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A normative critique of the concept of sovereignty

(One Volume)

Simon Edward Harris

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A normative critique of the concept of sovereignty

Simon Edward Harris

Abstract

Sovereignty in contemporary international relations is facing a number of key normative challenges. The anarchic precepts of the Hobbesian system are too narrow to meet the demands of the international community. The cosmopolitan approach to international relations is one which is equipped to deal with these problems and an evolution of sovereignty may be seen to be occurring.

The foundation of the International Criminal Court asserts the necessity for universal individual responsibility and, as such, pierces the shell of sovereignty. The 'climate change regime' questions a state's responsibilities to other states, peoples and individuals under the guise of 'trans-border obligations', whilst the case for according rights to indigenous peoples examines the sovereign state's ability to protect and welcome diversity within its borders whilst simultaneously remaining within a cosmopolitan framework. All three case studies ask questions of the sovereign state's ability to deliver an acceptable level of justice for each global citizen.

These three challenges are met via recourse to the theories of Andrew Linklater and John Rawls, in particular. What is argued for is a consistent notion of 'thin cosmopolitanism' which is able to guarantee fundamental rights for every individual. The idea of 'spatio-temporal justice', a concept which delivers duties and rights according to previous activities and policies, is also explicated. Spatio-temporal justice is viewed as a coherent liberal approach which is nevertheless able to accord different rights to different individuals on the basis of historical, economic and culture situatedness.

Despite the intransigence of an international system embedded in notions of power politics and game theoretic elements, elements of cosmopolitanism can be seen to be emerging with regard to all three case studies and, indeed, in the wider international political life.

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Declaration

No material in this thesis has previously been submitted for a degree in this or any university. This thesis was researched at the University of Durham between October 2003 and August 2004.

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Introduction

This essay seeks to investigate the normative worth of sovereignty in contemporary international relations, centring upon the new moral and political dilemmas it faces in post-Cold War politics. The three challenges discussed in this essay are the ability of the concept to respond effectively to challenges represented by universal individual responsibility, the recognition of trans-border obligations and also the ability of the state to embrace diversity within its boundaries in a morally appealing manner. These three challenges are all aspects of a single cosmopolitan case for modifying sovereignty, although different aspects of this are highlighted in each case study.

The first chapter articulates more precisely the concept of state sovereignty, briefly investigating its history and the various definitions that have been provided, in order to anchor the essay more successfully. The definition of the state owes much to Alan James' work whilst the definition of sovereignty focuses closely on Hinsley's work, although the concept is treated throughout the essay as a working hypothesis, since deeper investigation into the foundations of sovereignty are beyond the remit of this work. Chapter One also investigates the moral worth of 'classical' or 'Westphalian' sovereignty drawing on the works of Bodin, Hobbes and Locke in particular. In setting out the moral value of the concept as traditionally conceived, indicating both its *raison d'être* in international relations as well as its limitations, this section provides an analytical framework against which the cosmopolitan challenges are set.

The three challenges are introduced in the first chapter in order to provide an overview of the theoretical literature on the subject, but are then developed in subsequent chapters which focus on contemporary issues and debates. Chapter Two, which looks at the notion of universal individual responsibility, focuses on the foundation of the International Criminal Court. It argues that such an institution exemplifies the manner in which a sovereign state can no longer, morally or politically, claim exclusive concern or authority over its citizens. After outlining the 'human rights regime' following the end of the Second World War, the chapter moves forward to the Rome Conference on the establishment of the Court which raises a number of issues relating to sovereignty, such as universal jurisdiction, individual accountability and the role of an independent prosecutor, all of which are investigated

throughout the course of the chapter. The role of non-governmental organisations and of the existence of a nascent 'global civil society' is also included. The improvement argued for in Chapter Two corresponds roughly with the mode of reasoning developed by Andrew Linklater, and indeed, the concept of 'thin cosmopolitanism' is clearly visible in much of the essay.

Trans-border obligations are also viewed as a significant theoretical challenge facing sovereignty. The idea that the impact of activity within sovereign states is now the concern of all, especially regarding how they impact upon their immediate neighbours and those further away, has grown in recent decades and is now clearly visible with regard to the international management of environmental problems. Hence, Chapter Three, in tying in with the section in Chapter One, seeks to investigate the way in which climate change has been handled. It focuses on the Kyoto Protocol, indicating agreements between states and also the issues, mainly financial, which reinforce sovereign individualism.

One of the most taxing issues in international relations concerns indigenous peoples and the rights that they ought to enjoy. As groups who have enjoyed political autonomy, their relationship with the modern state is troublesome and so Chapter Four seeks to argue that a plausible solution can be reached which maintains its cosmopolitan credentials rather than reverting to a communitarian position. This issue is, arguably, the most complex of the three case studies and thus includes a good deal of theoretical discussion on the issue, suggesting a range of justifications for special rights, focusing on the types of justice that a morally-appealing variant of sovereignty ought to be able to produce. The empirical evidence in this chapter focuses mainly on the experiences of indigenous peoples in the 'new world'.

The role of non-governmental organisations, epistemic communities and of 'global civil society' is investigated in each of the case studies. These bodies and groups are increasing in their importance in international relations, reflecting, as they do, a form of moral conscience for the sovereign state with regard to issues of justice, be it transnational or sub-national, as well as constituting organs which legitimate and direct the policy of sovereign states on matters such as environmental policy. The importance of these bodies reflects an understanding that sovereignty is, in a sense,

becoming contingent, and that the actions of states are subject to the checks and balances offered by transnational bodies who have the ability to lodge credible critiques and suggestions for moral improvement. The role of international networks such as epistemic communities also feeds into a discussion of policymaking issues on the part of states, and the differing attitudes adopted, especially with regard to the so-called 'Euro-Atlantic split', is a further issue analysed throughout the essay.

This essay also aims to demonstrate that in order to produce a normative improvement in sovereignty, issues of spatio-temporal justice must also be included. This category, which accounts for the past actions of sovereign states, both in terms of cumulative industrial output and also moral culpability for enforced relationships of inequality and subjugation, can be seen to be emerging with regard to environmental problems and also the rights of indigenous peoples. This justice is rationalized as forming an extension of John Rawls' cosmopolitanism in particular, but also fits within the cosmopolitan schemas offered by a range of theorists, including Linklater.

In conclusion, this essay aims to demonstrate that sovereignty, as a morally contestable concept, is reacting to new challenges in international relations, and is able to manage these in order to evolve into a contingent and morally-appealing variant which is able to reconcile its Hobbesian roots with a burgeoning sense of cosmopolitanism, which is now a hallmark of many issues and debates.

Chapter One: The Normative Worth of Sovereignty in International Relations

Theory

Introduction

This chapter introduces a number of key ideas and theories which underpin the case studies in the later chapters. It fulfils a number of important tasks, beginning firstly with a short section which attempts to define sovereignty, assessing what makes a state sovereign and what the concept entails practically. What this section does not do is go too deeply into definitions of sovereignty. Rather, it seeks a usable working definition in order to illustrate the issues contained within the rest of the essay. Nor does this involve a history of the concept, although there is a discussion of historical change which is contained within the section which assesses the concept's normative worth. The section discussing sovereignty's normative worth begins with a discussion of legitimacy in international relations, a factor which ties in with the previous discussion of what makes a state sovereign in the first place. Following this, the chapter moves chronologically from Bodin and Hobbes, examining 'classical' or Westphalian sovereignty, to Kant's cosmopolitanism and the effect that his moral theory has had on contemporary international relations analyses. Following this, three of the challenges to sovereignty offered by the cosmopolitan critique are investigated, with each centring upon theoretical issues discussed during the case studies in the latter chapters. The communitarian and realist responses to the cosmopolitan notions espoused by Linklater, Pogge and Held, for example, are considered throughout these discussions and the criticisms are designed to pinpoint precisely the kinds of objections faced by the measures and activities considered in the later chapters.

Section One: Characterizing Sovereignty

This essay intends to ask normative questions of the concept of sovereignty. Hence, it is perhaps sensible to begin with a section outlining precisely what this term refers to. However, this is no small task as there exists a great selection of works by theorists all proffering slightly different interpretations. The first question that needs to be addressed is quite simple; what is sovereignty? When a state community is defined as being sovereign what can be said to be qualitatively different between these and other

groups? This apparently simple question instead produces a range of answers, each bound in semantics and overlapping issues of autonomy and control as well as legal prerogatives. Indeed, this impasse is so sizeable that it has been suggested that the concept is indefinable and is something everyone is keen to have but that few can justify why or how they have it.¹ The postmodern turn in theory argues that the concept is indefinable and that we are limited solely to examining the definitions of others² whilst Bartelson's conception draws on Kant's 'parergon', a frame which does the framing and which is neither inside nor outside, since it is the condition for the possibility of both.³ Nevertheless, it is agreed that the term is largely unproblematic when used in practice and, as Cynthia Weber argues, it is only ever challenged by 'constitutional lawyers and other connoisseurs of fine lines,'⁴ and in an essay of this length it is unwise to delve too deeply for fear of losing track of the issue at hand.

Stephen Krasner defines four key elements which all fit under the umbrella of sovereignty.⁵ 'Domestic sovereignty' refers closely to the work of Hobbes and Bodin in particular, whose main political concerns were with erecting a central legitimate authority to govern internally over a fixed territory. Hinsley notes that, initially at least, sovereignty was largely a matter of asserting that there existed 'a final and absolute authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: 'and no final and absolute authority exists elsewhere.'⁶ Secondly, there is 'interdependence sovereignty' which emphasises control in international politics rather than authority, particularly in relation to globalised issues such as environmental degradation and the AIDS epidemic. For the purposes of this essay, however, this theoretical category can, to an extent, be disregarded since the main aim here is to discuss the way in which nations are ceding their authority rather than investigating their autonomy,⁷ although control of events and processes is an essential

¹ Alan James, *Sovereign Statehood: The Basis of International Society* (London, Allen and Unwin, 1986), p. 18

² As with Jens Bartelson's *The Genealogy of Sovereignty* (Cambridge, CUP, 1995)

³ John Hoffman, 'Blind Alleys: Can We Define Sovereignty?', *Politics*, Vol. 17 (1997), pp. 53-58, p. 56

⁴ Cynthia Weber quoted in John Hoffman, 'Blind Alleys', p. 54

⁵ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ, Princeton University Press, 1999)

⁶ F.H. Hinsley, *Sovereignty* (2nd Ed.) (Cambridge, CUP, 1986), pp. 25-6

⁷ Robert Jackson's 'Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape', *Political Studies*, Vol. 47 (1999), pp. 431-456 discusses at length the difference between autonomy and authority especially with regard to economic matters

aspect of much discussed below, particularly in Chapter Three which focuses on environmental problems. 'International legal sovereignty' is connected to the recognition of a state as a legitimate sovereign political entity along with the legal independence that this involves. The equality of sovereign states was first formulated by Vattel in *Le droit de gens*, based on the logic that if, as with the domestic analogy, all men are equal, then so, internationally, are all states.⁸ The final category, often thought to be the most important is Westphalian sovereignty, which Krasner argues to mean that states 'exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior (*sic*).'⁹

To be sovereign a state must possess a fixed territory, a permanent population and a government. These are necessary but insufficient conditions, since many areas of the world possess these but are not able to act in the international community. James asserts that what divides the sovereign and non-sovereign, essentially, is constitutional independence.¹⁰ Sovereignty is a legal institution inasmuch as what an independent constitution does is provide the force of law which can be enacted on a given population and territory and rejects the existence of such authority elsewhere, except with the consent of the constitutionally constituted authority. This notion is supported further by the fact that international law presupposes sovereignty. Even when considering the human rights regime today, the United Nations (UN) clearly awards precedence to the state both in its Charter and in its activities, as evinced by the fact that humanitarian intervention remains illegal.¹¹ Sovereignty is also absolute in that a state either possesses it or it does not. This is to say nothing of a state's capabilities or autonomy, merely its constitutional separateness. The sovereignty a state possesses is indivisible and no outside body may make decisions for it. However, this does not mean that powers cannot be delegated outside of the state and that the decision process cannot be external as instruments such as treaties, bilateral agreements and so forth can all limit a state's actions, but only if it has consented to such limitations. Even at this juncture, it is not guaranteed that a state with constitutional independence will be considered sovereign, the final step being that of recognition. This is a

⁸ Krasner, *Sovereignty: Organized Hypocrisy*, p. 14

⁹ Krasner, *Sovereignty: Organized Hypocrisy*, p. 20

¹⁰ Alan James, 'The Practice of Sovereign Statehood in Contemporary International Society', *Political Studies*, Vol. 47 (1999), pp. 457-473

¹¹ Article 2(7) of the Charter of the United Nations (26 June 1945)
[<http://www.un.org/aboutun/charter/>] 1 October 2003

unilateral act taken by an individual state, formally recognising the existence of another legitimate sovereign state. Recognition may be withheld and this tactic has been used for normative purposes, as with Transkei discussed below, and similarly it may also be hastily conferred upon new states in order to attempt to guarantee rights to the oppressed, as occurred in the former Yugoslavia.

Section Two: The Normative Worth of Sovereignty

Having discussed briefly what is meant when sovereignty in international relations is referred to, the following section considers what is essentially the main issue at hand in this essay, namely the normative desirability of sovereignty. This section moves roughly chronologically beginning with the writings of Jean Bodin and Thomas Hobbes. To view the evolution of the theory surrounding the subject is to stress the historico-political situatedness of each theory for, whilst many claim that sovereignty is immutable, this is probably a mere romanticisation of the past in order to legitimate the present. Contemporary views on sovereignty are then investigated utilising Molly Cochran's key schism, the cosmopolitan and communitarian divide.¹² Throughout the examination of each theory for normative improvement or otherwise, criticism is also noted, since this section refers not only to whether sovereignty needs to be improved, but also whether this is at all likely. The critique of Westphalian sovereignty also includes references to other types of sovereignty of growing importance, such as environmental and human sovereignty, as well as variants which address sub-state communities, such as that held by indigenous peoples.

The critique of Westphalian or 'classical' sovereignty refers to 'normative improvement', which, for the purposes of this essay, includes the incorporation into international relations of the three cosmopolitan challenges discussed throughout.

The issue of legitimacy and sovereignty

Legitimacy is at the heart of all issues surrounding sovereignty. What, in essence, may be said is that sovereignty is an issue that is, at all junctures, normatively coupled

¹² Molly Cochran, *Normative Theory in International Relations: A Pragmatic Approach* (Cambridge, CUP, 1999)

with legitimacy and the changing perceptions of it are, intrinsically, moral assessments.¹³ For the purposes of this essay, legitimacy may be defined as ‘a generalized sentiment or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’¹⁴

The legitimacy of state sovereignty is a subject that has come to prominence particularly since the end of the Cold War. The Cold War was a period of history in which survival was perceived to be the sole priority but nevertheless, as Paul Taylor argues, there existed throughout a sense of a burgeoning ‘international community’ the rules of which were acknowledged, if not exactly adhered to.¹⁵ Taylor notes that the state’s right to act without moral limitations, which may be viewed as the modern equivalent of the divine order, was mitigated throughout this period,¹⁶ whilst McCorquodale notes that the state is not what is in question but rather the notion that it is an unquestionable moral good. McCorquodale illustrates this by demonstrating that human rights have blunted the state’s power to act unchecked by moral criticism, arguing that the ‘commitment to applying international human rights law to the right of self-determination reinforces the acknowledgement of states that their sovereignty is not absolute at least as far as the treatment of persons and groups on their territory is concerned.’¹⁷ What this assertion rests upon is the view that state sovereignty and cultural relativism cannot be used as an absolute defence against more cosmopolitan norms and values, an important argument which has impacted massively upon the formation of the International Criminal Court (see Chapter Two) and, to a lesser extent, the treatment of indigenous peoples (see Chapter Four).

It may be argued that the practical results of sovereignty’s normative improvement were discernible throughout the 1990s, as evinced by the fact that the UN Security Council approved Resolution SC940, which called for an armed intervention in Haiti

¹³ David Beetham, *The Legitimation of Power* (Hampshire, Macmillan Press, 1991)

¹⁴ Mark Suchman quoted in Ian Hurd, ‘Legitimacy and Authority in International Politics’, *International Organisation*, Vol. 53 (1999), pp. 379-408, p. 387

¹⁵ Paul Taylor, ‘The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty’, *Political Studies*, Vol. 47 (1999), pp. 538-565, p. 539

¹⁶ Paul Taylor, ‘Proactive Cosmopolitanism’, p. 539

¹⁷ Robert McCorquodale quoted in Taylor, ‘Proactive Cosmopolitanism’, p. 545

to restore its democratically elected government.¹⁸ Thus, the legitimacy of Haiti's sovereignty was viewed as being fundamentally contingent on it possessing a democratically elected government, rather than merely possessing an effective government which had previously been a fundamental criterion in anointing a territory with statehood. Furthermore, it may also be possible to view this decision as the tempering of sovereignty by the international community. This is particularly important when considering global challenges facing the sovereign state today. Many globalisation theorists are heralding the end of the modern state¹⁹ but the opposite may also clearly be seen. James and Jackson²⁰ note this contrary conclusion, contending that via measures such as the Security Council's Haiti resolution there exists an effort to sustain the state by re-legitimising it in the face of cosmopolitan demands borne of the human rights culture and the globalisation of politics in general. Indeed, it may be seen that many actions discussed in this essay recognise this re-legitimisation, particularly with regard to indigenous rights.

The function of recognising states may also be increasingly subject to normative considerations, with the UN becoming the chief organ by which sovereignty is awarded, rather than the rather ad hoc methodology adopted previously, a process which has had disastrous results as can be seen in the Badinter Commission's response to the problems of the former Yugoslavia.²¹ The additional requirement that states ought to be, in keeping with the spirit of the international community, well-founded, includes the requirement that aspiring states need to possess, according to Taylor, the ability to partake in international civil society and that they are both able and willing to provide acceptable levels of decency and internal welfare.²² Furthermore, it is suggested that it may soon be possible to view sovereignty as contingent and, therefore, removable and that certain states may soon be viewed as *unsovereign*. The notion that aspiring states ought to meet the norms of the international community is an interesting development considering that the norms of the international community themselves are a product of the sovereignty of states.²³

¹⁸ Paul Taylor, 'Proactive Cosmopolitanism', p. 555

¹⁹ See the discussion of Held in particular, below

²⁰ Robert Jackson and Alan James, *States in a Changing World: a Contemporary Analysis* (Oxford, Clarendon, 1993)

²¹ Robert Jackson, 'Sovereignty in World Politics', p. 448

²² Paul Taylor, 'Proactive Cosmopolitanism', p. 560

²³ Paul Taylor, 'Proactive Cosmopolitanism', p. 565

The UN's role in legitimating sovereignty, however, can be traced back to its earliest years. For example, when South Africa attempted to found Bantustans or independent republics to legitimate their apartheid policies, the international community was quick to denounce any state which emerged as a result of racial policies. Thus, Transkei, which fitted the requirements for classical sovereignty by possessing defined territory, a people and a constitutionally independent government, was declared invalid by all members of the UN.²⁴ What this action indicates is that despite a territory meeting juridical and empirical criteria for statehood, nevertheless, the would-be state had to be viewed from a normative position. The fundamental question was posed was, 'was it *right* that this state exists?'. The international community emphatically answered that it was not, thereby indicating that sovereignty was contingent on meeting certain moral requirements.

The UN's legitimating function corresponds with, amongst others, Reus-Smit's and Jackson's theses that sovereignty occasionally modifies itself in order to align with the historical and moral conditions of the international system.²⁵ This is particularly evident since the end of the Second World War where sovereignty has taken a human rights-based turn which, according to Reus-Smit and unlike most theorists' opinions, does not reflect a conflict between sovereignty and human rights as constituting mutually contradictory systems but, rather, two aspects of the same discourse which attempts to 'justify territorial particularism on the grounds of ethical universalism,'²⁶ an argument which queries the assertion that human rights are a result of the process of decolonisation. Indeed, the UN's statements legitimating decolonisation are resolute in their promotion of human rights, with the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples linking 'faith in fundamental human rights' with statehood.²⁷

The post-Second World War change was catalysed by Nazi Germany's incalculable abuse of human rights and, in the decades following, there developed a critique of

²⁴ Alan James, *Sovereign Statehood*, p. 146-8

²⁵ See Jackson, 'Sovereignty in World Politics' and Christian Reus-Smit, *The Moral Purpose of the State* (Princeton, NJ, Princeton, University Press, 1999)

²⁶ Christian Reus-Smit, 'Human rights and the social construction of sovereignty', *Review of International Studies*, Vol. 27 (2001), pp. 519-538, p. 520

²⁷ As reported in Reus-Smit, 'Human rights and the social construction of sovereignty', p.536

Hobbesian sovereignty which had entrenched itself during the period and which promoted the nation-state above all other values. The UN, in particular, presided over the development of an extensive body of international human rights law that 'recaptured, in a substantially purified form, the morally appealing idea of adherence to shared standards of justice as a condition for full membership in international society,'²⁸ though the remit of this is currently debatable and potentially one of the reasons why adherents of classic Westphalian sovereignty are unwilling to part with the reified concept of total jurisdiction. Stanley Hoffman, for example, argues that although human rights have questioned the state's right to go to war and to do whatever it likes, nevertheless they have had little tangible impact on international politics, whereas Kathryn Sikkink argues that the doctrine of internationally protected human rights offers one of the most powerful critiques of sovereignty as currently constituted, and the prominence of human rights law and foreign policies which account for these rights demonstrate the shifting sands of sovereignty as a reflection of the state's 'moral purpose.'²⁹

The normative worth of Hobbesian sovereignty and its critics

The history of sovereignty and its normative value, as noted above, may be viewed as being bound in situatedness, that its definition has evolved as the result of circumstances and tensions within particular situations. The following section sketches the evolution of sovereignty as developed by Thomas Hobbes and, firstly, Jean Bodin. Both theorists' works, but particularly Hobbes', have been utilised to develop complex political, systemic and moral arguments which inform and frame modern international relations. These theorists' works are critiqued throughout and this section leads into a discussion of more cosmopolitan understandings of the term.

Jean Bodin's *Six livres de la république* first crystallised modern sovereignty. Written during the height of the civil war between the Catholics and Huguenots, it presents the case for a central authority which should be able to wield unlimited power. Bodin defines sovereignty as the 'supreme power over citizens and subjects

²⁸ Jack Donnelly, 'Human Rights: A New Standard of Civilization?', *International Affairs*, Vol. 74 (1998), pp. 1-23, p.13

²⁹ Reus-Smit, 'Human rights and the social construction of sovereignty', p. 522

unrestrained by law,³⁰ which effectively results in a power which is unlimited in duration within a territory. Though seemingly absolute, Bodin's prince, however, remains subordinate to the law of God and nature, and here it may be noted how medieval moralistic notions creep back into what is, in essence, a thoroughly modern interpretation of how power must be organised within a territory. Bodin thus leaves an important dilemma in the balance since he does not resolve the issue of whether the prince's authority rest on moral, customary or coercive authority. Using W.J. Rees' schema, moral authority resides in people obeying laws simply because they feel that they are just and fair; customary authority revolves around obeying a law for fear of incurring the disapproval of other persons and is usually associated with the violation of social norms, customs or conventions, whilst coercive authority rests on obeying a law simply because it is backed by force.³¹

Hobbes presents a similarly pessimistic view of human affairs, proposing the notion that a pre-sovereign community is in the 'state of nature' whereby all are susceptible to attacks from all. Hence, it is entirely reasonable and normatively valuable to cede powers to an over-arching authority, a Leviathan, in order to protect oneself. Hobbes' work also introduces the idea of 'a social contract', a tacit or otherwise agreement between the sovereign and citizen, a concept which has impacted massively on all areas of politics throughout the centuries. Though Bodin and Hobbes' views of sovereignty are undoubtedly attractive when one is faced by a state of international anarchy, their normative value is highly vulnerable to criticism. Both wrote in times of great crisis when an authority who would guarantee a person's continuing existence would have, of course, been highly attractive, but their very context seems to damage the credibility of their ideas when applied to the modern world. Only the hardest of realists would argue that the international system today mirrors the civil wars of France and England but, nevertheless, these paradigms suggest, feed, inform and structure the ways in which international relationships are conceived. Constructivists charge that the way in which international relations is studied is the prime reason why classical sovereignty remains. It is argued that by constant referral to Hobbesian

³⁰ Jean Bodin quoted in Joseph A. Camilleri, 'Rethinking Sovereignty in a Shrinking, Fragmented World', in R.B.J. Walker and Saul Mendlovitz, *Contending Sovereignties: Redefining Political Community* (London, Lynne Rienner, 1990), pp. 13-44, p. 16

³¹ W.J. Rees in Camilleri 'Rethinking Sovereignty', p. 16

anarchy the notion has become something of a self-fulfilling prophecy.³² That is to say, states are violent and protect their sovereignty belligerently because they have been told to do so. The violence or 'war syndrome' which sovereignty seemingly generates has been dubbed 'the inevitable outgrowth of the doctrine of state sovereignty',³³ with sovereignty being viewed as the respectable word for chauvinist nationalism which has 'already launched our planet on a thousand wars.'³⁴ Certainly the political meshing of sovereignty and nationalism is a heady cocktail which has, especially in the twentieth century, produced wars of unprecedented ferocity which have invariably been legitimated by recourse to the principle of state sovereignty as an inviolate concept. Furthermore, Hedley Bull contends that sovereignty has limited the political imagination, especially in the West.³⁵ The totalising trend, however, seems to have been reversed, to an extent, in favour of a more morally appealing approach which recognises communities outside of the nation state.

By examining the international system in such a manner and loading the analyses with Hobbesian intellectual values and predispositions, it is wholly unsurprising that sovereignty remains such a vital component of most theorists' and policymakers' vocabularies. It is also worth noting that the realist conception of international relations, driven by the conclusions of Thucydides and Waltz, remain particularly pre-eminent in US politics as opposed to those of the European Union. Robert Keohane's analysis of the differences between European and American attitudes to sovereignty examines the political culture of each, noting how symbols of nationalism and military strength are used to support the case for a more absolute sovereignty. He refers to the Pentagon as being a lynchpin in the American psyche to which most US citizens turn over issues such as the ICC, whereas Europeans are more likely, in the absence of such strong institutions, to look to promote values and more cosmopolitan ends, preferring the unheroic requirements of bureaucratic compromise to the rallying call of the flag and the armed forces.³⁶ The discrepancy in sovereignty may impact

³² Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics', in Andrew Linklater (Ed.) *International Relations: Critical Concepts* Vol. II (London, Routledge, 2000), pp. 615-664

³³ Kurt Waldheim quoted in Alan James, *Sovereign Statehood*, p. 259

³⁴ Hannah Arendt quoted in Alan James, *Sovereign Statehood*, p. 261

³⁵ Hedley Bull noted in Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge, Polity Press, 1998), p. 34

³⁶ Robert Keohane, 'Ironies of Sovereignty: The European Union and the United States', *JCMS*, Vol. 40, (2002), pp. 743-65

upon international politics in the future. Indeed, hints of this Euro-Atlantic conceptual tension can already be felt especially with regard to the ICC and the Kyoto Protocol, from both of which the USA has distanced itself. What realist conceptions, as discussed above, do, above all, is reinforce the primacy of the 'fact', the empirically testable in world politics, rather than setting normatively-based agendas.

John Locke extensively modified Hobbes' thought by introducing inalienable human rights. Here naturalistic, medieval assumptions were reintroduced, thereby arguing that moral laws are both intrinsic and inherently superior to positive laws. The primacy of the moral over the politically expedient is a powerful weapon for those who wish to view a normative improvement in sovereignty and, as long as the concept is not viewed in an ahistorical manner, as a theoretical given, then perhaps change is possible. Locke also hints at the concept of legitimacy when asserting that a sovereign who infringes inalienable human rights automatically forfeits their right and authority to govern. Thus, Locke demonstrates that sovereignty is a contingent notion and indeed, this contingency can clearly be viewed in the arrival of the International Criminal Court (see Chapter Two).

The common apprehension equates the retention of sovereignty with strength but there is evidence to suggest that this link is not as persuasive as political rhetoric would indicate and that 'pooled' sovereignty offers an opportunity for states to succeed through cooperation. For example, states like Rwanda, with well-defined sovereign structures, allowed extremists to take power effectively. Equally, Robert Keohane maintains that sovereignty has been a disaster for 'the Cypruses, Somalias and Afghanistans of this world,' which have all struggled, whereas the post-Second World War West Germany flourished even though it was only 'semi-sovereign.'³⁷ In this way, accepting the matrix of norms and institutions that direct international society may be viewed, not as a sign of weakness, but rather, as a sign of strength, emphasising what has been dubbed 'the new sovereignty.' The 'new sovereignty' emerges from the fact that the 'only way most states can realize and express their

³⁷ Robert Keohane, 'Ironies of Sovereignty', p. 756

sovereignty is through participation in the various regimes that regulate and order the international system.³⁸

To treat sovereignty as an admirable quality, as a normatively desirable characteristic, is contested by, amongst others, Laski who maintains that it, 'would be of lasting benefit to political science if the whole concept of sovereignty were surrendered,' on the grounds that, 'it is at least probable that it has dangerous moral consequences' and moreover, 'is of dubious correctness in fact.'³⁹ Hence, classical sovereignty is morally undesirable since it possesses a false impression of itself as an immutable concept whereas in the 'nitty-gritty' of politics it does not act as such. The rhetoric of politics and the parameters of debate, which assume sovereignty to be fact, generate a plethora of discrepancies which create more problems than they solve. Such a conclusion provides a neat fit with the postmodern critique, which argues that the historical specificity of the term means that the schism between the juridical interpretation and the political fact results in sovereignty, as currently perceived, being undesirable. Ironically, the international lawyer chastises the juridical concept of sovereignty, questioning whether 'any single word has ever caused ... so much international lawlessness?'⁴⁰ This theme leads into the need for checks and balances on unlimited sovereignty as provided by the ICC. An International Court of Justice judge echoed this sentiment when asserting that one of the essential features of current international law was 'curbing ... the pretensions and aberrations of the doctrine of sovereignty,'⁴¹ indicating that it can not be feasibly treated as a concept unchecked for excesses. Optimistic thinkers of a Kantian persuasion may, therefore, be ready to argue that the message that an improvement in state behaviour is necessary is finally being understood, and that the beginnings of this process, which began after the end of the Second World War, may be felt in a number of areas, including those analysed below in the three illustrative chapters.

³⁸ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (London, Harvard University Press, 1995), p. 27

³⁹ Harold Laski, quoted in Hinsley, *Sovereignty*, p. 216

⁴⁰ George Catlin quoted in Alan James, *Sovereign Statehood*, p. 259

⁴¹ An ICJ Judge quoted in Alan James, *Sovereign Statehood*, p. 259

Sovereignty as the supplier of order

The modern international system does not resemble Hobbes' state of nature, which predicted that the absence of government would inevitably lead to an inability to develop industry, agriculture, navigation or trade.⁴² What mitigates this potential impasse is order, which the traditional state system does offer. In international society, rules are ever-present but they are not a necessary definition. This order then translates into a society of states which Bull declares to exist when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.⁴³ Thus, it may be argued that sovereignty in its present form is the *grundnorm* of international relations which aids the maintenance of international order. The rules which are communicated and administered, and above all, legitimised must, however, be capable of change in order that they remain valid and it may be ventured that a more flexible form of sovereignty may be necessary to retain order.⁴⁴

The post-Cold War era has witnessed an explosion in deep-seated ethnic tensions, which have transformed the dangers of the international society from purely statist affairs, whereby two or more states fear each other's political and economic powers or their ideology, to a more nuanced and potentially explosive world. Although, undoubtedly, Samuel Huntington over-emphasised the clash of civilizations, nevertheless there lies in his work the kernel of truth that ethnic, religious and cultural affairs, which are transnational, will have a much greater impact on the manner in which international affairs are formulated.⁴⁵ Indeed, already in the Balkans during NATO's humanitarian intervention in Kosovo the potential impact of ethnic warfare has been judged to be grounds enough to sidestep internal sovereignty for a greater cosmopolitan good.

⁴² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd Ed.) (New York, Columbia UP, 1995), p. 45

⁴³ Hedley Bull, *The Anarchical Society*, p. 9

⁴⁴ Hedley Bull, *The Anarchical Society*, p. 54

⁴⁵ Samuel Huntington, 'The Clash of Civilisations', *Foreign Affairs*, Vol. 72 (1993), pp. 22-49

Hence, Bull views sovereignty as a normative good, as a foundation upon which order can be realised. In this sense, order operates as a facilitator for the production of other values and it is important to recognise this, but there remains in international society a fundamental contradiction. For example, to state that expanding the range of human rights across the globe may lead to disorder is not to say that they are undesirable but rather, that they are, in this particular space and time, undesirable, since they may upset current order.⁴⁶ Fundamentally then, Bull posits that new moral norms and ways of operating within the international system, perhaps by modifying sovereignty, are to be welcomed but that they must be judiciously introduced in a way conducive to upholding the *raison d'être* of the international system itself. Order should not be viewed as a 'commanding value' and merely demonstrating that an institution or policy is conducive to order does not establish a presumption that either is morally desirable.⁴⁷

A focus on order between states indicates that the problems of international politics tend to emerge from the interaction of territorially defined and entirely separate blocks. In this way, traditional sovereignty and its associated rules may produce order but it is incapable of dealing with issues which are necessarily global, for example environmental problems, and it is for this reason that perhaps 'world politics' rather than relations between states will emerge. Moreover, these supranational alterations will be accompanied by a fundamental alteration in the way in which discussions take place with non-state actors playing a more pronounced role, an almost neo-medievalist notion.⁴⁸ Elements of this can be seen with regard to the drafting of the Rome Statute and Kyoto Protocol, examined in depth in Chapters Two and Three respectively. In terms of environmental politics, Falk asserts that 'the threats are all outgrowths of a mismanaged environment that is an inevitable result of a defective set of political institutions,'⁴⁹ indicating that sovereignty unrestrained is an ineffective and normatively undesirable concept, incapable of providing a basic level of environmental security. Nye and Keohane's anti-statist sentiments are even more pronounced as they stress that the state system is incapable of providing peace,

⁴⁶ Hedley Bull, *The Anarchical Society*, p. 147

⁴⁷ Hedley Bull, *The Anarchical Society*, p. 94

⁴⁸ Richard A. Falk, *This Endangered Planet: Prospects and Proposals for Human Survival*, (New York, Random House, 1971)

⁴⁹ Falk, *This Endangered Planet*, p. 98

security, including economic, social and ecological variants, or even minimum world order.⁵⁰

Further suggestions for a normative improvement come from what may traditionally be seen as an unlikely source, E.H. Carr. Though regarded as the first modern theorist to explore the international system in a scientific manner, purging the discipline of idealist fantasies which ignored the role of power, nevertheless, and especially in his later works, Carr demonstrates decidedly liberal, perhaps even utopian sentiments. Carr blurs the lines dividing the domestic and international, seemingly moving him even further from realist orthodoxy, as indicated by his advocacy of the idea that states ought to cede some power in order to create a 'humane political community,'⁵¹ a conclusion discussed in *The Future of Nations* which tackles the self-interestedness which absolute sovereignty generates.⁵²

Section Three: Sovereignty and the Cosmopolitan Challenge

Having explicated sovereignty, its inherent normativity and value, this section explores the cosmopolitan challenge. Cosmopolitanism offers an important critique of current conceptions of sovereignty and hence the section below tackles its inability to promote universal individual responsibility, the acceptance of trans-border obligations as well as laying out the way in which diversity within the sovereign community can be tolerated and, moreover, promoted.

Universal Individual Responsibility

This section argues that sovereignty can and should be able to shoulder universal individual responsibility and, thus, sketches Kant and Linklater's positions which both question the wisdom and moral usefulness of Hobbesian sovereignty, in order to create a modified sovereignty which is able to promote justice whilst maintaining order. The goal of universal individual responsibility is one which underpins many

⁵⁰ Nye and Keohane quoted in Bull, *The Anarchical Society*, p. 272-3

⁵¹ Andrew Linklater, 'The transformation of political community: E. H. Carr critical theory and international relations', *Review of International Studies*, Vol. 23 (1997), pp. 321-328, p. 329

⁵² E.H. Carr discussed in Linklater, 'The transformation of political community: E. H. Carr critical theory and international relations', p. 322

appraisals of sovereignty, and connects with the International Criminal Court as discussed in Chapter Two.

Kant's cosmopolitanism derives from the marriage of the primacy of reason and the will to place morality on a more stable footing than the consequentialist method, for example, does. Legalistic imperatives were important, Kant maintained, in order to avoid a situation in which figures such as Hume could potentially award moral praise to persons as if their actions were bestowed upon them because, by mere 'gift of nature,'⁵³ they tended to be generous rather than selfish. To counter the relativism and uncertainty of such a method, Kant identified the one faculty all moral agents possess – reason – and from this, constructed a moral system in order that he may universalise and normalise moral considerations.

The first idea in Kant's argument asserts that one ought not to act in such a way if we would not want others to act in the same manner. This conclusion leads to the first stage of the categorical imperative which states that, 'I ought never to act except in such a way that I can also will that my maxim should become a universal law.'⁵⁴ Though familiar to those well versed in Biblical studies, this maxim was bolstered by man's ability to reason. As is discussed below, the notion that man acts rationally is a conclusion which has been contested heavily, particularly with regard to international relations. Nevertheless, the sheer power of the concept of man as a reasonable animal cannot be underestimated and, indeed, much of modern intellectual history rests upon it. Reason also accords man the status of an 'end' rather than a 'means' and thus Kant argues that one ought to act as if you were 'through your maxims a law-making member of the kingdom of ends.'⁵⁵ This emphasis on the supremacy of law is noted in Kant's view of *a priori* principles of a lawful state, which would ensure the freedom of every member of a society as a human being, and equality between and independence of all these members. The extent to which this freedom is applicable only to one single, lawful state is arguable for, as Reiss notes, this freedom is meaningless whilst it resides in one state only, for 'right ... cannot possibly prevail

⁵³ Immanuel Kant quoted in David E. Cooper, *Ethics: The Classic Readings* (Oxford, Blackwell, 1998), p. 167

⁵⁴ Kant quoted in Chris Brown, *International Relations Theory: New Normative Approaches* (Oxford, Columbia University Press, 1992), p. 30

⁵⁵ Kant quoted in Brown, *International Relations Theory*, p. 31

among men within a state if their freedom is threatened by the action of other states. The law can prevail only if the rule of law prevails in all states and in international relations.⁵⁶ Moreover, Kant's unwavering universalism means that even if the implementation of the categorical imperative is not practicable, it does not mean that the theory is defective, merely that its implementation is difficult.

Having sketched the fundamental aspects of moral cosmopolitanism, it is perhaps fitting to remain with Kant and his suggestions for a normative improvement in sovereignty. Though his political stock has risen only recently, mainly owing to the globalization of world politics, Kant's political thought is incisive as a source for criticism of the Westphalian state system and the international anarchy it perpetuates. Kant's key political text was *Perpetual Peace*,⁵⁷ a blueprint for ridding the world of war, advancing important suggestions for the improvement of sovereignty. Before analysing precisely the proposals contained within *Perpetual Peace*, it is important to note that Kant's political ideology differs markedly from his moral theory, for whereas students of the latter may, rightly, conclude that Kant would prefer a universal moral community, students of the former will note he was able to grasp the manner in which politics and power operate.

*The Second Definitive Article of a Perpetual Peace: The Right of Nations shall be based on a Federation of Free States*⁵⁸ connotes the appealing normative idea that states ought to limit their own sovereignty in order to create a federal system with an over-arching global government. In this case, the concept of sovereignty is not contested, but merely removed from each individual state and multiplied up to a global level. However, this is far from what Kant envisages, for he was abundantly aware that as power is increased, so the potential for tyranny also grows. Thus, a world state, as a natural progression of the Hobbesian security dilemma, as suggested by David Gauthier, is avoided.⁵⁹

⁵⁶ Hans Reiss quoted in Brown, *International Relations Theory*, p. 32

⁵⁷ Kant, 'Perpetual Peace: A Philosophical Sketch', in Hans Reiss (Ed.), *Kant's Political Writings* (Cambridge, CUP, 1991), pp. 93-130

⁵⁸ Kant, 'Perpetual Peace', p. 102

⁵⁹ David Gauthier, *The Logic of Leviathan: the Moral and Political Theory of Thomas Hobbes* (Oxford, Clarendon Press, 1969)

Even with Kant's criticisms of world government noted, the most far-reaching cosmopolitan suggestions come from David Held and Daniele Archibugi whose proposals centre upon the democratisation of world politics via 'global governance'. The proposed reforms focus mainly on the UN, which, it is contended, contains within it the genesis of a legitimate global political authority. By reforming the UN and altering its institutions, thereby increasing its power, it may be able to live up to its Charter by upholding the prohibition on the discretionary right to use force and by activating the collective security system it envisaged.⁶⁰ The limiting of state sovereignty would be accompanied by a wave of democratisation within the UN in order to avoid double standards, a set of reforms which includes the founding of a second, democratically elected chamber. Only when these reforms are enacted would the transfer of jurisdiction from the state be practicable. Once the democratisation occurs, the path is clear for an international military force in order to alleviate the threat of a Hobbesian war, a conclusion substantiated by the invocation of Hobbes' mantra that 'covenants without the sword are but words.'⁶¹ Thus, even before assessing the desirability of the transfer of power it may be seen that the reforms necessary to facilitate the alterations in the use of force, in the present political climate, have very little chance of occurring. Nevertheless, Held and Archibugi's vision carries a great deal of normative force and its focus upon the expansion of dialogue to take into account those outside the state is a positive step.

The status quo with regard to the maintenance of domineering, sovereign legal powers is not, in the cosmopolitan schema, encouraged as is evinced by the scorn Kant pours upon 'savages' who 'cling to their lawless freedom,' refusing to engage in legal constraints, preferring the 'freedom of folly to the freedom of reason.'⁶² Here, the critique of sovereignty as a normative concept is clearly visible; state sovereignty, although the vehicle by which state power is maximised, is viewed as an obstacle in securing peace and prosperity for all. This is a direct attack on what would now be deemed the realist school of international relations in which 'each state sees its own majesty (for it would be absurd to speak of the majesty of a people)'⁶³ in not having to submit to any external law. To see the acme of international politics as the state is to

⁶⁰ David Held, *Democracy and the Global Order* (Stanford, Stanford University Press, 1995), p. 269

⁶¹ Thomas Hobbes quoted in Held, *Democracy and the Global Order*, p. 276

⁶² Kant, 'Perpetual Peace', p. 102

⁶³ Kant, 'Perpetual Peace', p. 103

mistakenly treat is as an 'end' rather than a 'means' and, therefore, to protect sovereignty from any interference, erosion or trimming is to fail to maximise politics' potential.

The cosmopolitan viewpoint is one which, in accordance with the Kantian schema, stresses the notion of universal individual responsibility, that each member of the global community is morally culpable for his or her actions and that state boundaries are morally incapable of suspending moral judgements made by those outside. Elements of the cosmopolitan schema are clearly visible in the rationales adopted by proponents of the International Criminal Court, and it may be argued that cosmopolitanism provides the dominant moral critique of sovereignty as well as hope for a morally-improved version of the concept.

Though Kant's political theory offers a plausible and attractive way to alter the international system, nevertheless, there are key problems with cosmopolitanism as a moral theory. A critique of Kant's universality which views reason as the progenitor of universal moral concern results from the argument that, under his methodology, since the insane and children do not or cannot possess rationality, they immediately fall beyond the limits of moral worth. This line of reasoning fails to take into account the potential of the species and awards too much credence to physiological irregularity and does not dent greatly the Kantian case. Secondly, the Kantian notion of universality may be dubbed 'culturally imperial' since it aims to impose what are sometimes referred to as being essentialist Western values upon non-Western states, and that the conception of the individual worth of man emanating from reason is a result of a peculiarly Western tradition, one that differs substantially from, for example, Confucianism, which is dominated by the moral worth of the community, and which, hence, strives for an entirely different form of the good. However, although the theory is indeed Western in its origin, this does not necessarily prove anything; for example, merely because Darwin and Bohr were educated in the West, it does not follow that their theories are intrinsically Western. Those who offer a defence of culture against universalising moral trends, it may be argued, may be awarding legitimacy simply on the basis of tradition and custom, a justification which, it would seem, is weak, ignoring as it does, justice. This argument is powerful, however, only if the universality of justice is accepted. Kant, moreover, maintained

that regional differences were beneficial and that individual cultural heritages should be treasured, but never at the expense of moral imperatives. This communitarian/cosmopolitan discourse is discussed in detail below and especially with regard to indigenous rights, where cosmopolitanism is faced with the challenge of embracing diversity within its totalising moral remit.

Andrew Linklater has developed a form of cosmopolitanism which has challenged directly the notion of sovereign legitimacy, constructing a system which mitigates the self/other divide using a surprising approach. Linklater's methodology for the political transformation, though cosmopolitan, is decidedly Hegelian, and, therefore, avoids the problematic transcendental universalism. For Linklater, the transformation is due to the development of 'dialogical communities' and here the influence of the Frankfurt School, and Jürgen Habermas in particular, is clearly evident. Nevertheless, Linklater remains wedded to Kant's appealing 'kingdom of ends' and the categorical imperative, though as noted, he approaches the concept from a very different angle.

Linklater asserts that the evolution of pre-existing international rights are generated by inter-social negotiation and that such dialogue offers an opportunity to extend the moral community beyond the Westphalian state as currently conceived. Indeed, *The Transformation of Political Community* anticipates, 'the transition to a condition in which sovereignty, territoriality, nationality, citizenship are no longer welded together to define the nature and purpose of political association.'⁶⁴ Thus, via this process, there emerges the recognition of mankind's capacity to view itself as being organised and morally above the normal statecentric central reference group, thereby rendering the traditional citizen/non-citizen distinction unjustifiable. Hence, Linklater views as possible the replacement of sovereignty with a global legal political system which affords protection to all subjects as moral equals. To this end, Linklater argues that the transformation of sovereignty involves the fundamental recognition that there ought to be an increase in the protection of fundamental human rights producing a sense of universal individual responsibility. However, Linklater remains committed to the moral standing of the state owing to the fact that it confers citizenship rights, although he does argue that its full moral impact cannot be realised until states are

⁶⁴ Linklater, *The Transformation of Political Community*, p. 44

unlocked from the notion of territorial and political entities. From this, it may be contended that for Linklater the existence of the state is not in question, but rather that its scope must be enlarged in order to maintain its moral capacity and not to compromise human freedom. This reasoning is particularly apposite with regard to the International Criminal Court and, indeed, it may be seen that the burgeoning field of international criminal law in this manner provides an excellent fit with Linklater's notion of the post-Westphalian state.

Linklater's work has received much criticism, as well as praise, although it is perhaps noteworthy that much of the criticism results, not from a philosophically antagonistic position, but rather on the basis of political caution and pragmatism.⁶⁵ What may be drawn from this is the conclusion that cosmopolitanism à la Linklater is a worthy and desirable transformation. However, although the international community ought to adopt freely-chosen moral principles, the figure of Hobbes looms large in the shadows. Elshtain notes that the single greatest problem with Linklater's methodology is that 'it is nearly impossible to discern what this international dialogue is going to be about.'⁶⁶ Moreover, discussions of higher levels of universality are all well and good for academic conferences and intellectual discussion but they 'are not the stuff of nitty-gritty power brokerage.'⁶⁷ Elshtain's criticisms suggest that sovereignty is an immutable concept, fixed in and across time, a conclusion which follows from Hobbes' conception of an unchangeable locus of power and legitimacy, rather than an acknowledgment of shifting balances of power and politics which may allow dynamic changes in the public good to happen. The immediacy of the latter position reflects an almost Machiavellian position which prioritises the immediately expedient over static understandings of authority and legitimacy.⁶⁸

Notions of moral progress contained within Linklater's work are vociferously attacked by Schweller who argues that, '[w]hether Linklater, or Kant, or Marx, or

⁶⁵ See, for example, Randall Schweller, 'Fantasy Theory', *Review of International Studies*, Vol. 25 (1999), pp. 147-50.

⁶⁶ Jean Bethke Elshtain, 'Really Existing Communities', *Review of International Studies*, Vol. 25 (1999), p. 141-46, p. 145

⁶⁷ Elshtain, 'Really Existing Communities', p. 145

⁶⁸ R.B.J. Walker, 'Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice' in R.B.J. Walker and Saul Mendlovitz (Eds.), *Contending Sovereignties: Redefining Political Community*, (London, Lynne Rienner, 1990), pp. 159-185

Habermas, or some contemporary critical feminist, postmodern theorists believe something will happen, must happen, can happen, and should happen, does not make it so – or likely to be so – in the foreseeable future,⁶⁹ a point which, although seemingly obvious, confirms that the fixity of sovereignty is an issue which is so powerful that any alteration in its scope or practice is viewed as essentially fanciful. More classical interpretations of Westphalian sovereignty tend to treat the concept as a given, but this is not the case.⁷⁰ Sovereignty is a normative postulate or a working hypothesis which is periodically renovated to reflect the changing historical circumstances, changing from being dynastic and imperial to popular, and then, anti-imperial.⁷¹ Clearly, absolutist sovereignty and its international relations' corollary, neo-realism, are strong, indicating that a fundamental change is unlikely to occur, other than in a piecemeal manner. However, it must be argued that what Linklater offers is not a grand blueprint for a better future but rather 'a normative vision,⁷² and, as his work has provoked a great deal of reaction, becoming an important weapon for proponents of cosmopolitanism, his work must, as Elshtain implies, contain a certain level of cultural resonance.

Trans-border obligations (Environmental problems)

Another key component of contemporary cosmopolitanism revolves around trans-border or transnational obligations, or, that individuals in one state ought to show some level of moral concern for those outside the community, and that this concern should be reflected in political actions such as the tackling of environmental dilemmas, explored in depth in Chapter Three. The construction of transnational obligations for the global good is discussed by Thomas Pogge who argues that the international system, which rests on 'the crystallization of the momentary balance of power,⁷³ is fundamentally unable to offer much hope of a normative improvement. Politicians are left without a *moral* reason for supporting institutions which contribute to a moral order since these are susceptible to the vagaries of power and influence. Thus, Pogge suggests the creation of 'epistemic communities', the cross-border

⁶⁹ Schweller, 'Fantasy Theory', p. 147

⁷⁰ A notion discussed in Jackson, 'Sovereignty in World Politics'

⁷¹ Jackson, 'Sovereignty in World Politics', p. 434

⁷² Andrew Linklater, 'Transforming political community: a response to the critics', *Review of International Studies*, Vol. 25 (1999), p. 165-75, p. 166

⁷³ Thomas Pogge's schema explained in Cochran, *Normative Theory in International Relations*, p. 42

sharing of values, knowledge and ideas which eventually, it is claimed, will be able to curb the excesses of absolute sovereignty, and direct it towards a more cosmopolitan endpoint. An order based on values rather than prudent decision-making also requires that, firstly, the parties involved are convinced that there ought to be a fairer scheme for the distribution of the benefits of the scheme, that the parties can identify and perhaps extend common values, and lastly, that each party is willing to modify their values to some extent. The appreciation of the need for collective action to improve the social and economic problems facing the world's community and the necessity to strengthen the very notion of world community to face the effects of technical and industrial rationality are also noted by Linklater, whose 'thin cosmopolitanism' offers hope that global problems are manageable without resort to world government.⁷⁴

The notion of an epistemic community is one which pervades much of the contemporary literature surrounding sovereignty and its role is prominent within this essay, especially when referring to the climate change regime discussed at length in Chapter Three, where the impact of a cohesive scientific community would be incalculable. Pogge's moral system can also be viewed in Martha Finnemore and Kathryn Sikkink's work, which discusses the way in which moral communities develop as a result of a 'norm entrepreneur' instigating a new standard which is eventually adopted by the international community, a phenomenon which is referred to as a 'norm cascade.'⁷⁵

Diversity within cosmopolitanism

Whereas the previous two cosmopolitan demands surround obligations and justice relating to those outside the state, the final challenge centres upon delivering greater levels of justice for internal groups. This section begins with the communitarian approach, Kantian cosmopolitanism's antithesis, followed by an examination of the way in which Linklater's 'thin cosmopolitanism' can distribute greater levels of justice, possibly to those groups within society, such as indigenous peoples, who have been marginalized and suppressed

⁷⁴ A theme discussed throughout Linklater, *The Transformation of Political Community*

⁷⁵ Martha Finnemore and Kathryn Sikkink's thought as reported in Nicholas Wheeler, 'Humanitarian vigilantes or legal entrepreneurs: enforcing human rights in international society', in Simon Caney and Peter Jones (Eds.), *Human Rights and Global Diversity* (London, Frank Cass, 2000), pp. 139-162

The communitarian counter to universalism is based on the assertion that universalists suppose that individual rights predate the community, a conclusion that Hegelians deem untenable.⁷⁶ The cosmopolitan answer to this is that although rights are not respected in a world without community, they nevertheless exist, just as citizens of states who do not enjoy civil liberties possess them regardless. Thus, in terms of global politics, it is important to construct and maintain a community in order that rights are respected.

Communitarianism is a 'moral standpoint which is tied to a local discourse, a particular community or historical tradition, with justice being constituted by respect for the values that the communities hold.'⁷⁷ The debate between cosmopolitans and communitarians rests on the fact that both sides assert ontological and epistemological points about how moral significance is developed. One of the chief proponents of communitarianism is Michael Walzer, who morally privileges the state as the ultimate form of political community and base of considerations for domestic and international justice, asserting that no community of humanity actually exists, arguing that 'I am not a citizen of the world ... I am not even aware that there is such a world such that one could be a citizen of it. No-one has offered me citizenship.'⁷⁸ For Walzer, the state is a moral requirement and the appropriate moral refuge for people in times of crisis. The communitarian approach to international justice treats it not as a matter of distribution but of ensuring order and non-intervention. Walzer and the communitarians, by attempting to reconcile the universal and the particular, have created an artificial separation of domestic and international realms.⁷⁹

Communitarianism is problematic since it assumes that moral communities are synonymous with political institutions, that is, that the state represents a nation as one. This, clearly, is not true, hence the demands for indigenous rights which bend sovereignty from being absolute to one which reflects groups which, in some cases, are transnational. As an extension of the above, the concept of toleration is also

⁷⁶ Hegel's view as noted in J.B. Schneewind, 'Modern moral philosophy' in Peter Singer (Ed.), *A Companion to Ethics* (Oxford, Blackwell, 1993), pp. 147-157,

⁷⁷ Janna Thompson quoted in Cochran, *Normative Theory in International Relations*, p. 8

⁷⁸ Michael Walzer quoted in Derek Heater, 'Does Cosmopolitan Thinking Have a Future?', *Review of International Studies*, Vol. 26 (2000), pp. 179-197, p. 180

⁷⁹ Cochran, *Normative Theory in International Relations*, p. 70

questionable since a communitarian may have to admit that it exists solely as a cultural norm rather than a universal. Hence, were this the case, then an intolerant society would be entirely justified as being as such, since in the communitarian schema, cultural legitimacy is the most powerful element. Identifying the moral community is also challenging since within every state there exists countless sub-communities each with their own moral code. Thus, to construct a normatively superior communitarian sovereignty it may be necessary to develop an elaborate network of specific caveats, thereby weakening the state, possibly endangering it.

Linklater, remains committed to a culturally-sensitive thin cosmopolitanism rather than thick, meaning a smaller and more basic level of commitments rather than extensive, and acknowledges that, '[p]articular social bonds remain but they are reconstituted in light of a normative commitment to engage the systematically excluded in dialogue.'⁸⁰ Furthermore, Linklater thinks that international political theory must be able to defend the existence of obligations to humanity which link insiders and outsiders in order to suggest the possibility of overcoming estrangement. Post-Westphalian changes encourage 'the emergence of new forms of political community in which the potential for higher levels of universality and difference is realised,'⁸¹ and so it may be contended that Linklater is merely encouraging a deeper awareness of the circles of moral concern as identified by Charles Beitz⁸² without, unlike Beitz, denying the fundamental importance of the more immediate circles.

Conclusion

Sovereignty is a tricky concept to tame. The interpretations and definitions that it generates make discussion surrounding its normative value and possible improvement challenging, but by terming it a working hypothesis, viewing it as a practical concept and focusing on the manner in which it operates in contemporary international society facilitates an analysis which highlights areas and issues in which a moral improvement is not only desirable but perhaps, essential. This chapter has examined the intellectual discourse which surrounds sovereignty today. The first major theme

⁸⁰ Linklater, *The Transformation of Political Community*, p. 107

⁸¹ Linklater, *The Transformation of Political Community*, p. 45

⁸² Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ, Princeton University Press, 1979)

to emerge from this is to say that even if a consensus cannot be reached as to how to modify each state's scope, nevertheless the fact that a wide range of theorists desire an alteration indicates that change is not entirely unlikely. Indeed, the following three chapters all indicate that there is hope for a normative improvement but that this may not be attempted in a Linklater-esque manner with a global moral dialogue but rather in an issue-specific context which may gradually alter perceptions. The dominance of realism, particularly in the world's only superpower, also may ensure that progress remains slow, although the growth of the European Union along with its core values, as discussed by Jackson and Keohane, may allow a fundamental alteration to happen.⁸³

This chapter has also demonstrated that sovereignty is a concept which alters and reorganises itself in light of contemporary issues, debates and challenges. What this indicates is that the belief held by many that the only way to succeed is to cling desperately to absolute power may ultimately prove damaging. Furthermore, and illustrated in the following three chapters, it may also be shown that an alteration in sovereignty may actually lead to the emergence of a more stable international order, more able to deal with the complex realities of post-Cold War politics. Nevertheless, the spectres of Hobbes and Bodin loom large.

⁸³ Jackson and James, *States in a Changing World*

Chapter Two: Sovereignty, Human Rights and the International Criminal Court

Introduction

The founding of the International Criminal Court (ICC) is, arguably, the most exciting event in international law since the Nuremberg trials which followed the end of the Second World War. Its remit, to try individuals who have committed egregious violations of human and humanitarian rights, is an important cosmopolitan normative challenge to Westphalian conceptions of sovereignty which has been sceptical or, indeed, hostile, to the rhetoric of individual moral responsibility. This chapter firstly, briefly sketches the role and history of human rights, particularly in the twentieth century, alongside a discussion of the philosophical underpinnings of the human rights regime. These foundations and their rationales are especially useful when trying to understand the strains and types of ideology which face contemporary political decision-makers as well as theorists.

The second section focuses on the planning and negotiating processes for the ICC which demonstrates both differing interpretations of how sovereignty ought to operate and, secondly, how political situations inform and fundamentally drive negotiation processes. This examination then concentrates on the Rome Statute for the International Criminal Court ('the Rome Statute') in order to highlight the legal, moral and political advances it proposes. Issues within this section include the consolidation of human as opposed to humanitarian rights; new categories of law which centre upon groups, such as women and children; and the changing role of the individual in international law.

The third section deals in greater depth with some of the most important aspects of the Rome Statute such as universal jurisdiction, and the changing nature of state and individual accountability in order to emphasize the impact the ICC may have upon the way in which international affairs are carried out. Included in this section is a discussion of the manner in which cosmopolitan notions have informed and shaped the debate about sovereignty in order to provide a more morally advanced variant. Alongside the Statute's innovations are discussions surrounding the legality and also desirability of the matters at hand, questions which have been generated largely,

though not entirely, by US scholars and politicians. These concerns feed into the fourth section of the chapter which judges the states' reactions to the Statute, though as with the previous section, much of the discussion focuses on the US if only for the fact that, as a hegemon, it occupies a crucial role within international life. The final section attempts to link the advances in international law more explicitly with theorists' views on international relations, focusing, in the main, on the cosmopolitans, solidarists and constructivists for whom the ICC offers the prospect of a morally-sensitive sovereignty.

Section One: Human Rights

Human rights undeniably play a vital role in international politics, whether it be a justificatory role or an actual, integral aspect of foreign and domestic policies. Their position was cemented in the latter half of the twentieth century although the debates surrounding their validity continue to this day. Their evolution can be viewed as having undergone three clear stages; firstly, that of 'normative construction', which occurred during the period between the UN Charter and the drafting of the 1966 International Covenants on Human Rights; secondly a period characterised by 'institution building' from the mid-1960s until the end of the Cold War; and thirdly, and the most important for the purposes of this essay, post-Cold War debates over human rights, personified by the negotiation of the International Criminal Court.¹

Post-Second World War Human Rights

Human rights have become an integral aspect of international relations following the end of the Second World War, which witnessed abuses on an unprecedented scale. The emergence of the 'human rights regime' was catalysed by the Nuremberg trials, and, to a lesser extent, the Tokyo trials which tried war criminals on a range of charges. These trials fixed in the minds of the international community the notion that respect for fundamental rights of humanity was a matter which affected the entirety of the human community regardless of the artificial borders created by state sovereignty. To what extent these trials are now steeped in a kind of political folklore

¹ This schema is suggested by Thomas Buergenthal in 'The Normative and Institutional Evolution of International Human Rights', *Human Rights Quarterly*, Vol. 19 (1997), pp. 703-723

is discussed below, but the facts of the trials are perhaps secondary; what it is more important is that a normative agenda emerged from them, which helped to frame a debate on the morality of sovereignty.

Jeremy Rabkins' analysis of the way in which the origin of the human rights regime has been misremembered begins with a quotation from the *New York Times*; 'The war crimes tribunals for Bosnia and Rwanda, the newborn international criminal court and a Spanish judge's indictment of Gen. Augusto Pinochet of Chile are extensions of the idea that how a nation treats its own citizens is everybody's business. That principle was established 50 years ago at the Nuremberg trials.'² Rabkin counters by discussing the proceedings, arguing they were far from universal, as is evinced by the fact that the cases were brought by USA, France, United Kingdom and USSR. The extent to which this derails the momentum accrued by the regime, however, is questionable and perhaps the spirit of Nuremberg now embedded in the political psyche is all that truly matters.

Essentially, the ICC represents an international criminal tribunal which is endowed with the ability to try the most serious international crimes including genocide, war crimes and crimes against humanity in order to prevent the ad hoc nature of international criminal tribunals from continuing into the twenty-first century. It has been described by Kofi Annan as, 'a gift of hope for future generations,'³ lauding it for promoting international accountability and demonstrating that sovereignty is as much to do with responsibilities as it is rights. The history of tribunals, which began with Nuremberg and Tokyo, has come into sharper focus more recently with the International Criminal Tribunals for the former Yugoslavia and Rwanda. To place such activities on a more permanent footing represents two important factors; firstly, that the international community is, as a general rule, unwilling to tolerate outrageous violations of human rights and secondly, and regrettably, that there is a need to curb the levels of violence in the contemporary world. In relation to the latter point, the *ius in bello* of humanitarian law has been expanded by the Rome Statute to include

² Tina Rosenberg, 'The Lives They Lived', *New York Times*, 3/1/99 section 6, p.26 quoted in Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* Vol. 19(2) (1999), pp. 81-96

³ Kofi Annan quoted in Gerhard Hafner, 'The Status of Third States before the International Criminal Court' in Mauro Politi and Giuseppe Nesi (Eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Burlington, US, Ashgate, 2001), pp. 239-253, p. 239

'crimes against humanity' which is now an aspect of international criminal law. The Court's existence is perhaps as much to do with prevention of human rights and humanitarian atrocities as it is to do with punishing the guilty. In addition, the Pinochet case remains one of the most controversial decisions in recent international law and marks a fundamental shift in attitude towards immunity. Chile's government signed up to the Convention Against Torture, and after vociferous legal debates on the subject, the House of Lords in a landmark case decided that Pinochet could be indicted for crimes under this measure even though many viewed his sovereign immunity, as a former head of state, to be sacrosanct. The Pinochet case indicates an extension of individual culpability, again penetrating the shield which sovereignty offered. The repercussions of this are yet to be felt in international courts to any great degree but, certainly, the momentum may allow a more cosmopolitan view of international law to develop.

Thomas Franck has articulated the idea of fundamental rules such as those underlying international criminal law as forming conditions on membership of the international community that, contrary to the ordinary practice of international law, are not themselves subject to the specific consent of states, except in the very act of accepting membership of the community itself.⁴ Thus, the collection of equally valid, independent competing entities becomes a society built upon key rules and foundations, thereby conveying a sovereignty which is contingent and subject to a global normative agenda. The impetus of Nuremberg and Pinochet, emerging as a logical consequence of this, underpins the relationship between sovereignty and the international system in the post-war era, a collective movement which has as its acme the ICC. As Nigel Rodley puts it, the

principles of Nuremberg were not only the victory of justice over the intolerable fiction of the unassailable state, as well as an affirmation of the supremacy of a higher positive law; they were also the base upon which a positive international law of human rights could be built, namely, the

⁴ This theme is discussed in Thomas Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995)

identification of duties for those sharing in the exercise of power to respect, at least to a minimal extent, the dignity of those subject to that power.⁵

This touches on the key notion within this essay, that sovereignty's prerogative does, and ought to, give way to the emerging global civil society and its standards, indicating the growth of a movement which transcends the state and its apparatus in an unprecedented manner. Though norms of the human rights culture became more entrenched during the fifty years following Nuremberg the enforcement regime did not alter massively. The ICC, however, marks a giant leap forward with regard to this and the fact it does not act solely at the behest of the great powers makes it controversial, as is discussed below in the section covering its trigger mechanisms.

Section Two: The Rome Statute

The Making of the Rome Statute

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court or 'DipCon' was opened by Kofi Annan on 18 June 1998 with the discussions being presided over by Giovanni Conso with negotiations being looked after by the Chair of the Committee of the Whole, Philippe Kirsch. As texts were prepared they were handed to the Drafting Committee headed by Cherif Bassiouni and thus, via the maze and networks of negotiations, ample opportunity was given for coalitions to be constructed and perhaps more importantly, for non-governmental organisations (NGOs) to have a very real impact on the framing of the debates about the nature of sovereignty.

The one hundred and sixty states present quickly divided into significant groupings which both shaped the negotiations and also reflected different attitudes to the role and function of sovereignty in contemporary politics.⁶ The Arab block and the Non-Aligned Movement each provided a strong and relatively coherent position on many of the major issues discussed, including the role of the Security Council, the ICC's

⁵ Nigel S. Rodley quoted in Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, OUP, 2003), p. 42

⁶ The names for the groups used within this chapter are borrowed from Bruce Broomhall, *International Justice and the International Criminal Court*

jurisdiction in internal conflicts as well as the *proprio motu* powers of the Prosecutor. The Non-Aligned Movement joined India, Pakistan and China, amongst others, and embodied the statist view which maximised state prerogative, objected to Security Council powers and also to the controversial Prosecutor. It has been suggested that objections raised by those in the South may be as result of the fear that the ICC would, in the end, tackle a small number of cases, mainly from third world states. Thus, the ICC and Security Council must be careful not to exacerbate the perception that the international system is driven entirely by a North which is quick to impose its own standards on a reluctant South.⁷

Although there was some agreement with other members of the Permanent Five of the Security Council, the US, effectively, fitted into a category on its own. Indeed, the US delegation headed by David Scheffer, remained closely attached to its own narrow conception of the ICC and reminded other delegates of its power to ‘make or break’ the Court depending on its provisions for peacekeeping missions,⁸ an issue examined in greater detail in the section on non-party jurisdiction. Unsurprisingly, the US favoured a stronger role for the Security Council, viewing it as the sole, legitimate body able to maintain peace, security and balance in international affairs. The US also held the view that the ICC ought to be a court of last resort, thereby maintaining an internationalist stance rather than the more cosmopolitan position as exemplified by the Like-Minded Group.

The Like-Minded Group consisted of around sixty states including Germany, the Netherlands, Canada and South Africa, all campaigning for the early establishment of the ICC and championing some of the most progressive proposals, an example being the German representatives who initially favoured universal jurisdiction. Importantly, perhaps, the Chair of the Committee of the Whole and of other working groups were delegates of the Like-Minded Group. Tellingly, the EU countries also issued their statements through the Austrian delegates since, at the time, Austria held the Presidency of the EU. The Like-Minded Group campaigned for a just, fair and

⁷ Hugo Young, ‘We can’t allow US tantrums to scupper global justice’, *The Guardian* (2 July 2002) [<http://www.guardian.co.uk/comment/story/0,3604,787646,00.html>] 4 January 2004

⁸ See David Scheffer, ‘The United States and the ICC’ in Dinah Shelton (Ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (New York, Transnational Publishers Inc., 2000), pp. 203-206

effective ICC which would be able to wield genuine powers and also, via complementarity, would be able to compel domestic courts to conduct their affairs in a manner which befitted internationally acceptable codes of behaviour, and it may therefore be seen that this group exemplified what may be deemed the cosmopolitan position.

The role of NGOs cannot be overestimated. Alongside the state delegates, there were also representatives from over two hundred and fifty NGOs which amassed strength by forming a coalition, the Coalition for an International Criminal Court (CICC). CICC organised itself, by way of a Steering Committee, into thirteen bodies which each focused on a specific issue, actually preparing and presenting to delegates daily papers to be taken into negotiations. Such interaction between state officials and NGOs helped to make the Rome Statute almost universal since it exercised 'the function of an international constitutional convention.'⁹ NGOs, often treated as an aspect of global civil society, are increasingly coming to prominence as bodies which can set agendas, build networks, develop and implement solutions across boundaries, a network of norm-builders whose normative reach extends to sovereignty, helping to construct a post-Westphalian state.¹⁰ Dialogue between groups, states and governments are facilitated by NGOs and perhaps reflects the dialogic approach which Linklater identifies in his work *The Transformation of Political Community*, discussed in the previous chapter. The environment of legitimation the NGOs provided suggests that the delegates sensed an overlap of duties between the state they represented and humanity in general. As *The Times* of India rightly notes, 'not since the establishment of the UN itself have so many countries voluntarily yielded ground on such a fundamental aspect of state sovereignty.'¹¹

⁹ Marc Weller, 'Undoing the global constitution: UN Security Council action on the International Criminal Court', *International Affairs*, Vol. 78 (2002), pp. 693-712, p. 700

¹⁰ Richard Price, 'Transnational Civil Society and Advocacy in World Politics', *World Politics* Vol. 55 (2003), pp. 579-606

¹¹ *The Times* of India quoted in Andrew Marr, 'As a century of war draws to a close, it's time for an age of international justice', *The Observer* (28 March 1999) [<http://www.guardian.co.uk/Kosovo/Story/0,2763,209651,00.html>] 15 March 2004

The Rome Statute in Brief

The ICC has jurisdiction over core crimes which are deemed to be those which are so grave as to 'threaten the peace, security and well-being of the world,'¹² a definition which appears to be reasonably uncontroversial. Indeed, the language used here seems to mirror the language of the UN Charter itself, although the addition of 'well-being' would seem to imply a concern which extends beyond the balance of peace and war. The echoing of the UN Charter is underlined further by the fact that the Statute is addressed to 'States' and 'Peoples' and nowhere are individuals explicitly mentioned as constituting a core audience. Hence, it may be seen that acceptance of the ICC represents what may be deemed a decidedly cosmopolitan improvement in sovereignty's normative status whilst simultaneously re-emphasising the primacy of the state itself.

As discussed above, Nuremberg expressly tied crimes against humanity to events which took place within the theatre of war. This, it has been suggested, was due in no small measure to the notion that the US government was fearful that the new crime could have been expanded to cover the mistreatment of its own black population, and thus, the definition was tightened.¹³ However, the Rome Statute far exceeds this limitation, defining crimes against humanity as any acts committed in a widespread or systematic way as part of an organised policy against any civilian population, thereby constituting the ICC as an organisation which overlaps both humanitarian and human rights in an unprecedented way. The list of crimes against humanity set out in the Rome text is both extensive and important with regard to the specific groups it addresses such as the crimes defined in Article 7 which expressly relate to crimes committed against women, the inclusion of these marking an important step in the evolution of rights relating to women in international relations.¹⁴ The list includes a wide range of crimes including murder, extermination, the forcible transfer of a

¹² Preamble to United Nations Rome Statute of the International Criminal Court ('Rome Statute') (17 July 1998) [<http://www.un.org/law/icc/statute/romefra.htm>] 1 November 2003

¹³ View of a judge at the Tokyo Tribunal as noted in Andrew Clapham, 'Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the International Criminal Court', in Philippe Sands (Ed), *From Nuremberg to The Hague* (Cambridge, CUP, 2003), pp.30-67, p. 43

¹⁴ This theme is discussed by Cherie Booth, 'US lets down world justice' *The Guardian* (13 June 2002) [<http://guardian.co.uk/comment/story/0,3604,736397,00.html>] 4 January 2004

population, torture, persecution, enforced disappearance, Apartheid and 'other inhumane acts of a similar nature.'¹⁵ The list of crimes against women includes rape, sexual slavery and enforced pregnancy.

The ICC claims jurisdiction in respect of war crimes in particular where 'committed as part of a plan or policy or as part of a large-scale commission of such crimes.'¹⁶ What is of particular importance with regard to this definition is that no strict threshold is defined and thus the independent Prosecutor, for example, may be able to launch an investigation where the numbers involved are relatively small. It may therefore be noted that the ICC is able to act in order to provide justice but that its key role may be as that of a deterrent, an important international tool helping to normalise behaviour. Also included in war crimes are serious violations of the laws and customs of armed conflict.¹⁷ Article 8 also catalogues the provisions of Article 3 common to the four Geneva Conventions, and, importantly, a range of crimes committed in non-international armed conflicts such as attacks upon civilians who are not participating in hostilities,¹⁸ indicating strongly that how a government treats its own people, via the ICC, becomes the business of the international legal community. Also codified are attacks on humanitarian workers,¹⁹ further offences of sexual violence²⁰ and the prohibition of the use of child soldiers under the age of fifteen.²¹ One of the most controversial of the war crimes discussed was the 'transfer, directly or indirectly by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.'²² This was a measure which Israel felt to be a politically-motivated attack on its actions, and a forerunner of how the ICC would become a political tool designed to attack its interests in the Middle East.²³ The definition of genocide used in the Rome Statute is taken directly from the Genocide Convention of 1948, which the US, along with over one hundred and thirty

¹⁵ Article 7 of the Rome Statute.

¹⁶ Article 8(1) of the Rome Statute

¹⁷ Article 8(2) of the Rome Statute

¹⁸ Article 8(2)(i) of the Rome Statute

¹⁹ Article 8(2)(ii) of the Rome Statute

²⁰ Article 8(2)(vi) of the Rome Statute

²¹ Article 8(2)(vii) of the Rome Statute

²² Article 8(2)(b) of the Rome Statute

²³ This is discussed in Gerhard Hafner, Kristen Boon, Anne Rübesome and Jonathan Huston, 'A Response to the American View as Presented by Ruth Wedgwood', *European Journal of International Law*, Vol. 10 (1999), pp. 108-123, p. 120

other countries, have pledged obedience to, as well as the promise to prosecute offenders. Like crimes against humanity, genocide does not have to occur during times of war and nor does there have to be a state plan, just the aim of destroying a national, ethnic, or religious group.

Part Four of the Rome Statute describes the composition and administration of the ICC, defining its organs which include the Presidency, the Appeals, Trials, and Pre-Trial Division, the Registry and an Office of the Prosecutor.²⁴ Arguably the most important of these bodies, and one examined in depth below, is the Office of the Prosecutor, whose head is elected by an absolute majority of the Assembly of State Parties and who will also have the ability to act as an independent organ of the ICC.²⁵ The importance of this independence is vital in understanding both the objections raised against the ICC and also the positive contribution the Court may make in international life. Article 52 stipulates that the Rules of Procedure and Evidence will only enter force with a two-thirds majority from the Assembly of State Parties and, hence, a possible objection to the ICC, that of the democratic deficit, seems largely unfounded.

Part 5 of the Statute focuses on processes for investigation and prosecution and includes provisions for making arrangements with states, persons and international non-governmental organisations,²⁶ which may indicate the growth of an international civil society which is both able, and arguably duty-bound, to investigate atrocities executed by a government anywhere in the world. Global responsibility for the welfare of the *cosmopolis* therefore connotes that a normatively desirable sovereignty may emerge, if only by dint of the fear of prosecution. This is a particularly solidarist notion, but perhaps practice will be the only true test of whether a sophisticated form of post-Westphalian sovereignty will appear. The penalties the ICC may impose are noted in Part Seven, the maximum being thirty years imprisonment unless the gravity of the crime demands a tougher sentence. A trust fund for the victims of crimes is also documented. As may be expected, the Rome Statute also has extensive provisions for revising judgements of the Trial Chamber through the Appeals

²⁴ Article 35 of the Rome Statute

²⁵ Article 43 of the Rome Statute

²⁶ Article 54(3) of the Rome Statute

Chamber²⁷ as well as measures for compensating the wrongly convicted.²⁸ The need for cooperation between all parties is also noted in Part Nine's Article 86.

Section Three: Issues raised by the Rome Statute

Accountability

Accountability, be it the extension or lack of, is a key issue with regard to the ICC. Particularly with regard to the ICC's ability to deflect immunities and amnesties, the body will have a profound impact on the way in which individuals within the international system are viewed. Indeed, what the institution does, as a body with enforcement capabilities, is make concrete the notion that individuals have defined duties under international rather than national law. For example the Hague Convention of 1907 intended to put an end to certain ways of waging war but, it 'nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders.'²⁹ The nascent ICC has focused ever more clearly the notion, first expounded in depth at Nuremberg, that crimes are not committed by abstract entities but, rather, by people and that the enforcement of laws and treaties, such as the Genocide Conventions, means that individual accountability is coming to the fore. Individual accountability recognises the rights, and as a corollary, the duty of man, reflecting the Kantian bypassing of the machinery of the state in order that individual justice may be served.

Rome constitutes progress towards a greater level of accountability but to reinforce steps taken there is a need to develop a culture of accountability which would lead to a convergence of perceived interests and behaviour on the part of the states. Essentially, there is a need for an epistemic community of appropriate behaviour, the moral equivalent of the scientific community essential for the improvement in environmental sovereignty. As Broomhall notes, the term 'collective conscience' has, in recent years, gained a greater level of sophistication and whereas previously it referred to issues surrounding peace and security only, the term now possesses a

²⁷ Article 83 of the Rome Statute

²⁸ Article 84 of the Rome Statute

²⁹ The Nuremberg Judgment and Sentence quoted in Andrew Clapham, 'Issues of complexity, complicity and complementarity', p.32

wider theoretical autonomy.³⁰ At present, what exists is a complicated system of which law is only one aspect, a system which also includes diplomatic and economic factors to enforce behaviour. Though this system is unlikely to fundamentally alter, nevertheless the inspiration behind the ICC, the international rule of law, comprises an important aspect of future civil society which may develop in the following few decades.

Immunities and amnesties hold an unusual position in international law and their legality is contentious. Amnesties are neither prohibited nor allowed in international law except in extraordinary cases such as Article 6(5) of the Additional Protocol 11 to the 1949 Genocide Convention where amnesties are allowed, although the International Committee of the Red Cross maintain that this does not apply to those who have broken international law.³¹ Ruth Wedgwood argues that the Rome Statute largely ignores the issues surrounding amnesties but the Statute can clearly be viewed as a direct attack upon the use of immunities in international law.³² Before the Rome Statute, the international community's attitude to amnesties and immunities was reflected in the notion that amnesties create room for manoeuvre under the guise of principled flexibility which recognises the dignity of the victims rather than the necessity to prosecute. Immunities for heads of state and state immunity per se have largely remained a matter of custom, albeit rather thin. However, the Rome Statute makes immunities illegal and as such represents a further attack on the system of states and their diplomatic rules in favour of victims of human rights abuses. It may therefore be argued coherently that the steps towards a greater level of state accountability are both, from a cosmopolitan standpoint, positive and, secondly, important with regard to the way in which states and their officials must assess their actions for, '[i]f the international rule of law is to become firmly rooted in practice, it will have to do so against the background of the modified or post-Westphalian system of the post-War international order.'³³ Cassese echoes this point arguing that,

³⁰ Broomhall, *International Justice and the International Criminal Court*, p. 46

³¹ Hafner et al, 'A Response to the American View as Presented by Ruth Wedgwood', p. 111

³² Ruth Wedgwood, 'The International Criminal Court: An American View', *European Journal of International Law*, Vol. 10 (1999), pp. 93-107

³³ Broomhall, *International Justice and the International Criminal Court*, p.8

[s]o long as states retain some essential aspects of sovereignty and fail to set up an effective mechanism to enforce arrest warrants and to execute judgments, international criminal tribunals may have little more than normative impact. Thus, we are once again reminded of the limits posed by international politics on international law.³⁴

Complementarity

Complementarity's importance is in relation to its compatibility with present statecentric architecture. Complementarity also seems to connote matters of complicity with regard to the way in which the international system operates, an issue examined towards the end of this section. Complementarity, effectively, demonstrates the primacy of domestic legal systems, as demonstrated by Article 18's deferral to national proceedings. The reasons for this are partly political and partly matters of efficacy. As an institution, the ICC appears to be more legitimate if it suspends action in deference to the state but equally, proceedings are more likely to be effective if kept to the national level since the acquiring of evidence, the transportation of witnesses and other practical matters is simply easier. The issue of legitimacy again appears to be crucial in establishing what may effectively become the constitutional architecture of a more developed world society. Legally, there appears to be little problem with complementarity since, '[I]t is within the sovereign power of a state to allow an international body to exercise jurisdiction in the same way in which a state exercises jurisdiction. There is no rule in international law prohibiting a state from conferring its adjudicatory authority on an international court.'³⁵

Occasions on which the ICC can defer to national courts occur where; no state entitled to jurisdiction under the Korean compromise³⁶ has initiated domestic proceeding; where an entitled state voluntarily transfers the case to the Court; where proceedings are interrupted because of a bar under national law, such as a statute of limitations, immunity or a grant of amnesty; or where action that has been taken is more limited

³⁴ Cassese quoted in Broomhall, *International Justice and the International Criminal Court*, p. 56

³⁵ Hafner et al, 'A Response to the American View as Presented by Ruth Wedgwood', p. 117

³⁶ Explained in the section on universal jurisdiction, below

than the ICC may hope for. The voluntary transfer criteria is important when assessing the sovereignty of states in the developing world since it implicitly accepts that those states which have limited autonomy but, nevertheless, sovereignty have the ability to press ahead with justice, the importance of which with regard to ethnic warfare will perhaps only be demonstrated by the Court's future activities. The criteria by which the ICC gains control over cases also reveals that states, in the future, must adhere to international standards of behaviour and the Statute may therefore develop into a near-universal code of conduct for sovereign states, a near contract that must be abided by. The ramifications of this and opportunities for viewing sovereignty as a contingent concept are, therefore, massive. Since joining the ICC results in awarding the body jurisdiction the vast majority of members, it is conjectured, will be democracies, 'not the abusive governments that self-protectively flock to UN human rights bodies, where membership bears no cost.'³⁷ It may therefore be argued that the ICC, in some way, represents and extends the Kantian notion of the federation as in *The Second Definitive Article of a Perpetual Peace: The Right of Nations shall be based on a Federation of Free States*,³⁸ a rolling alliance of states who agree to a certain standard of civilization. This shared stance views sovereignty as a contingent property which relies on governments treating their, and other states', peoples in a proper manner, consistent with international standards. Eventually, were one an optimistic Kantian, then the ICC may evolve into the *foedus pacificum* by which war will become banished from the world. Indeed, aggression has been deemed to be illegal and open to judicial treatment by all those who have signed the Rome Statute, the problem being, merely, that no definition has yet been decided upon.

Complementarity, it may be seen, is a double-edged sword. Whilst giving judicial primacy to domestic arrangements it nevertheless promises to act if a minimum standard of justice fails to be reached. It may be argued, for example, that there exists in international society a developing and shared norm of complicity³⁹ and conscience as part of a wider moral network which operates at a sub-state level. For example, for a state not to act in spite of the persecution of one of its minorities, indicates

³⁷ Kenneth Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs*, Vol. 80 (2001), pp. 150-154, p. 151

³⁸ Immanuel Kant, 'Perpetual Peace', p. 102

³⁹ An idea developed by Andrew Clapham in 'Issues of complexity, complicity and complementarity'

complicity by inaction, which may be remedied by the ICC, particularly by its independent Prosecutor.

Non-State Parties

Linked to universal jurisdiction is the issue of non-state or third party jurisdiction, which is particularly controversial in US politics. The Korean Compromise, discussed in the section on universal jurisdiction below, effectively allows for individuals from non-party states to be tried by party states which, as discussed below, caused American consternation especially with regard to UN peacekeeping issues. Traditionally, however, the US government has had few qualms over non-party jurisdiction and has itself used it to its own advantage, a prime example being the removal of General Manuel Noriega from Panama, an action legally vindicated by international drugs laws.⁴⁰

US fears surrounding the ICC centre closely on the non-party issue and although there are cogent points surrounding disagreements, nevertheless these seem to pale in comparison to the massive boon in the improvement of state behaviour which the ICC offers. The ICC exposes US citizens to an international judicial mechanism not approved by the US government or to laws not formulated in Congress, and, hence, it is perceived to threaten sovereign decision-making, US rights to self defence and also its participation in international humanitarian or peacekeeping operations. However, as Kofi Annan argues, no UN peacekeeper of any nationality has been accused of a crime 'anywhere near the crimes that fall under the jurisdiction of the ICC.'⁴¹ Here, the balance between the internationalist and cosmopolitan stance is particularly evident, with the appearance of loss of power from the hands of the American legislators being viewed as a potential threat. Indeed, in Congressional hearings the ICC has been described as a 'monster that we [the US] need to slay,'⁴² prompting suggestions of over-exaggeration in defence of sovereignty in which, 'Senators and Congressmen have lined up to assert a case for national sovereignty by elevating this

⁴⁰ This example is drawn from Kenneth Roth, 'The case for universal jurisdiction', p. 152

⁴¹ Kofi Annan quoted in Steve Crawshaw, 'Why the US needs this court' *The Observer* (15 June 2003) [<http://observer.guardian.co.uk/comment/story/0,6903,977743,00.html>] 15 March 2004

⁴² Senator Rod Grams quoted in David Forsythe, 'The United States and International Criminal Justice', *Human Rights Quarterly*, Vol. 24 (2002), pp. 974-991, p. 988

largely phantom enemy into an irresistible global force of anti-Americanism sufficient to justify the institutional paranoia that has most of Bushite Washington in its grip.⁴³ However, the US has recently dropped many of its objections with regard to its participation in peacekeeping operations,⁴⁴ but, nevertheless, there remains a great deal of tension.

Problems surrounding non-party action came to the fore when the UN Security Council debated an extension to peacekeeping operations in the Balkans. The US ambassador refused to commit troops unless guarantees were given that no troops would face the ICC for incidents that occur during their operations. Eventually, an agreement was reached under which US troops would be protected for twelve months, although the US representatives indicated that this measure would be enacted and re-enacted for the foreseeable future,⁴⁵ an action which violates the spirit of the ICC as established in Article 16 of the Rome Statute. Marc Weller noted that this contretemps was 'the most pronounced struggle about the nature of international law in the unipolar world yet,'⁴⁶ and this sentiment of US exceptionalism is an issue in detail below. Further to this, during 2000 the American Servicemembers' Protection Act was introduced into Congress, prohibiting any US court and all levels of government from dealing with the ICC, including the extradition of suspected war criminals. The Act, passed in 2002, also prevents US forces from participating in UN activities unless the Security Council granted immunity as well as preventing military aid to those who adhered to the ICC, apart from NATO countries, major non-NATO allies and those who promised not to send US personnel to the ICC.⁴⁷ The US has also signed agreements with over seventy countries, or over forty per cent of the world's population, exempting American citizens and, often, their own from ICC prosecution,⁴⁸ even though this actually violates Article 18 of the Vienna Convention on the Law of Treaties which obliges nations 'to refrain from acts which defeat the

⁴³ Hugo Young, 'We can't allow US tantrums to scupper global justice'

⁴⁴ Rupert Cornwell, 'Prisoner abuse: US backs down over immunity for soldiers', *The Independent* (26 June 2004) [<http://news.independent.co.uk/world/americas/story.jsp?story=534639>] 26 June 2004

⁴⁵ Security Council Resolution 1422 reported in Weller, 'Undoing the global constitution', p. 707

⁴⁶ Marc Weller, 'Undoing the global constitution', p. 707

⁴⁷ As reported in Sean D. Murphy, 'US Signing of the Statute of the International Criminal Court', *American Journal of International Law*, Vol. 95 (2001), pp. 397-400

⁴⁸ John Bolton, 'For us or against us?', *The Economist* (22 November 2003) [www.economist.com] 4 January 2004.

object and purpose' of a treaty.⁴⁹ Moreover, the Act promised to 'use all means necessary and appropriate to bring about the release from captivity'⁵⁰ of those held by the ICC, be they from the US, NATO countries or, indeed non-NATO countries. Ironically then, the US seems willing to use physical force, possibly upsetting world peace, in order to undermine a body which aims to improve the lot of the world's citizens.

Even opponents of the ICC, such as Ruth Wedgwood, are quick to admit that non-party action may provide a normative good, consistent with accepted rules of customary law. One argument in favour of trying non-party individuals is that states already try non-nationals on the basis of territoriality, or on issues that directly affect their citizens – the principle of passive personality – or via protective jurisdiction which rules on matters which affect state interests.⁵¹ However, the ICC, it is argued, is different from these examples since it involves a codified international body rather than the states themselves. Hence, it would appear that it is the institution which appears to promote cosmopolitan justice and damage sovereignty, albeit only marginally, that is in question and the reasons for this with regard to US objections are examined further below.

Triggers

This section examines those bodies charged with the ability to refer situations to the ICC. 'Situation' is used in preference to 'cases' since 'case' seems to imply that questions do need to be answered. The bodies able to refer situations to the ICC are the Security Council, individual states and, most controversially, the Prosecutor.⁵²

The role that the Security Council would occupy was heavily debated during negotiations. For example, India objected to the Security Council possessing enough power to dominate the Court's proceeding and perhaps, from a cosmopolitan outlook,

⁴⁹ *Human Rights Watch*, 'United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements' [<http://www/hrw.org/campaigns/icc/docs/art98analysis.htm>] 4 January 2004

⁵⁰ American Servicemembers' Protection Act as quoted in Murphy, 'US Signing of the Statute of the ICC', p. 398

⁵¹ Ruth Wedgwood, *The International Criminal Court: An American View*, p. 99

⁵² Article 13 of the Rome Statute

greater representation of all nations would have benefited global justice. The US, however, argued that the Security Council should not be restrained by only being able to refer cases under Chapter 7 of the UN Charter which accounts for matters which affect international peace. Although the US left negotiations dissatisfied with the role the Security Council occupied it nevertheless possessed the ability to halt proceedings for up to one year as well as refer them, which, nevertheless, is a considerable amount of power to be able to wield.⁵³ The Security Council's ability to suspend cases was negotiated under the guise of the 'Singapore compromise' and its effects can already be felt (see the section above on non-state parties). What the 'Singapore compromise' connotes is a tension between the internationalist and cosmopolitan stance since it infers that the greatest value in the international system is that of stability rather than justice, and that any movement towards a greater sense of global justice must be moderated in order that it does not upset fragile balances across the globe. The more sceptical may well be inclined, however, to argue that the 'Singapore compromise' reflected nothing more than the wish of a global hegemon to keep an even tighter grip on its own position.⁵⁴ The retention of power and control over proceedings certainly seems to have been an important factor during the discussion of the Rome Statute and it is notable that India wanted the state alone to be able to refer cases and that it, along with states such as China and Russia, declined to sign the Statute.

The greatest move away from state justice to a more cosmopolitan understanding is contained within measures establishing a Prosecutor. The Office of the Prosecutor is an independent organ and, as such, may have a very important role in prosecuting state officials for the most heinous of crimes. In this way, the Prosecutor may be seen as moving beyond the state system since it is able to impose its authority regardless of state sanction, which, obviously, is a contentious issue. To what extent, therefore, an independent Prosecutor signals the departure of the world system from Westphalian to a modified or post-Westphalian one is an matter of some import but nevertheless it is important to note that the Prosecutor's actions are subject to a good deal of state scrutiny. For example, the approval of a pre-trial chamber is necessary⁵⁵ and the Prosecutor has to justify decisions to the states concerned in order to provide an

⁵³ See Hafner et al, for example, p. 113

⁵⁴ This is a view endorsed in Scott Turner 'The Dilemma of Double Standards in US Human Rights Policy', *Peace and Change*, Vol. 28 (2003), pp. 524-554, which is discussed in greater detail below

⁵⁵ Article 15(3) of the Rome Statute

opportunity to defer to domestic justice, for states have one month to respond to the Prosecutor. A renegade Prosecutor, turning accepted procedure on its head, is therefore, highly unlikely. Nonetheless, the Prosecutor's independence may result in the disenfranchised in international society gaining a voice and it is for this reason that there is hope of a more representative system of international justice, a matter examined in greater depth in the section on the future of international law. Moreover, since individuals can refer cases to the Prosecutor,⁵⁶ he or she acquires the status of *actio popularis* which implicitly brings the individual close to the status of *locus standi in iudicio*,⁵⁷ which may have ramifications with regard to how a sovereign state views its people. In this way, the trigger mechanism may be able to bring those previously excluded into the international arena in a manner espoused by, for example, Linklater.⁵⁸

Universal Jurisdiction

One of the key issues which surrounds the ICC is universal jurisdiction, a concept which tallies with notions of cosmopolitan justice and respect for human rights to a greater extent than within the traditional Westphalian system of states. This section assesses claims that the Rome Statute embodies elements of universal jurisdiction including counter-arguments to this and a discussion of the way in which it may affect the normative worth of sovereignty. The importance of universal jurisdiction lies in the fact that it may privilege justice over order and, thus, must be introduced in such a way as to improve the lot of the world's citizens without upsetting the delicate international balance.

Judge Bassiouni contends that there currently exists in international law mandatory jurisdiction for all core crimes under the banner of *jus cogens*.⁵⁹ However, it may be seen that, at best, all that customary law allows is a permissive exercise of universal jurisdiction over genocide, crimes against humanity and some war crimes, although

⁵⁶ Article 15(12) of the Rome Statute

⁵⁷ Lamia Mekhamar, 'The Status of the Individual in the Statute of the International Criminal Court, in Mauro Politi and Giuseppe Nesi (Eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Burlington, Ashgate, 2001), pp. 123-130, p. 125

⁵⁸ Linklater, *The Transformation of Political Community*, p. 107

⁵⁹ Bassiouni's view as reported in Broomhall, *International Justice and the International Criminal Court*, p. 111

there is some hope that momentum towards an increasing number of mandatory crimes is increasing.⁶⁰ Indeed, a *jus cogens* rationale would lend a great deal of coherence to the ongoing evolution of international law with human rights, above and beyond humanitarian rights, becoming integral. For those who look towards a kind of legal federation, therefore, the ICC offers hope of a *civitas maxima*, or, at the very least, a clearly recognisable international legal community which goes some distance to recognising individuals. Moreover, the ICC has been described as constituting the culmination of twentieth century law making.⁶¹ The International Criminal Court, Weller argues, consolidates universality by, firstly, refining the list of international crimes which can be held to be genuinely universal; secondly, by affirming the duty of states to use their own jurisdictions and; thirdly, establishing a constitutional organ capable of a greater level of enforcement.⁶²

Nevertheless, it is difficult to award the ICC the badge of universality. Indeed, the concept of universality, a German proposition, was explicitly rejected during the negotiating processes, being replaced instead by the 'Korean compromise'. Under the compromise, the Court is able to exercise its jurisdiction where any member nation is one of the following; the state where the offence actually took place; the state which is home to the victim; the state which is home to the accused or, lastly, the state of custody for the accused.⁶³ In this respect the Court remains territorial inasmuch as the ICC only exercises its jurisdiction if *par malheur*, the territories are either unwilling or unable to prosecute. Universal jurisdiction, therefore, did not remain on the agenda during negotiations for very long but Article 12 clearly offers a stepping stone towards the goal, which was largely a European aspiration, by entitling the ICC to try non-party citizens as stipulated by the Korean compromise. A key US objection to the Rome Statute, as discussed by Ruth Wedgwood,⁶⁴ is that despite the step down from universality proper, the compromise nevertheless breaks customary international law. The custom in question is *pacta tertiis nec nocent nec prosunt*, a maxim enshrined in the Article 34 of the Vienna Convention on the Laws of Treaties. This measure holds that a treaty does not create either obligations or rights for a third state

⁶⁰ As noted in Broomhall, *International Justice and the International Criminal Court*, p. 112

⁶¹ Marc Weller 'Undoing the global constitution', p. 693

⁶² Marc Weller, 'Undoing the global constitution', p. 694

⁶³ Marc Weller, 'Undoing the global constitution' p. 702

⁶⁴ Ruth Wedgwood, 'The International Criminal Court: An American View'

without its consent and that any body which acts as such is acting illegally. This argument and its rebuttal are presented, above, in the discussion surrounding third party jurisdiction.

Section Four: Sovereign Reaction Following the Close of Negotiations

Of all the states' reactions to the ICC, perhaps the most interesting geopolitically is that of the US, whose u-turns on the issues have been bolstered by legalistic argumentation, though the extent to which they hold water is debatable. Below is an examination and recap of the arguments for opposing the ICC as proffered by the US, followed by an examination of possible political reasons as to why US may not wish to be part of the Court. As a preliminary note, the US's relationship with international law has always strange for although it 'seldom loses an opportunity to profess its loyalty to international arbitration in the abstract ... the expression of this sentiment has become so conventional that a popular impression prevails that it accords with the actual policy of the United States.'⁶⁵

The US fears that the ICC will suffer from a democratic deficit, a continuing concern amongst a people who revere their constitution so vociferously. The ICC, unlike the US Supreme Court for example, is not embedded in a wider system of democratic institutions. The ICC can make judgements, but is not answerable for them. Here, the Euro-American split⁶⁶ can be clearly felt, with the European model having embraced outside jurisdiction in the form of the European Court of Human Rights in particular. Moreover, the European Court of Human Rights imposes far more stringent curbs upon participating states.

The US views itself as a beacon on a hill with its superior Bill of Rights and therefore, refuses to be trumped by international law in a way other states would find perfectly acceptable.⁶⁷ Indeed, written into the Hungarian constitution is the notion that international law is able, at any point, to trump the domestic.⁶⁸ The constitutional

⁶⁵ Manley Hudson quoted in David Forsythe, 'The United States and International Criminal Justice', p. 980

⁶⁶ This theme is central to the recent work of Robert Kagan

⁶⁷ Forsythe, 'The United States and International Criminal Justice', p. 975

⁶⁸ Forsythe, 'The United States and International Criminal Justice', p. 975

exceptionalism that US political culture professes is connoted by Representative Bereuter (Rep. Neb) who, after having chaired the hearings on the ICC in the House of Representatives argued that although the officials of the EU are 'willing to give up elements of their sovereignty ... we are not and should not be'.⁶⁹ Unilateralists currently occupy prominent positions in both the White House and Congress, and favour self-reliance over multilateralism, treating treaties as unwelcome limitations on their behaviour. In this way, current US policymakers favour 'hard' power, which tallies with military and economic muscle, over the 'soft' power which emerges from a regime built upon treaties, norms and negotiations.⁷⁰ The status of the United States in contemporary international relations has been analysed by Charles Krauthammer who maintains that the US is 'no mere international citizen', that it is more powerful than any state has been since the Roman Empire and that it retains the ability to reshape norms and create new realities by 'unapologetic and implacable demonstrations of will'.⁷¹ However, the UN is opposed to the concept of hegemony, as is evinced by its assertion of sovereign equality in 'Inadmissibility of the Policy of Hegemonism in International Relations',⁷² and it may be seen that the US's efforts to distance itself from the ICC only compounds the view that the US is, to many intents and purposes, going it alone.

A second reason as to why the ICC meets American intransigence is simply that an international body may have an effect on the way in which policy may be constructed and implemented. As William Pfaff puts it, 'the motivation of the new decision makers in Washington is quite simple. They want the United States to have its way. They do not want to rule the world. ... They believe that the United States is the best of all countries, with the right ideas; that it deserves to prevail in international disputes because it is right.'⁷³ The ICC represents a body which has not been designed to fit American needs and thus challenges the United States use of human rights rhetoric to pursue unilateral objectives by forging a more neutral means of

⁶⁹ Representative Bereuter quoted in Forsythe, 'The United States and International Criminal Justice', p. 982

⁷⁰ Ivo H. Daalder, 'Are the United States and Europe Heading for Divorce?', *International Affairs* Vol. 77 (2001), pp. 553-567

⁷¹ Charles Krauthammer as noted in Detlev F. Vagts, 'Hegemonic International Law', *American Journal of International Law* 95 (2001), pp. 843-848, p. 843

⁷² 'Inadmissibility of the Policy of Hegemonism in International Relations,' UN General Assembly Resolution 34/103, noted in Vagts, 'Hegemonic International Law', p. 845

⁷³ William Pfaff quoted in Forsythe, 'The United States and International Criminal Justice', p. 978

prosecuting international justice.⁷⁴ Hence, it may be argued that, despite the legal arguments which tread around niceties, treating them as core issues, what is truly at stake is American vulnerability. This issue has received scant official comment but to many critics it appears that the chief reason as to why US support for the ICC was withdrawn is that a conscientious Prosecutor may be able to find some degree of fault with its policies in armed conflict.

Apart from the US, reaction to the Rome Statute has generally been favourable with many countries altering their constitutions, their sovereign remit effectively, in order to accommodate their new responsibilities. The UK, Canada and South Africa are examples of states taking such a stance. However, even in liberal democratic states there has been some disquiet. For example, the Canadian international lawyer, Edward Greenspan has refused to act in accordance with the body, stating that it is a court which will put politics ahead of justice and, moreover, that having liberal democratic states answering to undemocratic states is wrong.⁷⁵ Furthermore, Greenspan argues that member states are, 'granting massive power to a supranational, unaccountable, rootless group of lawyers,'⁷⁶ and hence it may be seen that the notion of territoriality as a grounding for jurisdiction over persons remains an important issue, even in the most forward-looking of states. Of those still refusing to join the ICC, other than the US, perhaps the most important are China, Israel and India, whose absence, owing to their geopolitical role and also their numbers in terms of population, represents an important omission.

⁷⁴ Scott Turner, 'The Dilemma of Double Standards in US Human Rights Policy', pp. 524-554, p. 524

⁷⁵ Peter Stock, 'Get ready for Globocourt', *The Report* (3 April 2002), Vol. 29(5) [<http://search.epnet.com/direct.asp?an=6266986&db=buh>] 4 January 2004, p. 23

⁷⁶ Peter Stock, 'Get ready for Globocourt', p. 23

Section Five: The ICC, Sovereignty and the Status of International Law
from a Normative Perspective

The advent of the ICC has, arguably, ushered in a new era in international law enforcement founded upon respect for human rights and for increased recognition of the individual within the system of states. This section examines the developments and attempts to map current thought in international relations theory onto the advances, taking into account the innovations and arguments as noted in the discussion above.

Falk notes that,

Westphalia as a construction of international reality retains a vast domain of unexplored normative potential, which will remain ... potential ... unless morally sensitive and forward looking ... political forces gain far greater access to policymaking and succeed in promoting a new image of reality that challenges economistic and geopolitical world pictures. To sum up, the realist construction of world order should not be confused with the range of world order constructions that are possible within a Westphalian framework.⁷⁷

This is a sentiment which certainly seems to resonate with regard to the ICC. Falk appears to be hoping for an epistemological revision to the manner in which issues of justice are viewed and certainly such a sentiment echoes Wendt's constructivist understanding of how international relations operates. It may be argued that a legitimate organ of justice emanating from a concern above and beyond political exigencies, given momentum by the epistemic impetus of the non-governmental organisations and so forth, may, in the future, help to guide decision-making processes in order to create a type of sovereignty which recognises its moral duties and limitations of action more readily.

The scope of the ICC suggests a convergence of humanitarian laws and human rights law in an unprecedented manner with the connection between core crimes and war

⁷⁷ Richard Falk's 'Horizons' as quoted in Henry E. Caney, 'The Grotian Eclectic and Human Rights: Four Recent Works by Richard A. Falk', *Human Rights Quarterly*, Vol. 24 (2002), pp. 799-829, p. 813

being uncoupled, thereby blurring the distinction between war crimes and crimes against humanity. Again, this connotes the entrenchment of human rights into the way in which sovereignty operates and, as Mégret contends, the ICC, 'seems deeply embedded in a cosmopolitan outlook rather than [being] geared to minimizing the side effects of sovereign co-existence.'⁷⁸ A cosmopolitan comprehension views sovereignty as being a normative good when it yields the maximum possible individual autonomy under the coercion presupposed by the social contract.⁷⁹ This creates tension with regard to the ICC since, 'carried to its logical extreme the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organized as a society of sovereign states,'⁸⁰ although Reus-Smit contends that this is not the case, and it may be for this reason that major powers such as the US, Russia and China, aside from domestic conflicts, are unwilling to move into a post-Westphalian epoch. The 'Europeanization', if such a term is applicable, of developments within international law demonstrates, however, that a significant number of powerful states are willing to leave aside thoughts of sovereignty in order to create an international system which resembles more closely the world envisaged by Kant than the one by Hobbes. Indeed, the institutional architecture of the EU, including the European Court of Human Rights, whose remit extends behind the Rome Statute's compass, reveals a comprehension of a more integrated and morally sophisticated version of sovereignty, echoing the post-Second World War proposal devised by the international lawyer, Hans Kelsen.⁸¹ Indeed, cosmopolitan citizenship, Linklater argues, requires that individuals support global institutions that are capable of enforcing justice for individuals when rights are violated,⁸² and thus hopes for a cosmopolitan variant of sovereignty may lie in the emergence of a robust ICC. However, perhaps such optimistic judgements must be restrained in order that the practical impact of the ICC may be better understood. The modified sovereignty emerging in contemporary Europe is somewhat of a historical

⁷⁸ Frederic Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', *European Journal of International Law*, Vol. 12 (2001), pp. 247-268, p. 259

⁷⁹ Fernando R. Tesón, 'The Kantian Theory of International Law', *Columbia Law Review*, Vol. 1 (1992), pp.55-102, p. 66

⁸⁰ Hedley Bull, *The Anarchical Society*, p. 152

⁸¹ As noted in Anthony Carty, 'Sovereignty in International Law: A Concept of Eternal Return', in Laura Brace and John Hoffman (Eds.), *Reclaiming Sovereignty* (London, Pinter, 1997), pp. 101-116

⁸² Andrew Linklater, 'Citizenship and Sovereignty in the Post-Westphalian European States', in Daniele Archibugi, David Held and Martin Köhler (Eds.), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge, Polity Press, 1998), pp. 113-137

irony since it reflects more closely the Philadelphian conception of sovereignty developed by the nascent US as a counterpoint to the domineering and morally stifling Westphalian system.⁸³ The extent to which power usurps morality, is therefore open to question and leads back to the initial discussion of the way in which the system operates.

Conclusion

Fernando Téson defines a Kantian federation as consisting of an 'alliance of separate free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by their mutual advantages derived from peaceful intercourse,'⁸⁴ and it may be seen that, in intention at least, the ICC represents an attempt to construct such a system in the face of Westphalian sovereignty. The ICC builds upon moralistic judgements about the manner in which a state ought to treat its people, attempting, as it does, to instil a thin code of behaviour for individuals at all levels, which may, ultimately, provide a shell of rights for each individual.

The growth of the human rights regime following the end of the Second World War may, in due course, be come to be viewed as a watershed in international relations, as the Peace of Westphalia is viewed now. However, at present, the tensions that exist between the Hobbesian, the internationalist and the cosmopolitan are readily apparent in all theatres of discussion and war. Indeed, the reaction and objections raised against the ICC on matters such as non-party jurisdiction and the trigger mechanisms indicate that traditional, territorial conceptions of sovereignty as relating solely to the state, still flourish, with the legal mechanisms and arguments countering their assertions remaining slightly vulnerable. Perhaps the evolution of customary law on the issues at hand will allow for greater clarity.

Returning to state reaction to the ICC, we may also argue that a fundamental schism may be developing in international relations, a topic discussed by Kagan, Vagts and Keohane. The 'European' way of dealing with the concept of sovereignty includes

⁸³ See Robert Keohane, 'Ironies of Sovereignty'

⁸⁴ Téson, 'The Kantian Theory of International Law', p. 86

what may almost be termed the de-territorialisation of sovereignty along with a more advanced conception of both the worth of the individual and of the necessity and worth of cross-border cooperation, whilst the US in both political culture and action seems rooted to Westphalian notions of sovereignty, a possible outgrowth of its position as the global hegemon and its suspicion of others, which remains, even following the end of the Cold War. Moreover, it may be argued that,

The excesses and exigencies of 'sovereignty' are due in part [to] the provenance of the term and its entry into the international and political vocabulary ... The law of inter-prince relations, with its roots in religious law, natural law, Roman law and morality was later strengthened and assimilated into the modern law of nations, but it did not shed its origin and its princely paraphernalia.⁸⁵

This suggests that any fundamental change in the normative status of sovereignty under the auspices of international bodies such as the ICC must be accompanied by an epistemic and definitional change with regard to what sovereignty connotes and denotes with legitimate and, indeed, legitimating arms, such as NGOs, helping to catalyse this change in order to provide a more morally-sensitive sovereignty.

⁸⁵ Louis Henkin quoted in Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries', *European Journal of International Law*, Vol. 12 (2001), pp. 867-888, p. 877

Chapter Three: The Environmental Challenge and Sovereignty

Introduction

The environment in international relations has traditionally occupied a relatively minor role, acting only as a backdrop against which the political takes place. However, and especially in recent decades, environmental dilemmas have come to the fore and demonstrated the necessity of global action to combat problems with the potential to unleash incalculable devastation. These quandaries must be tackled in a way which, to an extent, ignores the cartographer's arbitrary state boundaries and it is for this reason that the examination of environmental problems is essential when discussing the normative worth of sovereignty in contemporary international relations.

This chapter, therefore, aims to analyse a number of key themes with regard to the challenges and opportunities facing sovereign communities. Following a brief introduction to the 'climate change regime', Section One aims to explore the ethical status of the environment both in policymaking circles and also in philosophy, investigating positions such as strong and weak anthropocentrism to demonstrate what cooperation is likely if such an ethical position is held. This discussion leads into the notion of sustainability relating to negotiations at Rio and the climate change regime in particular, exploring the manner in which the search for sustainability has been informed by attitudes and economic bargaining. The sovereign states's relationship with the environment is also noted in this section, focusing on the way in which the ecological world cannot be meaningfully divided into the political units that we experience.

Section Two focuses on the notion of justice, and here links between this chapter and the previous one may be noted. A cosmopolitan schema, incorporating John Rawls' thought is used to argue that an inhabitable environment is an essential human right and that sovereign states are duty-bound to secure such a right for the entire human community. This justice is also discussed in relation to spatio-temporality and it is suggested that, unlike the justice examined in the previous chapter, such a version ought to, and is able to, recognise and adjust itself as a result of what occurred in previous generations. This notion feeds into an analysis of the role of developing

states, with regard to the climate change in particular, noting the problems encountered if universal duty is imposed upon all states in a blanket manner.

Section Three is grounded in *realpolitik* and examines potential causes for state intransigence with regard to environmental problems. Here the role of the 'epistemic community' is fully examined, indicating the circumstances under which it is able to drive and direct state action. This section focuses more closely on economic issues and also public opinion, substantiating the claim that the sovereign state is unwilling and, perhaps unable, to deal with environmental problems. Again, this analysis is coupled with an examination of negotiations over the climate change regime and especially over measures within the Kyoto Protocol. This section elucidates more fully the Euro-Atlantic divide outlined in the previous chapter, but also suggests that much of the rhetoric on the issue is, in terms of environmental action, misplaced.

This chapter draws upon two case studies which are intertwined with the conceptual and philosophical bases of environmental sovereignty. 'Climate change' otherwise known as 'the greenhouse effect' or 'global warming' is arguably the greatest single environmental challenge facing the planet today. Climate change is caused, in the main, by the release of greenhouse gases, especially carbon dioxide, into the atmosphere. These gases form a layer in the upper atmosphere trapping the Sun's rays as these bounces back off the surface of the Earth. In time, this leads to the Earth effectively becoming a greenhouse, unable to let some of the heat from the atmosphere escape. The potential effects of climate change are devastating and range from the melting of the polar ice caps which may raise the sea level, submerging a number of states to an increase in the number of freak weather conditions the planet experiences, meaning that hurricanes and typhoons, for example, may become commonplace. This case study has been chosen because tackling it requires universal cooperation with differentiated levels of sovereign responsibility, thereby evoking one of the key normative challenges to sovereignty. Via the processes and machinations of international summits, meetings and conferences, it also demonstrates the role that non-governmental and intergovernmental organisations have upon the exercise of sovereignty within contemporary international relations. As will be seen throughout the chapter, the success of NGOs, in relation to the victories their human rights

cousins secured in the fight for the International Criminal Court, is interesting and hints at the dichotomy, for example, between liberal justice and economic matters.

It is important to note that at the time of writing, July 2004, the Kyoto Protocol has yet to come into binding force since state ratification has not provided for the mandatory 55% reduction in emissions necessary to activate the treaty. Nevertheless, differing attitudes to the document, and climate change in general, offer scope for the analysis of the normative status of sovereignty with regard to environmental and, as a subsidiary, economic factors, which are discussed throughout.

The second case study involves the 'ozone regime' which centres upon the use of CFCs in industrial practices. CFCs have the ability to deplete the levels of ozone in the atmosphere, meaning that dangerous radiation is able to pass into the atmosphere, the result of which includes an increased susceptibility to skin cancer in both people and animals. Acute crop damage may also occur. This second case study demonstrates the possibility for international sovereign cooperation, and the conditions necessary for this to occur.

A brief history of the climate change regime

This chapter, in seeking to demonstrate the ways in which sovereignty is facing a number of important normative challenges with regard to environmental matters, draws upon a key issue within contemporary international politics, namely climate change. In this introduction, the cogent points surrounding the 'climate change regime' including its origins and positions held by various states are discussed in order to provide a backdrop for the more analytical ideas explored in Sections One, Two and Three which, as mentioned above, focus upon theoretical points whilst using climate change to elucidate arguments. Also noted are the main points contained within the Kyoto Protocol to the United Nations Framework Convention on Climate Change (from hereon in 'Kyoto' or the 'Kyoto Protocol').

Although it has only been on the political radar for a relatively short time, climate change, originally deemed the 'hothouse effect', was identified in 1827 by Fourier with investigations on the issue continuing throughout the nineteenth century in works

such as Tyndall's *On Radiation Through the Earth's Atmosphere* (1863) and also through Arrhenius' research. Following a lull in activity, interest re-emerged upon the founding of a carbon dioxide monitoring station in Mauna Loa in 1957 and the establishment of the Global Atmosphere Research Programme eleven years later. The 1979 World Climate Change Conference stated with some confidence that carbon dioxide was the most problematic amongst the greenhouse gases and appealed for nations to 'foresee and to prevent potential man-made changes in climate that might be adverse to the well-being of humanity.'¹ Also in 1979, the eighth World Meteorological Organization (WMO) Conference established the World Climate Programme (WCP) whose influence upon sovereign states, along with the Intergovernmental Panel on Climate Change (IPCC), has fulfilled a vital role in supplying information and scientific legitimacy as part of an epistemic community (see Section Three). The IPCC, established in 1988 by the United Nations Environment Programme (UNEP) and WMO is composed of three distinct divisions, Working Groups I (Science), II (Impacts) and III (Responses). Owing to its genesis, the IPCC is almost universally represented and it may be viewed as the most legitimate scientific body to exist on the subject. Legitimacy in environmental matters is, in relation to non-governmental and intergovernmental bodies, absolutely crucial just as the meetings and briefings at the Rome Conference described in Chapter Two helped to legitimate the International Criminal Court.

The 1985 Villach Conference, organised by the WCP, witnessed the emergence of something of a consensus and this, when coupled with the floods, hurricanes and droughts of the late 1980s, led individual governments to believe that the effects of climate change were both hugely damaging and, moreover, real. Following Villach, conferences in Toronto, Malta and Hamburg each called for reductions in the amount of carbon dioxide released into the atmosphere.²

These conferences and various scientific conventions led to the Rio Conference ('Rio') (1992) which proposed bold aims of reducing greenhouse gas emissions, but whose discussions were marked by the dominance and intransigence of the state as prime actor in international relations as well as throwing the North/South divide into

¹ Mathew Paterson, *Global Warming and Global Politics* (London, Routledge, 1996), p. 28

² Paterson, *Global Warming and Global Politics*, p. 35

stark relief. In Rio, the UNFCCC was negotiated and the impact of this can be seen in all climate change discussions, as noted throughout the three sections of this chapter. Sustainable development was also considered in Rio. The concept of sustainable development, examined below, emerged from the Brundtland Report (1987), written by the Norwegian Prime Minister Gro Harlem Brundtland, which called into question sovereign states' ability to tackle environmental problems, querying sovereignty's limitations and worth.³

After a number of conferences, Parties to the UNFCCC met in Kyoto in 1997 to finalise greenhouse emission reductions, along with a number of other measures. During the negotiations, various factions emerged each representing either individual or shared interests or intellectual positions relating to justice, order and the nature of the international system. These issues are investigated in the following three sections but it is important to present a brief sketch of states' original negotiating positions in order to elucidate more fully the challenges and pitfalls affecting those who would wish to construct a dynamic and powerful environmental regime beyond the remit of the sovereign state. For example, the Association of Small Island States (AOSIS), established at Rio, played an important role. AOSIS members have the most to lose from global sea rises considering that one of its members, the Maldives, consisting of over one thousand islands, is at no point more than two metres above sea level. The EU formed a second bloc, advocating the most stringent emission reductions owing to, arguably, a more developed cosmopolitan ethic,⁴ or possibly because of the fact that their emissions had, relative to 1990 levels, dropped. The 'umbrella group' or 'JUSCANNZ', consisting of Japan, the United States, Canada, Australia, New Zealand plus Switzerland formed a further group who, although concerned like the EU, were unwilling to cut emissions so radically, instead emphasising carbon sinks, tree-filled areas which soak up carbon dioxide. It may be seen that the key debate in policies and measures covered at Kyoto revolved around a clash of political and governmental cultures between the United States and Europe, since the EU, accustomed to harmonization, cross-border interaction and cooperation opted for

³ As reported in Owen Greene, 'Environmental Issues' in John Baylis and Steve Smith (Eds.), *The Globalization of World Politics* (Oxford, OUP, 2001), pp. 387-414, p. 393

⁴ Note the 'European' stance to major issues with regard to the ICC (see previous chapter). Also note the European approach to the politics of collaboration as discussed in Keohane's 'Ironies of Sovereignty'

tougher measures, some of which were to be mandatory. It may be argued that European states, including the United Kingdom, were advocating a circle of concern beyond their immediate neighbours and that they were sensing more acutely the need for collective action, possibly because of the institutional architecture of the EU itself.

What was eventually agreed were legally binding targets for industrialised countries to be achieved during the so-called Kyoto commitment period (2008-2012),⁵ with the US agreeing on the final day to cut emissions to seven percent below 1990 levels.⁶ Article 2, on greenhouse gas emission, may be viewed as a victory for the laissez-faire attitude over the EU since no mechanisms are mentioned. Indeed, the United States' delegation lobbied successfully for the list of measures to be prefixed by 'such as' rather than 'in particular', favoured by the Europeans.⁷ As no prescription was given to the states as to what to do, it may be argued that the sovereign state remains entirely pre-eminent, reflecting the deeply entrenched internationalist view championed by the Americans, rather than the European cosmopolitan method which centres more closely on the notion of global governance. Mechanisms for reduction are documented in Articles 3(10) and (11) but it has been argued that the devil lies in the detail, or rather, the lack of it.⁸ The activation procedure for the Protocol rested on ratification by fifty percent of the signatories who, in addition, had also to account for fifty-five percent of the stipulated emission reduction.

Kyoto's measures were deliberated further at Conferences of the Parties held in Bonn, Marrakech and New Delhi. During the Bonn negotiations, European delegates rejoiced at having saved the Protocol by offering concessions to the umbrella group including extending the definition of carbon sinks, for example. US delegates were present but were not involved in negotiations, a stance explained by Paula Dobriansky, the US Under Secretary of State for Global Affairs, who asserted that although

⁵ Christoph Böhringer, 'The Kyoto Protocol: A Review and Perspectives', *Oxford Review of Economic Policy*, Vol. 19 (2003), pp. 451-466, p. 451

⁶ Michael R. Molitor, 'The United Nations Climate Change Agreements', in Norman J. Vig and Regina S. Axelrod (Eds.), *The Global Environment: Institutions, Law and Policy* (London, Earthscan, 1999), pp. 210-235, p. 288

⁷ Article 2 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997) [<http://unfccc.int/resource/docs/convkp/kpeng.html>] 1 November 2003

⁸ See Michael Grubb, Christiaan Vrolijk, and Duncan Brack, *The Kyoto Protocol: A Guide and Assessment* (London, Royal Institute of International Affairs, 1999)

[w]e do not believe the Kyoto Protocol is sound public policy for the United States, we do not intend to prevent others from going ahead with the treaty, so long as they do not harm legitimate U.S. interests ... and we will welcome international views as we develop a science-based, market-friendly basis to deal with climate change.⁹

The American stance, therefore, rests upon the ability of the climate change regime to provide, via epistemic community activity, a precise calculation of what needs to be done and secondly, that these measures be enacted in such a way as not to damage the economy. Thus, it may be seen that narrow conceptions of interests are evident here, a factor discussed in Section One which explores sovereignty's relationship with the environment and also in Section Three which argues that the state's willingness to regulate itself is significantly diminished where financial prosperity is concerned.

Section One: Sovereignty and the Ethical Status of the Environment

Sovereignty, narrowly defined and relating to the wielding of legitimate authority and power within separate geographic units, is being challenged by environmental problems which affect the global whole. This initial section explores the ethical standing of the environment in contemporary international relations, as informed by philosophical traditions as well as relationships of power, autonomy and control under the Westphalian system. The two disparate strands of thought which dominate are the views that the environment, which includes our habitats and all the living organisms therein, has inherent value, value just by being. The second, and more prevalent, view argues that it retains value only inasmuch as it facilitates the existence of humanity.

⁹ Paula Dobriansky quoted in Greg Kahn, 'The Fate of the Kyoto Protocol under the Bush Administration', *Berkeley Journal of International Law*, Vol. 21 (2003), pp. 548-571, p. 553

Anthropocentrism and the Environment as an Economic Issue

The dominant view of the environment, especially in the industrialised world, is that it has no inherent value, in the way in which a human in the cosmopolitan's schema, for example, does. Two versions of this position have prevailed, namely 'strong anthropocentrism' and 'weak' or 'enlightened anthropocentrism.' The stronger variant robustly privileges humanity over the environment and, therefore, places the political organisation of man into sovereign communities as being more important than any other factor and is demonstrated in the view that man 'will be the Lord of Nature,' espoused by Leibniz.¹⁰ This view developed during the period of scientific discoveries but has been tempered by the Enlightenment and theology into the weaker version which has emphasised man's role as steward of the planet. This mode of thinking, favoured by the majority of the empiricists, most notably John Locke, has been the most important since the Industrial Revolution, in particular. However, it is not only the liberal rights theorists and capitalists who have referred to the environment solely in terms of resource and habitat, as possessing instrumental value only. Marx, for example, stated that 'the purely natural material in which no human labour is objectivised has no value.'¹¹ Thus, financial considerations have been of paramount importance when considering the environment, reflecting the sovereign state's fixation on narrow conceptions of the good which are based on military and economic power especially.

Purely financial considerations about environmental action can clearly be viewed in the progress of the ozone regime which initially divided the industrialised world into two blocs. The first of these, the Precautionary Group, including the United States, Canada, Sweden and Norway, all banned non-essential CFC usage and lobbied for a global ban, although it must be noted that during the Reagan Administration the US did rejoin the sceptic's camp.¹² The second, more conservative group consisted of the EC and Japan with France and the United Kingdom, in particular, demanding more

¹⁰ Leibniz quoted in Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford, Clarendon Press, 1997), p. 13

¹¹ Karl Marx quoted in Gillespie, *International Environmental Law, Policy and Ethics*, p. 11

¹² Owen Greene, 'Environmental Issues', p. 402

scientific proof.¹³ Importantly, once the decision to curb CFC usage was implemented, those states adhering to the newly set limitations actually did better economically. For example, in 1983 alone in the United States the reduction in CFC usage and the turn towards hydrocarbons saved over \$165million, a trend which continued throughout the ozone regime, easing the passage of the Montreal Protocol.

What this indicates is that sovereign states are willing to embark on environmental change only if the cost benefit analysis demonstrates that it is cost effective. Thus, it appears that claims that environmentally-speaking, the Westphalian world is reaching a new level of environmental morality which respects the globe merely because of its being rather than its economic value are misguided, especially when considering that the Montreal Protocol had written into it an escape clause for states where costs were deemed to be too high. Furthermore, *Greenpeace's* stance on the issue reveals a leaning towards acknowledgment of the North/South divide rather than a focus upon the planet when it posed the question, 'Why should they [the developing countries] forego these useful chemicals when the industrialised world has used them for 40 years and was totally responsible for the problem – for making 96% of the main CFCs?'¹⁴ Not only is the economic value of the environment raised but so too are questions of justice and development, explored in greater detail in Section Two. The justice here is temporal, since it is declared that to deny a person the right to utilise something which has been beneficial in the past even though it is now shown to be damaging is argued to be an injustice. This position also echoes the strong anthropocentrism defined above.

The view that the environment is a matter of economics is reinforced further by negotiations in Rio in 1992. For example, those countries who were dependent on either exporting or importing oil were, understandably, unwilling to sacrifice their prosperity for the well being of mankind and nature, morally desirable as it may be. The global South's view of the conference was expressed by one delegate who bluntly stated that, '[w]e from the south do not view this as an environment conference. We

¹³ The impetus for definitive scientific proof before any action which may incur costs is discussed in Section Three

¹⁴ *Greenpeace* (1987) quoted in Caroline Thomas, *The Environment in International Relations* (London, Royal Institute of International Affairs, 1992)

view it as an economic conference,¹⁵ which indicates the discrepancy in North/South relations. It may therefore be seen that, even at this early stage in the climate change regime, sovereign states were fundamentally unwilling to adopt measures that would impact negatively upon or impede economic development, even though short-term cutbacks may, in the long term, actually be beneficial.

Game theoretic notions play an important role in environmental issues. Issues of justice in relation to the International Criminal Court are likely to produce a win-win situation since nobody, save despots and dictators, are likely to lose out. It is a tangible global good and it is for this reason that the majority of states were willing to sign in Rome. This is not so with environmental politics, and the climate change regime especially, where there is perceived to be no win-win situation. The scientific method of determining levels of pollution and resources was also viewed as an extension of moral imperialism on the part of the North as is demonstrated by Agarwal and Narain's accusation that the World Resources Institute's report of 1991 was based

'less on science than on politically motivated and mathematical jugglery. Its main intention seems to be to blame developing countries for global warming and perpetuate the current global inequality in the use of the earth's environment and its resources.'¹⁶

Fears of 'ecocolonialism' are rife, in which 'technology cooperation', the term favoured by the United States over 'transfer', would be utilised by transnational corporations in order to gain an even greater foothold in the South, thereby perpetuating the core-periphery relationship as identified by dependency theorists.

The utilitarian's mantra of the 'greatest happiness for the greatest number' has had an immense impact upon attitudes towards perceived interests and this practical reasoning has informed much of the policymaking over the last two hundred years. This mode of thinking contrasts with the rights-based approach which underpins much cosmopolitan discourse, including the successful discussions over the

¹⁵ As noted in Paterson, *Global Warming and Global Politics*, p. 83

¹⁶ Agarwal and Narain quoted in Paterson, *Global Warming and Global Politics*, p. 89

International Criminal Court. It is for this reason that this chapter attempts to draw rights into the discussion of environmental matters.

There also exists a view that nature retains moral value merely as a result of its being, as evinced by the notion of 'respect for life' proposed by Albert Schweitzer.¹⁷ This is problematic since it does not, and arguably cannot, draw a definite line of where moral worth is to be awarded and where it is not. The sliding scale for the environment is therefore contentious and it has remained only on the margins of political life, rarely impacting on discussions over the worth of sovereignty.

Sustainability

Utilitarianism, strong and weak anthropocentrism when considered temporally as well as spatially all rely on sustainability since they aim to perpetuate the species. Unhindered economic activity has produced a myriad of problems as well as positives and only in recent decades has the notion that industrial activity cannot continue indefinitely come to the public fore. The Club of Rome's report, *The Limits to Growth* (1972), for example, asserted that, at then current levels, many important resources would be used up within the following one hundred years, meaning that governments would be forced to regulate their own citizens in order to maintain a level of approximate homeostasis. By framing problems in such a way as to appeal to realist notions, environmental problems have become pressing issues amongst the world's statespeople. 'Environmental security', a contentious term, has thus emerged as an important category amongst the policymakers. Equally, any problem the outcome of which is not deemed necessary for security reasons is likely to remain unresolved, as may be seen with the climate change regime. Despite an abundance of evidence to the contrary, there still remains lingering doubt over the potential damage that can occur even if carbon dioxide levels, in particular, were to rise.¹⁸

The idea of sustainable development (Agenda 21) was discussed in Rio, at which it was asserted that economic activity ought to be regulated in order to service the needs

¹⁷ Schweitzer's position noted in James Connelly and Graham Smith, *Politics and the Environment: From Theory to Practice* (2nd Ed.) (London, Routledge, 2003)

¹⁸ See Section Three of this chapter

of both generations to come as well as the present one. The Commission for Sustainable Development (CSD) and the Global Environment Facility (GEF) were established to complement the efforts of the previously existing branches of the UN. The CSD, made up of fifty-three states on rotation kept a balance of members favourable to the developing world from 1994 and has the power to review national policy of individual states and offer advice, if necessary. The CSD as a body which promotes dialogue between states and NGOs could, in future years, be at the heart of a reporting system which is able to impose environmental standards and advocate sweeping economic changes, although it is notable that there is some fear surrounding a supranational body with any power to formally limit economic activity.¹⁹ The Rio conference also spawned a series of follow-up conferences such as Cairo on population (1994) and Copenhagen on social development (1995), indicating that environmental problems, conceivable as security issues, are multiplying beyond traditional military concerns but, as yet, a normative shift in this field has yet to occur.

Geographical, Sovereign States and the Environment

The second part of this section endeavours to explicate the environment's relationship with other entities within the international arena, and especially sovereignty as understood, in Hinsley's definition, as the ultimate authority within a state.²⁰ Hence, this section aims to explore the challenge facing sovereignty in maintaining the environment, providing a sustainable future for humanity and the planet.

The sovereign state is necessarily defined geographically, since cartographers can demonstrate where one state ends and another begins. The notion that spheres of legitimate authority and action drive the manner in which the world operates is key and it is for this reason that the Westphalian system and, more precisely, Euro-American geopolitics has been dubbed 'mastery of the physical world.'²¹ However, it has been argued that the sovereign state as the protector of its citizens' environmental

¹⁹ Marvin S. Soroos, 'Global Institutions and the Environment: An Evolutionary Perspective', in Norman J. Vig and Regina S. Axelrod, *The Global Environment: Institutions, Law and Policy* (London, Earthscan, 1999), pp. 27-57

²⁰ F.H. Hinsley, *Sovereignty*, p. 25-6

²¹ Ronnie D. Lipschutz, 'The Nature of Sovereignty and the Sovereignty of Nature: Problematizing the Boundaries between Self, Society, State and System', in Karen T. Litfin (Ed.), *The Greening of Sovereignty in World Politics* (Massachusetts, MIT Press, 1998), pp.109-138, p. 115

well-being in the Hobbesian mould, is entirely mythic, since globalisation has identified the way in which the state's individual moral importance is contestable, with each unit merely constituting a small section of the global ecosystem which cannot be isolated in any meaningful way.²² Hence, states have to demonstrate that sovereignty, through cooperation, is able to confront problems which are, by their very nature, transnational, rather than international. Conventional politics' inability to grapple with the politico-ecological dichotomy was neatly summed up in the Brundtland Commission which commented that 'the Earth is one but the world is not,' and that 'a world in which human activities and their effects were neatly compartmentalised' within states was quickly disappearing.²³ Moreover, this failure to cope with the path-crossing nature of these problems has, it is claimed, led to a crisis of confidence amongst the planet's populations, a trend which also partially explains why NGOs and the media have such transboundary power.²⁴

The groundbreaking UN Conference on the Human Environment held in Stockholm in 1971 produced Principle 21 reiterated in Principle 2 of the Rio Summit's Declaration, now considered a constituent of international soft law²⁵. Principle 21 declares 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, and the responsibility to ensure that activities within their jurisdiction of control do not cause damage to the environment of other States or other areas beyond the limits of jurisdiction.²⁶

²² Daniel Deudney, 'Global Village Sovereignty: Intergenerational Sovereign Publics, Federal-Republican Earth Constitutions and Planetary Identities', in Karen T. Litfin (Ed.), *The Greening of Sovereignty in World Politics* (Massachusetts, The MIT Press, 1998), pp. 299-325

²³ The Brundtland Commission's report quoted in Lipschutz, 'The Nature of Sovereignty and the Sovereignty of Nature', p. 130

²⁴ Gwen Prins and Elizabeth Sellwood, 'Global Security Problems and the Challenge to Democratic Process', in Daniele Archibugi, David Held and Martin Köhler, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge, Polity Press, 1998), p. 252-72, p. 254

²⁵ Phillippe Sands, 'Environmental Protection in the Twenty-first Century: Sustainable Development and International Law', in Norman J. Vig and Regina S. Axelrod (Eds.), *The Global Environment: Institutions, Law and Policy* (London, Earthscan, 1999), pp.116-137, p. 127

²⁶ Principle 21 of the Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration') (16 June 1972)

[<http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>]

Although this declaration enforces sovereign responsibility for industrial activity in order to produce a global good,²⁷ it nevertheless reinforces the sovereign entity's place within international relations as being, in some ways, prior to the environment. Indeed, in the above extract, the state can be viewed as possessing its very own environment. Although not particularly troubling with regard to issues such as lakes used for fishing and forests, for example, the attempt to package the sky above a state seems rather puzzling. Hence, whilst the framing of the environmental debate focuses on the environment as a package of resources with precise limits, the ability of a global political system predicated on Westphalian sovereignty to resolve issues such as the greenhouse problem remains limited.

It has been argued that the momentum of the agreements reached at Stockholm, Rio and Montreal signal a fundamental alteration in international relations evincing a world of unprecedented global interdependence.²⁸ In terms of sovereignty's normative worth, it may be contended that there is an emerging understanding of the limitation of sovereignty's capability to deal with problems which are, by their very essence, global. This, in turn, may lead to a more inclusive form of sovereignty sensitive to cosmopolitanism²⁹ or perhaps 'terrapolitanism', a view which accounts for the well-being of the planet as a moral actor.³⁰ Negotiated efforts at Rio and Kyoto reflect this nascent understanding whilst simultaneously highlighting reasons for environmental inactivity and also those parts of the globe which cling to the traditional Westphalian system. The uneasy balance between the recognition of problems and states asserting their sovereign rights remains unresolved.

The problem, therefore, facing those who aim to tackle global ecological problems is developing a coherent vision of 'green sovereignty' which is able to manage the pitfalls and schisms of traditional international relations, acknowledging the limits of transnational action and also the primacy of the state, which is unlikely to be eroded or circumvented in any meaningful fashion. The 'green' approach, thus far, has been

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²⁷ This notion, summarised by the maxim 'one must not use his own so as not to injure others' is explored in greater detail below in the section on environmental justice

²⁸ Molitor, 'The United Nations Climate Change Agreements', p. 210

²⁹ In line with the Rawlsian method for obtaining justice outlined in Section Two

³⁰ Daniel Deudney, 'Global Village Sovereignty', p. 314

largely unsuccessful, tending to be deconstructive rather than constructive, offering a compelling criticism of state activity without proposing a reasonable alternative. Deudney argues that this occurs because of the tendency to view sovereignty alongside autonomy and supremacy rather than ‘the more protean concept more useful for capturing the generative logic of legitimate authority, autonomy and identity in political order more generally.’³¹ What may, therefore, be seen is the value of a more sensitive variant of sovereignty which is able to broach the Schmittian self/other divide, acknowledging the welfare of other states’ citizens as being morally important, a theme embellished in the second section on environmental justice. The reconfiguration of political space is, it is argued, necessary in order to be able to cope with the most pressing ecological questions, moving away from Westphalian and indeed, cosmopolitan notions, to terrapolitanism. However, the scope of this chapter does not permit a detailed investigation of any dramatic alteration of the international system, focusing instead on potentially dramatic normative alterations of sovereignty rather than its abandonment.

Section Two: Justice and the Environment

Environmental justice and the right to a clean and hospitable environment has become a key issue in recent years. As discussed below, emerging from the human rights culture following the Second World War,³² there grew the sentiment that access to certain material benefits, as well as negative liberties or ‘freedoms from’ were essential and that the international system ought to act in such a way as to guarantee these. Thus, this section aims to clarify what can be understood in terms of environmental justice beginning with an examination of conventional Enlightenment views of progress and the questioning thereof, followed by an examination of John Rawls’ notion of cosmopolitan justice as it may be applied to the individual with regard to the environment. This then leads into the notion of ‘spatio-temporal justice,’ an important notion and one which appears to exist in the realm of environmental politics rather than human rights, for example. This section aims to demonstrate that the contemporary world does and ought to provide moral consideration on the basis of previous actions as well as protecting those who will

³¹ Daniel Deudney, ‘Global Village Sovereignty’, p. 302-3

³² See Buergenthal’s schema as examined in the previous chapter

exist as part of future generations. This discussion is bound up in the issue of developing states' responsibilities and duties under the climate change regime, indicating that there exists a division between traditional Kantian cosmopolitanism and a more subtle variant which rests very much on the historical situatedness of the individual. The connection between cosmopolitanism and the developing state occurs by dint of the fact that developing states are the political communities through which individuals can enjoy greater levels of justice.

The Cosmopolitan Right to a Hospitable Environment

Conventional Enlightenment views of the progress of mankind have slowed, and, in some cases, reversed, especially in recent years. It can no longer be assumed that all our activities, economic or otherwise, are advancing the species or our communities. This sentiment can be viewed in the work of the Frankfurt School who adopted the view that elements of Kantian progress have been co-opted in such a way that the 'how' has triumphed with the 'why' becoming almost redundant,³³ but it appears that this trend is, to an extent, inverted as sovereign states learn to realise that they possess responsibilities as well as rights and capabilities. Indeed, the onus has shifted in order that industrial actors are forced to demonstrate that their projects are not endangering the environment, just as they are forced to view more carefully the human cost of progress, as in the case of Quebec's indigenous peoples, discussed in Chapter Four. Beyond the narrow confines of each sovereign state however, there is a burgeoning sense that industrial actors must prove that industrial activities do not unfairly disadvantage those not necessarily geographically adjacent.

The human rights regime has had a massive impact upon the way in which the environment is viewed. The human rights measures of the second wave of UN action, as exemplified by the International Covenant on Civil and Political Rights, for example, argued that the 'liberal' rights to speech, assembly and so forth were, in fact, moot points were people unable to eat and drink owing to the material conditions of their existence. Thus, there grew a sense of a new right to a habitable environment based upon the argument that, '[i]n order to live and secure the survival of his species,

³³ See for example, Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (London, Verso, 1997)

man needs to use and consume material things. This requirement of his nature, this claim of a right to live, precedes and survives any form of State organisation.³⁴ Material rights rather than liberties are less embedded in the industrialised nations which constitute the Annex I Parties to the Kyoto Protocol and so it is, perhaps, unsurprising that meaningful action with regard to climate change has been limited. Furthermore, it is even less startling that the state which guards its Bill of Rights so jealously, the United States, has been so vehemently unwilling, at least in international agreement, to limit its economic activities.

The right of each individual to be able to live and flourish in an unpolluted world can be reached by applying John Rawls' test.³⁵ Rawls suggests a thought experiment in which we, removed from our cultural and intellectual context and preferences, are asked to consider the rights we would wish to choose. Rawls contends that we would, invariably, adopt a position which involves equal rights to basic liberties, with economic and social inequalities being so arranged as to benefit the poorest members of society, thereby introducing both inalienable political and socio-economic rights. The imposition of the 'veil of ignorance' 'nullifies the contingencies and biases of historical fate,'³⁶ which certainly includes geographical considerations. Under this cosmopolitan schema the fears and interests of those living in, for example, low-lying states such as Bangladesh and AOSIS states with regard to the threat of global warming and sea level rises, must be considered. Environmental justice and the right to a hospitable habitat were key issues discussed at Rio and Kyoto.

Spatio-temporal Justice

There exists within environmental politics a burgeoning sense of spatio-temporal justice. The ICC, for example, affirmed that no cases would be considered where the incident occurred before its establishment in order to avoid an infinite regress of claims which may damage international order and peace. This is not so with environmental justice, where the net results and degradation are cumulative, as a result of centuries of industrial activity. For example, were Rawls' thought applied

³⁴ B.A. Wortley quoted in W. Paul Gormley, *Human Rights and Environment: The Need for International Co-operation*, (Leyden, Netherlands, A.W. Sijthoff, 1976), p. 38

³⁵ John Rawls, *A Theory of Justice* (Oxford, OUP, 1999)

³⁶ John Rawls quoted in Beitz, *Political Theory and International Relations*, p. 134

temporally, questions of intergenerational justice would have to be considered. Although Rawls does not expressly focus upon environmental matters it can be inferred from his original premise that an inhabitable world is crucial, something which can only be secured by previous generations 'stewarding' the planet in a sustainable manner. Furthermore, it may also be possible to extend Charles Beitz's 'circle of concern' in such a way that it encompasses future generations.³⁷ It may therefore be argued that one of the key normative challenges facing sovereignty is its ability to secure a spatio-temporal environmental justice that bridges the self/other dichotomy. This has been dismantled, to an extent, by the human rights activities surrounding the ICC, for example, and must now be applied in such a way as to include the future. The sovereign responsibility for the future of the planet can clearly be viewed in the response of one of the delegates at the Bonn negotiations, who, following a breakthrough exclaimed, '[w]e have rescued the Kyoto Protocol. We can go home, look our children in the eye and feel proud of what we have done.'³⁸

The state, replete with sovereign legitimacy, remains a powerful obstacle in forging solutions to environmental dilemmas. Legal sovereignty, a key component of external sovereignty, confers on states the right to make decisions which affect a geographical portion of the globe, its population, flora and fauna, and is reinforced by international law, including, ironically, environmental agreements and treaties, even those which recognise the states' inability to generate solutions by themselves. In legal terms, every agreement simply reinforces and reproduces the constitutive principles of sovereignty.³⁹ Indeed, Article 2 of the 1974 Charter of Economic Rights and Duties of States asserts the right of states to exercise permanent sovereignty over its natural resources and economic activities.⁴⁰ Arrangements such as these, it may be argued, make cross-border control of activities, or global governance, exceedingly difficult, rendering effective global environmental justice using the Rawlsian method outlined above, verging on the impossible. Hence, states like Brazil assert, quite legitimately, their right to deforestation for economic gain in spite of criticism, albeit mainly from the North. Furthermore, this points to a further tension in the political

³⁷ Beitz, *Political Theory and International Relations*

³⁸ Margot Wallstrom quoted in Mark Lynas, 'To make matters worse...' *The Guardian* (2 August 2001) [<http://www.guardian.co.uk/GWeekly/Story/0,,530722,00.html>] 4 May 2004

³⁹ Karen Litfin, 'Introduction' in Karen Litfin (Ed.), *The Greening of Sovereignty in World Politics* (Massachusetts, MIT Press, 1998), pp. 1-27, p. 6

⁴⁰ Caroline Thomas, *The Environment in International Relations*, p. 12

system quite unlike any other issue since it may be seen that the industrialised states of the North wish to curb the industrial development of the global South, even though they themselves are responsible for the majority of the problems encountered today.⁴¹

Although environmental problems have only meaningfully entered public consciousness in recent decades, legal responsibilities became contentious in the nineteenth century. The acceptance of responsibility for damage was not initially forthcoming though, as with the Harmon Doctrine (1895), which dismissed Mexican claims that US use of the Rio Grande was having negative consequences on Mexican stretches. This dismissal of transnational culpability for ecological damage was altered irrevocably by the maxim *sic utere tuo ut alienum no laedas*, or that 'one must use his own so as not to injure others.'⁴² Such decisions led to the emergence of regulatory regimes which, fundamentally, are international agreements that set the terms of specific types of state action, practice and also goals. Prime examples include the Montreal Protocol and regimes regulating the usage of rivers in Europe, which benefited all by limiting state action.

Environmental Justice and Developing States

Different elements of justice are therefore clearly visible and these problematic interconnections were revealed in stark detail during the framing of the Kyoto Protocol. The final text of the Protocol designates that only Annex I countries, the developed states, have to reduce emissions and it remains unlikely that states such as China, India, Indonesia, Brazil and Nigeria will be given definite targets to meet at any point in the next few decades even though China, for example, could easily reduce its dependence upon coal. It has also been suggested that, over the course of the next fifty years, emissions produced by the developing world will actually exceed the industrialised.⁴³ Questions of fairness may therefore be raised over the actual path of development taken by the industrialising states regarding their culpability for any environmental degradation from hereon in. As a counterbalance, it may be argued

⁴¹ Note *Greenpeace*'s attitude with respect to CFC emissions.

⁴² Paul Wapner, 'Reorienting State Sovereignty: Rights and Responsibilities in the Environmental Age in Karen Litfin (Ed.), *The Greening of Sovereignty in World Politics* (Massachusetts, MIT Press, 1998), pp. 275-297, p. 278

⁴³ See, for example, Kahn 'The Fate of the Kyoto Protocol under the Bush Administration'

that these states retain the right to the same development which the North has been fortunate enough to experience. Although the developing states' exemptions tally with the 'common but differentiated' approach espoused by the Rio Declaration which was ratified by the US Senate, this issue, in particular, remains unpopular.⁴⁴ US ratification of Rio may, in part, be due to the fact that the UNFCCC is a convention which means that its force in international law is a long way short of a treaty and secondly, that no precise targets or mechanisms were settled.

President George W. Bush's Administration rejected the Kyoto Protocol as unreasonable owing to the lack of developing state commitments, and also because of their preference for market-based voluntarism over internationally set targets which would have necessitated a thirty percent reduction in emissions. Bush's 'Letter to Members of the Senate on the Kyoto Protocol on Climate Change' explains that Kyoto is unfair because it

exempts 80 percent of the world, including major population centers (sic) such as India and China, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.⁴⁵

In a strange irony, Bush's rejection draws upon notions of universal duty amongst all the states even though states such as India and China are not responsible for the problems of climate change. It is wrong to believe that the US rejection is based entirely on its executive's narrow understanding of power, since rejection at the hands of the Senate was all but certain. The Byrd-Hagel Resolution, which was passed 95-0, asserted that the Senate would not ratify any treaty that,

(A) Mandate(s) new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or any other agreement also mandates new specific schedules commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance

⁴⁴ As noted in *The Economist*, 'Oh No, Kyoto' (5 April 2001) [www.economist.com] 10 May 2004

⁴⁵ Bush's letter quoted in Kahn, 'The Fate of the Kyoto Protocol under the Bush Administration', p. 551

period, or (B) would result in serious harm to the economy of the United States.⁴⁶

This indicates that the notion of spatio-temporal justice, examined above, may be coherent as an intellectual concept but that in policymaking circles where understandings of power are more restrictive, it is currently untenable as a tool, especially where short-termism and re-election are of paramount importance. However, environmental issues occupy an exceptional position in international relations in that they are able to privilege developing states over the developed world. Whereas military, political and economic power remain the preserve of the developed world, the developing world's future can impact massively on the developed's. In this way, it may be argued that the developing world possesses leverage in terms of environmental bargaining, and, indeed, that it is able to claim victories off the first world.⁴⁷

Section Three: Sovereignty, Non-Governmental Organisations and Relationships of Power and Control

The sovereign state's ability to address environmental problems is questionable. Issues of practicality and inclination plague attempts to construct meaningful regimes. NGOs have come to the fore with regard to environmental politics and this section analyses the growth of these bodies and the conditions necessary to provide a genuine breakthrough in the alleviation and prevention of environmental disasters. The example of the Montreal Protocol, which dealt with the diminution of the ozone layer, which prevents harmful rays from reaching the ground, is cited throughout this section. The success of Montreal and 'the ozone regime' is in stark contrast to the Kyoto Protocol and the climate change regime and throughout this section the differences and similarities between the two are noted.

⁴⁶ US Senate's Byrd-Hagel Resolution, quoted in Kahn, 'The Fate of the Kyoto Protocol Under the Bush Administration', p. 550

⁴⁷ Marian A. L. Miller, 'Sovereignty Reconfigured: Environmental Regimes and Third World States' in Karen Litfin (Ed.), *The Greening of Sovereignty in World Politics* (Massachusetts, MIT Press, 1998), pp.173-192, p. 188

Non-Governmental Organisations, Intergovernmental Organisations and Epistemic Communities

In judging the normative challenge and improvement in sovereignty with regard to environmental problems, it is vital to note the role of non-governmental organisations and Pogge's 'epistemic communities.' Both occupy a crucial role not only in bringing issues to the attention of policymakers and populations alike, but also in legitimating state action within the international arena. The roles occupied by environmental NGOs is somewhat different from the role that CICC played in discussions, for example, over the International Criminal Court. Those attending the Rome Conference were able to prick the moral conscience of the state delegates and also provide legal arguments as to why action was both necessary and morally good. Under the environmental regime, NGOs provide information about likely costs and effects of environmental degradations, stressing moral imperatives as a secondary factor. In addition, many NGOs also fulfil verification functions, such as the position held by the World Wildlife Fund who are charged by the International Union for the Conservation of Nature with the task of monitoring animal trafficking.⁴⁸

Transnationally-organised networks of knowledge-based communities, hereon referred to as epistemic communities, developed throughout the twentieth century, blossoming in the 1960s. The epistemic community involves shared consummatory values and principled values, shared causal beliefs or professional judgement, common notions of validity based on intersubjective criteria for validating knowledge and, lastly, a common policy project. UNEP and the Environment Liaison Centre (ELC) have helped to emphasise the political effects of scientific discoveries and research and have produced a scientifically legitimated debate over the morality of unrestrained state sovereignty. Caroline Thomas argues that,

NGOs have shown themselves to be willing and able to act as guardians of the international environment. In that context the time has come to expand the

⁴⁸ Wapner, 'Reorienting State Sovereignty', p. 286

role of NGOs under general international law by giving their guardianship role formal legal expression.⁴⁹

Although heavily overstated with regard to environmental dilemmas, nevertheless the recognition of the necessity for NGOs is tantamount to admitting that sovereign states, if left to their own devices, are unable to act for the good of humanity and the planet. By virtue of the fact that these communities and the problems they address are transnational, the debate surrounding environmental policy has widened the circle of moral concern both spatially and temporally, in that the rights of both neighbours and future generations are involved. The role of the NGO in environmental regimes was formalised in the Montreal Protocol Article 11(5) which stated that

Any body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer ... may be admitted unless at least one third of the Parties present object. The admission and participation of the observers shall be subject to the rules of procedure adopted by the Parties.⁵⁰

The UN's 1992 Framework Convention on Climate Change contains similar wording and it may therefore be asserted that the view that NGOs have an oppositional stance to states is mistaken and that, rather than undermining them, the new innovations allow 'the expansion, not the retreat of the states in addressing global environmental problems.'⁵¹ In addition to helping frame treaty or 'hard law', non-governmental organisations can also provide 'soft law' which guides and alters state activity, an example being the 1989 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade.⁵²

The epistemic community needs to agree on causes, measures and outcomes before a state is willing to erode or curb its sovereignty for a global good. Despite an

⁴⁹ Phillipe Sands quoted in Caroline Thomas, *The Environment in International Relations*, p. 29

⁵⁰ Montreal Protocol Article 11(5) cited in Kal Raustiala, 'States, NGOs, and International Environmental Institutions', *International Studies Quarterly*, Vol. 41 (1997), pp. 719-40, p. 723

⁵¹ Raustiala, 'States, NGOs, and International Environmental Institutions', p. 721

⁵² Edith Brown Weiss, 'The Emerging Structure of International Environmental Law', in Norman J. Vig and Regina S. Axelrod S. (Eds.), *The Global Environment: Institutions, Law and Policy* (London, Earthscan, 1999), pp.98-115, p. 105

abundance of evidence to the contrary, there remains lingering doubt over the extent of and the potential damage that can occur as a result of greenhouse gas emissions. As no such agreement has yet been reached, many states are unwilling to act in order to curb greenhouse gas emissions. Current scientific evidence suggests that the highest ceiling for carbon dioxide beyond which damage is unacceptable is between 600 and 1200 parts per million, the current level being around 370.⁵³ Moreover, the IPCC⁵⁴ has not yet proposed that which constitutes an unsupportable level of greenhouse gases, and nor has 'any other representative body yet dared to hazard an estimate.'⁵⁵ Furthermore, a 1997 article in *Science* asserted that 'most modelers (sic) now agree that the climate models will not be able to link greenhouse warming unambiguously to human actions for a decade or more,'⁵⁶ and, thus, it would appear that, at least on the part of a United States hostile to precautionary action, no internationally binding agreements will be enacted. The US legalese is pervasive as demonstrated by the fact that, owing to terms contained within the US' Clean Air Act, George W. Bush does not consider carbon dioxide a pollutant and, therefore, will not impose mandatory restrictions upon power plants in general,⁵⁷ once again asserting the pre-eminence of domestic legal arrangements over the international. Thus, it may be argued that action to remedy climate change is unlikely since the scale of the problem has yet to reach the level of a security threat, indicating that realist sentiments remain strong.

International Environmental Regimes

Much is made of the international system being characterised by unmitigated anarchy, a realist assumption which informs policymaking as well as intellectual debates. In recent decades the dominant thesis on anarchy is that of Kenneth Waltz, whose structuralist approach renders environmental action unlikely. Essentially, Waltz contends that because a self-help rationale operates within the international system, the only cooperation that can occur is likely to remain short-term and at the behest of

⁵³ Thomas Schelling, 'What Makes Greenhouse Sense: Time to Rethink the Kyoto Protocol', *Foreign Affairs*, Vol. 81 (2002), p. 2-9, p. 3

⁵⁴ See Section Three for greater detail on the IPCC's role within the climate change regime

⁵⁵ Schelling, 'What Makes Greenhouse Sense: Time to Rethink the Kyoto Protocol', p. 4

⁵⁶ Quoted in Jim Sheehan, 'The Case Against Kyoto', *SALS Review*, Vol. 18.2 (1998) 121-133, p. 122

⁵⁷ Bush letter quoted in Kahn, 'The Fate of the Kyoto Protocol under the Bush Administration', p. 551

dominant states.⁵⁸ Cooperation, according to the neorealist, is possible in two circumstances; where hegemonic stability theory operates or where game-theoretic analyses incontestably demonstrate the production of collective goods. A dominant state is needed to front a campaign on a certain issue and then maintain its momentum in spite of power-maximising individual actors who may regard their short-term needs and demands of being of paramount importance.

The liberal institutionalist counterpoint to the largely pessimistic understandings of whether cooperation is possible argues that, in fact, it is more possible when the hegemon is in decline⁵⁹ and that, moreover, 'existing regimes or institutional arrangements often prove highly resistant even to assaults spearheaded by one or more of the great powers.'⁶⁰ This indicates that state power in its rawest form is unable to dominate in a community of strongly shared mutual interests. To mitigate anarchy, states construct regimes or 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectation converge in a given area of international relations.'⁶¹

It is perhaps possible to view the emergence of nascent international regimes in environmental matters through the work of bodies such as the WMO, UNEP, and, the IPCC, although the failure of the climate change regime bears witness to the remaining power of the sovereign state with its interests. The following section analyses the successes that the climate change regime has achieved and also its limitations, especially with regard to economic matters and institutional arrangements which are able to bind states, forcing them to act. Rio's package of commitments was contained within Article 4 of the UNFCCC and its pledges provide limited evidence of a slight normative shift. For example, Parties to the convention promised to 'develop, periodically update, publish and make available to the Conference of the Parties, national inventories of greenhouse gas emission sources and sinks' and 'formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change ... and

⁵⁸ Kenneth N. Waltz, *Theory of International Politics* (New York, McGraw-Hill, 1979)

⁵⁹ Keohane, noted in Mathew Paterson, *Global Warming and Global Politics*, p. 98

⁶⁰ Oran Young quoted in Paterson, *Global Warming and Global Politics*, p. 117

⁶¹ Krasner quoted in Paterson, *Global Warming and Global Politics*, p. 117

measures to facilitate adequate adaptation to climate change,⁶² thereby indicating a level of accountability on the part of nations to the global whole. Moreover, states pledged to 'promote and cooperate in the development, applications and diffusion, including transfer, of technologies, practices and processes,'⁶³ and it is this economic element that is perhaps both the most surprising and also potentially the most revolutionary.

A fundamental challenge facing sovereignty is its willingness to relinquish control within a given territory even though a world of global interdependence is generally accepted. Thus, the prospect of constructing an effectual climate change regime was hampered by the fact that it was not until 2001 in New Delhi that a mechanism in any way capable of acting against those in non-compliance was devised.⁶⁴ It was decided that inventories must be produced under the guise of the 'National Inventory Review', which would bear the hallmarks of transparency, consistency, comparability, completeness and accuracy, but it appears that this remedy arrived too late to prop up a failing regime.⁶⁵

The unwillingness of states to bind themselves under international law in order to tackle a normative challenge can clearly be viewed in the promotion of voluntarism. Whereas a cosmopolitan is likely to promote a regime of global governance, fears remain that new layers of global bureaucracy will have ramifications for every sovereign state in terms of its ability to determine its own future or to restrain bureaucrats who operate supra-nationally.⁶⁶ What may be discernible here is the notion of political and, therefore, moral communities emerging from the concord between ruler and ruled, which logically results in the conclusion that decisions taken outside this community, whether morally worthy or not, being invalid. This potential criticism of the climate change regime echoes the fears of those who feared that the ICC contained a democratic deficit (see previous chapter). The anxiety that 'UN-inspired international laws, such as the climate treaty, are undermining national

⁶² Article 4 of the UNFCCC

⁶³ Article 4 of the UNFCCC

⁶⁴ Joyeeta Gupta, Xander Olsthoorn, and Edan Rotenberg, 'The role of scientific uncertainty in compliance with the Kyoto Protocol to the Climate Change Convention', *Environmental Science and Policy*, Vol. 6 (2003), pp. 475-486, p. 476

⁶⁵ Gupta, Olsthoorn, Rotenberg, 'The role of scientific uncertainty...', p. 477

⁶⁶ Sheehan, 'The Case Against Kyoto', p. 128-9

sovereignty by handing power to interest groups and international bureaucrats,⁶⁷ demarcates the internationalist from the cosmopolitan and the tension between a view such as this and the celebration of the UN in works of theorists such as Paul Taylor is tangible.⁶⁸

However, this is not to say that voluntarism is entirely ineffective or, from a cosmopolitan perspective, morally regrettable. Action taken at lower levels, from within smaller communities, has generally been more effective than at the national level. Indeed, European attempts to maintain momentum for Kyoto have been scoffed at, considering that it is unlikely to meet the targets that it argued for itself.⁶⁹ Furthermore, for all the furore over Kyoto, the United States remains one of the most powerful advocates of environmental reform both nationally and globally. The United States is not environmentally the 'Great Satan against which the rest of the world should unite,'⁷⁰ home as it is to, amongst others, the Sierra Club, Earth First, and the Environmental Defence Fund. Such groups have persuaded twenty-nine state legislatures to introduce Kyoto Protocol-conforming measures on carbon dioxide. It has been suggested that what has been perceived as intransigence on the part of the United States was in fact a calculated attempt on the part of EU states to take the moral high ground,⁷¹ exacerbating the transatlantic rift, dressing power politics in the language of morality.⁷² Interestingly, despite the outrage in the United Kingdom, as evinced by condemnation of Bush's environmental policy by 83% of those questioned, in a recent poll 57% of Britons believe that Kyoto should not be enacted if it damages the UK economically.⁷³

⁶⁷ Roger Bate, 'Greens versus sovereignty' *Economic Affairs* 19(1) [<http://www.blackwell-synergy.com/links/doi/10.1111/1468-0270.00146/abs/>] 12 May 2004, p. 53

⁶⁸ see Taylor, 'The United Nations in the 1990s'

⁶⁹ *The Economist*, 'Oh No Kyoto'

⁷⁰ Will Hutton, 'The greening of America', *The Observer* (7 December, 2003)

[<http://observer.guardian.co.uk/comment/story/0,6903,1101564,00.html>] 10 May 2004

⁷¹ As argued in Kahn, 'The Fate of the Kyoto Protocol under the Bush Administration', p. 555

⁷² Daadler's work on the potential 'divorce' of the United States and Europe seems to echo this notion, as does the work of Robert Kagan, who fervently favours an American unilateral approach to international relations

⁷³ Kendra Okonski of the International Policy Network, *The Guardian* letters page, *The Guardian* (24 February 2004) [<http://www.guardian.co.uk/letters/story/0,3604,1152846,00.html>] 10 May 2004

International Environmental Regimes and Economic Policy

The following part assesses the impact that economics has upon sovereignty's normative worth, especially with regard to the Kyoto Protocol, arguing that where economic hardship is likely collective action is improbable, even where it is for a cosmopolitan good. Economic policy remains firmly entrenched in competitive practices, as noted in Section One which indicated how the environment is regarded, and so it is encouraging, from a normative perspective that Kyoto-ratifying states are, in word at least, prepared to commit themselves to act in a manner which seemingly ignores the boundaries of political community. What the new wave of economic cooperation indicates is that states recognise the limitations of their ability to deal with environmental issues, and are willing to act in such a way as to benefit humanity in general. Thus, it may be argued that sovereign states, embedded in Hobbesian anarchical behaviour economically, are prepared to wield their power in such a way that it creates a moral good outside of state boundaries.

Cooperation amongst states was an essential feature of the final text of the UNFCCC with signing nations promising to collaborate in order to mitigate the possible effects of climate change, aiding those states in particular, who lacked the resources and technology to tackle the problems themselves. Financial arrangements, contained mainly in Article 11 of the UNFCCC, centred upon GEF housed at the World Bank, which is overseen jointly by UN's Environment Programme and its Development Programme. GEF's role is to facilitate the 'mechanism of the provision for financial resources on a grant or concessional basis, including the transfer of technology,'⁷⁴ and it is notable that the term 'transfer' is included. Although originally accepted only as an interim measure, it appears that GEF will remain indefinitely,⁷⁵ which has caused some disquiet amongst the South who view any organisation connected with the World Bank, ultimately, to be partisan. Furthermore, the intervening period between the Rio and Kyoto negotiations suggest that where economic sacrifices were openly accepted as being likely, many states acquiesced and relapsed into a statecentric approach rather than the near-Kantian environmental federation proposed in Rio. During this period, the necessity for climate change action was conceded by all

⁷⁴ Article 11 of the UNFCCC

⁷⁵ Grubb, Vrolijk, and Brack, *The Kyoto Protocol*, p. 42

negotiating parties but at the second Conference of the Parties held in Geneva in July 1996 Senator Tim Wirth, the US Secretary for Global Affairs under the Clinton Administration, asserted the need for a binding target which, nevertheless, remained flexible. This schism typified negotiations at Geneva and Berlin and became the defining issue at Kyoto.

The importance of the environment, when framing internationally binding agreements, seems to be relegated below economics, as is nicely evinced by the OPEC countries' refusal to accept that petroleum is environmentally harmful or the US opposition to all references to lifestyles changes at the Rio Summit combined with its efforts to minimise references linking consumption and environmental destruction.⁷⁶ US intransigence may also originate from its domestic arrangements such as the well-defined separation of powers, which leads to a focus on the local and an inability to innovate normatively, with politicians remaining reactive rather than proactive. Moreover, lobbyists wield enormous power with the Free Enterprise Institute, for example, indicating that the proponents of emission reduction would take all of us – and particularly the less fortunate among us – back in time to 'a world of darkness and cold', forgetting as they have, 'the importance of energy to the American way of life.'⁷⁷

Traditional Westphalian sovereignty, using the Hobbesian moral justification, argues that the boundaries of the moral community lie at the borders of a state, where the sovereign's legitimate power to protect and control ends. Hence, the views of those within this territory must be respected. With regard to environmental policy this is problematic since various, often conflicting, opinions arise, often leaving governments in a difficult position. For example, in a Gallup survey taken in 2003 respondents in the United States ranked climate change ninth out of ten on a list of environmental problems, well below domestic issues such as river and lake pollution.⁷⁸ Other polls have demonstrated that public knowledge about climate change is limited globally, as is evinced by the statistic that in the best-performing

⁷⁶ Wapner, 'Reorienting State Sovereignty', p. 279-80

⁷⁷ Sheehan, 'The case against Kyoto', p. 127

⁷⁸ Quoted in Steven R. Brechin, 'Comparative Public Opinion and Knowledge on Global Climate Change and the Kyoto Protocol: The U.S. versus the World?', *International Journal of Sociology and Social Policy*, Vol. 23 (2003) pp. 106-134, p. 113

state polled, Finland, only seventeen percent could identify fossil fuels out of a list of five options, as the single greatest cause of the greenhouse effect.⁷⁹ Again, the belief that the United States is entirely to blame for the failure of the climate change regime is out of place, since this poll also demonstrated that the least informed state amongst the industrialised world was, in fact, France.⁸⁰

Economic considerations were also raised with regard to Russia and the Ukraine's participation in the climate change regime. Russian sentiments, as expressed by Andrei Illarionov, verify the impression that normative improvements must not impinge upon economic development and success. Illarionov, shortly before the formal rejection of Kyoto, likened the climate change regime to an economic 'international gulag or Auschwitz'⁸¹ even though Russia is responsible for 17.4% of the world's total emissions. The Russian rejection is linked to the US rejection since, under the economically simple 'emissions trading' measures, Russia would have been able to sell its surplus emissions quota to the United States and the rest of the JUSCANNZ group.⁸²

Conclusion

It is clear that sovereignty in contemporary international relations is facing a number of challenges as a result of environmental dilemmas, not least over climate change. Westphalian notions which package the world into discrete compartments has proven to be illogical in terms of problems which are, by their very essence, global. Sovereignty has also stressed a state's rights over its duties and, hence, cooperation has been at best, fragmented and, at worst, almost impossible. Recognition of interdependence as embodied, for example, in the Brundtland Report, has led to the acknowledgement of environmental predicaments but, as yet, there has not, as Molitor suggests, been a seismic shift in sovereignty's normative status⁸³.

⁷⁹ Brechin, 'Comparative Public Opinion and Knowledge on Global Climate', p. 113

⁸⁰ Brechin, 'Comparative Public Opinion and Knowledge on Global Climate', p. 120-1

⁸¹ Nick Paton Walsh, 'Putin adviser calls Kyoto protocol a 'death treaty'' *The Guardian* (15 April 2004) [www.guardian.co.uk/climatechange] 10 May 2004

⁸² The potential for 'bubbling' is examined in Grubb, Vrolijk, Brack, *The Kyoto Protocol*, p. 92

⁸³ Molitor, 'The United Nations Climate Change Agreement', p. 210

Various philosophical and political stances have informed environmental views as held by policymakers and publics alike. The dominant of these, weak anthropocentrism, although sensitive to the environment has, nevertheless, privileged the human, especially where economic costs have to be taken into account. The favouring of the human, understandably, is a hallmark of all mainstream political ideologies from liberalism to communism and so it is unlikely that any burgeoning green sentiment will be able to dislodge the financial understanding of the environment. As examined throughout this chapter, economic inflexibility has been the key characteristic of the climate change regime and indeed, perhaps the success of the Montreal Protocol was down to the fact that hydrocarbons were more viable an option than CFCs. For all the espousals of justice viewed in the previous chapter, nevertheless, at the core of international relations remains a bedrock of power politics embedded in a narrow conception of interests. Waltz's and Hobbes' self-help analyses are, therefore, enduring in their importance and it would seem unlikely that any departure from these viewpoints in environmental matters is likely, although global sustainability has tempered, to a degree, unmitigated competition. How this concept develops in the next decade or so will best indicate the progress of the normative evolution of environmental cooperation.

The role of non-governmental organisations and epistemic communities has also been discussed at length throughout the chapter. Whereas NGOs attending the Rome negotiations provided legitimacy for nations engaging in the protection of fundamental human rights, it may be argued that NGOs have been unable to secure such a lofty position, unable to provide definitive scientific evidence to prove the case for the Kyoto Protocol or the necessity of financially-limiting actions. This is due not only to the states but also their publics, who have indicated their unwillingness to lose their competitive edge for a case which has not been proven beyond all doubt. The scientific epistemic community serves as legitimator of state action and, sometimes, inaction, whereas with regard to human rights activities, they prick the world's moral conscience, and as such, the scientific community is able only to score very limited victories off sovereign states. However, the climate change regime, as a normative project, is not entirely defunct, as can be seen in the recent proposal referred to as 'contraction and convergence' which depends upon a safe level of greenhouse gases being agreed upon. This amount will then be divided per capita amongst the Earth's

populations with big producers, such as the United States, being able to buy up the share attributed to underconsumers such as Bangladesh.⁸⁴ This suggestion, therefore, dismisses, national emissions limitations and instead argues for a set maximum for each global citizen.

This chapter has also explicated the view that the right to a habitable environment is a fundamental human right, which places the imperative of duty upon sovereign states. The cosmopolitan schema, developing out of the thought of Rawls, demonstrates the state's obligation to extend the moral community beyond its own boundaries just as borders were, to an extent, ignored during the Rome negotiations outlined in the previous chapter. The notion of spatio-temporal justice, in contrast to the justice explored in Chapter Two, sets a further challenge to the international community. Limiting the state's capabilities as a reaction and almost as amends for the actions of previous generations places an enormous strain upon governments worldwide as is exemplified by their unwillingness to act according to the concept of common but differentiated responsibility.

In conclusion, although it may be seen that current environmental negotiations, especially surrounding climate change, are mired in economics and cost benefit analyses, there nevertheless remains hope that sovereignty will be able to meet the environmental challenges set for it, particularly if the tasks are imbued with the language of human rights which has, since the end of the Second World War, worn a badge of legitimacy as can be viewed by the widespread agreement over the ICC.

⁸⁴ Mark Lynas, 'Hot Topic' *The Guardian* (3 December 2003)
[<http://society.guardian.co.uk/societyguardian/story/0,7843,1097998,00.html>] 10 May 2004

Chapter Four: Indigenous Rights and Sovereignty

Introduction

Indigenous rights provide an intriguing and difficult set of dilemmas for the sovereign state and the international system. Whereas the discussions of justice in the previous two chapters are essentially transnational, moving beyond the state, indigenous rights are firmly rooted within state boundaries. Indigenous peoples are those who have been subject to conquests and who have, as a result, suffered. Consequently, the challenges that the sovereign state must face in this arena are not necessarily of the cosmopolitan variety, as with environmental politics or the International Criminal Court, but are embedded in notions of specific community justice, which appears initially to bring indigenous rights into conflict with the conventional discourse of sovereign legitimacy.

Section One provides a brief overview of indigenous rights, offering a plausible definition of 'indigenous peoples' and the 'indigenous person', followed by a brief history of the connected concepts of indigenous and minority rights, noting the role of NGOs, and both soft and hard international law. It introduces the UN's Draft Declaration on the Rights of Indigenous Peoples, which illustrates many of the challenges facing sovereignty in the twenty-first century. It is important to note that, at the time of writing, July 2004, the UN has not yet ratified the declaration but, nevertheless, its contents are the most exigent calls made internationally and are, therefore, important.

Section Two provides an analysis of the communitarian viewpoint as relating to indigenous rights, highlighting the way in which cosmopolitanism is perceived by communitarians to be fundamentally unable to manage cultural diversity, instead imposing austere and potentially unwelcome demands upon the global community. As part of a dialectic, the liberal response to communitarianism is then discussed, leading to the synthetic position of 'justice for communities' which is able to reconcile the two positions in order to construct a credible alternative, which is aware of illiberal community practices, and thus imposing a minimum code of acceptable behaviour. Also included in this section is an examination of Westphalian

sovereignty, as enunciated by Locke, Hobbes, and Rousseau and its perceived inability to cope with the sub-national community.

Section Three provides a second rationale for indigenous rights, based upon the idea that liberal rights are, if applied in a manner which recognises their instrumental value, able to provide a modified form of sovereignty which can maximise equality and justice based upon a cautious reading of historical circumstances. The legal approach is also examined, enunciating the common law approach as in Canada and Australia which recognises the normative force of historical agreements rather than their legal veracity. In this way, the acceptance by sovereign states of spatio-temporal justice, as with the previous chapter, is cited as an example of a normative improvement in sovereignty but this notion is, to a degree, tempered by an appreciation of the way in which rights, such as access to lands and resources, are disregarded by states who aim to maximise their economic capabilities.

Self-determination, an explosive and crucial demand issued by indigenous peoples, is considered in Section Four. This passage investigates the relationship between nationalism and self-determination in the Westphalian discourse, including the limitation on its ability to resolve the issues presented by the indigenous rights movement. Part of the international system's inability to understand indigenous self-determination emanates from the fact that indigenous peoples operate outside the conventional political system, and thus, incorporating their wishes and desires into the conventional body of rights, remains an important and difficult task which sovereign states are undertaking in order to retain their moral legitimacy.

Section One: Indigenous Peoples and their Place in International Relations

Definitions

It would seem eminently sensible to begin a discussion of the indigenous person with a definition that narrows the term in order that the conceptual discussions within the chapter are anchored effectively. This task has taxed both analysts and indigenous peoples themselves. Indeed, in the framing of the UN Draft Declaration on the Rights of Indigenous Peoples (from hereon in the 'Draft Declaration') the indigenous

delegates refused to accept any definition as being valid. Nevertheless, the UN's Working Group on Indigenous Peoples (WGIP) asked for a working definition which was provided by the Special Rapporteur, Cobo Martinez, who argued that,

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 the societies now prevailing in those territories ... They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹

Martinez defines an indigenous person as a person who belongs to such a group through self-identification and is recognised and acceptance by these populations.² It is for these reasons that WGIP emphasises, priority in time, voluntary perpetuation of the culture, self-identification, an experience of subjugation, marginalization and dispossession in their research.³ These factors are discussed in greater detail below, but it is clear even at this initial stage that such criteria may offer a powerful critique of the way in which the international system currently operates.

The geographical placement of indigenous peoples is, quite naturally, worldwide, but in political circles, the geopolitical classification of these groups has been more limited. Populations move around and have been absorbed to such a degree that many scholars, including several African and Asian scholars, believe that indigenous rights should be reserved only for the Americas and Australasia.⁴ Particularly in the industrialised world, the pivotal issue has been the displacement of peoples by alien and dominant powers, rather than the marginalization of groups by those who also

¹ Martinez Cobo quoted in Sarah Pritchard, 'Working Group on Indigenous Populations: mandate, standard-setting activities and future perspectives', in Sarah Pritchard (Ed.) *Indigenous Peoples, the United Nations and Human Rights* (London, Zed Books, 1998), pp. 40-64, p. 43

² Cobo reported in Pritchard, 'Working Group on Indigenous Populations', p. 43

³ The conclusion of Rodolfo Stavenhagen, of WGIP reported in Justin Kenrick and Jerome Lewis, 'Indigenous peoples' rights and the politics of the term 'indigenous', *Anthropology Today*, Vol. 20(2) (2004) pp. 4-9, p. 5

⁴ John R. Bowen, 'Should we have a universal concept of 'indigenous peoples' rights?', *Anthropology Today*, Vol. 16(4) (2000), pp. 12-16, p. 13

claim ties to the land. With regard to the Asian and African experience, no large time difference exists between the emergence of the initial peoples and subsequent conquests. Thus, the so-called 'saltwater thesis' which implies that invaders had to arrive from overseas remains dominant, but, nevertheless, a tide of Asian and African NGOs such as the Asian Indigenous Peoples Pact and Tin Hinan for Nomadic Women are venturing to impact upon current negotiations.⁵

These permutations also lead into the distinction between minority and indigenous peoples. Although indigenous peoples have used the rationales of and rights accorded to minorities, they claim to be more than minorities, based largely on the fact that they constitute previously existing nations, though not states as per James' definition found in Chapter One and, as such, have a far stronger case with regard to self-determination (see Section Four). Coupled with this temporal element is the fact their histories have been ones of domination and subjugation, rendering redress a moral imperative.⁶

An Overview of the History of Minority and Indigenous Rights

Internationally legitimated minority rights, apart from seventeenth century religious and twentieth century rights, have been commonly imposed or coerced, rather than being freely adopted.⁷ The first striking example of minority ethnic rights occurred following the end of the Napoleonic Wars with Viscount Castlereagh, at the Congress of Vienna, arguing that the rights of Poles ought to be guaranteed by the three states who had carved up their territory, asserting that efforts to make the Poles 'forget their existence and even language as a people has been sufficiently tried and failed.'⁸ Although these pleas were ignored under the weight of assimilationist tendencies, this attitude indicates the power of culture and language which underpin indigenous claims in contemporary international relations.

The Treaty of Versailles had written into it the protection of religious and ethnic minorities, and another of its undertakings, the League of Nations, witnessed the birth

⁵ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (London, University of California Press, 2003), p. 74

⁶ Michael Walzer, *On Toleration*, (New Haven, Yale University Press, 1997), p. 217

⁷ Krasner, *Sovereignty: Organized Hypocrisy*, p. 73

⁸ Viscount Castlereagh quoted in Krasner, *Sovereignty: Organized Hypocrisy*, p. 83

of the indigenous movement when Levi General Deskaheh, Chief of the Younger Bear Clan of the Cayuga Nation, spokesman for the Six Nations of the Grand River Land in Ontario, travelled to Geneva to put the case for secession based upon self-determination. The United Kingdom immediately disallowed Deskaheh from speaking, claiming that the issue was for the British Empire alone, but nonetheless, it may be argued that with this, the indigenous challenge had arrived on a global level.

The Second World War and the struggle against fascism demonstrated that states could not be relied upon to protect their own citizens and with this sentiment came a greater receptiveness to measures which protected minorities. Moreover, the dismantled empires and their post-colonial successors could also not be trusted, a notion which corresponds with the Machiavellian concept that new and fragile states protect themselves at all costs.⁹ The immediate era following the end of the war was marked by the emergence of the human rights regime, as documented in Chapter Two, but elements of a communitarian or, at the very least, community-based sentiment, may be viewed in the UDHR. For example, Article 29 asserts that,

1. Everyone has duties to the community in which alone the free and full development ... [of] personality is possible. 2. In the exercise ... of rights and freedoms, everyone shall be subject only to such limitations as are determined by the law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁰

The inclusion of 'alone' in the above is of vital importance, indicating communitarian values, securing the place for communities as the normative heartland of human rights.¹¹

The International Covenant on Civil and Political Rights (ICCPR) (1966) caused controversy amongst states when it declared boldly in Article 27 that minorities

⁹ Machiavelli's philosophy discussed in Walker, 'Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice', p. 172

¹⁰ Article 29 of the Universal Declaration of Human Rights [<http://www.un.org/Overview/rights.html>] 10 July 2004

¹¹ Tore Lindholm paraphrased in Patrick Thornberry, 'Minority and indigenous rights at 'the end of history'', *Ethnicities*, Vol. 2(4) (2002) pp. 515-37, p. 523

within previously existing states shall not be 'denied the right ... to enjoy their own culture, to profess and practise their own religion, or to use their own language,'¹² rights which were argued against by the Australian delegates who maintained that their Aborigines were too primitive to enjoy them.¹³ More recently, the Australian government has revealed its hostility to the indigenous rights regime as can be seen when criticisms were lodged with the Committee on the Elimination of Racial Discrimination. The Australian government rejected these outright, deeming them 'insulting', 'unbalanced' and interference in sovereign affairs.¹⁴

The International Labour Organisation (ILO) responded more directly to the indigenous problem, penning the ILO Convention on Indigenous and Tribal Populations, 107 (1957) and the ILO Convention on Indigenous Peoples in Indigenous Countries, 169 (1989). The switch between 'populations' and 'peoples' is important and contentious, since the latter is viewed as carrying connotations of self-determination, thereby presenting a greater challenge to existing sovereign states as well as presenting notions of permanence, and historical and cultural indelibility.¹⁵ Although these conventions do not tangibly impact upon the framing of discourses of sovereignty to any great extent, they do inform decision-making processes in NGOs, such as the Inter-American Development Bank. If these moral codes are adopted by enough bodies, triggering the 'norm cascade,'¹⁶ then, ultimately, they may be seen to alter the international system from the bottom up.

Throughout the last twenty years of the twentieth century and particularly following the end of the Cold War, the indigenous issue has gained a stronger hold in discussions of minority and human rights. This can be seen in the Conference on Security and Cooperation in Europe's Copenhagen Convention (1990) which recognised the rights of national minorities, including the free use of their mother tongue in public and private and the incorporation of their histories into national school curricula. Furthermore, in 1992 the UN General Assembly passed the

¹² ICCPR quoted in Thornberry, 'Minority and indigenous rights at 'the end of history'', p. 523

¹³ Pritchard, 'Working Group on Indigenous Populations', p. 40

¹⁴ *Australians for Native Title and Reconciliation*, 'Indigenous Rights in Australia'

[<http://antar.org.au/obligations.html>] 1 July 2004

¹⁵ The connotations of the two terms are discussed in, for example, Niezen, *The Origins of Indigenism*

¹⁶ This term is borrowed from the work of Finnemore and Sikkink as discussed in Wheeler, 'Humanitarian vigilantes or legal entrepreneurs: enforcing human rights in international society'

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which clearly enunciated community rights. From 1985 to 1993, a working group developed the draft Declaration on the Rights of Indigenous Peoples, the articles of which are discussed throughout the course of this chapter. The claims and calls of the Draft Declaration are far-reaching and represents an 'emblematic synthesis of indigenous claims of rights, cultural statements and world views, suggesting the outline of a relationship between indigenous people, states and the culture of human rights,'¹⁷ and although it must be noted that many aspects of the Declaration are hotly contested by many governments, it is hoped that the Draft Declaration will be adopted by the end of 2004, marking the end of the International Decade of the World's Indigenous Peoples.¹⁸ The challenges sovereignty faces in modern international relations are clearly visible, therefore, within the dialogue that exists between the overlapping strands of legitimacy and association, challenging its ability to cope with diversity within units which are traditionally viewed as being mono-ideological and mono-cultural, at least in terms of political culture.

As with the other case studies considered within this essay, there exists within the indigenous rights movement a body of NGOs to question the morally-legitimated and organising principle of state sovereignty. The current proliferation of associations, federations and networks, such as the International Indian Treaty Council and the World Council of Indigenous Peoples are extremely active, and, in a slight irony, defend local attachments and simple technologies via electronic media, technologies of communication and transportation which, additionally, serves to establish and maintain connections. The lobbying power of these organisations can be viewed in the action of groups, such as the Crees in Northern Quebec, who, in collaboration, with other bodies as part of a transnational system, have the potential to act as a new form of civil society, with the ability to check the propensity of the state to homogenise language, culture and legal processes. Indeed, the 'politics of embarrassment,'¹⁹ through lobbying and the media, exemplified by the James Bay Crees, has been effectively applied to curb the excesses of the state and to highlight

¹⁷ Thornberry, 'Minority and indigenous rights at 'the end of history'', p. 521

¹⁸ United Nations, Draft Declaration on the Rights of Indigenous Peoples ('Draft Declaration') [<http://www1.umn.edu/humanrts/instree/declra.htm>] 1 July 2004

¹⁹ Ronald Niezen, 'Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples, *Society for the Comparative Study of Society and History*, 2000, pp. 119-48

the plight of indigenous peoples on the basis of reasoning explored more fully in Section Two of this chapter.

**Section Two: Indigenous Rights, Sovereignty
and Justice within and for Communities**

Much of the discussion over the normative worth of sovereignty and of moral imperatives in international relations emanate from the communitarian/cosmopolitan divide, discussed in the latter half of the first chapter. The issues surrounding indigenous rights allow for a concrete example of these two conflicting views and, hence, this section investigates the notion that justice for individuals, the achievement of which is a prime goal for sovereignty in the contemporary context, can only be accomplished within a community as well as this position's antithesis which is embodied in the liberal human rights regime as explored in Chapter Two. This section proceeds as a dialectic, firstly stating the communitarian position, objections to it, then the liberal position and, finally, a synthesis of the two which remains within the liberal tradition. At this juncture it is important to note that a subtle but vital distinction exists between justice within the community and the communitarian position, since the latter stresses the group above and beyond the individual, and so sees no harm in limiting individual rights in order to promote shared shares, whereas the former privileges the will, aspirations and choices of the individual. Where appropriate this distinction is made.

Human beings are born and live within a particular political and, therefore, moral community, and are bound to it and their neighbours by special ties. Thus, they have a special interest in maintaining the territorial integrity and stability of their own community, and also in shouldering the collective burden of upholding that community. Growing up in a particular community profoundly shapes the individual and, indeed, defines him or her and hence, it may be seen that global justice should be concerned with maintaining the community. As Dworkin comments, 'We inherited a cultural structure and we have some duty, out of simple justice, to leave that structure

at least as rich as we found it.’²⁰ The cultural context not only provides options but also provides the spectacles through which we identity our experiences as being of value, and thus care must be taken in handling a sub-state community in order for sovereignty to remain morally viable as a concept. The schism that exists between the individual and the community, especially with regard to justice within the community, is noted by Patrick Dodson who, in commenting on the Australian indigenous experience, argued that

[t]he Government wishes to drive a wedge between the concepts of rights and welfare, and between those who advocate a rights agenda and those seeking relief from the appalling poverty. This is an attempt at a new spin on a very old wicket of divide and rule. If it were a matter of rice bowl politics it might not be so bad but it is far more sinister than that. It is about removing the centrality of community as the life centre; it models on the individual as the essential unit of society. This is not our way. With all our social problems, the answer is not to attack the foundations of our community by putting the individual before the community.²¹

Negotiations surrounding the International Criminal Court privilege the individual above the community and anchor sovereignty’s normative worth around this, but it may be argued that without the community, the liberal self can only ever be a figment of theorists’ imagination. Christian Bay contends that liberals have ‘persistently tended to cut the citizen off from the person; and they have placed on their humanistic pedestal a cripple of a man, a man without a moral or political nature; a man with plenty of contractual rights and obligations, perhaps, but a man without moorings in any real community; a drifter.’²² Sociologically-speaking, it may be contended that Western philosophy, and as a result, the Western-dominated international system, has long struggled to reconcile the notions that reality derives from an individual’s perception but, concurrently, is assembled collectively by societies. In this way,

²⁰ Ronald Dworkin quoted in Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995), p. 83

²¹ Patrick Dodson’s 2000 Wentworth Address quoted in *Australians for Native Title and Reconciliation* ‘Why “practical reconciliation” is bad policy [www.antar.org.au/prac_rec.html] 1 July 2004

²² Christian Bay quoted in Darlene M. Johnston ‘Native Rights as Collective Rights: A Question of Group Self-Preservation’ in Will Kymlicka (Ed.), *The Rights of Minority Cultures* (New York, OUP, 1995), pp. 179-201, p. 180

Descartes' 'cogito ergo sum' wrestles with Durkheim's theory of the collective conscious.²³ Bhikhu Parekh in calling for the emergence of a globally-oriented citizen notes that the cosmopolitan is unable to generate global justice, since such a position

ignores special ties and attachments to one's community, is too abstract to generate the emotional and moral energy needed to live up to its austere imperatives, and can also easily become an excuse for ignoring the well-being of the community one knows and can directly influence in the name of an unrealistic pursuit of the abstract ideal of universal well-being.²⁴

A liberal slant on the communitarian right is persuasive and a strong reason for arguing that sovereignty, moderated to accept human rights as fundamental, be further aligned in order to be tolerant of diversity, even to the extent of welcoming, protecting and embracing it. To this end, Kymlicka argues that indigenous rights are not about placing the community over the individual but, rather, they are based on the idea that justice between groups requires that the members of different groups be accorded different rights,²⁵ a notion which reconciles the liberal and the communitarian in order to produce a morally and culturally sensitive international justice. Moreover, the deontological enterprise, which underpins the liberal discourse especially with regard to contemporary conceptions of sovereignty, installs the individual as sovereign, the author of the only moral meanings there are. As inhabitants of a world without telos, we are free to construct principles of justice unconstrained by such an order, or by custom or tradition or inherited status. So long as they are not unjust, our conceptions of the good carry weight, whatever they are, simply in virtue of our having chosen them.²⁶ However, 'to imagine a person incapable of constitutive attachments ... is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth,'²⁷ and, therefore, the liberal understanding is feasible

²³ Marcus Colchester, 'Indigenous rights and the collective conscious' *Anthropology Today*, Vol. 18(1) (2002), pp. 1-3, p. 1

²⁴ Bhikhu Parekh, 'Cosmopolitanism and global citizenship', *Review of International Studies*, Vol. 29 (2003), pp. 3-17, p. 12

²⁵ Will Kymlicka, *Multicultural Citizenship*, p. 47

²⁶ Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge, CUP, 1982), p. 177

²⁷ Sandel, *Liberalism and the Limits of Justice*, p. 179

and morally valuable since it resolves some of the crucial conflicts that exist between the two positions.

The universalism of human rights is often cited as an attack on rights which favour a community. Moreover, it may be argued that universalism is impossible. For example, proclamations of slogans such as 'truth' and 'justice' contain a dualism, based upon different interpretations. Although the terms are universally recognisable, they are then packed with each culture's particularism, making effective universal justice nigh on impossible,²⁸ especially given the communitarian assertion that the cosmos is not yet a *polis*.²⁹ Furthermore, although the communities in which we create rights and duties *are* constructed, they remain the only communities there are, and so they cannot be considered more or less authentic than some other kind. Thus, according rights to groups, such as indigenous peoples, does not necessarily go against the tide of the liberal metanarrative which seems to be directing sovereignty and history in general.³⁰ Linklater also advises caution for the grand sweeping ideals of the cosmopolitan endeavour when noting that, 'all claims to truth and enlightenment, and all emancipatory projects, contain the potential for dominating, marginalizing and excluding others.'³¹ Hence, from this viewpoint, indigenous rights should perhaps be admitted to the fold in order to secure rights which would otherwise be ignored by the well-intentioned human rights project. Modifying sovereignty to recognise rights should be possible if a framework of moral principles is constructed which accommodates multiple ethical traditions, allowing legitimate diversity. Again, legitimacy is at the hub of the issue and considered towards the end of this section are examples of cultural practices which are illegitimate and which should not be acceptable. Acceptable ethical distinctions include the recognition of the bond that many indigenous peoples feel towards their territory, since many view themselves as being trustees of the land for future generations and, as such, cannot conceive of being removed from it. This ethical tradition has been noted and worked into sovereignty-modifying legislation as with Canada's Indian Act (1867) which declared that, 'Except where this Act otherwise provides, lands in a reserve shall not

²⁸ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Notre Dame University Press, 1994), p. 4

²⁹ Parekh, 'Cosmopolitanism and global citizenship', p. 12

³⁰ See Francis Fukuyama *The End of History* (London, Penguin, 1992) for an explication of the victory of liberalism

³¹ Linklater, *The Transformation of Political Community*, p. 68



be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band [indigenous people] for whose use and benefit in common the reserve was set apart.³² Although this could appear to be a victory for indigenous financial justice over the capitalist system and Locke's sovereignty, which protects the liberal rights of commerce and ownership, it must also be noted that the Act does retain some discretion for the Governor in Council to alienate inalienable land,³³ an issue which is noted below in the discussion of the Innu people.

Indigenous cultural guarantees can be found in many international covenants and declarations but the most progressive claims can be found in the Draft Declaration. Article 6 affirms the collective right of indigenous peoples to live in freedom, peace and security as distinct peoples,³⁴ whilst Articles 7 and 8 provide against genocide, ethnocide and also assert indigenous peoples' rights to maintain and develop their distinct characteristics.³⁵ Part III of the Draft Declaration is the most important culturally, with Articles 12 to 14 defending the practice and championing the revitalisation of cultural traditions and customs, including the restitution of cultural, intellectual, religious and spiritual property incorporating rights to religious and cultural sites, including the repatriation of human remains.³⁶ Cultural traditions also incorporate the collective histories of peoples and so self-determination in the field of education³⁷ is also espoused, including officially sanctioned teaching in a language of choice.

The idea of justice within the indigenous community is susceptible to a myriad of criticisms based not only on liberal interpretations but also on more empirical grounds. Firstly, it may be contended that it is improbable, given change and the migration of peoples throughout history, that any current culture anywhere is continuous from the original inhabitants of an area³⁸ and thus, the possibility of an absurd infinite regress has to be considered. Culture is fluid and not static and so

³² The Indian Act quoted in Johnston, 'Native Rights as Collective Rights', p. 195

³³ Johnston, 'Native Rights as Collective Rights', p. 198

³⁴ Article 6 of the Draft Declaration

³⁵ Articles 7 and 8 of the Draft Declaration

³⁶ Articles 12-14 of the Draft Declaration

³⁷ Article 15 of the Draft Declaration

³⁸ Stephen Roney, 'There are no Canadian 'aboriginals'', *The Report* (2 March 2003) Vol. 30(3), [<http://search.epnet.com/direct.asp?an=9019897&db=buh>] 3 February 2004, p. 30

cultural distinctiveness may be undermined by interaction, meaning that, ultimately, indigenous rights may become redundant. Indeed, the cultural distinctiveness argument has been used by the Brazilian government who maintain that once the indigenous population of Amazonia begins wearing what are considered 'Western' clothes and negotiating contracts with transnational corporations, their legitimacy as culturally distinct groups has been lost.³⁹ In this way, many indigenous peoples have forfeited their rights to a governmental policy which is bound up in the discourse of economic development, an intransigence which tallies with the Brazilian position on deforestation, as discussed in Chapter Three, arguably reinforcing the North/South divide.

Recent, stinging attacks on indigenous rights have come courtesy of Professor Adam Kuper who in an article in *Current Anthropology*, confronted the indigenous peoples' movement, claiming it to be retrograde, anti-progressive and right-wing, charging that indigenous rights are privileges based entirely on the 'blood and soil' ideology of descent which echoes justifications given by Nazi Germany.⁴⁰ Thus, aboriginal rights based entirely on an accident of birth are, thus, flag-bearers of inequality, of class rights and race discrimination. Although not true, as is discernible by arguments proposed in this chapter, Kuper's thought has cultural resonance and has been adopted by *De Beers* as justification for ignoring indigenous claims.⁴¹ However, even though aboriginal communities are political, not ethnic or racial, this is sometimes something of a thorny issue since some aboriginal groups have argued for racial criteria for membership, given limited resources and the need for control. Whether indigenous peoples should be able to enjoy collective rights, as well as those accorded to them as a result of being citizens, has been the subject of fierce debate, especially in Australia. This dispute is fuelled by assumptions from theorists such as Barry who asserts that the correlation between indigenous rights and liberal citizenship may threaten civil unity and broadly based social and economic programmes which aim for equality.⁴² Furthermore, a critique of community rights comes from Noel Pearson, an Aboriginal activist, who claims that rights have deflected attention from deep-rooted social and

³⁹ See Michael Banton, 'International norms and Latin American states' policies on indigenous peoples', *Nations and Nationalism*, Vol. 2(1) (1996), pp. 89-103, for further details

⁴⁰ Adam Kuper, 'The return of the native', *Current Anthropology*, Vol. 44(3) (2003), pp. 389-402

⁴¹ Kenrick and Lewis, 'Indigenous peoples' rights and the politics of the term 'indigenous'', p. 5

⁴² Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press, 2001)

economic problems,⁴³ that they are a mere placebo for indigenous peoples which results in sovereign states relinquishing responsibility for historical inequalities.

Western philosophy and international relations theory has stressed the state and the individual, as is demonstrated by the lasting impact of Bodin, Hobbes and Locke. These figures leave no middle ground between humanity as individual organisms and the state. The legacy of this European tradition has led to assimilationist policies and tendencies which have dominated conceptualisations of sovereignty until the late twentieth century. John Stuart Mill's attitude to the colonised indigenous peoples can be viewed in his promotion of the incorporation into the national body politic of the indigenous person who would otherwise remain a 'half-savage relic' residing in his 'own mental orbit without participation or interest in the general movement of the world.'⁴⁴ Similarly, Rousseau, in the explication of the general will, argued that if, 'the general will is to be truly expressed, it is essential that there be no subsidiary group within the state'⁴⁵ and that a citizen ought to express 'his opinion and nothing but his own opinion.'⁴⁶

The liberal interpretation of human rights stresses that which communitarian logic is charged with forgetting, that human beings as inalienable moral units, have rights accorded to them merely by their being, for, as Clermont-Tonnerre in the French Legislative Assembly stated, 'One must refuse everything to the Jews as a nation, and give everything to the Jews as individuals.'⁴⁷ Thus, to promote indigenous peoples is to counter the normal view of states being units wherein all are equal. Recent liberal political theory has viewed indigenous rights as cultural and, therefore, group rights and, consequently, they have been susceptible to at least three objections. Firstly, culture is not considered a primary good relevant to egalitarian justice. Secondly, that group rights are obstructions, blocking the path of moral individualism in liberal democratic societies. Thirdly, that pandering to group interests provides incentives for

⁴³ Duncan Ivison, 'The logic of aboriginal rights', *Ethnicities*, Vol. 3(3), (2003), pp.321-324, p. 323

⁴⁴ John Stuart Mill quoted in Kymlicka, *Multicultural Citizenship*, p. 53

⁴⁵ Rousseau quoted in Vernon Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory', in Will Kymlicka (Ed.), *The Rights of Minority Cultures* (New York, OUP, 1999), pp. 31-56, p. 34

⁴⁶ Rousseau quoted in Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory', p. 34

⁴⁷ Clermont-Tonnerre quoted in Walzer, *On Toleration*, p. 39

abuse and undermines the conditions required for the promotion of egalitarian outcomes.

The following passage enunciates what may be termed the 'liberal synthesis' of indigenous rights with regard to justice within the community, focusing on the challenges that such rights would construct for the Eurocentric concentration on the individual whilst retaining a liberal position. Following this is an examination of toleration and its limits, centring on the idea that justice within communities must be underpinned by a set of basic moral principles which are inalienable and that internationally acceptable codes of behaviour will not tolerate certain activities, no matter how culturally legitimated.

The liberal defence of specialised community rights rests on the assertion that individual freedom is tied inexorably to membership in a national group and that group-specific rights can promote equality between the majority and the minority. Seemingly, this is communitarian justice but it is important to note that this rationale does not reject the liberal view about the importance of being able to realise one's own ends. Thus, liberals 'can and should endorse external protections where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices,'⁴⁸ an idea discussed in the section on toleration, below. In according cultural and social rights to indigenous peoples, the peoples would also accrue responsibilities. Thus, human rights may be universalised more effectively by admitting the Other to the community via the bestowment of rights, and imbuing them with the new sovereign responsibility to which other sovereign bodies are subject. Furthermore, to maintain credibility, the indigenous forum would have to include not only issues of cultural integrity, state interference and so forth but also potential human rights abuses perpetrated by the indigenous peoples themselves.⁴⁹ Indeed, many indigenous nations have decided to abide by international human rights agreements and do so with greater gusto than the government of states who often jealously guard their sovereignty.⁵⁰

⁴⁸ Kymlicka, *Multicultural Citizenship*, p. 37.

⁴⁹ Niezen, *The Origins of Indigenism*, p. 117

⁵⁰ Kymlicka, *Multicultural Citizenship*, p. 169

Toleration refers to the peaceful coexistence of groups of people with different histories, cultures and identities, which is especially important with regard to the nation-state, even the liberal nation-state, which traditionally allows less room for difference than do multinational empires or consociations,⁵¹ since it constitutes a kind of cultural corporation which claims a monopoly on arrangements within its borders.⁵² Consequently, diversity must be legally acknowledged as with the Canadian Charter of Rights which explicitly recognises 'aboriginal rights' which are cited in the Charter because they are in conflict with the state's dominant human rights culture.⁵³ However, if it becomes clear that the group can persist only through the denial of the human rights of its members, it may be argued that it has no claim to our respect.⁵⁴ Furthermore, if individuals with their rights in place choose to view themselves as part of the community, that choice must be guaranteed.⁵⁵ To this end, in the recent Manila Declaration, indigenous peoples accepted that the concept of justice is universal and that in

[r]evaluating the traditions and institutions of our ancestors it is also necessary that we ourselves honestly deal with those ancient practices, which may have led to the oppression of indigenous women and children. However, the conference also stresses that the transformation of indigenous systems must be defined and controlled by indigenous peoples ... [as] part of the right to self-determination.⁵⁶

Thus, it may be seen that the process of normalising the indigenous populations is one which has to be driven by an internal mechanism, that the grip of the sovereign state is illegitimate when it imposes codes of behaviour from outside. To reconcile this demand, therefore, the exercise of sovereignty must be carefully constrained and must be open to the consideration of historical circumstances, inequalities and political arrangements. Article 4(2) of the Draft Declaration, for example, maintains that states

⁵¹ Walzer, *On Toleration*, p. 27

⁵² Walzer, *On Toleration*, p. 25

⁵³ Roney, 'There are no Canadian 'aboriginals'', p. 30

⁵⁴ This notion is argued in Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y., Cornell UP, 1989)

⁵⁵ Donnelly, *Universal Human Rights in Theory and Practice*, p. 153

⁵⁶ The Manila Declaration quoted in Colchester, 'Indigenous rights and the collective conscious', p. 3

have to facilitate the employment of indigenous rights and practices except where they contravene national law and are contrary to international standards.⁵⁷ The self-fixing nature of indigenous cultures can be viewed in the emergence of organisations such as the Native Women's Association which is internally able to provide legitimate checks and balances on the excesses of tradition. The history of indigenous action within the United States has been one carried out, to the greater degree, from within the legal and political network developed by the European settlers⁵⁸ and as such, indigenous peoples, under the Indian Civil Rights Act (1968) are required to respect most, but not all, of the rights contained within the Bill of Rights.⁵⁹ In international soft law, instruments such as the Convention on the Rights of the Child call into question traditional punishments, whilst the Convention on the Elimination of all Forms of Discrimination against Women aims to censure some traditional practices. Perhaps the most oft-discussed practice relating to indigenous peoples is female circumcision or female genital mutilation, as it is often referred to. Practiced in over forty countries, it is linked to higher rates of AIDS and infant mortality, and, as Catherine Annas maintains, 'When the effects of female genital mutilation are honestly faced, nothing can justify it. Not culture. Not tradition. Not parental rights. Nothing.'⁶⁰ This invokes a challenge to indigenous populations and minority groups to desist in a practice which is viewed as being not only illiberal but also extremely dangerous.

Indigenous peoples, though they may be awarded specific rights are, nonetheless, subject to national review. Canadian members of peoples can and do challenge in the Canadian Supreme Court decisions taken within the group itself owing to rights as documented in the Canadian Charter of Rights. Two cases from the 1990s, one involving fishing rights and access to land *Sparrow v Regina* (1990) and the other on indigenous initiations, where an individual was abducted by elders as part of a ritual, *Thomas vs Norris* (1992) demonstrate the limit of indigenous rights and of sovereign toleration. The fact that under *Sparrow* fishing rights were upheld was used to argue that the unlawful abduction of a member of an indigenous community as part of a

⁵⁷ Article 4(2) of the Draft Declaration

⁵⁸ As argued in Taiaiake Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse', *Indigenous Affairs*, Vol. 3 (2001) via [www.iwgia.org], pp. 22-34, 1 July 2004

⁵⁹ Kymlicka, *Multicultural Citizenship*, p. 38

⁶⁰ Catherine Annas quoted in Niezen, *The Origins of Indigenism*, p. 113

ritual should, similarly, be recognised as an action which prioritised the collective over the individual. The court rejected this reasoning, arguing that there was absolutely no reason to assume that external protections and internal restrictions would or should stand or fall together.

This section has attempted to construct a plausible rationale for according rights to indigenous peoples, based upon the notion that justice is only meaningful within the community and that, with regard to indigenous peoples, this sense of community is inextricably linked to the sense of self. In doing so, it has discussed and acknowledged the liberal viewpoint, understanding its moralistic case, in order to construct a coherent notion of justice which, whilst sensitive to the needs of the community, nevertheless remains a part of the liberal tradition of rights. Such a position challenges prevailing the conception of sovereignty which attempts to construct a sense of unity within its respective borders. This is almost impossible owing to the indigenous peoples' cultural and historical situatedness and their previous exercise of political autonomy which pre-dated the 'Western' notion of sovereignty, explored in detail in Chapter One and Section Four of this chapter. Culturally sensitive rights provide an effective alternative to the illiberal assimilation which still continues in contemporary Australia as evinced by Prime Minister John Howard's 1988 statement that 'Aboriginal people should be brought into the mainstream of Australian society.'⁶¹

Section Three: Indigenous Rights, Human Rights, and Legal Justice

This section aims to show that complementing the community-based arguments and their ultimately liberal synthesis, there is a further set of arguments that legitimate indigenous rights and the reconceptualisation of sovereignty to encompass this. This line of reasoning is based upon human rights and aims to arrive at equality by understanding the historical and legal peculiarities which surround indigenous peoples.

⁶¹ John Howard quoted in *Australians for Native Title and Reconciliation*, 'Why "practical reconciliation" is bad policy'

The first justification for special indigenous rights, and one used frequently in US and Canadian courtrooms, is based upon the notion that collective rights may be necessary in order to provide economic and political equality in cases where indigenous peoples are disadvantaged with respect to a particular resource, whether it be land or political representation. In these cases, group differentiated rights, such as the protection of languages, the reservation of certain areas for hunting and fishing, or mechanisms to ensure electoral representation, must be shown to rectify previously existing inequalities.⁶² The inequalities suggested in the criterion above have been formed largely by the histories of indigenous peoples⁶³ who have been 'the victims of colonial discourses of progress'⁶⁴ and who have been described variously as children, slaves of nature, unenlightened and uncivilised.

It is debatable whether the language of human rights, so favoured by many theorists of international relations, is actually beneficial to indigenous peoples, an issue which rests upon the foundation of rights themselves. Human rights are usually justified from a Kantian point of view, from the standpoint that all humans are equal, that all have inalienable and identical rights, a claim which can be prone to criticism on the grounds outlined in the previous section and also in Chapter One. Rights are not universally desired by indigenous peoples and persons, as can be viewed in Pearson's objections noted in the previous section and also in the New Zealand Maoris' decision to forego rights in favour of permanent representation in Parliament.⁶⁵ In this guise, the language and foundations of human rights serve as a barrier to indigenous rights but if they are viewed as being of instrumental value, rather than moral ends in themselves, they then become tenable and defensible once more. In viewing rights as a means to the goals of justice and equality, then indigenous rights are able to occupy a useful role within a morally-sensitive version of sovereignty which is able to act to guarantee a greater degree of justice whilst maintaining order.

The rights accorded to indigenous peoples have, aside from securing the continued enjoyment of cultures, centred upon land and resource rights. The Draft Declaration

⁶² Bowen, 'Should we have a universal concept of 'indigenous peoples' rights?', p. 14

⁶³ Indigenous peoples' history is bound up in notions of self-determination, a factor and concept discussed in length in the following section.

⁶⁴ Thornberry, 'Minority and indigenous rights at 'the end of history'', p. 528

⁶⁵ The 1865 decision of the Maori community as reported in Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (Newbury Park, California, Sage, 1993), p. 14

asserts a number of important rights ranging from development and control over lands, territories and resources,⁶⁶ to recognition of the inviolability of intellectual and cultural property, as well as measures to develop and protect their sciences, technologies, and cultural manifestations.⁶⁷ Furthermore, under the terms of the Declaration, indigenous people would be able to affirm their right to restitution or compensation for lands, territories and resources which have been confiscated or used without consent, and to conserve the environment and productive capacity of lands.⁶⁸ Taiaiake Alfred argues that economic rights, such as fishing rights, do not indicate any significant normative shift since those rights pre-dated the modern state by hundreds of years, and, moreover, that rights like these seem to relegate the importance of indigenous peoples to the past since they do not embrace the indigenous cultures or utilise their traditions in the name of modernity.⁶⁹ However, in offering recompense for past actions, sovereign states are admitting retroactive culpability and, as such, would be embracing a spatio-temporal justice not unlike the environmental variant discussed at length in the previous chapter. Economic factors, as with issues relating to the environment, often seem to act as trumps and indigenous rights in domestic law often seem to be abrogated as with the Canadian government's authorisation of a multi-billion dollar nickel mine on the site of Innu burials, caribou migration trails and hunting ground and its brokering of a deal for the world's second largest dam, to be situated on the Lower Churchill River, in the heart of the Innu lands.⁷⁰ These actions clearly point to a discrepancy in terms of development, for whereas the government seems to favour economic and material development, indigenous peoples tend to stress spiritual and religious development, a sentiment expressed by a delegation from the Brazilian Yanomano people who travelled to the World Bank in the 1980s to argue this point.⁷¹ Economic and environmental justice for indigenous peoples not only relate to their histories of dispossession and of governments reneging on treaty agreement, discussed below, but also on the substantive bond that exists between indigenous peoples and their land. Unlike traditional state sovereignty, this tie is not a dominion over territory but rather a

⁶⁶ Article 26 of the Draft Declaration

⁶⁷ Article 29 of the Draft Declaration

⁶⁸ Articles 27 and 28 of the Draft Declaration

⁶⁹ As argued in Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse'

⁷⁰ Discussions on the use of Innu lands can be found in Kenrick and Lewis, 'Indigenous peoples' rights and the politics of the term 'indigenous', p. 5

⁷¹ Wilmer, *The Indigenous Voice in World Politics*, p. 37

sophisticated partnership with it.⁷² Accordingly, to strengthen their ties to the land further, Articles 22 to 24 of the Draft Declaration contend that indigenous peoples have the right to special measures for the improvement of their economic and social conditions and the right to determine and develop priorities and strategies for exercising their right to development, including programmes through their own institutions.⁷³

Whereas the historical argument for granting rights rests on a subtle understanding of justice and culpability, the second approach, the legalistic approach, argues that the agreements negotiated between indigenous peoples and their invaders carry normative force, if not actual legal force. Tully, for example, contends that the common-law history of treaties and negotiation in North America does provide what may be termed, modifying the Rawlsian, an 'overlapping consensus' between the indigenous and Anglo-American legal conceptions of property and that this history of agreement, perhaps distinguished from specific historical settlements, provides a sound basis for returning land to indigenous groups.⁷⁴

Indeed, colonial powers did sign treaties with 'nations' during the eighteenth and nineteenth centuries, mainly for land rights, and the vestiges of this jurisprudence, it is argued, lives on in the indigenous right and the doctrines of legal pluralism.⁷⁵ In this way, sovereign alterations in contemporary society, although morally appealing in promoting equality, are nevertheless merely recognitions of concomitant sovereignties. However, it is notable that few, if any, of the major indigenous groups, are actually demanding secession as part of their right to self-determination and, hence, fears that justice may be placed too high above order appear unfounded. Accordingly, the 'common law doctrine of aboriginal rights' in recent Canadian jurisprudence refers to the legal rights of indigenous peoples as originally recognised in the custom generated by relations between the indigenous peoples and the incoming French and English settlers from the seventeenth century onwards,

⁷² Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse'

⁷³ Article 22 of the Draft Declaration

⁷⁴ The Rawlsian notion of the 'overlapping consensus' noted in Bowen, 'Should we have a universal concept of 'indigenous peoples' rights?', p. 14

⁷⁵ Colchester, 'Indigenous rights and the collective conscious', p. 2

particularly with regard to the treaty process between the peoples and the Crown.⁷⁶ As a basic constituent of Canadian common law, this doctrine regulates the interplay between Canadian systems of law and government and native land, rights, customary laws and political institutions.⁷⁷ In this manner, it aims to protect diversity and promote justice, thereby establishing a more normatively appealing version of sovereignty, since the Canadian government, under the Hobbesian conception, could feasibly dismiss indigenous claims.

The native customary law discussed here has been recognised in varying degrees from the nineteenth century onwards but only in recent decades has it been fully accepted. The two landmark cases are the *Calder* decision (1971) in Canada and the *Mabo* decision (1992) in Australia, although *Calder* can be overridden by the rights explicated in Canada's Charter of Rights and Freedoms.⁷⁸ The report compiled by the Royal Commission on Aboriginal Peoples in Canada (1996) in line with common law and human rights justifications, advised that indigenous peoples receive land, fishing and linguistic rights but also noted that the evolution of cultures and rights would have to be carefully monitored.⁷⁹

Legalistic justifications are also subject to objections. Firstly, it may be argued that whatever rights were existent disappeared with the imposition of full sovereignty which made no special reservations for the indigenous populations. In short, there are and can be no inherent indigenous rights. Such a rationale was enunciated by the US State Department who, in responding to complaints made by a number of Indian nations, forcefully declared that 'conquest renders the tribes subject to the legislative power of the United States and in substance terminates the external powers of sovereignty of the tribe.'⁸⁰

The exercise of historical sovereignty is, therefore, offered as a reason for moderating contemporary society but such an argument is rejected by Anaya, who contends that this is unlikely to be accepted by the international community and also because it

⁷⁶ Ivison, 'The logic of aboriginal rights', p. 325

⁷⁷ Brian Slattery reported in Ivison, 'The logic of aboriginal rights', p. 325

⁷⁸ Ivison, 'The logic of aboriginal rights', p. 326

⁷⁹ Ivison, 'The logic of aboriginal rights', p. 326

⁸⁰ Wilmer, *The Indigenous Voice in World Politics*, p. 58

'ignores the multiple, overlapping spheres of community, authority and interdependency that actually exist in the human experience.'⁸¹ Also rejected by Anaya are cultural claims for placing the indigenous above the minority and instead it is argued that the crucial point is that indigenous rights are distinguishable by the fact that remedies are needed for past injustice,⁸² a spatio-temporal notion which tallies with the environmental justice discussed in the previous chapter. Thus, the human rights rationale seems the most compelling in awarding rights to indigenous peoples and one which remains within the liberal tradition but, nevertheless, addresses the intellectual objections to which liberalism is prone.

Section Four: Indigenous Rights, Sovereignty and Self-Determination

This section addresses that which is commonly viewed as the most important of all the indigenous rights tabled in the Draft Declaration, namely self-determination. Tied to self-determination are images of nationhood, nationalism and legitimate authority and, hence, this section addresses these from a traditionally 'Western' standpoint, since these contribute heavily to modern conceptions of sovereignty in contemporary international relations. However, it is to be noted that these images do not necessarily correlate with anything within the indigenous political vocabulary. Entangled in this discourse, is a discussion outlining the limits of Westphalian self-determination, which is then followed by a closer examination of indigenous self-determination as contained in the Draft Declaration. Also noted in this passage are state reactions to self-determination.

Nationalism can be viewed as both a reaction against globalisation and also a product of it.⁸³ As global interconnections become more and more prominent, individual groups, nations, and states have become more willing to assert their cultural and national distinctiveness in the face of a grand homogenising trend. This is due, in part, to the fear of cultural imperialism which emerges from the 'systematic penetration and domination of the cultural life by the ruling classes of the West in

⁸¹ S. James Anaya, *Indigenous Peoples in International Law* (New York, OUP, 1996), p. 78

⁸² A theme discussed throughout Anaya, *Indigenous Peoples in International Law*

⁸³ Fred Halliday 'Nationalism' in John Baylis and Steve Smith (Eds.), *The Globalization of World Politics* (Oxford, OUP, 2001), pp. 440-5

order to reorder the values, behavior (sic), institutions and identity of the oppressed peoples to conform with the interests of the imperial classes.'⁸⁴

Nationalism is a normative concept, as it moulds how we do and, indeed, should live our lives whilst simultaneously informing us about the nature of legitimate authority. Beyond justifications in terms of traditional understandings of sovereignty in the Westphalian system, the state system can be seen to represent the interests of separate, individually legitimated nations. Nationalism contains, and perhaps creates, an indivisible sense of community even amongst those who have not even met.⁸⁵ As such, it is a powerful tool in the maintenance of the political life of a state. As a created sentiment, the 'image of a nation is largely the product of dominant elites whose definition of self and society, though virtual, acquires an air of solid reality. Indigenous peoples' claims for the right to self-determination challenges this image, making their request subversive and dangerous to the established order of things.'⁸⁶ Fears of subversion are perhaps exaggerated since, as noted above, few indigenous peoples are requesting statehood in the Westphalian sense, with calls for secession remaining the preserve of those groups, such as the Basque separatists, who operate within the mainstream international system. Moreover, it is clear that any attempt at the partial or total disruption of state sovereignty is fundamentally incompatible with the purposes and principles of the UN Charter, a fact supported by Erica-Irene Daes, a former chairperson of WGIP, who asserted that no state would be created until a state's political system became so exclusive and non-democratic that it no longer could be said to be representing the whole people.⁸⁷ The alien nature of Western political concepts is present in the statement of Matthew Coon-Come, grand chief of the Grand Council of the Crees, which asserts that '[w]e Crees are not 'nationalists'. That concept does not exist in the Cree language. Our tie is not just political, it is also physical. We are part of our lands.'⁸⁸

⁸⁴ James Petras, 'Cultural Imperialism in the Late 20th Century', *Journal of Contemporary Asia*, 23 (1993), pp. 139-148, p. 140

⁸⁵ Benedict Anderson, *Imagined Communities*, (London, Verso, 1983)

⁸⁶ D. Rosengren, 'On 'indigenous' identities: Reflections on a debate', *Anthropology Today*, Vol. 18(3) (2002), p. 25, p. 25

⁸⁷ Erica-Irene Daes' view as noted in Niezen, *Recognizing Indigenism*, p. 130

⁸⁸ Matthew Coon-Come quoted in Niezen, *The Origins of Indigenism*, p. 156

This sense of 'oneness' typifies the indigenous attitude to nationalism and self-determination, in that the organization of the group is not placed at the top of the moral hierarchy since the land, the individual and the community are all part of the same indivisible whole. Indeed, such a notion may actually help to ease the type of environmental dilemma discussed in the previous chapter, for whereas the history of Western philosophy emphasises man above all else, the indigenous view is more acutely aware of the manner in which man is bound in his environment, rather than merely having an economically-based connection with it. The limitations inherent in Westphalian sovereignty with regard to indigenous rights exist because it regards identity, culture and tradition as valuable only if they help to strengthen national debates and provide a pool of loyal labour for defensive, military and economic purposes.⁸⁹ This suggests that sovereignty is constrained by capabilities and security issues, which, traditionally, for indigenous peoples, are not of paramount importance.

The norms of indigenous self-determination are non-discrimination, cultural integrity, control over land and resources, social welfare and development. The most powerful call for these is found in Article 3 of the Draft Declaration which asserts that, 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'⁹⁰ The text of this article is the same as is found in Article 1 of the International Covenant on Civil and Political Rights and also the Covenant on Economic, Social and Political Rights but with 'all peoples' being replaced with 'indigenous peoples.'

The term 'peoples' is one fraught with controversy as can be viewed in the fact that Australia, Belgium, Canada, Denmark, France, Luxembourg, the Netherlands, New Zealand, Sweden and Turkey all voted against the two International Covenants based upon the ambiguity of the term which implicitly awards greater moral status to internal nations seeking to become a state. The problematic nature of 'peoples' can also be seen in the construction of the indigenous rights regime where discussions were marked by an obstinacy on the part of states and indigenous delegations as to

⁸⁹ Oliver P. Richmond, 'States of sovereignty, sovereign states, and ethnic claims for international status', *Review of International Studies*, Vol. 28 (2002), pp. 381-412, p. 389

⁹⁰ Article 3 of the Draft Declaration

whether to refer to the groups as 'peoples', 'populations' or 'persons' especially during the framing of the Draft Declaration. During these discussions, the UN went beyond its usual parameters for participation by opening its sessions to all interested parties, evoking a sense of Linklater's dialogic community in order to promote greater levels of justice both outside of and within the traditional state community. By encouraging participation in the preparation of the Declaration, the UN also ensured that representation was more likely to be universal which, as with the NGOs at the Rome Conference, ensured a greater level of legitimacy.

National reactions to the calls for self-determination, although generally enthusiastic, present a plethora of interpretations. The Canadian position, for example, is that self-determination is now seen by many as a right which can continue to be enacted in a functioning democracy in which citizens participate in the political system and have the opportunity to have input in the political processes which affect them.⁹¹ A brief examination of this viewpoint seems to suggest that, far from the collective right of self-determination favoured by indigenous peoples, what is being offered is the standard account of political participation in a liberal democratic state. Norway, home to the Sami, was more forthcoming in its response stating that, 'the right to self-determination includes the rights of indigenous peoples to participate at all levels of decision-making in legislative and administrative matters and the maintenance and development of their political and economic systems.'⁹² The US position was one which reinforced the importance of the state but its suggested text, which emphasised more fully the role of the state, was ultimately rejected.⁹³ Similarly, Latin and South American states maintained the importance of the state over the community, enacting repressive policies in Brazil, Argentina and Peru which all deny self-determination to their peoples. The repressive nature of the South American attitude, however, may be symptomatic of their levels of development and the North/South divide in which economics is placed on a pedestal above justice.⁹⁴

⁹¹ The statement of Canada given to the UN Commission for Human Rights in 1999 as quoted in Caroline E. Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples', *European Journal of International Law*, Vol. 12(1) (2001), pp. 141-57, p. 151

⁹² Quoted in Foster, 'Articulating Self-determination in the Draft Declaration...', p. 151

⁹³ Foster, 'Articulating Self-determination in the Draft Declaration...', p. 148

⁹⁴ Banton, 'International norms and Latin American states' policies on indigenous peoples'

The normative challenge for sovereignty is to reconcile indigenous self-determination with the state's propensity to maximise its economic capacity and potential. The requests of indigenous peoples, if granted, would entail a rethinking of the ways in which economic activities are organized within states, which could, it is argued, pose a direct challenge to current understanding of the state.⁹⁵ The overlapping loci of authority can be clearly seen in the potential discrepancy between Article 32 which asserts the right of the indigenous person to freely choose his or her own rights of citizenship without disbaring him or her from enjoying full citizenship rights of the nation⁹⁶ and Article 35 which maintains that indigenous peoples, in particular those divided by national borders, 'have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political and social purposes'⁹⁷ with other people across borders. This undermines traditional Westphalian sovereignty with its discrete, geographically-defined political units, and thus acceptance of these terms may ultimately help to weaken the state's primacy in international relations. It is, therefore, perhaps no surprise that, at the time of writing, the Draft Declaration is yet to be adopted, although the dialogue between NGOs, the UN and states continues in earnest with individual governments acting to preserve and promote indigenous justice.

Conclusion

This chapter has discussed the indigenous rights movement, and the manner in which its normative rationale questions the moral legitimacy of the organising principle of the sovereign state and how sovereignty may be modified in order to embrace its demands.

The first argument for indigenous rights rests upon communitarian justice, which maintains that the moral well-being of a community ranks higher in importance than do the interests of the individual within the society. Dominant conceptions of sovereignty note the indivisibility of the individual and the state as is evinced by the work of Hobbes, Locke and Bodin as discussed in Chapter One but, it is clear that

⁹⁵ David Maybury-Lewis's thought noted in Niezen, 'Recognizing Indigenism', p. 130

⁹⁶ Article 32 of the Draft Declaration

⁹⁷ Article 35 of the Draft Declaration

sub-state communities, including indigenous peoples, are moral units which bear attention, understanding and measures which are sensitive to the limitations on the grand, unifying logic of the sovereign state. Thus, culturally-sensitive justice for the community is a viable concept and goal for a morally-receptive form of sovereignty and so elements like cultural and linguistic rights are rightfully embedded in international conventions. Communitarianism tends to exclude those outside the community and dismisses the importance of the individual and so what may therefore be propounded is the liberal synthesis of the communitarian position which results in what may be termed 'justice for communities' which embraces diversity whilst simultaneously being underpinned by a basic moral foundation which regards the individual as being of paramount importance. This approach, which is far less homogenising than many expansive and austere cosmopolitan standpoints, is one which is both practicable and morally appealing, providing the 'thin cosmopolitanism' which Linklater espouses. To this end, restrictions placed upon the state not to damage the community are reconciled by an acceptance that illiberal restrictions upon a community member are also intolerable. However, it may also be seen that the indigenous rights regime cannot stand on this reasoning alone and that the liberal human rights regime can provide a greater measure of justice for those who have historically been subjugated and dispossessed.

The second, and more persuasive, of the arguments proposed is based upon a human rights rationale which centres around the notion that equality can only be achieved where amends are made for actions which have, in the past, led to the emergence of inequalities, dispossession and dominance by an outside power upon a previously-existing community which had enjoyed political autonomy. The basis of human rights in this context owes a great deal to the instrumental appreciation of the topic, in which rights are viewed not as ends in themselves, but rather as mechanisms to guarantee particular moral requirements. As with environmental problems, the justice is spatio-temporal, where existing ruling elites and systems recognise that, at an earlier point in time, alien political cultures and domineering politics had been immorally, if not illegally, imposed. For sovereignty to recognise the moral force and validity of these arguments is to demonstrate the normative evolution of the concept. In a similar vein, historical agreements between the invaders and invaded also contain normative force as do the historical arguments of prior occupation though, as noted

above, this line of reasoning is susceptible to the charges made against it by, amongst others, Kuper.

The working definition of an indigenous people given earlier in this chapter embraces the 'saltwater thesis', that is to say that only sea borne invasions can lead to post facto indigenous rights, rendering the problem one limited to European invasions of the 'new world.' Discrepancies between the positions taken by the three most prominent states involved in indigenous rights, the United States, Canada, and Australia reveal disparities and concord on the subject with Canada remaining the most proactive in fulfilling the requests of its indigenous populations and Australia the least receptive. However, all three states have, unsurprisingly, been unwilling to accept the notion of self-determination, although acceptance of demands may soon be forthcoming if all recognise the limitations of the term in the vocabulary of the indigenous peoples themselves. Secession, for the vast majority of indigenous groups, is not a political aim, representing, as it does, a recognition of Western political notions of self and sovereignty which simply do not exist in indigenous cultures. Whereas demands for Westphalian sovereignty, including requests issued by those who favour the communitarian over cosmopolitan, stress dominion over and ownership of land, resources and so forth, the indigenous conception emphasises the manner in which people are merely part and parcel of the land itself.

In conclusion, the acceptance of indigenous rights by the sovereign state rests upon dynamics of justice for the community built upon the foundations of a liberal bedrock of rights, a willingness on the part of 'new' states to promote a form of justice which is sensitive to past inequality, and lastly a clearer comprehension that indigenous peoples' rights are compatible with the current international system, if only by dint of the fact that the indigenous peoples themselves operate outside of that system.

Conclusion

Sovereignty in contemporary international relations is facing a number of key challenges. Traditional conceptions have viewed it as a moral good, an important and immutable anchor of the international life, which, by its very existence, validates the actions and policies of each individual state. However, the Hobbesian state with unlimited internal jurisdiction and no right to question the policies of its neighbours is no longer tenable as normative challenges based on human rights, trans-border obligations and the need to recognise diversity within states borders begin to question sovereignty's moral worth. These three challenges are reiterated below, alongside an appreciation of the non-governmental activity which pervades all three. The notion of spatio-temporal justice, an important and new concept which has begun to guide contemporary conduct is also included.

The traditional conception of sovereignty, the Westphalian in Krasner's examination, centres empirically on a fixed territory, population and government when combined with constitutional separateness. Its normative worth, according to Jackson who terms it the *grundnorm*, rests on its ability to provide a basis on which other values can be produced, most notably, order. However, this essay has sought to demonstrate that sovereignty as presently conceived is too narrow theoretically. We now recognise and must address conceptions of the good and of the moral worth of communities both outside of and within the state. The political imagination may be expanded so that sovereign states become increasingly aware of their responsibilities as well as their rights.

Sovereignty, as a legitimate international concept, is becoming contingent. The legitimacy of a state in the eyes of the international community is absolutely fundamental to the international system as is demonstrated by the manner in which the Bantustans of Apartheid South Africa were rejected as potential states and also why states such as Haiti have to demonstrate their moral worth in order to remain valid. Sovereignty is becoming increasingly contingent upon human rights, the adoption of which is becoming the shared standard of civilization for full membership of the international community. Though moral judgements have played an important role since the end of the Second World War, they occupied a diminished role during

the course of the Cold War and only in the last fifteen years have they returned to the mainstream international political life, questioning the morality of the sovereign state.

The cosmopolitan challenge of promoting individual responsibilities and rights constitutes an important evolution in the life of the sovereign state. The Kantian categorical imperative and the tide of Enlightenment philosophy which present the individual as a moral end have impacted massively upon international relations by way of the human rights regime whose crowning glory is the ICC. Human rights question, in Kant's terms, the majesty of the state as a constituent of an international system typified by lawless savages clinging to their freedom, unaware that the moral potential of mankind is being wasted, simply by dint of sovereign supremacy. Accordingly, sovereignty's ability to legitimise governments who treat citizens as they please is no longer defensible as evinced by the ICC's very existence and the tribunals for the former Yugoslavia and Rwanda which seem to indicate that some crimes transcend the individual and are directed, instead, against humanity.

The ICC represents the recognition of the dignity of the individual, the limitations on the state's exercise of power and, according to Rodley, the existence of a higher positive law.¹ In this way, sovereignty, pre-eminent in international relations, must evolve in order to mirror the normative requirements developed by the international community if it is to be regarded as, in any way, legitimate. Thus, the prospects for universal jurisdiction, which may lead to further developments in international criminal law, have increased markedly in recent years. Accompanying this is the hope that governments, NGOs and so forth will be able to modify sovereignty in order to explore its inherent normative possibilities in order that a cosmopolitan or to use Parekh's less politically contentious term, globally-oriented, outlook develops, superseding mere sovereign co-existence. Indeed, Tesson's appreciation of the Kantian *foedus pacificum* seems to tally with the aspirations of the ICC and, potentially at least, this institution may lead to a positive moral modification of sovereignty as presently understood. Linklater's dialogic community, which avoids the pitfalls of Kantian transcendental universalism, favouring instead the Hegelian approach, also appears to present a promising methodology for extending moral

¹ Rodley in Broomhall, *International Justice and the International Criminal Court*, p. 42

concern, but only if the self-fulfilling prophecy of the Hobbesian war of all against all is re-appraised by policymakers. Linklater's hopes for a world in which sovereignty, citizenship and nationality are not welded together, thus, remains only a vision but, in this essay at least, there are signs that the cosmopolitan outlook is entrenching itself in the wider political consciousness.

Further to the ICC's protection of the rights of the world community, the right to a clean and hospitable environment has also become a key issue in recent years and one which has been championed by a vast number of NGOs. The Rawlsian-inspired right to a world in which the enjoyment of 'liberal' rights is possible has dominated and driven the epistemic community surrounding the climate change regime, and indeed, the lack of progress in tackling the problem may be seen to be directly related to disagreements as to what constitutes acceptable levels of greenhouse gases. Nevertheless, the right to a hospitable environment is one which may, in the near future, lead to limitations on a sovereign state's ability to industrialise and use its resources as it sees fit.

A second cosmopolitan challenge emanates from the view that each sovereign state ought to be aware of its trans-border obligations, thereby disrupting the self/other dichotomy which currently characterises sovereignty. International relations, Pogge argues, operates as a balance of power and excludes outsiders. Thus, politicians are left with no true *moral* reason for taking neighbours and those on other continents into account. Pogge therefore suggests the construction of epistemic communities with the ability to transcend the state in order to provide for global well-being. The creation of international regimes, sets of implicit or explicit principles, norms, rules and decision-making procedures around which expectations converge, are becoming increasingly important and offer a mode of alleviating the alienation and exclusion of outsiders which occurs under the anarchic precepts of the international system. Trans-border obligations and the recognition of interdependence have been particularly evident with regard to environmental dilemmas. The notion that the Earth is one but the world is not has become increasingly prominent, catalysed by events, news stories and reports which have forced leaders to explore possibilities which may limit their own power but which will offer a boon for those in other areas of the world. The limitation of the worth of the individual state in environmental matters has led to a

slight maturation in the way in which individuals problems are handled. Nevertheless, game theoretic, short-term financial considerations and lack of scientific certainty have, too often, prevailed, demonstrating the power of territorially limited notions of responsibility embedded in Westphalian sovereignty.

Anthropocentrism, both strong and weak, has been the dominant position with regard to the environment and, consequently, instrumental and financial calculations have halted most attempts to deal with dilemmas at the international level. One of the greatest successes of an environmental regime, the Montreal Protocol on the use of CFCs, relied on the fact that hydrocarbons, CFCs' replacements, were not only less polluting but also significantly cheaper. Had this not been the case then the ozone regime, it may be argued, may not have been so successful. Financial considerations may also be noted in the early stages of the climate change regime when, at the Rio Summit in 1992, those who proffered ideas of limiting the use of fossil fuels were met by a wall of intransigence by oil exporters and importers, even to the extent that some states aimed to class petroleum as a non-polluting resource.² This kind of attitude typifies the unwillingness of states to curb their economic power for the greater good and it may therefore be seen that any significant normative improvement in environmental matters is unlikely to occur whilst the Hobbesian war rages financially. Economic considerations also dent a state's willingness to accept diversity within its own borders as can be seen in the Canadian government's plan to build a nickel mine in an area which is sacred to the Innu people and which would have also disrupted their fishing and hunting activities.

A further normative improvement may lie in sovereignty's ability to reconcile its totalising tendencies with the acknowledgment of diversity within cosmopolitanism. As has been argued, sub-state communities are worthy of moral consideration since ties and identities are formed within these communities rather than within a state as a single entity. For sovereignty to become more morally appealing it ought to recognise the role of diversity within its boundaries and abandon assimilationist tendencies which have led, in the case of indigenous peoples, to policies of subjugation and repression. With regard to indigenous peoples, a number of logics have been

² Wapner, 'Reorienting State Sovereignty', p. 279-80

provided which each rationalize why specialised rights are justifiable but perhaps the most persuasive are the liberal, rather than communitarian, arguments. The liberal position contends that rights to self-determination, land and language are morally acceptable since they make amends for previous injustices. Thus, Kymlicka, for example, asserts that those who, in general, support the human rights regime, ought to accept diversity by endorsing external protections but, concurrently, should reject internal restrictions which limit the rights of group members to act as moral ends with their own aspiration and will, above and beyond the community. A more liberal and expansive sovereignty can, it is argued, allow groups such as indigenous peoples to hold rights as long as these are protections rather than internal restrictions. In this way, cultures, which are not considered a primary good, can be guarded, for, as Dworkin argues, we have a duty to protect the cultures in which we live and develop.

Indigenous rights have been the most divisive of the three areas for normative improvement discussed in this essay. Those who support a robust set of human rights argue that, essentially, these rights are illiberal and are based purely upon descent and accidents of birth and that separate but equal is, echoing the US civil rights legislation, inherently unequal. However, the cosmopolitan may be able to argue that the community *per se* is not what is being protected but rather that, as mentioned above, such rights are enacted in order to secure equality where there previously existed relationships of dominance. Furthermore, these rights are underpinned by a cosmopolitan logic which provides a bedrock of fundamental rights which all people must enjoy, ruling out illiberal practices such as female genital mutilation, however culturally legitimated they may be. Thus, cosmopolitan sovereignty must be able to reconcile and understand the importance of culture rather than insisting on an austere and almost uncultured form of liberalism, for it has been argued that cosmopolitans, though enlightened, are moral drifters who move through life without significant attachments.

Alfred notes that elements of indigenous rights are not normative improvements on any vast scale since they are simply the re-granting of previously existing rights.³ Nevertheless, a state's willingness to cede authority over important rights based upon

³ A theme discussed in Alfred, 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse'

injustices which occurred centuries before does demonstrate that a new variant of sovereignty is emerging and that this new form is culturally-sensitive, even to the point of being willing to promote organisations which, were one a strict realist, undermine the nation state as previously drawn, bringing together groups of people scattered over various borders.

Of the various types of justice documented in this essay perhaps the most impressive is spatio-temporal justice, a category which applies to the case studies of environmental problems and indigenous rights issues, though not, owing to the problems of retroactivity, to the human rights as relating to the ICC. In the case of indigenous peoples, the rights which have been accrued are, if one were only spatial, fundamentally illiberal. If these groups were stripped of their history and culture then liberal critics would have strong grounds for countering them. However, these rights are not only spatial but also temporal, recognising, as they do, what has happened in the past. Thus, rights which guarantee exclusive access to fishing and hunting grounds are granted on the basis of a history of subjugation and domination. These historical circumstances having produced inequalities and disparities are, therefore, justifiably redressed by a modern form of sovereignty sensitive to actions which occurred centuries previously, recognising the immorality, if not the illegality, of ancestors' actions. Spatio-temporal justice can also be seen with regard to environmental problems where, in the framing of the Kyoto Protocol, responsibilities are accrued as the result of industrial activities which have occurred in the past as well as the present, as can be seen in the 'common but differentiated' approach. Furthermore, spatio-temporal justice can also become an issue with regard to future generations for if Rawls' veil of ignorance is employed in such a way as to be devoid of temporality then the rights of future generations must be considered.

In each of the case studies considered, the role of NGOs or epistemic communities has been considerable and important. NGOs, a constituent aspect of 'global civil society', are increasingly coming to prominence as bodies capable of creating agendas and maintaining legitimate pressure upon sovereign states over various issues in order to develop networks and construct norms. Linklater's dialogic community may be viewed in epistemic communities as bodies and networks which promote international and inter-governmental dialogue in order to widen circles of concern. In terms of the

Rome Conference, the Coalition for an International Criminal Court (CICC) was able to direct delegates, offering legal objections and suggestions for consideration. Moreover, since NGOs from virtually every state attended, CICC acquired an air of legitimacy, representing humanity's interests, offering ways to improve sovereignty for the benefit of the global community. Similarly, the negotiations surrounding the UN's Draft Declaration on the Rights of Indigenous Peoples included at every level various bodies, helping to constitute an indigenous peoples' epistemic community, which helped to validate the individual demands of each group.

Epistemic communities are vitally important with regard to environmental problems as suppliers of research, costs, potential problems and also solutions, but are, perhaps, more fallible than their CICC counterparts owing to the problems of asserting, beyond doubt, scientific fact. Whereas CICC pricked the moral conscience of mankind, the epistemic community surrounding the climate change regime had to prove that damage was serious, lasting and anthropogenic and, as yet, has been unable to do so, meaning that governments have been relatively inactive. However, this is not to say that scientific epistemic communities are powerless, for if consensus was reached by a majority of legitimate bodies, then sovereign intransigence would become difficult, if not impossible.

As discussed in the introduction, this essay aimed to address not only whether alterations to sovereignty were morally desirable but also whether they were likely to happen. Each of these case studies has demonstrated that states hold a range of views on a range of topics. The most visible and potentially most important in terms of practical politics is the Euro-Atlantic split, with theorists, such as Daadler and Kagan, arguing that the two are heading for divorce.⁴ Keohane argues that Europeans are fundamentally more cosmopolitan and that they are more prepared to indulge in compromise and negotiation whereas the United States is far more likely to be robust in its attitude, rejecting the international in favour of the domestic.⁵ This sentiment can be seen in the negotiations over the ICC and also over climate change where the US sought to maximise its voluntarism and its political supremacy. US attitudes are

⁴ As in Daadler, 'Are the United States and Europe Heading for Divorce?' and Keohane, 'Ironies of Sovereignty'

⁵ As discussed in, for example, Marc Weller, 'Undoing the global constitution'

rooted in internationalism which views rules as being of use only if they guarantee order. The US attitude also encourages the primacy of power and facts in international relations, rather than their European counterparts who seem more intent on providing justice and adhering to normative agendas.⁶ To what extent this divide will grow is debatable, resting, arguably, on the economic performance of both. The North/South divide can also be seen with regard to environmental matters with many countries from the South viewing the Rio negotiations, for example, as an economic conference rather than an environmental one. Here, different priorities may clearly be viewed and it is wholly unsurprising that the developing world is focused more on continuing their development rather than maintaining an environmentally-sound status quo.

In conclusion, sovereignty is a concept which has come under a great deal of scrutiny in recent decades. No longer can it claim to be an unconstrained moral good. The Hobbesian fiction by which a state could do as it pleased as long as it protected its citizens from invasion has been shown to be insufficient in contemporary international relations. This essay has investigated three challenges to sovereignty in order to demonstrate the manner and extent to which sovereignty is being eroded, if not actively relinquished, for a greater moral good. The cosmopolitan notion of individual responsibility has been endorsed and validated by all but a handful of states, indicating a willingness on the part of most to accept that sovereignty is not and cannot be a defence against the violation of fundamental rights. With regard to environmental matters, discussions have illustrated that states are willing to cede some authority for the good of others, but, currently, financial considerations dominate and there has been relative inaction on the part of all concerned. Indigenous rights have demonstrated that even where the sovereignty of a group is legally null and void, nevertheless moral culpability continues.

Many theorists argue that sovereignty is an outmoded concept which will give way under the stress of globalisation but James and Jackson, for example, maintain that the normative modification of sovereignty in line with cosmopolitanism perhaps, will serve as a method for reenergising and reinvigorating the state in order that it remains

⁶ see Keohane in particular

an anchor for the international system. Sovereignty is reacting to new dilemmas and agendas in international relations, adapting its remit to provide greater levels of justice and accountability for individuals and groups within the global community. The breadth of the literature on the topic indicates that there exists a groundswell of opinion, both academic and otherwise, which is lobbying for an evolution of sovereignty in order that it is able to provide greater moral assurances to each member of the cosmopolis. Although the international system remains fundamentally tied to internationalism, which views its prime normative directive as being the maintenance of order, nevertheless, cosmopolitan moral improvements are clearly visible in all elements of international life and there is a significant amount of evidence to argue that this process will continue in the following few decades.

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