1] My argument, rather, is that the perception itself displays a lack of historical perspective. The treatment of globalisation as a recent phenomenon is to misrepresent some of its most important and enduring characteristics. Far from being threatened by globalisation, the contemporary state system should be seen as one of its most important products.

I begin by arguing that the Westphalian states system is best seen as a specifically European arrangement which ended some considerable time ago. While the states system we have inherited bears some resemblance to its ancestor, it is also the outcome of a series of changes which have radically affected its character. The greater part of this chapter focuses on two of these changes. One relates to Western imperial expansion and the other to the emergence of independent states in territories which had once been subject imperial rule. The latter development coincides with what the English School of international relations scholarship calls the 'expansion of international society'.[2] Consideration of the manner in which this expansion took place, and especially of the many continuities between the order of European empires and the order of independent states which followed, suggests the need for a far less anodyne description.

Discussion of these issues allows me to return to the contemporary debate about globalisation. I argue that there are important respects in which state sovereignty (or, at least, state control over its own inhabitants) remains central to, and continues to be promoted by, the contemporary international order. While there are clearly important policy areas in which states' freedom of action is seriously curtailed by international developments, the significance of this constraint is often misunderstood. It should be seen, not as undermining the international order, but as one of its intended effects. It is well known, for example, that the freedom of action of national governments is often severely constrained by international financial markets. Yet it is not sufficiently

1 See Paul Hirst and Graham Thompson (1999) *Globalisation in Question* (Oxford: Polity) for an influential argument of this kind.

2 Hedley Bull and Adam Watson (eds) (1984) *The Expansion of International Society* (Oxford: Clarendon).

recognised that these markets have been constructed, as a matter of deliberate policy, by a number of powerful states and supra-national agencies.[3] Or again, much of the concern about globalisation in the West centres on its alleged impact on social policy. In this case, the discourse of globalisation serves as a cover for neo-liberal attacks on welfare state regimes in Western societies.[4] Elsewhere, one of the most powerful obstacles to the establishment of such regimes comes from the World Bank and IMF – that is, from the continuing effects of Western domination. I will suggest that the promotion of state capacities in some areas and their curtailment in others belong together in an international order which uses state sovereignty as an instrument of indirect rule.

The Westphalian states system

The origins of the Westphalian system of states are usually located in seventeenth-century European attempts to bring destructive religious conflict under some kind of control. In effect, the 1648 Treaty of Westphalia and other agreements that brought the Thirty Years War in Europe to an end are seen as marking the emergence of a new European order of independent sovereign states. These agreements sought to contain the political problems resulting from the existence of powerful religious differences between Catholics, Lutherans and Calvinists by granting territorial rulers supreme political authority within their domains, leaving it to rulers and their subjects to reach some accommodation in matters of religion. The principle of non-interference in the internal affairs of a sovereign state played a fundamental part in this regime of pacification by restricting the capacity of the rulers of states to intervene on behalf of their co-religionists in other participating states. In effect, populations which had been subject to a variety of overlapping and conflicting sources of authority were assigned to sovereign rulers who were themselves acknowledged as having the primary responsibility for the government of the populations within their territories. Political arrangements designed to pacify warring populations are thus seen as transforming the condition of the Western part of Europe.

This conventional account has many limitations, some of which are discussed by Wayne Hudson in Chapter 1 of in this volume, but it will serve to identify a number of features which have been preserved in this systems successors.[5] It suggests a view

3 See Eric Helleiner (1994) *States and the Re-Emergence of Global Finance: From Bretton Woods to the 1990s* (Ithaca: Cornell University Press) and, for the earlier post-WW2 period, Francis Gavin (2004) *Gold Dollars and Power* (Chapel Hill: University of North Carolina Press). Mark Blyth (2002) *Great Transformations*: *Economic Ideas and Institutional Changes in the Twentieth Century* (Cambridge: Cambridge University Press) provides a more general analysis of changes in the international financial regime.

4 Barry Hindess (1998) 'Neo-Liberalism and the National Economy', in Mitchell Dean and Barry Hindess (eds) *Governing Australia* (Melbourne: Cambridge University Press), 210–226.

5 There is an extensive literature on the emergence of the Westphalian system and its geo-political effects. See, for example, Edward Keene (2002*) Beyond the Anarchical Society* (Cambridge: Cambridge University Press); Carl Schmitt (2003) *Nomos of the Earth in the*

of the Westphalian system of states which is rather different from that presented by Jackson Maogoto in Chapter 12, and it has fundamental implications for our understanding of government, not only within individual states but also in the states system. Before I move on to these implications, however, I need to say something about the concept of government itself. The term 'government' is commonly understood as referring, in Aristotle's words, to 'the supreme authority in states',[6] a usage which suggests that government should be seen as emanating from a single centre of control, albeit one which may itself be divided between, for example, executive, legislature and judiciary, or the states of a federal system and the federal commonwealth itself. However, Michel Foucault and the 'governmentality' school of social analysis have revived our interest in other understandings of the term.[7] While Aristotle is often cited in support of the conventional usage just noted, he also refers to 'the government of a wife and children and of a household',[8] a form of rule which he distinguishes both from the government of a state and from the rule of a master over his slave. What these diverse usages have in common is little more than the perception of government as seeking, in Foucault's words, 'to structure the possible fields of action of others', or even of oneself.[9] Government, in this broad sense, refers to the activities involved in regulating the conduct of one or more actors.

Nevertheless, as Foucault acknowledges, there is something distinctive about 'the particular form of governing which can be applied to the state as a whole'.[10] When he uses the term in this way his conception of government is still clearly focused on the state: it is concerned with conducting the affairs of the state's population in what are thought to be the interests of the whole. There is another respect, however, in which his conception of government is not entirely state-centred since he argues that government of the state is not restricted to the work of *the* government, that is, of the state and the agencies under its direct control. Government will also be performed by agencies of other kinds, religious organisations, employers, financial institutions, legal and medical professionals and voluntary associations, and also, less directly, by

---

International Law of Jus Publicum Europaeum (New York: Telos Press); Benno Teschke (2003) *The Myth of 1648* (London: Verso); Richard Tuck (1999) *The Rights of War and Peace* (Oxford: Oxford University Press); Robert Walker (1993) *Outside/Inside: International Relations as Political Theory* (Cambridge: Cambridge University Press).

6 Aristotle (1988) *The Politics*, Steven Everson (ed.) (Cambridge: Cambridge University Press), para 1279a, p. 27.

7 See especially Michel Foucault (2001) 'Governmentality', in James Faubion (ed.) *Michael Foucault: Power* (London: Allen Lane). For studies which adapt Foucault's account of government to the study of contemporary Western societies see, for example, A. Barry, T. Osbourne, *et al*. (1996) *Foucault and Political Reason* (Chicago: University of Chicago Press); Dean and Hindess, *Governing Australia*; Rose, *Power of Freedom* and the general discussion in M. Dean (1999) *Governmentality: Power and Rule in Modern Society* (London: Sage).

8 Aristotle, *The Politics*, para 1278b, p. 37–38.

9 Michel Foucault, 'Governmentality', 341.

10 Michel Foucault (2001) 'The Subject and Power', in Faubion (ed.), *Michel Foucault: Power*, 206.

markets and other institutionalised patterns of interaction. On this view, the work of governing the state as a whole extends beyond the institutions of the state into what is now called civil society.

I should add that the state-centred view of government has also been brought into question by influential figures in the disciplines of public administration and international relations who write of the emergence of 'governing without government'.[11] They have used the term 'governance' to describe significant recent developments involving forms of regulation which cannot be seen as emanating from a supreme authority. We are advised that the work of government within states is increasingly being conducted by public-private partnerships and by formal and informal networks involving state and non-state agencies while, in the international sphere, states and other actors are regulated by an expanding web of conventions, treaties and international agencies, all of which operate without the backing of an overarching Hobbesian power.

If the Westphalian settlements established a system of states, they can also be seen, following this broader usage, as instituting a novel regime of government. While it operates, like civil society and the market, with no controlling centre, it nevertheless serves to regulate the conduct of the states and populations encompassed by this system. Thus, where classical political thought generally follows Aristotle in treating the state as 'the highest of all' forms of community,[12] the Westphalian system signals the emergence of a more complex form of political reason. While individual states clearly retain their privileged positions with regard to their own populations, there are also important governmental contexts in which the overarching system of states and the population it encompasses is now regarded as 'the highest of all'.

The modern art of government has thus been concerned with governing not simply the populations of individual states but also the larger population encompassed by the system of states itself. It addresses this task first, by promoting the rule of territorial states over populations and secondly, by seeking to regulate the conduct both of states themselves and of members of the populations under their control. States are expected to pursue their own interests, but to do so in a field of action which has been structured by the overarching system of states to which they belong. Liberalism, perhaps the most influential contemporary version of the art of government, should be seen in similar terms: that is, as focusing on governing both the populations of particular states and the population (which now incorporates the whole of humanity) of the system of states more generally.[13]

To describe the Westphalian system as a regime of government in this sense is to work primarily at the level of intentions, not of results. It is to identify a set of governmental objectives and perceptions of the resources, obstacles and other conditions that are likely to be encountered in their pursuit and of the instruments,

11 There is a substantial literature in both fields. See, for example, Jean-Jacques Rousseau (1968) [1762] *The Social Contract* (Harmondsworth: Penguin).

12 Aristotle, para 1252a, p. 5.

13 Barry Hindess (2004) *Liberalism: What's in a Name?, Global Governmentality: Governing International Spaces* (London: Routledge), 23–39.

tactics and procedures available for dealing with them.[14] The outcomes of government are not determined by the actions of government alone: they also depend on the actions of others, including the resistance, misdirection and indifference of those whose conduct government seeks to control. Thus, my aim in describing the contemporary system of states as a regime of government is to identify an important element of design and the objectives which it is intended to pursue. It is not to suggest that those objectives will necessarily be realised or that there is no possibility of resistance.

Three features of the system established by the Westphalian agreements are particularly important for our understanding of later developments. First, the sovereignty of a state within the Westphalian system was a function of its recognition as a state by other members of the system of states.[15] In this respect, the rights of states to manage their own affairs have always been heavily qualified by a corresponding set of responsibilities to the international community, that is, to the overarching system of states to which they belong. The significance of this view of sovereignty can be seen if we compare it to the contractarian view set out, in rather different forms, by Hobbes, Locke, Rousseau and again more recently by John Rawls. The latter treats states as if they had arisen out of formal or informal agreements amongst numerous individuals, who in turn became subjects of the states resulting from those agreements. This perspective suggests that sovereignty is essentially a matter of the internal relations between a state and its citizens on the one hand and of the capacity of a state to defend itself on the other. According to this view, government is something that happens within states, not in the international arena.[16] The claim that state sovereignty is a matter of recognition by other states suggests, in contrast, that states may well operate in the absence of internal legitimacy. This condition is discussed, from a rather different perspective, by William Maley in Chapter 16.

Second, the Westphalian states system was specifically European, covering territories and populations in parts of Europe by means of treaties and understandings between participating states. Like many principles of public life, the principle of non-interference in the internal affairs of other participating states was honoured more in the breach than in the observance, operating as a set of prudential considerations serving to limit the spread of conflict. Even in this prudential form, however, it imposed few constraints on states' interference in the affairs of those who inhabited territories not covered by these agreements and in which no truly sovereign states were thought to exist.[17] Thus, while states may have found their activities in parts of Europe restricted by Westphalia and other related treaties, they were not so restricted in other parts of the world. Indeed, they experienced little difficulty in deploying

---

14 See Nikolas Rose (1999) *Power of Freedom* (Cambridge: Cambridge University Press) for further discussion of this point.

15 Thomas Bierstecker and Cynthia Weber (eds) (1996) *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press). More recently, the 1933 Montevideo Convention on the Rights and Duties of States insists, in Article 1, that the 'state as a person of international law should possess the … capacity to enter into relations with other states'.

16 Hedley Bull (1977) *The Anarchical Society* (London: Macmillan) is the classic statement of this view.

17 Schmitt, *Nomos of the Earth*.

natural law and the Roman *jus gentium* to secure what they could regard as lawful grounds for territorial expansion elsewhere.[18]

Third, if the Westphalian settlements addressed the problem of pacifying warring populations by establishing a system of sovereign states, this solution produced a closely related problem of its own: that of pacifying states and their rulers. This was a major concern of liberal political thought in the eighteenth century and it has since remained a central theme in liberal discussions of international order.

The globalisation of the states system

To leave the discussion at this point would be to suggest, like the English School of international relations theory, that the contemporary states system is simply an expanded version of the original Westphalian system.[19] Consideration of two fundamental stages in the spread of that system to other parts of the world suggests a less attractive view. First, the effect of imperial acquisitions in other parts of the world was to bring new territories and populations into the remit of the Westphalian system.[20] Others were brought into the system indirectly through a number of complementary and interdependent developments: the deployment of a discriminatory standard of civilisation in their dealings with non-state entities and states (China, Japan, Russia, the Ottoman Empire, Thailand) that were not themselves accepted as part of the system of states; the imposition of elaborate systems of capitulations which required independent states to acknowledge the extra-territorial jurisdiction of Western states; and 'the imperialism of free trade'.[21] This last phrase derives from Gallagher and Robinson's influential (and still controversial) interpretation of nineteenth-century British policies but it has an obvious relevance for us all today.

Most discussions of Western imperialism focus on the subordination of substantial non-European populations to rule by particular European states. However, a second aspect of the imperial order was no less important: the incorporation of those populations and the territories they inhabited into the European system of states. Direct or indirect imperial domination was the form in which the European system of states first became global in scope. It divided the world into several kinds of

18 See Emmerich de Vattel (1916) [1758] *The Law of Nations, or, the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Washington: Carnegie Institute) and Francisco de Victoria (1995) [1557] *De Indis et de Ivbre Belli Reflections* (Buffalo: William S. Hein and Co.) and the discussion in Anthony Anghie (1996, 2005) *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press) and for influential early examples of such tendentious reasoning.

19 Bull and Watson, *The Expansion of International Society*.

20 David Strang (1995) 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in Thomas Biersteker and Cynthia Weber (eds) *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press).

21 Gerrit Gong (1984) 'The Standard of Civilization', *International Society* (Oxford: Oxford University Press); David Fidler (2000) 'A Kinder, Gentler System of Capitulation?', *Texas International Law Review* 35, 387–413; John Gallagher and Ronald Robinson (1953) 'The Imperialism of Fair Trade', *The Economic History Review* VI (Second Series) (1), 1–15.

populations: citizens of Western states; non-citizen subjects of Western states; and various residual populations, consisting of the subjects of states that were independent but not fully accepted as part of the states' system.

The incorporation of non-European populations into the European system of states was the first, and still most important, form of globalisation. It was followed, sometimes after a considerable gap, by the second stage in the globalisation of the European states system. The widespread achievement or imposition of independence was only partly a process of imperial withdrawal. It left behind not only states and governing institutions but also substantial settler populations, many of whom were able to dominate the newly independent states. In these cases, as Paul Keal's discussion shows, indigenous peoples remained subject to a form of imperial rule. Moreover, while it dismantled one aspect of the imperial order, independence left the other firmly in place. It both expanded the membership of the system of states and established a radically new way of bringing non-Western populations under its rule.[22] As a result, these populations found themselves governed both by modern states of their own and by the regulatory mechanisms of the overarching system of states within which their own states had been incorporated. This is the point at which citizenship, of a kind, became a universal human condition.

To be a member of the system of states is to be a sovereign entity, one that is not ruled directly by another state. Yet, as Roland Rich insists, to make this point is not to say that members of the modern system of states engage with each other as equals. In this case, as with other regimes of government that operate with no controlling centre (the workings of an established market or of civil society, for example) some members are clearly more equal than others. Not only is the overarching system of states hierarchically structured, containing stronger and weaker states and more or less exclusive inner circles, but many of the recently established states are highly dependent on external assistance, having inherited poorly developed infrastructures and state agencies and state practices designed to serve a system of government by outsiders, and so on. This condition leaves them open to kinds of external supervision that do not apply, or do not apply so strongly, to more established states. Moreover, like many states that have never been colonised, they are recognised as members of the international system of states without being admitted to its more exclusive inner circles. As a result, they are subject to updated versions of the European 'standard of civilisation' which requires them to demonstrate their fitness to participate in various international arrangements (OECD, GATT and its successor, WTO, providing the most obvious examples) and which is used from time to time to legitimate intervention by other states. They are also subject to intrusive regulation by international financial agencies of the kind discussed by Ross Buckley in Chapter 15 of this volume.

22 Cf Sanjay Seth (2000) 'A Post Colonial World', in G. Fry and J. O'Hagen (eds) *Contending Images of World Politics* (London: Macmillan), 214–226.

Liberalism

Standard academic accounts of liberalism present it as a normative political doctrine or ideology organised around a commitment to individual liberty and, in particular, to protecting that liberty against the state. To this end, it establishes normative criteria in terms of which the actions of states may be judged and sometimes found wanting. This view of liberalism is not entirely false but it is certainly incomplete. The twentieth century emergence of normative political theory as an independent academic specialism, complete with its canon of historical texts and its own internal debates and related developments in international relations and law led to the appearance of a specifically academic body of liberal thought. As a result, academics working in these areas often associate liberalism with a particular strand within the normative canon and with the ideas of, for example, John Rawls or Joseph Raz.

However, liberalism can also be seen as a positive project of government concerned with addressing the practical problems involved in governing states and their populations.[23] What distinguishes it from other such projects is the view that some of the more important spheres of social interaction have an autonomous, self-regulating character. Perhaps the most influential formulation of this perception appears in Adam Smith's *The Wealth of Nations*. He describes the economic activity of commercial societies as constituting a system of interaction in which the conduct of participants is regulated not only by the values, interests and the like which they bring to these interactions but also by the signals of other actors – that is, by the prices for goods and labour resulting from numerous individual decisions to buy or to sell, or to seek a better deal elsewhere. This view suggests that state interference in economic interaction – for example, by setting prices or minimum wages – will produce misleading signals, thereby distorting the system's own regulatory mechanisms. Smith uses this point to argue that police regulation of economic activity and the mercantile system substantially reduce the overall wealth of the nation.

Liberal political reason takes this image of the self-regulating market as the key to understanding how modern states should be governed.[24] Their populations are seen as encompassing a variety of domains – the sphere of economic activity, the workings of civil society, the processes of population growth and so on – each of which should be regulated, as far as possible, by the free decisions of individuals in the course of their interactions with others. The suggestion is that, once such domains of free interaction have been established, they will function most effectively if external interference in their workings is reduced to a minimum. On this view, then, rather than subject them to detailed state regulation, liberal government should aim

23 I have argued elsewhere (Hindess, *Liberalism*) that this view of liberalism fosters a better understanding of the work of central figures in the liberal tradition and also, more importantly, that it provides a fuller and more powerful account of liberal governmental practice at both national and supra-national levels.

24 Cf Foucault's suggestion that in liberal thought the market plays 'the role of a 'test', a locus of privileged experience where one can identify the effects of excessive governmentality' (M. Foucault (1997), *The Essential Works 1954-1984 Ethics, Subjectivity and Truth*, Paul Rabinow (ed.) (New York: New York Press), 76).

to secure conditions under which they can safely be left to regulate themselves – the assumption being that they will do so in such a way as to promote the well-being of the population and of the state itself. Liberal government, in other words, should aim to rule over, and to work through, the activities of free individuals.

This much is reasonably familiar. It seems to imply that liberal political thought, from Adam Smith to J.S. Mill and on to Friedrich Hayek, can be seen as a set of governmental variations on the underlying theme of individual liberty. Yet the ramifications of the view that individuals are governed by habits of thought and behaviour which are themselves acquired in the course of interaction with others are more complex, and rather less congenial, than this anodyne picture suggests. It suggests, in particular, that suitably autonomous agents are likely to be found only in a limited range of social conditions. There are conditions in which interaction with others can be expected to promote the relevant capacities in the people concerned, notably in the market and what has recently become known as civil society, and other conditions in which it can be expected to undermine them. In the latter case, individuals are seen as less than fully autonomous and therefore as having to be ruled in ways that leave them less than entirely free. In his *Lectures on Jurisprudence*, for example, Smith insists that nothing 'tends to corrupt and enervate and debase the mind as dependency'.[25] It is for this reason, he argues, that the level of crime and disorder is far greater in Edinburgh and Paris, with their large numbers of servants and retainers, than it is in London, where they are a smaller part of the overall population. As a result, the level of police regulation exercised over the population is also greater. The best way to reduce crime and disorder, he argues, is to increase the proportion of free wage-labourers and minimise that of servants and retainers. In the absence of 'freedom and independency', it seems, there is no alternative to authoritarian, and relatively ineffective, rule.

Liberalism supposes, then, that the population to be governed by the state will also be governed by a variety of what Friedrich Hayek calls autonomous social orders, patterns of interaction which have developed independently of central control. Not all such orders can be expected to promote the autonomy of the individuals caught up in them. Liberals have tended to treat orders like the market, which are seen as promoting individual autonomy, as if they result from a long process of historical development and 'improvement', at least in the first instance. Where such orders are seen to exist, they have argued that the role of government is to secure the conditions required for their operations to continue. Orders of other kinds, however, are seen as more or less undeveloped, and the individuals within them are accordingly seen as comparatively uncivilised and thus as behaving in a fashion that is irrational and therefore often unpredictable. In this case the role of government is thought to be a matter of maintaining some reasonable degree of public security and fostering what John Stuart Mill calls the 'improvement' of the subject population: that is, the development of orders, especially the market, that will promote autonomous conduct. Although he approaches the issue from a very different direction, Ranajit Guha's meticulous analysis, in *A Rule of Property for Bengal*, of British attempts to

25 Adam Smith (1978) [1776] *Inquiry into the Nature and Causes of Wealth of Nations* (Oxford: Clarendon Press), 333.

create the prerequisites of properly functioning markets in colonial India can be read as an important case study of this liberal endeavour.

The assumption that humans are social animals capable of acquiring the capacities involved in autonomous action enables liberalism to distinguish, not only between individuals who are autonomous and those who are not, but also between populations (and sub-populations within them) consisting largely of one or other type of individual. Where these distinctions draw on an image of progress or improvement, as they usually do in modern Western thought, they suggest that the contemporary world can be divided into modern populations and those who still belong to an earlier time. Where the former can be governed through the promotion of suitable forms of individual liberty, the latter must first be improved. Even personal slavery, John Stuart Mill tells us:

> By giving a commencement to industrial life, and enforcing it as an exclusive occupation of the most numerous portion of the community, may accelerate the transition to a better freedom than that of fighting and rapine.[26]

The second aspect of liberalism to be noted here, then, is that, throughout the nineteenth and much of the twentieth centuries, many of those ruled by liberal states were subject peoples of European imperial possessions. These peoples experienced liberal government as a kind of authoritarian rule, just as many do today in Central and South America and in parts of Asia.[27] The liberal ideal may be for the state to rule over, and to rule through, the free activities of autonomous individuals but liberals have traditionally taken the view that substantial parts of humanity do not, as a matter of fact, possess the minimal capacities for autonomous action that would enable them to be governed in this way.[28] This view is a matter less of liberal hypocrisy, as some commentators have suggested,[29] than of liberal attempts to deal with a perceived reality which does not satisfy the conditions required for the operation of their preferred form of liberal government.

Such apparent disjunctions between ideal and practical reality, in turn, suggest to liberal political reason that populations and sub-populations within them may be ranked according to their degree of improvement. The more cultivated inhabitants of civilised states are thought to be being relatively close to the condition of individual autonomy while others are seen as further removed from that condition. The latter are the objects of the civilising mission of colonial government, which thus generated systematic patterns of discrimination between populations and sub-populations

---

26 John S. Mill (1977) [1865] 'Considerations of Representative Government', in J.M. Robson (ed.) *Collected Works of John Stuart Mill, vol. XIX* (Toronto: University of Toronto Press), 394–395.

27 See, for example, Cristina Rojas (2002) *Civilization and Violence* (Minneapolis: University of Minnesota Press).

28 Hindess, *Liberalism*.

29 See, for example, Ranajit Guha (1997) 'Not at Home in Empire', *Critical Inquiry* 23, 482–493; Edward Said (1992) 'Nationalism, Human Rights and Interpretation', in Barbara Johnson (ed.) *Freedom and Interpretation: The Oxford Amnesty Lectures 1992* (New York: Basic Books), 175–205.

within them on the basis of what seemed to be their existing level of civilisation or 'improvement'. I argue in the following section that the shift noted earlier from direct imperial rule to independence radically transformed the conditions under which the liberal project of improvement could be pursued.

I suggested earlier that system of states must itself be seen as a regime of government, albeit one that operates, such as civil society and the market, with no controlling centre. This, in effect, is the third aspect of liberalism to be noted before we proceed. International relations specialists will hardly need persuading that liberal thought has always been concerned with the regulation and re-organisation of the international sphere. Michael Doyle identifies a tradition of liberal political thought, going back at least to Kant, which sees the development of constitutional government within states as a means of securing peaceful relations between them, while Albert Hirschman and Michael Howard both argue that liberals have been concerned to promote commerce within and between states, in part because it was seen as a means of pacifying states and their rulers. John MacMillan adopts a broader canvass for his account of liberal internationalism, arguing that early liberal thinkers saw absolutist and feudal relations within states and the Westphalian system of relations between them as mutually supportive components of an overarching illiberal order, with the result that their critiques tended to focus on both the domestic and the international aspects of this overarching order.[30]

Liberalism should thus be seen as a governmental project concerned not simply with the particular populations of individual states but also with the aggregate population that the system of states encompasses. It addresses this governmental task at two levels: first, by promoting the rule of territorial states over populations and second, by promoting treaties, commerce and other devices to civilise and to regulate the conduct both of states themselves and of those within the particular populations under their authority.

A liberal international order

How does this sketch of the liberal project of government relate to the contemporary condition of sovereignty? I began this chapter by suggesting that, in the Westphalian order and its successors, the sovereignty of states should be seen as an artefact of the system of states to which they belong and that it is therefore misleading to regard states as constituted essentially on the basis of formal or informal agreements among their citizens. I went on to argue that European imperialism brought the greater part of humanity into the remit, directly or indirectly, of the European states system. The establishment of independent states in what had once been imperial domains was the second stage in the globalisation of this system. Like its Westphalian and imperial

30 Michael Doyle (1983) 'Kant, Liberal Legacies and Foreign Affairs', *Philosophy and Public Affairs* 12, 205–235, 323–413; Albert Hirschman (1977) *The Passion and the Interests* (Princeton NJ: Princeton University Press); Michael Howard (1978) *War and Liberal Conscience* (London: Temple Smith); John MacMillan (1998) *On Liberal Peace* (London: Tauris). See also James Richardson's (2001) *Contending Liberalism in World Politics* (Boulder CO: Lynne Reiner) discussion of the diverse liberal views of international relations.

predecessors, the contemporary states system operates as a regime of government in the broad sense notes earlier, albeit one with no controlling centre. Its members are sovereign states, recognised as such by other states within the system. All are affected by the system's regulatory mechanisms although some are vastly more powerful than others.

The behaviour of contemporary states, even the most powerful, is thus subject to significant external constraints – to a variety of international conventions, treaties and a developing framework of international law on the one hand and the 'civilising' effects of international trade on the other. In itself, this is hardly a cause for concern. The grossly unequal character of the international order from which these constraints derive is another matter. Thus, while all states are subject to the general supervisory mechanisms of the enlarged system of states, a clear majority of non-Western states are also subject, as we have seen, to the more specific regulation of the international development regime. Some of these states (with more than a little help from their friends) have played the development game with a notable degree of success while others have tried to play by radically different rules, usually with unhappy results, but most have fallen somewhere between these extremes.

An important legacy of the imperial era is the liberal perception, noted earlier, of a need for a civilising mission to bring about the improvement of the less advanced. It is a mission which can no longer be pursued in its straightforward imperial guise. Instead, the liberal project of improvement is now pursued by parties of two very different kinds and with both overlapping and competing visions of what it might involve. It is pursued first, as it was in the colonial period, by significant minorities in the imperial domains themselves, many of whom are also concerned to reaffirm (and thus to reinvent) elements of their own cultural heritage. Like Western colonial officials before them, members of such liberal minorities frequently combine a civilised distaste for the dirty work of governing their less advanced compatriots with a reluctant acknowledgment of its necessity. The positive affirmation of non-Western values sometimes provides them with a local, culturally specific variant of the patronising liberal view that the people of these domains cannot yet be trusted to govern themselves.

The liberal project of improvement is pursued, secondly, by Western states themselves working through a more distant set of indirect means. They operate, in effect, through national and international aid programs that assist, advise and constrain the conduct of post-colonial states, and also through international financial institutions and markets, including the internal markets of multinational corporations.[31] It is tempting to suggest, in fact, that the use of markets to regulate the conduct of states and of governments within them has become increasingly prominent as we move further away from the decolonisations of the mid-twentieth century. In part, this is a consequence of the decline and eventual collapse of the socialist bloc, but it also reflects the concern of the 'international community' to tighten supervision over what it regards as weak and poorly performing states. In

31 Cf Thomas Bierstecker (1995) 'The Triumph of Liberal Ideas in the Developing World', in B. Stallings (ed.) *Global Change, Regional Response* (Cambridge: Cambridge University Press).

liberal eyes, as noted earlier, the market appears to perform a variety of desirable functions: not only in promoting prosperity overall but also in regulating the conduct of states and fostering civilized attitudes and patterns of conduct among both their rulers and inhabitants.

Where it could once rely on colonial forms of indirect rule over the subjects of Western imperial possessions, liberal political reason now has no alternative but to treat those who it sees as most in need of improvement as if they were in fact autonomous agents. Indirect rule within imperial possessions has been superseded by an even less direct form of decentralised rule, in which the inhabitants of post-colonial successor states are governed through sovereign states of their own. There is no reason to suppose that this new form of indirect rule will be any more, or any less, successful than its imperial predecessors in imposing its will on target populations. My aim, as noted earlier, is to focus on the level of design in the modern system of states, not to suggest that the intentions which lie behind this design are likely to be realised.

I conclude by emphasising the fundamentally liberal character of the regime of 'good governance' which is now being promoted by the World Bank and other agencies, both within states and in the international arena. Good governance seems designed to ensure that the freedom of action of governments is severely constrained by both internal and international markets. Yet, as Raj Kumar argues, it is also seen as involving the implementation of basic human rights and democracy – in the sense that the governments of states are expected to be at least minimally responsive to the wishes of their citizens and the citizens in turn are expected to own, or at least to go along with, the policies of their government. Indeed, the language of 'ownership' now plays an important part in development discourse. Joseph Stiglitz, while still vice-president of the World Bank, described the Bank's proposed Comprehensive Development Framework as involving:

> … a new set of relationships, not only between the Bank and the country, but within the country itself … Central is the notion that the country (*not just the government*) must be in the driver's seat'.[32]

The point here is to get the citizens themselves to take responsibility for implementing the conditions imposed by the Bank. As Adam Smith's analysis of market interaction reminds us, empowerment, responsibility and self-control can also serve as instruments of regulation. The promotion of reforms designed to limit the freedom of action of governments, and therefore the ability of citizens to influence their actions, goes hand in hand with the promotion of democracy as a central component of good governance.

I suggested earlier that liberalism is concerned with governing not only the populations of individual states but also the larger population encompassed by the overarching system of states. It addresses the latter task by seeking to regulate both the actions of states and the conduct of the populations under their control. Good governance seems designed to operate at each of these levels.

---

32 J. Stiglitz (1999) 'Towards a new Paradigm for Development', 1998 WIDER Lecture, Helsinki, 7 January, 1999, 22–23 (emphasis added).

Chapter 18
Indigenous Sovereignty

Paul Keal[1*]

In their recent book *International Relations and the Problem of Difference*, Naeem Inayatullah and David Blaney argue that as well as marking the arrival of the modern state system based on the mutual recognition of sovereignty, the Peace of Westphalia postponed dealing with the problem of cultural difference.[2] The more familiar story of Westphalia has been that it established states as the containers of cultural difference. Henceforth the cultural differences between states would not be a problem in their mutual relations so long as there was mutual recognition of and respect for sovereignty. Difference had been displaced from the international 'into the domestic realm'. Westphalia promised greater tolerance between states, but within them it resulted in cultural differences being subjected to political and social forces disrespectful or outright intolerant of diversity. An important result of this was what James Tully calls the 'Empire of Uniformity'. By this he means that 'the language of modern constitutionalism … was designed to exclude or assimilate cultural diversity and justify uniformity.'[3] The recognition of equality and tolerance of difference between states was not matched within them and so Inayatullah and Blaney interpret 'the theory and practice of international society as largely a deferral of genuine recognition, exploration, and engagement of difference'.[4]

Indigenous sovereignty is a concept that challenges the Empire of Uniformity. It calls into question the political and moral legitimacy of states with indigenous citizens and is essential to engaging with difference at both the domestic and international levels. It is inextricably linked to 'indigeneity' and the rights necessary to define and reproduce it. As well as this it unsettles orthodox understandings of sovereignty. In common with Innaytullah and Blaney, Karena Shaw argues that the Hobbesian conception of sovereignty embedded in political theory and the discourse of international relations is one that both precludes questioning its premises and marginalises indigenous peoples and other minorities as 'different'. Hobbes' conception of sovereignty established it as a basis for legitimate authority that cannot be fundamentally questioned. If it were seriously questioned, a crucial

1 * I wish thank Tim Rowse and Greg Fry for their invaluable comments on an earlier draft of this chapter.

2 Naeem Inayatullah and David L. Blaney (2004) *International Relations and the Problem of Difference* (New York and London: Routledge), 22.

3 James Tully (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press), 58.

4 Inayatullah and Blaney, *International Relations and the Problem of Difference*, 44.

premise in the legitimation of state authority would be undermined.[5] Nevertheless, this is precisely the aim of some versions of indigenous sovereignty. Contrary to established understandings of sovereignty, which regard it as indivisible, strong versions of indigenous sovereignty assert that it is divisible and look forward to a world of 'multiple and overlapping' sovereignties.

This chapter addresses these themes in four sections. The first considers the problem of defining indigenous peoples and argues that this is best done in relation to the emergence of a global movement of indigenous peoples, which Ronald Niezen calls 'indigenism'.[6] The second section identifies different ways in which indigenous sovereignty has been used and is especially interested in the argument that the discourse of sovereignty should be rejected by indigenous peoples for being alien to indigenous concepts of power and authority. Thirdly, the argument that sovereignty is indivisible in international law is discussed and rejected. The final section deals with the relevance of indigenous sovereignty for central government and suggests ways in which indigenous aims might be met.

Indigenous peoples and 'international indigenism'

The definition of indigenous peoples is a vexed question about which there is no agreement. Nevertheless, the most widely cited definition has been the one expressed in 1986 by José Matinez Cobo:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of society now prevailing in territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations of their ancestral territories, and their ethnic identity, the basis of their continued existence as peoples, in accordance with their cultural patterns, social institutions and legal systems.[7]

This definition refers to four inter-related factors common to most definitions of what it means to be indigenous: a past that involved subjection to colonial settlement, historical continuity with pre-invasion or pre-colonial societies, an identity that is distinct from the dominant society with which they co-exist, and a concern with the preservation and replication of culture. Neizen rightly observes that while this is 'comprehensive and durable … it does not apply unfailingly to all situations in which people claim indigenous status and protections.'[8] Colonial settlement is generally interpreted as European settlement. Consequently, several Asian states that

5 Karena Shaw (2004) 'Knowledge, Foundations, Politics', *International Studies Review* 6(4), 10.

6 Ronald Niezen (2003) *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley CA: University of California Press), 3.

7 José Martinez Cobo (1986/1987) *Study of the Problem against Indigenous Populations*, vol. V, *Conclusions, Proposals and Recommendations*, UN Doc E/CN 4?Sub 2, Add 4, paras 379 and 381.

8 Niezen, *The Origins of Indigenism*, 20.

did not experience substantial European settlement have argued 'that the concept of "indigenous peoples" is so integral to the common experience of European colonial settlement as to be fundamentally inapplicable to' them.[9] Historical continuity is similarly problematic. While there are many places where the inhabitants of lands subjected to colonisation clearly were the original inhabitants, in other places they had themselves been settlers. In short, they were not the original inhabitants. Defining indigenous peoples in terms of who came first is one reason why India and China insist that the concept does not apply within their borders. As far as India is concerned, 'centuries of migration, absorption, and differentiation [have made it] … impossible to say who came first'.[10] Not only that, Kingsbury makes the important point that when 'indigenousness of "sons of the soil" becomes the basis of legitimation for a politically or militarily dominant group [as in Fiji and Malaysia], restraints on abuses of power can be difficult to maintain.'[11]

Having recognised these limitations, the focus of this chapter is peoples who were subjected to colonisation, primarily by Europeans. For the purpose of understanding notions of indigenous sovereignty it is helpful to start from the common experiences that have caused a very diverse range of peoples to cohere into an international movement seeking rights. Professor Mick Dodson, who was then Aboriginal and Torres Strait Islander Social Justice Commissioner, recalls the first time he attended a session of the UN Working Group on Indigenous Populations. Surrounded by people from around the world he found they shared the same stories and sufferings.

> We were all part of a world community of Indigenous peoples spanning the planet; experiencing the same problems and struggling against the same alienation, marginalisation and sense of powerlessness. We had gathered there united by our shared frustration with the dominant systems in our own countries and their consistent failure to deliver justice. We were all looking for, and demanding, justice from a higher authority.[12]

As Niezen puts it: 'A common experience of those who identify themselves as indigenous … is a sense of illegitimate, meaningless, and dishonorable suffering.'[13]Out of the experience of sharing a common sense of frustration, of having been marginalised politically, legally and materially, indigenous peoples cohered into a global movement. Niezen calls this movement 'indigenism' and convincingly argues that it 'has the potential to influence the way states manage their affairs and even to reconfigure the usual alignments of nationalism and state sovereignty'.[14]

The sense of indigenous identity that animates the international indigenous movement or indigenism issues from the 'the logic of conquest and colonialism' and similarities in the treatment of indigenous peoples by settler states. Niezen identifies

---

9 Benedict Kingsbury (1999) 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in J.R. Bauer and D.A. Bell (eds) *The East Asia Challenge for Human Rights* (Cambridge: Cambridge University Press), 340.

10 *Ibid.*, 352.

11 *Ibid*., 353.

12 Quoted by Niezen, *The Origins of Indigenism*, 47.

13 *Ibid*., 13.

14 *Ibid*., 3.

three crucial similarities: subjection to compulsory assimilative state education, loss of subsistence, and state abrogation of treaties.[15] Taking these in turn, assimilative state education refers to the practice of removing indigenous children from their culture and subjecting them to social control. It means taking their culture away from them. Second, indigenous peoples have been denied subsistence on land, which they regard as 'the most important source of autonomy and power'. Last, treaties, agreements and promises meant to regulate relations between indigenous peoples and settlers are broken resulting in the reinforcement of indigenous identity.

The thrust of this section has been that indigenous identity, what it is to be an indigenous person, is best understood in terms of the common experiences arising from colonisation, which have brought diverse indigenous peoples together in a global movement of resistance seeking justice. The importance of this for understanding the concept of indigenous sovereignty is, first, that the problem of indigenous sovereignty arises from colonisation. Second, indigenous claims to sovereignty begin from the premise that the legitimacy of state sovereignty should not be assumed and, third, recognition of indigenous sovereignty is fundamental to identity incorporating genuine difference. The next section concerns different meanings given to indigenous sovereignty.

The meaning of 'indigenous sovereignty'

'Indigenous sovereignty' has no fixed definition and is connected not only to rights over territory but also to the foundations of identity. The meanings discussed range from the position that indigenous peoples had sovereignty prior to the arrival of settlers and never lost it, to the rejection of the language of sovereignty as something that ensnares indigenous peoples in structures of government inimical to indigenous ways of life and notions of power. My examples are drawn mainly from the settler states of Australia, New Zealand and Canada, which, to reiterate an earlier point, are not necessarily representative of all states containing indigenous peoples within their borders.

For many indigenous people, the political problem and outstanding justice issue concerning sovereignty is the failure of non-indigenous people to recognise their prior sovereignty. As the Australian activist Michael Mansell puts it, Aboriginal Australians 'did not consent to the taking of our land, nor to the establishment of the nation of Australia on our country – our sovereign rights as a people remain intact'.[16] Or in the words two indigenous Canadians: 'It is a matter of historical record that before the arrival of Europeans, First Nations possessed and exercised

15 *Ibid*., 87–91.

16 Michael Mansell (1998) 'Back to Basics – Aboriginal Sovereignty', available from http://www.faira.org.au?Irq?archives?199809/stories/back-to basics.html,.2. See also Larisa Behrendt (2003) *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press), 95. 'The notion of Indigenous People as a sovereign people derives from the fact that indigenous people have never ceded their land and continue to feel separate, both in identity and the way they are treated differently from other Australians'.

absolute sovereignty over what is called the North American continent'.[17] The First Nations of Canada did not see the various treaties negotiated between them and Europeans as ones that surrendered or diminished their sovereignty.[18] As far as First Nations were concerned, treaties were negotiated between sovereign nations. Similarly in Aotearoa New Zealand the Māori did not perceive the Treaty of Waitangi as in any way compromising their sovereignty.[19] In regard to both Canada and New Zealand, treaties can be read as recognition that there was indigenous sovereignty to be alienated. Indeed, one reading of the Treaty of Waitangi interprets it as having recognised Māori sovereignty in order to enable it to be alienated. In the case of Australia, there was no treaty and the problem of whether its Aboriginal peoples had sovereign rights was dealt with by the fiction of *terra nullius*, which asserted that the country was unoccupied and open to settlement under the sovereignty of the British Crown. In part, the doctrine of *terra nullius* was a denial of the inhabitants of such territory having any political and social organisation recognised by Europeans.

The doctrine was overturned by the 1992 Mabo case heard before the High Court. It established that while the sovereignty of the Commonwealth of Australia could not be challenged it did not extinguish native title to unalienated Crown lands. Aboriginal Australians could make claims to unalienated Crown lands but not to sovereignty. In commenting on the outcome of the case, the social justice activist and lawyer Frank Brennan SJ accepted that the sovereignty of the Commonwealth was not open to challenge. He went on to articulate two points about aboriginal sovereignty. The first was that in the case of Australia, Aboriginal sovereignty could only ever be a political claim; one that aimed at establishing 'a basis on which to exercise power over land and resources and increase control [by Aboriginal people] of their own lives as individuals and communities.'[20] Aboriginal sovereignty, he asserted, is about accepting that there is 'a sovereign people within the nation'.[21] Second, if we accept Rousseau's theory of popular sovereignty then some kind of sovereignty could exist within indigenous communities. Brennan argues that sovereignty, as it is normally understood, makes sense only in relation to a nation that has 'its own land base, economic resources and social structure', which is manifestly not a position enjoyed by many indigenous peoples in Australia or elsewhere at this juncture. For Brennan, sovereignty is linked to land and since many Aboriginal peoples no longer have any

17 Georges Erasmus and Joe Sanders, (2002) 'Canadian History: An Aboriginal Perspective' in John Bird, Lorraine land and Murray Macadam (eds) *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto and Vancouver: Irwin Publishing), 3.

18 *Ibid*., 7.

19 See Claudia Orange (2001) *The Story of a Treaty* (Auckland: Bridget Williams); John Pocock (2000) 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Māori' in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press); Paul Keal (2003) *European Conquest and the Rights of Indigenous Peoples: The Backwardness of International Society* (Cambridge: Cambridge University Press), 148–151.

20 Frank Brennan (1995) *One Land One Nation: Mabo – Towards 2001* (St Lucia: University of Queensland Press), 127.

21 *Ibid*.

hope of being able to control the lands of their ancestral origin, they cannot hope to have sovereignty as it is normally understood in politics and law. Consequently, he favoured self-determination as a goal more likely to be achieved.[22]

Dianne Otto,[23] also a lawyer, works from a critical perspective framed by post-colonial studies. She disagrees with self-determination being a sufficient means to recover indigenous rights and more particularly, identity. Her argument is that without a concept of indigenous sovereignty, which has so far not been part of legal theory there can be no satisfactory 'recognition of post-colonial indigenous identity'. Self-determination within the structures of sovereign states is not an adequate means by which indigenous peoples can recover authorship of the identities taken from them as part of colonial domination. Only indigenous sovereignty will achieve this end. By indigenous sovereignty she 'means the power for indigenous communities to imagine themselves … [and] to be creators of themselves as subjects rather than objects of law and history.' Indigenous sovereignty would enable 'the reconceptualisation of Aboriginal identities as bearers of rights, obligations and unique nationhood, and as agents of their own destinies'.

Her account of sovereignty tied to particular indigenous cultural identities is a radical departure from the orthodox understanding of it. Her case for reconceptualising sovereignty is that the power to define, shape and maintain identity is fundamental to all indigenous rights. Sovereignty is constitutive of identity and consequently if indigenous rights are to be fully realised sovereignty must be invested in indigenous peoples. She argues not for a new single definition of sovereignty, but instead for different layers of sovereignty defining different areas of competence – not in competition with each other but as interacting parts of a whole. Her conception is one in which sovereignty does not belong to the state alone. It has sovereignty over some things but not others. Indigenous peoples would have control over legal and political systems that affect them, but would exercise such control within the boundaries of the state. For indigenous peoples she is 'laying claim to an area of jurisdiction that previously belonged to the state' – not to all areas of jurisdiction.[24] In some matters it would free indigenous peoples from the jurisdiction of the state but not in others. In the final analysis, indigenous sovereignty is to be realised only within the boundaries and political structures of sovereign territorial states. The state retains control over external affairs and those matters that affect all groups within it. In relations between these groups, its role is that of mediator and arbiter. This involves not a radical departure from the traditional role of the democratic state but a transfer of some of its power to the hitherto dispossessed, which is perhaps the most threatening thing of all for state leaders.

Another use of indigenous sovereignty is suggested by Michael Mansell who himself uses it discursively as an instrument of struggle. His starting point, previously mentioned, is that indigenous Australians never lost the sovereignty they had prior to occupation. For him the 'essential point' about sovereignty is that it 'gives us a power

22 *Ibid*., 159–160.

23 Dianne Otto (1995) 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia', *Syracuse Journal of International Law and Commerce* 21, 701–739.

24 *Ibid.*, 736.

base from which to dictate the agenda. It provides a focus on the fundamental rights of a people: sovereignty provides the leverage necessary to demand action from governments'.[25] Noel Pearson, another Aboriginal leader, disagrees with Mansell. In common with Frank Brennan, Pearson thinks the language of sovereignty is more likely to hinder than help. To his mind, there 'are a vast number of fundamental problems' inherent in the idea that Aboriginal people were sovereign and still have that sovereignty. He asks:

> 'Does sovereignty inhere in Aboriginal groups at the national level or does it exist at the local level? Does the concept of an Aboriginal Nation have roots in the pre-European past?' He speculates that it may in fact be difficult to sustain the argument that there was an Aboriginal nation prior to European invasion.[26]

Pearson accepts the possibility of 'local indigenous sovereignty' existing 'internally within a nation-state' but has serious doubts about whether the concept of prior sovereignty can be expressed in terms of the concept of sovereignty inscribed in international law.[27] He suggests 'that the concept of sovereignty developed in western legal tradition to describe nation states is artificial if applied to the Aboriginal relationship to land which is at the core of the indigenous domain'. In essence he is concerned that 'advocacy of the sovereignty agenda reduces the gains the [indigenous] people could make via appropriate pragmatism'.[28] Corntassel and Primeau have similarly thought that '[c]oopting sovereignty to fit indigenous perspectives of autonomous freedom has done far more harm than good.'[29]

Far from being sceptical in this way about the notion of sovereignty, Larissa Behrendt sees it as crucial to 'the restructuring of the relationship between Indigenous and non-Indigenous Australia.' She argues 'that the 'recognition of sovereignty' is linked to the recognition of the uniqueness of individual identity and history'.[30] By implication the failure to recognise sovereignty has resulted and will continue to result in the denial of a unique indigenous identity. For Behrendt, recognition of sovereignty for indigenous peoples is 'a crucial starting point for the achievement of rights', including the central right of self-determination.[31] Unlike Pearson she does not see the language of sovereignty as an impediment to advancing indigenous rights. She cites with approval the opinion of the National Aboriginal Health Organisation about the value of the concept:

---

25 Michael Mansell (1998) 'Back to Basics – Aboriginal Sovereignty', available from http://www.faira.org.au?Irq?archives?199809/stories/back-to basics.html, 2.

26 Noel Pearson (1993) 'Reconciliation: To Be or Not To Be – Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation?', *Aboriginal Law Bulletin* 3(61), 14.

27 *Ibid*., 15.

28 *Ibid*., 16.

29 Jeff J. Corntassel and Tomas Hopkins Primeau (1995) 'Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"', *Human Rights Quarterly* 17(2), 363.

30 Larissa Behrendt (2003) *Achieving Social Justice* (Sydney: Federation Press), 96.

31 *Ibid*., 99.

> 'Sovereignty is not a vague legal concept; sovereignty is a practical and achievable goal and, for Aboriginal people, can be defined as recognition of our Aboriginal rights. Sovereignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action.'[32]

The object of recognition is neither statehood nor to threaten 'the sovereignty of the Australian state' but to achieve 'a fundamentally different relationship'.[33]

On the basis of the recognition of sovereignty being an essential step to self-determination Behrendt identifies five clusters of issues that reveal the content of indigenous sovereignty and self-determination. These are:

1. the recognition of past injustices, in which she includes 'the failure to recognise Indigenous sovereignty and laws';
2. autonomy and decision-making powers, in relation to which the recognition of sovereign is related to control over 'the decision-making that affects people's day-to-day lives';
3. property rights and compensation;
4. the protection of cultural practices and customary laws; and finally,
5. the equal protection of rights under international law.

'What emerges is the idea of the recognition of sovereignty as an expression of distinct identity and a starting point for the exercise of self-determination as a way achieving empowerment, autonomy and equality.'[34]

Last among the perspectives on indigenous sovereignty being canvassed are those that reject the language of sovereignty as being simply 'inappropriate'. Precisely because indigenous sovereignty is so often presented as something to be realised only within the territorial boundaries and political institutions of the states that have subjugated them, some indigenous thinkers reject the discourse of sovereignty. Perhaps the most forceful among these is Taiaiake Alfred, who argues that 'sovereignty is an exclusionary concept rooted in an adversarial and coercive notion of power'[35] and is an inappropriate model for indigenous governance. He writes that 'Indigenous peoples can never match the awesome coercive force of the state; so long as sovereignty remains the goal of indigenous politics, therefore, native communities will occupy a dependent and reactionary position relative to the state. Acceptance of "Aboriginal rights" in the context of state sovereignty represents the culmination of white society's efforts to assimilate indigenous peoples.' His view is that colonial states have framed indigenous peoples 'in the past' in ways that have enabled them to ignore 'the fact of contemporary indigenous peoples' nationhood.' Thus:

---

32 *Ibid*., 100.

33 *Ibid*., 103.

34 *Ibid*., 106–115.

35 Taiaiake Alfred (1999) *Peace, Power, Righteousness: An Indigenous Manifesto* (Ontario: Oxford University Press), 59.

> Native people imperil themselves by accepting formulations of their own identities and rights that prevent them from transcending the past. The state relegates indigenous peoples' rights to the past, and constrains the development of their societies by allowing only those activities that support its own necessary illusion: that indigenous peoples do not present a serious challenge to its legitimacy.

This leads to the further arguments first, that 'Native leaders have a responsibility to expose the truth and debunk the imperial pretence that supports the doctrine of state sovereignty and white society's dominion over indigenous nations and their lands.' And second, that basing claims to legitimacy 'on the rule of law is hypocritical and anti-historic.' To Alfred's mind '[t]here is no moral justification for state sovereignty'.[36]

By calling sovereignty an 'exclusionary concept', he draws attention to the fact that it confers property rights on some people and not others; and that it excludes some from the rights enjoyed by others. It is coercive because it is inextricably linked to the practices of colonisation and colonialism, which means it has served to justify dispossessing indigenous peoples of their lands and taking their children away from them. That it continues dependence on the state suggests that sovereignty is not imaginable outside state structures, that it involves structures of domination, including the imposition of non-indigenous systems of justice and policing, and that it is not about spiritual connection with land.

Rather than giving indigenous people control over their lives the quest for sovereignty might simply result in placing structures of domination into the hands of indigenous administrators. In support of this he cites two Canadian scholars who argue that:

> … by adopting the European-Western ideology of sovereignty, the current generation of Indian leaders is buttressing the imposed alien authority structures within its communities, and is legitimizing the associated hierarchy comprised of indigenous political and bureaucratic elites. This endorsement of hierarchical authority and a ruling entity constitutes a complete rupture with traditional indigenous principles.[37]

Consequently Alfred calls for a modified concept of sovereignty that will be consistent with indigenous understandings of power and authority.[38]

The differences between Indigenous and European-Western understandings of power, to which Alfred refers, are evident in attitudes to nature and real property. According to Alfred and other indigenous leaders, power in the Western sense derives from the alienation of nature. Non-indigenous peoples seek to dominate nature and treat land as property. In contrast, indigenous peoples typically see themselves not as owners of land but rather as stewards with responsibility for its care and preservation. Power is, in Western thought, connected with the possession of property and this

---

36 *Ibid*. See also Duncan Ivison who argues that 'Western discourses of rights and sovereignty have been used to dominate indigenous peoples as much as to liberate them'. Duncan Ivison (2002) *Postcolonial Liberalism* (Cambridge: Cambridge University Press), 164.

37 *Ibid*., 56.

38 *Ibid*., 57

is in turn closely related to sovereignty. Indeed, the conjunction of discourses of property and sovereignty has been a vital element in the dispossession of indigenous peoples that has brought them to their current condition.

Dale Turner, also an indigenous scholar, describes the Western European discourses of rights and sovereignty as 'the most devastating landscapes that have been forced upon Aboriginal peoples'. 'These intellectual traditions have created discourses on property, ethics, political sovereignty, and justice that have subjugated, distorted, and marginalized Aboriginal ways of thinking'.[39] Turner asserts that in the history of indigenous contact with settler societies very little, if any, attention has been given to Aboriginal conceptions of sovereignty. 'Aboriginal peoples have had to use Western European discourses of rights and sovereignty to explain their place in the world'.[40] They have, in other words, been denied the capacity to talk about this in their own terms, which would include a very different view of sovereignty.

It is evident that Turner, like Alfred wants to reject European notions of sovereignty because of the role they have had in the dispossession and marginalising of indigenous peoples and because they would not provide for good indigenous governance. At the heart of each of their conceptions of the world is concern with a form of relationship to land that is not part of the mental landscape of orthodox understandings of sovereignty. In contrast to this, Aboriginal or indigenous sovereignty refers to 'the unique relationship that Aboriginal peoples have to their territories.' The question is how this relationship can find political and legal expression in states in which sovereignty has meant dispossession and the denial of indigenous rights?

To summarise, while 'indigenous sovereignty' is regarded by some theorists as crucial to recognition of a distinct indigenous identity and rights, other more radical theorists, such as Alfred and Turner, regard the language of sovereignty as alien to indigenous concepts of power, authority and connections with land. For them engaging in discourses of sovereignty is more likely to result in the destruction of distinct identity than the recognition of it. While it is clear that indigenous sovereignty is closely connected with the recovery of control over indigenous identity and the reproduction of indigenous cultures, it is important to note that none of the writers mentioned above advocate statehood or secession for indigenous peoples. Notwithstanding this the very idea of indigenous sovereignty begs the question of whether state sovereignty is divisible.

---

39 Dale Turner (2001) 'Vision: Toward an Understanding of Aboriginal Sovereignty', in Ronald Beiner and Wayne Norman (eds) *Canadian Political Philosophy Contemporary Reflections* (Toronto: Oxford University Press), 325. Turner explains that he uses 'the concept of Aboriginal, or tribal, sovereignty ... to capture, albeit crudely, the unique relationship that Aboriginal peoples have to their territories.' He emphasises that these are conceptions articulated by indigenous peoples themselves. 'For example, the Eeyouch of Eeyou Astchee (Cree of Northern Quebec) state that for countless generations we have carefully looked after the land and all the creatures that inhabit it. Central to our values has always been the idea of sharing', 329.

40 *Ibid*., 327.

Is sovereignty divisible in international law?

Arguably the concept of indigenous sovereignty conflicts, fundamentally, with how sovereignty is understood in international law. The deep connection between sovereignty and statehood has ensured that indigenous sovereignty is not recognised in international law. Sovereignty is inevitably linked to statehood and to the extent that indigenous sovereignty challenges the political and moral legitimacy of the state, it is assumed that it is about statehood and ultimately secession. Most states remain very sensitive to the use of 'sovereignty' by groups seeking to establish political and administrative autonomy within state structures because it suggests that sovereignty might be divisible. An example of this is the reaction of the Government of Papua New Guinea to the Second Draft of the Bougainville Constitution dated 25 March 2003.

At the same time as acknowledging that the Independent State of Papua New Guinea has absolute sovereignty, this document claims self-determination and sovereignty for Bougainvillians as a nation within a nation. Opposing this approach, the Attorney General's Taskforce on the Draft argues that sovereignty is indivisible; that there 'there is only one Sovereignty, not several.' Accordingly it recommended removal of the phrase '*the sovereignty of the People*' contained in the Preamble.[41] The Report identifies particular legislative powers of the state that it regards as 'irreducible and indivestable core of state sovereignty powers (IAICOSS powers). The first of these is the essence of sovereignty powers.' According to the Report 'The power in this category defines what Sovereignty means. There is only one power in this category and it is the power to legislate.'[42] It acknowledges that there are some shareable legislative powers but concludes these are ones that:

> … should not be made exclusive powers of the Bougainville legislature. To do so would be tantamount to acknowledging the position of an independent legislature with a separate sovereignty.[43]

The Report concludes its analysis of the Draft Constitution with the emotive plea that allowing it 'to be formalized in its present form and content is to drive the last nail into the coffin of the Independent State of Papua New Guinea.'[44] And this is reinforced in Appendix B where the 'principle of one State and one sovereignty' is proclaimed as 'the foundational principle of any modern state.'

Without this principle, there is no collective legal entity as such to take responsibility for the protection and welfare of the society as a whole. Instead, there is likely to be nations of tribes people based on linguistic groups, but not one nation of tribes.[45] In response the Taskforce of the Bougainville Constitutional Commission Technical Team sets out reasons for why the IAICOSS principle 'is completely

41 Independent State of Papua New Guinea (2003) 'Report of The Attorney General's Taskforce on the Second Draft of Bougainville Constitution', 31 October, 12.

42 *Ibid*., 87.

43 *Ibid*., 88.

44 *Ibid*., 93.

45 *Ibid*., 106.

contrary to the general directions of international law, and associated development of constitutional law, world wide.'[46] This opinion is supported by distinguished constitutional lawyer Professor Yash Ghai, who goes further by stating that in 'forty years of teaching and researching constitutional law' he has 'not come across' the IAICOSS principle. He goes on to argue that in practice sovereignty is divisible. In support of this he cites the case of the European Union. The states that joined it have 'given up large elements of their state sovereignty over economy, immigration, currency, defence and so on. They are', he continues, 'now on the verge of giving up further sovereignty as the new EU Constitution is about to be adopted.' What he goes on to say bears upon the idea of multiple and overlapping sovereignties and is apposite to the discussion of indigenous sovereignty.

Domestically, sovereignty has undergone greater attrition. The distinction between unitary, decentralised and devolved states has been blurred. The concept of subsidiarity, which is gaining increasing acceptance, means that in a state, state power should be vested in the lowest level of government which is capable of discharging it effectively. Under this concept, a great deal of power is now being transferred to local levels. Also state structures become very complex, especially in multi-ethnic states and states coming out of post-conflict situations. Special forms of representation, autonomy – general or asymmetrical have become part of constitutions. State sovereignty gets diffused, shared, parcelled, so that increasing full state sovereignty can be exercised only through the co-operation of different institutions and groups. The sum total of powers exercised by state organs at different levels is sovereignty but it has become greatly transformed in responding to pressures from above and compulsions from below. It is unlikely that a state could survive today if its sovereignty was not sufficiently flexible to accommodate these pressures and compulsions.[47]

The implication of this is that sovereignty is now an open or permissive concept. If the Task Force and Professor Ghai are correct, sovereignty is divisible in ways consistent with international law and multiple and overlapping sovereignties are possible within the overarching framework of state sovereignty. What indigenous peoples and other minorities want is precisely the right to a distinct identity, the right to be different and yet part of a whole comprised of or comprising different identities, with each able to exercise sovereignty and self-determination over the cultural practices and the reproduction of those practices. If sovereignty is divisible, then the concept of indigenous sovereignty has some potentially important implications for the structures and practices of central government. The next and final section identifies three such implications that require re-conceptualising relations within states and ultimately the nature of state sovereignty.

---

46 Bougainville Constitutional Commission Technical Team. (2003) 'Opinion on Certain Issues about Validity of Constitutional Laws Implementing the Bougainville Peace Agreement Raised in the Report of the Attorney General's Task Force on the 2nd Draft of the Bougainville Constitution', 4 December, 5.

47 Yash Gha (2003) Personal correspondence from Professor Yash Ghai to Mr Anthony J. Reagan, 3 December.

What relevance does the concept have for central government?

In the first place, Taiaiake Alfred forcefully articulates the indigenous challenge to the political authority and moral legitimacy of the state.

> We need to realize that Western ideas and institutions can do nothing to ease the pain of colonization and return us to harmony, balance, and peaceful coexistence …. We must deconstruct the notion of state power to allow people to see that the settler has no right to determine indigenous futures.[48]

Of importance, in relation to this concept, is Rousseau's theory of popular sovereignty in which 'the object of the state, if not corrupted by tyrants or selfish sectional interests was a good in which all its members might participate on terms of justice and equality.'[49] For many indigenous peoples the problem is that they have been unable to participate in the sovereign state on these terms and that it has overridden their interests in favour of those of a morally, if not politically, illegitimate settler society.

Relevant to this is the meaning given to the term 'indigeneity' by Maaka and Fleras. For them it refers to the discourse of political claims and goals pressed by indigenous peoples. They argue that indigeneity:

> Challenges the paramountcy of the state as final arbiter of jurisdictional control and absolute authority.

Further:

> [i]ndigeneity as principle and practice is ultimately concerned with reshaping the structure of indigenous peoples – state relations in the hope of crafting a legitimate political order where patterns of belonging can be explored. Claims to indigenous sovereignty are a central element of the discourse. Obsolete versions of absolute sovereignty are being discarded for indigenous equivalents that emphasise an autonomy both relative and relational, yet non-coercive.[50]

Second, the state has typically been conceptualised as the container of a single community or nation, which is implicit in the idea of the nation-state. The presence of indigenous and other minority peoples within states points to the state as a container of not one but several communities. In Canada in particular, First Nation peoples insist that negotiation with the dominant settler society should be on a *nation* to *nation* basis, signifying in part, 'a special relationship with the state'. First Nations claim that the relationship between them and the state is properly one between nations. This approach in itself implies that each nation possesses some

48 Alfred, *Peace, Power, Righteousness*, 47.

49 Stanley Benn (1967) 'Sovereignty', in Paul Edwards (ed.) *The Encyclopedia of Philosophy* (New York and London: Collier Macmillan), vol. 7, 504.

50 Roger Maaka and Augie Fleras (2000) 'Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa', in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press), 92–93.

measure of sovereignty. The idea of states being multi-national leads in turn to that of 'multiple and overlapping sovereignties'. I began by referring to Innaytullah and Blaney's argument that Westphalia was a way of dealing with difference which resulted in the Empire of Uniformity within states. As a means to dealing with difference within states and re-imagining sovereignty in a way 'that works against the 'empire of uniformity' ', they propose Benedict Anderson's concept, of 'multiple and overlapping sovereignties', which they say is suggestive of a 'patchwork of identities and authorities'.[51]

In their analysis sovereignty is a 'property right of rulers'.[52] They argue that the idea of sovereignty is used to 'divide space and bundle its varied meanings into discrete, homogenous, and absolute cultural units. Thus sovereignty is often treated as an answer to the problem of adjudicating competing claims to land or territory.'[53] If, however, there is to be any hope of resolving the conflicts created by difference within states a more imaginative approach is needed. Innaytullah and Blaney cite Beruit, Sarajevo and Jerusalem as:

> … cities that have been torn by mutually excluding claims made by opposing social groups. Each of the competing parties claims the right to inhabit the same land, use it as an economic resource, and derive their identities and history from that use and habitation.'[54]

Indigenous peoples today are not in the situation that the citizens of those cities have had to face. What is similar is that indigenous claims also involve inhabiting and sharing the same land. In both cases, 'a modern conception of landed property/ sovereignty' is an obstacle to the resolution of conflict. Like so many others, Innaytullah and Blaney overlook indigenous peoples. Nevertheless, their solution to mutually excluding claims has relevance for indigenous sovereignty. 'No longer treated as a homogenous substance, sovereignty might be divided and distributed to create complex jurisdictional arrangements involving settlements that must be continuously renegotiated and as well as uncertainties that must be navigated by dialogue.'[55]

As the means to re-imagine sovereignty 'as a homogenous substance' and of escaping the Empire of Uniformity, they adopt the idea of multiple and overlapping sovereignties. Similarly Maaka and Fleras write about 'nested' sovereignty, which encapsulates the idea that 'a people retain the right of self-determination over those jurisdictions of direct relevance to them but in conjunction with the legitimate concerns of other jurisdictions.'[56] Regardless of how they might differ, the ideas of 'multiple and overlapping sovereignties' and 'nested sovereignty' both have serious implications for how we imagine political community within the state in at least two regards: just constitutional arrangements within states and the form of democracy appropriate to them.

---

51 Innayatullah and Blaney (2004) *The Problem of Difference*, 212.
52 *Ibid*., 188.
53 *Ibid*.,191.
54 *Ibid*., 204.
55 *Ibid*., 213.
56 Maaka and Fleras, 'Engaging with Indigeneity', 94.

James Tully has written extensively about the law and institutions modern societies need if they are to allow for 'forms of self-government appropriate to the recognition of cultural diversity'. He calls for constitutions that recognise cultural diversity by accommodating it. For him, a constitution is a 'form of activity, an intercultural dialogue in which the culturally diverse citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.'[57] Mutual recognition refers to the requirement that a just form of constitution must 'give recognition to the legitimate demands of diverse cultures in a manner that renders everyone their due'.[58] Consent is the principle that a constitution should be an expression of popular sovereignty; and cultural continuity requires 'respect for the continuity of cultures of self-rule.'[59] This leads to the question of what form of government would be most likely to give the members of multi-national states the freedom 'to change the rules of mutual recognition and association from time to time as their identities change.'[60] For Tully and others, it would be a multinational democracy based on dialogue and a dialogic ethic that respects difference. His proposals has much in common with Andrew Linklater's vision of the post-Westphalian state in which 'more complex associations of universality and difference can be developed by breaking the nexus between sovereignty, territoriality, and citizenship and by promoting wider communities of discourse.'[61] Tully and Linklater share the goal of wanting to free peoples from structures of domination. The lines of argument pursued by both would require changing arrangements within states in ways that would necessarily require re-imagining sovereignty.

Third, it should be abundantly clear that indigenous sovereignty is inextricably bound-up with identity and indigeneity. Part of what it is to be indigenous is to have a special connection with land. From this assertion, it follows that claims to indigenous sovereignty are, as well as anything else, claims that support the case for land rights or access to land. This poses another challenge for states that are either unwilling to support indigenous land rights or seek to limit the nature of claims made against them. As long as the question of land rights is not resolved the moral legitimacy of the state may be questioned and this in turn may affect the standing particular states have in the international community.

To conclude, indigenous sovereignty requires revision of the Westphalian conception of the sovereign state. It is a concept inextricably connected to the expression of identity and the implications of this will vary according to whether a thin or rather thick version of identity is involved. An example of a thin version of identity would be an individual of indigenous descent who identifies herself as

---

57 Tully, *Strange Multiplicity*, 30.

58 *Ibid*., 6.

59 *Ibid*., see Chapter 5.

60 James Tully (2001) 'Introduction', in A.-G. Gagnon and James Tully (eds) *Multinational Democracies* (Cambridge: Cambridge University Press), 5.

61 Andrew Linklater (1998) *The Transformation of Political Community*: *Ethical Foundations of the Post-Wesphalian Community* (Cambridge: Polity Press), 60.

indigenous on a census form but lives within state cultural and political structures, supportive of but not active in the reproduction of indigenous culture. In contrast, a thick sense of identity, of which Alfred and Turner are representative, involves a much more active participation in recovering and reproducing culture. It demands a more serious engagement with difference and the establishment of multiple and overlapping sovereignties, with indigenous peoples having the right to sovereignty over matters crucial to their identity.

One important question this raises is the extent to which indigenous sovereignty can or already does find expression in public policy. It is not my purpose in this chapter to empirically establish this but there are cases that support, at least *prima facie* the conclusion that indigenous sovereignty already has been incorporated in meaningful ways into public policy. The clearest example is perhaps Aoteoroa New Zealand, which now accepts a dual identity and in which there are shared and overlapping areas of sovereignty. How states accommodate indigenous identities and deal with the historic denial of indigenous sovereignty is vital to the future, not only of indigenous peoples and the survival of indigenous cultures, but also the political and moral legitimacy of those states. The common experiences which have animated indigenism will not be redressed by states unwilling to revise the Westphalian conception of the state.

Chapter 19

Civil Society and Sovereignty in a Post-Statist Circumstance

Jan Aart Scholte

Modern political thought has normally associated sovereignty with the state. Long-standing so-called 'Westphalian' assumptions have placed sovereignty – the locus of final political authority – in country governments. As other chapters in this volume have attested, the Westphalian story has taken many forms; however, all versions agree that sovereignty is vested, in one or the other fashion, in the state. Nor is sovereignty on the modern account to be found anywhere else, such as the religious order or the market. In the Westphalian model, unitary territorial national states have absolute, unilateral, comprehensive, supreme control over their designated jurisdiction.

This modern conception had broad correspondence to geopolitical practices in the 300 years following the Peace of Westphalia in 1648. During this period governance – the formulation, implementation, monitoring and enforcement of societal rules – was in effect equivalent to country government. First in Europe and gradually across the rest of the planet, the functions of governance came to be executed more or less wholly and solely through the state (including colonial administrations). In this sense, one could speak of a *statist* mode of governance with a global reach by the early twentieth century.

In contrast, governance over the past half-century has acquired a decidedly post-statist character. As this chapter will repeatedly emphasise, the state remains a crucial site of public regulation in this post-Westphalian condition. However, the construction and administration of societal rules is now also undertaken at multiple other sites besides the state. Extensive governance today transpires as well through suprastate institutions on regional and global scales, through transborder links between substate authorities in provincial and municipal spheres, and through a host of private regulatory mechanisms. In addition, substantial transgovernmental networks have developed a certain dynamic of their own as they link middle-ranking and senior state officials across the world in areas such as financial, judicial and military affairs. This post-statist mode of governance implies different constructions of sovereignty, if indeed the notion of a site of final societal authority remains applicable at all. Contemporary governance is distinguished by what could be termed 'polycentrism', where rules to manage collective problems come from many places at once.

Civil society activities, too, have adjusted to post-statist, polycentric circumstances. Under the Westphalian order civil society – the political associational life of citizens

– was oriented to the state and its claims to sovereign authority. However, the move from statist to polycentric governance has brought significant shifts in civil society: for example, in the issues that civil society associations address; in the organisational forms that these bodies adopt; in the collective solidarities on which civil society groups build; in the types of governance institutions that civil society actors engage; and in the regulatory roles that civil society associations themselves perform. In turn, these altered orientations and activities of civil society have had implications for sovereignty in post-statist times. Many civil society groups have promoted a relocation of regulatory authority to bodies other than the state and have reconstructed notions of collective identity and community in non-national, non-state terms. This substantial influence of civil society activities in post-statist governance has, not surprisingly, raised important questions about the democratic credentials of these associations.

The rest of this chapter elaborates on the issues just outlined. Thus the first section below briefly summarises the shift from statist to polycentric governance. The second section gives a working definition of civil society. The third section identifies eight ways that civil society operations have altered with the transition to polycentric regulation. The fourth section considers the implications of post-statist civil society activity for sovereignty. The final section reflects on issues of democratic access and accountability *vis-à-vis* civil society in post-statist circumstances of polycentric governance.

From statism to polycentrism

Contemporary history has witnessed a significant spatial reconfiguration of social relations away from the preceding focus on country units. In a word, social geography has altered. On the one hand, society has over the past half-century experienced a large and unprecedented degree of globalisation. That is, more and more communications, travel, production, markets, money, finance, organisations, military affairs, ecological developments, health problems, laws and social consciousness have operated on a transplanetary scale.[1] Concurrently, social relations have since the middle of the twentieth century also increasingly adopted more regional patterns. Much of this regionalisation has occurred on a macro scale, across a group of countries. Examples include the European Union (EU), the strategies of many Japan-based companies *vis-à-vis* Asia, and the growth of civil society networks that span Southern Africa. Other regionalisation has occurred inside countries, for example, with moves towards greater autonomy for Quebec within Canada and the provincial governments within Argentina. In addition to globalisation and regionalisation, social geography has lost some of its earlier concentration on country units with notable degrees of localisation, as illustrated for instance by the growth of indigenous people's movements and town twinning projects.

1 J.A. Scholte (2005) Globalization: A Critical Introduction, 2nd edn (Basingstoke: Palgrave Macmillan), Chapters 2, 3.

This emergence of more multilayered social spaces has been reflected in the contours of governance, that is, the regulatory apparatus in society.[2] Under the earlier country-centred social geography, regulation took what could be termed a statist form. With statism, governance was more or less equivalent to the operations of country-based governments: regulation effectively meant the state. In statist circumstances, all establishment and administration of societal rules transpired through the state and inter-state relations. At this time, global and maco-regional regulatory mechanisms were small in scale, if present at all, and these suprastate bodies fell more or less completely under the thumb of country authorities. Likewise, in a statist mode of governance provincial and local governments had no significant autonomy from central governments regarding countrywide and transborder policy questions. Moreover, substate authorities in a statist situation lacked substantial possibilities to engage directly with the broader world outside of their state territory. Apart from central banks that were not part of the state apparatus in certain countries, private governance of public affairs was barely known. In short, as the term suggests, statism entailed governance that was for all intents and purposes reducible to the state.

The statist mode of governance saw its peak roughly from the latter part of the nineteenth century to the middle of the twentieth century. During this time, territorial bureaucratic centralised country governments reigned supreme over the vast majority of humanity, including through state-based colonial empires. Governance through local councils, multilateral institutions, religious orders and market actors was everywhere superseded by, or firmly subordinated to, regulation through the state. States supplied almost all the public rules to govern nearly every aspect of social relations: money, language, armed violence, sexual behaviour, employment, formal education, health standards, heritage, nature conservancy, and so on.

Following, and spurred on by, some fifty years of large-scale globalisation, regionalisation and localisation, statist conditions no longer mark governance in the early twenty-first century. To be sure, states remain major and indispensable sites of regulation in contemporary society. The end of stat*ism* in no way entails the end of the state itself. However, governance now also involves suprastate (macro-regional and transworld) regimes that operate with some autonomy from states. In addition, many substate (municipal and provincial) governments today engage directly with spheres beyond their state's territory. Also, the growth of transstate networks among country officials dealing with particular issues (such as environmental regulators and financial supervisors) has tended to fragment states while working through them.[3]

In other words, governance today has become decidedly multi-layered and trans-scalar. Societal regulation occurs at – and through interconnections among – local, micro-regional, country, macro-regional and global sites. No single 'level' comprehensively reigns over the others, as occurred with the primacy of the state over suprastate and substate spheres in statist circumstances. Instead, governance tends to be diffuse, emanating from multiple locales at once. Points and lines of

2 *Ibid*., Chapter 6.

3 A.-M. Slaughter (2004) *A New World Order* (Princeton NJ: Princeton University Press).

authority are not always clear, and there is often no obvious and consistent place of final policy decision.

The dispersal of governance in contemporary history has occurred not only across different layers and scales of social relations, from the local to the global, but also with the emergence of various regulatory mechanisms in private quarters alongside those in the public sector. In recent decades, increasing numbers of rules for companies, financial flows, communications, ecological management and other matters have come to be devised by and administered through nongovernmental actors such as firms and civil society organisations. Although this private regulation of public affairs has generally depended on support from, or at least the tolerance of, official country authorities, it too has maintained substantial autonomy from the state, further complicating the workings of post-statist governance.

Needless to say, this shift from statism to polycentrism implies changes in sovereignty. Although some theorists and policymakers may continue to invoke Westphalian concepts that place sovereignty entirely and exclusively in states, these ideas do not and cannot match actual practices of governance in the decidedly more multi-scalar social relations of contemporary history. States remain very important, but even the most powerful country governments are unable to enact anything close to sovereignty in its Westphalian sense, where a state would exercise uppermost, unqualified, exclusive, all-encompassing authority over its territorial jurisdiction.

Civil society

Before considering what the emergence of post-statist governance has meant for civil society, it is important to elaborate on that term itself. Like sovereignty, the concept of 'civil society' is open to widely varying and often deeply contested interpretations.[4] Its history dates back to ancient Greek notions of *politike koinonia* and ancient Roman ideas of *societas civilis*. In its first modern revival, in English political thought of the sixteenth century, civil society was – in stark contrast to current notions – taken to be equivalent to the state. By the early nineteenth century, Hegel understood civil society to lie outside government; yet for him it encompassed all of society between the family and the state, thus including the market. A hundred years later Gramsci excluded the market and treated civil society as an arena of ideology, class hegemony and associated political struggles within capitalist countries. For dissidents in Eastern Europe and Latin America during the 1970s and 1980s, civil society meant a sphere of autonomous popular resistance to an authoritarian state. More recently, many have cast civil society as a 'third sector' (that is, alongside official and market circles) where nongovernmental organisations (NGOs) undertake a variety of service delivery and advocacy functions.

The present analysis draws inspiration from several of these notions, but also has its own distinctive take. Here civil society is conceived to be a political arena where

4 J. Ehrenberg (1999) Civil Society: The Critical History of an Idea (New York: New York University Press); S. Chambersand and W. Kymlicka (eds) (2002) Alternative Conceptions of Civil Society (Princeton NJ: Princeton University Press); M. Kaldor (2003) Global Civil Society: An Answer to War (Cambridge: Polity).

citizen associations seek, from outside political parties, to shape the rules that govern one or the other aspect of social life. Dissecting this definition, it puts emphasis on civil society as politics, that is, activity involving the acquisition, distribution and exercise of power in social relations. More specifically, the political activities in question are those undertaken by citizen associations, that is, by groups of people as they affirm their rights and responsibilities as members of a polity. As the term is understood here, civil society excludes political parties, inasmuch as such bodies aim to occupy state or (in the case of regional parliaments in Africa, Europe and Latin America) other offices of public governance. Arguably, minority and fringe political parties that have no hopes of taking governmental office could fall in a grey area on the boundaries of civil society. In any case, all civil society activity involves deliberate efforts to shape societal rules. These rules include not only explicitly articulated regulations such as state legislation and corporate social responsibility schemes, but also informal norms such as professional rituals and gender roles.

Civil society associations assemble people who share concerns about a particular policy issue. The countless instances of civil society activities include anti-poverty campaigns, business forums, consumer advocacy, criminal syndicates, pro-democracy groups, development cooperation initiatives, environmental movements, ethnic lobbies, faith-based associations, human rights promotion, labour unions, local community groups, peace movements, peasant mobilisations, philanthropic foundations, professional bodies, relief organisations, think tanks, women's networks, youth associations, and more. The huge diversity of civil society groups is evident not only in their broad range of focal issues, but also in their multifarious organisational forms, constituencies, capacity levels, geographical scopes, ideological persuasions, strategic visions, and campaign tactics.[5]

Several points of qualification to this definition merit emphasis. First, civil society as understood here ranges far wider than a third sector of NGOs. It also includes business organisations (meaning associations of entrepreneurs such as chambers of commerce, rather than companies as such), research institutes, religious bodies, and trade unions. Indeed, many civil society associations are not formally organised, officially registered, or professionally administered. Thus civil society actors may be loose and ephemeral bodies, unofficial and even underground associations, and driven by unremunerated and sometimes also spontaneous activism.

A second important qualification to the conception adopted here is that civil society activity is not always 'civil'. On the contrary, some elements of civil society show decidedly anti-democratic, corrupt and violent tendencies. 'Citizen associations seeking to shape the rules that govern social life' can include criminal gangs, fundamentalist campaigns, militarist groups, racist movements, sexist organisations, terrorist cells, and xenophobic initiatives. Although research on civil society has tended to downplay this dark side, citizen action can, clearly in some cases, be deliberately harmful. There is nothing inherently open, honest, caring and beneficent about civil society.

5 J.A. Scholte (2002) 'Civil Society and Governance in the Global Polity', in M. Ougaard and R. Higgott (eds) *Towards a Global Polity* (London: Routledge), 145–165.

Third, civil society associations do not (as the aforementioned East European and Latin American activists would have had it) necessarily pursue agendas of social change. 'Shaping the rules' can mean upholding the existing order or even returning to a *status quo* ante. Hence, civil society includes mainstream business forums, conservative trade unions, and orthodox think tanks as well as transformist elements such as anarchists, radical feminists and religious revivalists. While many civil society campaigns aim at reform and revolution of the social order, far from all of them do.

Given its defining concern (as conceived here) to shape the rules of social life, civil society activity unfolds in relation to a governance apparatus. In former circumstances of statism, when governance was effectively equivalent to country-based public regulatory institutions, civil society associations functioned in relation to the state. They focused their attention on state policies and directed their interactions with regulators to state authorities. Under statist conditions, civil society groups framed issues on country lines and organised themselves institutionally as country-based bodies and networks. Senses of state-centred national identity and solidarity generally provided a principal social bond among the individuals who collaborated in civil society campaigns. Indeed, infused with methodological statism, modern political theories (whether Lockean, Kantian, Hegelian or Gramscian) have tended to assume that civil society is generated by, and can only exist in relation to, the state. In mainstream political thought, notions such as 'global civil society' and 'local civil society' have been considered oxymorons.

Yet these orthodox views miss the fundamental more generic point that civil society exists in relation to a regulatory apparatus. This governance framework can be – and in modern history chiefly has been – the state. But it does not have to be. When the prevailing mode of governance changes – as it has done with the contemporary shift from statism towards polycentrism – the character of civil society can be expected to alter in tandem. In no way is this to suggest that the state has ceased to be important for civil society activism. On the contrary, country governments continue to figure large in civil society campaigns of the early twenty-first century. However, under contemporary governance many civil society activities have also extended beyond the state to other sites of societal regulation.

Post-statist civil society

Civil society in contemporary conditions of multi-scalar social geography and polycentric governance has at least eight general features that distinguish it from civil society under statist circumstances. These differences relate to:

1. the issues that civil society associations address;
2. the organisational forms that civil society activities adopt;
3. the bases of solidarity on which civil society bodies build;
4. the geographical scales on which civil society campaigns mobilise;
5. the regulatory agencies that civil society movements target;
6. the arrangements that governance bodies put in place to engage with civil society;
7. the agencies with which civil society bodies collaborate in policy execution; and
8. the replacement of the state by civil society in the performance of certain governance functions, particularly in respect of the provision of social services.

In the light of such trends, many analysts have come to speak of 'transnational' and 'global' civil society.[6]

To be sure, none of these eight developments is completely new to recent decades. For example, from early modern times onwards certain civil society associations have addressed global issues (such as the abolition of slavery), maintained a transworld organisation (such as the International Committee of the Red Cross), appealed to nonterritorial solidarities (such as a common religious faith), mobilised across multiple countries (such as labour movements of the nineteenth century), and so on. However, the degree to which contemporary civil society has departed from a state-centred modus operandi is qualitatively far greater and historically unprecedented. Understandably, then, phrases such as 'global civil society' and 'transnational advocacy networks', unknown before the 1990s, have rapidly become common currency in contemporary political analysis.

Regarding issues of concern, civil society associations in today's post-statist conditions have to extents never before seen framed their agendas in non-state, non-country, non-national terms. The many examples of transborder, transworld problems addressed through contemporary civil society include arms control, climate change, cultural protection, debt relief, digital inclusion, gender equity, HIV/AIDS, human rights, labour standards, poverty eradication, refugees, religious revivalism and trade agreements. Citizen action groups have treated these and countless other issues as matters that extend across multiple countries and require more than states to be handled adequately.

---

6 See R.D. Lipschutz (1992) 'Reconstructing World Politics: The Emergence of Global Civil Society', *Millennium* 21(3), 389–420; A.M. Florini (ed.) (2000) *The Third Force: The Rise of Transnational Civil Society* (Tokyo/Washington DC: Japan Center for International Exchange/Carnegie Endowment for International Peace); J.A. Scholte (2000) 'Global Civil Society', in N. Woods (ed.) *The Political Economy of Globalization* (Basingstoke: Macmillan), 173–201; , H. Anheier *et al*. (eds) (2001) *Global Civil Society 2001* (Oxford: Oxford University Press); M. Kaldor (2003) *Global Civil Society: An Answer to War* (Cambridge: Polity); R. Taylor (2004) *Creating a Better World: Interpreting Global Civil Society* (Bloomfield CT: Kumarian); R.D. Germain and M. Kenny (eds) (2005) *The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era* (London: Routledge).

Indeed, recent years have seen considerable civil society activism develop around the general theme of globalisation, a catchword for the notion that society and politics can no longer be defined in country and state terms alone. Prominent civil society initiatives concerning globalisation have included the World Social Forum (WSF) process, launched in 2001. The WSF has assembled hundreds of thousands of citizens across the planet in local, country-wide, regional and global gatherings to deliberate on alternative world orders.[7] Other civil society activism on issues of globalisation has been expressed through petitions, letter campaigns, consumer boycotts and artistic performances.

In addition to shifts in the agenda of civil society activism, post-statist circumstances of polycentric governance have also brought changes in the organisational forms of citizen groups. Tens of thousands of civil society actors now operate as transborder bodies. For example, the International Council of the WSF draws its members from dozens of countries. A number of other civil society associations such as Amnesty International and Save the Children have run permanent global secretariats. Some globally organised civil society bodies such as the Geneva-based World Economic Forum (WEF) are unitary and centralised bureaucracies, while others such as the Brussels-based International Confederation of Free Trade Unions (ICFTU) are more decentralised groupings of country-based affiliates. Initiatives such as Shack/Slum Dwellers International and the StreetNet alliance of roadside vendors have developed transworld networks among locally based initiatives. Meanwhile bodies such as Vía Campesina, the global peasants movement launched in 1993, and People's Global Action (PGA), started in 1998, have operated as transplanetary campaigns without a central coordinating secretariat. Indeed, the PGA has mainly organised itself through a website.[8]

A third distinctive feature of post-statist civil society activity is its substantial grounding in non-state identities and solidarities. State-based civil society associations have tended to rally their followings with appeals to a shared national identity and a sense of community linked to the state in question. Indeed, many of these organisations have had the adjective 'national' or the name of the relevant nation affixed to their name: for example, the National Union of Students or the Indonesian Women's Movement. However, considerable elements of contemporary civil society have attenuated their focus on the state inasmuch as they appeal to social bonds that fall on other than state-nation lines. For example, civil society initiatives by indigenous peoples (such as Amazonian Indians) and other ethnic groupings (such as the Basque people) have focused on micro-national substate and transstate identities. Certain other civil society groups have drawn on macro-national regional identities in terms of Pan-African, Pan-Arab, Pan-Asian, Pan-European and Pan-Turkish social bonds. Many more contemporary civil society associations have built on nonterritorial bases of collective solidarity – for instance, in terms of age, class, disability, gender, race, religious faith or sexual orientation. Illustrative examples

7 W.F. Fisher and T. Ponniah (eds) (2003) *Another World Is Possible: Popular Alternatives to Globalization at the World Social Forum* (London: Zed); J. Sen *et al*. (eds.) (2004) *World Social Forum: Challenging Empires* (New Delhi: Viveka Foundation).

8 Available at http://www.agp.org.

include the Union Network International (UNI), the Women's Environment and Development Organization (WEDO), the Strategic Alliance of Afro-Descendents in Latin America and the Caribbean, and the International Lesbian and Gay Association (ILGA). In addition, significant amounts of civil society activity are today driven by cosmopolitan inspirations to provide security, justice and democracy for humanity across the planet. Many ecological campaigns, human rights organisations and peace movements have shown this tendency to identify with the human species as a whole.

Fourth, drawing on such transborder and global bonds, civil society networks in post-statist times have increasingly mobilised actors beyond a state in their attempts to influence that state. Rather than engaging their state directly, many civil society activists have worked through wider world arenas in pursuit of changes to state policy. With a so-called 'boomerang effect', these campaigns throw their politics outside the country and then catch the transborder reverberations to their advantage.[9] For example, anti-apartheid activists mobilised global support to end the racist laws of the National Party government in South Africa. Many modestly resourced policy think tanks in the South have nurtured links with global foundations and prominent research institutes abroad to raise their standing *vis-à-vis* their country's government. Civil society associations in Kuwait have utilised global measures to press their state to change budget allocations, economic planning and environmental laws. Women's groups in Europe have often looked to regional institutions in Brussels and Strasbourg as a channel through which to exert suprastate pressure on their state for upgraded policies on gender equity. Likewise, indigenous peoples have used the United Nations for indirect lobbying of state governments to accord greater attention to aboriginal concerns. Meanwhile, transworld street demonstrations have protested against military interventions by the US government in Vietnam and Iraq.

Several of the instances just cited also illustrate a fifth trend in post-statist civil society, namely, that this citizen activism has over recent decades increasingly targeted sites of governance other than the nearest territorial state. For example, a number of NGOs and social movements have since the mid-1990s closely tracked policy developments around the Group of Eight (G8) leading industrial states. Likewise, regulatory measures developed through macro-regional bodies such as the European Union (EU) and the Southern Common Market (MERCOSUR) have drawn substantial civil society interest, as have the operations of global governance agencies such as United Nations (UN), the Organization for Economic Cooperation and Development (OECD), and the World Trade Organization (WTO). Most regional and global governance meetings now have parallel civil society gatherings that shadow (and sometimes also substantially affect) the official proceedings. The so-called 'Battle of Seattle' around the WTO Ministerial Conference in 1999 is one occasion that received particularly concentrated media attention.[10] Less

9 M. Keck and K. Sikkink (1998) *Activists beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca NY: Cornell University Press).

10 A. Cockburn and J. St. Clair (2000) *Five Days that Shook the World: Seattle and Beyond* (London: Verso); M. Kaldor *et al*. (2000) 'Seattle: December '99?' *Millennium: Journal of International Studies* 29(1), 103–40.

spectacularly, interventions from the NGO Forum at the 1994 UN Conference on Population and Development in Cairo were instrumental in preserving official commitments to family planning. On certain occasions, civil society actors have even accepted governmental invitations to become members of state delegations to global conferences, thereby gaining access to the more restricted zones of the meetings. To maintain direct contacts with suprastate agencies on a day-to-day basis, some civil society associations have opened permanent bureaux near the headquarters of the macro-regional and global bodies. For instance, the ICFTU, Oxfam and the Institute of International Finance (IIF) all maintain offices in Washington, DC within walking distance of the headquarters of the International Monetary Fund (IMF) and the World Bank. In the realm of private regulatory mechanisms, quite a few civil society organisations have, such as the Clean Clothes Campaign and the Maquiladora Solidarity Network, closely monitored schemes of so-called corporate social responsibility (CSR).

Sixth, and to meet this increased interest from civil society in governance beyond the state, many transstate, suprastate and private governance agencies have devised mechanisms of one kind or another to engage (at least to some extent) with civil society associations. For instance, many suprastate institutions have established specific bureaux and appointed designated officials to handle relations with civil society groups. Thus, most of the more than seventy World Bank missions across the planet now include a civil society liaison officer on their staff. In addition, a number of macro-regional and global regulatory bodies have issued guidelines for staff interactions with civil society organisations.[11] The UN has a formal accreditation scheme for civil society associations, as do the Bretton Woods institutions and the WTO for their main meetings. A number of global governance agencies have formally built civil society consultation into various policymaking processes. Prominent examples include the operations of the UN Commission for Sustainable Development (CSD) and the preparation of Poverty Reduction Strategy Papers (PRSPs) in conjunction with the IMF and the World Bank. Among macro-regional organisations, MERCOSUR has maintained a Socioeconomic Advisory Forum as a formally institutionalised mechanism for civil society inputs. In the realm of private governance, the Internet Corporation for Assigned Names and Numbers (ICANN) has developed procedures for civil society consultation.

To be sure, governance agencies beyond the state have often sought 'engagement' with civil society associations merely as a way to neutralise opposition. Some sceptical civil society organisations have therefore refused to enter into what they see as sham 'dialogue' with suprastate and private regulators. However, on other

11 ADB (1999) *Cooperation with Civil Society Organizations: Policy and Guidelines* (Abidjan: African Development Bank), October; World Bank (2000) *Consultations with Civil Society Organizations: General Guidelines for World Bank Staff* (Washington DC: World Bank, NGO and Civil Society Unit); UNDP (2002) 'UNDP and Civil Society Organizations: A Policy Note on Engagement', available at www.undp.org/mainundp/propoor/civil.htm.; IMF (2003) 'Guide for IMF Staff Relations with Civil Society Organizations', 10 October, available at www.imf.org/external/np/cso/eng/2003/101003.htm.

occasions, the authorities have established procedures for interaction with civil society out of genuine intent to gather citizen inputs for improved policies.

A seventh characteristic of civil society in contemporary polycentric governance has seen these citizen associations collaborate with a number of regulatory bodies other than country governments in the execution of governance functions. This trend has been particularly evident in environmental regulation. For example, in 1980 the World Conservation Union (IUCN) and the World Wide Fund for Nature (WWF) collaborated with the United National Environment Programme (UNEP) to launch a World Conservation Strategy that developed guidelines for states. Several years later, the International Council of Scientific Unions (ICSU) played an important advisory role to the World Meteorological Organization (WMO) and UNEP in setting up the influential Intergovernmental Panel on Climate Change (IPCC). The Secretariat for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has worked in close cooperation with the IUCN and the WWF. In another issue area, hundreds of civil society associations have interacted with the World Bank since 1996 to conduct a Structural Adjustment Policy Review Initiative that has assessed the effects of macroeconomic reforms in eight countries.[12]

Eighth and finally, the shift towards polycentric governance has often seen civil society bodies complement or replace the state in the execution of certain functions. One prominent example is the provision of humanitarian relief by large global NGOs in disaster scenarios in the South. With other aid programmes, too, Northern donor governments have since the 1980s often opted to transfer their overseas development assistance directly to NGOs, bypassing Southern states. Meanwhile, in both North and South, contractions of state provision of various care services since the 1980s have frequently left civil society programmes to fill the resultant voids. In respect of global commerce, some civil society groups have operated alternative so-called 'fair trade' schemes in contrast to the prevailing state-sponsored 'free trade' regime. In the sphere of environmental regulation, the civil society initiative Global Forest Watch has since 1997 tracked illegal logging and its impacts on local populations in ten countries across the world. In all of these diverse cases, civil society has to some extent taken the place of the state in governance.

In sum, then, civil society in post-statist polycentric governance is in a number of important respects different from its statist predecessor. To be sure, none of the preceding observations imply that state governments, country units and national identities have ceased to be relevant in contemporary civil society activities. On the contrary, as stressed before, states remain key. However, it is equally plain that the state is no longer the sole governance framework to which civil society relates today. Collectively, the eight developments of recent decades reviewed above have moved civil society into a decidedly post-statist condition.

12 SAPRI (2005) Website of the Structural Adjustment Policy Review Initiative, available at www.worldbank.org/research/sapri/; SAPRIN (2005) Website of the Structural Adjustment Policy Review International Network, available at www.saprin.org/.

Post-statist civil society and sovereignty

Having set out broad trends in contemporary governance and the altered patterns of civil society activity that these developments have evoked, this analysis can proceed to the question of implications for sovereignty. What has civil society activity under conditions of polycentric regulation meant for ideas and practices of sovereignty? Three general consequences can be discerned:

1. the end of statist sovereignty;
2. the promotion of relocated sovereignties;
3. the encouragement of post-sovereign politics.

Regarding the first of these three themes, the turns in civil society activities described in the previous section are among the many developments in a globalising, regionalising and localising world that have rendered Westphalian statist constructions of sovereignty unsustainable. Along with so much else in contemporary communications, ecology, finance, health, production and more, civil society activities today are not – and cannot be – confined to discrete country units over each of which a single centralised state apparatus would exercise total and exclusive governance authority. Indeed, much civil society activity today operates with global connections such as air travel, computer networks and electronic money that have made statism obsolete.[13] Substantial civil society programmes now rest not on country-based resources, but on global pools of staff, finance and knowledge that an affected state is poorly placed to control alone. True, major transworld funders of civil society activities such as the Ford Foundation, the Friedrich Ebert Stiftung and the Open Society Institute do not blatantly disregard states, but they do not prostrate themselves before country governments either. Moreover, widespread promotion by contemporary civil society of non-state, non-national and non-territorial identities – in addition to, or even instead of, the state-nation – has weakened the affective underpinnings of sovereignty in its Westphalian statist guise. And by circumventing the state and engaging directly with suprastate and private governance mechanisms, civil society associations have further undermined notions that sole and final public authority resides in the state.

While contributing to the end of statist sovereignty, civil society associations have rarely aimed for or furthered the end of the state itself. Again, the survival of Westphalian principles and the survival of country governments are two different issues. Indeed, it is important not to exaggerate the extent that contemporary civil society activity has been reoriented away from the state. Most civil society associations – including many citizen initiatives that address transborder and global issues – continue to engage at least partly with states. Many civil society actors still regard country governments as the major – and in many cases also the preferred – site

13 J. Naughton (2001) 'Contested Space: The Internet and Global Civil Society', in H. Anheier *et al*. (eds), *Global Civil Society 2001* (Oxford: Oxford University Press), 147–168; C. Warkentin (2001) *Reshaping World Politics: NGOs, the Internet, and Global Civil Society* (Lanham MD: Rowman & Littlefield).

of governance. In this vein, many citizen campaigners have sought to reinforce the state as an agent to tame transborder processes of globalisation and regionalisation. Moreover, certain nationalist elements in contemporary civil society have continued to promote the principle that each independent nation-state should exercise supreme, exclusive, unqualified and comprehensive rule over its territory and people.

However, uncompromising attachments to state sovereignty of the kind held by dogmatic nationalists are increasingly the exception in contemporary civil society. Most citizen groups of the early twenty-first century have, to one degree or another, tended to make their engagement of and support for the authority of country governments conditional upon whether the state in question advances their purposes. Where a state cannot or does not serve the ends of a given civil society association – or does so insufficiently – the business forum, faith group, or NGO in question is now increasingly prepared to turn elsewhere: to other states, to suprastate institutions, or to private regulatory mechanisms. Enough citizen activism has diverted to these other sites that Westphalian conceptions of sovereignty have become obsolete in relation to civil society today.

Faced with the end of statist governance, certain civil society groups have sought to relocate sovereignty elsewhere than country governments, so that a different site becomes the place of final regulatory authority in society. In this vein, for example, activists in the world federalist movement have aimed to transfer sovereignty 'upwards' from the nation-state to a planet-spanning 'global state'. On such a globalist scheme, supreme and absolute authority would be vested in a planetary government (either an upgraded United Nations or some other construction built from scratch). This sovereign global state would have its own global constitution, global cabinet, global ministries, global parliament and global judiciary.

However, world federalism and other designs for a central planetary state have attracted little more than fringe support in contemporary civil society. Even the US World Federalist Association renamed itself Citizens for Global Solutions in 2004, partly in order to take distance from notions of a planetary sovereign. True, many civil society organisations including Citizens for Global Solutions have argued for an enlargement of transworld governance, including the creation of bodies such as a fully fledged global environmental organisation, a global central bank and a global competition authority. However, such proposals for greater global regulation have generally not entailed support for a global sovereign, that is, the reestablishment of absolute, unilateral, comprehensive, supreme authority, but now over a single planetary sphere rather than over multiple separate country realms.

Another small minority within post-statist civil society has advocated a regionalist alternative, whereby sovereignty would be shifted from country governments to macro-regional governance institutions such as the EU or the African Union. However, the followings of movements such as European federalism, Pan-Africanism and Arab nationalism have if anything declined rather than risen over the past fifty years. Most civil society supporters of macro-regionalisation today favour this development as part of a move to multi-level governance rather than as a replacement of statist with regionalist sovereignty. Indeed, their backing of regionalisation is often paired with endorsement of the subsidiarity principle that is, decision-taking authority should rest in the smallest sphere and be as close as possible to the affected citizens.

Taking the alternative route of devolution, some other elements in post-statist civil society have promoted a relocation of sovereignty 'downwards' to smaller governance units. In this vein some contemporary indigenous peoples' movements have sought to assert self-determination as so-called 'first nations' outside of established states. For their part, micro-nationalist strivings among some Achenese, Corsican, Eritrean and Quebecois associations have advocated a redefinition of final governance powers in states of a smaller scale than existing countries. More radically, anarchist movements have aimed to dissolve state bureaucracies altogether in favour of popular sovereignty through self-organised local communities such as the Christiania project in Copenhagen. Followers of Vía Campesina have also tended to favour a localist path of this kind.

Taking these various globalist, regionalist, micro-nationalist and localist impulses together, civil society activities in contemporary post-statist times have tended to pursue sovereignty in relation to multiple and dispersed sites of governance. Some citizen initiatives have reasserted the principle of state sovereignty, while others have advocated transfers of sovereignty to suprastate, substate and nonstate locations. In a sense, these different strivings have substantially cancelled each other out, so that no regulatory authority is left with a position of final political authority.

In addition to the various frameworks of sovereignty just reviewed, many other contemporary civil society associations have enacted what might be termed 'post-sovereign' politics. That is, these citizen groups have in their campaigns moved willy-nilly between a host of regulatory authorities at different levels and across both public and private sectors. Thus, for example, on the question of genetically modified foods, consumer movements have concurrently addressed themselves to several country governments, to local offices, to regional and global authorities, and to corporate social responsibility frameworks. In engaging these diverse sites, the civil society associations in question have not bothered themselves much about questions concerning who holds sovereignty. Likewise, civil society strivings for the abolition of landmines, for the creation of an International Criminal Court, for the cancellation of poor country debts, and so on have defied the Westphalian principle that civil society organises itself on country lines and directs its mobilisation exclusively at the 'home' state.

For the most part, this civil society furtherance of post-sovereign politics – where no single type of governance institution commands final authority – has occurred by implication rather than by design. Most citizen mobilisations on issues such as climate change, intellectual property claims, labour standards, trade rules, and women's rights have not been conducted with explicit attention to the impacts on sovereignty. Rather, the structural logic of polycentric governance itself has pulled civil society groups to direct their attentions to multiple authorities, including but not limited to 'their' state. In all of these instances and many more, sovereignty has been a secondary concern, if it has been considered at all.

That said, certain civil society activists have welcomed and positively promoted moves away from the principle of sovereignty, in whatever form. These advocates of governance-without-sovereignty include some sections of the WSF and the wider so-called 'global justice movement' (an alternative and arguably more apt characterisation of what has popularly often been described as the 'anti-globalisation

movement'). Such civil society circles would endorse the language of critics who denounce sovereignty as a pre-Enlightenment pact of tyrants, a pillar of illiberal governance, anti-democratic in its centralising and exclusivist logic, coercive in its way of forcing all world politics into a particular mould, hegemonic in its legitimation of authoritarian rule with fables of self-determination. These elements of contemporary civil society – found, for example, among some ecologists and human rights campaigners – see the end of sovereignty as the beginning of deeper democracy.

Civil society and post-statist democracy

But does civil society in conditions of polycentric governance necessarily generate greater democracy? Many critics, from positions across the political spectrum, have worried that post-statist civil society, particularly when it operates globally, holds influence without adequate democratic control.[14] Under the Westphalian order, democratic sovereign states could guarantee the democratic credentials of their respective country-bound civil societies through official monitoring overseen by popularly accountable representatives. However, if civil society actors in post-Westphalian circumstances can often reduce or even altogether escape the final authority of the state – and indeed any other single governance institution for that matter – how can the democratic *bona fides* of these citizen initiatives be assured?

The challenge of undemocratic practice has been glaringly apparent in the case of global *un*civil society. For example, certain transborder networks have blatantly disregarded democratic duties to engage with adversaries in respectful debate. Some groups have gone to the extremes of inflicting physical harm and in certain cases even death on their opponents. Terrorist units have moreover meted out violence indiscriminately. Thus far, it has proved difficult to organise polycentric governance to check the bigotry, ideological fundamentalism and terrorism that has marked some parts of contemporary civil society.

Other civil society challenges to democracy under post-statist conditions have been subtler. For example, embedded structural inequalities related to age, class, country, culture, (dis)ability, gender, race and sexual orientation have often had the effect of biasing access to post-statist civil society in favour of dominant social circles. Participation in civil society has thus not been democratic, in the sense that all players have equivalent opportunities of involvement. Under Westphalian conditions, a democratically governed sovereign state with an egalitarian agenda might seek to promote a level playing field in civil society. However, many parts of contemporary polycentric governance lack a democratic underpinning – and in many cases have little intention of developing one. Thus, some notable exceptions aside, institutions such as ICANN, the OECD or the Nuclear Suppliers Group (a transstate regulatory mechanism) have not deliberately and systematically sought to give voice to marginalised circles through civil society. Likewise, civil society

14 J.A. Scholte (forthcoming), *Civil Society and Global Democracy* (Cambridge: Polity), Chapter 5.

participation in the United Nations has shown a consistent dominance of middle-aged, professional, Northern, westernised, able-bodied, male, white, heterosexual people, with little systematic effort at countermeasures.

In addition, much civil society activity in post-Westphalian politics has lacked adequate public transparency. All too often civil society organisations engaged in transborder affairs have operated in considerable obscurity if not downright secrecy. Such groups have revealed little about their mission and purpose, their methods of work, the sources of their funds, the names and responsibilities of their leading figures, or even basic contact information. In a democracy, any stakeholder who wants such basic information about civil society activities should in principle be able easily to obtain it. To be sure, some civil society associations in the post-statist world have made extensive efforts to inform the public about their aims and activities, through brochures, websites, newsletters, reports, videos and mass media broadcasts. However, many other civil society groups have underestimated the importance of public communications and have not practised anything close to sufficient transparency. Indeed, the Global Accountability Index published in 2003 by the One World Trust (itself an NGO with a deep commitment to expand civil society activity) rated the World Bank and the WTO considerably higher in respect of access to online information than Amnesty International or the World Wide Fund for Nature.[15]

Shortfalls with respect to public debate, public participation and public transparency have tended to weaken democratic accountability in post-statist civil society as well.[16] By the principle of accountability, actors in positions of influence should answer for their errors and omissions by providing affected people with due apologies, explanations, compensations and/or resignations. When the damages caused are particularly severe, the person at fault may be detained and/or the organisation in question may be dissolved. Public accountability applies to civil society activity no less than to any other field of social life such as business, education, government or relations within a household.

Under Westphalian conditions, the democratic accountability of civil society activity could – in principle if not always in practice – be secured through a democratic state. Civil society associations operating in a country would be monitored by the state that exercised jurisdiction over that territory. So long as this country government was itself subject to sufficient democratic control, the state's accountability mechanisms could also operate in a democratic fashion, checking neglect, incompetence, fraud, graft and violence in civil society.

---

15 H. Kovach *et al.* (2003) *The Global Accountability Report 1: Power without Accountability?* (London: One World Trust).

16 M. Edwards (2000) *NGO Rights and Responsibilities: A New Deal for Global Governance* (London: Foreign Policy Centre); H. Slim (2002) 'By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations', Paper for the International Meeting on Global Trends and Human Rights – Before and After September 11, Geneva, 10–12 January; J.A. Scholte (2004) 'Civil Society and Democratically Accountable Global Governance', *Government and Opposition* 39(2), 211–233; L. Jordan and P. van Tuijl (forthcoming) *NGO Accountability*.

However, as repeatedly stressed throughout this chapter, the state-civil society binary relationship no longer prevails under contemporary conditions of polycentric governance; hence state oversight by itself cannot provide an adequate mechanism to secure the accountability of civil society activities in the twenty-first century. A solitary state cannot maintain full surveillance of the membership, communications and financial transactions of a civil society association that has globally dispersed offices, global Internet and telephone traffic, and global electronic money flows.

To be sure, some suprastate governance authorities have devised a number of mechanisms to supplement traditional accountability measures for civil society associations such as legal registration with and reporting to the state in whose territory the groups operate. For example, civil society organisations that wish to participate in proceedings of the United Nations must obtain accreditation under official procedures of the Economic and Social Council. Likewise, the Bretton Woods institutions and the WTO operate a formal registration process for civil society actors that wish to attend their major conferences. However, most suprastate, trans-state and private regulatory bodies in contemporary polycentric governance make no systematic attempt to secure the public accountability of the civil society actors that they encounter. In any case, accountability mechanisms for civil society constructed and implemented by the UN, the World Bank, ICANN or other such bodies are suspect to the extent that the governance agencies in question have such weak democratic credentials themselves.

In some cases civil society groups have taken the matter of their public accountability in post-statist politics into their own hands. In this vein, for example, the NGO Steering Committee of the CSD for a time maintained an elaborate self-regulatory framework to promote accountable civil society involvement in UN work on environment and development.[17] In another issue area the Humanitarian Accountability Project (HAP), started in 2000, has given special attention to raising the accountability of NGOs to the recipients of international emergency relief.[18] The Philippine Council for NGO Certification has developed a highly rigorous scheme of nonofficial oversight for civil society in that country.[19] Under its strategy 'Fighting Poverty Together (1999–2003)', ActionAid has given particular attention to developing its accountability to the poor people that it aims to support.[20] Yet to date such laudable initiatives at greater accountability through self-regulation remain the exception. Most civil society associations are complacent about or even unaware of issues concerning their public accountability in a post-statist circumstance.

Of course the problem of ensuring democratic practice in civil society activity is not new to post-statist times. The state and civil society often had undemocratic

17 F. Dodds (2001) 'From the Corridors of Power to the Global Negotiating Table: The NGO Steering Committee of the Commission on Sustainable Development', in M. Edwards and J. Gaventa (eds), *Global Citizen Action* (Boulder: Lynne Rienner), 203–213.

18 HAP (2005) Website of the Humanitarian Accountability Project, available at www.hapgeneva.org/.

19 PCNC (2005) Website of the Philippine Council for NGO Certification, available at www.pcnc.com.ph.

20 J. Chapman and A. Wameyo (2001) *Monitoring and Evaluating Advocacy: A Scoping Study* (London: ActionAid).

relationships with each other in the Westphalian era, for instance, in colonial and fascist regimes. Uncivil society and terrorism challenged governments in Ireland and Russia under statist conditions. Elite classes, men and dominant racial and religious groups as often as not exercised disproportionate power in civil society during the period of old-style sovereign statehood. Nor did civil society have impeccable standards of transparency and accountability before the onset of polycentric governance.

Yet, even if civil society frequently fell short of democratic practices under the Westphalian order, at least the formula to secure open debate, equal participation, transparency and accountability in civil society was clear. That is, one needed to focus on the sovereign state, to ensure that democratic forces controlled the sovereign state, and then to devise effective regulation of civil society through the sovereign state. Today, under post-statist conditions of polycentric governance, the very design of democratic frameworks is unclear, let alone how to implement them successfully.

Thus, while sovereignty can readily imply oppression, and while statist governance in a Westphalian mould often suffered from severe democratic deficits, burgeoning civil society activity in a post-Westphalian, post-sovereign condition of polycentric governance does not automatically generate an improvement. As ever, democracy requires unrelenting effort – arguably much more of it than has generally been applied in post-statist civil society to date.

Conclusion

Trudy Jacobsen

Sovereignty is in crisis. Beset within and without by conflicting notions, multiple locations or sources of authority and exercised by actors whose own loyalties may be ideologically or spatially pluralistic: the concept of sovereignty in the Westphalian sense is facing radical and perhaps irrevocable change. These challenges, present for some time but manifested on a large scale only recently, arise from changes in power relations as new nation-states become industrialised and seek to acquire the same level of sovereign recognition that the west has enjoyed for centuries, as concerns have become global and transnational rather than domestic, and as ideology has come to have more resonance with the individual than the authority of the government to which that individual may be geographically affiliated. Divergent disciplinary perspectives have further undermined the possibility for the continued superiority and universal acceptance of Westphalian sovereignty.

This book is a first step in drawing together some current interpretations of sovereignty and the directions in which it may be headed as we face the twenty-first century. The perspectives expressed herein are multi-disciplinary, emanating from lawyers, international relations specialists, representatives of non-Western political philosophy, historians, practitioners in the realms of health and the environment, educators, and commentators. The preceding chapters have resulted from discussion, the incorporation of contributory perspectives from other disciplines, and refinement of original ideas. Can this multiplicity of perspectives, however, reveal whether we are indeed facing the end of Westphalia?

Sovereignty as a traditional and emergent concept

This conception is not the first time that the notion of sovereignty has been tested and found wanting. In considering sovereignty as a traditional concept, it is particularly interesting to note, as Wayne Hudson points out in Chapter 1, that many parties to the original Treaty of Westphalia were not representatives of states *per se* and that transnational institutions and semi-autonomous polities continued to operate unaffected. More importantly from the perspective of this book, the Treaty itself may be seen as 'embodying an efficient approach to relations between states which did not depend on theological conceptions',[1] as the latter were and continued to be multiple and conflicting in Europe. It should therefore be possible, according to Hudson, to reconsider sovereignty in new ways today despite the added incorporation of perspectives from non-Western thought, as sovereignty has faced similar revisionism

1 See Wayne Hudson, 'Fables of Sovereignty', Chapter 1 in this volume.

in the past and has survived; but the idea of the nation-state and the delimitations of its scope will not change radically overnight.

Instead, it may be the concept of authority that faces the most sweeping process of change, according to Joseph A. Camilleri. All previous attempts at revisionism highlight the inadequacies of sovereignty as a concept but offer little in the way of alternatives. The replacement of domestic requirements with regional and global trade and security concerns have resulted in a plurality of centres or locations, the authority of which actors may respect equally, or more, or less than compared to others. This issue of space must necessarily lead to a reconsideration of sovereignty in terms of autonomy, subsidiarity, and the legitimacy/accountability nexus as authority, trade networks and the issues that mobilise people become increasingly supranational. For Camilleri, the world 'is no longer "sovereign", in any sense of the word'.

Space comprises a significant component of Gerry Simpson's 'The Guises of Sovereignty', Chapter 3. Sovereignty as the exercise of authority over a territory delimited by the recognition and protection through force of precise spatial boundaries appears to be declining but is preserved in the methods by which domestic actors catalogue and proscribe the movements and actions of people; simultaneously, events are occurring at a level that transcends the nation-state and have their basis in ideologies that are shared by peoples who may be geographically distant and thus subject to another sovereign authority. Any new conceptualisation of sovereignty must, for Simpson, take into account the 'abnormal' spaces in which sovereignty operates, namely metaphysical, extraterritorial, deferred, internationalised and deterritorialised sovereignties. Simpson also makes the point that relations between sovereigns in the Westphalian context are conducted in terms of who is a Great Power, who is a friend or and enemy, and who is equal, yet these are very arbitrary categories.

Sovereignty in international perspective

This is especially true for global actors with perspectives on sovereignty that are not based in Western political philosophy. One of the supposed benefits of colonialism for the peoples it was imposed upon was the implementation of 'rational', post-Enlightenment Western systems of governance, far superior than the traditional power-sharing mechanisms adhered to by pre-existing polities. The former naturally included the Westphalian concept of sovereignty, which would privilege European interests. This is very clear from the manner in which early colonial governments wrote of their proposed activities. The Mekong Commission Report (1866–1868), for example, advised that 'if one wishes this protectorate to yield the results for our commerce and influence that are expected … it will be indispensable to clearly indicate administrative reforms to the Cambodian government or even to impose them.'[2]

2 Francis Garnier (1995) *Travels in Cambodia and Part of Laos: The Mekong Exploration Commission Report (1866-1868)* [1885], vol. 1, trans. Walter E.J. Tips (Bangkok: White Lotus), 55.

One of the first of these reforms throughout the colonised world was the demarcation of physical boundaries to delineate the borders of districts, provinces and countries. In many non-Western cultures, where maps were largely unknown until colonisation, authority was measured by the number of people controlled from a particular centre. Ideology was therefore a key component of government. The adoption of Western models of secular governance dislocated the form of traditional power arrangements but did not rupture them completely. Legitimacy continued to stem from traditional measures of prowess, such as the demonstrated participation in religious events or adherence to particular ideologies, and networks based upon ethnicity or kinship. Post-colonial governments have retained this two-tiered level governance mechanism because the only alternative to wholesale espousal of Western values is non-participation in the international community and exclusion from its benefits, such as humanitarian assistance and global trade networks.

International perspectives toward sovereignty are informed by Westphalian concepts inherited from colonial times and inculcated through Western education, and the ideologies that legitimise authority in non-Western cultures. The concept of sovereignty inherited from Westphalia has therefore flourished. So, however, has the importance of ideology in non-Western theories of governance, and therefore in non-Western approaches to sovereignty. Anthropologists for decades have been aware that institutions and concepts are extremely likely to differ between cultures. There is a tendency in Western political philosophy, for example, to assume that any status or prestige that does not involve the display of military strength or economic control is unimportant, whereas in reality, ideology is at least as important, if not more so, than these categories.[3] It is not impossible, therefore, to continue in the twenty-first century to conceive of sovereignty as over peoples rather than territories, nor that religion could form the basis for a sense of identity or supreme authority that transcends national boundaries and citizenship.

The world has been particularly attuned to this possibility since 9/11. For most people in the West, a co-ordinated attack by peoples claiming affinity with each other not in the name of a national separatist organisation or government in exile but in the name of an ideology was a confronting one. Jihadi Islamists have come to represent, for many, new and threatening citizens occupying virtual territory not delimited by traditional concepts of sovereignty, and therefore almost impossible to control – except through those citizens' other identities as residents of nation-states that do abide by Westphalian principles of sovereignty. As Amin Saikal writes in Chapter 4 on Western and Islamic conceptualisations of sovereignty, the influence of the Jihadi Islamists is increasing in popularity in the Muslim world, but the key is to create more space for Ijtihadi (non-Jihadi) Muslims in the international community so that their contribution may be heard throughout the Islamic world. The concept of sovereignty, therefore, will have to be modified to accept the existence of intangible space that is nonetheless teeming with citizens, all of whom are simultaneously members of actual nation-states.

---

3 Shelly Errington (1990) 'Recasting Sex, Gender and Power: A Theoretical and Regional Overview', in Jane Monnig Atkinson and Shelly Errington (eds) *Power and Difference*: *Gender in Island Southeast Asia* (Stanford CA: Stanford University Press), 5.

Islam is not the sole example of the incompatibility of Westphalian and non-Western approaches toward sovereignty. See Seng Tan has illustrated in Chapter 5 that Southeast Asian conceptualisations of sovereignty had historically conflicted with those of the colonising powers. It was not until global focus shifted toward Southeast Asia against the backdrop of World War II, however, that this became a significant issue of concern in an international context. Even after the end of the war and the decolonisation period, the kind of sovereignty entertained by Southeast Asian governments never quite meshed with those of their Western counterparts. Today, a sense of regional identity is threatening to explode the minimal adherence that has continued to this and other models of Western governance, although Tan does not believe that the concept will lose all Westphalian overtones due to a lack of critical exploration and a viable alternative.

Chinese attitudes towards sovereignty have their roots in Confucian philosophy and several assimilated Western philosophies, including communism. In Chapter 6 Yongjin Zhang says that sovereignty is an ambivalent concept in theory and practice, and that this ambivalence has allowed successive Chinese governments to attach different meanings to it when convenient over the past hundred and fifty years. What have seemed contradictory actions on China's behalf in matters of sovereignty could not have occurred, according to Zhang, were not sovereignty in its Westphalian sense deeply subjective according to particular temporal, participant and desired outcome criteria. How can we reach a universal understanding of a concept that allows for such broad interpretations as China has demonstrated over the past two centuries?

Transcending state sovereignty

An accepted understanding of sovereignty is growing increasingly problematic; yet simultaneously, consensus is an urgent global requirement as interests and issues transcend borders. These issues include (but are not limited to) terrorism, human rights and human security, refugees, pandemic diseases, the environment, and international justice. Diehard proponents of the Westphalian inviolable state scenario cannot easily accept criticism and intervention from their neighbours, but those neighbouring states must protect the interests of its citizens even if this means contravening the tenets of non-interference. Sometimes states must also intervene in the interests of another state's citizens. Although strict criteria exist to determine when such intervention may be necessary, we are as individuals and as states obliged 'to speak out against every abuse of power, whoever its author, whoever its victims. After all, we are members of the community of the governed, and thereby obliged to show mutual solidarity'.[4] 'Cooperation' is essential and can be enforced through pressure from regional and international networks.

This state of affairs cannot help but go against Westphalian ideals of sovereignty and alter our understanding of its nature. That said, it is unlikely, according to Brian L. Job, that radical deviation from Westphalian principles will occur as

4 Michel Foucault (2000) 'Confronting Governments: Human Rights' [1984], in Michel Foucault, *Power*, ed. James D. Faubion, trans. Robert Hurley and others, vol. 3 in *Essential Works of Foucault*: *1954–1984* (New York: The New Press), 474–475.

these are the sole protection that each state has against similar interference. The fluidity or ambivalence of sovereignty can be a help or a hindrance in the case of security. Coalitions of states can intervene in what may be perceived as domestic matters because they are impacting upon the sovereignty of other states in terms of refugees, for example, or threats to security. Yet those same states may then uphold the Westphalian concept of sovereignty in preventing similar intervention or even regulation of their own domestic or international policies. This ambivalent approach makes it extremely difficult for supra-state bodies such as the United Nations to enforce action from the international community.

The human cost of such polar interpretations of sovereignty has been made clear by recent events in Rwanda and Darfur. As Howard Adelman posits in Chapter 8, if states are made up of individuals who agree to abide by certain conditions in exchange for the protection of their interests by the state, what happens to those who cannot agree to the conditions? Are they rogue members of the state who must conform or face persecution? Or do individuals possess inalienable rights regardless of their state affiliation? Liberal cosmopolitans argue that such stateless persons have the right to seek protection from other states. States can claim that their sovereignty is being violated in this scenario, however, as another state has made decisions regarding a citizen not their own. Similarly, accepting refugees is often not a matter of choice on the part of the host state but an obligation. Determining which potential refugees to accept as members of the host state is often based upon criteria that is supranational, which again brings us to the problem of transnational loyalties in considering Westphalian sovereignty.

In Chapter 9, 'State Sovereignty and International Refugee Protection', Robyn Lui makes the point that although all refugees should receive equal protection, the reality is very different. There is a hierarchy of conflict that directs the resources and attention of the international community. Those that are unlikely to net high yields in terms of political and economic interests continue unabated with generations of refugees spending their lives in border camps or seeking asylum in neighbouring states. When some sort of intervention is forthcoming, ameliorative measures tend to be focussed upon policy issues within the state experiencing the diaspora rather than global systems that allow such policies to be implemented. State sovereignty in the Westphalian sense means taking responsibility for citizens' complaints; there is no suprastate responsibility for the international mechanisms that cause inequality within states.

Disease may be the largest threat to traditional concepts of sovereignty. Microbes do not recognise the Treaty of Westphalia. Neil Arya asserts that protection of the citizen, ostensibly the primary objective of states, should make defence against disease a priority in a time when HIV/AIDS, avian flu, and other illnesses are affecting members of all states. Their continued presence has more than a little to do with transnational issues such as trafficking of drugs and sex workers, membership or lack of membership in trade organisations with standardised testing policies, and the like. Preventative measures in this regard necessitate cooperation with neighbouring states and international networks. As stated above, cooperation when coerced can infringe upon state sovereignty, but Arya sees reconceiving state failure as the refusal or inability to protect the health of citizens, followed by action on the part of

the international community to enforce such protection, as the only logical course of action. Such a radical proposal would indeed alter the concept of sovereignty in its Westphalian sense, but could benefit humankind.

Lorraine Elliott makes a similar case in considering environmental issues. The borders demarcating states are not logical in an ecological sense; furthermore, as all human activity impacts upon the environment in some respect (usually for the worst), it is incumbent upon all humans to take responsibility. States, however, can only regulate how their own citizens approach environmental management; furthermore, observance of Westphalian sovereignty absolves states and their citizens from responsibility for their impact on the environment once the effect passes beyond their borders. At the same time, if a state's primary objective is the protection of its citizens, regional and international cooperation (and enforcement) is necessary in this regard as for health issues. Yet Elliott is more optimistic than other authors in this volume, stating that the international community does seem to consider the environment an issue worth changing our approach to sovereignty.

Justice, another transnational issue, has had a reasonable degree of success in operating within the confines of the Westphalian state system. The International Court of Justice (ICJ) had its foreshadowing in the Jay Treaty of 1794, which established the mechanism for resolving disputes between the fledgling United States of America and its former colonial power, England. This treaty recognised that states were bound to experience conflict on issues and that an international, unbiased forum should be available for resolution of such conflicts. The process for selection of judges, laws to be observed and the like were agreed to in the treaty. The League of Nations brought into being the Permanent Court of International Justice in 1922, followed by the International Court of Justice in 1946. It is important to note, however, that these international justice initiatives were for issues between states in the Westphalian sense of the word.

It was not until 1998 that states agreed to create the International Criminal Court (ICC). The difficulty for some states in agreeing to the ICC (including China, the USA and Iraq) was that it would make it possible for an international body to prosecute its citizens – in other words, state sovereignty could be transcended. As Jackson Maogoto states in Chapter 12, the events of the twentieth century have resulted in the modification of the Westphalian state system towards less authority for states in certain areas. He also warns 'few states ascribe fully and enthusiastically to the gains of international justice' and that the task of convincing states that sacrifices of sovereignty are necessary for the greater good lies before us. Maogoto sees the elimination of Westphalian sovereignty from international justice terminology as unlikely, but further modifications, interpretations and qualifications as to what exactly is meant when the term 'sovereignty' is invoked are inevitable.

Sovereignty and development

Overseas development assistance, ostensibly an area in which states contribute to the 'greater good' of humankind by voluntarily sacrificing surplus resources for less developed nations, can infringe upon the sovereignty of those less developed

nations through insistence on the implementation of policies and standards that will ultimately privilege the interests of donors. Roland Rich points out in Chapter 13 that 'countries relying on sovereignty as a defence to the demands of living in a global community are placing their faith in a rather porous shield'. Developing nations are in a catch-22 situation in which the only alternative, complete isolation, is a radical and dangerous step. Westphalian sovereignty is not going to protect the rights of states who cannot act in the best interests of their citizens (that is, accepting humanitarian and development assistance) without ceding at least some of those rights.

C. Raj Kumar argues in Chapter 14 that sovereignty must be reinterpreted for these reasons – that in light of world developments that perpetuate inequalities we must rethink how sovereignty is defined, protected and imposed, not only between states, but also within states, by elites. Corruption, when states and elites within states privilege the interests of a few over the interests of all citizens, harms the legitimacy state sovereignty in international and domestic perspectives. Transparency in governance, equality across the board and a proactive civil society are essential to the success of states and therefore to the continuation of state sovereignty as interventions from other states and the international community will not be necessary.

In the meantime, some international organisations are interfering too directly in the sovereignty of less developed nations, with the result that those nations are unable to extricate themselves. Ross P. Buckley makes the case in Chapter 15 that the International Monetary Fund (IMF)'s strict criteria for involvement in aiding economic recovery in debtor nations may hinder the development of confidence and expertise. Furthermore, the IMF is not the supranational organisation it appears to be, governed as it is by member nations whose voting rights correspond to their nation's gross domestic product (GDP). Those who make decisions in the IMF, therefore, are developed, industrialised, wealthy states. In other words, the IMF is a covert opportunity for wealthy states to infringe upon the sovereignty of less developed countries by pinning economic assistance to policy reforms that may privilege the interests of those wealthy states, not the citizens of the state seeking assistance.

Reconceiving the state

How should sovereignty, and therefore the state, be reconceived? What should we take into consideration? It may be difficult to reconcile the expectations of citizens with a form of sovereignty that places some authority beyond the control of those citizens and their elected representatives. William Maley points out in Chapter 16 that incidences of 'shared' sovereignty occur most often in the area of the judiciary, where positions are not usually democratically elected. Particularly in the case of states that have experience massive internal conflict or interventions, trust may prove an insurmountable issue in any sovereignty model that may be configured in the future.

In Chapter 17, Barry Hindess returns to the problem addressed by Ross P. Buckley in relation to sovereignty and development. Assistance is provided by international organisations directed by the wealthiest and most powerful nations in exchange for

the adoption of Western 'good governance' models in less developed states, in their regional organisations, and as a condition for entry into international networks. This approach results in the infringement of the sovereignty of less developed states. One method of redress would be to ensure that the implementation of international conditions in return for development assistance be a responsibility of citizens rather than the state elite, thus promoting democracy as well as regulating the actions of state governments. State sovereignty in a Westphalian sense would therefore be strengthened through internal reforms that would place power in the hands of the people, while maintaining the state's place in the global state system.

Yet citizens are not equally privileged within states. In many cases, the rights of indigenous inhabitants of a territory are first suppressed and then marginalised in the interests of the dominant or 'mainstream' group. When indigenous sovereignty is recognised by states or the international community, the sovereignty of the state is compromised in a Westphalian sense. Paul Keal makes the point in Chapter 18 that the original Hobbesian concept of sovereignty does not allow for the autonomy of any group within the state mechanism as ostensibly the state is the representative of the will of its citizens. Westphalian sovereignty, therefore, has already been altered in some states, and recognition of indigenous sovereignty in the global theatre has furthered the process. Moreover, indigenous sovereignty in multiple locations within states and across the overarching system of states means that all indigenous people can claim indigeneity, transcending state sovereignty.

The term 'civil society' has come to represent extra-state organisations and communities of individuals that are activists and advocates of issues states themselves are failing to address appropriately or adequately in the eyes of citizens. Although these communities may begin within the context of states, many soon find partner organisations or umbrella groups that transcend the state system. In this context, again, we see a growing loyalty to ideological similitude, wherever it may lie, rather than the dictates of state policy. Similarly, as Jan Aart Scholte illustrates in the final chapter, governance has taken on a new aspect, stemming from polycentric locales rather than a monist state authority. How, then, can sovereignty retain its Westphalian context in what is essentially a post-statist existence? How can extra-, trans- and supra-state bodies be regulated when accountability mechanisms are varied and largely unenforceable by states? Accreditation and accountability requirements are not uniform from state to state and self-regulation is low on the list of priorities for civil society initiatives more concerned with their ameliorative agenda than their own transparency. Multiple, unfettered supra-state bodies do not constitute a viable alternative to state sovereignty.

Re-envisioning sovereignty

We have sought, in this volume, to determine whether we are facing the end of sovereignty as it is understood in Westphalian terms. Such notions are based upon absolute authority over a territory that is demarcated by physical boundaries recognised by other states. Individuals within those boundaries are subject to the authority of the state as (ostensibly) those individuals have agreed to cede their

freedoms in exchange for governance by a person or persons they have determined have the right to do so, and will carry out this responsibility in their collective best interests.

Ideological issues and concerns that extend across states are challenging this vision of sovereignty. The loyalties of individuals are increasingly not to the state but to other bodies that have more ideological resonance with them. These bodies transcend state borders, can operate in virtual space, and are largely unregulated. At the same time, trans- and supra-state issues such as the environment, pandemic disease, and human diaspora are making borders more irrelevant. Once no borders exist, it is not possible to accurately gauge the extent of state sovereignty. This results in overlapping sovereignties and conflicts of sovereignty. Yet Westphalian sovereignty is being upheld (if not enforced) by states that wish to protect their own absolute authority over their territory and to impose ideological sovereignty over that of others. As Gerry Simpson says in Chapter 3: 'This, then, is a mystifying and exasperating time to study sovereignty.'[5]

The model of sovereignty that arose as a result of the Peace of Westphalia in 1648 will not disappear overnight. Its legacy is all too firmly entrenched in the international organisation of states, in international law, and in the democratic processes that represent the epitome of human rational thought and political philosophy. There are no viable alternatives other than anarchy, which cannot be permitted. Michel Foucault reminds us that power is pervasive, potent, and in need of constant checks and balances:

> I am saying that power, with its mechanisms, is infinite (which does not mean that it is omnipotent, quite the contrary). The rules that exist to limit it can never be stringent enough; the universal principles for dispossessing it of all the occasions it seizes are never sufficiently rigorous. Against power one must always set inviolable laws and unrestricted rights.[6]

We are witnessing now, in the first decade of the twenty-first century, a struggle between tradition and modernity as conventional understandings are reshaped to fit views from divergent disciplines, cultures, and experiences. Sovereignty may be in crisis, but times of crisis are also times of opportunity. Our challenge, as global citizens, is to take this opportunity to reconceptualise sovereignty in a globally responsible manner, incorporating the plurality of perspectives that must come to represent human, rather than Western, post-Enlightenment, thought now that we are residents of the global village. Our vision can no longer be singular but all-encompassing.

5 Gerry Simpson, 'The Guises of Sovereignty', Chapter 3.

6 Michel Foucault (2000) 'Useless to Revolt?' [1979], in Foucault, *Power*, 452–453.