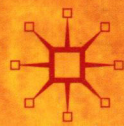# SOVEREIGNTY
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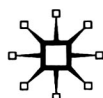
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# Sovereignty: Interpretations

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# Sovereignty: Interpretations

*Also by Jo-Anne Pemberton*

GLOBAL METAPHORS
Modernity and the Quest for One World

*For my mother.*

# 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.

# Contents

# 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

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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-