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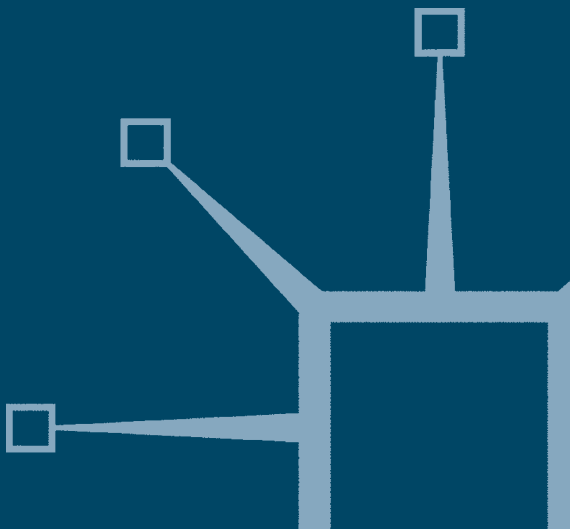
Sovereignty

Interpretations

Jo-Anne Pemberton



Sovereignty: Interpretations

Also by Jo-Anne Pemberton

GLOBAL METAPHORS
Modernity and the Quest for One World

Sovereignty: Interpretations

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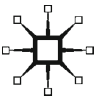

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For my mother.

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Contents

Preface

I am considerably indebted to a number of people who have supported me in preparing this manuscript. My colleague in Sydney, Helen Pringle has provided enormous encouragement and I have gained much enlightenment on the finer points of political theory from my extensive conversations with her. Helen has also been very generous in pointing me towards materials of interest. Ephraim Nimni, Preston King, Roderic Pitty and Mark Rolfe have also been an invaluable source of both emotional and intellectual support and I offer them my sincerest thanks. There are several others who have assisted me in the course of writing this book and whom I would like to thank: Jamie Roberts, Isabel Homrich da Jordanda and Sandrine de Castro all of whom have drawn my attention to literature of great relevance to this topic. There are several others who have assisted me in a variety of ways in writing this book to whom I wish to express my deepest thanks: Jens Boel, Mahmoud Ghander and Steve Nyong of the UNESCO Archives and Peter Carmen of the Paris American Academy. Many thanks also to Laetitia Thibaut and David Santoro who assisted me with a number of French translations. Finally, I would like to thank members of my family: Mark, Sally, Gail, Gregory and Christian Pemberton all of whom provided support in various ways.

The topic of sovereignty is a very broad one and relates to any number of issues. Inevitably, one has to be selective in choosing what materials and topics to include and in deciding on how much space one will accord them. Obviously, some readers will have a different view than I do of the choices I have made. Originally I intended to include a chapter on the status of humanitarian intervention when viewed through the prism of sovereignty, however, I came to the conclusion that as this topic has been extensively and very effectively addressed in recent years, its inclusion was unnecessary. Nonetheless, I have touched on this topic at certain points throughout the book.

The book is organised thematically. Chapters 2 and 3 address the internal and external dimensions of the question of sovereignty. Chapter 4 deals with the relation between sovereignty and imperialism as well as the role sovereignty plays in the post-colonial world. Chapter 5 continues this examination of the relation between sovereignty and colonialism, except its focus is specifically on the experience of those indigenous peoples who continue to live under a form of colonial rule and who are striving to establish their right of self-determination. The Chapter 6 looks at the question of where sovereignty lies, if it lies anywhere, in the context of the European Union while Chapter 7 returns to more general issues in examining the relation-

ship between sovereignty, the state and war. At the same time, it is important to note that at certain points the individual chapters refer back to or flag certain topics raised in the other chapters.

All translations from the French texts listed in the bibliography are mine as is the translation of the 1909 edition of Pasquale Fiore's *Diritto Internazionale Codificato e la sua Sanzione Giruidica*. Where I have translated a quotation from the French appearing in an English language text this is indicated in the Notes section at the end of the book.

1
Introduction

During the closing decades of the twentieth century, there appeared a sizeable body of literature spun around the theme of globalisation with much of this literature heralding the decline or even demise of the sovereign state. Globalisation in its various forms – economic, cultural, environmental and so forth – had blurred the old lines of territorial demarcation. Social activity, and with it social problems, were beginning to spread profusely across borders. Territorial divisions were said to be melting away, merging into the almost seamless flux of late modernity. Viewed against this background, the sovereign state, as a legally and politically sealed unit, looked increasingly anachronistic: a remnant of a rapidly fading past in which territory defined almost everything. Thus, the question was posed: how are communities to organise themselves in an increasingly borderless world? Proposals centred on the notion of multi-level governance were prominent in this context, suggestive as they were of a world characterised by overlapping but complementary jurisdictions ranging from the local to the global.

Yet, despite this shift away from state-centric perspectives we were not always told to discard the term sovereignty itself. Rather, it was suggested that sovereignty needed to be reconceptualised so as to accommodate the increasing porosity of territorial borders and multi-dimensionality of world politics. Hence, we saw such adjectives as pooled, shared or divided attached to the word. The difficulty, however, is that such reconceptualisations would render sovereignty its own opposite, that is, the opposite of what it has been taken to mean since at least the late sixteenth century: supreme, absolute and indivisible authority. It is, of course, true that the meaning of the word 'sovereign' has shifted in the past. In medieval France, for example, the word *souverain* could stand for any authority 'which had no other authority above itself' and thus, France's 'highest courts' in that period were designated '*Cours Souverains*' (Oppenheim, 1912, p.111; see also Bluntschli, 2000, p.388). It was the French lawyer Jean Bodin who restricted the scope of the term, using it to refer to that supreme authority which is vested in the state and only in the state. This

understanding was taken up and rendered more explicit by later authors in a context in which rulership was becoming increasingly depersonalised and even though, hand in hand with sovereignty's depersonalisation, state organs were multiplying.

Bodin's adaptation of the concept was well suited to a period in which the overall trend was in the direction of the centralisation of royal power, something which entailed anti-hegemonial struggle and a general consolidation of state borders. Now it may be that a world comprised of discrete and hierarchically organised entities is no longer an effective way of managing human affairs. The sovereign state form is, after all, only one way of organising social experience. If the sovereign state is indeed becoming a moribund institution then the term sovereignty will likely either fall into disuse or be redefined along the lines indicated above. However, it is not apparent that the sovereign state is as irrelevant as some have suggested. It is true that globalisation, the impact of which is highly uneven, raises important questions about the *de facto* enjoyment of this *de jure* condition. Further, to the extent that this phenomenon conduces to a strengthening of international co-operation and international institutions, it is to be welcomed. Even so, the state remains the basic unit of world politics and, whatever may be the fate of particular governments or regimes, there is little evidence that the institution of the state has become illegitimate in the eyes of people the world over. Certainly, there are many groups who are highly dissatisfied with the state in which they live, however, the response of such groups, where they cannot reach accommodation with the state which encircles them, is usually to engage in secessionist struggle with the ultimate aim of establishing a new and independent state.

That the rhetoric concerning the dilution of sovereignty in a globalised world became less intense in the early twenty-first century may be due to the added focus on military-territorial security in this period. In the first decade of the twenty-first century the power of the state, and the significance of the kind of power that it possesses, became more perceptible. Yet, talk of sovereignty's demise was in any case bound to die down given the palpable and continuing presence of an international system constructed around sovereign states. My view is that claims about the end of sovereignty in a shrinking world were often more hortatory than real, driven by the conviction (one that has been embraced in other periods of history and not without reason), that the sovereign state is a destructive institution which fosters oppression within the state and suspicion and conflict without.

Again, the preceding observations are not meant to suggest that the current system will or should remain with us for eternity. As I have indicated, the state system is only one way of managing the affairs of humanity and humanity may well decide one day that it is no longer adequate to the task. A survey of domestic and international conditions as regards conflict, extreme poverty,

human rights abuses, and environmental degradation provides compelling evidence of the current failings of this system. However, as indicated, my assumption is that the institutions of the state and sovereignty will be with us for some time to come not only because of the absence of ready alternatives but also because these institutions continue to command widespread support. Independent statehood is currently seen as the principal means by which the security of a community can be achieved and its self-expression realised and this is even though the sovereign state remains, at the same time, the principal source of insecurity and too often serves as an obstacle to communal flourishing. Indeed, these two points are crucially inter-related: the qualities which render the sovereign state a useful instrument in some contexts, such as its law and order powers, render it a threatening institution in others.

Accepting these last points, a critical re-examination of the concept of sovereignty would seem to be in order and throughout this study I have sought to bring to light what I believe to be the ethical imperatives embedded in it, although in full recognition of the fact that the institutionalisation of the concept poses significant risks. I do not call what I have undertaken a reconceptualisation of sovereignty simply because my belief is that these imperatives, in a more or less developed form, are evident in most of the writings on sovereignty produced since at least the time of Bodin. That these imperatives have been neglected or only confusedly understood by some theorists can be explained in terms of a tendency to conflate sovereignty with political power and, related to this, to overlook the social context, whether internal or external, in which the idea of the sovereignty of the state is forged. However, it is in political life above all that infantile understandings, not to mention cynical manipulations, of the concept have been most in evidence. Political actors down through the centuries as well as in the present day have been conspicuous in their attempts, often successful, at personalising the power of the state even while claiming to be its servant. Yet, personalised power, whether in disguised or explicit form, is not sovereignty at all since by definition power that is merely personal has no constitutive base: it refers only to the will of the person or persons who assert some obscure right to wield it.

That the concept of sovereignty originally was developed in connection with theories of personal rule and the absolutist state should not be allowed to elide, as I argue in Chapter 2, the essentially democratic thrust of the concept. That sovereignty's origins can only lie with communal willing was well understood from the beginning. Authors such as Bodin and Thomas Hobbes, although associated with absolutist renditions of the theory of sovereignty, clearly appreciated that the authority of the state ultimately depended on a communal state of mind made manifest in constitutive acts and continuing acceptance of the state's authority. It was not difficult to go from here to arguing, as came to be widely accepted from

the eighteenth century onwards, for a right of collective resistance to the commands of power and the institution of democratic political forms. The popularisation of sovereignty has thrown up its own problems such as the danger of ochlocracy, indeed, it was because of this danger that Bodin resisted what he called popular states or at least suggested that popular states should only be governed by the virtuous and wise. The response to the problem of ensuring that the people as a body is protected from itself generally takes the form of the constitutionalisation of rights and representative democracy. However, in seeking to distance the people from itself representation cannot avoid the problem, the problem that it is principally designed to ameliorate if not resolve, which is the gap between rulers and ruled.

It was because the existence of such a gap gave scope to abuses of power that Rousseau eschewed representation. Government by popular assemblies is not widely considered to be an option in modern democracies and thus attention must turn to ways of ensuring that the distance between rulers and ruled, while necessary for the business of government, is not such that access to the public sphere is unduly curtailed. The problem of the abuse of state power tends to be more pronounced in non-democratic states or states lacking institutions independent of the executive charged with enforcing constitutional rights and this last issue is addressed in relation to China in Chapter 4. Yet it is also a problem, to a greater or lesser degree, in democratic states where periodic electoral processes have proved to be an insufficient means of checking corruption and dictatorial uses of power and given this, and given the tendency of power to ignore or obscure its origins in communal attitudes, the idea that democracy has as its corollary a right of insurrection is something of which the public should be ever conscious and public officials ever wary. Yet, a radicalisation of contemporary democratic processes must extend beyond assertions of people power, as important as these can be, in the streets or elsewhere. Indeed, we need to ask of any given polity who comprises the people. A truly democratic polity, is one in which the sovereignty of the state is solidly and *widely* anchored to the community, such that the voices of the marginal and disempowered are ensured a hearing in the public sphere.

A sophisticated understanding of what sovereignty signified internationally took a long time to develop and this matter is traced in Chapter 3. Even though the beginnings of the sovereign state system were forged in a context of anti-imperial struggle, some members of this system proved more than willing to indulge in imperialist behaviour themselves. Part of the explanation for this kind of behaviour concerns another form of infantilism when it comes to thinking about sovereignty: the notion that sovereignty can somehow be asserted as a set of international rights while being virtually ignored as a set of international obligations. This way of thinking is depicted well in Freud's essay 'On Narcissism' wherein he sources the

beginnings of the narcissistic personality to the projection onto the child of the parents' own narcissistic feelings. He writes in relation to this: 'Illness, death, renunciation of enjoyment, restrictions on his [the child's] own will, are not to touch him; the laws of nature, like those of society, are to be abrogated in his favour; he is really to be the centre and heart of creation, "His Majesty the Baby"' (Freud, 1957, p.48). Drawing an analogy between state-centric behaviour and childish narcissism is hardly new. Rousseau, for example, in his essay called *Considerations on the Government of Poland* noted that becoming a great power means being able to say like the Russians of the day, that is, like a child: 'When the whole world is mine, I shall eat a lot of candy' (Rousseau, 1762).

That said, it is also important to emphasise that there is more than stunted emotional development at stake here: a decentralised political and legal order gives rise to certain inconveniences and an interventionist policy has historically been seen as a way of addressing these. Although it would be wrong to suggest that there was no recognition of the incompatibility between state sovereignty and intervention prior to the nineteenth century, (Bodin and many theorists after him understood the necessary relation between sovereignty and non-intervention and in the early eighteenth century, the institution balance of power was conceived of as a means of preventing hegemonic behaviour), it was only in the period following the defeat of Napoleon Bonaparte that the relation between sovereignty and non-intervention really began to crystallise in state practice. Most notable in this context, was the Congress system. This system was instituted towards the end of the Napoleonic wars and involved meetings among the powers to discuss issues of common concern and declare on the public law of Europe. Efforts at placing relations in Europe on a sound legal footing accelerated in the second half of the nineteenth century. Especially after the Franco-German war of 1870–1871, there was a renewed push (renewed, because of the earlier efforts of Jeremy Bentham and the Abbé Henri Grégoire among others), to codify and extend international law, with the ultimate aim of abolishing war.

The twentieth century saw states significantly redefine their rights and responsibilities under international law and not only in relation to intervention and the use of force. States exercised their sovereignty to greatly add to their range of obligations, such that it is difficult today to maintain that the municipal realm remains a domain wholly reserved to states. My argument here is that the logic of sovereignty in the international sphere should lead to the entrenchment and extension of state obligations. Even though states have often tended to act as if there is only one sovereign in the world, the fact that states inevitably come into contact with and need each other means that they must find ways of managing their relations. Indeed, it is impossible for a state to maintain a solipsistic outlook since the rights of states only gain meaning in a social context: their existence

depends on shared frameworks of understandings and, based on these, mutual recognition. It follows that sovereignty is not above international law but can only be thought of in relation to an international legal order. Relations between states are thus managed within a context of mutual recognition which must from the outset encompass such norms as respect for sovereignty and its corollary non-intervention (see Jackson, 1998, p.9n and Frost, 1996, p.152). Beyond this, and based on these basic principles as well as the emergence of certain shared values and interests, states can enter into any number of obligations. Indeed, one could argue that sovereign states, as sites of potentially ever thickening sets of mutual responsibilities, can serve as the instruments of their own transcendence, or at least as instruments by which international relations can move beyond its primitive, egoistic stage to a situation in which law is sovereign. In stating this last, I am not urging the appearance of international institutions equipped with a power of sanction comparable to that of the state, but only the widespread adoption or internalisation by states of a law-abiding attitude.

I have suggested that states have indefeasible obligations to one another by virtue of the fact, as argued by Mervyn Frost, that they are constituted, at least in part, through acts of mutual recognition. Each state is implicated in the constitution of the other. Yet, while *prima facie* these obligations concern interstate relations, in a fundamental sense they are obligations owed by one portion of humanity to another. This is even though they are carried out *via* the mechanism of the state. It is the idea of humanity obligations, and the idea of the sovereign state as a means, albeit contingent, of protecting the interests of humanity that leads us to the concept of humanitarian intervention. We owe duties to other states, such as respect for their territorial integrity, only because we owe duties to humanity and where those who wield power in a state are destructive of the interests of humanity then sovereignty loses its *raison d'être*. While sovereignty may serve as a license to kill in certain circumstances, it is not a license to murder, whether externally or internally. Although sadly it has been exploited and even invoked as such, it remains the case that the rights a state enjoys under this rubric are wholly a function of the rights we possess as human beings and states cannot be permitted to do that which is impermissible for human beings (Christopher, 2004, p.132).

It is on the natural rights of human beings that our obligations to the stateless also rest. Humanity, as the final author of the state system, in order to advance its ends, imposed on states an individual and collective duty of care towards the stateless. Summing up these points, one can say that there is an important sense in which the legitimacy of the state system is contingent upon its ability to advance the well-being of human beings irrespective of their nationality or legal status. Indeed, every effort to advance the interests of humanity *via* the mechanism of the state system, whether

in the form of individual states or in the form of international institutions, is a reaffirmation of its value.

In Chapter 4, I further examine the relation between sovereignty and empire, addressing the argument that while sovereignty entails non-intervention in the context of a state system in which states mutually recognise each other, this rule need not apply to entities not recognised as sovereign. A prominent line of argument developed in defence of imperialism in the past was that the European law of nations did not apply to entities, regardless of whether these entities possessed developed state organs or not, deemed uncivilised by European standards. Intervention in such entities thus was not a violation of sovereign rights as they could not be said to be in possession of them. This argument was used to justify the swallowing up of large parts of the world by European powers. It also was used to justify interference within China's borders, causing the Chinese, in order to defend themselves against foreign incursions, to examine and embrace the European law of nations including the principle of sovereignty and this development is discussed in some detail. In any case, my response to this defence of imperialism echoes previous comments. Sovereignty is only of instrumental value: it is nothing more than a means of providing a secure space in which communities can grow and flourish. The crucial value at stake is thus autonomy and whether this autonomy is crowned by the concept and institutions of sovereignty is irrelevant when it comes to the question of intervention and conquest. Indeed, the preservation of a people's independence is important precisely because it affords them the opportunity to engage in a struggle to become sovereign and self-determining in the Kantian sense. For a long time, sovereignty allied itself with imperialism, giving justification to European domination of large parts of the globe. However, I argue that the relation between sovereignty and imperialism was superficial and bound to collapse in the light of the much more potent and intellectually inevitable relationship that grew between sovereignty and the principle of self-determination. Sovereignty's significance lies in the fact that it is both an articulation of the struggle for self-determination and a means, although not a necessary means, of furthering this never-ending struggle. Imperial domination, since it involves an explicit repudiation of the principle of self-determination, thus threatens the principle of sovereignty itself.

It could be argued that the post-World War II unravelling of colonial systems earlier established by European powers marked a further maturation in thinking about the concept of sovereignty. Indeed, this development can be seen as a direct legacy of an earlier maturation in thinking in the European context involving the popularisation and constitutionalisation of the sovereignty of the state. Decolonisation reflected recognition that the institution of sovereignty, if it is to be more than *de facto* mastery, must be based in legitimacy. Some maintain that the post-colonial

sovereignty regime (under which the sovereignty of territories which were not self-governing was recognised, based on the idea that the peoples of these territories had a right to self-determination irrespective of their level of empirical preparedness), has failed the people of the post-colonial world. It is a regime which has fostered and allowed to flourish corrupt, inept and repressive governments, governments which deny their citizens genuine self-determination, reducing them to subject status or even worse. A widely held view is that the international sovereignty regime aids and abets such governments, shielding them from international criticism and interference.

It is true that the muscular rhetoric of sovereignty employed by some governments in the international context is merely a smoke-screen intended to divert attention away from the vicious reality that lies beyond. It is also true that the international recognition of the external sovereignty of the state, which as we have seen is in an important sense constitutive of it, can serve to legitimate tyrannical governments operating under its banner. Clearly also, external sovereignty is a significant obstacle to efforts to provide oppressed and suffering peoples with humanitarian assistance. Even so, the problem with the external sovereignty of certain states, is not a problem of sovereignty *per se*. First, there is nothing in the theory of sovereignty that says that states are immune from criticism or that the borders of a state can never be crossed in the name of humanity. In fact, as regards this last, historically most legal and political theorists have argued to the contrary. Second, the problem of external sovereignty, in this context, lies with the ongoing recognition of something which is internally absent. In principle, recognition of the sovereignty of the state is simply declaratory of what is assumed, by virtue of a state's constitution, to already exist: sovereignty. Thus, international recognition does not *give* a state sovereignty, although it certainly helps to preserve the sovereign independence of the state as well as *de facto* situations of power. The upshot of all this is that while one may speak of the failure of the post-colonial international sovereignty regime (to the extent that it has hindered the struggle for self-determination either through reinforcing the power of dictatorial governments through non-interference and, importantly, inappropriate interference), the issue internally speaking is not so much the failure of sovereignty as its non-existence.

Now one should not discount the significance of the achievement of sovereign independence by formally colonised peoples and the value that they continue to place on their independent status. However problematic its internal make-up may be, the external sovereignty of the state, in the sense of an internationally recognised right of independence and non-interference, may still be prized. The issue then becomes, not one of finding alternatives to sovereign statehood for certain parts of the world, but one of how to render states which are weak, ineffective and/or illegitimate properly sovereign within: as truly self-determining. Michael Walzer, fol-

lowing John Stuart Mill, points out that self-determination by definition, as is also the case with sovereignty, cannot be given to a people: self-determination can only be achieved by a community through its own 'efforts'. Indeed, following on from earlier remarks, external sovereignty may be valuable even where internal sovereignty is lacking in that it secures an area in which a people can strive to become authentically free, even though there may be many serious obstacles in their path and they may experience many setbacks along the way. Walzer acknowledges that a people may exist amidst circumstances so dire that any notion of them struggling for their freedom is inconceivable, yet he remains sympathetic to what he calls Mill's 'stern doctrine of self-help' and for this he has been criticised (Walzer, 1977, pp.87–90; see also Doppelt, 1978, p.10).

Jack Donnelly is similarly wary of intervention, stating that it is 'much easier to produce great harm than to provide major help'; intervention may unleash further violence through exacerbating rivalries and tensions and also, through forestalling organic struggle, hinder the development of the necessary psychological basis for free institutions. Rather than intervention, Donnelly recommends 'self-restraint'. By this he means that states, or more specifically powerful states, should avoid 'actions [military, economic or diplomatic] that actively support or encourage rights violating régimes' in order to 'return the fate of human rights to a national struggle between dictators and their citizens' (Donnelly, 1988, p.259). Yet, this rejection of international 'paternalism' in the form of intervention, which as we have seen can be traced back to Mill and Kant, obviously cannot be the last word on the question of human rights (Donnelly, 1988, p.259). The question of human rights concerns much more than the problem which is state repression: there is also the question of the economic blockages to their realisation and while these blockages may be an effect of dictatorial government they are also an effect of structural economic conditions of which the wealthy members of the state system are the architects. Removing economic blockages to the realisation of human rights might indeed entail self-restraint in some areas or circumstances, however, in others, especially when it comes to the very poor, a much more activist form of international policy-making is required. Economic action, whether in the form of aid or other types of assistance, should not be regarded as charity since, as already pointed out, each state is implicated in the construction of the other and thus in a fundamental sense we are each responsible for the other. That the state system is grounded in mutual obligations means that this system has never been and never can be a purely self-help system. Once we understand this point, we can then proceed to meditate on the kinds of obligations states owe each other.

Most importantly, as I have also suggested, when we speak of state obligations we are really speaking of the obligations of one part of humanity to another. To repeat, sovereignty is a status conferred by humanity for the

advancement of individual communities and humanity as a whole. These points taken together suggest an obligation on the part of the economically privileged, by virtue of their very existence and as a part of their humanity obligations, to assist in the creation of the conditions of the good life for all. If this obligation is not fulfilled then the very poor and destitute, who like those rendered stateless through war or persecution effectively live in a state of nature, cannot but be expected to exercise their natural right of necessity. The assertion of such a right was widely criticised in the past as it served as a pretext for imperial conquest. Yet, despite its considerable abuse, there is a sense in which the articulation of such a natural right has merit. As Walzer suggests in discussing Thomas Hobbes's defence of a right of necessity, there are circumstances in which it is 'right to set aside any consideration of territorial integrity-as-ownership and to focus instead on life' (Walzer, 1977, p.57).

In Chapter 5, the concepts of sovereignty and self-determination are further explored in relation to the condition of indigenous peoples. The question of the relation between indigenous peoples and the states which enclose them has been to the fore in recent years in part because of the debates leading up to the passing of the UN's Universal Declaration on the Rights of Indigenous Peoples in September 2007. Controversy has surrounded the Declaration because of its assertion of a right of self-determination, in relation to political, economic and cultural matters, on the part of indigenous peoples. Even though it is quite clear that the Declaration only refers to a relative form of self-determination (that is, a limited right of self-determination within the constitutional framework of the sovereign state), some have objected to this document because of its alleged secessionist implications. The word sovereignty is sometimes used by indigenous groups, however, this is usually in order to refer to the form of internal self-determination described above. It is true that it is sometimes used by the same groups in its full legal sense, although claims to sovereignty of this nature can be seen as a means of venting anger at past and present injustices or as a means of moral suasion. Given that indigenous peoples typically live under conditions of continuing colonial domination, such claims are bound to be in most cases rhetorical (although this in itself is not without significance), rather than real. Some have urged indigenous groups to stop using the word sovereignty because its employment gives rise to the suspicion that behind the claims to a right of internal self-determination lies a more ambitious agenda. Others have argued that the assertion of a continuing indigenous sovereignty based on prior ownership should be avoided, simply because such an assertion is not convincing and is seen as merely a 'lever for concessions within the established constitutional framework' (Alfred, 2001, p.28). It is certainly true that claims to a continuing indigenous sovereignty are often intended to serve this rhetorical purpose, however, to the extent that such claims are successful in this

regard, it is because they bring to mind important historical questions concerning the legitimacy of European conquest.

A good number of authors have explored the debates concerning the sovereign status and rights of indigenous peoples against a background of imperial conquest and domination. Such debates have been characterised by considerable ambiguity with authors such as Vitoria, Grotius and Vattel, to a greater and lesser degree, condemning colonial conquest while also providing pretexts for it, whether in the form of a right of civilisation or a right of necessity. These distinct but overlapping ideas gained increasing currency as imperialism accelerated, however they were also subject to considerable legal critique. The writings of Rousseau and Kant, with the latter seemingly ascribing a right of self-determination even to those he deemed to be in a state of lawless freedom, and the French revolution's elevation of the principle of equality, inspired nineteenth century continental publicists to critically analyse and challenge, wholly or in part, these two justifications of imperialism. Throughout the nineteenth century, the right of civilisation, as the most cited justification for imperial domination, was repeatedly denounced on the grounds that it was contrary to natural law, the law of nations, scientific reason and increasingly state practice. Attention also turned to the question of whether a lack of civilisation precluded a people from exercising sovereignty, with some arguing that the question of sovereignty should be treated separately from the question of civilisation: a people could be regarded as sovereign in respect to their internal arrangements even though they lacked European conventions and culture. Indeed, some argued that it did not really matter whether non-European peoples possessed the European concept of sovereignty or not in order for them to be treated as sovereign: the mere presence of a human society was enough to establish a right to external independence.

Appearing alongside this form of criticism, were denunciations of the criterion of civilisation itself, with some authors stating it was impossible to apply given that civilisation was a relative notion and that no civilisation was capable of objectively measuring itself. In addition to this, the concern was expressed that the putative right of civilisation could also be used to justify imperial conquest within Europe. Further, as critics of imperialism noted, those defending the right of civilisation or the broadened notion of *terrra nullius* typically acknowledged the sovereign rights of indigenous peoples in maintaining that the acquisition of their lands or a part of their lands should be undertaken by means of treaties rather than by force. In fact, much of the land acquired during the age of imperialism was acquired by the former rather than the latter means. Yet, this also raises the tantalising question of whether indigenous peoples could ever have ceded sovereignty through the instrument of the treaty. Some indigenous peoples claim today that such surrender was impossible in the light of their customary laws, a point that is more than a little reminiscent of the ancient

and widely recognised principle that the one thing a sovereign can never do is annihilate its own sovereignty.

In terms of state practice, Chapter 5 examines the treatment of indigenous peoples in the United States, Canada, Australia and New Zealand in respect to the issue of indigenous rights, including the right of self-determination, in both the past and present. It examines the problem of indigenous groups insisting on a continuing sovereignty in a situation in which there is no domestic legal forum in which such a right can be asserted against the sovereignty of the state. As has been acknowledged by various state legal institutions in a number of instances, domestic legal forums are wholly creatures of the state's sovereignty. Nonetheless, as already suggested, even if claims to an ongoing sovereignty by indigenous representatives are not legally persuasive, the re-examination of the historical record that such claims invite may cause us to view indigenous rights less as a grant made at the discretion of the sovereign power than as a payment of a debt that is *owed*.

Chapter 6 of this study examines the European Union (EU) as its developing legal and political contours are held up as indicative of how a post-sovereignty world might be shaped. In this regard, the EU has been projected as an institutional hybrid: it is neither an interstate arrangement nor a supranational entity. The EU's ambiguous status is above all seen as being reflected in the fact that while it lacks some of the traditional marks of sovereignty, for example, military, policing and taxation powers, the doctrine of the supremacy of EU law (as laid down by the European Court of Justice in 1964), has been implicitly accepted by Member States. According to this doctrine, the effect of the obligations that Member States enter into in joining the EU is that any 'unilateral act incompatible with the concept of the community cannot prevail' (*Costa v. ENEL*, Case 6/64, 15 July 1964).

Closely related to the idea of the supremacy of EU law is the principle of direct effect: EU law is directly effective in the jurisdictions of Member States without the need for it to be subsequently enacted by national parliaments in order to take effect. This applies whether an EU norm precedes or follows a 'national provision' (Hartley, 1998, p.218). The mutually supporting notions of direct effect and the supremacy of EU law have led, in particular, to claims concerning the demise of the sovereignty of Member States, and it is worth recalling here that law-making power was for Bodin chief among all the marks of sovereignty. Yet, on close inspection it becomes clear that the sovereignty of Member States remains intact. Certainly, significant powers, including certain law-making powers, have been transferred to EU institutions. Nonetheless, sovereignty has not been limited. As indicated above, historically it has been considered impossible for a sovereign to extinguish its own sovereignty. To do so would be to destroy the ground on which it stands, thus rendering all its acts void. This recalls

another crucial point: sovereignty is not personal power but is constituted power and it follows from this that its sphere of operation must be contained within certain constitutional boundaries. Action taken by those who wield the sovereign power which oversteps constitutional limits, while possible politically, can never be undertaken legitimately or be considered a sovereign act.

Some have argued that the British Parliament, in passing the European Communities Act of 1972, achieved what had hitherto been thought impossible under British constitutional law: that Parliament could bind future Parliaments. As I have mentioned, law-making power is considered to be the chief mark of sovereignty and supreme law-making power has always been understood by theorists to mean the power to make and unmake the law and it is precisely this that is meant by the old saying that the sovereign is above the law. Now if we accept the definition of sovereignty as the supreme power to make and unmake the law, then it would follow that Britain's submission to EU law is only by virtue of the 1972 Communities Act and that, at least from the perspective of the British constitution, (and it is important to note that domestic courts of Member States have upheld the view that EU law is not supreme in respect to all the provisions of their state constitutions), Parliament is free at any moment to pass legislation withdrawing Britain from the EU (Hartley, 1999, p.167). If the British Parliament enacted such legislation, then EU law would no longer prevail over national legislation and the courts would no longer be able to 'disapply' British law where it came into conflict with EU law. Viewed from this angle, EU law is supreme only as long as Member States choose to continue to be members of this legal order.

At the same time, the EU is obviously much more than an ordinary intergovernmental arrangement and this is especially because of the principle of direct effect. In this regard, it stands in contrast with international law in general which often requires, depending on a state's constitution, national legislation in order to come into effect. The so-called dualist doctrine, which is discussed in this Chapter, insists on this point: it is through their enactment in national legislation that international treaties become the law of the land. In desisting from passing such enabling legislation, possible given the decentralised nature of the international legal order, states are ignoring the international legal obligations that they have entered into with other states. Thus, it can be stated that in comparison with the wider international legal order, the EU legal order is highly organised and developed. In this regard, I agree with those who think that it provides a template for the wider international legal order: international law could make progress *via* 'the multiplication of specialized legal orders based upon constituent treaties…which may in the long term tend to provide the international order with the institutional and normative advances that are part of the [European] Community legal order' (Leben, 1998, p.298).

There is no logical reason why international law in general should not have direct effect. Indeed, as Hugo Krabbe points out, as a matter of logic it should: it does not make much sense that one can enter into international legal obligations and be bound by those obligations yet also be free not to carry them out (Krabbe, 1930, pp.244–5). That states can ignore their international legal obligations, whether under the guise of the dualist doctrine or not, is the price we pay for maintaining a high degree of legal and political decentralisation internationally. However, such a situation is logically incoherent and based on a primitive understanding of sovereignty: that the legal order of the sovereign state is superior to that of the international legal order.

Chapter 7 reflects in more depth on a question touched on in Chapter 3: the place of war in a sovereign state system and, in relation to that, the problematic relation between war and law. This Chapter begins with an examination of the view expressed by Rousseau that war, by which he means intense and sustained levels of violence, is a product of the state system: war springs not from nature but is a consequence of the appearance and replication of the state form. Once one state appears other states are bound to appear by virtue of the threat posed to segmented societies by peoples organised into states. Thus, a state system arises because states, in the absence of a law enforcer, confront each other as potential enemies. In one sense for Rousseau, the insecurity felt by states is a paranoid fantasy and the hostilities consequent upon that insecurity a form of madness, albeit a madness that has a certain method in it. Yet, Rousseau appreciated that war is an instrument of reason, an instrument deliberately chosen by states in the pursuit of their policy objectives and which, as a result, should be used in a disciplined way. The importance of this view is that it suggests that war can and should be guided by intelligence and this leaves open the possibility that more rational analysis may see this activity circumscribed in any number of ways. Rousseau, of course, went beyond this in exploring ways in which perpetual peace might be achieved, yet he is also noted for the case he mounts concerning the principle of distinction: only states can be enemies never human beings.

Following in the wake of Rousseau, Kant explored the morally problematic issue of deploying the bodies of others in dangerous and bloody contexts and demonstrated the absurdity of the notion that war could be considered a right of states. This notion, the most extreme expression of the view that the state's legal order is superior to the international legal order, was an absurdity because a claim to a right of war was simultaneously a complete and emphatic denial of the existence of any sovereign right at all. Kant was writing in a context in which the view of war as a policy tool was commonplace. It is a view that would gain especially stark expression in the work of Carl von Clausewitz, someone who would issue some highly instructive warnings concerning the mercurial nature of

military conflict. Given the predominance of the political conception of war, and given the high level of political and legal decentralisation in Europe in the eighteenth and nineteenth centuries, it was hardly likely that states would agree to war's abolition. Yet, as discussed earlier, certain early nineteenth century developments point to a strong sense that in a multipolar system recourse to war needed to be curbed.

The latter part of the nineteenth century would see attention turn to regulating war's effects, something that was impelled by the industrialisation of the means of war as well as by the fact that war was still not illegal. Vattel had argued in the eighteenth century that the just war doctrine, by then in a state of decline, was dangerous. States entering conflicts brandishing the sword of justice were likely to deny any rights to their adversary, the consequence of this being escalating levels of violence. The alternative Vattel proposed was that participants in war, or at least participants in ordinary wars, should typically be seen as moral equals and thus as in possession of the same belligerent rights. This view, or later versions of it, informed the push to codify international law in the late nineteenth century although, as discussed in Chapter 3, these legal efforts also overlapped with a simultaneous push to outlaw war as an instrument of policy, something which was achieved in stages between 1920 and 1945.

The general argument of this chapter, that war and sovereignty stand in contradiction, is then addressed specifically in relation to wars of anticipation – an issue that has become controversial in recent years particularly in the light of the 2003 invasion of Iraq. The broad conclusion reached in this context is that the assertion of a right of anticipation is the assertion of a privilege and not a right and as such is a denial of the principle of sovereign equality.

This study concludes with a brief chapter which seeks to isolate the major difficulties engendered by the institution of sovereignty which have been raised throughout, pointing to certain conceptual perspectives from which these difficulties might be addressed, albeit without necessarily abandoning the concept of sovereignty itself.

2
The Municipal Realm

Society and the state

In his very suggestive study of the concept sovereignty, F.H. Hinsley maintains that while the state may be only one way of arranging and systematising social power, once this form has established itself the concept of sovereignty is almost bound to emerge. When the machinery of the state begins to enclose and dominate society, controversies over who is entitled to wield this machinery and in whose name are inevitable (Hinsley, 1986, p.17). Initially, society encounters the state as a strange and unnatural form, the modes of which are foreign to traditional 'ways' and because of this, and because the state centres on the 'principle of dominance', the community resists its imposition. Such opposition, along with the fact that establishing the state is an arduous enterprise, explains why it has not always made its appearance. There is no 'desire' on the part of society to be dominated by the state, rather there is 'an urge in men', whether for reasons of private gain or public benefit, 'to possess its kind of power' (Hinsley, 1986, pp.10, 15–16). Going further than Hinsley, Jacques Derrida argues that all states originate in a form of violent capture, although the violence of which he speaks is both real and metaphorical in character.[1] He states:

> *All* Nation-States are born and found themselves in violence…the moment of foundation, the instituting moment, is anterior to the law or legitimacy which it founds. It is thus outside the law, and violent by that very fact…. Before the modern forms of what is called, in the strict sense, 'colonialism', all States…. have their origin in an aggression of the colonial type. This foundational violence is not only forgotten. The foundation is made in order to hide it; by its essence it tends to organise amnesia, sometimes under the celebration and sublimation of grand beginnings (Derrida, 2001, p.57).

The metaphorical dimension of Derrida's explanation of the violent origins of the state concerns its necessarily pre-legal basis and in this regard, his

contention is simply tautologically true. That aside, and following on from Derrida's remarks, the question addressed in this chapter is whether sovereignty serves merely as a means of sublimating the state's violent beginnings as well as the forms of violence in which it continues to participate, through bathing the state in a lustrous glow (thus, recalling the divine and princely motifs that informed its early conception), or whether the logic of sovereignty can lead us down a radical democratic path. Even if the state were founded on the doctrine that might is right, which John Austin shrewdly described as either a 'truism affectedly and darkly expressed' or 'false and absurd', it is also the case that over time might must make right and in so doing acquire legitimacy (Austin, 1906, pp.186–7).[2]

It is argued below that the concept of sovereignty is an initial means of reconciling power with legitimacy or the state with community. The transmutation of might into right is no simple matter and it has universally required determined efforts. Yet it is through such exertions that the people emerge as something more than a loose collectivity, becoming instead *a people*. Obviously, there is power in this shared identity as it can issue in concrete and efficacious action, such that the rulership comes to appreciate or is compelled to appreciate that *l'union fait la force*. Etienne Balibar points out that it is at 'insurrectional' moments that the collective 'we' is at its most condensed and it is such moments that ideally result in a condition of 'democratic reciprocity' whereby the people grant each other rights as individuals, rights which are properly speaking 'transindividual' as they have been collectively seized (Balibar, 2004, pp.185–6).

The state's manifestation as an external and coercive machinery of command, stands in sharp contrast with the organic forms of rule in stateless societies where authority largely depends on 'psychological and moral coercion rather than on force' and where the 'structure of command invariably emanates directly from the community.' Even where there is 'final authority that is fully effective for…[a stateless society's]…purposes' it is an authority which is internal to the community and operates in accordance with its rules. The state, however, stands apart from and over the community and it is only with the emergence of this type of command structure that we find an institution in which the concept of sovereignty can be lodged (Hinsley, 1986, pp.15–17). Yet, if the institution of the state succeeds in establishing itself the concept of sovereignty may take a long time to emerge or may not emerge at all. Hinsley notes that the 'resistance of the customary society to the ways of the state, the disregard by the traditional ruler of the influence of the changing community, the persistence on both sides of the outlooks of the "segmentary state"' were striking characteristics of the development of the state in Europe and for some time forestalled that 'turning-point' which sees that meeting or association of state and society which is necessary for the appearance of sovereignty. He adds that these features were even more prominent in ancient Egypt, the Chinese Empire and Ottoman Turkey such that 'the advance of the mutual impact of

government and, society … [was] … even more halting and slow' and hence 'the turning point … [was] … even longer delayed – if it was ever achieved' (Hinsley, 1986, pp.20–1).

Sovereignty needs the state: sovereignty cannot exist without the state because by virtue of it being supreme political authority it demands an institution distinct from the community in which it can locate itself and through which it can exercise dominance. Yet, as noted, the appearance of the state does not guarantee that the idea of sovereignty will emerge. The idea that there exists in the body politic a supreme authority only arises when the community no longer regards 'the state as alien to the society and have to some extent begun to identify the claims of the state with the needs of the community' (Hinsley, 1986, pp.17–18). However, irrespective of whether the community in some way needs the state or simply cannot fend it off, the state must be controlled. Equally, where resistant elements confront the state machinery, elements which it cannot eliminate, the state must come to some arrangement with the community. The state and community must negotiate between them a relationship and this relationship may take the form of sovereignty (Hinsley, 1986, pp.21–2).

To think of the state in terms of sovereignty is to think of the exercise state power as authoritative or to demand that it be so. The community through vesting sovereignty in the state frees the state to act but also seeks to discipline its actions. Thus, while one might agree that the state is the result of and perpetuates a kind of violence, this is not *prima facie* the case with sovereignty, even though it undoubtedly and endlessly entails the risk of violations of its terms. Sovereignty involves the incorporation of a people by the state, however this is by no means a passive process of absorption. For sovereignty to exist there must be a people conscious of itself as a people, conscious of its power as a people and collectively ready to believe and act as if sovereignty were vested in the state.

In his *Law of War and Peace* (1625) Hugo Grotius claimed that the act of submission to the sovereignty of the ruler was irrevocable since the sovereignty of the state arises from a pact and 'it is a rule of the law of nature to abide by pacts' as this is the best way the common good which lies at the base of the state is served, although Grotius added a number of important qualifications to this claim (Grotius, 1925, pp.14–15, 44).[3] In challenging Grotius's contention Rousseau stated: '"A people," says Grotius, "may give itself to a king." Therefore, according to Grotius a people are *a people* even before the gift to the king is made. The gift itself is a civil act; it presupposes public deliberation. Hence, before considering the act by which a people submits to a king, we ought to scrutinize the act by which people become *a* people' (Rousseau, 1968, p.59). Rousseau's point is that the constitutive moment, or the process through which the people 'take collectively the name of a *people*', occurs at the time of a prior and original social contract (Rousseau, 1968, p.62). Yet, this act of association also presupposes public deliberation,

and so it is better to say that the people both make and are made by the constitutive moment: they both create and are created by 'the institution of sovereignty' (Balibar, 2004, p.158).

Sovereignty thus emerges where state and society agree to render power as authority because they both need and fear each other. Yet, while the concept in a sense bridges the distance between society and state, it also defines and preserves it. Sovereignty has its source in the community but it is located in the state which rules over it. Sovereignty flows upwards through an act of collective will only to move downwards in the form of supreme authority and political power. Hinsley is surely right to argue that 'its fundamental aim, and ultimate achievement…[is]…to cover up' the inescapable 'dualism' between the rulership and people that the activity of government involves (Hinsley, 1986, p.130). The rulership usually would prefer that the sovereignty of the people slept undisturbed. As Alexis de Toqueville states, the notion of the sovereignty of the people, which lies 'more or less, at the bottom of almost all human institutions', generally remains concealed from view. It is 'obeyed without being recognized, or if for a moment it is brought to light, it is hastily cast back into the gloom of the sanctuary' (Toqueville, 1945, p.55).

It is precisely because of the inescapable dualism that the business of government entails and the sorts of dangers that it poses, that it is vital that we stay alive to the fact that the sovereignty of the state is only real to the extent that it is collectively imagined. Austin stated, following Jeremy Bentham, that the positive mark of sovereignty is that the '*bulk* of the given society is in a *habit* of obedience or submission to a *determinate* and *common* superior' (Austin, 1906, pp.96–7; Bentham, 1948, p.38).[4] This statement may conjure relations of repression and submission, yet for Austin what accounted for political obedience was a positive disposition toward government on the part of the mass of population rather than a fear of punishment. Austin knew that sovereignty rested on a general attitude of mind, specifically, a 'law-abiding' attitude, his fundamental contention being that 'authority is merely the reflex of habitual obedience, that in default of this all is vanity' (Manning, 1933, pp.202, 208).[5] For this reason, as the nineteenth century British idealist T.H. Green stated in discussing Austin, sovereignty must not be thought of 'in abstraction as the wielder of coercive force, but in connection with the whole complex of institutions of political society', that is, in connection with a general will. As he famously stated: 'Will, not force, is the basis of the state' (Green, 1999, pp.69, 84).

It is precisely because Austin understood that the sovereignty of the state was grounded in the will of the electorate that he regarded 'superiority' and 'inferiority' as entirely 'reciprocal' notions, such that it was possible to view the sovereign as 'inferior' to the people (Manning, 1933, p.223). There is nothing strange about the notion of sovereignty in Austin. Rather, as Charles W. Manning explains, it is simply a theoretical means of explaining and relating the ritual obedience of the population to the decrees and