



Sovereignty in Fragments

The Past, Present and Future
of a Contested Concept

EDITED BY
Hent Kalmo and
Quentin Skinner

CAMBRIDGE

Sovereignty in Fragments

The political make-up of the contemporary world changes with such rapidity that few attempts have been made to consider with adequate care the nature and value of the concept of sovereignty. What exactly is meant when one speaks about the acquisition, preservation, infringement or loss of sovereignty? This book revisits the assumptions underlying the applications of this fundamental category, as well as studying the political discourses in which it has been embedded. Bringing together historians, constitutional lawyers, political philosophers and experts in international relations, *Sovereignty in Fragments* seeks to dispel the illusion that there is a unitary concept of sovereignty of which one could offer a clear definition. This book will appeal to scholars and advanced students of international relations, international law and the history of political thought.

HENT KALMO is a Ph.D. student in the Faculty of Law of the University Paris X-Nanterre and an LLM student at Harvard Law School.

QUENTIN SKINNER is Barber Beaumont Professor of the Humanities, Department of History, Queen Mary, University of London.

Sovereignty in Fragments

*The Past, Present and Future of a
Contested Concept*

Edited by

Hent Kalmo

and

Quentin Skinner



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press,
New York

www.cambridge.org

Information on this title: www.cambridge.org/9781107000049

© Cambridge University Press 2010

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2010

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Sovereignty in fragments : the past, present and future of a contested
concept / [edited by] Hent Kalmo, Quentin Skinner.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-107-00004-9 (hardback)

1. Sovereignty. I. Kalmo, Hent. II. Skinner, Quentin. III. Title.

JC327.S6445 2010

320.15—dc22

2010033024

ISBN 978-1-107-00004-9 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to in
this publication, and does not guarantee that any content on such websites is,
or will remain, accurate or appropriate.

Contents

<i>Notes on contributors</i>	page vii
<i>Acknowledgements</i>	viii
Introduction: a concept in fragments HENT KALMO AND QUENTIN SKINNER	1
1 The sovereign state: a genealogy QUENTIN SKINNER	26
2 The apparition of sovereignty DENIS BARANGER	47
3 The Westphalian myth and the idea of external sovereignty PÄRTEL PIIRIMÄE	64
4 Double binds: sovereignty and the just war tradition JENS BARTELSON	81
5 The durability of organized hypocrisy STEPHEN D. KRASNER	96
6 A matter of fact? The many faces of sovereignty HENT KALMO	114
7 The survival of sovereignty MICHEL TROPER	132
8 Sovereignty and after NEIL MACCORMICK	151
9 Prolegomena to the post-sovereign <i>Rechtsstaat</i> PATRICK PRAET	169
10 Sovereignty beyond the state JÜRI LIPPING	186

vi	Contents	
11	Sovereignty between government, exception and governance ANTONIO NEGRI	205
12	Conclusion: vocabularies of sovereignty – powers of a paradox MARTTI KOSKENNIEMI	222
	<i>Bibliography</i>	243
	<i>Index</i>	264

Contributors

DENIS BARANGER is Professor of Public Law at the University Panthéon-Assas (Paris II).

JENS BARTELSON is Professor of Political Science at Lund University.

HENT KALMO is a PhD student in the Faculty of Law of the University of Paris X-Nanterre and an LLM student at Harvard Law School.

MARTTI KOSKENNIEMI is Academy Professor at the University of Helsinki.

STEPHEN D. KRASNER is the Graham H. Stuart Professor of International Relations at Stanford University.

JÜRI LIPPING is a lecturer in the Institute of Government and Politics at the University of Tartu.

NEIL MACCORMICK was Regius Professor of Public Law and the Law of Nature and Nations at Edinburgh University.

ANTONIO NEGRI is an independent researcher and writer.

PÄRTEL PIIRIMÄE is Associate Professor in History at the University of Tartu.

PATRICK PRAET is a Belgian attorney-at-law and a former lecturer in the Eurofaculty at the University of Tartu.

QUENTIN SKINNER is the Barber Beaumont Professor of the Humanities in the Department of History at Queen Mary, University of London.

MICHEL TROPER is Professor Emeritus of Public Law at the University Paris X-Nanterre.

Acknowledgements

The idea for this book originated in a conference held at the University of Tartu in September 2007. We are deeply indebted to all those who delivered papers on that highly successful occasion, and also to our enthusiastic and very helpful audience. Warmest thanks also to the University of Tartu for providing us with splendid facilities, to Annika Aas and Merike Ristikivi for tireless assistance in organizing the conference, and above all to Professor Marju Luts-Sootak for guiding the preparations at every stage.

Since that time we have greatly revised, reshaped and extended our initial coverage of our theme. We should like to express our appreciation to all our contributors for their efficiency in meeting their deadlines, and for their patience in undertaking the numerous revisions that were needed to turn their chapters into a book. We are particularly grateful to those who agreed substantially to rewrite their original papers, and to those who contributed the additional chapters we commissioned after the conference.

We owe a very special word of thanks to the staff of Cambridge University Press. Richard Fisher and John Haslam both gave us generous encouragement from the outset, and John Haslam supervised the process of production with unfailing efficiency and helpfulness. The Press's two anonymous referees provided a large number of valuable suggestions, all of which we gratefully adopted. We should also like to express our thanks to Louisa Parks for translating Antonio Negri's chapter from Italian, to Carrie Parkinson for help and advice at every stage, and to Emma Wildsmith for acting as our subeditor, in which capacity she brought to bear a great deal of tact as well as a wonderfully vigilant eye.

The division of editorial labour between us has been as follows. Quentin Skinner subedited the chapters before submission and conducted negotiations with the Press. Hent Kalmo helped to organize the Tartu conference, corresponded with our contributors about their chapters, created the bibliography and put together the final version of

our text. He wishes to offer warm thanks to the European Commission for the award of a Marie Curie Doctoral Fellowship; to Professor Marju Luts-Sootak and Professor Michel Troper for support and encouragement over several years; to Jüri Lipping for indispensable advice about the organization of the conference; to Märt Kalmo for help with information technology; and to Maria Talihärm for being her wonderful self.

Introduction: a concept in fragments

Hent Kalmo and Quentin Skinner

I

The status of sovereignty as a highly ambiguous concept is well established. Pointing out, or deploring, the ambiguity of the idea has itself become a recurring motif in the literature on sovereignty. As the legal theorist and international lawyer Alf Ross put it, ‘there is hardly any domain in which the obscurity and confusion are as great as here’.¹ The concept of sovereignty is often seen as a downright obstacle to fruitful conceptual analysis, carried over from its proper setting in history to ‘plague and befog contemporary thought’.² It seems to bring with it so many hidden meanings and connotations of absolutist forms of government that a more moderate age, committed to international law and increasingly enmeshed in the web of global interdependence, simply has no use for it. So contested is the concept that, rather than pursuing the contestation, many political theorists think we should give up so protean a notion. Granting that the debate on the relevance of sovereignty frustratingly oscillates between claims that it will either continue to exist or that it is about to disappear, forgetting it altogether, and thereby escaping this seemingly endless argument, can easily appear as the most urgent task for political theory. ‘In order to think in a consistent manner in political philosophy’, wrote Jacques Maritain between the two World Wars, ‘we have to discard the concept of sovereignty’.³ Almost a century ago, when these words were written, such recommendations ran against the tide and had an air of Utopia about them. But today, with the flow of investments, information, crime, pollution and entertainment across state borders reaching levels that some theorists see as nothing short of torrential, the tide seems to have turned. The claim that sovereignty is long overdue to be given up can now, in the view of many, be made to rest on firm descriptive ground by pointing to its ‘obsolescence’. And good riddance, too. Some authors even perceive

¹ Ross 1947, p. 34. ² Ward 1928, p. 178. ³ Maritain 1969, p. 61.

an enormous emancipatory potential in the demise of a concept that is not only fatally riddled by vicious ambivalence, but in reality does nothing but mask the crudely egoistical motives of nation-states. 'For at the "end" of sovereignty, and the emaciated legalism which it has sought to legitimize for much of the past three centuries, lies the hope of a resurrected sense of justice and humanity'.⁴

Unfortunately or not, such liberating calls 'to ring finally the knell of sovereignty'⁵ have not been heeded. Although a whole vocabulary of evasion has developed, composed of numerous periphrases and adjectives attached to the term sovereignty to re-qualify it for post-modern times, by this very evasion the endeavour has (somewhat paradoxically, but no less inevitably) been destined to remain indebted to the original idea. Regular waves of criticism have, if anything, conspired to keep the concept of sovereignty at the centre of theoretical debates. It is still with us, to the point of obsession for all brands of political philosophy, however discordant their theoretical interests in other respects. Indeed, the omnipresence of the term can perhaps go a long way to explaining its notoriously slippery character. As Jens Bartelson has written, sovereignty is a 'sponge-concept' whose very ambiguity is conditioned by its centrality.⁶ The gist of this argument is easy to grasp. If sovereignty is made to accommodate the length and breadth of political theory and practice, how could it ever be unequivocal? Pinning it down one way or another turns out to be itself a politically contestable choice. Getting rid of it, on the other hand, would amount to renouncing politics altogether. 'Sovereignty is merely a name for political activity', wrote the philosopher and historian R.G. Collingwood, 'and those who would banish sovereignty as an outworn fiction are really only trying to shirk the whole problem of politics'.⁷

Not that attempts to wrap up the idea of sovereignty in a short sentence have been lacking. On the contrary, innumerable definitions have been put forward over the centuries. F.H. Hinsley, for example, has influentially written that 'the term sovereignty originally and for a long time expressed the idea that there is a final and absolute authority in the political community'.⁸ Although this is the kind of definition that is still likely to command the widest approval, many find it outmoded in an era of ever-growing fragmentation that has engendered limits to even the most absolute of authorities. Taking note of these developments, James Tully has attempted to model a concept of sovereignty that accords with

⁴ Ward 2003, p. 2112. ⁵ Leibholz 1965, p. 234.

⁶ Bartelson 1995a, p. 237. ⁷ Collingwood 1989, p. 106.

⁸ Hinsley 1986, p. 1.

the ‘overlapping and interdependent terrain’ of contemporary constitutionalism. ‘Sovereignty in this non-absolute sense means the authority of a culturally diverse people or association of peoples to govern themselves by their own laws and ways free from external subordination’.⁹ Both of the above definitions, however, hide rather than define away disagreement. In a way that can seem frustrating, all definitions of sovereignty inevitably turn out, depending on one’s point of view, to be either over- or under-inclusive. This is what long ago provoked the despair of G.C. Lewis who wrote in his *Remarks on the Use and Abuse of Some Political Terms* that:

the strict and scientific meaning of sovereignty appears to be so well ascertained, and to admit of so little doubt, that political writers might have been expected to agree on this point, if they agreed on no other. Nevertheless, explanations of sovereignty have been proposed which sin, both in excess and defect, by including what ought to be excluded, and excluding what ought to be included.¹⁰

Things have not changed. Tully, for example, thinks that ‘states’ and ‘nations’ can today be considered sovereign only when these views come with an implicit proviso ‘that the exercise of political power in them has the consent of the people’.¹¹ Others would certainly wish to add different provisos, qualifications, distinctions and caveats. Therefore, once we expand any given definition, spelling out its implications and amplifying its meaning within various political theories, what first seemed like convergence explodes into an irreconcilable disagreement. Widely accepted definitions of sovereignty thus have the character of what Cass Sunstein has called ‘incompletely theorized agreements’ – people who accept the definition need not agree on what it entails in particular cases.¹²

To start with, what is the nature of the authority invoked in the name of sovereignty? Is it legal or political in nature? No agreement is forthcoming on this crucial point. Some have thought that ‘while it belongs to the field of politics, sovereignty is properly, and can only be, a legal conception’.¹³ Others have insisted that ‘sovereignty is essentially a political and not a legal concept’.¹⁴ According to still another view ‘it is part of the very concept of sovereignty itself to hold together that sovereignty is political but also outside politics’.¹⁵ Naming ‘the mystical foundation of authority’ or the liminal sphere of indistinction between might and right, sovereignty appears as the very guarantor of the unstable union of politics and law – the afterlife of the original

⁹ Tully 1995, p. 195. ¹⁰ Lewis 1898, p. 48. ¹¹ Tully 1995, p. 194.

¹² Sunstein 1996, p. 35. ¹³ Middleton 1952, p. 136. ¹⁴ Leibholz 1965, p. 217.

¹⁵ Prokhovnik 2007, p. 155.

coup de droit that grounds every legal order. Not only that, but ‘the distinction between legal and political sovereignty is political in being in principle contestable’.¹⁶ Giving a more general twist to these observations, Martti Koskenniemi’s book *From Apology to Utopia* has offered an analysis of how sovereignty is necessarily torn between what he calls the ‘legal approach’ and the ‘pure fact approach’. The first perspective seeks to bring sovereignty under the umbrella of international law as a higher normative code that has the mission of taming states’ subjective politics. The concept is here equated with the set of rights and duties granted to states, similar to the limited autonomy of sub-state bodies. This is sovereignty within the law. The second view conceives of sovereignty as being external to international law and a means to fulfil the inherent, pre-legal liberty of states. What causes sovereignty to remain contested is that a choice between these two positions cannot be made. Koskenniemi claims that it is in the very nature of the sovereignty discourse that ‘arguments will arrange themselves so as to manifest the opposition between the legal and the pure fact views. Because a preference cannot be made, however, arguments have to proceed so as to make the initial opposition disappear’.¹⁷ In his contribution to the present volume, Koskenniemi also argues that, although much of the literature on sovereignty claims a distinction between the ‘political’ and ‘legal’ uses of the notion, there are no such different uses but that, on the contrary, the mutability of sovereignty will explain why any attempt to distinguish between ‘politics’ and ‘law’ will ultimately be futile.

These problems, according to Koskenniemi, suggest a need to rethink the history of sovereignty speech and who should be identified as its native speakers today. This is what the present volume aims to offer. The rapidity with which the political constellation of the contemporary world changes is such that there have been few occasions for a careful consideration of the nature and descriptive usefulness of the concept of sovereignty. What exactly is meant when one speaks about the acquisition, preservation, infringement or loss of sovereignty? What does the specificity of sovereignty as an argumentative claim consist of? Who can today invoke it plausibly? Although Stakhanovite efforts have been made in recent years to bring about some conceptual clarity, there still is a ‘disconcerting uncertainty about what sovereignty is, where it is to be found, where it came from in the first place, and what is happening to it now’.¹⁸ This volume is guided by the idea that all these questions belong together. Answering the question as to what sovereignty

¹⁶ Prokhovnik 2007, p 160. ¹⁷ Koskenniemi 2005, p. 239.

¹⁸ Walker 1995, p. 27.

is cannot be separated, for example, from the question as to who is thought to be its proper bearer. Similarly, where sovereignty is to be found is not a question that can be given a right answer, over and above its history. And perhaps most importantly of all, in order to enquire intelligently into what is happening to sovereignty now, we need to have already given some thought to all of the above. This is because sovereignty is not a property that can be analysed in the abstract, separating it from the multiple discursive contexts in which it has been invoked. By taking a 'parallax view' of the concept of sovereignty, this book revisits the assumptions underlying the applications of the concept, and also studies the political discourses within which it has been embedded. Offering divergent but complementary perspectives, the chapters as a whole seek to dispel the illusion that there is a single agreed-upon concept of sovereignty for which one could offer a clear definition.

II

In order to further the debate on the contemporary relevance of the concept of sovereignty, the following chapters tease out the tensions and ambiguities inherent in this central notion in political and legal philosophy, making a plea for a more discerning vocabulary to talk about it. Too many authors seek to buttress their conclusion that sovereignty is being 'eroded' by a motley collection of observations regarding the increasingly intertwined character of social, economic and political processes, all lumped together under the heading 'interdependence'. This is far from being a new theme. Predictions of the demise of state sovereignty as a result of the 'levelling effects of interdependence'¹⁹ have surfaced through the whole twentieth century and have come from all quarters. The former US Secretary of State Robert Lansing wrote at the beginning of the 1920s that what was about to convert the theory of 'world sovereignty' into practice was the interdependence of states.²⁰ In the mid-twentieth century, the distinguished international law scholar Georg Schwarzenberger also noted that 'it is a fashionable and, at a first glance, persuasive proposition to argue that, on the international level, independence is increasingly giving way to interdependence'.²¹ The fashion has surely not subsided. The past decades have, on the contrary, witnessed a rapid expansion of 'interdependence scholarship' emphasizing the enmeshed character of international relations supposed to constrain nation-states' manoeuvring room to an unprecedented degree.

¹⁹ Latham 2000, p. 1. ²⁰ Lansing 1921, p. 56.

²¹ Schwarzenberger 1957, p. 264.

Some authors have even ventured the hypothesis that, by now, we have moved 'beyond interdependence'.²²

Nonetheless, too many questions are left unanswered by short-circuiting the relationship between sovereignty and interdependence. First, the meaning of 'interdependence' itself is beset by confusion. To strike a mild note of scepticism about the claim that it inevitably saps state sovereignty, is not the phenomenon of 'interdependence', however understood, precisely made comprehensible by presupposing the existence of multiple states? Stephen Krasner, another contributor to this volume, has offered a salutary reminder that 'interdependence is an inherent, a logically necessary, aspect of an international system composed of sovereign States'.²³ The general assumption underlying claims that sovereignty is today being whittled away tends to be that it can be equated with independence, the very opposite of interdependence, and showing that the latter has increased sufficiently proves that the former is 'in decline'. Now, it may well be that some ideas that the notion of sovereignty used to evoke have become less helpful in describing contemporary political relations, but this can surely be established only by embarking on a more detailed analysis and, in particular, by including all the intermediate steps (but is there only one way?) from 'interdependence' to the reduction of sovereignty. In order to satisfy ourselves that we are witnessing the end of sovereignty rather than a deepening of its complexity,²⁴ we are badly in need of a more discriminating vocabulary.

This raises another, more fundamental, problem associated with the debate on the ramifications of interdependence, and the relevance of sovereignty in general. It concerns the relationship of the concept of sovereignty to its referent, that is, what this concept aims to capture (if, indeed, there is such a thing). Should we assume that the term 'sovereignty' directly names a special kind of power configuration that has stayed in equilibrium for a long time, but when various pressures induce this secular equilibrium to unravel, the concept is simply left without any referent and therefore becomes 'obsolete', bereft of its descriptive value? Or, alternatively, should we consider sovereignty as something of a 'natural kind', implying that its meaning changes in unison with changes in the reality to which it refers? The first assumption seems to underlie the proposition that the concept of sovereignty has become simplistic, the second gives sense to assertions that interdependence has brought about a marked shift in the meaning of sovereignty. If it is

²² MacNeill *et al.* 1991, p. 4; Chayes and Chayes 1995, p. 26.

²³ Krasner 1993, p. 301.

²⁴ As submitted, among many, by Pauly and Grande 2005, p. 6.

indeed the case that ‘the constitution of international relations defines sovereignty’,²⁵ then it should also not be surprising that the explosion of an atom bomb can make a concept plunge into crisis.²⁶ The assumption here is that the concept is so intimately tied up with its referent that, if the latter becomes more complex, the concept inevitably falls under strain.

III

But if we prefer, instead, to conceive of sovereignty as an argument, as a claim to authority, than there is no sense at all in which it can be ‘reduced’. Wouter G. Werner and Jaap H. de Wilde have convincingly argued that in order to understand the meaning of a concept such as sovereignty, it may be far more fruitful to attend to its various uses than to look for any corresponding realities.

In other words, the question as to what state of affairs corresponds to the meaning of the term ‘sovereignty’ should be replaced by questions like – In what context is a claim of sovereignty likely to occur? To whom is a sovereignty claim addressed? What normative structures are used to determine the legitimacy of a claim to sovereignty? What consequences follow from acceptance of a sovereignty claim?²⁷

All this points to a need to disentangle, as much as possible, the complex links between concepts, institutions, practices and doctrines – all of which have been seen as the true nature of sovereignty. Moreover, our account of the ups and downs of sovereignty should be informed by some understanding of conceptual change and the political life of language in general and, for this, our timeline should stretch back further than the last decades or even the last century.

All the more so given that the links described above are themselves subject to mutation. As one of the contributors to this volume has written, ‘the relationship between the very term sovereignty, the concept of sovereignty and the reality of sovereignty is historically open, contingent and unstable’.²⁸

In other words, we are sure to go astray if, in studying the nature of sovereignty, history is not given its proper weight. International relations scholars themselves have come to believe that ‘there is little to gain from research efforts that define away the rich historical contents and changing practices that are often labelled state sovereignty’.²⁹ Others

²⁵ Philpott 1997, p. 16. ²⁶ As suggested by Pasini 1965, p. 161.

²⁷ Werner and de Wilde 2001, p. 286. ²⁸ Bartelson 1995a, p. 2.

²⁹ Weber and Biersteker 1996, p. 284.

have even set about writing histories themselves.³⁰ It is important to stress that the aim of the first chapters of this volume is not to study the history of the word ‘sovereignty’. This would certainly not be the best way to bring to light its place in a wider context of political theory. The aim is rather to make explicit the polemical dimension of a concept that has been amenable to numerous, often directly contradictory, uses. This is how Michel Foucault – with his characteristic predilection for military metaphors – describes the convoluted historical trajectory of the doctrine of sovereignty:

First, it referred to an actual power mechanism: that of the feudal monarchy. Second, it was used as an instrument to constitute and justify the great monarchical administrations. From the sixteenth and especially the seventeenth century onward, or at the time of the Wars of Religion, the theory of sovereignty then became a weapon that was in circulation on both sides, and it was both to restrict and to strengthen royal power. You find it in the hands of Catholic monarchists and Protestant antimonarchists; you also find it in the hands of Catholics who advocate regicide or a change of dynasty. You find [the juridico-political] theory of sovereignty being brought into play by aristocrats and *parlementaires*, by the representatives of royal power and by the last feudalists. It was, in a word, the great instrument of the political and theoretical struggles that took place around systems of power in the sixteenth and seventeenth centuries.³¹

What the present volume attempts to show is that various doctrines of sovereignty continue to be used in similar strategic ways. Pulling the threads together in the conclusion, Martti Koskenniemi tries to elucidate how ‘sovereignty’ has been invoked in countless contexts to support the most varied kinds of positions: to argue for independence and to argue for integration in a system of (sovereign) equals, to claim particular rights, powers and privileges as well as to deny the relevance of any rights, powers or privileges, etc.

Koskenniemi also argues that, as an eminently polemical concept, the special power of sovereignty depends on the way it simultaneously invokes the registers of both description and prescription. Other scholars have written along similar lines that the role sovereignty plays in normative discourse consists in its imaginarily bridging the gap between ‘is’ and ‘ought’ so that ‘a successful claim to sovereignty establishes a link between an institutional fact (“being” sovereign) and the rights and duties that follow from the existence of this institutional fact’.³² We find this kind of bridging from one mode to another well expressed in Rousseau’s dictum that ‘the Sovereign, by the mere fact

³⁰ See, for example, Jackson 2007. ³¹ Foucault 2003, pp. 34–5.

³² Werner and de Wilde 2001, p. 284.

that it is, is always everything it ought to be'.³³ The close association of 'is' and 'ought' within the sovereignty discourse has had the consequence that many arguments about the politically desirable have put on the clothes of some doctrine of sovereignty. For example, a demand for more direct democracy in the form of referenda and popular initiative has been presented as a simple deduction from the principle of popular sovereignty. Marcel Gauchet has analogously argued that it is the 'true nature' of popular sovereignty that requires the institution of constitutional review.³⁴ Insistence that the acquisition of sovereignty is a pure fact has often amounted to an endorsement of a declaratory theory of recognition with the concomitant requirement that, once certain facts are present, there is a duty upon the international community to recognize the new state. Another consequence frequently thought to follow from the extra-legal character of sovereignty is that states' obligations under international law ought to be construed restrictively. These examples are enough to indicate how blinkered would be our perspective if we chose to stay at the surface of sovereignty speech and ignored its argumentative context. As suggested by Michel Foucault in the passage quoted above, when it comes to sovereignty, theoretical and political battles are largely fought with the same arms.

Many of the chapters in this book conceive of sovereignty as an argumentative resource. But this is not to say that reasoning involving the concept of sovereignty should be seen as a mere smokescreen serving to cover the reality of political ambition. Admittedly, some authors, particularly those impatient with the concept, have considered it precisely in this light. 'The career of the notion of sovereignty', wrote the historian P.W. Ward, 'illustrates the general characteristics of political thinking. The various forms of the notion have been apologies for causes rather than expressions of the disinterested love of knowledge'.³⁵ In a similar effort to get to the political behind sovereignty speech, to what it 'actually refers', it has been suggested that, at least most of the time, when we encounter the word 'sovereignty', the argument is about allocating power. 'That is, when someone argues that the United States should not accept a treaty because that treaty infringes upon US sovereignty, what the person most often means is that he or she believes a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (US) level, and not at the international level'.³⁶ But is there really an available vocabulary that would allow us to keep our feet firmly planted on the ground of 'actual' disagreement,

³³ Rousseau 1997, p. 52. ³⁴ Gauchet 1995, p. 48. ³⁵ Ward 1928, p. 167.

³⁶ Jackson 2003, p. 433.

safe from airily ambiguous concepts? Can we circumnavigate the concept of sovereignty in explaining what is the nature of the 'power' to be allocated and who is its recipient? Moreover, even if we agree for the moment that allocation of power is the substance of the argument, would we be justified in treating the rules of the language that govern this argument as a simple veneer? The chapters in the present volume attempt to tread lightly and to offer us a more fine-tuned depiction of the way in which political concepts function. The contributors do not limit themselves to taking note of the ambivalence of sovereignty; they rather attempt to explain this ambivalence by reconstructing the various strategic settings that give rise to it. The unifying theme of this volume is to take sovereignty speech seriously and to explore its specific grammar. The more historical chapters study the changing nature of this grammar; others point to the complex, often contradictory, ways in which it is today practised and how it adapts itself to evolving circumstances. The final chapters enquire into the prospects for relying on this grammar in order to achieve 'optimal' sovereignty or, indeed, optimal allocation of power.

IV

The need for a more historically informed analysis becomes particularly clear when, taking a cue from Hinsley, we consider the concept of sovereignty expansively as 'a restatement of the permanent problem of deciding the basis of government and obligation within a political community'.³⁷ It is precisely when various doctrines of sovereignty are construed as a set of questions and answers, rather than immutable propositions, that we cannot afford to ignore its history. This is because those questions and answers can themselves hardly be eternal, brooding above the fray of history. As the international relations theorist R.B.J. Walker puts it, 'the principle of state sovereignty codifies a historically specific answer to historically specific questions about political community'.³⁸ It is not that we already know what is around us and what is the nature of the concepts we possess, but that it would also be useful to educate ourselves about where it all came from. History can illuminate the present not only by yielding similarities and revealing the continuous roots of our conceptual make-up, but also, and perhaps even more importantly, by its very strangeness, by making us attend to the multiplicity of paths we did not follow. The literature, in fact, abounds in calls for a more historical approach to sovereignty, and

³⁷ Hinsley 1986, p. 26. ³⁸ Walker 1990, p. 173.

the opening chapters of this volume attempt to respond to these calls. This historical part is by no means a mere complement to what follows, grafted onto more direct conceptual analysis, serving as an introduction to, but separate from, it. Without succumbing to any simplistic form of historicism, we can rather say with a tinge of paradox that sovereignty does not have a history but is a history. Or as Harold Laski once remarked: 'Sovereignty, liberty, authority, personality – these are the words of which we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition.'³⁹ If political concepts are seen as a multilayered semantic sediment from an accumulation of arguments, then a genealogical approach, uncovering the hidden layers, inevitably comes to appear as a crucial step on our way to understanding the notion of sovereignty. The ambiguity of sovereignty has historical depth; it is not the result of conceptual confusion born out of a persistent misunderstanding of its 'true nature', or even of its core, but reflects past efforts to give it content. The higher levels have not completely covered up the lower ones. Earlier doctrines of sovereignty continue to be visible in contemporary political theory. In the opinion of Cynthia Weber – another international relations scholar who has strongly regretted the blindness of the discipline to the historicity of sovereignty – it is precisely the spatial and temporal variation of this notion which can, at least in part, account for 'how competing descriptions claiming to capture the essential nature of sovereignty and thus statehood can co-exist in modern global political discourse'.⁴⁰

The above geological metaphor should not, of course, be taken at face value. It only serves to bring out the 'thick' character of the concept of sovereignty, its embeddedness in a rich (but particular) historical setting; it does not do justice to the polemical nature of the many doctrines of sovereignty. In fact, any claim as to what sovereignty is can also be read as a claim as to what it is not. The nineteenth-century German theory of state sovereignty, for example, was largely directed against the revolutionary idea of popular sovereignty. The latter is itself a deeply contested idea, reflected in the ambiguity of the term 'people': the sovereignty of the 'eternal' people is not that of the momentary or 'empirical' people, and neither of the two is the sovereignty of the nation. Similarly, as we saw above, to say that sovereignty is a legal notion often amounts to saying that it is not a purely factual matter. None of these distinctions were introduced merely for the thrill of speculation. Showing how this kind of conceptual inventiveness always responds to a particular argumentative situation, intervening in a political debate

³⁹ Laski 1931, p. 314. ⁴⁰ Weber 1995, p. 2.

by seeking to change its very terms, is a theme that runs through the present volume.

The contemporary debate on sovereignty is indeed largely situated within the coordinates of a conventional history made up of episodes such as ‘the Grotian moment’, ‘the Westphalian revolution’ and so on. These foundational moments have been incorporated into the identity of various schools of thought so that no clear line can be drawn between our reading of the history of sovereignty and our conception of its functions and meaning. Entrenched readings of texts, which have been accorded the status of classics within modern political theory, have themselves furnished foundations for different traditions, with the consequence that ‘with the emergence of the question of sovereignty in crisis, texts such as these become part of the openly contested cultural terrain’.⁴¹ The influence of our reading of these texts and our understanding of the history of sovereignty also extends to how we can imagine the future – it is our view of the past that delimits our horizon of expectation. So, in surveying the emergence of a post-Hobbesian order in Europe⁴² or in getting rid of the ‘mal de Bodin’ in France,⁴³ theorists are staking out their own vision of the future by comparing it to what sovereignty has been thought to be in the past (as those theorists see it). The more historically minded chapters of this volume therefore feed into current debates on sovereignty in at least two ways. They point to the variability of sovereignty, to the unresolved tensions which inhabit it and underlie its ambiguity. But in addition – and just as importantly – they take a new look at the foundational episodes and place them within the overall structure of political argument. In this way, the present volume seeks to open up for reconsideration the conventional history of the concept of sovereignty.

The opening chapters by Quentin Skinner and Denis Baranger offer two historical approaches to sovereignty, laying bare fundamentally different ways of understanding the notion. In contemporary political theory, declarations of the end of sovereignty have been paralleled by similar gloomy tidings for the state. And yet, do we possess an unequivocal definition of the state that allows us to pinpoint the thing that is supposed to be ‘in retreat’? Is it not rather the case that sovereignty and state are concepts so intimately related that the ambiguity affecting one of them necessarily spills over to the other? Indeed, Alan James has noted that ‘what makes sovereignty ambiguous and problematic is the contradictory character of the state’.⁴⁴ Although the state

⁴¹ Ashley and Walker 1990, p. 146. ⁴² Wind 2001.

⁴³ Ziller 2003. ⁴⁴ James 1986, p. 3.

is generally taken to be the name of the agency that wields sovereign power over some determinate territory, Skinner argues that this definition is not a very illuminating one. He attempts to demonstrate that, as with sovereignty, the concept of the state escapes definition. By considering various rival answers to the question of whose actions count as authentic expressions of the sovereignty of the state, Skinner traces a genealogy of the modern state up to our own times. He describes the argumentative context in which Thomas Hobbes arrived at his highly influential view that the power of the state is that of a fictional person, distinct from both rulers and ruled, and then follows the fortunes of this conception by studying how it was subsequently pitched against rival understandings of the state. In the following chapter, Baranger shows that, while it may have been an exercise in political propaganda to pretend that sovereignty is one and a single reality, this is how it has been presented for a long time. He argues that, although contemporary constitutional theory insists that sovereignty does not exist as a 'thing' and is only a feature of legal discourse, the development of reasoning in terms of sovereignty has coexisted with an immense effort to locate sovereignty in the real world, to make it appear in the sphere of human representations. According to this line of thinking – which today goes under the name of the 'unitary approach' – sovereignty was brought forth as the regulative principle of what would otherwise have been a chaos of authorities, powers, magistrates, etc. The law was taken to be a superior, more fundamental, layer of reality, which provided a means of distinguishing reality from deceptive appearances. Although this view may be difficult for us to grasp, Baranger describes how, despite changing justifications, there persisted for a long time the idea that sovereignty ought to be visible and that its existence ought to be apparent at the surface of the legal system.

The next two chapters, by Pärtel Piirimäe and Jens Bartelson, continue the preceding historical analysis by taking up the relationship between sovereignty and the idea of the just war. Piirimäe revisits the 'Grotian moment' and takes issue with a widely asserted view that the emergence of the distinction between *bellum solenne* (formal war or legally just war) and *bellum iustum* (morally just war) prompted the abrupt decline of the traditional substantive criteria of justice, namely the existence of a just cause and just intentions. On the basis of evidence from seventeenth-century legal theory and actual state practice, Piirimäe argues that the development of the idea of external sovereignty did not render the moral quality of war unimportant. This leads him to suggest that, for a better understanding of the extent of the early-modern sphere of 'sovereign independence', we should look

beyond the structures of legal enforcement and take into account the alternative means of enforcing universal norms, particularly the role of public opinion that governs the elusive world of the reputation of states. Bartelson's chapter similarly engages writings by medieval and early-modern authors in order to show that the difficulties we currently experience when trying to pass judgment on contemporary practices of warfare owe much to early-modern conceptions of political authority, which regarded the state of nature as a source of legitimacy. Bartelson tries to account for the way in which there has been forged a double bind between authority and force: while the use of force has conventionally been justified with reference to legitimate political authority, the same authority has been legitimized with reference to the violence that would ensue in its absence. Leading up to the chapters that follow, he ends by suggesting some ways of re-conceptualizing the relationship between political authority and force that could help us to dissolve the double bind and hence restate the conditions under which war might be justifiable.

V

As Denis Baranger shows, at least since the sixteenth century, sovereignty has been made to stand for a principle of unity which draws together the multiplicity of powers within the political realm, dispelling the fragmentation of authority by tracing its 'marks' back to a common point of origin. Although lawyers and political theorists have for a long time put forward various images of piecemeal sovereignty, others have sought to call them to order by distinguishing between the possession of sovereignty and its exercise. The swinging movement between these two positions has been remarkably persistent. The contemporary debate proceeds by a similar exchange of arguments. Some claim that, by yielding authority up to international organizations and down to infra-state bodies, states have long ceased to be the locus of effective decision-making – so that we are witnessing 'the beginning of an unbundling of sovereignty'.⁴⁵ Others retort that the exercise of sovereignty has always been dispersed in this way, without states losing their privileged status as the source of this authority. For those attached to sovereignty as a principle of unity, to claim otherwise is to fail to make an important distinction between the limitation and the transference of sovereignty. In their opinion, fragmentation of its authoritative 'marks' in no way amounts to the fragmentation of sovereignty itself,

⁴⁵ Sassen 1996, p. 29.

an idea that could be nothing but a contradiction in terms and would run counter to the very core of the concept. 'If sovereignty is divided, it loses its distinguishing trait'.⁴⁶

Some authors believe, nonetheless, that the unity of sovereignty is today undermined in a more profound way. The various end-points of authority upon which sovereignty has been fastened are themselves conceived of as increasingly fragmented in contemporary political theory. The 'people' as a substantive unity enjoys a far more limited currency in democratic theory than used to be the case. Hardt and Negri's concept of 'multitude' also resolutely breaks with a long tradition celebrating unity, a tradition that can look back to Hobbes as one of its most spectacular representatives. They imply that, as the figure of the people dissolves, the concept of sovereignty itself demands to be reinterpreted. 'The multitude is a multiplicity, a plane of singularities... The people, in contrast, tend toward identity and homogeneity... Whereas the multitude is an inconclusive constitutive relation, the people is a constituted synthesis that is prepared for sovereignty.'⁴⁷ Hardt and Negri are far from being alone in thinking along these lines. From a different perspective, but in similar terms, Pierre Rosanvallon has written in his long study of the history of popular sovereignty that whereas a monist conception of popular sovereignty conjures up the image of a unitary people, recognition of the social reality of division and disagreement demands a pluralist reading of this principle.⁴⁸ There have been other voices calling for a pluralist view of sovereignty to capture the contemporary fragmentation of authority. 'If politics is defined by the questions of who gets what, when, where, and how', writes Richard Bellamy, 'then the answers increasingly must be in the plural – different people, in different ways and employing different criteria according to the context and the good concerned. That suggests that sovereignty will also be plural, because more dispersed, with different persons or bodies having the power to decide in different circumstances, without there necessarily being any single, hierarchical system of decision-making'.⁴⁹ Another way of saying this is to assert that there is simply no longer a specific person or body of persons whose actions are equivalent to the actions of the state. As Quentin Skinner argues, this modern sceptical view can be seen as the most recent stage in the long historical contest over the state. Skinner also asks whether this claim, fashionable in contemporary political theory, represents the end of the road for theories of the state. His conclusion is that, even if we are indeed moving towards a world state,

⁴⁶ de Witte 2006, p. 518. ⁴⁷ Hardt and Negri 2000, p. 103.

⁴⁸ Rosanvallon 2000, pp. 404–5. ⁴⁹ Bellamy 2000, p. 224.

the original question as to who or what agencies should be taken to have the right to exercise the substance of sovereignty – to decide who gets what and in what circumstances – will only become more urgent.

But are we moving towards a world state? The state itself as a political form, and another candidate for the bearer of sovereignty, is today said to be ‘in retreat’ with the result that ‘authority over society and economy is undergoing another period of diffusion after two centuries in which authority became increasingly centralised in the institution of the state’.⁵⁰ A report of the US National Intelligence Council, published in late 2008, predicted in a similar vein that the current ‘trend toward greater diffusion of authority and power’ leads to a more complex international system, raising the ‘likelihood of fragmentation occurring over the next two decades, particularly given the wide array of transnational challenges facing the international community’.⁵¹ As pointed out above, the two claims of the demise of sovereignty and the retreat of states have largely been in step. So, during the 1990s the theme of the end of sovereignty was resuscitated by a post-Cold War *imaginaire* of the ‘powerlessness’ of states.⁵² Building on a concept introduced by Robert Jackson, Richard Falk argued a decade ago that the classical notion of sovereignty needs to be retooled, because ‘all states, no matter how militarily potent and economically formidable, have become to a significant degree “quasi-states”’.⁵³ The most prominent vehicle for this kind of deconstructive attack on the state has, however, been the Luhmannian approach to systems theory. With an unexpected similarity to the views of early twentieth-century political pluralists, it has been intent on resisting the ‘temptation that bids us make our State a unity’,⁵⁴ picking it apart into multiple functional systems, greeting the self-deconstruction of its hierarchical structure, relegating the nation-state to the lumber room of nineteenth-century artefacts. The main thrust of this line of theory is not only that states have become largely powerless in the grip of globalization, as submitted by Falk, but that the unity of state authority is in the process of being parcelled out. In analysing the crisis of the concept of sovereignty, Antonio Negri takes as the starting point of his contribution to this volume precisely these two positions. He argues that, if we give due weight to the criticism that Falk has levelled at the centralization of the international order and the work of Luhmann on normative fragmentation and the construction of constitutionalism without the state, and combine them with the Foucauldian thesis of the biopolitical transformation of the concept of sovereignty, we have no option but to conclude that the classical

⁵⁰ Strange 1996, p. 86.

⁵¹ National Intelligence Council 2008, p. x.

⁵² Cohen 2006, p. 180.

⁵³ Falk 1999, p. 43.

⁵⁴ Laski 1917, p. 1.

concept of national sovereignty has been overcome. Negri is, however, keen to insist that the theoretical experiences which give expression to the idea of 'overcoming sovereignty' cannot be reduced to a single paradigm. They point to different manifestations of the crisis of the concept of sovereignty which consists in its incapacity to connect the various aspects that used to be united in it: a principle of social organization; a principle of justice and innovation; a principle of international power.

The sceptical view described above, emphasizing the diffusion of authority and the fragmentation of its once unitary source, has also taken hold of a large part of contemporary legal theory. It is today often pointed out that although most (state) legal systems might have had something resembling a hierarchical structure in the past, contemporary developments have continued to undermine linear forms of authority and determination to a point where the representation of law as a pyramid is bound to appear as a gross simplification. Network is today perceived as a much more congenial metaphor for picturing law.⁵⁵ It is readily admitted that a more or less clear-cut hierarchy is still sustained as an ideal within contemporary legal reasoning, but that it is often possible to expose this ideal as an illusion or even a mystification of the legal reality. A considerable part of modern legal theory can indeed be read as issuing from an effort to provide a more complex and true-to-life description of law than the one suggested by the traditional hierarchical model. The latter is thought to represent the modern, as opposed to the post-modern, picture of law. In entangling the law's hierarchy, the impact of systems theory has again been decisive, though not without a helping hand from deconstruction of all varieties. Both currents have contrived to provoke a crisis in the pyramidal model of law by unmasking the traditional doctrine of sovereignty. The latter is revealed to have been nothing but a grandiose *trompe-l'oeil* that has hitherto successfully protected the law against the deconstruction of its foundation. 'The constitutional law construction of the political democratic sovereign as the top layer of law's hierarchy has allowed the law to externalize its threatening paradox and to hand it over to politics where it is "resolved" by democracy.'⁵⁶ Such self-delusion is no longer possible. With the venerable fiction of an ordering sovereign, the unity of state and law have to go. 'In a world of disaggregated states', writes Anne-Marie Slaughter, 'the sovereignty that has traditionally attached to unitary states should arguably also be disaggregated. Taking this step, however, requires a different conception of the very nature of sovereignty'.⁵⁷

⁵⁵ See, in particular, Ost and Kerchove 2002. ⁵⁶ Teubner 1997a, p. 766.

⁵⁷ Slaughter 2004, p. 186; 2005, p. 12.

Contrary to the above arguments, many international relations scholars are unsatisfied with the erosion-of-sovereignty thesis and think that it is rather the continuing resilience of states which is the interesting fact to be accounted for.⁵⁸ Realists have above all been reproached for ignoring the question as to why sovereignty persists.⁵⁹ In the present volume, Stephen Krasner, one of the leading exponents of this tradition in political science, takes up the challenge and sets about analysing the reasons why the institution of state sovereignty – which he has famously called a form of ‘organized hypocrisy’ – can be expected to continue operating in the future, barring extreme circumstances. Hendrik Spruyt suggested in his influential study *The Sovereign State and Its Competitors* that one of the main reasons why states are still in charge despite various centrifugal forces is that ‘fragmented sovereignty and crosscutting jurisdictions raise the costs of international transactions and divide loyalties in unpredictable ways’.⁶⁰ Krasner takes a different tack and concentrates more on strategic interactions within the system of sovereign states. He claims that the key actors of this system, those that might have the power to create new normative structures, have not had an incentive to do so. In his view, although sovereignty has worked very imperfectly, it has still worked better than any other structure that decision-makers have been able to envisage. Yet Krasner does not deny that there may be profound unit transformation in the offing. What is new in the contemporary world is the ability of pre-modern states to threaten the core security interests of modern and post-modern states. Krasner maintains that such circumstances could create pressure to engage in even more institutional hypocrisy in the form of a decoupling between rules and behaviour, with a corresponding change in the basic rules themselves.

VI

No treatment of the contemporary tribulations of the concept of sovereignty would be complete without an analysis of the European Union, that ‘irregular body ... like some misshapen monster’, to borrow the expression that Samuel Pufendorf used to characterize the Holy Roman Empire of his time.⁶¹ What makes the case of the European Community particularly interesting is that, from the very beginning, it has provided ample food for thought to theorists seeking to determine its nature. The Union is often taken to be a paradigmatic case of

⁵⁸ Cohen 2006, p. 180. ⁵⁹ Weber and Biersteker 1996, p. 111.

⁶⁰ Spruyt 1994, p. 194. ⁶¹ See Schröder 1999, p. 966.

diminished sovereignty, an example for the rest of the world to follow or, as Alf Ross said more than forty years ago, ‘a preparatory school for a world federation’.⁶² If so, has it been successful in propelling us into a post-sovereign Europe? Or has the irony of history prevailed, so that what was first an anti-sovereignty project has now turned into an aspiration for statehood, with all its paraphernalia, including a flag, an anthem, and, yes, sovereignty itself? Another suggestion, which has recently been given tightly argued support,⁶³ is that the EU is a federation, a political form distinct from both empire and the state. Over the years, the debate between these different positions has shown no signs of dying down. Hegel once wrote that ‘if it is difficult to comprehend nature, it is an infinitely more arduous task to understand the state’.⁶⁴ Well, it has turned out that it is even more difficult to determine what exactly is about to emerge in Europe. Although it may seem overly metaphysical, it is nevertheless clear that the search for a suitable nomenclature to classify the European Union is not merely an academic debate, one that consumes the idle energy of Community law scholars but is of no relevance to anyone outside their circle. The terminological unease has deeper roots. As Joseph Weiler has noted, it is ‘a reflection of a preoccupation, even an obsession, mostly political and ideological, with sovereignty and its location in Europe’.⁶⁵

Indeed, the EU is far more than merely a case study; it is perceived as the future in the present, a laboratory for trying out new forms of government. Although Stephen Krasner argues that the European Union will not pose a challenge to conventional sovereignty at the global level, and that its experience will not be replicated in other areas of the world, there is no doubt that its unconventional architecture has already provoked a remarkable amount of conceptual innovation, which has spilled over to other fields of scholarship concerned with the fortunes of sovereignty in the contemporary world. Within the European Union we seem to be able to observe not only a growing ‘interdependence’ of states – the implications of which for sovereignty are, as we saw above, contested – but also a profound transformation of the legal concept of sovereignty. The member states have gone a long way in tying their hands in favour of community bodies, but is that enough for the locus of sovereignty to have shifted or for it to have come unbundled? Even if one agrees with Krasner’s opinion, expressed in this volume, that the ideas of supremacy and direct effect are a dramatic departure from conventional notions of state sovereignty, does Community law’s supremacy,

⁶² Ross 1965, p. 120. ⁶³ Beaud 2007. ⁶⁴ Hegel 1991, p. 307.

⁶⁵ Weiler 1999, pp. 270–1.

enshrined in doctrine ever since 1964, presuppose that the Union itself is sovereign? Again, the argument is not about the application of a shared concept of sovereignty to a special, although very important, polity. Technical arguments are necessarily born out of more fundamental differences in legal and political worldview. Schmittians tend to downplay the wide competencies of the Union, claiming that the ultimate authority remains with the ‘final arbiter’ since it is the political limit situation which is defining. Although member states have become entangled in an intricate web of duties which curtails their voice in a growing number of areas, nothing prevents them in principle – so the argument goes – from extricating themselves from this web, reasserting their dormant sovereignty and reminding the EU of its consensual foundations.⁶⁶ ‘The normal case proves nothing, the exception proves everything’, as Carl Schmitt provocatively put it.⁶⁷ Other scholars think that this is to deal in extreme and improbable hypotheses. It is, on the contrary, the everyday institutional practice with its well-honed division of functions that defines the nature of the Union and tells us what the EU has made out of sovereignty. The traditional unitary approach has to be jettisoned because ‘it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any member state in possession of ultimate power over its own internal affairs’.⁶⁸

But even if we are willing to underwrite the rejection of the unitary perspective on sovereignty, the question remains: what should we bring in to replace it? Many – perhaps the majority – of European law scholars have come to endorse a disaggregated perspective with its figurative language of shared, split, divided, or partial sovereignty. This imagery of fragmentation, however, appears less as a serious effort to rigorously re-conceptualize sovereignty than as a last-ditch attempt to salvage a concept that no one is quite willing to give up. The idea of piecemeal sovereignty is sometimes not taken seriously even by those who profess it. ‘Often the metaphorical language of sovereignty disaggregation is contained in self-consciously ironic quotation marks, a rhetorical flourish to highlight the oxymoronic suggestion in such strange couplings as “shared” or “divided” sovereignty, and thus to indicate the failing or bankrupt currency of the traditional explanatory language of sovereignty’.⁶⁹ In view of these difficulties, theorists who hold fast to the idea of indivisible sovereignty are again tempted to invoke the distinction between the delegation of powers and their surrender, claiming

⁶⁶ See, for example, Vahlas 2005, p. 1599. ⁶⁷ Schmitt 1922, p. 15.

⁶⁸ MacCormick 1999, p. 132. ⁶⁹ Walker 2003a.

that sovereignty can in principle always be recalled. But they have been castigated in turn for ignoring the gradual redefinition of sovereignty in the process. When units collectively reallocate sovereignty, then the issues removed from their scope are not simply 'collected' elsewhere. Neil MacCormick has compared the pooling of sovereignty, instead, to a loss of virginity – something is lost without anyone else gaining it. These critics find that a better way to describe the truly new situation is to conclude that Europe has reached the stage of post-sovereignty.⁷⁰

In their contributions to this volume, Neil MacCormick and Michel Troper, two outstanding contributors to the debate on the fate of sovereignty in Europe, proceed to take stock and add to the arguments that have been offered as to the impact of the European project on sovereignty. Both of them have been at work for decades in elaborating their views on the subject without having had occasion to directly confront each other's conclusions. Both MacCormick and Troper take as their point of departure the work of Raymond Carré de Malberg and his distinction of three senses of 'sovereignty'. Carré de Malberg was an important legal theorist of the early twentieth century, who has left a profound mark on subsequent French doctrines of sovereignty but has remained largely unknown to anglophone scholars. Their two chapters begin to make amends in this regard: not for the sake of rescuing the French theorist from oblivion, but in order to show how his writings can be surprisingly relevant for making sense of our post-modern quandaries. Both MacCormick and Troper return to the problem addressed historically in the opening chapters of the volume: to what kind of entity or agency can sovereignty be ascribed? Troper argues that all the three concepts of sovereignty listed by Carré de Malberg remain the necessary tools of contemporary legal discourse. If it is today difficult to articulate a coherent doctrine relative to the bearer of sovereignty, this reveals not an inadequacy in the concept of sovereignty but a crisis of democracy. MacCormick, by contrast, defends the case he has previously stated concerning the 'post-sovereign' character ascribable to member states of the European Union, and indeed the Union itself. Drawing on his conception of law as an institutional normative order, he contests the thesis that only where there is a supreme or sovereign power of commanding can there be 'law' or a state at all. He argues that superseding this idea enables us fruitfully to construct concepts of post-sovereign states and commonwealths, with one possible candidate for such a status being discoverable in the European Union.

⁷⁰ Wæver 1995, p. 418.

VII

So, where do we find ourselves after the dust from the work of post-modern demystification has settled? Some theorists greet the new wider world and gesture at the vistas that open up. ‘To escape from the idea that all law must originate in a single power source like a sovereign’, writes Neil MacCormick, ‘is thus to discover the possibility of taking a broader, more diffuse, view of law’.⁷¹ To authors wishing to elaborate a version of deliberative democracy for ‘the global village’, the principle of national sovereignty also tends to seem an argumentative stop sign in the service of obstructionist practices. But others feel deeply disoriented in the modern ‘framegrative space’, to use the (barely pronounceable) expression introduced by James Rosenau in order to designate the modern mixture of fragmentation and integration.⁷² The image of politics they see emerging is composed of the stuff of impersonal and omnipresent governance, supposedly the only form of authority fit for a post-national constellation and capable of coming to grips with new ‘transnational issues’. By contrast with government, responsibility or even power, the particularity of ‘governance’ lies in its free-floating and largely non-transitive character. Governance does not demand to be pegged to any point of origin – it comes close to dispensing with human agency altogether. It therefore almost spontaneously points to a political theory relieved of the historical ballast of sovereignty. For theorists who cherish the relationship between sovereignty and accountability, this is, however, to progress into the unknown: ‘The reorganization of political theory and practice around a fragmented, divisible conception of sovereignty serves to separate the relationship between power and responsibility.’⁷³ Their apprehension is that by detaching the concept of sovereignty from that of the state, one will inevitably render it hollow and sever its link to the idea of the political which has the state as its privileged container. Against the backdrop of such fears, it has recently been claimed that ‘with the subversion of the political space of territorial sovereignty, the global governance discourse comes up with an impoverished conception of order that is exclusively based on efficiency and structural necessities and leaves no room for a sensible account of the political’.⁷⁴

Anyone wishing to unravel the relationship between sovereignty and the state must therefore face the formidable challenge of expanding the space of the political beyond the borders of nation-states,

⁷¹ MacCormick 1993, p. 16. ⁷² Rosenau 2003, p. 390.

⁷³ Bickerton *et al.* 2007, p. 12. ⁷⁴ Späth 2005, p. 21.

without simply offering us a new variety of the domestic analogy. Although not presuming frontally to meet this challenge, Jüri Lipping sets about clearing the ground for the accomplishment of the task which, for those who believe in its possibility, must be one of the fixtures of future political philosophy. Lipping argues that, if we want to retain the concept of sovereignty in any meaningful way, there is no alternative to its conceptual disconnection from the state and to re-thinking it altogether outside this classical frame. Developing the insight shared by two political philosophers as different as Hannah Arendt and Carl Schmitt, namely that the concept of the political presupposes the concept of publicity or openness (*Öffentlichkeit*), he suggests that this might give us some clues to account for the variety of social and political relations beyond the confines of the territorial state. In another thoughtful response to the above criticism, Patrick Praet examines the fate of the rule of law within the 'post-sovereign' world. Refusing the alternative 'state or international' in its general form, he notes that *Rechtsstaat* can theoretically function at both an 'international' and a 'municipal' level, and that a material analysis of its key features within various factual situations therefore becomes necessary. An analysis of the EU member states leads Praet to conclude that the relation is ambivalent. When it comes to preserving the separation of powers among the *trias politica*, traditional sovereignty seems better suited than the EU legal order; but in relation to the protection of fundamental rights, the role of supra-national institutions like the European Court of Human Rights can, in his opinion, only be applauded.

Nonetheless, even if we decide to resist the conclusion that sovereignty is about to reach its end, we have, of course, only taken the first step. What remains to be explained is why the concept continues to figure prominently in contemporary political theory and why it is still useful in studying international relations. The mistake that contrasts with the over-hasty assertion of its demise is that of taking sovereignty for granted as a 'matrix of the political' which is always inevitably with us, and is beyond explanation. Conceiving of sovereignty as a 'foundational concept' in this way can easily lead us to blind ourselves to its effective functioning in multiple discourses. Sixty years on, the words of Hans J. Morgenthau that 'denunciation of the principle of sovereignty ... occur[s] much more frequently than does a serious endeavour to comprehend its nature and the function it performs for the modern state system'⁷⁵

⁷⁵ Morgenthau 1966, p. 299.

still ring true. But the same goes for defences of sovereignty and claims that it is still intact. The vague conclusion that sovereignty is alive and well is no less vulnerable than the unqualified announcement of its demise: both assume that there is such a 'thing' as sovereignty, which can be approached in different ways in different argumentative contexts. If the concept of sovereignty is, instead, conceived of as an argumentative resource, this way of thinking will turn out to be a rather confusing piece of reification. There may be something like a family resemblance between the various uses to which the term is put, something which allows us to think up definitions of some generality, but surely there is no homogenous metaphysical glue that binds all these uses together.

In taking on the master concept of legal and political philosophy, and bringing together historians, constitutional and international lawyers, political philosophers, international relations scholars, and practitioners of law, we have not set ourselves the aim of working towards something like a master theory. The aim is rather to create bridges between fields of enquiry, which have hitherto been linked by tenuous cross-references (if at all). Since many of the contributors are among the most prominent figures in their field, our hope is that other scholars will be encouraged to engage in comparable inter-disciplinary dialogues. It is not as if this kind of lateral communication is an end in itself. In the case of sovereignty, there is, however, much to be said for it. Scholars in different fields are here at least nominally grappling with related issues. A division of labour between these fields, on the other hand, can involve an artificial carving up of the concept of sovereignty. In fact, it can even bring about serious myopia. For example, if political scientists choose to leave the 'legal portion' of sovereignty to lawyers and to concentrate on factual independence instead, their efforts to understand the institutional reality of sovereignty will inevitably be misplaced from the very beginning. Similarly, unfortunate consequences may follow from allocating the 'external portion' of sovereignty to international law scholars, so that the remaining 'internal portion' can then be left to constitutional lawyers. By inviting contributions from scholars working in all these disciplines, and offering the reader an all-round view of the concept of sovereignty, it may be possible to question these very conceptual divisions. Not that this kind of all-round view is ever possible or can even be approximated. If there is something that all the above fields of scholarship have come to share, it is perhaps fragmentation itself. Although in different ways, all of them have assimilated the often destabilizing anti-lessons which contemporary philosophy, and the 'French

theory' in particular, has imparted. When expecting to garner the fruits of the disciplinary division of labour, then, instead of obtaining an all-round view of sovereignty, it may well be that what is unveiled is rather a jigsaw puzzle with pieces that simply refuse to fit together. This may, however, be the most exact picture we can hope to have of a concept in fragments.

1 The sovereign state: a genealogy

Quentin Skinner

I

When we trace the genealogy of a concept, we uncover the different ways in which it may have been used in earlier times. We thereby equip ourselves with a means of reflecting critically on how it is currently understood. With these considerations in mind, I attempt in what follows to sketch a genealogy of the modern state. Before embarking on this project, however, I need to make two cautionary remarks about the limitations of its scope. I assume in the first place that the only method by which we can hope confidently to identify the views of specific writers about the concept of the state will be to examine the precise circumstances in which they invoke and discuss the term *state*. I consequently focus as much as possible on how this particular word came to figure in successive debates about the nature of public power. The other limitation I need to signal is that I confine myself exclusively to anglophone traditions of thought. I do so in part because I need to bring my historical materials under some kind of control, but mainly because it seems to me that any study of the changing vocabularies in which moral or political concepts are formulated can only be fruitfully pursued by examining the histories of individual linguistic communities. To attempt a broader analysis would be to assume that such terms as *lo stato*, *l'État* and *Der Staat* express the same concept as the term *state*, and this would be to presuppose what would have to be shown. Hence the seemingly arbitrary restriction of my historical gaze.

To investigate the genealogy of the state is to discover that there has never been any agreed concept to which the word *state* has answered. The suggestion, still widely canvassed, that we can hope to arrive at a neutral analysis that might in principle command general assent is I think

This chapter is a greatly abbreviated version of Skinner 2009. For help with the complete statement of my case I am greatly indebted to Duncan Bell, Greg Claeys, John Dunn, Peter Hall, Hent Kalmo, Susan James, Janet McLean, Noel Malcolm, Philip Pettit, David Runciman and Jim Tully.

misconceived.¹ I would go so far as to suggest that any moral or political term that has become so deeply enmeshed in so many ideological disputes over such a long period of time is bound to resist any such efforts at definition. As the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries.²

This is not to deny that one particular definition has come to predominate. As handbooks on political theory regularly point out, there has been a noticeable tendency in recent times to think of the state – usually with a nod in the direction of Max Weber – as nothing more than the name of an established apparatus of government.³ The issue that remains, however, is whether our thinking may have become impoverished as a result of our abandonment of a number of earlier and more explicitly normative theories that a genealogical survey brings to light. Can a genealogy free us to re-imagine the state in different and perhaps more fruitful ways? After presenting my historical survey, this is the question to which I turn in the closing section of this chapter.

II

Within anglophone legal and political theory, the earliest period in which we encounter widespread discussions about the state, statehood and the powers of states is towards the end of the sixteenth and the beginning of the seventeenth centuries. This development was in large part owed to the influence of scholastic discussions about *summa potestas*,⁴ together with the growing availability of French treatises on sovereignty⁵ and Italian manuals on ‘politics’ and reason of state.⁶ With the confluence of these strands of thought, the term *state* began to be used with increasing confidence to refer to a specific type of union or civil association, that of a *universitas* or community of people living subject to the sovereign authority of a recognized monarch or ruling group.

This is not to say that the word *state* was the term most commonly employed to describe the form of union underlying civil government.

¹ But for a recent attempt see Morris 1998, esp. pp. 45–6; for a more pluralist approach see Vincent 1987.

² For further considerations along these lines see Geuss 1999; Bevir 2008; Krupp 2008.

³ Forsyth 1991, p. 505; Morris 2004, pp. 195–6. For Weber’s definition see Weber 1984; for discussions in which it is presupposed see Poggi 1978; Jordan 1985; Caney 2005, esp. pp. 149–50.

⁴ Brett 1997; Höpfl 2004, pp. 186–223. ⁵ Skinner 1978, vol. II, pp. 254–75.

⁶ Mattei 1979; Borelli 1993. On England see Baldwin 2004; Malcolm 2007, esp. pp. 30–73.

Some writers preferred to speak of the *realm*, some even spoke of the *nation*, while the terminology in most widespread use referred to the *body politic*, generally with the implication that such bodies are incapable of action in the absence of a sovereign head to which they owe their direction and obedience. It was by a relatively simple process, however, that the term *state* came to be inserted into this lexicon. One of the questions addressed in the Renaissance genre of advice-books for princes had always been how rulers should act to maintain their state, that is, to uphold their status or standing as princes. Machiavelli was only the most celebrated of numerous political thinkers who had emphasized the importance of being able *mantenere lo stato*,⁷ and when Edward Dacres published his translation of *Il principe* in 1640 he duly made Machiavelli speak about how a prince must act ‘for the maintenance of his State’, and how a prudent prince must ‘take the surest courses he can to maintain his life and State’.⁸

If we consult the legal theorists, we frequently find them talking in similar terms. According to these writers, however, there is something of more impersonal significance that rulers must preserve if they wish to avoid a *coup d'état*, a strike against their state. They must preserve the welfare of the body politic, and they are warned that they cannot hope to maintain their own status unless they keep this body in security and good health. It was at this juncture that, in referring to this underlying *corpus politicum*, a number of legal theorists began to describe it as the state. The resulting linguistic slippage was slight, but the conceptual change was momentous: rather than focusing on the need for rulers to maintain their own status or state, these writers began to speak of their obligation to maintain the states over which they ruled.⁹

For an illustration of these tendencies, we can hardly do better than turn to Jean Bodin's *Six livres de la république*, which was first translated into English as *The Six Bookes of a Common-weale* in 1606.¹⁰ At the beginning of Book I Bodin supplies a definition of what his translator, Richard Knollys, calls ‘the Citie or state’.¹¹ Bodin argues that ‘it is neither the wals, neither the persons, that maketh the citie, but the union of the people under the same soveraigntie of government’.¹² He concedes that this sovereign power can be that of the people themselves, but he goes on to express a strong preference for monarchy over all

⁷ Hexter 1973, pp. 150–72. ⁸ Machiavelli 1640, pp. 139, 141, 169.

⁹ On this transition see Mansfield 1996, pp. 281–94; Harding 2002, pp. 252–335; Skinner 2002, vol. II, pp. 382–7.

¹⁰ For Bodin on the state see Franklin 1973 and 1991; Skinner 1978, vol. II, pp. 284–301, 355–6.

¹¹ Bodin 1962, 1.2, p. 10. ¹² Bodin 1962, 1.2, p. 10.

other forms of government. To institute a monarchy, he explains, is to create a type of public authority in which ‘all the people in generall, and (as it were) in one bodie’ swear ‘faithfull alleageance to one soveraigne monarch’ as head of state.¹³

This way of thinking about the state (which I shall call the absolutist theory)¹⁴ was soon picked up in two distinct strands of legal and political discourse in early seventeenth-century England. One arose out of scholastic discussions about *suprema potestas*, especially as conducted by such luminaries of the Second Scholastic as Vitoria, Bellarmine and Suárez. Although these philosophers allow that the *universitas* of the people must have been the original bearer of supreme power,¹⁵ they insist that the act of submitting to government always involves what Suárez characterizes as a ‘quasi-alienation’ of political rights.¹⁶ This is the line of argument we find in a work such as Matthew Kellison’s *Right and Jurisdiction of the Prelate, and the Prince* of 1621.¹⁷ Kellison maintains that, as soon as the people ‘make choice of a King’, the effect is that ‘the Communitie despoileth it selfe of authority’, subjecting itself to an absolute ruler who thereafter exercises absolute power over the whole body of the state.

The other and more influential way in which the absolutist theory was articulated was as part of the doctrine of the divine right of kings. Sir Robert Filmer begins his *Patriarcha* (c.1630)¹⁸ by stigmatizing as a dangerous heresy the belief in the natural liberty of mankind.¹⁹ What this argument fails to recognize, he argues, is that all rulers receive their authority not from the people but directly from ‘the ordination of God himself’.²⁰ Kings are the Lord’s anointed, the vicegerents of God on earth, and consequently enjoy supreme and unquestionable power over the body of the commonwealth or state.

King James I frequently talks in these terms, especially when haranguing his Parliaments about the extent of his sovereign rights.²¹ But the English writer of this period who speaks with the greatest confidence in this idiom is the Roman lawyer Sir John Hayward.²² Hayward’s first

¹³ Bodin 1962, 1.8, p. 99.

¹⁴ Following Poggi 1978 and Vincent 1987, pp. 45–76.

¹⁵ Höpfl 2004, pp. 204–17, 224–30.

¹⁶ Suárez 1975, 3.4.2, p. 49: ‘non est delegatio sed quasi alienatio’. Cf. Höpfl 2004, pp. 248–62.

¹⁷ On Kellison see Sommerville 1999, pp. 60–2.

¹⁸ Sommerville 1991a, pp. xxxii–iv shows that, although *Patriarcha* was not published until 1680, the manuscript was completed before 1631.

¹⁹ Filmer 1991, p. 2. ²⁰ Filmer 1991, p. 7.

²¹ King James VI and I 1994, pp. 143, 145, 147, 149. On James as an ‘absolutist’ see Sommerville 1991b, pp. 247–53; Sommerville 1999, pp. 107–10, 227–30.

²² On Hayward see Levack 1988; Sommerville 1999, pp. 51–2, 68.

presentation of his views about state power can be found in his *Answer* of 1603, in which he lays down that all authority comes not from the people but from God, so that even heathen rulers count as the Lord's anointed.²³ The underlying 'body politick' cannot possibly have been the original possessor of sovereignty, for it amounts to nothing more than 'a heedless and headless multitude' without direction or government.²⁴ Drawing on Bodin, Hayward concludes that it will always be more natural 'that one state, bee it great or small, should rather bee commaunded by one person' as head of state.²⁵

These arguments were in turn picked up by a number of polemicists whose primary concern was to vindicate – against Catholic apologists such as Kellison – the claim that temporal rulers have a right of absolute control over ecclesiastical as well as civil affairs. Hayward also contributed to this debate, and was one of the first to describe this Erastian commitment as an argument about the proper relationship between 'church and state'.²⁶ The fullest argument along these lines can be found in the work of another Roman lawyer, Calybutte Downing,²⁷ whose *Discourse of the State Ecclesiasticall* was first published in 1632.²⁸ Downing declares that the king of England must be recognized as the 'supreme Civil head' over the ecclesiastical no less than 'the Civill State'.²⁹ As in all absolute monarchies, the 'State is so framed' that there is one person with unquestionable authority to govern all the 'distinct and settled societies of that State'.³⁰

III

While the absolutist theory was widely defended in the opening decades of the seventeenth century, it was also subjected to a growing barrage of attack. Critics agreed that, when we talk about the state, we are referring to a type of civic union, a body or society of people united under government. But they repudiated the metaphor according to which this *societas* or *universitas* is a mere headless torso in need of a sovereign to guide and control it. It is equally possible, they claim, for sovereignty to be possessed by the union of the people themselves. We accordingly find these writers using the term *state* to refer not to a passive and obedient

²³ Hayward 1603, Sig. G, 3^r.

²⁴ Hayward 1603, Sig. B, 3^v; Sig. H, 3^r; Sig. K, 2^v.

²⁵ Hayward 1603, Sig. B, 3^v; Bodin is cited to this effect at Sig. D, 3^r.

²⁶ Hayward 1607, pp. 2, 6, 8, 14.

²⁷ On Downing see Levack 1973, pp. 115–17, 187–8; Sommerville 1999, pp. 40–1.

²⁸ Downing's treatise was reissued in an extended form in 1634; I quote from this version of the text.

²⁹ Downing 1634, pp. 58, 68. ³⁰ Downing 1634, p. 46.

community living under a sovereign head, but rather to the body of the people viewed as the owners of sovereignty themselves.

Two distinct challenges to the absolutist theory evolved along these lines, eventually giving rise to what I shall call the populist theory of the state. One stemmed from a group of writers who are best described as political anatomists, and whose principal interest lay in comparing the different forms of government to be found in various parts of the world. As they liked to observe, there are many communities in contemporary Europe in which the people are not ruled by a sovereign head but instead govern themselves. Focusing on the special characteristics of these polities, they frequently label them as *popular states* or simply as *states* to distinguish them from monarchies and principalities.

This usage undoubtedly owed something to the fact that such communities were generally governed by legislative assemblies in which the people were represented according to their different social ranks or 'estates'. These assemblies were usually described as meetings of the estates, while their members were said to attend them in virtue of some qualifying status or state. But whether the term *state* was used to refer to the sovereign body of the people, or alternatively to these assembled bodies of their representatives, the effect was to give rise to a sharp distinction between *monarchies* and *states*.

This distinction is strongly present, for example, in Edwin Sandys' *Relation* of 1605, in which he surveys the religious and constitutional arrangements prevailing in different parts of Europe.³¹ Sandys consistently distinguishes between monarchies and 'states', reserving the latter term for those polities, especially in Italy, in which the people govern themselves.³² The same is true of Giovanni Botero's *Le Relazioni Universali*,³³ which was first translated as *Relations of the most famous kingdoms and common-wealths* in 1601.³⁴ When Botero turns to Switzerland, he describes it 'a state popular, and subject to no one Prince',³⁵ and when he examines the constitution of the United Provinces he likewise speaks of it as a state,³⁶ explaining that it is a community in which 'the people and citizens have so much voice and authoritie' that they are able to regulate their own affairs.³⁷

For many of these writers, it proved a fine line between providing descriptions of republican constitutions and celebrating the alleged

³¹ On Sandys's *Relation* see Rabb 1998, pp. 21–46.

³² Sandys 1605, Sig. N, 3^r; Sig. P, 2^v; Sig. S, 3^r.

³³ On Botero's *Relazioni* see De Luca 1946, pp. 73–89.

³⁴ On Botero see De Luca 1946; Mattei 1979. I quote from the final, most extensive version of Botero's *Relazioni*, translated by Robert Johnson and published in 1630.

³⁵ Botero 1630, p. 310. ³⁶ Botero 1630, pp. 200, 206. ³⁷ Botero 1630, p. 206.

superiority of these self-governing regimes. This preference was generally grounded on a view about how we can best hope to retain our natural liberty while submitting to government. To live under a monarchy, it was frequently urged, is to subject yourself to the prerogative rights of a king, and is thus to live to some degree in dependence upon his will. As the *Digest* of Roman Law had laid down, however, to depend on the will of another is what it means to be a slave.³⁸ If you wish to preserve your freedom under government, you must therefore ensure that you institute a political order in which no prerogative powers are allowed. The inflammatory conclusion towards which these writers are drawn is thus that, if you wish to live 'in a free state', you must be sure to live in a self-governing republic. As a result, they begin to describe such polities not merely as states by contrast with monarchies, but more specifically and more invidiously as *free states* by contrast with the dependence and slavery allegedly imposed by every form of kingly rule.

The chief inspiration for this line of thought can be traced to the Roman historians and their accounts of Rome's early transition from monarchical to consular government.³⁹ It was a moment of great significance when Philemon Holland, in publishing the first complete translation of Livy's history in 1600, described the expulsion of Rome's kings as a shift from tyranny to 'a free state'.⁴⁰ Holland went on to narrate how, when Lars Porsenna attempted to negotiate the return of the Tarquins, he was aggressively reminded 'that the people of Rome were not under the regiment of a king, but were a free state' and intended 'to be free still and at their owne libertie'.⁴¹ The body of the people no longer needed a head; they had taken possession of sovereignty themselves.

A number of early-modern commentators revived and strongly endorsed this preference for 'free states'. An influential example is provided by Traiano Boccalini's *Ragguagli di Parnasso*, which appeared in English as *The new found politike* in 1626.⁴² After ridiculing and denouncing the monarchies of contemporary Europe, Boccalini brings his discussion to a close with a series of orations in which a group of learned spokesmen vie with one another in praise of Venice. What has enabled her citizens to maintain their freedom while helping their city to achieve such grandeur and fame? Various answers are put forward, but everyone agrees that one key to Venice's success is that she has always been 'a free state'. For centuries her citizens have preserved the same

³⁸ *Digest of Justinian* 1985, 1.6.4, p. 18. ³⁹ Skinner 2002, vol. II, pp. 308–43.

⁴⁰ Livy 1600, p. 44. ⁴¹ Livy 1600, p. 54.

⁴² On Boccalini see Tuck 1993, pp. 101–3.

republican constitution, and this in turn has provided ‘the true solid foundation, wheron their Greatnesse consisted most firmly built, & withall the eternitie of their Libertie’.⁴³

By this time, a second and more radical line of attack on the absolutist theory of the state had begun to emerge. This development largely stemmed from scholastic discussions about *summa potestas* and their adaptation by Huguenot publicists in the closing decades of the sixteenth century. A minority of the Schoolmen had always argued that, in Jacques Almain’s words, no independent community can ever abdicate its original sovereignty.⁴⁴ This contention was enthusiastically taken up by such radical Huguenots as Theodore de Bèze and the author of the *Vindiciae, contra tyrannos*, the latter of whom repeatedly insists that the *populus universus* remains *maior* or greater in authority than any ruler to whom it may happen to delegate its primitive right of self-government.⁴⁵

These arguments had the effect of enlarging the case in favour of ‘free states’. We begin to encounter the broader claim that, under all lawful forms of government – monarchies as well as republics – rights of sovereignty must remain lodged at all times with the *universitas* of the people or (as some begin to say) with the body of the state. Unless this is so, the people will be condemned to living in dependence on the goodwill of their sovereign, and this will have the effect of reducing them from their pristine state of freedom to an unnatural condition of servitude.

The earliest English political theorist to lay out this exact line of argument was Henry Parker in his *Observations* of 1642. Parker speaks with confidence about ‘the whole State of England’ and ‘the whole body of the State’, to which he adds that it is our ‘nationall union’ that makes us ‘a whole state’.⁴⁶ For Parker the crucial question is how political authority is disposed between crown and state. His negative answer is that sovereignty cannot possibly lie, as the royalists were contending, with the king as head of state. Kings may be *maior singulis*, greater than the individual members of the body politic, but they are *minor universis*, of lesser power and standing than the *universitas* of the people as a whole.⁴⁷ Parker’s positive answer, although much hedged about, is thus that sovereign power must ultimately reside with the whole body of the people, and that the name of this body politic is the state.

⁴³ Boccalini 1626, pp. 191–2.

⁴⁴ Almain 1706, col. 978: ‘Nulla Communitas perfecta hanc potestatem a se abdicare potest’. On Almain see Burns 1992, pp. 138–45; Skinner 2002, vol. II, pp. 255–62.

⁴⁵ *Vindiciae, contra tyrannos* 1994, pp. 74, 78. For a discussion see Garnett 1994, pp. xxii–xxxii.

⁴⁶ Parker 1642, pp. 29, 45. ⁴⁷ Parker 1642, pp. 2–4.

IV

No sooner was the populist theory put into circulation than it was vehemently denounced by royalists and absolutists of every stamp. Some of them merely reverted to the claims put forward by Charles I's father in support of his divine right. But others attempted to meet the critics of the monarchy on their own ground. When, for example, John Bramhall published his line-by-line critique of Parker's *Observations* as *The Serpent Salve* in 1643,⁴⁸ he conceded that 'Power is originally inherent in the People', and described the 'collected Body' underlying civil government as the 'Body of the State'.⁴⁹ But he then proceeded to reaffirm the scholastic orthodoxy that, when the people submit to government, the legal act they perform is that of 'divesting' themselves of sovereignty, in consequence of which their ruler becomes the absolute head of 'the whole Body' of the state.⁵⁰

Still other defenders of absolutism responded by laying out a very different theory of the state, a theory in which the relationship between subjects and sovereigns was conceptualized in unprecedented terms. Among these writers by far the most important was Thomas Hobbes, who announces at the outset of his *Leviathan* of 1651 that, in putting forward his theory of public power, he will speak 'not of the men' but 'in the Abstract' about the nature of the COMMON-WEALTH or STATE.⁵¹

Hobbes opens his analysis by reflecting on what he describes as the natural condition of mankind. He promptly launches a scathing attack on the belief that sovereign power must originally have been possessed by the body of the people. One of his underlying purposes in presenting his celebrated picture of man's life in the state of nature as nasty, brutish and short is to insist that the image of the people as a united body makes no sense. The condition in which nature has placed us is one in which we live entirely 'dissociate' from one another, subsisting as a mere multitude in a state of solitude in which 'every man is enemy to every man'.⁵²

Hobbes is no happier, however, with the absolutists and their rival theory according to which the proper relationship between the people and their rulers is that of a passive and obedient body to a sovereign head of state. He fully endorses the parliamentarian contention that the only mechanism by which lawful regimes can be brought into existence

⁴⁸ On Bramhall's 'moderate royalism' see Daly 1971; Smith 1994, pp. 220–3.

⁴⁹ Bramhall 1643, pp. 17, 21, 89. ⁵⁰ Bramhall 1643, pp. 14, 21, 23.

⁵¹ Hobbes 2008, Epistle Dedicatory, p. 3; Introduction, p. 9.

⁵² Hobbes 2008, ch. 13, pp. 89–90.

is 'by the consent of every one of the Subjects'.⁵³ To which he adds that, even after the members of a multitude have subjected themselves to sovereign power, they remain the 'authors' of whatever actions may subsequently be performed by those to whom sovereignty has been assigned.⁵⁴

Due to these commitments, Hobbes never talks in the manner typical of absolutist theorists about the reverence due to kings as the Lord's anointed or God's vicegerents on earth. He always maintains that the status of even the most absolute monarchs can never be higher than that of authorised representatives.⁵⁵ Furthermore, he proceeds to give an exacting account of the duties attaching to their office, arguing that their fundamental obligation is to act at all times in such a way as 'to procure the common interest' by conducting their government in a manner 'agreeable to Equity, and the Common Good'.⁵⁶

As well as registering these objections to prevailing theories of the state, Hobbes lays out his own rival theory at the same time. He begins by explaining what it means to speak of a sovereign as a representative:⁵⁷

A PERSON, is he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.*

When they are considered as his owne, then is he called a *Naturall Person*: And when they are considered as representing the words and actions of an other, then is he a *Feigned or Artificiall person*.⁵⁸

What Hobbes is basically telling us here is that a representative is the name of a person who takes upon himself the 'artificial' role of speaking or acting in the name of another man (or another *thing*) in such a way that the words or actions of the representative can be attributed to the person being represented.

With this exposition, Hobbes arrives at a question that no earlier theorist of the state had been obliged to raise. If sovereigns are representatives, what is the name of the person whom they represent? To understand Hobbes' answer, we need to begin by attending to his distinctive account of the political covenant.⁵⁹ As we have seen, he denies

⁵³ Hobbes 2008, ch. 16, p. 114; ch. 28, p. 219; cf. ch. 21, p. 150.

⁵⁴ Hobbes 2008, ch. 16, p. 114; ch. 17, p. 120.

⁵⁵ Hobbes 2008, ch. 19, pp. 130–1.

⁵⁶ Hobbes 2008, ch. 19, p. 131; ch. 24, p. 171.

⁵⁷ For Hobbes on representation see Pitkin 1967, pp. 14–37; Jaume 1986; Skinner 2007.

⁵⁸ Hobbes 2008, ch. 16, p. 111.

⁵⁹ Hobbes speaks of two ways in which political authority can be established: by 'institution' or by 'acquisition'. It is only in respect of the former case, however, that he fully works out his theory of authorization and representation, which is why I concentrate on 'government by institution' in what follows.

that such agreements can ever be made between the body of the people and a designated sovereign in the manner presumed by Henry Parker and his ilk, simply because there is no such thing as the body of the people. It follows that, if there is to be a political covenant, it can only take the form of an agreement between each and every individual member of the multitude, who agree to authorize an individual or assembly to act in their name.

But what does it mean to *authorize* such a representative? Hobbes gives his answer in discussing the role of ‘Persons Artificiall’ in chapter 16:

Of Persons Artificiall, some have their words and actions *Owned* by those whom they represent. And then the Person is the *Actor*; and he that owneth his words and actions, is the *AUTHOR*: In which case the Actor acteth by Authority.⁶⁰

Here Hobbes is telling us that, when we authorize someone to represent us, we must be willing to regard ourselves as the ‘owners’ of whatever is subsequently said or done by our representative. The reason is that, by our act of authorization, we grant him authority to speak and act in our name. We must therefore be prepared to accept responsibility for his words and actions as if they had been *our own*, as if we had spoken or acted ourselves.⁶¹

With this analysis Hobbes arrives at his central contention about the implications of the political covenant. When we authorize a sovereign, we transform ourselves from a mere multitude into a unified group. We are now united by our common agreement to live in subjection to law, and by the fact that we have a single determining will, that of our sovereign representative, whose words and actions count as those of us all. But this is to say that, rather than being ‘dissociate’ from one another, we are now capable of willing and acting as one person. As Hobbes summarizes, ‘a Multitude of men, are made One Person, when they are by one man, or one Person, Represented’.⁶²

The act of covenanting may thus be said to engender two persons who had no previous existence in the state of nature. One is the artificial person to whom we grant authority to speak and act in our name. The name of this person, as we already know, is the sovereign. The other is the person whom we bring into being when we acquire a single will and voice by way of authorizing a man or assembly to serve as our representative. The name of this further person, Hobbes next

⁶⁰ Hobbes 2008, ch. 16, p. 112.

⁶¹ For Hobbes on authorization see Gauthier 1969, pp. 120–77; Baumgold 1988, pp. 36–55; Skinner 2007.

⁶² Hobbes 2008, ch. 16, p. 114.

proclaims in an epoch-making moment, is the commonwealth or state.⁶³ ‘The Multitude so united in one Person, is called a COMMONWEALTH’,⁶⁴ and another name for a commonwealth is a CIVITAS or STATE.⁶⁵

We are now in a position to solve the puzzle raised by Hobbes’ initial contention that all lawful sovereigns are merely representatives. Whom do they represent? Hobbes’ answer is that they represent the state.⁶⁶ He categorically distinguishes the state not merely from the figure of the sovereign, but also from the unity of the multitude over which the sovereign rules at any one time. While sovereigns come and go, and while the unity of the multitude continually alters as its members are born and die, the person of the state endures, incurring obligations and enforcing rights far beyond the lifetime of any of its subjects.⁶⁷

As with the other theories of the state I have examined, Hobbes’ fictional theory (as I shall call it) is basically intended to furnish a means of judging the legitimacy of the actions that governments undertake. According to the absolutist theory, such actions are legitimate as long as they are performed by a recognized sovereign as head of state. According to the populist theory, such actions are only legitimate if they are performed by the will (or at least the represented will) of the sovereign body of the people. According to the fictional theory, the actions of governments are ‘right’ and ‘agreeable to Equity’ if and only if two related conditions are satisfied.⁶⁸ The first is that they must be undertaken by a sovereign – whether a man or assembly – duly authorized by the members of the multitude to speak and act in the name of the person of the state. The second is that they must basically aim to preserve the life and health of that person, and hence the common good or public interest of its subjects not merely at the time of acting but in perpetuity.⁶⁹

V

Hobbes’ fictional theory had little immediate impact on English political debate.⁷⁰ During the constitutional crisis of 1679–81, when the

⁶³ For further discussion see Tukiainen 1994; Skinner 1999.

⁶⁴ Hobbes 2008, ch. 17, p.120.

⁶⁵ Hobbes 2008, Introduction, p. 9 and ch. 17, p. 120.

⁶⁶ Jaume 1983; Skinner 1999; Loughlin 2003, pp. 58–64.

⁶⁷ Hobbes 2008, ch. 19, pp. 135, 221.

⁶⁸ Hobbes 2008, ch. 24, pp. 171–2; ch. 30, pp. 239–40.

⁶⁹ Hobbes 2008, ch. 17, p. 120; ch. 19, p. 131; ch. 24, p. 171; ch. 30, pp. 239, 241.

⁷⁰ Parkin 2007, pp. 334–44, 361–77 reports a largely hostile reception, with no specific discussions of Hobbes’ theory of the state.

Whigs attempted to exclude the heir presumptive from the throne, they mainly sought to legitimize their renewed attack on the Stuart monarchy by reviving and consolidating the populist theory of the state.⁷¹ Meanwhile, their Tory opponents, in repulsing their attack, mainly defended the crown by reverting to the claim that the king must be recognized as the God-given head of the passive and obedient body of the state.⁷²

During the same period, however, the fictional theory began to capture the attention of numerous European commentators on the *ius gentium* and the law of nature. The earliest important philosopher to draw heavily on Hobbes' account was Samuel Pufendorf in his *De iure naturae et gentium* of 1672.⁷³ Soon afterwards, Pufendorf's work became widely known in France through the efforts of his translator and editor, Jean Barbeyrac, whose annotated version of Pufendorf's *De iure naturae* appeared as *Le droit de la nature et des gens* in 1706.⁷⁴ Thereafter, the same theory was articulated by such jurists as François Richer d'Aube in his *Essais* of 1743 and Martin Hubner in his *Essai* of 1757.⁷⁵ Of all these restatements, however, by far the most influential was that of Emer de Vattel in *Le droit des gens* of 1758. Vattel likewise speaks at length about *l'Etat* as a distinct *personne morale*, and his analysis played a role of exceptional importance in the assimilation of the idea into English political thought.⁷⁶

This process of assimilation may be said to have begun with the publication of White Kennet's translation of Barbeyrac's edition of Pufendorf in 1717. When Pufendorf turns to the question of political association in Book VII, Kennet's translation makes him speak of 'the inward Structure and Constitution of Civil States'.⁷⁷ The state is said 'to exist like *one Person*, endued with Understanding and Will, and performing other particular Acts, distinct from those of the private Members' who make up its subjects.⁷⁸ Pufendorf adds that 'Mr *Hobbes* hath given us a very ingenious Draught of a Civil State', and in framing his own definition he closely echoes Hobbes' account.

As a purely moral person, Pufendorf next concedes, the state cannot hope to act in its own name; it stands in need of a representative to speak and act on its behalf.⁷⁹ Pufendorf is emphatic that anyone – whether an

⁷¹ Houston 1991, pp. 101–45. ⁷² Houston 1991, pp. 69–98.

⁷³ For Pufendorf's dependence on Hobbes see Palladini 1990.

⁷⁴ On Barbeyrac's translation see Othmer 1970, pp. 124–34.

⁷⁵ Glaziov 1993, pp. 62–3, 65–7.

⁷⁶ Jouannet 1998; Beaulac 2003, esp. pp. 254–60. ⁷⁷ Pufendorf 1717, p. 465.

⁷⁸ Pufendorf 1717, p. 475, cols. 1–2. For discussion see Denzer 1972, esp. pp. 185–8.

⁷⁹ Pufendorf 1717, p. 476, col. 1.

individual or an assembly – who is instituted to represent the state is thereby endowed with irresistible sovereignty.⁸⁰ He is no less emphatic, however, that when sovereigns exercise these powers they do so merely as representatives, and hence as holders of offices with duties attached. The specific duty of sovereigns is to procure the safety of the people, together with the ‘internal Tranquillity’ of the state.⁸¹ Moreover, this is a task of much greater complexity than that of merely fostering the common good of the populace at any one time. The original aim of any multitude in establishing a state is to construct what Hobbes had described as a lasting edifice:

For they who were the Original Founders of Commonwealths, are not supposed to have Acted with this Design, that the State should Fall and be Dissolv'd upon the Decease of all those particular Men, who at first compos'd it; but they rather proceeded upon the Hope and Prospect of lasting and perpetual Advantages, to be derived from the present Establishment, upon their Children and their whole Posterity.⁸²

With this affirmation, Pufendorf supplies one of the earliest unequivocal statements of the claim that the person of the state is not merely the bearer of sovereignty but the means of guaranteeing the legitimacy of governmental action over time.

A moment of still greater significance in the reception of the fictional theory was reached when an English version of Emer de Vattel's treatise on the law of nations was published in London in 1760. Vattel defines the *ius gentium* as the law governing the relations between independent states, and accordingly begins by analysing the concept of the state itself. As a union of individuals, the state is said to be the name of a distinct ‘moral person’ possessed of ‘an understanding and a will peculiar to itself’.⁸³ Separate states can in turn be regarded as ‘moral persons who live together in a natural society’, and ‘every nation that governs itself, under what form soever, without any dependence on a foreign power, is a *sovereign state*’.⁸⁴

Vattel concedes that the person of the state is not itself capable of action; if it is to speak and act, there must be some agreed form of public authority to represent it. As soon as such a government is instituted, the bearer of sovereignty is invested with the highest powers ‘of commanding whatever relates to the public welfare’.⁸⁵ These powers belong,

⁸⁰ Pufendorf 1717, p. 517, cols. 1–2.

⁸¹ Pufendorf 1717, p. 569, col. 1; p. 571, col. 1.

⁸² Pufendorf 1717, p. 481, col. 1. ⁸³ Vattel 1760, p. 1.

⁸⁴ Vattel 1760, p. 10. For the context in which he formulated this principle see Toyoda 2009.

⁸⁵ Vattel 1760, p. 21.

however, 'originally and essentially to the body of the society', and all sovereigns exercise them merely as representatives entrusted to act 'for the safety of the state'.⁸⁶ Sovereigns come and go, but the person of the state endures, which is why its interests must be given the highest priority. Like Pufendorf, Vattel concludes by offering a vision of the state not merely as a guarantor of the legitimacy of governmental action, but of its power to bind whole nations to their promises over long tracts of time.

By this stage the fictional theory had begun to catch the attention of English legal theorists, a process undoubtedly fostered by the appearance in 1750 of the first collection of Hobbes' political works to be issued in England since the publication of *Leviathan* a century before. Among the lawyers drawn to Hobbes' theory, none enjoyed a higher reputation than Sir William Blackstone, who incorporated its basic tenets into the introductory essay in his *Commentaries on the Laws of England* in 1765.⁸⁷ Blackstone begins by insisting that it makes no sense to treat the body of the people as a natural collectivity. The problem thus raised, however, is that 'many natural persons, each of whom has his particular will and inclination' cannot 'by any *natural* union be joined together' in such a way as to produce 'one uniform will of the whole'.⁸⁸ The only solution is to institute what Blackstone calls a '*political* union' of the multitude, to which he adds that the name of this union is the state. 'A state is a collective body, composed of a multitude of individuals, united for their safety and convenience and intending to act together as one man'.⁸⁹ The distinguishing mark of sovereignty – that of having the authority to legislate – may equally well 'reside' in different forms of government, but the authority itself is always part of 'the natural, inherent right that belongs to the sovereignty of a state'.⁹⁰

VI

By the mid-eighteenth century, the idea of the sovereign state as a distinct *persona ficta* was firmly entrenched in English as well as continental theories of public and international law. Towards the end of the century, however, the English branch of the genealogy I have been tracing began to ramify in a strongly contrasting way.⁹¹ No sooner had Blackstone introduced the fictional theory to a broad English readership than it

⁸⁶ Vattel 1760, p. 19.

⁸⁷ For Blackstone on law and the English state see Cairns 1984; Lieberman 1989, pp. 31–67.

⁸⁸ Blackstone 1765, p. 52. ⁸⁹ Blackstone 1765, p. 52. ⁹⁰ Blackstone 1765, p. 49.

⁹¹ For this contrast see Dyson 1980.

fell victim to an almost lethal attack. Furthermore, out of this violently hostile reaction there emerged a way of thinking about public power in which the concept of the state as a legal personality was allowed to slip almost entirely from sight.

This attack may be said to have rolled forward in two successive waves. The first was associated with the rise of classical utilitarianism, and in particular with the reforming jurisprudence of Jeremy Bentham. Bentham's earliest published work, his *Fragment on Government* of 1776, took the form of a scornful and vituperative critique of precisely those sections of Blackstone's *Commentaries* to which I have referred.⁹² Launching his tirade, Bentham announces that 'the season of *Fiction* is now over',⁹³ and that the time has come to ground legal arguments on observable facts about real individuals, and especially on their capacity for experiencing, in relation to political power, the pain of restraint and the pleasure of liberty.⁹⁴ His response to Blackstone's description of the state of nature, the union of the multitude and the creation of the state is accordingly to pronounce these passages completely *unmeaning*, a mere sequence of fictions of just the kind that legal theory must learn to avoid.⁹⁵

Bentham's repudiation of legal fictions had an overwhelming influence on the subsequent direction of utilitarian thought. We look in vain among other early utilitarians – William Paley, William Godwin, James Mill – for any sustained discussion of the state, and insofar as we encounter such discussions in later utilitarian theory they invariably echo Bentham's commonsensical account. A classic instance is provided by John Austin's lectures on *The Province of Jurisprudence Determined* of 1832.⁹⁶ As Austin informs us, his own understanding of the state is that the term simply denotes 'the individual person, or the body of individual persons, which bears the supreme powers in an independent political society'.⁹⁷ Later we find the same view summarized – along with so much else in the utilitarian creed – by Henry Sidgwick in his *Elements of Politics* of 1891, in which the state is viewed as nothing more than an apparatus of government empowered to command the exclusive allegiance of those living under it.⁹⁸

It is true that by this time a reaction had set in against these commonsensical accounts. During the closing decades of the nineteenth century

⁹² For Bentham on Blackstone see Burns 1989; Schofield 2006, pp. 51–7.

⁹³ Bentham 1988, p. 53. ⁹⁴ Schofield 2006, pp. 32–44.

⁹⁵ Bentham 1988, p. 113. For Bentham on fictions see Schofield 2006, pp. 14–27, 74–7.

⁹⁶ On Austin and Bentham see Lobban 2007, pp. 173–87.

⁹⁷ Austin 1995, p. 190n. ⁹⁸ Sidgwick 1897, p. 221.

a determined effort was made to reintroduce into English legal and political theory the idea of the state as the name of a distinct person. Some legal theorists, notably F.W. Maitland and his disciples, extended the theory of corporations as *personae fictae* to include the state as the most 'triumphant' fiction of all.⁹⁹ Still more contentiously, an influential group of English moral philosophers turned to Rousseau and especially Hegel to help them articulate the claim that the state is the name of a person with a real will of its own. The fullest presentation of this argument can be found in Bernard Bosanquet's *Philosophical Theory of the State*, which first appeared in 1899.¹⁰⁰ According to Bosanquet the state possesses its own substantial will, the contents of which are equivalent to what we would ourselves will if we were acting with complete rationality. He is thus led to propose what he calls 'the identification of the State with the Real Will of the Individual in which he wills his own nature as a rational being'.¹⁰¹ The moral freedom of citizens is taken to reside in their ability to conform to the requirements of their real or rational wills, and thereby conform to the will of the moral person of the state.

For a short while this way of thinking enjoyed a considerable vogue, but it soon provoked a strong reaction in favour of what I have been calling the commonsensical approach.¹⁰² One particularly irascible response came from L.T. Hobhouse in his *Metaphysical Theory of the State* of 1918. The state, Hobhouse retorts, is nothing more than the name of a 'governmental organisation', and in speaking of the powers of the state we are simply referring to acts of government.¹⁰³ A year later, Harold Laski published his *Authority in the Modern State*, in which he argued in very similar terms. When we speak about the state, he declares, we are merely referring to a prevailing system of legal and executive power, together with an associated apparatus of bureaucracy and coercive force.¹⁰⁴

By the time Laski published these thoughts, the second wave of the commonsensical attack was already well under way. Laski was still content to assume that the state remains the master concept that needs to be analysed.¹⁰⁵ By this stage, however, it was precisely this article of faith that a number of political theorists had begun to doubt.

Among the developments encouraging this sceptical stance, perhaps the most salient was the rise of international legal organizations in the

⁹⁹ Maitland 2003, p. 71.

¹⁰⁰ Nicholson 1990, pp. 198–230; Boucher and Vincent 2000, pp. 87–126.

¹⁰¹ Bosanquet 1910, p. 154. ¹⁰² Nicholson 1990, pp. 189–90.

¹⁰³ Hobhouse 1918, pp. 75–6. ¹⁰⁴ Laski 1919, pp. 29, 37.

¹⁰⁵ Laski 1919, pp. 26, 32.

period immediately preceding the First World War. In particular, the Hague conferences of 1899 and 1907 extensively limited the rights of sovereign states to engage in military actions on their own terms.¹⁰⁶ Still more significantly, the establishment by the League of Nations of the Permanent Court of International Justice in 1922 brought into being a legal authority whose judgments were capable, at least in theory, of overriding the jurisdictions of individual states in many areas over which they had previously taken themselves to enjoy an inviolable sovereignty.

Reflecting on these changes, a growing body of commentators began to suggest that the sovereign state was a concept that had simply had its day. This is already the thrust of Norman Angell's argument in *The Foundations of International Polity* in 1914. To treat the state as the basic unit of political analysis, he asserts, is hopelessly outdated and 'at variance with the facts'.¹⁰⁷ More recently, the decline and fall of the state has become a cliché of political theory.¹⁰⁸ No doubt this outcome has partly been due to the continuing growth of international organizations with authority to overturn the local jurisdictions of individual states. More significance, however, ought probably to be accorded to two further developments that are clear for all to see. One has been the rise of multinational corporations and other such agencies that, by controlling investment and employment, coerce individual states into accommodating their demands even when these may conflict with the social and economic priorities of the states concerned.¹⁰⁹ The other development has been the increasing acceptance of an overarching ideal of human rights. The European Court of Human Rights was established with express authority to override the local jurisdictions of member states if they could be shown to violate the European Convention on Human Rights adopted in 1950. More recently, some international legal theorists have gone so far as to argue that, in the name of securing such rights, it may be permissible to interfere, by military force if necessary, in the internal arrangements of purportedly sovereign states.¹¹⁰

These developments have convinced a growing number of commentators that the powers of individual states are in terminal decline. The state, we are told, is shrinking, retreating, 'fading into the shadows'.¹¹¹ As a result, the concept of the state is losing any significance in political

¹⁰⁶ Keefer 2006 and 2007. ¹⁰⁷ Angell 1914, p. xxviii.

¹⁰⁸ Bartelson 2001, pp. 77–113.

¹⁰⁹ For examples see Strange 1996, pp. 91–109, 122–79; Hertz 2001, pp. 40–61, 170–84.

¹¹⁰ See Tesón 1997; Wheeler 2000; Caney 2005, esp. pp. 231–46; for a survey see Weiss 2007.

¹¹¹ Strange 1996, pp. 82–7; Creveld 1999, pp. 420–1.

philosophy and the theory of international relations alike.¹¹² Frank Ankersmit has recently gone so far as to conclude that ‘now for the first time in more than half a millennium the State is on the way out’.¹¹³

VII

To trace the genealogy of the state is to discover that the concept has been a subject of continuous contestation and debate. Of late, however, we have chosen to confront this intellectual heritage in such a way as to leave ourselves astonishingly little to say about it. We seem largely content to reiterate that the term *state* is simply a way of referring to an established apparatus of government, and that such governments are of slight and diminishing significance in our newly globalized world.

This outcome strikes me as deeply unsatisfactory. One weakness of many recent discussions has arisen from their excessive eagerness to announce the death of the state.¹¹⁴ It is of course undeniable that individual states have forfeited many of the traditional attributes of sovereignty, and that the concept of sovereignty itself has to some extent become disjoined from its earlier associations with the rights of individual states.¹¹⁵ Nevertheless, the world’s leading states remain the principal actors on the international stage, and the ideal of humanitarian intervention has yet to be invoked in such a way as to challenge the sovereignty of any major state.¹¹⁶ Furthermore, such states remain by far the most significant political actors within their own territories.¹¹⁷ They have become more aggressive of late, patrolling their borders with increasing vigilance and maintaining an unparalleled level of surveillance over their own citizens. They have also become more interventionist, and in the face of their collapsing banking systems they have even proved willing to step forward as lenders of last resort. Meanwhile they continue to print money, to impose taxes, to enforce contracts, to engage in wars, to imprison and otherwise penalize their errant citizens, and to legislate with an unparalleled degree of complexity. To speak in these circumstances of the state as ‘fading into the shadows’ seems one-sided to the point of inattentiveness.

¹¹² See, for example, Creveld 1999; Hertz 2001, esp. pp. 18–37. For other writers who converge on this point see Bartelson 2001, p. 1n.

¹¹³ Ankersmit 2007, p. 36. ¹¹⁴ Bartelson 2001, pp. 149–81.

¹¹⁵ MacCormick 1999, pp. 123–56; Bellamy 2003; Prokhovnik 2007, esp. pp. 105–16, 183–246.

¹¹⁶ See the examples discussed in Tesón 1997, pp. 175–266; Wheeler 2000.

¹¹⁷ As Troper argues in Chapter 7 of this volume, there are even good reasons for remaining sceptical about the extent to which the institutions of the European Union have undermined the traditional sovereignty of member states.

Even if we agree, however, that the concept of the state remains indispensable to legal and political theory alike, we still need to ask whether it is sufficient to operate with what I have been calling the commonsensical account. What, if anything, has been lost as a result of the widespread repudiation of the earlier and more explicitly normative ways of thinking about the state that my genealogy has brought to light?

My own answer would be that, if we reflect on what I have been calling the absolutist and populist theories, it is hard to avoid the conclusion that they are nowadays of exclusively historical interest. If we turn, however, to the fictional theory, we come upon a way of thinking that ought never to have been set aside. As a number of legal and political theorists have begun to urge, we can scarcely hope to talk coherently about the nature of public power without making some reference to the idea of the state as a fictional or moral person distinct from both rulers and ruled.¹¹⁸ I should like to end by explaining why I agree that this element in our intellectual heritage stands in need of reappraisal and indeed of reinstatement.

We need to begin by recalling why the proponents of the fictional theory were so anxious to mark a categorical distinction between the apparatus of government and the person of the state. They had two connected reasons for this commitment. One was a desire to provide a means of testing the legitimacy of the actions that governments undertake. According to the fictional theory, the conduct of government is morally acceptable if and only if it serves to promote the safety and welfare of the person of the state, and in consequence the common good or public interest of the people as a whole.

There is admittedly an obvious objection to this line of thought, and it has been central to liberal political theory at least since the publication of John Rawls' *A Theory of Justice* in 1971. Rawls proclaims at the outset of his treatise that the first virtue of all social institutions is justice. The proper method of assessing the legitimacy of a state's actions must therefore be to ask whether they are fair or just. If we ask what justice requires, one inescapable part of the answer is that priority must be assigned to the rights of individuals over any attempt to promote such inclusive goals as the common good. 'Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.'¹¹⁹

It is arguably a weakness of this case, however, that it refuses to acknowledge that it may sometimes be necessary – especially in times of

¹¹⁸ See Runciman 1997, 2000, 2003; McLean 2003, 2005; cf. Bartelson 2001, pp. 149–81.

¹¹⁹ Rawls 1971, p. 3.

crisis – for the maintenance of individual rights to give way to broader notions of the public interest. One reason for wishing to reintroduce the fictional theory into the heart of our political discourse is to furnish us with a means not merely of testing the legitimacy of government conduct, but of vindicating the actions that governments are sometimes obliged to take in times of emergency. If there is a genuine national crisis, there must be a strong case for saying that the person whose life most urgently needs to be saved is the person of the state.

I turn finally to the other and more powerful reason for conceiving of public power in these terms. We need to be able to make sense of the claim that some government actions have the effect of binding not merely the body of the people but their remote posterity. Consider, for example, the case that Maitland took to be of exemplary significance: the decision of a government to incur a public debt.¹²⁰ Who becomes the debtor? We can hardly answer, in the manner of the populist theory, that the debt must be owed by the sovereign body of the people. If the debt is sufficiently large, the people will lack the means to pay it. But nor does it make any better sense to suggest in commonsensical terms that the debt must be owed by the government that incurred it. If the government changes or falls, this will have no effect in cancelling the debt.

By contrast, it seems a decisive reason for accepting the fictional theory of the state that it offers a coherent solution to this and several related puzzles. It does so by declaring that the only person sufficiently enduring to be capable of owning and eventually repaying such debts must be the person of the state. As a *persona ficta*, the state is able to incur obligations that no government and no single generation of citizens could ever hope to discharge. I would go so far as to say that, in the present state of contract law, there is no other way of making sense of such obligations than by invoking the idea of the state as a person possessed, in Hobbes' phrase, with an artificial eternity of life.¹²¹ We need to recognize that one reason why states are likely to remain powerful actors in the contemporary world is that they will outlive us all.

¹²⁰ My discussion is indebted to Maitland 2003, pp. 39–45, 70–1.

¹²¹ For further discussion see McLean 2003, esp. pp. 175–6, 178–83.

2 The apparition of sovereignty

Denis Baranger

I

The concept of sovereignty is generally approached in a twofold fashion. First, one seeks to understand its meaning. Second, one aims to derive some consequences from the fact that a certain community, or institution, can be said to be sovereign. As for the meaning of sovereignty, an analytical approach has often prevailed in the recent past over what we may call a metaphysical one. The metaphysical approach sought to identify the essence of sovereignty. The analytical approach has attempted to establish that such an approach had major inherent drawbacks and failed to account for all the uses of the term 'sovereign'. The analytical approach did not seek to identify an essence of sovereignty. Instead, it purported to explore all the possible uses of the term in positive law. As a result, this analytical approach has been in a position to show that in many cases a full and unified set of consequences, especially of legal ones, did not stem from the use of the term. Different meanings involved different legal consequences.

In this chapter, I wish to suggest that the study of sovereignty could benefit from another approach, which would focus on the way in which sovereignty has appeared, or rather has been said to appear, in modern political consciousness. It is suggested here that some key characteristics of the legal concept of sovereignty will be left in the dark if they are not envisaged in this fashion. The history of sovereignty cannot be distinguished from modes of reasoning in which the apparition of the legal object (or a certain legal characteristic of this object) is carefully taken into account by specific discursive devices: sovereignty was made visible through certain signs, or marks. These marks were intended to trigger a process of recognition in which moral agents were induced to accept the evident, or maybe 'self-evident' existence of the sovereign.

I wish to thank my friends of the *séminaire de droit politique* (*Institut Michel Villey*) for their comments on an earlier version of this text. I also wish to express my gratitude to Quentin Skinner.

All these categories of thought point to a concept of sovereignty the features of which are defined according to a larger understanding of how things appear in the 'common world' of man. Far from restricting their effects to an empirical world of mere 'facts', these modes of apparition were intended to generate legal effects, the first of which being that the sovereign's existence should be duly acknowledged.

In contemporary times, the analytical school of constitutional theory has insisted that sovereignty does not exist as a 'thing' belonging to the real world, and is only a feature of legal discourse. Yet the growth of modern public law has coexisted with an immense effort to locate sovereignty in the world, to ascribe it a place in the sphere of human representations. It is some aspects of this effort that I would like to trace here. In a sense, while the analytical scholars have been successful in showing that sovereignty is a word that covered several meanings (*Souveränität*, *Staatsgewalt*, *Herrschaft*, and possibly more), this discovery ought to be confronted with the fact that for a long time sovereignty has been seen as a unified phenomenon. Certainly, although it was maybe misleading, and even possibly the result of an exercise in political propaganda on the part of state lawyers (*légistes*) to pretend that sovereignty was one and a single reality, this is nevertheless how it has been presented for a long time. The underlying question is therefore the following: is there an element of necessity – and therefore some consequence to be drawn at the level of concepts – in this phenomenal unity?

In the context of the rise of a legal culture based – amongst other things – on individualistic principles, sovereignty is not the only legal notion that might lend itself to this particular approach. It is eminently the case, for instance, with human rights. As legal entities, they stand in need of a preliminary process of identification. One could suggest that an individualistic legal thought only tolerates two sorts of objects: entities whose existence is the result of an act of will (norms); or characters that are *inherent* (to their bearers) and whose existence is *self-evident*. As for the second category, to which human rights and (it is suggested) sovereignty belong, it is self-defeating to claim that they result from a manifestation of will. At the level of political theory, one may venture to suggest that they result from a mutual understanding within civil society. Yet this is not sustainable at the level of law. The existing legal framework of human rights is incompatible with the view that human rights are the offspring of something even remotely resembling volition, or even consent. The legal framework of rights requires that they appear in a certain way. They stand in need of another description, in which they are said to belong inherently to human beings. This existence is

expressed as a self-evident character.¹ It lends itself to a declaratory process rather than to a sort of 'lawmaking'. All this forms a specific body of modes of generation and corruption. Self-evidence, or inherence, are modes of legal apparition. My purpose is to study these modes in themselves. This requires us to approach legal concepts in a manner that is usually restricted to empirical objects. This might be held by some to be entering on an eminently slippery path. There is ample evidence, however, that to do so enables the observer to recapture modes of legal thought that may have become obsolete but once were in currency. This is the case of the modes of apparition used in the discourse of sovereignty. To put it in very general terms, but also in terms which are sufficiently repeated in the discourse of pre-modern and modern lawyers to deserve theoretical attention, sovereignty is such a reality as *appears* and lends itself to *recognition*. In many cases, legal or political discourse inform us that the sovereign is 'recognized' by his subjects. In such contexts, recognition is the mode by which sovereignty is acknowledged. This is how the relationship between sovereign and subject is tied (as in the case of the '*lettres de reconnaissance*' by which vassals acknowledged to be under the '*ressort et souveraineté*' of the French king²) or is shown not to be tied (as in the case of the Italian cities which declared themselves to be '*universitates superiorem non recognoscentes*'). This is also the way in which the sovereign acknowledges himself: 'he is absolutely sovereign', says Bodin,³ 'who does not recognise anything higher than him after God'.⁴ As a means of acknowledging sovereignty, recognition is not a creation of the Hegelian theory of the state: it was already used in Roman and later feudal law. Apparition and recognition are the two major aspects of sovereignty as a phenomenon.

It is in certain regards preferable to approach sovereignty in this way. Especially, it may serve as a guide for what is at the same time the intellectual and the legal history of sovereignty. In general terms, this idea of identification seems to bear more fruit than the idea, say, of an 'invention' of sovereignty by some particularly enlightened and prophetic authors. Another option, at the other end of the spectrum, consists of claiming that sovereignty was not invented by anyone but resulted from mere facts, the historical development of political entities of a certain kind. Both views are difficult to sustain. 'Facts' do not exist

¹ As is made clear by the famous first sentences of the American Declaration of Independence: 'We hold these truths to be self-evident, that ...'.

² See Bodin (1986, I, p. 323). The form of '*lettres de reconnaissance*' was more general than this particular use: they were granted, for instance, to acknowledge the existence of a debt, or as letters of nobility.

³ Bodin 1986, Book I and *passim*. ⁴ Bodin 1986, I, p. 182.

by themselves, nor do their conceptual consequences unfold in the field of law without some intermediaries. It is obvious that the role of thinkers is critical. Sovereignty was not invented out of the blue: rather, the very authors to whom we customarily refer in this context have made the claim that it was identifiable in a pre-existing legal landscape. This identification was, of course, a very creative work, the only constraint being that the creative nature of the work could not be acknowledged.

It is quite clear, however, that to know a thing through its manifestations generates problems of several kinds. Is what manifests itself the thing as such 'or only a semblance of it?'. If the thing, when looked at from 'different points of view, obliquely or directly or from any other point of view' will appear different, is there a difference in reality? Finally, if the thing is such that, by its nature, it appears through a diversity of manifestations, is it not that 'we have seen it only in a condition which may be compared to that of the sea-god Glaucus, whose original image can hardly be discerned because his natural members are broken off and crushed and damaged by the waves in all sorts of ways, and incrustations have grown over them of seaweed and shells and stones'?⁵ A study of sovereignty cannot elude these elementary questions regarding the relationship between what is and what appears to be. Many, if not all, of the issues regarding the dogmatic status of the concept of sovereignty in public law are mere varieties of these elementary problems: how does one acknowledge the fact that a certain entity is or is not sovereign? Why is it that sovereignty can be attributed to several entities concurrently (the people, the 'state', a certain organ within the state)? What are the conditions under which one is justified in distinguishing between the *title* and the *exercise* of sovereignty? What is the functional relationship between sovereignty as a whole and the several competences that are attached to it? What are the organic relationships between a sovereign and his subordinates? At what conditions, finally, would we be entitled to say that sovereignty has disappeared?

II

At the time when French legists became increasingly interested in sovereignty, the understanding of matters of public law was beset with immense confusion. The location of power was the most intricate question of all. It touched upon the very existence of political power. Sovereignty was brought forth as the regulative principle of what would otherwise have been a chaos of authorities, powers, magistrates, etc.

⁵ Plato 1894, x, p. 598.

Sixteenth-century and early seventeenth-century French lawyers frequently pride themselves on their ability to replace disorder with an orderly account of this diverse and often confusing scenery. Conversely, Italian lawyers, whether imperial or papal, are rhetorically blamed for the confusion they throw on the question of the structure of power in the *respublica christiana*. As a result, there have to be ways of identifying the *true* locus of power as opposed to false, misleading ones. The location of sovereignty is therefore posed as a problem of knowledge and not of will. The classical doctrine of sovereignty presents itself as a knowledge that has been lost and needs to be regained. 'So that one can know who is such, that is, sovereign Prince, one has to know his marks that are not common to other subjects' (1986: 1, 295). In the *Traité des Seigneuries*,⁶ Loyseau deals with sovereignty within the framework of a depiction of seigneuries. Cardin le Bret⁷ is busy showing sovereignty, not as a metaphysical concept, but as a series of manifestations visible in the post-feudal state of his time. The rights of the king interact with other rights. Sovereignty is the feature that regulates this complex system of rights. Yet, when it is shown in this way as a set of rights, sovereignty is no more than a system of marks mapping the post-feudal system of political power.

The peculiarity of sovereignty in this context of the writings of the French *légestes* is that it is not described as being in any way novel. It resides in the legal landscape, and for some it has always been out there. But it is hard to see. This is exactly how Bodin puts the matter in the 1566 *Methodus ad facilem historiarum cognitionem*.⁸ According to Bodin, Aristotle and most of the more recent authors are aware of the existence of sovereignty. But they leave the question of its definition unanswered.⁹ Loyseau, in the *Traité des Seigneuries*, follows pretty much the same line of argument: sovereignty was not clearly established amongst the ancients; in the present time, the rights of the sovereign, he says, are still remarkably difficult to identify (1608: 49). Some elements of the republican idiom are being summoned to account for the present chaos. Says Cardin le Bret: 'since fortune has meddled with human affairs, it has by perpetual revolutions perverted the order of ... powers of the earth. As a result, it is now difficult to know which ones can properly be called sovereign' (1689: 3). Needless to say, this reference to fortune and its disturbing effects on commonwealths was already a theme of Bodin's preface to the *Six Livres de la République*. The identification

⁶ Loyseau 1608. ⁷ Le Bret 1689. ⁸ Bodin 1951, p. 358s.

⁹ For a restatement of the same reasoning in the *Six Livres*, see Bodin 1986, 1, pp. 176, 295s.

of sovereignty is a prerequisite to the restoring of order. Yet, although some elements of the Aristotelian language of natural law are still at play in the writings of the French legists, it is obvious that the objective outcome of their work will be to re-order the commonwealth at the expense of the Aristotelian notion of nature. In Bodin, in particular, republican *fortuna* is presented as the force that produced the destruction of a once intelligible political order. The identification of marks of sovereignty is the device which will help recreate *ordo ab chao*. But, although Bodin probably did not envisage this outcome, the apparition of sovereignty will contribute to further abolishing a view of the world as an ordered cosmos in which there dwelled a hierarchy of beings. The paradox is that the classical learning of the legists envisaged sovereignty as a means to restore a hierarchical understanding of order in the political world: it took a pre-modern, Aristotelian, mind, to build up a concept that would become the cornerstone of the modern, post-Aristotelian, vision of politics.

What exactly, one could ask, did these early-modern lawyers identify under the label of sovereignty? There is no straightforward answer. Sovereignty was a legal phenomenon: it existed at the level of law, and not of empirical reality. As a result, lawyers intending to prove its existence had to dig into multiple legal resources to identify the marks of sovereignty. In the post-feudal state, the unity of the sovereign was identifiable throughout a diversity of customs and written laws. As Quentin Epron has shown in a recent work, what appears to the reader as an utter absence of order in treatises such as those produced by the French Gallican lawyer Guy Coquille is in fact a deliberate attempt at unveiling the existence of 'locuses', on which the analysis of law insists.¹⁰

What is at stake here is the relationship between law and empirical reality. Identifying sovereignty was tantamount to making law visible. One way to accomplish this was to incarnate it in the sovereign. At the same time, it is only as a legal concept that sovereignty could become visible. The evidences provided by the law were more cogent than those provided by mere material signs. Bodin, Loyseau or Guy Coquille are not indifferent to titles of honour. Yet they systematically play down the role of titles, rituals or symbols when it comes to uncovering the scheme of power in the state. The law was held to be a superior, more fundamental, layer of reality, to which one could refer against deceptive appearances. Whenever reality failed to stand up to expectations, law was a source on which one could draw with a view to making reality meet the requirements of the ideal. Yet the law was diverse, providing

¹⁰ Epron 2006.

hints but expressing no ultimate truth. These hints had to be carefully investigated in order to map the legal system and locate sovereignty. This character of the sovereign, that it *has to* and *can be* located in that way, will not disappear in the age of modern natural law.¹¹

This method of acknowledging the presence of the sovereign through scattered marks and signs was not without its shortcomings. Identifying marks of sovereignty is a very subjective method in more than one sense. It relies on the subjectivity of the lawyer drawing up the list. That sovereignty should be inherent,¹² and thus require a process of identification and not of enactment or self-assertion by way of an act of will generates its own difficulties. Mostly, it is open to every beholder to see it where he thinks fit: the making and unmaking of 'loys' for Bodin; the 'absolute power over subjects' (*puissance absolue sur les sujets*) in the view of Loyseau; the right of the sword, as far as Hobbes expressed a point of view on the matter. Every beholder could decide for himself which mark was decisive. Absent a written constitution, and more generally a culture of legal uniformity, the process of identifying sovereignty belonged intellectually to a world of legal pluralism.

Behind the diversity of rights, immunities, revenues, the sovereign of whom pre-modern lawyers struggled to identify the legal marks was maybe not as visible as he should have been. In his *Traité de la Souveraineté du Roi* (early seventeenth century) Cardin le Bret seems to be aware of the necessity to 'describe kingship' before he sets out to explain the meaning of the king's sovereignty: 'Having purported to represent in this book in what the King's sovereignty consists, it seems to me that I cannot begin more appropriately than by describing kingship.'¹³ There is little one knows about kingship as such, though, once the chapter has been read, however carefully. What seems to be of greater moment in this regard is not this introductory chapter but the rest of the treatise. Marks of sovereignty depict a monarch who is, in a certain sense, only one individual amongst others. The king does not absorb in his person the entire machinery of power in the way the modern state does. The king's person is distinct from those of other lords, and even of his own officers and commissaries. The language of pre-modern sovereignty will describe the latter as the monarch's 'emanations' (yet another word which would deserve an analysis in terms of a theory of apparition). Yet, while legal characters of diverse importance are being enumerated, the subject of these characters is very much left in the dark.

¹¹ See, for example, Blackstone 1979, vol. 1, p. 46: 'this will naturally lead us into a short enquiry concerning ... the natural, *inherent* right that belongs to the sovereignty of a state, *wherever that sovereignty be lodged*, of making and enforcing laws'.

¹² Blackstone 1979, p. 46. ¹³ Le Bret 1689, p. 1.

Monarchical sovereignty implies that the full recognition of the monarch's quality of being as a person will best serve the interest of the community. Yet, ascribing 'rights' to him also implies that he is not the sole power in the state. Sovereignty grants him a status of paramountcy in this complex system of fiefs, seigneuries, etc. But sovereignty, at that period, does not grant exclusivity of power. Marks of sovereignty belong to a world in which *imperium* and *dominium* are not fully distinguished. There is a distinct element of subjectivism in this way of understanding sovereignty as a 'right'. It bars the sovereign from being the source of all powers in the state. If he is himself the bearer of rights, these rights have to be rooted in a law that is, of necessity, both superior and exterior to the person called the 'sovereign'. This prevents the modern analysis of sovereignty from fully distinguishing itself from the medieval definition of the word 'sovereignty', as a superiority of a relative nature in a larger hierarchy of authorities.

This subjective nature of the marks or rights of sovereignty invites a comparison with human rights. Despite its apparent unlikeliness, this comparison is far from unjustified: the right to be sovereign was one of the first ones to be claimed by modern theorists of constitutionalism and human rights.¹⁴ One could draw an analogy between the enumeration of monarchical rights in early-modern legal literature and the declarations of human rights drafted during the Enlightenment. In both cases, the sovereign individual is made visible through his legal attributes. In both cases, it is impossible to exhaust these attributes: the absent individual – not knowable as such, except through certain manifestations – is made present (represented) by his rights. In both cases, the law is a necessary intermediary for the acknowledgement of his individuality. Both the lists of monarchical prerogatives to be found in pre-modern treatises and the lists of human rights compiled in modern declarations exemplify at the same time the ability of law to *produce* individuality and the limits of such a strategy. The political acknowledgement of the individual in the Western world has required declarations of rights. The law, therefore, is part of a larger attempt to constitute the individual. Yet no list of legal attributes can exhaust individuality. The early theory of sovereignty as marks, i.e. traceable signs of existing rights, was faced with the same problem. There was no obvious path from the marks to the bearer of these marks. If there was one, he appeared as merely one member amongst others in a larger family of public authorities.

¹⁴ *Rights of Man*, Paine's famous pamphlet, is very much a piece on sovereignty, and little else. Similarly, the American Declaration of Independence is as much a text on sovereignty as a statement of individual human rights.

III

To a significant extent, post-medieval legal discourse and political theory draw on a common linguistic stock. They have in common certain raw materials. One of them is the very word 'sovereignty'.¹⁵ Another is the reference to a set of powers, not always exactly the same, but with important similarities: making and unmaking laws, declaring war and peace, adjudicating litigations, appointing public magistrates, etc. This set is a common denominator of many discourses on political power. It is an important entry in the lexicon containing the vocabulary with which the issues regarding sovereignty are expressed. The modes of apparition are patterns into which this vocabulary is inserted. For example, it will appear necessary to describe rights not only as legal capabilities, but also in terms of 'manifestations', of 'marks' of a phenomenon that happens to go under the name of 'sovereignty'. This results in formulae in which power as a whole (i.e. sovereignty) is put in relation with its various manifestations. Another example is the way in which Bodin, for instance, distinguishes the 'communication' of power from its 'delegations'. Sovereign power cannot be 'communicated', which involves a wholesale fractioning of it between co-ordinate entities. Yet, while the supremacy (i.e. an asymmetrical power to give and take back certain legal capacities) of the sovereign is acknowledged, powers can be 'delegated', which is a kind of power-sharing compatible with the asymmetrical nature of sovereignty. The word 'emanation' often indicates that this specific mode of apparition is referred to. It entails that an entity is not self-sufficient, but derives its power from a distinct and superior source.

It is apposite to devote some attention to the way in which Hobbes creates his own formula of sovereignty, and how this formula is dependent upon a certain understanding of the manner in which sovereignty manifests itself. As a case study of this larger problem, I will pay attention to some formulations in the English version of the *Leviathan*.¹⁶ In commonwealths 'by Institution', a person or assembly of men is 'given ... by the major part, the *Right to Present* the Person of them all'.¹⁷ The sovereign *is* the representative, an artificial person authorized to act and judge by the members of the multitude as if his actions and judgments were their own. The sovereign, says Hobbes 'represent[s] the words and actions' of other men.¹⁸ It is, he says, 'the *Unity* of the

¹⁵ This was acknowledged by Bodin himself: 'Il est ici besoin de former la définition de la souveraineté, parce qu'il n'y a ni juriconsulte, ni philosophe politique qui l'ait définie' (1986, I, p. 179).

¹⁶ Hobbes 1996. ¹⁷ Hobbes 1996, p. 121. ¹⁸ Hobbes 1996, p. 111.

Representer, not the *Unity* of the Represented, that maketh the Person One'.¹⁹ 'From this Institution of a Commonwealth are derived all the *Rights*, and *Faculties* of him, or them, on whom the Sovereigne Power is conferred by the consent of the People assembled'.²⁰ 'Soveraignes by Institution' have, we are told, *Rights*, which are 'annexed to the Sovereignty'. The twelve rights spelled out in chapter 18 of *Leviathan* are of a varying nature. The first five are guarantees against the subject deduced from the nature of the covenant. The other seven are legal capacities by which the sovereign is empowered to further the 'end' of the commonwealth, namely 'Peace and Defence of all'. Hobbes deduces these rights from the 'essence' of sovereignty. That the several marks of sovereignty are in fact the features of a unitary whole, and therefore cannot be shared or communicated to others, are two features that had been already identified by Bodin.²¹ Being 'essential and inseparable' means that these rights can be deduced from the very existence of the covenant which resulted in 'the attaining to this sovereign power'. On the 'knowledge of the sovereign' depends the very existence of the commonwealth: 'for without those Essential Rights ... the Commonwealth cannot at all subsist'.²² Men must be put in a position to 'discern in what man, or Assembly of men, the sovereign is placed, and resideth'.²³

In the learning of the legists, marks of sovereignty were signs that the sovereign was somewhere to be found in the pre-existing world. While he is one of those responsible for the destruction of the *Weltanschauung* to which such ideas belonged, Hobbes has contrived a way to ensure that his artificial sovereign should enjoy the same degree of self-evidence and conspicuousness. Self-evidence is achieved by civil science, which purports to establish *more geometrico* that every commonwealth is built upon one and a single sovereign. Conspicuousness is what the doctrine of 'the office of the Sovereign Representative' (Hobbes 1996: ch. 30) aims at making possible. This office consists in the 'procurement of the safety of the people' and takes the form of 'a generall providence, contained in public instruction ... and in the making and executing of good laws'.²⁴ As for the instruction, one of the key lessons that subjects should be taught lies in the inseparability of the essential rights of sovereignty. 'Millions of men be made believe, that the same Body may be in innumerable places, at one and the same time, which is against Reason', similarly the people should be taught that to break into parts the inseparable rights of sovereignty is to do 'like the foolish daughters

¹⁹ Hobbes 1996, p. 114. ²⁰ Hobbes 1996, p. 121. ²¹ Bodin 1986, I, p. 298.

²² Hobbes 1996, p. 243. ²³ Hobbes 1996, p. 127. ²⁴ Hobbes 1996, p. 231.

of *Peleus* ... which desiring to renew the youth of their decrepit father, did by the counselling of *Medea*, cut him into pieces'.²⁵ The analogy with the Eucharist is telling, as is indeed a mythological reference reminiscent of the way in which Plato mentions the 'Sea-God Glaucus' in the *Republic*.

'The Common-peoples minds, unlesse they be tainted with [false opinions] are like clean paper, fit to receive whatsoever by Publique Authority shall be imprinted in them'.²⁶ If this was so easy, though, the entire business of writing the *Leviathan* would be pointless: in fact, men 'are by nature provided of notable multiplying glasses (that is their passions and Selfe-love) ... but are destitute of those prospective glasses (namely Morall and Civill science)'.²⁷ At several points, Hobbes insists on the difficulty of the task of having subjects 'be put in mind of the Authority that maketh them Lawes'.²⁸ Subjects cannot be easily taught whom they should obey 'nor, when 'tis taught, remember it, nor after one generation past, so much as know in whom the Sovereign Power is placed'.²⁹ They are apt to mistake the true marks of sovereignty for false and deceiving ones: there are several indications in the *Leviathan* of the tendency of political knowledge to fall victim to false perceptions: if an assembly is sovereign, men will not make the mistake of thinking the assembly is inferior to 'them altogether'. But if the sovereign is a monarch 'they see it not'.³⁰ Similarly, men are prone to be misguided by titles of honour, although Hobbes uses optical analogies to make it clear that the subjects 'shine, some more, some lesse, when they are out of [the sovereign's] sight; yet in his presence, they shine no more than Starres in presence of the Sun'.³¹

The conspicuousness of the sovereign is necessary in order for subjects to discern him and pay obedience to him, which is their first and foremost moral duty. In their very nature, rights of sovereignty have no obvious reason to be called 'marks': they are deduced by way of a theoretical reasoning about human nature and political societies. Yet Hobbes also insists that these rights 'are the markes, whereby a man may discern in what Man, or Assembly of men, the sovereign power is placed, and resideth'.³² There is reason to think that the fact that these rights are also referred to as 'marks' is justified by what we may call Hobbes' *civil apologetics*. The purpose of civil philosophy is to convince men of certain political truths. 'Men are easie to be seduced' by doctrines

²⁵ Hobbes 1996, pp. 233–4. ²⁶ Hobbes 1996, p. 233. ²⁷ Hobbes 1996, p. 129.

²⁸ Hobbes 1996, p. 235. ²⁹ Hobbes 1996, p. 234. ³⁰ Hobbes 1996, p. 128.

³¹ Hobbes 1996, p. 128. ³² Hobbes 1996, p. 127.

of resistance, and it is against the sovereign's duty to 'let the people be ignorant, or mis-informed of the grounds and reasons of those his essential Rights'.³³ In matters political, the subject has a duty to obey, but he has a right to know whom he should obey. The right to sovereign power ought to be 'a known right'.³⁴

That the sovereign *could* and at the same time *should* be identified by certain marks also proves necessary at another stage of Hobbes' reasoning. Once the sovereign has been authorized, he is the commonwealth's sole legislator. The way in which Hobbes' argument about 'civill laws' unfolds in chapter 26 of the *Leviathan* is dependent upon a reflexion on the manifestation of law. The tenets of this reasoning are well known, but it is useful to go back to Hobbes' own words in order to identify the way in which the idea of marks of sovereignty is transferred onto a (somewhat) new ground. 'The Law', says Hobbes (and in this, he only restates what was said by Bodin), 'is a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth, by voyce, writing, or some other sufficient argument of the same'.³⁵ It is therefore necessary to consider what arguments and signs are sufficient for the knowledge of the law. 'For', says Hobbes, 'the will of another, cannot be understood but by his own word, or act'.³⁶

Hobbes' doctrine of sovereignty is Janus-faced: on the 'natural' side are the marks that make the sovereign what he is.³⁷ On the 'artificial' side are the marks of his authority that are stamped upon the civil laws. In civil society, the law is not self-evidently law. It owes its authority to the fact that it appears as a manifestation of the sovereign's will. 'The difficulty' then consists in 'the evidence of the authority' derived from the sovereign. Authority is a matter of persons. The authority of the law entirely depends on the ability of law to bear on its face certain evident, knowable (Bentham would later use the word 'cognoscible'), signs of the sovereign's person. It is apposite to go on speaking of 'marks' of sovereignty in this context, as what counts as far as law is concerned is *authority*, which could be compared to a superficial seal indicative of who enacted the rule and that bears no relation to its content, and not *truth*, which is an inherent character of what a rule means and bears little or no relation to who enacted it.

³³ Hobbes 1996, p. 232. ³⁴ Hobbes 1996, p. 244.

³⁵ Hobbes 1996, p. 187. ³⁶ Hobbes 1996, p. 188.

³⁷ He is the last one to enjoy natural power. He has been made who he is according to the prescriptions of natural reason, and by way of a covenant made in the state of nature. His rights of sovereignty are responses to the defects of mankind's natural condition.

IV

The state has become self-evident. Few, in modern times, deny its existence. The superficial marks and/or scattered legal rights of the sovereign merge into a larger, all encompassing, individual named the state. The fierce intellectual battle that surrounds it is a battle about its legitimacy, its internal arrangement, hardly about its existence. Although the different theories of the modern state distinguish themselves by their different approaches to the legitimacy of power, they are bound to come up with an adequate language with which to express these ideas about legitimacy. The issue of the apparition of sovereignty thus turns out to be part of a larger problem, that of the ways in which political power should be made apparent in the context of the state. This seems to be a better way of stating the problem than to distinguish between theories of sovereignty and theories of, say, 'separation of powers'. To understand this point at greater depth, it is of interest to contrast the ways in which power is made apparent in Locke's *Two Treatises of Government*³⁸ and in Rousseau's *Contrat Social*.³⁹ Locke's language of political power focuses on its manifestations. For Rousseau, the only legitimate power is that which is connected with the general will. This leads Rousseau to disqualify former modes of apparition and to offer a new one instead.

John Locke's *First Treatise* exemplifies a significant, albeit little noticed, process in the history of constitutional ideas: the demise of marks of sovereignty. What Locke seems to mean from § 81 up until the end of the *First Treatise* is that the title to sovereignty as such is of little importance, if it is not accompanied by the designation, by clear and discernible marks, of the person who should exercise this sovereignty.

It would be of no behoof for the settling of Order, and Establishment of Government in its Exercise and Use amongst Men, unless there were a way also taught how to know the Person, to whom it belonged to have this Power, and exercise this Dominion over others ... For were I never so fully perswaded that there ought to be Magistracy and Rule in the world, yet I am never the less at Liberty still, till it appears who is the Person, that hath Right to my Obedience ... if there be no Marks to know him by. (1988: § 81)

Now it is clear that this statement is not meant to justify yet another recourse to marks of sovereignty. Rather, it aims at showing that these marks are nowhere to be found. The question about power is undeniably, as Locke puts it, 'who should have it'. The emphasis is laid on the way in which God's will is made apparent, not so much in revelation as in nature.

³⁸ Locke 1988. ³⁹ Rousseau 1964.

God [cannot] be supposed to make it a Sacred Law, that one certain Person should have a right to something, and yet not to give Rules to mark out, and know that Person by, or give an *Heir* a divine right to power, and yet not point out who that *Heir* is. 'Tis rather to be thought, that an *Heir* had no such right by Divine Institution, but yet leave it doubtful, and undeterminable who such *Heir* is. (1988: § 127)

The absence of conspicuousness of God's election is a strong argument against patriarchalism in the *First Treatise*. Filmer, says Locke, identifies marks that are by no means specific to the sovereign, such as sentencing subjects to death, which would mean that 'Judge Jefferies', James II's hanging judge, 'had Sovereign Authority'. In other cases, Locke makes the point that the use of a certain power does not involve that the person who has used it had a proper title to it (1988: § 129 and § 132). Patriarchalism thus collapses into a justification of de facto power. Locke is keen to restate the same idea in the *Second Treatise*:

there being nothing more evident, than that Creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection, unless the Lord and Master of them all should, by any manifest Declaration of his Will, set one above another, and confer on him by an evident and clear appointment an undoubted Right to Dominion and Sovereignty. (1988: § 4)

If marks of sovereignty are nowhere to be found, new modes of apparition of political power should be devised.

Should we decide to adopt a strategy of interpretation in which the two treatises were meant to express a single, coherent, theory of political authority, we should pay greater attention to the fact that, at several points in the *First Treatise*, Locke speaks as if he attributed a positive meaning to the concept of sovereignty and expresses a willingness to use it in his political theory. An instance of this is to be found in § 131 of the *First Treatise*: 'War and Peace cannot be made for Politick Societies, but by the Supream Power of such societies; because War and Peace, giving a different Motion to the force of such a politic body, none can make War or Peace, but that which hath the direction or the force of the whole Body, and that in Politick Societies, is only the Supream Power.' And if the *Second Treatise* only uses the term 'sovereignty' marginally, it also contains evidence that Locke understood power as making several appearances according to circumstances, it being sometimes united and sometimes partitioned. This structured way of talking about political power (the same power which is at times united and at other times partitioned) is in itself a mode of apparition, albeit one in which some reasons can be summoned for not using the word 'sovereignty' in order

to describe its apparitions as a unitary phenomenon. In the third paragraph of the *Second Treatise*, political power as a whole is described as a 'Right' to be used with a view to the public good. Immediately, though, this unitary 'right' splits up into a series of manifestations: to legislate, to use the force of the community, to defend the commonwealth against foreign injuries. In government, what is actualized is the splitting up of power into several 'powers'. In the *Second Treatise's* larger theoretical framework, though, the potential unity of power is maintained in prerogative and (more fully) in society's right to create a new government should the existing one become tyrannical.

§ 3 of the *Second Treatise* is one trace amongst many of the way in which the common stock of earlier public law, and especially the *regalia* that were enumerated in the legal treatises of kings' rights, did not disappear from the modern vocabulary of power. They were still accepted as the relevant manifestations of higher public authority. Different political theories implicitly agreed that these were the raw material of political power, the basic manifestations of the state. Yet they rearranged these elements differently, not only because they had different political purposes and ideas about legitimacy, but also because these ideas were associated with different patterns of apparition. Locke's rearrangement of the *regalia* into several 'powers' within the state was at the core of one of these doctrines. In his chapter on the English Constitution in *L'Esprit des Loix*, Montesquieu would later draw a distinction between three '*pouvoirs/puissances*' which, he says, belong to all states. The way in which he defines these 'powers' can be seen under two, not mutually incompatible, lights: one is as an intellectual attempt to convey the abstract meaning of these separate powers, under the premise that they exist everywhere if only one has eyes to see them (hence Montesquieu's insistence on 'visible powers').⁴⁰ But what Montesquieu does in order to lend credence to his view is to select some of the items listed in the enumerations made by pre-modern lawyers and to fit them forcibly into three larger boxes, and three only. The king's rights ('*droits du roi*') are thus drawn out of their original context and made available for a new theory of political power.

One should draw attention to the fact that the 'powers' of constitutional liberalism are functions recast into organs, i.e. state agencies. As an activity, the 'executive power' is primarily based on the fusion of certain *regalia*, pre-modern sovereign rights. As this activity is entrusted to a certain agency, this agency is christened accordingly: executive power, legislative power ... the sum of these institutional powers makes

⁴⁰ Montesquieu 1951 p. 575.

the state (in one sense of the word). Its proponents will hasten, not without justifications, to say that is no less a state because it is built this way, although its unity is not achieved by putting to the fore the unity of political power and naming it 'sovereignty'.⁴¹ But what gives this state its overall unity has ceased to be self-evident: the theory has made good use of the bricks (if you like a 'bottom-up' theory of the state⁴²) but will always lie open to the claim that it has used a cement of inferior quality. This approach focuses on the manifestations of power, maybe because its purpose is to provide remedies against the tendency of these manifestations to have an adverse effect on liberty. It is, however, liable to criticism for the way in which it attempts to show that these are indeed manifestations of a power that remains one and the same (something which is ultimately implied by the fact that they take place in the same political community).

It is not illegitimate to conclude – at least for the time being – this investigation with a few words on the famous passage on 'Japanese charlatans' in Rousseau's *Contrat Social*. This passage has been read by some as a charge against Montesquieu,⁴³ by others as an indictment of Grotius and Pufendorf.⁴⁴ Yet, on the face of it, this passage deserves to be read as a more sweeping attack on the modes of apparition of sovereignty that were made use of by many of Rousseau's predecessors. Rousseau famously discarded the plurality of powers as an illusion, and even as the result of a conspiracy. Beyond the illusory appearances of sovereignty produced by his predecessors stands a fully, gloriously, united sovereign: unable to divide sovereignty in its principle, 'our men of politics' divide it in its object by distinguishing 'powers' or 'rights'. The entire history of the successive apparitions of sovereignty – here treated somewhat disparagingly as mere *appearances* – is admirably summed up in this paragraph. The presentation of sovereignty sweeps away all phenomenal differentiations of power as inauthentic. Attempts to introduce cleavages into the exercise of political power are treated as deceitful and unsuccessful: 'they sometimes merge all these parts and sometimes unite them', transforming the sovereignty into 'a fantastic body' which, after 'having dismembered it' they reassemble in a random fashion. *Their* work could persuasively be depicted as deliberate attempts to cast a veil over sovereignty, and as result, to conceal the

⁴¹ This other strategy involves, in turn, the recourse to other linguistic devices, such as insisting on the 'essence' of sovereignty, as opposed to its manifestations, or by distinguishing between the *title* and the *exercise* of sovereignty.

⁴² The 'bottom' standing here for the most concrete and diverse representations of political power, and the 'top' for the most abstract and unified ones.

⁴³ Carré de Malberg 1920–1922, Book 2, p. 26. ⁴⁴ Derathé 1988, pp. 290–4.

moral justification of the state. With the general will, Rousseau substitutes a moral interiority, what he himself calls a 'common self' (*moi commun*), for the scattered and superficial fragments of sovereignty which the earlier lawyers and '*politiques*' identified as signs indicative of the sovereign's presence. The history of the apparitions of sovereignty reaches the point at which there ultimately appears, to use Hegel's phrase (in quite a different context from the one for which it was coined), 'the seat of the self on which the multiple points have merged'. In Rousseau's *studio*, a pattern of sovereignty was elaborated which conveyed a concern for the unity of power, and a lesser interest for the diversity of its manifestations.

3 The Westphalian myth and the idea of external sovereignty

Pärtel Piirimäe

I

The idea that the diplomats who gathered in Münster and Osnabrück to put an end to the Thirty Years' War ended up establishing a new international order has for a long time enjoyed the status of textbook knowledge, both in the disciplines of international relations and international law. This idea is now increasingly discredited. Critics have attacked its central claim – that the peace treaties of Westphalia replaced the universalistic, hierarchical order of states with a system composed of independent 'sovereign' states – on at least two different levels. First, there is the level of textual criticism. Scholars, who have actually taken pains to read the rather technical texts of the treaties, have pointed out that they had nothing to do with the sovereignty or independence of European actors, nor did they refer to any corollary of sovereignty, such as non-intervention.¹ This kind of criticism, of course, can be evaded – and indeed, has been evaded by the proponents of 'Westphalian sovereignty' – by arguing that the principle of sovereign equality was implicitly rather than explicitly acknowledged or legitimized in the treaties and served henceforth as the foundation for the European order.² Yet even this more cautious interpretation of the Westphalian thesis can hardly withstand the second level of criticism, which is based on the historical analysis of the post-Westphalian settlement. This has shown that the imperial estates (princely territories and free cities) did not acquire anything like external sovereignty in their relation to the Empire, nor did the Emperor exercise his supreme authority over the territories. The framework in which the Emperor cooperated with the princes through various imperial institutions cannot be put into the ideological straitjacket of sovereign nation-states, but could be more

The research for this article has been supported by the targeted financing scheme SF0180040s08 of the Ministry of Education and Research of Estonia.

¹ Osiander 2001a, p. 266 *passim*.

² See quotes in Beaulac 2003a, pp. 68–70; Osiander 2001a, pp. 264–5.

aptly named the ‘complementary empire-state’ as suggested by Georg Schmidt.³ With regard to long-term developments in Europe as a whole, Helen Thompson has pointed out that, in international politics ever since Westphalia, most states have lacked the power to realize their claim to external sovereignty; powerful states, on the other hand, have not only habitually intervened in the affairs of others but have indeed proclaimed their right to do so, for example at the congresses of Vienna and Berlin, in the Treaty of Versailles, or in the doctrines of Monroe and Truman. As a result, ‘the external sovereignty of states has not since 1648 been the basis for much of international politics’.⁴

This chapter deals with the Westphalian myth on a third level – that of a normative idea of sovereignty. It should be noted that the textual criticism allows for the possibility that the normative idea of sovereignty was expressed at a later (or perhaps at an earlier) date; the historical criticism allows for the possibility that the normative idea was present but was not realized because of the structural conditions of international politics. This is why I wish to ask whether the normative idea of external sovereignty was actually present in seventeenth-century thought, and, if it was, whether it existed in the form described by modern scholarship. This moves us into the realm of the history of international law. The scholars in this discipline have underscored the seminal importance of the ideas of Hugo Grotius. A substantial part of this chapter is therefore devoted to his thought. However, in addition to looking at his ideas in the intellectual context of his predecessors and followers, I shall also look at how the normative ideas of these philosophers and jurists were reflected in contemporary state practice. Only by studying the actual international ‘rules of the game’ can we assess to what extent, if at all, the novel ideas of theorists were shared by their contemporaries and were applicable in actual practice.

II

The concept of external sovereignty itself is a modern one, invented to distinguish the international dimension of sovereignty from domestic sovereignty or the supremacy over all other authorities within a certain territory. According to Hedley Bull’s widely used definition, ‘external sovereignty’ signifies ‘independence of outside authorities’.⁵ Bull’s definition is a general one and needs further clarification. Several scholars have pointed out that the claim to external sovereignty is not a claim to absolute freedom of action in relation to other sovereign communities,

³ Schmidt 1999, pp. 193–200. ⁴ Thompson 2006, p. 256. ⁵ Bull 1995, p. 8.

but a claim that there is no superior authority over a particular sovereign community.⁶ Though these two claims should not be confused, they cannot be that cleanly separated either, as one seems necessarily to lead to the other. When we speak about the lack of any superior authority, i.e. the ultimate authority of a sovereign over a community, we refer to the sovereign's right to act freely or without interference within a given sphere of action. The sphere of sovereign action has a domestic and an international dimension. It is perhaps less problematic to assert the absolute nature of sovereign authority domestically, where it clashes only with the (presumed) rights of individual subjects. Even when the existence of such rights was granted, the proponents of the concept of sovereignty could render them legally ineffective by assigning their observance to the conscience of the sovereign (as was done by Jean Bodin). Things get more complicated when we consider the international dimension. The activities pursued by sovereigns to maintain the well-being and safety of the community necessarily include actions that overlap and potentially infringe upon the sovereignty of other communities, e.g. in matters of foreign trade, in the use of common resources such as the open sea, in the protection of citizens travelling or living abroad, etc. If there is no higher authority that can constrain the authority of sovereigns to define and act upon their interests in the international sphere, the condition of international relations is that of anarchy where sovereign communities pursue all these activities with unconstrained freedom.

In what follows I shall focus on the most controversial aspect of sovereign freedom of action: the unlimited right to go to war that seems to be a corollary of the concept of sovereignty. In the early-modern context, it was controversial from both an ethical and a political point of view. Ethically, Christian doctrine had always been concerned about the spilling of other humans' blood. Although St Augustine managed to reconcile warfare with early Christian pacifism, the Christian doctrine never accepted the Aristotelian idea of natural warfare against barbarians. Even more suspicious was warfare against fellow Christians, which carried severe political implications. It generated internal discord within Christendom, putting Europe at the mercy of non-Christian, barbaric Ottoman Turks. On the other hand, the right of rulers to wage war was contested only by a small minority of pacifists, mainly belonging to various religious sects. The majority accepted the main principles of what was known as the *bellum iustum* doctrine. Those principles had been most influentially formulated by St Thomas Aquinas, who had

⁶ Hinsley 1986, pp. 158, 266; Dahbour 2006, p. 113.

stated that for a just war (*bellum iustum*) three conditions had to be fulfilled: *recta auctoritas* (war must be waged by a legitimate authority), *iusta causa* (a material cause is needed, such as self-defence, recovery of property or punishment for injuries) and *recta intentio* (the existence of a material cause must not be exploited for other aims such as conquest).⁷

It should be emphasized that a just war according to scholastic doctrine did not require authorization by any universal authority (such as the Pope) but established the criteria by which a prince could wage war on his own authority. Thus the demise of universal authorities and the rise of the concept of sovereignty in the sixteenth century did not affect the fundamental applicability of the *bellum iustum* doctrine, and it was possible to adjust it to the international world inhabited by independent sovereigns. In the course of this adjustment, the most important shift concerned the fundamental understanding of the legal character of just war. In the Thomist view, the prince's right to wage war was an extension of his right to punish malefactors within the community: 'And just as they use the sword in lawful defence against domestic disturbance when they punish criminals ... so they lawfully use the sword of war to protect the commonweal from foreign attacks.'⁸ Even though the prince's motivation was primarily defensive, by virtue of the infringement of his rights by agents outside the community he became an enforcer of universal, godly justice.

Despite their emphasis on defensive motivation, the sixteenth and early seventeenth-century neo-Thomists upheld the notion that just war is an act of punishment. But this had to be translated into the modern language of sovereignty. Thus the Jesuit Francisco Suárez (1548–1617) in his disputation *De bello* (first published in 1621) described the legitimate offensive wars as parallel to domestic lawsuits – the sovereign who acted wrongly forfeited his or her sovereignty and the sovereign who was wronged assumed the dual role of judge and executor of the sentence:

just as within a state some lawful power to punish crimes is necessary to the preservation of domestic peace; so in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another; and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power in question must reside in the sovereign prince of the injured state, to whom, by reason of that injury, the opposing prince is made subject; and consequently, war of the kind in question has been instituted in place of a tribunal administering just punishment.⁹

⁷ Aquinas 1964–1981, 2ae 2ae, Qu. 40. ⁸ Aquinas 1964–1981, 2ae 2ae, Qu. 40.1.

⁹ Suárez 1944, sect. IV, § 5.

Suárez's interpretation of the legal character of just war as just punishment is at odds with the concept of sovereignty as independence of outside authorities. If one sovereign can judge the legality of another sovereign's actions, 'external sovereignty' becomes an empty concept. Suárez's views, however, were not at all eccentric in his day. It was common for seventeenth-century theorists to interpret just war as just punishment. Hugo Grotius not only accepted this argument of Suárez but even broadened the ways in which sovereignty could be obtained over other communities. Grotius regarded the neo-Thomist view that a prince obtains sovereignty only over the prince who has directly injured him as too narrow, and proposed instead a theory of an international world in which individual sovereigns have responsibility and authority, derived from natural law, to execute universal justice everywhere:

And so far we follow the opinion of *Innocentius*, and others, who hold that War is lawful against those who offend against nature; which is contrary to the Opinion of *Victoria*, *Vasquius*, *Azorius*, *Molina*, and others, who seem to require, towards making a War just, that he who undertakes it be injured in himself, or in his State, or that he has some Jurisdiction over the Person against whom the War is made.¹⁰

Thus Grotius attaches himself to the earlier canonist tradition, which had argued that someone must have global responsibility for enforcing universal laws. The difference is, of course, that while Pope Innocent IV had argued that this authority belongs to the Pope (and to some extent to the Emperor), Grotius attributed it to independent sovereigns. The violations that according to Grotius should be punished are those that every natural man should recognize as a sin, namely the grave violations of natural laws such as bestiality, human sacrifice, cannibalism, suicide, dishonouring one's parents or the killing of strangers.¹¹ But sovereigns could also intervene in the conflict between another sovereign and his or her subjects. While Grotius generally rejected the right of resistance,¹² he did not think that, if subjects were violently oppressed, the rest of the world should tolerate it. His solution was to go back to the idea that had been proposed in the sixteenth century by Jean Bodin. Bodin had restricted the absolute prohibition of resistance to the relationship between sovereign and subjects. A legitimate ruler who falls into tyranny could not be resisted by his own subjects, but could be justly deposed by the intervention of a foreign ruler.¹³ The fundamental asymmetry between the rights of subjects and sovereigns that this idea

¹⁰ Grotius 2005, Book II, ch. 20, § 40.4. ¹¹ Grotius 2005: Book II, ch. 20, §§ 40–4.

¹² Baumgold 1993, p. 10.

¹³ Bodin 1962, pp. 220–1; cf. Skinner 1978, vol. II, p. 286.

implied was also one of the main tenets of Grotius' doctrine of universal punishment. The fact that subjects relinquished certain rights to their sovereigns affected only their mutual relationship, not the rights of other sovereigns to enforce justice in the entire world.¹⁴

The concept of war as punishment entailed important consequences for the legal status of the belligerents. Since the rights and duties were in Grotius' view strictly reciprocal, the guilty party had an obligation to abstain from resisting the just attacker:

Neither can I admit another Maxim of those Authors, namely, that even those who have given just Cause to take up Arms against them, may lawfully defend themselves ... no more than a Criminal can plead a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate, on a Pretence that his Punishment may be greater than his Crimes deserve.¹⁵

Thus at the time of the Peace of Westphalia, the most influential thinker on the norms of international relations had presented a doctrine of sovereignty that was full of holes left by his insistence on the right of intervention and the duty of non-resistance to executors of universal justice. Grotius' idea of universal punishment was shared by later thinkers, such as John Locke (1632–1704), who famously argued in his *Second Treatise* that individuals in the state of nature, and consequently sovereigns in the international world, have the right to punish violations of the law of nature.¹⁶ On the other hand, there were theorists in the tradition of natural law who tried to repair at least some of these holes. Thus the famous contemporary of Locke, the German jurist and historian Samuel von Pufendorf (1632–94) set out to save the notion of sovereign equality by rejecting the doctrine of universal punishment:

Yet there ought to be some restraint in this, so that not every man, even though he live in natural liberty, should have the right to coerce and punish by war any person who has done any other person an injury, on the sole excuse that the public good demands that injuries to the innocent should not go unpunished, and that what concerns one should concern all ... Nay, for a person to thrust himself forward as a kind of arbitrator of human affairs, is opposed even to the equality granted by nature, not to mention the fact that such a thing could easily lead to great abuse, since there is scarcely a man living against whom this could not serve as an excuse for war.¹⁷

In Pufendorf's view, the concept of punishment was only applicable within the system of positive law. This view did not mean that sovereigns could not pursue their rights against other sovereigns by means

¹⁴ Grotius 2005, Book II, ch. 25, § 8.3. ¹⁵ Grotius 2005, Book II, ch. 1, § 18.1.

¹⁶ Tuck 1999, p. 171. ¹⁷ Pufendorf 1934, Book VIII, ch. 6, § 14.

of war. He accepts the traditional view that wars can be used ‘to assert our claim to whatever others may owe us by perfect right, when they refuse to perform it for us of their own accord’ and ‘obtain reparation for losses which we have suffered by injuries, and to extort from him who did the injury guarantees that he will not so offend in the future’.¹⁸ But all these wars, both defensive and offensive, were described by him as extensions of the natural right of self-defence. Thus Pufendorf abandoned the view of the sovereign as an executor of universal justice. He not only returned to the more restrictive view of his authority that had been proposed by Suárez, but avoided the description of just war as punishment altogether.

III

In our analysis thus far, Grotius with his emphasis on universal justice stands out as a thinker with a distinctly non-modern view of external sovereignty. This runs counter to the widespread contention in the literature that Grotius replaced the traditional Thomist criteria of just war with purely *formal* criteria which required only that war be waged by sovereign authority. As this contention touches upon the central issue of this chapter, the relationship of sovereignty and just war, we need to take a closer look. It was originally put forward by Carl Schmitt, who argued that Grotius was in line with ‘jurists of modern international law’, such as Balthazar Ayala, Alberico Gentili and Richard Zouche, who endeavoured to establish war as ‘an institution of law’ (*Rechtsinstitut*) which was independent of the ‘moral-theological problem of guilt’. According to Schmitt, they reduced the issue of the justice of wars to the problem of ‘institutional and structural quality of the belligerents’, and thereby created a huge rift between themselves and the moral theology of the likes of Vitoria, who spoke ‘like father confessors’ about moral purity and sin.¹⁹ Schmitt concludes that the new non-discriminatory concept of war enabled people to view the states in war ‘as equal from the point of view of the law of nations, i.e. to treat both states on an equal level both legally *and* morally’.²⁰

It is difficult, however, to miss the fact that Grotius – unlike, for example, Balthazar Ayala, who was only interested in the legal effects of war – devotes large parts of his *De iure belli ac pacis* to a detailed discussion of the substantive criteria of justice. He emphasizes that conformity with formal justice does not absolve the ruler from the obligation to

¹⁸ Pufendorf 1934, Book VIII, ch. 6, § 6. ¹⁹ Schmitt 1950, pp. 79–93.

²⁰ Schmitt 1950, p. 115 (my emphasis).

follow these criteria: ‘What has been said touching the Justice of the Cause, ought to be observed in publick Wars, as well as in private ... ’Tis true, those Wars that are commenced by publick Authority have certain Effects of Right, as the Sentences of Judges: Of which hereafter: But are therefore not less criminal, if begun without a just Foundation.’²¹ Schmitt brushed this obvious discrepancy aside by saying that Grotius’ argument was ‘erratic and insecure’, and ‘many thinkers from Grotius until Vattel confused “just war” with the material question of *iustae causae*’.²² Other commentators who support Schmitt’s line of argument have ignored this part of Grotius’ work and concluded, unflinchingly, that ‘Grotius makes “just” war equivalent to “solemn” war; he interprets justice in terms of formal requirements set by natural law or *jus gentium* and adhered to by belligerents.’²³ More recently, Bernd Klesmann has similarly argued that the emergence of the concept *bellum publicum solenne* by Grotius meant that ‘the just cause was largely detached from the sphere of moral justification and acquired its meaning through its formal manifestation’.²⁴ German scholarship, in particular, has agreed with the Schmittian view that the ‘moral theology’ or the idea of a universal moral order based on natural law, which made an attempt to distinguish between morally just and unjust belligerents, was discarded in the seventeenth century.²⁵

To assess the relationship of sovereignty and the traditional substantive criteria of just war in Grotius’ thought, we need to look at the ideological background of his distinction between *bellum iustum* and *bellum solenne*. It is important to note that the concept ‘*iustum*’ had acquired a double meaning by the early seventeenth century. In medieval Thomist doctrine it had signified the *moral* quality of the belligerent who was waging war without blame, with clear conscience. However, from the sixteenth-century onwards lawyers started to use the same word to signify the *formal* quality of war as a public and rule-based contest of arms which had certain legal consequences.

Perhaps the most fruitful angle from which to consider the early-modern theorists’ use of the concept ‘*iustum*’ with all its various shades of meaning is to study their answer to the question, whether or not war could be ‘just’ on both sides. The medieval canonists and theologians did not allow for this possibility because in their system the justness of war could only derive from the injustice of the opponent. Therefore, if A had the right to wage war against B, then B had the reciprocal moral

²¹ Grotius 2005, Book II, ch. 1, § 1.3. ²² Schmitt 1950, pp. 131–2.

²³ Johnson 1975, p. 231. ²⁴ Klesmann 2007, p. 15.

²⁵ Dickmann 1971, pp. 128–30; Behnen 1986, p. 65; Kunisch 1991; Duchhardt 2000, p. 285.

duty to abstain from resisting A. This was the objective definition of justice. The sixteenth-century neo-Thomist Francisco de Vitoria explained the impossibility of bilateral objective justice as follows: 'If it is agreed that both parties have right and justice on their side, they cannot lawfully fight each other, either offensively or defensively.'²⁶

But the neo-Thomists added a crucial exception: it can happen that a party in war can be ignorant of true justice and genuinely believe himself to have a just cause when objectively he has not. Such 'invincible error' was seen as a valid excuse: 'Where there is provable ignorance either of fact or of law, the war may be just in itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are hence excused from sin.'²⁷ Thus the Spanish theologians shifted the perspective in judging the justice of the belligerents away from the viewpoint of an omniscient and unbiased observer – God – to the subjective viewpoint of the belligerents themselves, taking into account what they could possibly know about objective justice.

For the theologians it was particularly important to liberate the conscience of subjects who could now obey the call of their ruler to go to war without worrying whether it was sinful or not, as long as the injustice of the ruler's cause was not absolutely evident. But rulers had the obligation to seek objective truth before going to war by forming an informed judgment based on the careful examination of 'the justice and causes of war', which included listening to the arguments of their opponents.²⁸ However, a more sceptical view was developed during the sixteenth century, which asserted that the perception of objective justice was virtually unattainable for man. Such a view was explicitly put forward by Alberico Gentili, the professor of law at Oxford in the late sixteenth century. Gentili saw the very attempt to discover objective validity of mutual claims as futile. Therefore, he says, 'we aim at justice as it appears from man's standpoint'.²⁹

This gradual shift from the objective to the subjective concept of justice had a major impact on legal traditions that were primarily concerned with the legal effects of warfare. If true justice was often hidden from the eyes of men, being transparent to God only, it became questionable whether men were entitled to treat their enemies as morally inferior. In the subjectivized world of good intentions, all belligerents were seen as having a certain moral equality, once they fulfilled formal

²⁶ Vitoria 1991, p. 313; cf. Molina 1615, Tractatus II, Disp. 102, § 2.

²⁷ Vitoria 1991, p. 313. ²⁸ Vitoria 1991, pp. 306–8.

²⁹ Gentili 1933, Book I, ch. 6.

criteria that distinguished them from a band of robbers. The parties in war that were ‘just’ in this third, formal or legal sense, were equal with regard to the legal effects of war. One of the first to put forward such a view was Balthazar Ayala, a civil lawyer who worked as a military judge for the Spanish Royal Army in the Low Countries. He wrote in 1581:

A war may in one sense be styled just and yet not be waged for just cause; for the word ‘just’ has varying meanings and does not always indicate justice and equity but sometimes signifies a certain legal completeness. It is in this latter sense that we use the word ‘just’ in connection with marriage and matrimony ... and it is in the like manner that the phrase ‘just war’ is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war.³⁰

It was exactly in this legal sense that Alberico Gentili used the concept ‘iustum’ in his definition of war as a ‘just and public contest of arms’,³¹ and the usage became widely accepted by the early seventeenth century.³² Hugo Grotius took a step forward when he decided to avoid the confusing double meaning and developed his own terminology. He reserved *bellum iustum* and *bellum iniustum* for the traditional moral distinction and employed novel concepts *bellum solenne* and *bellum minus solenne* for the legal one. Whereas the former distinction concerns the realm of conscience and sin, the latter pertains to the ‘peculiar legal effects’ that arise from a regular war, just as legitimate marriage has specific effects in civil law, and so contrasts with the cohabitation of slaves.³³ A war qualified as *bellum solenne*, when it was waged between nations, when it was authorized by the supreme sovereign, and when it was publicly declared.³⁴

Grotius’ and his contemporary lawyers’ greater emphasis on the regularity of warfare compared to earlier writers rendered the doctrine more restrictive and less restrictive at the same time. It became more restrictive in the sense that the laws of war – such as the rights concerning captivity and postliminy, and many other laws added by Grotius in the third book of *De iure belli ac pacis* – become valid *only* in a regular war. Those who waged ‘war’ (in a technical but not in a legal sense) on their own authority in a private vendetta or in acts of brigandage could not benefit from the laws of warfare. On the other hand, the doctrine became less restrictive in the sense that, as Martti Koskenniemi has put it, ‘all wars between sovereigns can be called

³⁰ Ayala 1912, p. 22.

³¹ Gentili 1933, Book I, ch. 2; cf. Haggemacher 1990, p. 169.

³² E.g. Fulbecke 1602, p. 37. ³³ Grotius 2005, Book I, ch. 3, § 4.1.

³⁴ Grotius 2005, Book III, ch. 3, §§ 1–5.

formally legal and the laws of war are equally applicable in respect of both belligerents in them'.³⁵

IV

When assessing the implications of Grotius' distinction, we should, however, avoid the widespread tendency of overinterpreting its novelty and overestimating its transformative power in relation to contemporary state practice. In particular, the Schmittian interpretation fails to capture the importance of the role of the substantive criteria of 'just war' in Grotius' normative order. It wrongly assumes that for the early modern theorists the moral equality of belligerents was identical with, or derived from, their legal equality. The possibility of an equal legal treatment of belligerents was in fact inherent already in the neo-scholastic distinction between objective and subjective moral justice in war. Their scepticism about the possibility of finding out objective justice in each and every case was shared by Grotius. The application of the rules of warfare in cases when substantive justice of the warring parties was dubious was a means to avoid unnecessary suffering, and thus contributed to universal moral order. But this cannot be interpreted as the abandonment of the notion of objective moral justice altogether and its replacement with the formal notion of justice.

In Grotius' system, the normative order derived from natural law existed parallel to the world of sovereign freedom regulated by the voluntary law of nations. As Hedley Bull has pointed out, Grotius 'does not seek to show whether it is natural law or the voluntary law of nations that should take priority on this issue'.³⁶ Martti Koskenniemi explains that the primacy of one over the other hinges upon the existence of the belief in a singular concept of the just and in the human capacity to recognize it. If one admitted, like Gentili, that 'both belligerents may be equally correct in their perception of justice', then 'the primacy of the normative order is wiped away and discourse must start, instead, from the sovereign's assumed subjective authority'.³⁷

Grotius, however, did not go down the road pointed out by Gentili but took pains to maintain the possibility of objective justice and corresponding legal consequences at least in principle. He outlined the legal effects of not only 'solemn' and 'less solemn' but also of 'just' and 'unjust' wars. Most importantly, in his view the obligations of third parties towards the states at war depended on whose side true justice

³⁵ Koskenniemi 2005, p. 104 (my emphasis).

³⁶ Bull 1990, p. 88. ³⁷ Koskenniemi 2005, pp. 105–6.

lay. Grotius argues that it is the duty of ‘those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side’.³⁸ He contends that this was not only a moral duty of a righteous ruler but that it also had legal consequences: ‘if the Wrongs done to me by the Enemy be openly unjust, and he by those Supplies puts him in a Condition to maintain his unjust War, then shall he not only be obliged to repair my Loss, but also be treated as a Criminal’.³⁹ Similarly, private individuals who were ordered to participate in a manifestly unjust war were not only entitled to refuse but it was ‘their Duty not to meddle in it’.⁴⁰

Not all early-modern theorists agreed with Grotius on this. Cornelius van Bynkershoek, for example, abandoned the requirement that neutrals should adapt their behaviour according to the perceived substantive justice. In his *Questiones juris publici*, published in 1737, he writes that ‘the question of justice and injustice does not concern the neutral’ who must show no ‘favouritism toward or prejudice against either belligerent’.⁴¹ Yet Grotius’ views were shared by most influential seventeenth- and eighteenth-century thinkers who equally saw the element of ‘moral theology’ as an inherent part of the law of nations. Thus Emerich de Vattel, far from acknowledging the freedom of sovereigns to use war at their will as an ‘instrument of statecraft’, writes in 1758: ‘We ought even to refuse assistance to the one whose cause is unjust, whether he be at war with one of our allies, or with another state: to assist him on such an occasion, would in the event be the same thing as if we had contracted an alliance for an unjust purpose; which we are not allowed to do.’⁴²

V

Let us now move beyond the realm of normative theories and ask which of these approaches was a more adequate reflection of contemporary state practice. Was Grotius’ and his contemporaries’ ‘moral theology’ hopelessly out of touch with seventeenth-century political realities? Heinz Duchhardt has, for example, argued: ‘The question of *iusta causa* had, after all, been one of morality, theology and conscience; this approach was bound to become obsolete within a Europe constituting itself anew, witnessing the change in its dominant perspectives,

³⁸ Grotius 2005, Book III, ch. 17, § 3. ³⁹ Grotius 2005, Book III, ch. 1, § 5.3.

⁴⁰ Grotius 2005, Book III, ch. 26, § 3.1. ⁴¹ Bynkershoek 1930, p. 61.

⁴² Vattel 1760, Book II, § 168.

i.e. competition between states, and the principle of “reason of state”.⁴³ A look at the state practice, however, does not confirm that this was the case in the seventeenth century. The governments took substantive justice rather seriously, spending significant energy on commissioning, translating and printing publications that justified their wars to both domestic and foreign audiences. The public debates that ensued were definitely not focused on the issue whether or not a war was waged by sovereign authority or whether it had been properly declared, but they dealt with the substantive criteria of justice.⁴⁴

To be sure, such polemical battles were largely rhetorical exercises because, in the condition of conflicting juridical claims, sometimes going back for centuries, it was usually not difficult to invent a sufficiently plausible excuse for war. But the very point of such an exercise was to demonstrate that one was not manifestly and openly violating the rules of the European society of states. The failure to demonstrate the justice of one’s cause could very well have adverse political consequences. This happened, for example, with Sweden when it attacked Denmark in August 1658 without explaining its reasons publicly to European audiences. The attack, which breached the peace of Roskilde concluded only half a year earlier, caused great consternation in European courts. Sweden had been negotiating with England for an alliance and sent a special envoy to the Lord Protector with a letter that explained the reasons for the attack and implored the Lord Protector to assist. But the English government had learned about the attack before the Swedish envoy arrived, and the news aroused severe criticism by some of its members.⁴⁵ It seems that the apparent violation of the law of nations was a strong factor in breaking off the alliance negotiations, as the English were not happy to appear to be supporting the manifestly unjust side.

Nevertheless, the English were prepared to help Sweden diplomatically by attempting to persuade the Dutch not to render military assistance to Denmark. Denmark and the Netherlands had concluded a defensive alliance a few years earlier, and the Danes immediately requested Dutch assistance according to the stipulations of the alliance treaty. But the diplomatic intervention by an English resident in The Hague, George Downing, was seriously hampered by the lack of a Swedish manifesto offering a proper explanation for the war. Downing, who was in daily contact with the Swedish agent in The Hague, Harald Apelboom, laments in a letter to the Secretary of State John Thurloe: ‘Mr Applebom [*sic*] hath received nothing as yet from his king, nor is there

⁴³ Duchhardt 2000, p. 285. ⁴⁴ Cf. Piirimäe 2010. ⁴⁵ Gihl 1913, p. 62.

any manifesto as yet published, that we know of; so that all men are in amazement at this action beyond imagination; and it may well be supposed, that the enemies of the king of S[weden] are not sparing in their language against him upon such occasion.⁴⁶ In another letter he expresses his belief that the existence of an official legitimation would have enabled him at least to delay the States General joining the war on the Danish side: 'indeed even this resolution of the states of Holland might have been hindred at least for a considerable time, if the king of Sweden had but done soe much as but written one word or two to Mr. Appleboom, declaring the grounds of this his undertaking; or onely saying, that he had good grounds, and that he would declare them'. The lack of a public justification, he adds, encourages Sweden's enemies to join in a concerted effort against it: 'I can assure you, that the ministers of the emperor, Poland, Brandenburg, and all their friends, doe keep holyday at that business; and the king of Sweden declaring nothing, they make bold to declare sufficiently against him.'⁴⁷

The political consequences of manifest injustice were possibly great, or so at least this experienced diplomat argued, but they did not amount to a criminalization of the king of Sweden or his subjects. The next peace treaty of Copenhagen was less favourable for Sweden, but this was because of a changed political balance, not because it was a collective punishment measured out by victors on the violator of the normative order. The fact that the discriminatory concept of war was not applied here cannot, however, be considered as a specific achievement of the novel doctrine of external sovereignty. Randall Lesaffer shows in his study of early-modern peace treaties that from the late fifteenth century onwards there was no trace of a discriminatory concept of peace in agreements ending wars, and concludes, 'as far as settlements in peace treaties for damages received or done are concerned, the external sovereignty of the states could be no greater at the middle of the eighteenth century than it had been three hundred years before'.⁴⁸

Although Grotius' natural law argument entailed the possibility of a discriminatory approach, it had real value only as a moralizing device in the world of political propaganda.⁴⁹ The moral value of the apparent substantive justice or injustice, however, could be sufficiently large to influence the behaviour of sovereigns in their relations with one another. Many contemporary sources prove, for example, that Grotius' plea for neutrals to assist only the just side in war reflected a common normative belief in Europe. Thus the Elector of Brandenburg recommended

⁴⁶ Thurloe 1742, VII, 344. ⁴⁷ Thurloe 1742, VII, 352; cf. Piirimäe 2010.

⁴⁸ Lesaffer 2001, pp. 103–4. ⁴⁹ Cf. Lesaffer 2001, p. 99.

in 1700 that the King of Denmark should abstain from war against Sweden. He wrote that ‘this way His Majesty can avoid the detestable name of aggression. It is well known to His Majesty what depends on it: the justice of war secures the support of God, and attracts the favour of Heaven and of people’.⁵⁰ The Danish Manifesto of 1644 calls upon the allies of Sweden not to support it, because ‘ad injusta bella nulla est obligatio’.⁵¹ The rule that one should abstain from assisting an unjust cause was not only applicable to states but also to private individuals who sought employment with foreign potentates. A German preacher, for example, argued in 1657 that officers must not serve a foreign ruler before they make sure that there is ‘causa belli legitima’. If this exists, a soldier is an ‘executor justitiae’, otherwise he is a murderer.⁵² This argument is more extreme than the views of Grotius or Vattel, who had said that, even though the soldiers on the unjust side did not have the true right to kill their enemies, they were not punishable if the war was regular.⁵³ It nevertheless reflects the widespread understanding in European society that it was morally culpable to fight for an unjust side.

If anything became obsolete in seventeenth-century Europe, it was not the requirement of having a just cause for war, but Grotius’ stipulation that for a war to qualify as *bellum solenne* it had to be publicly declared. This requirement was tested in the conflict between Sweden and Denmark in 1658. Sweden avoided a public declaration in order to give credence to its argument that this apparently new war was actually the continuation of the old one. The thrust of the Swedish argument was that the peace of Roskilde never actually took effect because Denmark did not fulfil its part of the agreement. Therefore Sweden only resumed hostilities that had been temporarily suspended and Denmark, the original initiator of the war in 1657, continued to be the aggressor.

This is the only occasion known to me on which an attempt was made to use Grotius’ concept of *bellum solenne* and his requirement of declaration in political propaganda. The specific issue at stake was the arrest of the Swedish diplomat Sten Bielke in Copenhagen during the war, for which Sweden had accused Denmark of grossly violating the *ius gentium* principle of the inviolability of diplomats. On the orders of his government, a Danish councillor wrote an anonymously published *Legal-political dissertation* which claimed that Sweden’s undeclared war did not qualify as *bellum iure gentium*; it was instead a mere ‘robbery’

⁵⁰ Abelin 1635–1738, vol. xv, p. 749. ⁵¹ Anon. 1647, p. 228.

⁵² Schupp 1657 (no pagination).

⁵³ Grotius 2005, Book II, ch. 26, § 6; Neff 2005, p. 147; Vattel 2008, Book III, § 68.

(*latrocinium*). Therefore, it argued, the usual laws of *ius gentium*, including the rights of diplomats, did not take effect.⁵⁴

The Swedes brushed the argument aside as unfounded. Their refutation was written by the young Samuel Pufendorf. At that time he was serving as home tutor to Bielke and was arrested alongside him.⁵⁵ In an anonymously published pamphlet Pufendorf thoroughly ridiculed the Danish application of Grotius' argument: 'A regular war or a just war *iure gentium* ... requires that it is waged on both sides by the authority of the supreme power of the state'.⁵⁶ He explained that the requirement of declaration 'does not mean that there should be a herald in a colourful robe' but its function is 'only to signify that it is waged by public authority'.⁵⁷ Pufendorf's crucial argument is that the lack of declaration did not necessarily mean that war was not properly authorized, because there could be other signs of the existence of *recta auctoritas*.

Although Pufendorf himself in his later systematic treatises remained faithful to the Grotian requirement of declaration,⁵⁸ his earlier argument was repeated by Cornelius van Bynkershoek, in surprisingly similar terms, eighty years later. Bynkershoek blames Grotius for obscuring a subject that used to be clear: 'For if two sovereigns are engaged in hostilities without having declared war, can we have any doubt that war is being waged according to the will of both? In that case there can be no need of a declaration, since it is being waged publicly and needs no proof.'⁵⁹

VI

The analysis of various provisions of Grotian theory against the background of contemporary state practice indicates that natural law principles loomed large in seventeenth-century normative thought. There is no sign that the law of nations was reduced to setting the rules for duels.⁶⁰ On the contrary, we have seen that the adherence to formal rules was neither a necessary nor a sufficient condition of legitimate war. As it became increasingly obvious which political actors were carriers of sovereignty, the formal criteria such as the official declaration of war became obsolete and public debate focused almost exclusively on the substantive justice of warring parties. The development of the idea of external sovereignty did not render the moral quality of

⁵⁴ Rosenkrantz 1659, *passim*.

⁵⁵ Döring 1995, pp. 88–124. ⁵⁶ Pufendorf 1995, p. 148.

⁵⁷ Pufendorf 1995, pp. 134, 148.

⁵⁸ Pufendorf 1934, Book III, ch. 6; Pufendorf 2009, Book I, def. III.6.

⁵⁹ Bynkershoek 1930, ch. 2. ⁶⁰ Cf. Koskenniemi 2004, p. 497.

war unimportant: early-modern theorists and politicians, rather than replacing just war with formal war, were careful to maintain the distinction between them.

The Schmittian interpretation discussed in this chapter fails to capture the richness and the viability of moral norms governing the field of action of European sovereigns vis-à-vis one another. Their freedom was not constrained by any superior authority, but by other, more subtle instruments of order in international politics. Modern theorists have pointed to various non-moral foreign policy factors such as reciprocity, tacit agreements and fear of communal response that we should account for as contributing factors to international order.⁶¹ In the seventeenth-century context we should add considerations such as the fear of godly punishment and the desire to have a reputation suitable to a Christian and civilized prince. To be sure, the desire for reputation did not necessarily mean that wars were shunned: it could cut both ways, since the reputation of rulers suffered not only if they waged manifestly unjust wars, but also if they failed to resort to war when their rights were blatantly violated. Either way, the principles of substantive justice played an important role.

To sum it up, Grotius' vision of sovereignty did not correspond to the ideal model envisaged by the proponents of 'Westphalian sovereignty'. He followed the lead of the neo-scholastics in viewing just war as a punishment for the violation of universal moral order, which implied that only one side in war could be just in the true sense of the word. In order to diminish the suffering in war that such a discriminatory notion could cause, he proposed a distinction between formal and non-formal wars, without relinquishing the moral distinction between just and unjust parties. This remained the prevailing view throughout the seventeenth and eighteenth centuries. Although the idea that Europe was a single community governed by universal moral order based on natural law was not backed up by any structures of legal enforcement, there were alternative means of enforcing universal norms, belonging to the elusive world of public opinion and the reputation of states and sovereigns.

⁶¹ Henkin 1968, pp. 45–60; Koh 1997, p. 2621.

4 Double binds: sovereignty and the just war tradition

Jens Bartelson

I

In order for a war to be justifiable, or so we learn from most books on the subject, it must be waged by a *legitimate authority*. For a long time, the most obvious locus of that authority has been the sovereign state, and to the extent that international institutions could ever claim to possess such authority, this was by virtue of prior agreements among the former.¹ But as has been pointed out, this basic equation of legitimate authority with state sovereignty is problematic, since it implies that there cannot be any legitimate authority over and above that of states. In the absence of any such overarching authority, it becomes hard to see how the doctrine of just war could be anything more than an instrument of state interest, by providing a convenient way of demonizing the opponent in times of war.² As one critic has remarked, ‘in a world of sovereign states, a formula whose righteousness is in the eyes of the beholder is surely fatally flawed’.³

This basic difficulty has been with us at least since Grotius, but has been further aggravated by the recent emergence of new kinds of warfare and the rise of new actors. Many of the wars being fought today cannot easily be classified as either international or domestic in character, simply because most of them are both simultaneously. Many of those wars also involve non-state combatants, such as terrorist networks and private security firms.⁴ These new forms of warfare have not only proved difficult to understand with reference to existing theories

I would like to thank Walter Carlsnæs, Benjamin de Carvalho, Yale Ferguson, Kjell Goldmann, Nina Græger, Stefano Guzzini, Halvard Leira, Randall Lesaffer, Richard Little, Iver Neumann, Magnus Reitberger, Ole Jacob Sending, Casper Sylvest, Jonas Tallberg, Neil Walker and Wouter Werner for their helpful comments on earlier drafts of this chapter.

¹ See for example Finnemore 2005, pp. 187–206; Hurrell 2005a, pp. 15–32; Rengger 2005, pp. 143–61; Johnson 2006, pp. 167–95.

² Koskeniemi 2004, pp. 492–511; Slomp 2006, pp. 435–47.

³ Myers 1996, pp. 115–30, at p. 129. ⁴ See Leander 2005, pp. 605–22.

of international relations, but have proved equally hard to discuss in normative terms.⁵

But flawed or not, arguments distilled from the just war tradition have figured pre-eminently in justifications of war during the last decade. In response to the above predicament, some scholars have argued that legitimate authority should be relocated to agents other than sovereign states. Two main ways of restating the idea of just war compete in the literature today, either in terms of a *global empire* or in terms of a *global community*. Whereas the former is based on the idea that the current state of exception justifies imperial expansion in the interest of sustaining a modicum of sociopolitical order on a global scale, the latter is based on the idea that any such authority ought to derive its legitimacy from the hypothetical consent of all mankind.

Yet the meaning of legitimate authority has not received much attention in this context. This is the task of the present chapter. How is the relationship between authority and force understood in just war theory? In order to answer this question, I shall focus on how the relationship between political authority and the right to war has been conceptualized within the just war tradition, in the present as well as in the past. Consequently, the following analysis is limited to the problem of legitimate authority within those parts of just war theory that are concerned with the right to war (*jus ad bellum*). In this context, the existence of legitimate authority is regarded as a necessary but certainly not a sufficient condition of justifiability, since the circumstances under which war might be justifiable cannot be reduced to the question of whether the political authority waging it is legitimate or not.⁶

As I shall argue, the cumulative consequence of past efforts to justify war with reference to legitimate authority has been to create a *double bind* between conceptions of political authority on the one hand and the use of force on the other. Therefore, if we want to make some historical sense of the just war tradition, we ought to conceive of the relationship between legitimate authority and the use of force as a two-way street: not only does the justification of war require legitimate authority, but this authority has frequently been legitimized with reference to the violence and disorder that would ensue in its absence. As I would like to suggest, while this double bind is contingent and historically mutable, it is still implicit in most justifications of political authority in modern political and legal theory.

⁵ See Rengger 2002, pp. 353–63; Holliday 2003, pp. 115–33; Kamm 2004, pp. 650–92; Patterson 2005, pp. 116–34.

⁶ Compare Calhoun 2002, pp. 37–58.

But the fact that the double bind is contingent and mutable does not make it any easier to escape, since we are under the spell of an established tradition. Passing moral judgments on warfare almost invariably implies invoking concepts that are integral parts of the just war tradition. So by using these concepts we are bringing semantic baggage from the past to bear on our present concerns. The existence of such a double bind is also what makes contemporary efforts to relocate legitimate authority to agents other than states difficult, since the double bind traps these efforts within the same logic of sovereignty that they seek to escape. If we want to find a way out of our present predicament, it is not sufficient to discuss whether the right to war ought to remain the prerogative of sovereign states, or whether it should be relocated to a global empire or a global community. Rather, we must be prepared to question the foundations of modern political order by inquiring into the historical sources of this particular authority.

The rest of this chapter is divided into three sections. In the first, I shall briefly describe how the relationship between legitimate authority and the right to war is understood in contemporary just war theory. I shall then describe how we got into our present predicament by examining how this relationship was formed in the past. In the final section, I shall try to elaborate some implications for our ability to rethink the relationship between authority, legitimacy and war in response to contemporary challenges.

II

Although much of the academic debate on the use of force in world politics has been focused on whether the authority required to conduct just wars should reside with states or international institutions, many of those who have participated in this debate have implied that states and their governments derive their legitimacy from their ability to defend the political community against internal and external enemies. To these authors, the legitimacy of any political authority derives from an *implicit social contract* between rulers and ruled, according to which the acceptance of the latter hinges on the ability of the former to provide peace and social order.

In order to exemplify this point, let us start with *Just and Unjust Wars* (1977). In this influential book, Michael Walzer argued that all accounts of war necessarily have a distinctive moral content even when this is downplayed or denied. Wars possess a moral reality of their own, take place within a moral universe to which we can only gain access through a vocabulary that is 'sufficiently common and stable so that

shared judgments are possible'.⁷ To Walzer, states have rights to territorial integrity and political sovereignty. These rights 'derive ultimately from the rights of individuals, and from them they take their force'. Individual rights to life and liberty are thus the basis of state rights, the latter 'rest on the consent of their members'. Yet the rights of states cannot be derived directly from those of individuals. To Walzer, the legitimacy of a state depends on something more than the mere consent of its individual members: 'The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if the state doesn't defend the common life that does exist, its own defense may have no moral justification.'⁸ Thus, a state has the authority to wage war to defend itself against its enemies, but ultimately the source of its legitimacy is nothing but its *potential* or *prior* exercise of that authority for this very purpose.

Walzer has recently addressed the question of legitimate authority by arranging different possible loci along a continuum ranging from a wholly unified world state to a fully pluralistic state system. At the former end of the continuum he envisages a global state in which 'each individual, every person in the world, would be connected directly to the center'. At the latter end, he depicts a world in which 'sovereign states negotiate with each other ... reach agreements, and sign treaties, but the treaties are not enforceable by any third party'.⁹ In order to reconcile the conflicting demands of unity and pluralism within a stable global order we would require 'a UN with a military force of its own capable of military interventions and a strong version of peacekeeping – but still a force that can be used with the approval of the Security Council or a very large majority of the General Assembly'.¹⁰ Although Walzer has a preference for multilateral arrangements, the tension between statism and multilateralism remains unresolved: while states are vested with inalienable rights of self-preservation, international institutions possess the right to intervene in states that have failed in this regard.

Other scholars during the Cold War emphasized the critical potentials of the just war tradition as an antidote to what was perceived as the pernicious influence of political realism in world affairs. As Jean Elshtain argued in 1985, 'there is ... an alternative tradition to which we in the West have sometimes repaired either to challenge or to chasten

⁷ Walzer 1977, p. 20. ⁸ Walzer 1977, pp. 53–4. ⁹ Walzer, 2004, pp. 172–3.

¹⁰ Walzer 2004, p. 187.

the imperatives realism claims merely to describe and denies having in any sense wrought'. But as she went on to remark, '[a] just war requires agents to carry out its purposes. But if the warrior no longer serves as an avatar of justice, how is war itself to claim this imprimatur?'.¹¹ In a similar vein, Stephen Toulmin criticized the tendency of the just war tradition to locate the right to war in the sovereign state, since in the last instance 'the claims of human survival must override the claims of sovereignty and nationhood'.¹²

In recent years, the once critical spirit appears to have been weakened. In Elshtain's *Just War against Terror* (2003), we learn that it 'is the rightful authority of earthly kings and kingdoms to punish wrongdoers. Matters of temporal justice must not be left to self-help. The prospect of leaving questions of righting injustice and imposing penalties in the hands of each and every person conjures up a nightmare of private warfare, vengeance, and vendettas'.¹³ Yet in order to make wars undertaken by such rightful authority just, they must also 'help create the safe surround that permits civic peace ... to flourish', since such peace is the most basic end of any government.¹⁴ When a government becomes destructive of this end, 'it abandons its minimal *raison d'être* and can no longer be said to be legitimate'.¹⁵ Thus, the authority required to justify acts of war against those who threaten the social order derives its legitimacy from its ability to do so effectively in the interest of domestic peace. Should a government fail to deliver the basic conditions of social order, it would thereby lose its legitimacy. But again, the legitimacy of political authority is not derived from any democratic sources – such as the will of the people – but from the ability to preserve a political community, with violent means if necessary.

Other contributors have done little to push the problem of legitimate authority beyond such circular accounts. In a textbook on the topic, we learn that the legitimate authority required to wage war resides with 'the duly constituted ruler who speaks with the authority of the populace and who does not have recourse to a higher authority for arbitration'.¹⁶ In a similar fashion, Regan states that since 'one of the primary purposes of organized society is to protect its members from domestic and foreign violence ... organized society needs to rest the authority to wage war in certain institutions and personnel'.¹⁷ As another authority has noted, 'a government may, and sometimes must, step outside its ordinary sphere of authority into the role of a third party, institutionally

¹¹ Elshtain 1985, pp. 39–57, at 46 and 50–3.

¹² Toulmin 1992, pp. 280–98, at p. 298. ¹³ Elshtain 2003, p. 52.

¹⁴ Elshtain 2003, p. 54 ¹⁵ Elshtain 2003, p. 48.

¹⁶ Christopher 1994, pp. 86–7. ¹⁷ Regan 1996, p. 20.

vacant but morally required by the general public reflection, in order to maintain the right in international conflict'.¹⁸

The above accounts thus reiterate commonplaces of modern political theory in support of the view that legitimate authority ultimately resides in the sovereign state, but without specifying the sources of its legitimacy beyond the basic requirements of self-preservation. Sovereign states have the right to defend themselves and their citizens with violent means against internal as well as external enemies, yet the very source of their legitimacy is nothing but the ability to do so successfully. But if the authority to use violence externally cannot be legitimized on grounds other than its prior success, it would seem that this authority cannot be subjected to moral scrutiny either, since in this case the presence of such authority is a necessary condition of social and moral order rather than its consequence.

Recent efforts to relocate the authority to wage war to other levels run into similar difficulties. Whereas a global empire would derive its legitimacy from its ability to create and maintain peace and order at the global level, a global community would do so from its ability to reconcile global differences in the interest of commanding the consent of all mankind. Let us start with the notion of a *global empire*. In Michael Doyle's happy phrase, an empire is a 'sovereignty that lacks a community'.¹⁹ In the context of the just war debate, a global empire is seen as the possible end result of American unilateralism within what essentially remains a territorially differentiated international system.²⁰ As Weigel has argued, 'the United States has a unique responsibility for leadership in the war against terrorism and the struggle for world order ... that responsibility may have to be exercised unilaterally on occasion'.²¹ Such claims to boundless authority entail a corresponding obligation to provide the basic requirements of political order in a world in which these would supposedly otherwise be lacking, hence the legitimacy of a global empire would derive from its ability to deliver peace and order on a global scale. This would in turn depend on its relative success in defending the peoples brought under its sway from both internal and external enemies, rather than on the consent of those subjected to imperial rule, or on the ability to protect or promote their basic human rights. Instead, its success would hinge on the extent to which these subjects can be persuaded or coerced into trading some of their existing liberties for more security. Such notions of a global

¹⁸ O'Donovan 2003, p. 25. ¹⁹ Doyle 1986, p. 36.

²⁰ Kagan 2003; Huysmans 2006, pp. 135–65; Hurrell 2005a, pp. 153–76; Cox 2004, pp. 585–608.

²¹ Weigel 2003, pp. 13–44, at p. 32.

empire would make the effort to articulate a normative framework seem rather pointless, since it is difficult to see how any normative principles could carry any independent clout in relation to the forces they are supposed to tame. Hence, if the relationship between authority and the use of force is indeed a two-way street, then the use of force can always be understood as an implicit claim to possess legitimate authority, while carrying the corresponding obligation to impose and maintain order within that domain.

The alternative has been to suggest that legitimate authority ought to be relocated to a *global community*, to a community without sovereignty.²² But the coherence of that conception would require that we can indeed conceive of a political community in the absence of any overarching authority. This is where the quest for a global community runs into trouble, since the very same division of mankind into distinct communities that makes this idea look compelling also turns out to be the main obstacle to its realization. Because of the pluralistic structure of international society, every claim in universalistic direction can easily be recast as an expression of some particular identity or interest, and is hence likely to generate conflict rather than peace.²³ Yet at first glance, the concept of a global community seems to make the just war tradition irrelevant. By definition, there would be neither external enemies to wage war against, nor any sovereign states left that could go to war with each other. On closer inspection, however, it is hard to see how a global community could exist without some global authority to keep it from falling apart. It is therefore tempting to conclude that while the relevance of just war theory might seem limited to a world populated by discrete political units, the double bind between authority and force seems difficult to escape, since a community of all mankind would be hard to realize without institutionalizing yet another social contract between rulers and ruled at the global level. To simply posit the existence of a global community as the basis of such contract will hardly bring this problem closer to a solution, since such a community appears to be little more than the good old nation blown big by means of a domestic analogy.²⁴ As has been pointed out, the very transition to a global community is difficult to justify in terms themselves democratic, since the relevant *demos* in this case is the expected outcome of this transition rather than its starting point.²⁵

²² See for example Kaldor 2002, pp. 268–78.

²³ See Bozeman 1984, pp. 387–406; Bartelson 1995b, pp. 255–72; Cochran, 1999; Shapcott 2001, pp. 30–52; Jahn 2005, pp. 177–207.

²⁴ See for example Held 1999, pp. 84–111; Held 2005, pp. 10–38.

²⁵ Wendt 1999, pp. 127–33; Näsström 2003, pp. 808–34.

I would therefore like to conclude that the double bind between authority and the use of force has been so firmly entrenched in standard definitions of the core concepts of just war theorizing so as to block the routes of escape. As long as we formulate questions about the legitimate use of force in conventional terms, we plug into a tradition of thought which provides us with the resources necessary for answering these questions. But by doing this, some things also slip through the back door – in this case an implicit social contract between rulers and ruled according to which legitimate authority rests on the ability to provide protection against both internal and external enemies. Due to the tacit acceptance of this social contract, it has become hard to see how the legitimate authority required to justify warfare could ever be relocated to institutions categorically distinct from the sovereign state without thereby giving rise to the very same problems such a relocation was supposed to solve in the first place.

III

But how did this implicit contract come into existence, and how did it become taken for granted? In this section, I shall focus on how the double bind between authority and force has been construed in the just war tradition, and how it became foundational to modern legal and political theory. Prior attempts to reconstruct the just war tradition have frequently assumed that this tradition is distinct from other traditions of thought, and have sometimes also assumed that this tradition consists of a series of answers to a set of perennial questions. But as soon as we start to ask questions about the locus of legitimate authority, we are bound to note that the ways in which this question has been answered vary to such a degree that it becomes difficult to sustain the impression of a distinct and continuous tradition of thought at all.²⁶

Although the question of legitimate authority has been of marginal concern in the recent revival of just war theory, it was an absolutely crucial concern to medieval and early-modern scholarship.²⁷ As I shall try to make clear in this section, if we focus on how the relationship between legitimate authority and the use of force has been conceived in theology and law, the just war tradition looks inseparable from, rather than opposed to, that of secular statecraft. From being integral to medieval conceptions of authority as law enforcement, the double bind is implied in the contractual justification of the modern state, as well as crucial to its right to wage war.²⁸

²⁶ See Johnson 1975, pp. 26–33; Bartelson 1996, pp. 239–360.

²⁷ See for example Nussbaum 1943, pp. 453–79; Forsyth 1992, pp. 23–41; Tuck 1999.

²⁸ Compare Neff 2005, pp. 1–158.

In order to make this point, let us have a look at what some of the canonical texts within the just war tradition have had to say about the source and locus of legitimate authority. In his *Letter to Faustus the Manichean* (397/98), Augustine argued that either God or the temporal ruler had the responsibility to decide whether recourse to war was necessary, since ‘the natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority’.²⁹ Even if the precise location of that authority was far from obvious to Augustine, he assumed that the ultimate purpose of wars waged in its name must be to preserve or restore social order. This being so, since peace, understood as ‘ordered concord, with respect to command and obedience’ to him is more basic than war. As he writes in the *City of God* (c.426 CE), ‘there can be peace without any war, but no war without some degree of peace’.³⁰ Thus, to Isidore of Seville, equally hesitant about the locus of the required authority, ‘a war is just when, by a formal declaration, it is waged in order to regain what has been stolen or to repel the attack of enemies’.³¹ But quite irrespective of their relative inability to pinpoint the exact locus of legitimate authority, both Augustine and Isidore assumed that some such authority simply had to be present somewhere in the social body, since it would be hard to speak of any social order at all in its absence, and hence also of war as an activity taking place *between* two or more separate agents. This assumption that authority was integral to the identity of the agents remained crucial to most medieval conceptions of just war, despite the fact that in medieval legal practice, authority was anything but unitary in character.³²

Augustine and Isidore also set the terms for the subsequent debate. According to Gratian’s *Decretum* (1148) ‘a just war is waged by an authoritative edict to avenge injuries’.³³ But Gratian also provided a more precise account of the possible loci of legitimate authority. To him, wars should only be undertaken by public officials, and then under the command of God or by some legitimate *imperium*. Yet exactly which institutions could rightfully claim this status was not made entirely clear. In effect if not in intention, he accorded such authority to all secular rulers from the Emperor down to the pettiest princes, while granting some authority to the Church to initiate wars in defence of the faithful against infidels.³⁴

²⁹ Augustine, *Contra Faustus the Manichean*, quoted in Russell 1975, p. 22.

³⁰ Augustine 1998, p. 939. ³¹ Quoted in Johnson 1980, p. 153.

³² Krieger 1977, pp. 249–70.

³³ Gratian, *Corpus Juris Canonici*, quoted in Johnson 1980, p. 153.

³⁴ Russell 1975, pp. 55–76.

Gratian's *Decretum* spurred two kinds of commentaries, both of which purported to offer more precise accounts of where the right to wage war ought to be located. The simplest solution was to stipulate that only princes possess the authority (*ordinaria potestas*) required for war to be just. 'A just war', writes Huguccio, 'is waged by the just edict of a prince'.³⁵ Given the political make-up of Europe at the time, this solution was not very helpful, since virtually every ruler could and did advance such claims in support of his violent acts.³⁶ Since the right to wage war was among the chief characteristics of the prince, it was therefore as hard to deny princes this right as it was to confer it on any other kind of agent. Furthermore, the authority of the prince derived from his responsibility for maintaining peace and justice within the community over which he held sway.³⁷ This responsibility entailed the right to use force to that end, and thus represented a first instance of a double bind between legitimate authority and the use of force in the context of medieval legal thought.³⁸ In sum, a war was just by virtue of being waged by a prince, yet what made a prince a prince was his right to wage war.

Other commentaries were more restrictive in outlook. The authority to wage war was gradually being restricted to kings, the Emperor and the Pope. For example, Hostiensis condemned wars among Christian princes on the grounds that only the Emperor had the authority to wage war and grant the permission to bear arms. The Emperor consequently also had the right to wage war against those offending princes who had stepped out of Christian society through their resort to unauthorized acts of violence. According to Hostiensis, just wars could only be waged on the authority of Emperor, or, under extreme circumstances, on the authority of the Pope. The authority to decide when such extreme circumstances were at hand rested with the Pope, as did the duty to direct crusades against infidels and heretics.³⁹

The commentaries to Gratian's *Decretum* thus indicate two broad tendencies in the medieval understanding of the right to war. On the one hand, early commentators allowed almost any prince to wage war simply by virtue of being a prince, thereby reinforcing the relationship between legitimate authority and the use of force as long as it served the purposes of law enforcement, however defined. On the other hand, later commentators took a more restrictive approach by limiting this authority to the Emperor, while justifying this restriction with reference to the

³⁵ Quoted in Russell 1975, p. 89. ³⁶ Keen 1965, pp. 69–72.

³⁷ See Harding 2002, pp. 69–108. ³⁸ Neff 2005, pp. 29–82.

³⁹ Russell 1975, pp. 100–5, 120–6; Johnson 1980, pp. 150–71.

common interest of Christian princes in keeping the peace, however unjust. Since these accounts gave prominence to the rights of secular rulers, all of them were difficult to reconcile with papal claims to supreme authority.⁴⁰

But at a deeper level, these tendencies were in agreement insofar as they understood the authority required to justify the use of force as being crucial to the identity of the agents in question. Depending on the choice of terms, it was clear that this identity derived from the legal standing of these agents within the feudal order. But these entitlements were subject to constant contestation, and the authority to adjudicate such claims was itself contestable. These conflicts were further aggravated when claims to superiority and autonomous jurisdiction were fused – and later equated – with claims to *territorial* dominion. When this happened towards the end of the thirteenth century, the secular rulers of France and Naples began to challenge the claims to universal authority of Pope and Emperor simply by claiming the same legal and political status within their own territorial domains.⁴¹

Aquinas provided an important reconceptualization of the double bind. Much of the novelty of his conception lies in the superimposition of an Aristotelian account of political community on to the received doctrine. Since he held that the end of all political activity is the common good of the political community, the prince is allowed and indeed obliged to wage war in defence of the community, its territory and its citizens. As he states in *Summa Theologica* (1265–74), ‘as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances ... so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies’.⁴² The authority of the prince is legitimized with reference to his ability to defend the political community against both internal and external enemies. From this point of view, going to war for reasons other than the good of the community would not only make that particular war unjust, but would also undermine the legitimacy of princely authority.⁴³ Thus, by assimilating the Aristotelian account of the *polis* to the concerns of contemporary theology, Aquinas was able to restate the Augustinian idea of peace in terms of the *ends* of social order, represented by the purpose of

⁴⁰ See Pennington 1976, pp. 35–48; Osiander 2001b, pp. 119–45.

⁴¹ von Elbe 1939, pp. 665–88; Ullmann, 1949, pp. 1–33.

⁴² Thomas Aquinas, 1964–1981, II/II.40.4. ⁴³ Russell 1975, pp. 258–71.

the worldly community in space and time. How to define the common good, and how to best safeguard it in times of discord, became salient issues in subsequent theological debates.⁴⁴

A recognizably modern version of the double bind was forged by subsequent attempts to answer these questions. Both natural law and secular statecraft emphasized the right of the community to safeguard its own survival with violent means if necessary, and gave the prince the right to define and act upon the common good.⁴⁵ ‘The prince’, wrote Cajetan in 1525, ‘can of his own authority use the sword against internal or external disturbers of order; [his] reason is the perfection of the State. It would not in fact be a perfect state which did not have the power to punish ... those who trouble its tranquility, whether they are citizens or foreigners’.⁴⁶ By the same token, in *De Jure Belli* (1532) Vitoria allows every state the authority to declare and to make war in order to defend itself and to avenge any wrongdoing against itself. But he goes on to ask what is a state, and who can properly be called a sovereign prince? The answer lies in its sovereignty, since ‘a perfect State or community ... is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates’.⁴⁷ In this way, Vitoria further tightened the connection between the authority of the state and the justness of war. Not only is legitimate authority necessary in order to justify warfare, but the right to make war is what makes the state *the* locus of legitimate authority in the first place.⁴⁸

Although Vitoria regarded states as being embedded within a universal order comprising the totality of mankind, many of his successors emphasized their independence by redefining the concept of sovereignty in terms of indivisibility and absoluteness.⁴⁹ Hence, to Grotius, a war is ‘solemn, according to the Law of Nations’, when it is made ‘by the Authority of those that have the Sovereign power in the State’.⁵⁰ This being so, since the ‘natural order and the Peace of Mankind require, that the matter should be so regulated in every State’.⁵¹ Grotius then goes on to discuss the proper locus of that sovereign authority. He insists that this authority must be supreme, since ‘in Civil Government, because there must be some dernier Resort, it must be fixed either in one Person, or in an Assembly; whose Faults, because they have no

⁴⁴ See Kantorowicz 1951, pp. 472–92; Rupp 2000, pp. 217–25.

⁴⁵ See Viroli 1992, pp. 238–80; Leira 2007, pp. 65–88.

⁴⁶ Cajetan, *Summula de Peccatis*, v, quoted in Johnson 1975, p. 54.

⁴⁷ Francisco de Vitoria, *De Jure Belli (De Indis)*, III, in Brown Scott 1917.

⁴⁸ Bartelson 1995a, pp. 127–34.

⁴⁹ See Kennedy 1986, pp. 1–98; Tuck 1987, pp. 99–119.

⁵⁰ Grotius (1625) 2005, I.III, pp. 248 and 250. ⁵¹ Grotius 2005, I.III, p. 252.

superior Judge, God declares'.⁵² The fact that such supreme authority in some instances had been conferred on the king by the consent of the people does not imply that such authority could be reclaimed by the same constituency, however. This being so, since the sovereign authority required to make war 'be but one, and of itself undivided'.⁵³ But in many cases, this supreme authority is divided in practice, 'either amongst several Persons, who possess it jointly; or into several Parts, whereof one is in the Hands of one Person, and another in the Hands of another'.⁵⁴ In order to handle such cases in legal practice, Grotius holds that we must judge 'by the Will of him, that conferred that right'.⁵⁵ Grotius here implies that, even in those cases where indivisible and supreme authority is difficult to locate in practice, we are nevertheless obliged to assume that it exists in principle. In fact, such indivisibility is a necessary condition of legal order, since 'just as mathematicians treat geometrical figures as abstracted from material objects, so I have conceived of law in the absence of all particular circumstances'.⁵⁶ In this way, Grotius made indivisible sovereignty the foundation not only of the right to war, but also of the society of states within which this right could be exercised.⁵⁷ By doing so, he emancipated secular statecraft from some of the constraints on the use of force imposed by natural law, thereby turning what was left of the just war doctrine into a *moral* rather than legal concern.⁵⁸

Grotius had thus provided the basics of modern accounts of the relationship between legitimate authority and the right to wage war, and thereby also of the social contract we find implicit in many contemporary theories of just war. With Grotius, the legitimate authority necessary to justify warfare was firmly located in the modern state, and defined in terms of its sovereignty. Sovereignty in turn was understood as the supreme and indivisible authority within a given territory, its legitimacy deriving from the tacit consent of self-interested subjects themselves enjoying a right of self-preservation analogous to that of states coexisting in a state of nature. But by turning states and individuals into moral equals, Grotius had also justified the use of private violence for the ends of self-preservation, hence also making sovereign authority necessary in order to maintain the conditions of social order and peace within the community thus constituted.⁵⁹

⁵² Grotius 2005, I.III, p. 274. ⁵³ Grotius 2005, I.III, p. 305.

⁵⁴ Grotius 2005, I.III, p. 306. ⁵⁵ Grotius 2005, I.III, p. 307.

⁵⁶ Grotius 2005, Prolegomena to the First Edition of *De Iure Belli ac Pacis*, Book III, p. 1762.

⁵⁷ See Haggemacher 1983, pp. 529–44. ⁵⁸ Neff 2005, pp. 85–130.

⁵⁹ Tuck 1999, pp. 82–6.

The double bind between authority and force was then conclusively sealed by Vattel. To him, the capacity to wage war in order to restore the conditions of natural justice is the very mark of state sovereignty, and as long as the ruler is capable of defending the self-interest of his state in this way, his authority cannot be challenged on any legal grounds.⁶⁰ Consequently, there can be no legitimate authority over and above that of individual sovereign states that could help settle disputes between them, only voluntary agreements between them to that effect.⁶¹ So by the end of the eighteenth century, the double bind between legitimate authority and the use of force had been condensed in the modern concept of sovereignty. This did not mean that the age-old tension between law and force had thereby been resolved, but rather that it had been removed from contestation. As we have seen, this happened gradually from the very moment the prince was made final arbiter of the common good of the community, until the concept of community came to refer exclusively to territorially bounded groups of people. For better or worse, this legacy is activated whenever the core concepts of the just war tradition are dusted off and put to use today.

IV

The brief historical account sketched above helps us understand some of the difficulties we encounter when we try to pass moral judgment on contemporary warfare. Within the just war tradition, the use of force has consistently been justified with reference to legitimate authority, and that authority has consistently been legitimized with reference to the discord that presumably would ensue in its absence. Rather than being a corrective to the immoral practices of sovereign states, or simply a convenient fig leaf to conceal those practices, just war theory appears to have been involved in the shaping of both the sovereign state and modern practices of warfare by rendering them mutually constitutive. This intimate connection between the modern state and modern forms of warfare is also what makes the just war tradition look irrelevant today, since both the state and the modern practices of war are being challenged by the rise of new agents and new kinds of war. Hence we seem to be under the spell of an intellectual tradition that offers little guidance today, as it contaminates our concepts with connotations that keep us trapped in the past.

Contemporary attempts to escape this predicament leave us with a dilemma. On the one hand, attempts to relocate legitimate authority

⁶⁰ Vattel 1760, Book III, 4. ⁶¹ Von Elbe 1939; Beaulac 2003a, pp. 128–83.

to a global empire fail to conceptualize legitimacy other than in crude output terms, such as the provision of peace and social order. On the other hand, attempts to relocate the sources of legitimacy to a community of all mankind fail to consider that, even if such a community could be created, its legitimacy would require either consent or an effective protection of human rights that both seem out of reach in the present. But if my historical analysis of the just war tradition is correct, there is little new about this predicament. Not only has the locus of legitimate authority been constantly contested within the just war tradition, but this constant contestation has also been instrumental in relocating authority between different kinds of agents. This has taken place in response to perceived problems of order, and accounts for some of the remarkable continuity displayed by the just war tradition from the early Middle Ages to the present. Hence the contestation of legitimate authority we experience today seems to restore the default settings of political thought and action after what appears to have been a Westphalian interlude, an interlude during which the locus of legitimate authority remained relatively uncontested.

Furthermore, the above account should sensitize us to the fact that the double bind between authority and the use of force also has been a potent instrument of criticism that can be used in order to delegitimize the excessive use of force by the powers that be. This is what Aquinas and Vitoria did when they required that princes should wage war only for the common good of the community, thereby relocating the source of legitimacy from the persona of the prince to the body politic. This is what contemporary critics do when they insist that the American empire fails to deliver what empires are supposed to deliver, and that moral judgments on warfare necessitate recourse to a wider legal framework that takes the interests of humanity into consideration.⁶² Yet imagining such a framework was easier before Grotius turned the right to war into a corollary of absolute and indivisible sovereignty. Then the notion of an overarching human community gradually lost its regulative force until it was conclusively replaced by a state-centric law of nations which ruled out this possibility altogether. So in the final analysis, the reason why we got into our present predicament with respect to the problem of just war coincides neatly with the reason why this predicament seems so hard to escape. This has very little to do with the idea of war, but more with the idea of peace: as long as we continue to assume that the use of force is necessary to create and maintain peace and social order, we shall find ourselves under the spell of the double bind.

⁶² Brunkhorst 2004, pp. 512–26; Cohen 2004, pp. 1–24.

5 The durability of organized hypocrisy

Stephen D. Krasner

I

Sovereignty has come to provide the dominant logic of appropriateness for organizing political life, despite the fact that logics of consequences often dictate behaviour that is inconsistent with the basic principles of sovereign statehood and expectations of how it is actually practised.¹ This decoupling of logics of appropriateness and logics of consequences, an example of organized hypocrisy,² is not a new development. It has always characterized the sovereign state system. Consequential actors have not had an incentive to align more closely dominant principles and actual behaviour. This calculus could, however, change if the core security interests of the most powerful states are threatened in ways that cannot be accommodated within existing sovereign norms. If such threats do become manifest, the decoupling between rules and norms could become even greater, or the rules of the international system might be rewritten. Neither of these outcomes, greater decoupling or new rules, is preferable to the status quo of organized hypocrisy.

The concept of sovereignty embeds two separate and distinct principles and one fundamental assumption about actual practice. The three core elements of sovereignty are:

- International legal sovereignty: international recognition which implies the right to enter into contracts or treaties with other states, juridical equality, membership in international organizations.
- Westphalian/Vattelien sovereignty: the absence of submission to external authority structures, even structures that states have created using their international legal sovereignty.
- Domestic sovereignty: more or less effective control over the territory of the state including the ability to regulate trans-border movements.

¹ March and Olsen 1989. ² Brunsson 1989.

These three elements of sovereignty are analytically and empirically distinct; they are not an organic whole.³ The Peace of Westphalia actually said little about what later came to be called Westphalian sovereignty. Emmerich de Vattel, a Swiss jurist, was the first explicitly to stipulate the rule of non-intervention.⁴ The elements of sovereignty are not logically related, nor have they always been conjoined in practice. Political entities can have international legal sovereignty, recognition, without having Westphalian/Vattelien sovereignty or effective domestic sovereignty. States can have effective and autonomous domestic governance without being recognized. They can enjoy recognition and effective domestic governance without having Westphalian/Vattelien sovereignty. In the contemporary world there are two striking deviations from the conventional sovereignty script: the European Union, whose members have used their international legal sovereignty to compromise their Westphalian/Vattelien sovereignty; and failed or weak states that enjoy international legal sovereignty and sometimes Westphalian/Vattelien sovereignty but are unable to exercise effective domestic sovereignty. In the *Breaking of Nations* Robert Cooper argues that in the contemporary international environment there are three worlds: the modern world of conventionally sovereign states; the post-modern world of Europe; and the pre-modern world of failed, repressive and badly governed states.

The rules and practices of sovereignty did not begin at any particular point in time. Rather they evolved over several centuries. The Peace of Westphalia, which is often seen as the key transition to the modern state system, was, in fact, only one of many way stations. There were elements of the Peace that led later observers to identify it as the 'majestic portal which leads from the old into the new world'.⁵ The treaties did re-affirm the right of the princes of the Holy Roman Empire to enter into treaties, although this was a right given to them initially in the Golden Bull of 1356, one of the founding documents of the empire. It did treat Protestant and Catholic states equally. It did re-affirm the principle first enunciated in the Peace of Augsburg of 1555 that the prince could set the official religion of his territory, although this right was circumscribed by other provisions of the Treaties of Osnabrück and Münster, which comprise the Peace. For instance, there were a number of cities with mixed populations in which the Peace stated that authority had to be shared between Protestants and Catholics. The Peace also included manifestly medieval provisions such as rules for

³ Fowler and Bunck 1995, pp. 124–5. ⁴ Vattel 1760, Book 2, ch. iv.

⁵ Gross 1948, p. 28.

designating the Electors of the Holy Roman Empire and stipulations that are in conflict with what are now considered core principles of sovereignty, such as the provisions for supporting religious toleration in Germany, which violate the rule of non-intervention in the internal affairs of states. The Peace provided that religious questions had to be decided by a majority of Protestants and Catholics voting separately in the Courts and Diet of the Holy Roman Empire. A basic constitutional provision of the Empire was thus defined by an international treaty. Even the re-affirmation of the right of princes to make treaties was conditioned by a clause stating that any such 'Alliances be not against the Emperor, and the Empire, nor against the Publick Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire'.⁶

That sovereignty has always been characterized by organized hypocrisy, a disjunction between logics of appropriateness and logics of consequences, is not surprising in an environment as complex as the international system. There is probably no single set of rules that could align interests, power and principles; no set of rules that would create a self-enforcing equilibrium from which actors never had an incentive to deviate. But what is, perhaps, surprising is the durability of this decoupling. Every major peace treaty from the Peace of Westphalia to the United Nations charter enunciated principles that were inconsistent with accepted sovereign norms.⁷ Despite these inconsistencies, no enduring alternative construct has arisen to replace or even complement sovereignty. Constructs that were explicitly accepted in the past, such as colonialism (arguably consistent with sovereignty rules in that the colonial power did have full control over domestic and international affairs), protectorates, and the mandates of the League of Nations and trusteeships of the United Nations, have disappeared, but new developments such as the European Union and failed states have brought organized hypocrisy into the contemporary world.

Sovereignty has endured because the interests of key players in the system could be accommodated by deviations from its rules and practices. For the rules to change, key actors, those with an ability to change the system, would have to support some alternative set of constructs, something that they would only do if such alternatives could provide better outcomes. When sovereignty rules have manifestly failed to provide desirable outcomes, states have been able to cobble together alternatives. In Bosnia, for instance, governance has been provided

⁶ Treaty of Münster, in Israel 1967, p. LXV. ⁷ Krasner 1999, ch. 2.

under the auspices of the Contact Group and the European Union. When the United States and other countries moved from recognizing the government of Taiwan as the government of China to recognizing the government in Beijing, they established quasi-diplomatic arrangements for conducting business with Taiwan. The American Institute in Taiwan operates what is, in effect, a diplomatic mission. This arrangement is not a perfect substitute for conventional diplomatic ties; for instance Taiwanese officials in Washington do not meet with their counterparts in the State Department building, but Taiwan has flourished economically and achieved effective domestic and Westphalian/Vattelien sovereignty despite having formal diplomatic ties with only a handful of countries, most of which it has provided with significant economic subventions. Hong Kong, formally a part of China, has a separate visa regime from that of China and is a member of some international organizations of which China is also a member. When China assumed control of Hong Kong in 1997 it was anxious to reassure both the Hong Kong and international business communities that the Hong Kong economy could operate under different rules from that of the rest of China. The rest of the world was happy to accommodate China's desires even though this meant violating conventional sovereignty norms.

Mapping the contemporary world

There are now 192 members of the United Nations. In addition there are a few other political entities, most notably Taiwan, which have Westphalian/Vattelien or domestic sovereignty, but do not have international legal sovereignty. Table 1 lists all of the members of the UN as well as a few other entities (Taiwan, Puntland, Somaliland) that have attributes of sovereignty but not international legal sovereignty. Countries are classified according to which attributes of sovereignty they possess. The modern world of conventional sovereigns is comprised of states that have international legal, Westphalian/Vattelien and domestic sovereignty. The states of the post-modern world have international legal and domestic sovereignty but not Westphalian/Vattelien sovereignty. The states of the pre-modern world have international legal sovereignty but not domestic sovereignty; they may, or may not, have Westphalian/Vattelien sovereignty. The following lists categorize countries by the attributes of sovereignty. The lists for pre-modern states differentiate across the categorization offered by different sources, the differences among the sources being an indication of

the disagreement over how to determine when a state has failed or is so badly governed that it can exercise authority over activities within its own territory.

The modern world: traditional sovereignty: Albania, Antigua and Barbuda, Argentina, Armenia, Australia, Bahamas, Barbados, Bahrain, Belize, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Canada, Cape Verde, Chile, China, Costa Rica, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Gabon, Ghana, Grenada, Honduras, Iceland, India, Israel, Jamaica, Japan, Jordan, Kazakhstan, Korea, Republic of Kuwait, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Namibia, Nauru, New Zealand, Nicaragua, Norway, Oman, Palau, Panama, Paraguay, Peru, Philippines, Qatar, Russian Federation, Samoa, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Serbia, Seychelles, Singapore, South Africa, Suriname, Swaziland, Switzerland, Thailand, Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Ukraine, United Arab Emirates, United States of America, Uruguay, Viet Nam.

The post-modern world (mainly EU): international legal and domestic but not Westphalian/Vattelien sovereignty: Andorra, Austria, Belgium, Bosnia and Herzegovina, Bhutan, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Fed. States of Micronesia, Monaco, Netherlands, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, United Kingdom of Great Britain and Ireland.

The pre-modern world: failed, poorly governed states (all sources). International legal sovereignty, possibly Westphalian/Vattelien sovereignty, but not domestic sovereignty: Afghanistan, Angola, Bangladesh, Burundi, Cameroon, Cent. African Republic, Chad, Comoros, Dem. Rep. of Congo, Rep. of Congo, Côte d'Ivoire, Eritrea, Ethiopia, Guinea, Guinea-Bissau, Haiti, Iraq, DPR Korea, Lao PDR, Liberia, Mali, Nepal, Niger, Nigeria, Papua New Guinea, Sierra Leone, Solomon Islands, Somalia, Sudan, Tajikistan, Tanzania, Timor-Leste, Togo, Uganda, Uzbekistan, Rep. of Yemen, Zimbabwe.

The pre-modern world (countries included in only two or three sources): Azerbaijan, Belarus, Burkina Faso, Burma, Cambodia, Equatorial Guinea, Indonesia, Kenya, Malawi, Myanmar, Pakistan.

The pre-modern world (countries included in only one source): Cuba, Dominica, The Gambia, Georgia, Guyana, Iran, Kiribati, Lebanon, Lesotho, Libya, Madagascar, Mauritania, Moldova,

Mozambique, Rwanda, Sao Tome & Principe, Senegal, Sri Lanka, Syria, Tonga, Turkmenistan, Vanuatu, Venezuela, Zambia.⁸

Domestic and Westphalian/Vattelien but not international legal sovereignty: Puntland, Taiwan, Somaliland.

The eighty-four countries of the modern world have all three conventional attributes of sovereignty. They are recognized, free of external authority and exercise control over their own territory.

The second group, the post-modern world, is made up of thirty-four countries that are members of the European Union and a few other small states that do not have Westphalian/Vattelien sovereignty but are competently governed and recognized.

The third group of weakly governed states, all of which are recognized, some of which have Westphalian/Vattelien sovereignty, varies from thirty-seven to seventy-three countries depending on which list of failed states is being used. They comprise the pre-modern world.

Finally there are a few countries – Taiwan, Puntland, Somaliland – that have domestic sovereignty and Westphalian/Vattelien sovereignty but not international legal sovereignty.

The modern world of conventional sovereigns

A plurality of the world's states do conform to the conventional rules of sovereignty, including some of the largest and most powerful. The United States, the global hegemon, has been an ardent defender of its own sovereignty while at the same time vigorously advocating the spread of democracy, sometimes in conformity with the Westphalian/Vattelien sovereignty of the target state and sometimes not. China, at least rhetorically, has perhaps been the purest advocate of sovereignty, defending its own and invoking the principle of non-intervention in the internal affairs of other states as one of the guiding tenets of its foreign policy. Rather than attributing these differences to some inherent distinction in Chinese and American attitudes, they are best understood as a reflection of the power differences between these two states: the United States has the capacity to challenge the Westphalian/Vattelien sovereignty of other states; China fears that its own autonomy and what it understands to be its territorial integrity is at risk. The United States is more concerned with the threat to international security posed by badly governed states; China is more concerned with maintaining its own national integrity.

⁸ Sources for the pre-modern world lists: Center for Global Development 2003; Failed State Index 2007; Weinstein *et al.* 2005; Kaufmann *et al.* 2005; Stewart and Rice n.d. and Department for International Development 2004.

The post-modern world of the European Union

The European Union (EU) is a new kind of institutional structure: more than a conventional international treaty organization, less than a federal state. The EU has been created by the decisions of its member states. It is a manifestation of their exercise of international legal sovereignty. But the EU is not just a conventional treaty organization. The members of the EU have used their international legal sovereignty to create supranational institutions and pooled sovereignty arrangements that have violated their own Westphalian/Vattelien sovereignty. As Robert Cooper has argued, 'the European Union is a highly developed system for mutual interference in each other's domestic affairs, right down to beer and sausages'.⁹

The EU is, however, not some kind of superstate or a federal state even though it divides authority between Brussels and member states. The powers of the central institutions of the EU – the most important being the Council, Commission, European Parliament, the European Central Bank, and the European Court – are, with the exception of the Court, limited to specific functional areas. The budget of the European Union itself is limited to less than 1.27 per cent of the GDP of the member states. The number of individuals in the bureaucracy is relatively small. Some decisions require the unanimous consent of the members, others a qualified majority. The EU does not, in most cases, have the power to implement its own regulations. Member states must implement EU decisions. The EU does not tax, spend, police or coerce. The members of the EU are invited to obey European decisions, they are not obligated to obey. The hallmark of a truly federal state would be that key decisions across all issue areas could be taken without the consent of all of the member states. In the United States this issue was resolved only after a civil war. In Europe unanimity is still required for what are understood as constitutional changes.¹⁰

Still, the EU does have extraordinary powers and an elaborate institutional structure that has evolved over time in ways that could not have been foreseen by its founding members or even the European visionary statesmen of the early 1950s. The European Court of Justice has successfully asserted that its decisions have supremacy over national law and direct effect in the national judicial systems of member states. The European Central Bank sets monetary policy for states in the eurozone.

The institutional structures of the EU and its scope are still not settled. The ultimate degree of integration remains uncertain. The

⁹ Cooper 2003, p. 27. ¹⁰ Moravcsik 2002; Weiler 2002.

constitutional treaty was rejected in 2005 by voters in France and the Netherlands, two of the original signatories of the Treaty of Rome. Some countries are members of the eurozone; others are not. The Schengen Accord for open borders involves only a sub-set of member states, and also two states that are not EU members, Norway and Iceland.

The EU has been so successful because it has created over time a set of agreements that are self-enforcing. Individual states may not have been entirely happy with specific decisions that were taken, but their leaders still decided that adhering to the Union was better than departing from it. Surely some of the new members of the EU would have preferred a different deal than the all-or-nothing package that they were offered but no other offer was on the table. Taking this deal was better than rejecting it.¹¹

The EU will not, however, pose a challenge to conventional sovereignty at the global level. The European experience will not be replicated in other areas of the world. European integration after the Second World War was facilitated by the support of the United States, which provided a security umbrella for Europe. The largest state in Europe, Germany, was anxious to constrain its own freedom of action both because Nazism delegitimated German nationalism and because, after losing two wars, Germans saw European integration as a way to escape from an inherently unstable balance of power. More generally, the first half of the twentieth century had been a catastrophe for Europe. Tens of millions had died. Europeans, not just Germans, were sympathetic to other possibilities beyond the conventional sovereign-state system. The specific conditions that supported European integration are not present elsewhere.

The pre-modern world: failed and badly governed states

One of the most striking aspects of the contemporary world is the extent to which domestic sovereignty has faltered in states that still enjoy international legal, and sometimes even Westphalian/Vattelian, sovereignty. Between thirty-seven and seventy-three countries can be classified as pre-modern political entities in which there is limited domestic political authority and governance. Failed, inadequate, incompetent, or abusive national authority structures have sabotaged the economic well-being, violated the basic human rights, and undermined the physical security of the people living within their borders. In some cases, state authority has collapsed altogether for an extended period, although such instances

¹¹ Gruber 2000.

are rare. Afghanistan in the early 1990s before the Taliban consolidated power, Liberia for much of the 1990s, and the Democratic Republic of Congo and Sierra Leone in the late 1990s offer three examples.

In some parts of the world disorder including civil war has become endemic. For the period 1955 to 1998, the State Failure Task Force identified 136 occurrences of state failure in countries with populations above 500,000. In 1955 fewer than 6 per cent of the countries were in failure. In the early 1990s the figure had risen to almost 30 per cent, falling to about 20 per cent in 1998, the last year of the study. Adverse regime change was the most common form of state failure, followed by ethnic war, revolutionary war and genocide.¹²

The pre-modern world and the existing regime

The pre-modern world poses a number of challenges for the modern and post-modern worlds. Some of these challenges can be accommodated within the familiar if unacknowledged capaciousness of organized hypocrisy. Other threats from the pre-modern world, especially those associated with global energy supplies and the nexus of transnational terrorism and weapons of mass destruction could, however, pose much more serious challenges that could lead to pressure to alter the basic rules and principles of the existing regime.

Some of the spillover from the pre-modern to the modern and post-modern worlds – criminality, disease, humanitarian crises – can be managed within familiar structures of conventional sovereignty or accommodated by decoupling logics of appropriateness from logics of consequences. Transnational criminality is a serious challenge. The same criminal networks that smuggle drugs also smuggle people, counterfeit goods, counterfeit currency, counterfeit drugs and pirated movies.¹³ Poor communication, inadequate healthcare systems and corruption will make it more difficult to control outbreaks of potential pandemic disease outbreaks. Gross violations of human rights present unpleasant political choices for democratic leaders in powerful states. If they fail to intervene and a humanitarian disaster occurs, they may lose the votes of citizens who are attentive to and care about the fate of particular countries, regions, ethnic groups, or principled issues in general. On the other hand, if a political leader does decide to intervene the benefits can never be known with certainty (would a genocide have taken place if foreign troops had not been used?), but the costs of intervention, especially if they include the lives of soldiers, will be all too

¹² Goldstone *et al.* 2000, pp. iv, v, pp. 3–5. ¹³ Naim 2005.

apparent to his or her domestic public; the eighteen Americans killed in Mogadishu being a case in point.

Criminality, disease and humanitarian crises will not lead to a change in the basic rules of the game. Criminality is expensive for the developed world but not exceptionally expensive. The United States has spent billions of dollars on the so-called war on drugs with limited success, but there is little political support for changing American drug laws or ending the programme. If drugs became sufficiently threatening, the industrial world has an obvious solution, legalization. Money laundering and the consequent regulations that have been promulgated are a deadweight loss on business but they have not stifled global commerce. Counterfeiting and other forms of theft of intellectual property rights are hardly new and reflect the different incentives facing technology leaders and followers. New diseases are threatening but the last, if not the first, line of defence are national, not transnational or international, policies. Humanitarian crises do leave leaders in industrialized countries with uncomfortable choices. Nevertheless, they do not compel interventions that could be domestically costly; and they will not lead to changes in the basic rules of the game because a regime that mandated humanitarian intervention would be less attractive than the existing regime that does not.

The United Nations adopted the Responsibility to Protect with much fanfare, but its actual impact on state behaviour will be limited. Political leaders in those states with the capacity to intervene will not risk their tenure in office by putting their troops in harm's way and political leaders who abuse their own populations will not be dissuaded by United Nations resolutions, even resolutions that they have themselves supported.

II

The failure of economic growth and political development in the pre-modern world reflects, at least in part, the almost universal adoption of a vision of the scope of state activity modelled on the richest countries in the world, coupled with weak governance structures that are incapable of carrying out many of these obligations. Virtually all countries have formally accepted responsibility for providing their citizens with health, education, infrastructure, basic human rights, social security and scientific opportunities. The template provided by the modern and post-modern worlds has been embraced by the pre-modern world.¹⁴

¹⁴ Meyer *et al.* 1997; Fukuyama 2004.

The political leaders and governments of the pre-modern world, even those with the best intentions, do not, however, command the economic and organizational resources that would be needed to fulfil their formal obligations.

Many conventional aid programmes have addressed the problem of development in ways that are entirely consistent with the existing rules of sovereignty. The direct provision of budget support is one obvious example. There have also been other programmes, however, that illustrate how the component elements of sovereignty can be decoupled. In particular, states can use their international legal sovereignty to compromise their Westphalian/Vattelien or domestic sovereignty. In some instances states have tried to deal with the gap between state capacity and the scope of state responsibilities by contracting out some state functions to external actors. Depending on the depth of delegation to external actors, these contracts can be inconsistent with conventional sovereignty rules.¹⁵

A number of states have contracted out their customs collection to private multinational corporations. The collection of customs duties can be a sink of corruption. Individual inspectors can demand bribes. Goods can be incorrectly invoiced. Monitoring by central authorities, even assuming that the central authorities are honest, can be very difficult. At least some countries have responded to this problem, in many cases because of prodding from international financial institutions, by hiring private firms to run key elements of their customs service. Indonesia, for instance, used a Swiss firm, SGS, to collect its customs from 1985 until 1997. The Suharto government embraced this initiative because corruption in the customs service was undermining the government's effort to develop indigenous industries that were dependent on imported components.¹⁶ In the late 1990s Mozambique contracted with Crown Agents, a British firm, to run the customs service and train indigenous personnel, a process that was completed in 2006.¹⁷ As part of an agreement with international donors Liberia agreed to extensive external authority in core government agencies. Foreign assistance in this instance offered substantial leverage. Aid contributors threatened to withhold contributions absent the Liberian Governance and Economic Management Assistance Program (GEMAP) agreement.¹⁸

The most interesting contemporary example of contracting out is the Regional Assistance Mission to the Solomon Islands (RAMSI). In

¹⁵ Matanock 2008. ¹⁶ James 2002. ¹⁷ Crown Agents n.d.

¹⁸ Dwan and Bailey 2006.

2003 the Solomon Islands, never very effectively governed, was on the verge of collapse. Gangs had seized weapons from armouries in the capital and even robbed the treasury. The political leaders in the Solomons saw that they were about to lose power. They asked Australia and other Pacific countries for assistance. Acting under a Chapter VI UN resolution, legislation passed by the Solomon Islands, and the endorsement of the Pacific Islands Forum, a consortium of Pacific islands states led by Australia essentially took control of key financial activities, including the auditor general's office, and parts of the police and judicial systems. Australia sent 2,000 troops to the Solomon Islands to restore order. Under the agreement signed by the Solomon Islands the Participating Police Force can act without approval from the Islands' authorities. RAMSI personnel are exempt from civil and criminal law while performing their duties. The cost for Australia is substantial, about \$200 million a year. The success of RAMSI is not guaranteed. It is, however, an example of external activity that has prevented state failure. If the RAMSI model could be generalized, and inviting in external actors before things fall apart was viewed as a readily available and legitimate policy option, the problem of state failure might become less acute.¹⁹

Mixed tribunals are another example of shared sovereignty. In East Timor, Kosovo and Sierra Leone courts have been established that include both national and international judges. In East Timor and Kosovo these tribunals were initially created by a United Nations transitional authority, which exercised executive power. In Sierra Leone the Special Court was established through a formal treaty between the government of Sierra Leone and the United Nations.²⁰

Contracting out state functions is entirely consistent with international legal sovereignty. The state is free to terminate the contract if it so chooses. It is not consistent with domestic sovereignty: the need to use international service providers, to borrow Paul Collier's term, is an admission of the government's own lack of capacity or legitimacy.²¹ Depending on the degree of delegation to external actors, contracting out might, or might not, be consistent with Westphalian/Vattelien sovereignty. In cases where delegation is limited, for instance contracting with a multinational firm to collect customs, Westphalian/Vattelien sovereignty is not challenged. In cases where it is deep, for instance RAMSI, where personnel are exempt from national criminal and civil law in their official capacities, and can make authoritative decisions on their own, Westphalian/Vattelien sovereignty is compromised.

¹⁹ RAMSI n.d.; Matanock 2008. ²⁰ Burke-White 2002; Sierra Leone n.d..

²¹ Collier 2007, p. 119.

Contracting out is but one more example of organized hypocrisy. It is not a challenge to the basic principles of the system but rather a mechanism for accommodating conditions, in this case the gap between the formal scope of state authority and state capacity in weakly governed polities, that do not conform with the assumptions of sovereignty. No alternative principles have been put forth. To minimize conflict with existing norms, political actors refrain from establishing shared sovereignty as a general category. Each instance of shared sovereignty is treated as a *sui generis* case.

III

Changes in the existing structure of rules will only come about if there are threats to the basic security interests of the powerful rather than from transnational bads, humanitarian crises, or governance failures in weak or failed states. The core security interests of states in the modern and post-modern worlds could emanate from the pre-modern world. These threats are of several kinds: weapons of mass destruction including nuclear weapons, support for transnational terrorist activities including safe havens and specific operations, and energy supplies and prices. Pakistan and North Korea have nuclear weapons. Iran, arguably a pre-modern state, could have them soon. North Korea has missiles that could deliver these weapons to Japan, China and Russia, and it has provided missile technology to Pakistan. Despite the fact that its GDP is less than 1 per cent of that of Japan, North Korea could kill millions of Japanese citizens.

Would a country possessing nuclear weapons but with limited material resources make a conscious decision to attack a major power in the modern or post-modern world? Probably not. The leaders would have to expect devastating retaliation. Could an attack occur because of miscalculation or loss of control over weapons systems? Possibly. Scott Sagan has pointed to a number of close calls in the United States arising from the inherent difficulty of controlling nuclear weapons systems.²² All of these systems are complex and tightly coupled; that is, there are many interactions among the various components of the system and a failure in one component or linkage can quickly damage the whole system. They are prone to normal accidents; that is, to failures that cannot be completely eliminated by better planning or more redundancy. More redundancy may simply make the system even more complex.²³

²² Sagan 1993. ²³ Perrow 1986.

Could a regime with limited resources sell or give nuclear material to other actors including transnational terrorist organizations? Possibly. It is not hard to construct such scenarios. A regime, for instance, that was internally threatened might hope that an attack by a third party, which it supported, would exacerbate tensions with the West and rally domestic political support. The regime might believe that the source of the weapons could not be clearly identified, and that without clear identification there would not be retaliation. The leaders in a failing state that possessed nuclear weapons might be willing to sell them to secure the revenues required to pay off those supporters needed to keep the regime in power.

While the most likely outcome of nuclear weapons proliferation to weaker actors is that they will never be used, this is not the only possible outcome. As Richard Posner has argued, we are generally prone to underestimate the expected utility (in this case negative expected utility) of small probability, but very bad, events.²⁴

The situation is more alarming with regard to chemical and biological weapons. They would be less destructive but more difficult to trace. The knowledge of how to produce such weapons is widespread. They could still kill thousands, or in the case of biological weapons, tens of thousands of people. Even states with relatively limited resources could procure such weapons and provide them to transnational terrorist groups.

Safe havens matter for transnational terrorism. Major terrorist attacks are complicated enough to make training worthwhile. Training is more easily accomplished in a fixed location. Camps require safe havens, but they can function in very poor and weak states. Al-Qaeda, through its alliance with the Taliban, was able to use camps in Afghanistan to help train the participants in the 9/11 attack. When the Taliban was defeated by the United States, Al-Qaeda established new camps in the ungoverned spaces along the Pakistan–Afghanistan border.

State sponsors of terrorism can provide support and training for transnational terrorist groups. Argentina has indicted Iranian officials for the attack on the Jewish Community Center in Buenos Aires in 1994. Iran has supported Hezbollah in Lebanon and Hamas in Palestine. The Libyan government was responsible for the destruction of Pan Am Flight 103 in 1988.

The nexus of more readily available weapons of mass destruction, especially chemical and biological, globalization, especially easy communication through the Internet or telephony, transnational terrorism,

²⁴ Posner 2007.

radical Islamic ideology, and failed or malign states has created an historically unprecedented threat to the security of even the most powerful states in the world. For the first time actors with relatively limited resources could damage the security of the most powerful political entities. There is no guarantee that this will happen, but it may.

Finally, there are economic threats that could become core security challenges. These are all related to energy. The industrialized world has demonstrated that even very substantial price increases would not be considered a security threat worthy of military action, even if such increases had a significant effect on macro-economic performance. The quadrupling of oil prices after the 1973 Middle East War did not precipitate the use of force, even though these price changes did have a negative medium-term effect on global economic growth and productivity. Economic adjustment, even painful adjustment, to higher oil prices was not viewed as a security threat that would warrant the use of force. The dramatic increase in oil prices that took place in the first decade of the twenty-first century, with prices moving from \$12 to \$30 per barrel during the 1990s to over \$125 per barrel in 2008, had a less dramatic impact on global economic growth than the price rises of the 1970s. The financial crisis of late 2008 was far more damaging.

Saddam Hussein's invasion of Kuwait in 1990, in contrast, did prompt a military response. The fear was that Saddam would be able to dominate global oil supplies by controlling production levels in Iraq, the Gulf and Saudi Arabia, which, collectively, accounted for 20 per cent of world production. Had the conquest gone unchallenged, Saddam would have been in a position to make a credible threat to cut back on physical supplies and precipitously raise oil prices. The opportunity costs of cutbacks could have been modest for Iraq but devastating for much of the rest of the world. If a regime with a radical Islamist agenda took control of one of the major oil-producing states of the Middle East a similar threat could arise. A single regime could be in a position to sharply reduce global supplies, throwing the world economy into a tailspin. Weak states in the pre-modern world might suffer most if this scenario became a reality, but states in the modern and post-modern world would suffer as well.

Transnational terrorism and the prospect of a dramatic rise in world energy prices have precipitated three wars in the last two decades – against Iraq in 1991 and 2002, and Afghanistan in 2001. What would happen if the worst-case scenarios came to pass, a transnational terrorist attack much worse than 9/11 or a cutoff of oil supplies that precipitated, say, a five-fold increase in prices in a matter of weeks? One possibility is that the conventional sovereignty regime would be

dramatically changed through the introduction of new principles that directly challenge Westphalian/Vattelien sovereignty. Such changes would, in the first instance, be the result of coercion, but they could be legitimated, that is, become generally accepted and embodied in international agreements, because transnational terrorist attacks or economic chaos had made it clear that the old rules were no longer adequate. These new rules would compromise Westphalian/Vattelien sovereignty. They would be designed to legitimate control over territory or control over some functional activities hitherto viewed as being the exclusive prerogative of the state by external actors. Unlike shared sovereignty, control would not be negotiated; it would be imposed. It would be permanent or quasi-permanent, not limited to some specific period of time.

If occupation had been precipitated by a sharp cutback in oil sales, then control over activities related to energy might be assumed by an external entity. This entity would have to occupy and defend oilfields and related facilities. New norms and principles would be proposed. For instance, subsoil resources in the occupied state could be designated as part of the common heritage of mankind. The disposition of these resources could be decided by an existing international organization, such as the World Bank, or by some new entity with representatives from the major powers, the target state, and international organizations. The revenues from production could be allocated, in varying percentages, to the producing country, to neighbouring states, to developing countries, or for some more general global purposes such as combating or mitigating the effects of climate change.

Alternatively, if intervention were motivated by a large terrorist attack that had been conceived, planned and prepared in the ungoverned spaces of a particular state, external actors might lay claim to a specific piece of territory rather than to a designated set of functions. Policing and security within that territory might be controlled by a new entity created by the occupying powers. This entity might enforce existing national law or introduce a new legal system. The existing laws of war regarding military occupations would be displaced. The formal boundaries of the state would not be changed but the exercise of authority within those boundaries would be divided. New principles legitimating such structures would be justified in terms of the need to preserve international peace and security.

Such fundamental challenges to the existing sovereignty regime are not to be welcomed. Any new set of principles, like designating oil reserves as part of the common heritage of mankind or asserting the right to quasi-permanently exercise authority over territory within the

boundaries of an existing state, would be contested. External actors, even if their claims were legitimated, if not universally endorsed, might not find it easy to exercise the authority that they had asserted. Occupation is costly. The track record of those that have engaged in more conventional state building designed to restore conventional sovereignty is mixed. There are no formulaic solutions. The 2006 National Security Strategy of the United States avers that ‘The goal of our statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system’ but immediately recognizes that this is the ‘work of generations’.²⁵

Nevertheless there should be no illusions about the possibility of mega-terrorist attacks or sharp decreases in energy supplies and concomitant price increases leading to new rules. Domestic publics in the modern and post-modern world would demand such changes just as they would call for a greater focus on security at home in the wake of a mega-terrorist attack, even if this meant relaxing existing legal constraints on the state. Governments in advanced countries would begin to reconfigure their bureaucratic structures to create organizations that could engage in activities that reflected new rules and principles about responsibilities for territories or functions beyond national borders. These are not developments to be welcomed. They would be costly, contested, challenging and dangerous.

Organized hypocrisy has always characterized the sovereign state system. Logics of appropriateness and logics of consequences have always been decoupled. The complexity of the international system, the variety of actors within it and the diversity of their interests, makes it almost a certainty that no set of rules will be consistently followed. Nevertheless the two basic principled attributes of sovereignty – international legal sovereignty and Westphalian/Vattelien sovereignty – and the basic assumption of effective domestic governance, have not been challenged by some alternative set of norms. The key actors in the system, those that might have the power to create new normative structures, have not had an incentive to do so. Sovereignty has worked very imperfectly but it has still worked better than any other structure that decision-makers have been able to envision.

There are aspects of the contemporary system that could, however, lead to fundamental regime change. What is new in the contemporary world is the ability of pre-modern states to threaten the core security interests of modern and post-modern states. Globalization, the ease of

²⁵ United States 2006, p. 1.

communication and transportation, and the availability of weapons of mass destruction including nuclear weapons, have created a situation in which even states with very limited material resources could threaten the key interests of even the most well endowed polities. These interests could also be threatened if there were a precipitous reduction in oil supplies and a consequent surge in prices, whether because of a calculated move by an exporting state or loss of control over production and transportation facilities.

If either of these existential threats becomes a reality, there would be pressure to change the basic rules themselves. More powerful states might claim authority over ungoverned areas. They might assert the right to directly control some or all government functions in states that were considered a threat. Oil reserves in troubled countries might be redefined as part of the common heritage of mankind rather than the sovereign property of a particular state. Implementing and legitimating new rules would be costly and time consuming. But in the wake of a mega-terrorist attack or substantial damage to the world economy there would be domestic political support for such initiatives and resources could be deployed to make them a reality. Absent such dramatic threats to the core interests of the powerful, organized hypocrisy will remain the order of the day. Existing principles and norms will not be challenged, but they will be violated.

6 A matter of fact? The many faces of sovereignty

Hent Kalmo

I

Sovereignty is often seen as a liminal concept. It is thought to inhabit the frontier territories between law, ethics and political science, where, as James Bryce once put it with Victorian verve, ‘the limits of conterminous sciences or branches of learning have not been exactly drawn’ and which therefore have been ‘infested by a number of vague or ambiguous terms’.¹ The fact that the word ‘sovereignty’ has found its way into the vocabulary of various disciplines is hardly very interesting in itself. There is, however, a more fundamental sense in which the concept of sovereignty can be thought of as a liminal one. It has often been taken to stand for the rootedness of law in factual power that ultimately determines the limits of its reach. Hence the double nature of sovereignty as a quality somehow poised between facts and norms, simultaneously both political and legal. Thinking along these lines, one could say that the reason why sovereignty is a liminal concept is because it points to the paradoxical possibility that, when illegality becomes extreme, it can convert itself into a new standard of legality. One sovereignty is replaced by another so that what was before a punishable act of resistance becomes the founding act of a new state.

For a long time, lawyers, and especially international lawyers, have been interested in the question as to whether the formation of a new state is a fact or a legal fiat. The alternative almost inevitably crops up in discussions of the rival doctrines of recognition. But the issue has a much wider significance. It is often seen in a more philosophical light as being about the limits of law and legal imagination in general. Somewhat paradoxically, lawyers have attempted to solve one of the most fundamental problems of law, the birth and demise of legal orders, by affirming that these events are not a matter of law at all. We can discern an obvious analogy here with the way lawyers have

¹ Bryce 1901, p. 49.

analysed sovereignty since there is a correspondence between the birth of a new state as a legally inexplicable event and the non-derivable character of sovereignty. The question that has puzzled lawyers is that, if sovereignty is an original power that is owed to no one, how could its emergence be subjected to a rule that belongs to another legal system?

This chapter attempts to take the sting out of this puzzle. It will be argued that the conception of sovereignty as a pre- or meta-legal quality has induced many writers to view it not as one element of legal reasoning among others but as a doctrinal or scientific question, with the implication that every legal claim about sovereignty should be put to the test of some theory of what sovereignty really is. In the presence of apparently contradictory claims emanating from different legal orders, the natural instinct is to ask which of these claims is correct. By contrast with this way of thinking, this chapter will suggest that we can learn more from attending to the circumstances of the ascription of sovereignty to this or that entity than from analysing it as an abstract property. What is achieved by this ascription? What is the possession of sovereignty by an entity taken to imply in the case at hand? How does this particular act of ascription shape the meaning of the word 'sovereignty'? These are the questions one should ask when the aim is not to construct a theory of sovereignty but to explore the way in which the concept is actually used in legal and political reasoning.

II

If law is born with states, what legal resources do we have to interpret the acts that bring about a new state? That was the way the question was set up at the start of the twentieth century by Georg Jellinek. Jellinek was the most illustrious representative of the current known as the 'general theory of the State' which developed in Germany as a counterpoint to the strictly positivistic approach of the majority of contemporary public lawyers. In 1900, he published a monumental work, *Allgemeine Staatslehre*, which studied the state not only from a legal but also from a historical and sociological angle. Although these points of view were meant to supplement each other and, in a way, offer two sides of the same story, there was a point where the legal perspective failed. That was when it came to accounting for the emergence of new states. Jellinek argued for the claim that the birth of a new state is an extra-legal fact by relying on a proof by contradiction. The factual character of state creation appeared to him as the only remaining solution after all the possibilities to bring this event within the domain of law had been found unsatisfactory. International law, the law of other states, the law

of the newborn state itself: all these perspectives were considered in turn by Jellinek as possible ways of construing the creation of a state – but all were rejected by him.

The proposition that no legal system provides a criterion for evaluating the act of creating a new state is bound to seem odd to a contemporary lawyer, accustomed – or rather resigned – to an overabundance of legal norms from a growing variety of sources. After all, international law surely contains rules regulating the emergence of new states. But, according to Jellinek, international law will not allow us legally to assess the process of state formation. International law addresses itself to existing states and not to the ‘state-creating powers’ (*staatsbildende Mächte*)² engaged in this formative process. In other words, international law can begin to apply only once a state is already in existence. The thrust of Jellinek’s arguments does not consist in the claim that there are no rules which *purport* to regulate these ‘state-creating powers’. For example, in the case of secession, the state from which the nascent state secedes may well have rules covering this kind of event: acts aimed at separation may conform to, or be in contradiction with, the rules of the ‘mother-state’. Using these rules as a measuring stick to evaluate the legality of the act that brought about a new state would, however, amount to subjecting the process to an inappropriate standard. ‘The State which emerged in this way can never ... be judged by the law of another [state], for the law can only evaluate what is subjected to its possible rule’.³ Given that the sovereignty of another state is not subjected to a state’s rule, the latter may attempt, but will necessarily fail, to regulate the former’s emergence.

The same reasoning applies if the creation of a new state proceeds by way of a delegation or active involvement of another state. Even here, although apparently relying on permission from without, the new legal order, in Jellinek’s opinion, ‘legally still rests on its own will’. The acquisition of sovereignty cannot be achieved through a delegation, because this would imply that it hinges on the goodwill of the delegating state (which would thus remain supreme). We can further unfold this argument by noticing that the ‘donor’ state would be unable to commit not to withdraw the permission as, at least from a legal point of view, the norm containing the commitment could itself be invalidated. It is true that one state can purport to authorize the creation of another sovereign state. Jellinek, however, argued that, even in this case, it is really the will of the new state which supports its sovereignty. There would be two conflicting claims as to the source of validity of the new legal order,

² Jellinek 1922, p. 273. ³ Jellinek 1922, p. 273.

only one of which would correspond to reality. New states of course can, and often do, adopt wholesale the norms of the state to which they used to be subjected. Jellinek points out that it may even happen that a part of a state which becomes independent leaves its former constitution entirely unchanged. As far as the content of the law is concerned, there would in this case be little to suggest that we are dealing with the constitution of a new sovereign state. Nevertheless, according to Jellinek, it is not the content which counts. With the emergence of a new state, the *status* of the constitution undergoes a profound change. Despite its unchanged letter, it now acquires 'legally a character which cannot be derived from its previous form'.⁴

If international law and the law of other states are excluded as possible avenues for drawing the original state-creating act within the bounds of law, what is left over? There is a third, less intuitive possibility: namely, to rely on the law of the newborn state itself. Jellinek is quick to dismiss this suggestion. 'The State cannot', he writes, 'establish law for its own emergence, for, in order to create law, it first has to exist'.⁵ Once a state is in existence, it will admittedly become possible to retrospectively evaluate the behaviour of those involved in the process of its birth. The 'decisive act of creation' will, however, necessarily remain beyond the reach of the new legal system. After all, the original act is itself a precondition for the validity of the new legal order. Would it not be wildly illogical to suppose that this state-creating act acquires its validity and meaning from the very legal system it established? Jellinek has no doubt that this is so and, having now set aside, one by one, all the other possibilities for construing the founding act legally, reaches the conclusion that the creation of states is an event that lies beyond the province of law: the birth of a state is a fact that cannot be construed legally at all. All actions that precede this event remain subject to the law of the 'mother state', whereas those that follow have their natural standard of evaluation in the legal order that was created. According to Jellinek, it is the mysteriously transient moment between these two chains of events that admits of no legal qualification.

Jellinek's analysis of the problem of state formation exerted a profound influence. His conclusion that the emergence of new states is a matter of fact and not of law became widely accepted and continues to resonate in contemporary discussions of the nature of statehood. The theory was, in particular, heavily drawn upon when lawyers sought to come to terms with the legal consequences of the First World War and the proliferation of new states that accompanied it. One author,

⁴ Jellinek 1922, p. 275. ⁵ Jellinek 1922, p. 273.

spelling out the implications of Jellinek's reasoning, held it to be 'entirely clear' that

the act of State creation lies *beyond* law for the following reasons: State creation requires the establishment of the highest power, *suprema potestas*. If that were to be considered a legal event, one would have to find a legal ground for it, or put differently, *derive* it legally. But the entire law of a State derives from its own *suprema potestas*. The *suprema potestas* thus cannot itself be derived from the law created by it. One would be moving in a vicious circle. But it is equally impossible to derive *suprema potestas* from the law of another State, since the law of the latter is law only *for it*.⁶

Nor can international law have a say in the emergence of state sovereignty, as this would open up the possibility of its contradiction with domestic public law. And this cannot be: 'The baselines of domestic law and international law must coincide; they cannot be in contradiction.'⁷ All this implies that the birth of a sovereign power must be seen as flowing from a 'metaphysical original will'.⁸

Hans Kelsen, Jellinek's most famous student, at first ridiculed the idea that the emergence of a legal order could itself be construed legally,⁹ but then veered around to defend the thesis that, from the point of view of international law, the creation of states is no more mysterious than the act of incorporation within domestic law. One simply has to ask 'which facts qualify under international law as 'the birth of a State'.¹⁰ Although he rejected Jellinek's view that state creation is a pure fact, Kelsen shared his belief that there is only one way to address the problem. In his opinion, the proper criterion for legally evaluating the formation of new states is to adopt the perspective of international law.¹¹ He agreed with Jellinek that the attempt to account for the creation of a state by relying on the law of that same state would be a blatant instance of *petitio principii*. An external point of reference is needed. In fact, only an order superior to the state can contain the rules which determine the criteria for its formation.¹²

III

When the discussion revolves around the 'birth' of a state, its 'continuity' or other 'vicissitudes' that may befall a sovereign State during the course of its existence,¹³ it can seem entirely natural to move on and ask: but what is a state? What is the nature of the entity that undergoes

⁶ Rauschenberger 1921, p. 115. ⁷ Rauschenberger 1921, p. 120.

⁸ Rauschenberger 1921, p. 121. ⁹ Kelsen 1911, p. 124. ¹⁰ Kelsen 1929, p. 613.

¹¹ Kelsen 1929, p. 613. ¹² Kelsen 1929, p. 613. ¹³ Verzijl 1969, p. 117.

these processes? Corresponding to the two polar positions on the formation of a state, there are theories which hold that the state is primarily a fact¹⁴ and others which claim that it is entirely a creation of law. These two theories continue to have their proponents among international lawyers.¹⁵ There are also intermediary theories which seek to do justice to both the factual and legal elements in statehood or ‘the increasing difficulty of the State to be nothing but a “fact”’.¹⁶ The avowed aim of all these theories is to offer an answer to the question: what is a state? For Jellinek, this question was part of the ‘metaphysical principles’ (*metaphysische Anfangsgründe*) of law on which everything else had to be built. The idea behind this view is that it is only after we have given a satisfactory answer to this general question and found out what the state really is that more specific problems concerning the formation and demise of states can be approached in a sufficiently informed way. In the words of one international lawyer, the law ‘adopts for its own purposes the notion of a State as developed by the general theory of the State’.¹⁷ According to this conception, there is no need for a ‘separate enquiry into the birth of a “State in the sense of international law” and that of a “State in the sense of public law”’, for the question as to whether an entity can properly be described as a state ‘is a problem of theoretical analysis by the general theory of the State’.¹⁸

Jellinek’s view assumes that a state for one purpose is always also a state for another – an assumption which may be true in most cases but not necessarily all.¹⁹ However, rather than proceeding to weigh the merits of various theories of statehood, let us take a critical look at the question itself and its relevance for understanding legal reasoning. For a start, let us ask not ‘What is a state?’, but ‘What is the meaning of the word “state” in legal language?’. Even if the question is reduced to this apparently more tractable form, it will not be long before we realize that it is difficult to match the word ‘state’ to some determinate set of facts or states of affairs. Indeed, we have run into an example of a more general phenomenon which, according to H.L.A. Hart, characterizes legal language as a whole: ‘our inability to define its crucial words in terms of ordinary factual counterparts’.²⁰ The fashionable reflex in grappling with this kind of difficulty is to claim that obviously the state is not a ‘brute fact’; it is an ‘institutional fact’ like marriage. This suggestion would lead us to another, philosophically updated intermediary theory.

¹⁴ According to Louis Henkin, ‘[a]n entity that is in fact a state is a state. It has the status and capacities, the duties and rights of a state. It has to behave like a state, and has to be treated like a state’. See Henkin 1995, p. 14.

¹⁵ Shaw 1997, p. 139. ¹⁶ Verhoeven 2008, p. 45. ¹⁷ Verzijl 1969, p. 63.

¹⁸ Verzijl 1969, p. 63. ¹⁹ Crawford 2006, p. 31. ²⁰ Hart 1983, p. 21.

But let us try to avoid this apparently attractive road. Hart's advice is to revise the question instead: rather than ask for the meaning of a single word such as the 'state' or a 'corporation', he urged us never to take these words alone, but to consider whole sentences in which they play their characteristic role. For example, '[w]e must take not the word "State", but the sentence "He is a member or an official of the State"'.²¹

Alf Ross, taking a cue from Hart, advocated the same Benthamite strategy in analysing legal language. 'When it has been stated under what conditions a statement of the type "the State has enacted a law", "the State has made a treaty", "the State has sentenced a person", "the State has imposed a revenue duty", "the State has constructed a railway", etc. – all statements in which "the State" figures as acting subject – is properly used, then all has been said that can be said',²² wrote Ross. 'It is not possible to extract a single word, the word "State", in these sentences and ask what it means or stands for. It is not possible to replace the word "State" by other words, so that a certain substance, occurrence, activity, quality or anything else is designated, which "is" "the State"'.²³

That seems right. Where one may want slightly to modify Ross' recommendation is when he insists that our task is to study the 'proper' use of such statements. Words such as 'state' or 'sovereignty' often make their appearance in legal arguments which do not have anything like a 'proper' trajectory. This aspect of contestation remains in the background if we ask a general question like: what does it mean in law for an entity to be a 'sovereign state'? But legal reasoning never plays out on such an abstract plane. The type of question one will encounter is rather: what does it mean, in a given legal system and regarding a particular issue, that an entity is a 'sovereign state'?

For example, the question as to whether, say, France, is sovereign, i.e. has the property of sovereignty, does not seem to have much sense when put in this abstract form. What is meant largely hinges on whether the argument is about domestic, European or international law and the kind of issue that is being discussed. The valuable point Hart and Ross sought to convey was that abstract legal terms have a meaning only in context. There just is no way of condensing the fragmented use of terms like 'state' and 'sovereignty' into a unified theory of what they refer to. What we can, and should, do is to describe the way in which such terms are actually used. Abstract theories are unfortunately of little use here. As Hart remarks, though theories of the state 'spring from an effort to

²¹ Hart 1983, p. 26. ²² Ross 1960, p. 124. ²³ Ross 1960, p. 124.

define notions actually involved in the practice of a legal system, they rarely throw light on the precise work they do there'.²⁴ In fact, Hart held the type of question 'What is ...' to be badly misleading in this kind of analysis as it induces us to look for a general theory of the state where none is needed.

To say that many legal terms have no direct factual counterparts does not mean that facts of various sorts may not be relevant in the application of these terms. When a lawyer asks whether a particular entity is a state, the law itself will direct her to look at a number of external attributes. But this factual enquiry will always be referred to a particular legal issue to be resolved. 'It is sometimes said', writes Ian Brownlie, 'that statehood is a question of fact, meaning that it is not a question of law. However, as lawyers are usually asking if an entity is a state with a specific legal claim or function in view, it is pointless to confuse issues of law with the difficulties, which undoubtedly exist, of applying the legal principles to the facts and of discovering the important facts in the first place'.²⁵ To put the same point differently, the definition of a state acquires legal significance only when it is invoked to influence events.²⁶

Returning to the problem of state creation, it may well be possible to explain the meaning of a statement such as 'a state x was born at time t ' without having to build up an entire theory of statehood. Moreover, the meaning of this statement is clearly very different depending on whether it is made within the framework of international law or by the courts of the newborn state with reference to their domestic law. In international law, it means that, starting from t , x possesses the rights and duties attached to statehood, whatever these may be. But the statement also has a meaning within the legal order of the new state. It implies that, after t , all norms which are valid in this legal order owe their validity to a domestic delegating norm (as it is incompatible with the notion of sovereignty as a non-derivability of a legal order that a foreign norm should penetrate a legal order without an explicit or implicit internal authorization). In particular, if at $t + 2$ someone seeks the application of a norm adopted by the 'mother state' – i.e. the state which formerly held sovereignty over the territory of the new state – to an earlier event, the reasoning of the courts will have to be different depending on the time of the events being evaluated. Whereas events that took place at $t - 1$, i.e. before the new state was created, can be assessed according to a norm of the 'mother state' without further justification, this is not so with events that took place at $t + 1$. Since the 'mother state' has become

²⁴ Hart 1983, p. 25. ²⁵ Brownlie 1998, p. 69. ²⁶ Henkin 1995, p. 13.

a foreign state at t , one would in this case also have to show why its norms were valid within the territory of the new state at $t + 1$. Fixing t is what it means to decide the date of birth of a state from within.²⁷

There is thus no logical impossibility involved in organs applying a particular legal order determining the date at which this legal order was established. This is what happened in many of the states that became independent in the wake of the First World War, as courts were obliged to resolve disputes arising from the ambiguous legal situation which obtained in these countries at the time of the war. It is not entirely clear what Jellinek and Kelsen had in mind when they wrote that construing the creation of a state from a perspective of that very same state amounts to an instance of *petitio principii*. A state can very well adopt norms relating to its formation – even if this happens retrospectively. Jellinek and Kelsen assume, without any obvious reason, that the norms giving legal meaning to the founding events must pre-exist these events. The argument about begging the question appears to be premised on the idea that there is a moment or a span of time when a state comes into existence, either as a fact (Jellinek) or as the legal consequence of the relevant rules (Kelsen). However, once we let go of the idea that there is a set of rules which has the privilege of determining how things ‘really’ stand – or more precisely, the idea that the creation of a state is a theoretical question which transcends the divergences that may exist between legal orders – it becomes clear that the ‘same’ state necessarily has many faces – and possibly even dates of birth – depending on the perspective we adopt in looking at it.

IV

The above remarks are not meant to suggest that it is entirely vacuous to talk about the ‘state’ as an entity which can be born and fade away. Tempting as this deconstructive gesture may be, we should avoid the ungenerous claim that, when this kind of language is used, nonsense is being spoken. The argument is rather that statements such as ‘the state x was born at time t ’ have a specific meaning when they appear in legal language and that this meaning is lost on us when we take such statements as theoretical propositions, to be measured against some theory of what the state is, independent of any context. The same applies to the ‘demise’ and ‘resurgence’ of states. At times, it can seem unclear whether we are dealing with a case of state continuity or state succession.

²⁷ Notice that this is not the same as determining the temporal validity of the norms which belong to the legal order of the new state.

In other words, we are unable to distinguish between ‘cases where the “same” state continues to exist, despite changes of government, territory, or population, and cases where one state can be said to have replaced another with respect to a certain territory’.²⁸ Unfortunately, there is no universal way of deciding which of these alternative accounts we should adhere to on a given occasion. The long-standing debate among specialists of international law about the elements that preserve the identity of a state can be compared to an issue over which much philosophical ink has been spilt over the centuries: which properties should be taken to make up the substance of a thing and which can be seen as merely accidental? Leaving aside doubts about the meaningfulness of this type of question, it is clear that, from a legal point of view, the endurance of the identity of a state is something that can very well depend on the frame of reference that one adopts. State A can be a successor of state B for the purposes of one legal order and its continuator for the purposes of another – this proposition would simply be a summary description of the way in which the rights and duties attached to the entity differ in the two legal systems.

It may seem natural to approach this issue by first attempting to resolve the theoretical question as to whether the state under study ‘really’ is a successor of an earlier state or identical with it, and then proceeding to spell out the implications for all legal orders. That could, however, lead us to misrepresent the rights and duties allotted to the state in different legal systems. In the final analysis, it is not the character of a state – a successor or continuator – which determines its legal status. On the contrary, it is the set of its rights and duties with respect to the earlier state that determines whether it is a successor or continuator of this state. The actual state of affairs may, in fact, be too complicated to be amenable to this kind of short description. As Ian Brownlie has written, ‘the general categories of “continuity” and “state succession”, and the assumption of a neat distinction between them, only make a difficult subject more confused by masking the variations of circumstance and the complexities of the legal problems which arise in practice... Legal techniques may well entail relying on continuity in one context, but denying its existence in another’.²⁹ The affirmation that there exists a continuity between two apparently distinct states, A and B, carries the implication that the present state A should enjoy the rights and fulfil the duties that belonged to B. Obviously, this implication may be desired in one context, but not in another.

²⁸ Crawford 2006, p. 400. ²⁹ Brownlie 1998, pp. 80–1.

The case of the Baltic States is illuminating in this regard. Estonia, Latvia and Lithuania were occupied by the Soviet Union in 1940 and although many countries refused to grant *de jure* recognition to their incorporation into the USSR, it was seen as a *fait accompli* – an act that may have been illegal, but ‘not non-existent in actual fact’.³⁰ The question that arose, and elicited much theoretical attention over the ensuing years, was whether the formerly independent Baltic States had become extinct, replaced by their Soviet namesakes. As Kristina Marek wrote in 1954,

An answer, whether in the affirmative or in the negative, automatically solves the problem of their continuity. If indeed they became extinct, then there is no possible subject of such continuity, the Baltic S.S.R.s not being identical with their territorial predecessors. If the answer is in the negative, then the Baltic States continue to exist and to possess the same international personality as before the invasion and annexation of their countries.³¹

The assumption driving this reasoning is that there is a uniquely correct answer to the question as to whether the Baltic States existed in 1954. At the time, Marek took it to be unclear, as none of the classical rules of international law appeared to safeguard their legal survival. Yet a strong case could be made for the continued existence of Estonia, Latvia and Lithuania, mainly relying on the lack of international recognition of their annexation. What weighed against extinction, in Marek’s view, was the fact that, even in 1954, fourteen years after the occupation, it could not be asserted ‘that the possibility of a restoration of the three Baltic States has finally vanished beyond hope’.³²

Now that the hope has become a reality and the three Baltic countries have ‘reverted to sovereignty’,³³ the question of their possible extinction has apparently received a definite answer. All these countries have asserted continuity with their pre-war namesakes, a claim which seems to imply their continuous existence throughout the post-war period. Although ‘the sovereignty of States does not include the right to decide on continuation or extinction in the event of territorial changes’,³⁴ such changes were minor in this case and most states have been ready to uphold the Baltic countries’ claim to continuity. An unqualified statement to the effect that the present Estonia, Latvia and Lithuania are the ‘same’ as those which lost their independence in 1940 would, nevertheless, be both misleading and uninformative. The validity of pre-war legal norms was not generally recognized in their domestic law. Moreover, not all states accepted the continuation thesis,

³⁰ Marek 1954, p. 391. ³¹ Marek 1954, pp. 397–8. ³² Marek 1954, p. 416.

³³ Müllerson 1998, p. 15. ³⁴ Fastenrath 2000, p. 671.

which was applied selectively even by the Baltic States themselves in their international relations. The thesis undoubtedly has great political and symbolic importance for these countries, but as international lawyers concluded shortly after their 're-independence' in 1991, 'neither the Baltic States nor the political world in which they evolve are the "same" as in 1940'.³⁵ The domestic and international legal relations of the time were not and could not have been re-established. Indeed, the question as to whether the Baltic States existed in 1954 is meaningless from a legal point of view if it is not tied up with a specific problem of law. The answer would be different depending on the problem and the legal order in which it is being tackled. It is not as if the events of 1991 gave a final answer to a doctrinal question that was raised in 1954. The proposition regarding the continued existence (or non-existence) of the Baltic States in the post-war period is rather a retrospective aspect of a later legal argument whose stakes are legal relations of the time when the argument is fought out.

V

All the caveats offered above regarding the concept of the state also apply to the concept of sovereignty. The latter has similarly been thought to designate a mixture of facts and norms. According to the Austinian theory, which made its way into doctrinal writings in the second half of the nineteenth century, sovereignty is a state of factual obedience in which all law is grounded, both conceptually and causally. This theory was well summarized by Westel Willoughby when he wrote in 1896 that '[s]overeignty, upon which all legality depends, is itself a question of fact, and not of law'.³⁶ Much German legal theory of this period started from a similar conception, establishing an intimate link between the validity of a legal system and the factual reach of its sovereign support. In the words of one contemporary German author, the limit of sovereignty 'cannot be defined legally, [for] it lies in the province of facts, where generally the concept of sovereignty emerged and where it is at home (*heimisch*)'.³⁷ Sovereignty, in other words, was seen as the force of law, with all the ambivalence wrapped up in this expression. It was at the same time the legal side of facts and the factual side of law. Sovereignty was 'out there' – moulded by law, but still somehow transcending all interpretative contexts.

This way of thinking can still be recognized in the three-element theory that bundles sovereignty with population and territory as necessary

³⁵ Koskenniemi and Lehto 1992, p. 197. ³⁶ Willoughby 1896, p. 217.

³⁷ Gareis 1883, p. 30.

conditions for the existence of a state. The Montevideo Convention of 1933 also mentions 'government' and the 'capacity to enter into relations with other states' among the criteria for statehood, alongside 'a permanent population' and 'a defined territory'.³⁸ Viewed from the angle of this definition, the state becomes something which encompasses both facts and legal institutions – 'an association of land with sovereignty'.³⁹

Even lawyers who have no sympathy for the view that sovereignty is a pre-legal fact tend to conceive of it as a quality that is objectively attached to a legal system. As with a state, which can either exist or not exist, a legal system just is or is not sovereign, quite independently of what those applying it happen to claim. Kelsen, for example, famously argued that it was up to us as external observers to arbitrate between the supremacy claims of different legal systems. According to this view, we can mentally place ourselves within two possible frames of reference: we can either take the side of national law, assume that it overrides international law and thereby embrace a legal version of imperialistic solipsism – 'start from one's own sovereign *ego* in order to comprehend the external world' – or, alternatively, we can posit the primacy of international law and consider individual states not as sovereign authorities 'but only as partial legal orders within the framework of a total, the international legal order'.⁴⁰ In Kelsen's opinion, sovereignty (understood as supremacy) was thus not itself a legal question, at the mercy of multiple interpretations originating in different legal systems. The question as to whether the norms of one legal system prevail over those of another was not to be decided by law, but assumed away by theory.

For someone who adopts this perspective, the claims made by the courts of a legal system to be superior to another system can only appear as subjective opinions requiring theoretical confirmation. It is interesting to note the extent to which scholarly debate on the supremacy of EC law has been coloured by the belief that supremacy is an objective, almost factual, quality of a system of rules. Like Jellinek, who reviewed various legal systems as possible ways of construing the formation of a state, contemporary lawyers seek to nest the Communities within their 'correct' legal framework, be it international law, the law of the member states or natural law. Theodor Schilling, for example, has argued that the only possible 'theoretical basis' of the EU is international law.

³⁸ See the Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S 19.

³⁹ Hall 1924, p. 19. ⁴⁰ Kelsen 1960, p. 638.

The hypothesis of any original autonomy of the European Treaties must, in his opinion, be rejected because this ‘presupposes that these treaties were ordained by an original constituent power’.⁴¹ He adds that, given the historical facts, this kind of ‘big bang’ – which would have marked the beginning of a new legal order – cannot be assumed to have taken place. When the European Court of Justice, relying on ‘unacceptable interpretations of the original treaties’, claims otherwise, it is simply wrong.⁴²

And yet, even if it is true that member states purport to bestow validity on the Community legal order, it does not follow that the latter is ‘really’ or objectively under the umbrella of international law, independent of the perspective we adopt. The European Court of Justice (ECJ) has clearly stated that the law stemming from the Treaties has an ‘original nature’.⁴³ Given that this is the way that the Community courts reason, it would make little sense to say that, contrary to what they claim, Community law actually is not original, but owes its validity to an external authorization. This is not because, as Jellinek wrote, ‘the law can only evaluate what is subjected to its possible rule’, the EU having by now acquired its own *suprema potestas* and being somehow outside the reach of the member states. The reason why the ECJ is, so to speak, right by definition is that supremacy is not a property that hangs on a set of norms. It is itself a legal question that is decided by those who apply these norms.

But the member states are also right. To see why this implies no contradiction, let us consider a slightly modified version of the ‘wild hypothetical’ example devised by H.L.A. Hart. Suppose the British Parliament ‘passes an Act which purports to validate [French] law by providing that the laws currently effective in [French] territory, including those relating to the competence of legislative and judicial authorities, shall be valid’.⁴⁴ Now, even if such an unlikely thing were to happen, we would hesitate to say that the French law henceforth derived its validity from English law. Of course, if all we did was to look at the content of the English authorizing norm and the set of French rules which satisfy the description contained in it, we could be misled into believing that English law is supreme with respect to French law. This is, after all, what we assumed the English law to say. The important question is: what is our reason for saying that, despite the all-authorizing English norm, the French legal system would still not derive its validity from

⁴¹ Schilling 1996, p. 391. ⁴² Schilling 1996, p. 393.

⁴³ Case 6/64, *Flaminio Costa v. E.N.E.L* [1964] ECR 585.

⁴⁴ Soviet Union in the original, see Hart 1983, p. 319.

English law? As Hart convincingly argued, concentrating on texts or the letter of the law will not do here. The reason why we ought to refuse to accept the conclusion that English law would be superior to French law is that French courts and other law-enforcing agencies do not 'recognise the operations of the British ... legislature as criteria for identifying the laws that they are to enforce'.⁴⁵ Hart's point was not that the British attempt to validate French law simply fails.

On the passing of the [French] Laws Validity Act it would be right to say that *for the purposes* of English law, or according to English law, [French] laws were validated or derive their validity from an English statute, and the effect of this would be that English courts would apply [French] law in adjudicating upon any transaction or conduct to which the [French] authorities would apply [French] law.⁴⁶

The same is true of the relationship between Community law and the laws of the member states. In the opinion of some of the member states' highest courts, it is ultimately up to them to determine the limits of EU law within their jurisdiction. This is not a minority view. The constitutional courts of the new member states have tended to add their voice to the *souverainiste* group of old members, writing an additional chapter of what has become known as the 'Solange story'.⁴⁷ Nonetheless, it would not be correct to say that the fact that more and more member states have chosen to strike a defiant pose vis-à-vis the ECJ has had the effect of tipping the balance and imposing new limits on the supremacy of Community law. There is no sign that the ECJ has changed its vision of the world and renounced the idea of absolute supremacy according to which Community law trumps even the core of member states' constitutions. *For their own purposes*, both the ECJ and the member states are right, and as much as one may deplore its absence in the name of legal certainty, there is no 'final arbiter' who could reconcile these conflicting supremacy claims. In fact, all the *souverainiste* courts see themselves as 'final arbiters' within their own jurisdiction. Using Kelsenian terminology, one could say that the situation is (at least potentially) one of many-sided imperialistic solipsism.

VI

One of the most interesting facts about law is the coexistence of multiple frames of reference among which we can number not only international and domestic law but various other institutional sites that apply and

⁴⁵ Hart 1983, p. 319. ⁴⁶ Hart 1983, p. 319. ⁴⁷ See Sadurski 2008.

reason on rules. It would be too narrow to view these sites as systems of norms – they are frames of argumentation within which various concepts of sovereignty are in circulation. We can thus expand the above analysis and, rather than follow Jellinek in his search for the ‘correct’ legal perspective on sovereignty and statehood, explore the possibility that different legal orders may have a divergent view of the same matter so that ‘answers to legal questions become dependent on whom you ask, what rule-system is your focus on’.⁴⁸ In fact, when we define sovereignty as a set of rights (and perhaps duties), this immediately prompts the question: rights under which law? There are no rights in themselves. However the set of rights making up sovereignty is defined, it may be recognized in one legal order, but not in another.

For example, it is often stated that the member states of the EU remain sovereign because they retain the right of withdrawal.⁴⁹ With its emphasis on the emergency brake rather than the smooth everyday drive, this argument has an obvious Schmittian bent. However, if we are willing to go all the way with Schmitt, then we should also ask who will decide the extent of the right of withdrawal from the EU and whether it can be exercised in a particular case. Can member states take recourse to self-interpretation of international law or the Lisbon Treaty? What if their interpretation conflicts with that of the ECJ or some international tribunal called upon to decide the case? It would seem that, even if we attempt to pin down sovereignty with as clear a definition as possible, there will still be no ‘objective’ way of affirming whether a particular entity is sovereign or not. We cannot extract this question from legal argumentation and place it above the conflict of interpretations.

The above argument relates to the attribution of sovereignty, but the attribute itself is also fashioned within legal argumentation. Whichever concept of sovereignty we consider, its legal meaning will ultimately be filled in by those who rely on it to reach a legally relevant decision. For example, if we choose to define sovereignty as the set of competencies that a state must be able to exercise, the content of this set still remains an open question. In domestic law, the issue can be indirectly resolved by a court deciding which competencies may be delegated without harm to national sovereignty. The Czech Constitutional Court went so far as to elaborate a whole theory of post-modern sovereignty in its 2008 decision on the Lisbon Treaty. The court adopted a restrictive interpretation of the demands of national sovereignty, finding the Treaty to be in conformity with the Czech constitutional order because,

⁴⁸ Report of the Study Group of the International Law Commission 2007, p. 245.

⁴⁹ See, for example, Vahlas 2005, p. 1599.

among other reasons, ‘today sovereignty can no longer be understood absolutely [but] is more a practical matter’.⁵⁰ From the international perspective, the question as to the meaning of ‘sovereignty’ is decided (and continually re-decided) by defining the rights of ‘sovereign States’ and delimiting the areas which, in the words of the Permanent Court of International Justice, are ‘solely within the jurisdiction of a State’.⁵¹ This latter aspect can be described as the outer view of the ‘internal sovereignty’ of a state. A state may, of course, not agree with this ‘outer’ view and persist in legislating against the dictates of international law. Although this would make it liable to penalties under international law, internally the legislation would remain in force. In other words, there would be a divergence between the ‘inner’ and ‘outer’ views on the ‘internal sovereignty’ of a state.

To suggest that sovereignty is defined within law is not tantamount to saying that there is some conceptual necessity in ‘raw’, factual sovereignty being subjected to, or tamed by, law. To oppose factual and legal sovereignty can indeed be misleading, given that the claim that sovereignty is first and foremost a fact may itself be an argument in support of a particular legal outcome. The gist of the argument would be that the case is effectively decided for us: ‘To predicate that a given legal result is a question of fact is to assert that it is not a question of arbitrary discretion ... The emphasis ... on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty’.⁵² But facts, or supposed facts, may also be played on to achieve exactly the opposite result. One could thus attempt to counter the claim that a factual authority has been set up in some territory and now demands to be recognized by invoking the principle *ex iniuria ius non oritur* and assert that a certain event – for example, an occupation – must be considered a ‘mere fact’ with no legal consequences.

What is most deceptive about construing sovereignty as a self-standing quality or fact is that it suggests that we can capture it with a fencelike definition. Hart had every reason to castigate legal theorists who ‘continue to hammer away at single words’⁵³ instead of setting their sights on the propositions in which they occur. Indeed, even if sovereignty is conceived of as a matter of fact more than a relation of ideas – to (mis)use Humean terminology – it must be recognized that

⁵⁰ Judgement of the Czech Constitutional Court, Pl. ÚS 19/8, 26 November 2008.

⁵¹ Nationality Decrees Issued in Tunis and Morocco. Advisory Opinion of 7 February 1923. *PCIJ* B04.

⁵² Lauterpacht 1948, pp. 23–4 (quoted in Crawford 2006, p. 4).

⁵³ Hart 1983, p. 26.

the many concepts designated by this notoriously protean word will always remain caught up in some larger web of argument. Its legal pattern of usage will thus necessarily be determined by what we may call the grammar of law. This wider context cannot be bracketed off from the analysis. Although Kelsen may not have gauged all the implications of his own reasoning, he was right when he declared that, from a legal point of view, the birth of a new sovereign state is, properly speaking, never a question *de facto* but always *de jure*.⁵⁴ For, as he himself would later repeatedly emphasize, there are no facts 'in themselves' in the province of law, no directly evident facts, but only facts as they appear in the mirror of law.⁵⁵ This last metaphor is perhaps not entirely apt as it suggests that, however distorted the legal image may be, it always remains a reflection of some original. In law, there is often no such original and, when it comes to sovereignty, there never is.

⁵⁴ Kelsen 1929, p. 617.

⁵⁵ Kelsen 1942, p. 94. The mirror metaphor does not come from Kelsen.

7 The survival of sovereignty

Michel Troper

The history of the modern world is closely linked to the birth, growth and triumph of the political form known as the sovereign state. However, for more than half a century, a number of prominent thinkers have been talking of a decline or a crisis of the state. Several books have been explicitly entitled 'the crisis of the State'.¹ Their authors agree on the symptoms of the crisis, which are both internal and external. They include the development within the state of powerful economic or social forces; the decline of public services and the increasing privatization of public corporations; the loss of control of the economy by the state and domination by the market; the fact that, in several countries, many important activities are regulated not by the state but by independent agencies; the developing role of minorities; and the dramatic changes that they see in the legal system because of such phenomena as the growing importance of international organizations or legal pluralism. Even the rule of law is seen as a symptom of the crisis of the state, because it means that the power of the state is limited.² All these writers stress that the symptoms affect not mere peripheral characteristics of the state, but its very essence: sovereignty.

In recent years, the most remarkable change in the role and perhaps in the very concept of the state has come from the slow, but apparently inescapable and irreversible, growth of the European construction. It is an undisputed fact that the European Union is an entirely original form of political governance that differs in many important respects both from the state, even a federal state, and from a confederation or international organization. The existence of the European Union provides arguments to those who believe that sovereignty is in crisis. First, the organs of the Union have received and have developed powers that used to be exercised by the individual states, and the norms

I wish to express my deep gratitude to Charles Buzzy Baron for his precious remarks and patient corrections.

¹ See for example, Del Vecchio 1935; Poulantzas 1976; more recently Cassese 2002.

² Ferrajoli 1997.

they enact prevail over the legal norms of the domestic legal system, i.e., over norms enacted by the states, who thus seem to have lost their sovereignty. However, on the other hand, the Union is not a state, the member states survive and are not subordinate to the Union, the Union is not the master to determine its own powers – it does not possess what German legal scholars call *Kompetenz-Kompetenz* – and therefore it has not replaced the national states and it is not sovereign either, at least for the time being. As Neil MacCormick famously wrote, sovereignty is not like property ‘which can be given up only when another person gains it’, but ‘more like virginity, something that can be lost by one without another’s gaining it’.³

Having observed the weakening of the power of the states and the corresponding strengthening of European institutions, authors adopt different attitudes. Many consider these phenomena from a normative point of view. Some regret them and claim that the sovereignty of the nation-states ought to be restored or at least protected against further erosion. Others see in them a cause for celebration, because they see the decline of state sovereignty as a step towards a strengthening of the rule of law and of a more liberal society. However, one can celebrate in several different ways. There are those who consider that the European construction will be accomplished only if and when the union becomes a super-state, thus acquiring the sovereignty that has been lost by the nation-states. And there are those who, like Neil MacCormick, are happy to see sovereignty disappearing altogether, again like virginity, whose loss ‘in apt circumstances can even be a matter for celebration’.⁴

I will choose here a different point of view and stick to mere description. I shall not ask whether sovereignty is an obstacle on the road to the construction of the European Union and, if it is an obstacle, whether that obstacle should be rebuilt or removed. I shall ask only if, at the present stage, it is true, as some argue, that the state can no more be characterized as sovereign. However, one cannot reach an answer by simply observing the state, because, if sovereignty has been or is a character of the state it is not an empirical character. It cannot even be said to exist in the usual sense of the word. But it is a fact that people who have been talking about the state in the last few centuries have been using that word because, without it, it was considered impossible to say anything meaningful. The only question is therefore whether we still need the concept of sovereignty in the present context or whether

³ MacCormick 1999, p. 126.

⁴ MacCormick 1993. Similarly, a few years ago, he had written: ‘sovereignty and sovereign States ... have been but the passing phenomena of a few centuries [and] their passing is by no means regrettable’ (MacCormick 1993).

it has become a hindrance when we try to make sense of new developments in the law.

This choice implies that we dismiss two questions. The first is that of the decision-making process within the EU and the so-called 'democratic deficit'. Many state constitutions have provisions that mention 'national' or 'popular sovereignty' and indicate that they are democratic. According to the received view, this means that the sovereignty of the state does not really belong to the state itself but to the people of the state. Thus, if decisions are taken at the European level by authorities that are not democratic or not democratic enough, by definition the people cannot be called sovereign. However, the state or the people of the state can be said to have lost their sovereignty if they are legally bound by decisions made by external authorities. Whether these authorities are democratic or not is absolutely irrelevant. If the people has lost its sovereignty to a democratic authority, one could argue that it is a good thing, but we should still call it a loss. The only serious question is therefore whether such a loss has actually taken place.

The second question to be dismissed is that of the *de facto* political or economic independence of the states. One sometimes reads that a state is not 'really' sovereign because, for reasons related to its size, its wealth or its military might, it does not enjoy a wide margin of autonomy relative to other states, to international organizations or to internal institutions such as a church or a large corporation.⁵ However, sovereignty is a legal, not a political, concept and should be clearly distinguished from independence or from might. Obviously, some entities such as a colony, the member state in a federal system or a large corporation are much more powerful than many full sovereign states. Yet we do not use the same concept to characterize them. Just as legal personality entails a number of rights, even if the person cannot in fact exercise them, the sovereignty of a state is not affected by its factual capacity to act independently. One should add that when we speak of sovereignty of the state we try to say something that applies equally to all states, whereas, if we refer to *de facto* independence, we would have to call some states independent but not all.

If we stick to sovereignty in the legal sense, the task will be to research the powers of the states and their organs and ask if they can still be said to be sovereign in spite of globalization or developments of the EU, or in other words whether we still need the legal concept of sovereignty to describe them. However, we could use two different approaches to that question.

⁵ Slaughter 2004.

The first approach would consist in an analysis of the powers possessed and exercised by the contemporary state. We would then ask if they are sovereign powers or if legal theory needs the concept of sovereignty to describe the state. This approach could lead to four different answers.

First we could say that sovereignty is a character of the state, but not an essential character; some states are sovereign, but others are not, in the same way that some are democracies and others are autocracies. For instance, if sovereignty is the character of a state the organs of which have a monopoly of the production of rules, then not all states are sovereign, and we may conclude that, as a concept useful for the description of the state, sovereignty is indeed obsolete.⁶

Secondly, we could maintain that every state is sovereign if, instead of defining sovereignty as power that is supreme, unlimited and indivisible, we think of it as a power limited, divisible and not supreme. It could be limited by international law or European law. It would be divisible because the powers of sovereignty could be shared between the states and some international organizations. Because it could be limited and divisible, it would not be supreme. Another way of expressing that idea would be to say that no state is sovereign in a traditional sense, but that all states are sovereign in this new sense.⁷ And it need not even be an exclusive character of the state, so that the EU could also be described as sovereign in this broad sense.⁸

The third answer maintains that there is an exclusive relation between state and sovereignty in the traditional sense, so that sovereignty remains an essential character of the state alone. But since, in contemporary Europe, the various countries have lost their sovereignty without the EU gaining it, both sovereignty and statehood are concepts of the past and the states are not states any more.⁹

⁶ Ferrajoli 1997.

⁷ In Neil MacCormick's words, 'no member State remains politically or legally a sovereign State in the strict or traditional sense of these terms' (MacCormick 1999). See also Walker 2003a and Besson 2005.

⁸ In France, this view has been defended by Robert Badinter (Badinter 2003). Some go even further and consider that European sovereignty has replaced the sovereignty of the states. Olivier Duhamel, a law professor and one of the drafters of the failed European constitutional treaty said that European law has been consecrated as superior to domestic law, and that this is not something new, because the (European) constitution only confirms the transfer of sovereignty ('Le droit européen est bien consacré comme supérieur au droit national. Ce n'est d'ailleurs pas nouveau. La Constitution en cours ne fait qu'entériner ce transfert de souveraineté' (Duhamel 2003)).

⁹ In this sense, Yves Mény writes, 'whereas everybody agrees to recognize that the European construction has a *sui generis* quality, the concepts at our disposal are inadequate because of their national origin and because they are linked with the development of the State' (Mény 2002).

Finally, it might be argued that nothing has changed. Sovereignty in the traditional sense is still an essential character of the state and, in spite of the profound changes in the world and the transformations in the legal systems of Europe, the states are still sovereign.

It appears that these different approaches are based not only on different interpretations of the transformations in the legal systems, but also on different concepts of sovereignty. Thus, our choice between them merely corresponds to an initial definition that is purely stipulative or, in other words, the answers are predetermined by the initial definition of sovereignty and are not entirely free of all ideology. The reason is that the concept of sovereignty that legal scholarship has always been working with belongs to the language of legal theory.¹⁰

In addition to the danger of finding in the state only the type of sovereignty that we have posited as a premise of our research, such concepts make it difficult to give a satisfying account of constitutional provisions like the following: ‘*x* is a sovereign State’ or ‘sovereignty belongs to the people of the State *x*’. According to some of the above-mentioned approaches, such provisions might be considered false. For instance, if we believe that sovereignty is the power of a state that has a monopoly of the production of rules valid for the national territory, then it may be that the provision ‘*x* is a sovereign State’ is false. Yet, if such provisions have the status of legal norms, they are ‘ought’ sentences and cannot be true or false. Moreover, legal actors, ministers and parliaments refer to them and it may be the case that, while legal theorists will argue that the state is not really sovereign or that the concept of sovereignty is obsolete, a concept of sovereignty is still being used in legal language, and some norms are considered valid or invalid because of their relation with provisions stating that the state or the people is sovereign.

For example, before a treaty is ratified, the French Constitutional Council may verify that it is not contrary to the constitution. The most frequent clause used by the Council to exercise the verification is article 3, which says that national sovereignty belongs to the people. Even if those who think that sovereignty does not exist or that the concept is

¹⁰ It is sometimes argued that at the metalinguistic level, sovereignty is a descriptive concept, because it is used to identify legal rules or norms – e.g. by defining a legal rule as a command by the sovereign – while it is normative as a concept of legal language, because it is used to justify the power of an organ who is called the sovereign (Turegano Mansilla 2007). This seems to be only partly true: at the metalinguistic level a legal theory can also be normative. This is the case for instance with theories that not only assert that states have already lost their sovereignty, but also recommend that, because states have lost their sovereignty, constitutional courts should recognize the supremacy of international or European law over the domestic constitution.

obsolete, and who claim to be describing reality, cannot simply reject the council's jurisprudence as nonsensical.

We therefore need to turn to a second and different approach. If we want to make sense of positive law, i.e. of the discourse that is actually being used in the law, we should avoid using these theoretical concepts altogether and work instead with the concepts that are actually being used in the language of the law, because, as with other legal concepts, sovereignty has no existence independently of that language. Thus, in order to determine whether sovereignty has really become obsolete or whether it has changed, we must not ask whether states still possess a monopoly over the production of norms applicable to their territories, or whether they still exercise independently some important functions, such as the regulation of the economy, the administration of justice or the control of a currency, but only if the concept of 'sovereignty' is actually used or has been used and if the way it is being used has changed.

In doing this, we may profit from a distinction made by the most important French constitutional scholar in the past century, Raymond Carré de Malberg, between three meanings of the word sovereignty in the French language or three concepts of sovereignty:

In the original sense, the word 'sovereignty' refers to the supreme character of the State's power. In a second sense, it refers to the whole range of the powers included in the State's authority and it is therefore synonymous with that authority. Thirdly, it is used to characterize the position occupied within the State by the highest organ of the State's authority and in that sense, sovereignty is the same thing as the power of that organ.¹¹

Carré de Malberg stresses that the French language is poor and contains only one word for the concept of sovereignty. The same could be said of English. However, the German language has three, one for each of these senses. *Souveränität* corresponds to sovereignty in the first sense, i.e. the supreme character of the state on the international as well as on the domestic level. *Staatsgewalt* is the power of the state in the second sense. *Herrschaft* is the power of domination by an organ. Carré de Malberg believed that these distinctions could help us to discover the 'true nature' of sovereignty.¹² Such a belief is obviously naïve, but the distinction can nevertheless clarify a few traditional puzzling questions.

One of these is whether it is possible to divide sovereignty. On the basis of Carré de Malberg's distinction it is easy to see that sovereignty in the first sense, the quality of the highest organ of the state, is indeed

¹¹ Carré de Malberg 1920–1922, vol. 1, p. 79.

¹² Carré de Malberg 1920–1922, vol. 1, p. 86.

indivisible, because, as soon as one divides it, no organ is the highest. On the other hand, if sovereignty is the range of powers that can be exercised by the state, it is perfectly divisible. It is even possible to divide them by their subject matter (the power to wage war, to control a currency, to render justice, etc.) as Pufendorf did with the *partes potentiales*,¹³ or by the type of legal acts that are necessary to exercise them (like legislation and execution). Separation of powers is precisely a division of sovereignty in this sense.

In the same way these distinctions help us to understand why some sentences using the concept of sovereignty which seem incompatible or contradictory can nevertheless be simultaneously true. Thus, at the time of Carré de Malberg, during the French Third Republic, it was possible to answer the question ‘who is the sovereign’, by any one of three sentences: ‘the French state is the sovereign’, ‘the French Parliament is the sovereign’, ‘legislation is a sovereign power’. In the first sentence, sovereignty refers to the supreme character of the state’s power, which enables it to act on the international level and interfere with other sovereigns, or to dominate the Church or any other institution. In the second sentence, sovereignty is a quality of an organ of the state, and in the third sentence it is one of the powers that the state may exercise.

We see also that Carré de Malberg, contrary to what he says, does not really discover or produce these three concepts of sovereignty after a philosophical analysis of the nature of the state. Instead – and this is why he claims to be a positivist – he describes the way legal authorities use them in order to justify certain actions.

Following this method, we can at this point examine whether these three concepts are still necessary and are still in use in contemporary legal discourse in the way they were at the time of Carré de Malberg.

But before turning to this task, a preliminary remark seems to be in order. Carré de Malberg’s distinction does not give a sufficient account of some sentences that we find in constitutional documents as well as in the discourse of state authorities. Take for example, ‘the sovereign is the people’ or, ‘sovereignty belongs to the people’.¹⁴ Such a sentence obviously does not mean that the French people is the state and effectively acts on an international level, nor that it exercises a power of domination and certainly not that the people *is* a range of powers. In reality, they are used to justify other sentences: e.g. in French legal discourse ‘sovereignty belongs to the people’ was used during the Third Republic

¹³ Pufendorf 1706 (livre VIII: ‘Où l’on traite des principales parties de la souveraineté’).

¹⁴ Constitution of 1958, art. 3.

to justify 'Parliament is sovereign' or 'the law is sovereign'. It meant that Parliament exercised a sovereignty that was not its own, but that belonged to the people and was exercised *in the name of* the people, or that the law expressed the general will, or the will of the sovereign people. In this context, when imputed to the people, the word 'sovereignty' was thus used in a fourth sense: it is the quality of a being in whose name sovereignty in the first three senses is exercised. The doctrine of sovereignty in this fourth sense is a principle of imputation. Depending on the type of justification that is necessary in a given system, the entity that is being called the sovereign in this fourth sense can be the people, the king, the nation or even the state itself, as in the German legal doctrine of the nineteenth century.

Now, when we look at legal discourse, we can see that, in spite of the political and economical transformations, in spite of globalization, in spite of the European construction, these four concepts of sovereignty are still necessary to contemporary argumentation.

Consider first the case of international sovereignty. For several prominent scholars, the main reason why 'the concept of sovereignty has become logically inconsistent' resides in new developments in international law.¹⁵ The developments they have in mind take place both in general international law and in European law.

They argue first that states have lost one of the main attributes of sovereignty: the right to wage wars, because of the UN Charter. They also stress that contemporary international law addresses not only states but also individuals, because of the treaties that organize the international protection of human rights and because individuals can be prosecuted for certain crimes before international courts. Another important argument is that article 56 of the Vienna Convention on the law of treaties has limited the state's power of denunciation of or withdrawal from a treaty.¹⁶

These arguments call for some remarks. First, they are formulated on the metalinguistic level of legal doctrine. The language of the treaties themselves is very different and they do not stipulate anything about a demise of sovereignty. On the contrary, the Organization of the United Nations 'is based on the sovereign equality and independence of all

¹⁵ Ferrajoli 1997, p. 39s.

¹⁶ Article 56, Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

States, of non-interference in the domestic affairs of States'¹⁷ and the Vienna Convention explicitly mentions the principles 'of sovereign equality and independence of all States, of non-interference in the domestic affairs of States'.¹⁸

Secondly, even if the powers of the states have indeed been limited by these treaties, this is only because the states themselves have signed and ratified them on the basis of their sovereignty. The existence of these limits does not prove a loss. It is rather a manifestation of the state's sovereignty. Moreover, the limits last only as long as the states consent and they can always terminate these treaties. True, denunciation is prohibited by the Vienna Convention, but the Vienna Convention binds only the states that have ratified it, and one could easily argue that, since the Convention could not possibly refer to itself but only to other treaties, a state could terminate the Vienna Convention. And, even if denunciation were considered a violation of international law, the act of denunciation could still be valid under domestic law.

European integration is obviously much deeper than that realized by international law, but the question of sovereignty is discussed in similar terms. Proponents of the demise of the concept of sovereignty take two approaches. On the one hand, they stress that the EU is neither a confederation nor a federation. It is regulated neither by international law, which governs the relations between sovereign states, nor by national constitutional law, which governs the relations between a sovereign state and its components. Hence, sovereignty cannot play any role in the interpretation of the relations between the EU and the member states. On the other hand, these authors point at some constitutions that explicitly consent to limitations of sovereignty.

The first approach is based on the language of the Court of Justice of the European Communities, which declared in 1963 that the 'Community constitutes a new legal order ... for the benefit of which the States have limited their sovereign rights, albeit within limited fields'.¹⁹ Commentators interpret the phrase 'new legal order' as meaning that the Community is essentially different both from international law and from national legal systems. They claim that the community is different from a confederation, because it possesses some characteristics that confederations lack, for instance direct effects on citizens of the member states or primacy over municipal law. A confederation is based on a treaty and is therefore governed by international law, so that the states remain sovereign. On the contrary, if the community

¹⁷ Art. 2 § 1 of the Charter. ¹⁸ Preamble.

¹⁹ Van Gend & Loos, Case 26–62 (5 February 1963), cf. Craig 2001.

is not a confederation, although it has been created by treaties, it is not based on these treaties anymore and, hence, not on the will of sovereign states.²⁰

The community is also different from a national legal system because in such a system every entity is directly or indirectly empowered by the highest rules, e.g. the member states by the federal constitution. This is clearly not the case with the European Community. Thus, neither the European Community nor its member states can be said to be sovereign, which is supposed to prove that sovereignty is an obsolete concept in the European context.

However, this reasoning is deeply flawed, because it is based on an ambiguous definition of a confederation. If a confederation is defined by the fact that the states retain their sovereignty, one cannot prove that the European Union is not a confederation without showing first that the states have lost their sovereignty. But this is precisely the question. The loss of sovereignty is not the consequence of the European Union not being a confederation. At best, if a confederation were the only type of union where states retain their sovereignty, which it is not, loss of sovereignty would be a sign that the European Union is not a confederation. But there are several forms of unions between states where they keep their sovereignty, so that no conclusion can be drawn as to the nature of the EU. On the other hand, if a confederation is defined in some other way, e.g. a list of powers exercised by the organs of the confederation or the absence of direct effects (since there is no logical connection between these characters and the fact that states have retained their sovereignty), we cannot draw any conclusion regarding the sovereignty of the member states from the true proposition that the European Union is not a confederation.

The second approach is based on the language of national law. Several authors mention constitutional texts, such as the Preamble of the French constitution of 1946:²¹ 'Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace.' We find similar provisions in other countries, e.g. article 11 of the Italian constitution: '[Italy] agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends.' Such texts seem to provide sufficient evidence

²⁰ Craig 2001; Verges 2002.

²¹ The constitution of 1958 explicitly refers to the Preamble of 1946. Therefore, although the constitution of 1946 is not in force, its preamble is still part of constitutional law.

that the international sovereignty of the states has been limited by the states themselves through their constitutions.

This reasoning, however, is not quite convincing. Even if such a limitation were possible, it would be not an external, but rather an internal (municipal) one. Sovereignty would not be limited by international law, but by an act of the state itself. It would be only a self-limitation, which means no limitation at all, because a constitution can always be amended. Sovereignty precisely resides in the ultimate power to amend the constitution, so that the state remains sovereign, as the German Constitutional Court decided in its famous Maastricht judgment of 1993.²² In the eyes of the German court, and also later in those of the French Constitutional Council, European law is not a limit on sovereignty. On the contrary, it is national sovereignty that is a limit on European law. Even the principle that European law prevails over domestic law is not contrary to national sovereignty, precisely because that prevalence itself is ultimately based on the national constitutions.²³

The provisions about limitations of sovereignty mean only that the state may accept obligations under international treaties. But this power is in itself a manifestation of international sovereignty. As Professor Combacau rightly stresses, 'sovereignty is not a sum of competences, but the quality of a power that has no superior'.²⁴ Therefore an entity is either sovereign or not sovereign, but it cannot be limited. Only competences can be limited. In the words of the Permanent Court of International Justice: 'No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'²⁵

The second meaning of sovereignty to be considered relates to the authority of the state. According to a classical view, sovereignty, in the sense of the range of powers or competences that can be exercised by the state, is unlimited and indivisible. However, some claim today that this view should be dismissed, because these powers are now limited and divided between the states and European authorities.

²² BVerfGE 89, 155 – Maastricht.

²³ Constitutional Council, Decision 2004–505 DC, Treaty establishing a Constitution for Europe; Decision 2006–540 DC, Copyright and related rights in the Information Society.

²⁴ Combacau 2000.

²⁵ Case of the S.S. Wimbledon, 1923.08.17: Judgment No.1 (PCIJ, Ser. A., No. 1, 1923).

As far as limitation is concerned, we have already seen that neither international law nor the European Union limit sovereignty itself but that the states consent, through treaties, to limit the exercise of their powers. This is the reason why the French Constitutional Council, when deciding on the compatibility between a treaty and the French constitution, particularly with respect to the provisions proclaiming the principle of national sovereignty, examines whether the treaty infringes 'on the essential conditions of the *exercise* of national sovereignty'. Such an infringement happens either when some extremely important powers are transferred to some international authority, e.g. the control of the currency to the central European bank, or when these authorities take their decisions by a qualified majority, because in that case France could be in a minority and be constrained against its will.

In the case when the treaty has been found incompatible with the constitution on certain points, the constitution can be amended in order to authorize the process of ratification. This has happened a few times, e.g. the Maastricht Treaty and the constitutional treaty. In such a case, the principle of national sovereignty remains the same, because the text of article 3 of the constitution ('National sovereignty shall be vested in the people, who shall exercise it through their representatives and by means of referendum') has not been reformulated. This shows that in the language of the French constitution, the transfer of competences is not incompatible with the principle of national sovereignty and that the incompatibility that has been eliminated was only that with the 'essential conditions of the exercise of national sovereignty'. The powers of sovereignty themselves have not been transferred and can always be recovered by a renegotiation, by a denunciation of the treaties, or by a new constitutional amendment. It may be that the third solution would be a violation of international law, but that would not make it invalid from the point of view of national law.

According to another idea, sovereignty today is divided and shared between the state and the European Union. It is divided, because some competences are exercised exclusively by the European Union and others exclusively by the states. It is shared, because some competences are exercised jointly.

On the first point, we have already seen that sovereignty, in the sense of *state authority*, is not the actual exercise of competences, but the power to exercise them if the state so wills. Thus, even when the exercise is delegated by the state, the power itself is never lost. For instance, if the state delegates to a private corporation the right to build and manage a prison or to print paper money, it can always take it back and exercise these functions through its own agencies. The same is true when the

exercise of those powers has been delegated to an international organization or to the European Union. This is precisely the reasoning under which sovereignty is held to be 'inalienable'. The phrase does not mean that it is forbidden to alienate sovereignty, but that it is impossible. The state can delegate the exercise of some powers, but, because it can always put an end to the delegation, it will always retain the essence of the power.

As for the idea that sovereignty is shared because some subjects are regulated both by European law and by national law, it is true that there are similarities with the German federal system, where in certain matters the federation is empowered to pass framework legislation and the *Länder* apply and implement them. In the European Union also, in certain matters, states are under an obligation to transpose directives into national law in the same way that, in case of a conflict between European Union law and domestic law, national courts must apply European law.

However, these obligations have two independent sources. The first is European law, but a state can always infringe its international obligations. There might be international sanctions, but an action taken in violation of international law may be perfectly valid under domestic law, and this is precisely what constitutes sovereignty. The other source is the national constitution. In some cases, for instance in France, it is the constitution that orders the application of European law, and it is that which is the base for the sharing of powers between national and European authorities. But this does not prove that sovereignty has been shared. It proves on the contrary that sovereignty remains entirely in the hands of the state. The sharing of powers is just one manifestation of its sovereignty.

The third argument we need to consider arises from the idea of sovereignty as the quality of an authority that is superior to all others and has no superior. One often reads that such an authority may exist in some political systems but that it is not a necessary feature of every state. Scholars stress that some constitutions not only do not call any authority sovereign, but that many are carefully designed precisely to prevent any single authority or state organ from becoming sovereign, notably through a balance of powers.

This observation is certainly true, but only on the basis of a very strict definition of 'organ'. In this strict sense, an organ is, in Montesquieu's words, any 'single person or body of magistrates' acting or deciding in the name of the state.²⁶ We can call this type of organ in a strict

²⁶ Montesquieu 1989, Book 11, ch. 6.

sense a simple organ. However, an organ in a broader sense can be complex. This is the case when a function of the state is performed by a group of organs. For instance, a parliament is often a complex organ composed of at least two houses. Each house is a simple organ because it performs certain actions separately, and the parliament is a complex organ, because, as a whole, it is considered the author of the most general rules.

Thus, provided we do not deny that there is a hierarchy of norms or of functions, we shall indeed find in every constitution an organ that can be called sovereign, because it performs the supreme function or enacts the highest norms. In the ancient French monarchy, prior to the Revolution, the sovereign was the king alone. But in eighteenth-century England, the sovereign was Parliament, a complex organ, composed of the Commons, the Lords, and the King. The simple or complex quality of the supreme organ is what distinguishes a liberal from an illiberal constitution, but every constitution has such a sovereign.

The sovereign can be identified by the hierarchical level of the norms it enacts. If there is no written constitution or no judicial review of legislation, the highest norms are statutes, as in England or in France at the time of the Third or the Fourth Republic. If there is a written constitution and judicial review, the constitution is the highest norm and the sovereign is that complex organ, which is capable of amending the constitution.²⁷ Therefore, in order to prove that sovereignty in this third sense is an obsolete concept, we would have to show that legal actors accept that the constituent power is now limited by international law and by the European Union. This is far from being the case. Several constitutional courts have stressed that European law prevails over national statutes, but only on the basis of the constitution. In France, for instance, the Constitutional Council decided in 1975 that the basis for the supremacy of European law over acts of Parliament is article 55 of the constitution.²⁸

The same is true for the prevalence of European Union law over national constitutions. In Italian law, a European norm can derogate from the constitution, but only on the basis of an interpretation of the constitution by the Italian constitutional court and within certain limits. Thus, statutes which transpose treaties into Italian law can still be declared unconstitutional if they infringe fundamental constitutional

²⁷ Vedel 1992, pp. 173–84.

²⁸ Decision 74–54 DC of 15 January 1975, Voluntary Interruption of Pregnancy Act; article 55 reads ‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.’

principles or inviolable individual rights.²⁹ Similarly, the French Constitutional Council has decided that the obligation to transpose European directives is based not on the treaties but on the French constitution.³⁰ This means that European law prevails over the constitution to the extent that the constitution prescribes it.

There are two consequences. First, if the prevalence of European law is based on the French constitution, the constituent power can always amend the constitution and abolish the prevalence. Second, even in the absence of a constitutional amendment, since the constitution could not, without contradicting itself, decide to submit to a European rule that would go against its own express provisions, the Constitutional Council decided in 2004 that the constitution has implicitly protected such provisions and that European law cannot have primacy over them. Finally, in order to avoid acknowledging the supremacy of European law, the Council forged a new concept, that of ‘the constitutional identity of France’ and ruled in a 2006 decision that ‘the transposition of a directive may not run counter to a rule or principle inherent in the constitutional identity of France, except when the constituting power consents thereto’.³¹

Although the expression ‘constitutional identity’ was inspired by the failed constitutional treaty (art. 1–5) and the Treaty of Lisbon,³² the Constitutional Council has been careful to avoid transposing it literally. The treaty mentions the ‘national identity’ and not the ‘constitutional identity’. More important, the treaty does not envisage the possibility that the national constitutions could escape the supremacy of European law, while the language of the Constitutional Council has precisely that purpose. What is striking in this formulation by the Council is the extraordinary step taken to preserve the sovereignty of the national state. This has two aspects. First, if an international rule contradicts

²⁹ Constitutional court, decision no. 183–1973, no. 170–1984, no. 168–1991 and no. 93–1997; Guastini 2000.

³⁰ Decision no. 2004–496 DC dated 10 July 2004; Decision no. 2006–540 DC dated 27 July 2006 ‘Indent 1 of Article 88–1 of the Constitution provides: “The Republic shall participate in the European Communities and the European Union constituted by States which have freely chosen, under the Treaties that established them, to exercise some of their powers in common”; the transposition of a Community Directive into domestic law thus complies with a constitutional requirement.’

³¹ Decision no. 2006–540 DC dated 27 July 2006; Troper 2008, pp. 123–31.

³² Treaty on European Union, Article 4.2: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

one of the principles inherent in the constitutional identity of France, the domestic principle prevails. But, on the other hand, these principles do not bind the constituent power, which remains truly sovereign.

The fourth and final meaning of ‘sovereignty’ that needs to be considered is ‘imputation’. The function of a principle of imputation is to present a rule as binding because it expresses the will of some being, such as the king, the people, the nation, the state, etc., or because it has been derived from that will.

Some rare legal theories may dispense with such a principle if they do not consider legal rules to be binding. For instance, Alf Ross argued that, if validity means binding force, then a legal theory that rests on the concept of validity, such as Kelsen’s Pure Theory, is not fully positivist but only quasi-positivist.³³ This is not the place to discuss whether Ross is right in his critique of Kelsen,³⁴ because we are analysing not the meta-language of legal theory but the language of the law.

At that level, we see that legal systems continue to use the concept of sovereignty as imputation that was born together with the modern state and that the function of that concept is the same as it was from the beginning. We do not need to decide whether the law is really binding or whether sovereignty provides a good justification. We can also, at the same time, consider that the law is not really binding or that it is binding but that sovereignty does not provide a good justification for its binding force and observe that, at least in some modern legal systems, legal discourse rests on the idea that all rules either express the will of the sovereign or that those who have enacted them have been empowered by the sovereign.

Such an observation can be empirically tested. France provides a good example. Article 3 of the Declaration of the Rights of Man reads:

The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

And article 6:

Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.

The principle stated in article 6 does not recommend that the legislative power be entrusted to representatives. It creates a presumption that all valid statutes are the expression of the general will (or the will of the sovereign) and that those who exercise the legislative power and enact valid statutes are representatives of the sovereign. It does not

³³ Ross 1961. ³⁴ Cf. Troper 2001, pp. 19ff.

matter that a legislative authority is not elected. It is still presumed to be a representative. In the constitution of 1791, for instance, the king, because he had a veto, was part of the legislative power and was called a representative.

The principle that the law is the expression of the will of the sovereign may seem to be defeated by at least two modern phenomena: on the one hand, the development, even in France, of some form of constitutional review of statutes; on the other hand, the superiority of European law over statutes and even over the constitution. We see, however, in both cases, that judges have made explicit efforts to reconcile these phenomena with the principle.

Sovereignty as imputation was used as one of the main arguments against the introduction of judicial review of the constitutionality of statutes because, if statutes are the expression of the will of the sovereign, judges should not be allowed to go against that will. When it was finally developed, after 1958, the Constitutional Council never proclaimed that the principle was dead. On the contrary, it made all sorts of efforts to preserve the doctrine.

First, the Council decided in 1962 that it lacked jurisdiction to review statutes that had been adopted by referendum, because such statutes were 'the direct expression of the general will'.³⁵ Several years later, in a famous *obiter dictum*, it qualified the principle mentioned in article 6 of the Declaration of the Rights of Man, saying that 'the laws that have been adopted by Parliament express the general will only to the extent that they respect the constitution'.³⁶ This means that the presumption is not absolute, that it has been created by the constitution and that certain conditions must be met, but also, in the view of the Constitutional Council, that the sovereign people expresses itself both in the constitution and in statutes. In the constitution, the sovereign decides what counts as a true expression of its will, or in other words when it is being correctly represented. In statutes it expresses its legislative will.

If, however, the Constitutional Council decides that a statute is unconstitutional, i.e., that it does not express the general will, the constitution can always be amended in order to overrule the Council's decision. One of the most prominent members of the Council, Georges Vedel, thought that the possibility of an amendment was the best justification for the Council itself, because it protects that institution from

³⁵ Décision no. 62-20 DC du 06 novembre 1962, Loi relative à l'élection du Président de la République au suffrage universel direct, adoptée par le référendum du 28 octobre 1962.

³⁶ Décision no. 85-197 DC du 23 août 1985, Loi sur l'évolution de la Nouvelle-Calédonie.

the accusation of being undemocratic. If the constitution is amended, this means that the sovereign has spoken directly. If it is not amended, this means that the sovereign has tacitly consented to the decision.³⁷ Thus the Council always speaks in the name of the sovereign people.

Obviously, such theories have deep flaws. One of them is that they presuppose that the true sovereign is the people as a constituent power. This contradicts the idea that statutes are the expression of the general will. Another is that it does not take into account the discretionary character of constitutional interpretation. If the Council merely applied the constitution without interpreting the text or if interpretation were simply declaratory, then one could very well say that they apply the will of the sovereign. But if there is some element of discretion in the process of interpretation, then it is not the will of the sovereign, but that of the council that prevails over the will of Parliament. A third flaw is that if the sovereign is the constituent power alone and if amending the constitution is difficult, then it is hard to call the system a democracy.³⁸ However, the coherence of these theories is irrelevant. On the contrary, the fact that one cannot avoid constructing them is a sure sign that there is a deep necessity to think of a sovereign to whom all rules can be imputed in the last resort.

The same can be said about the consequences of the European construction that French courts tried to reconcile with the theory of popular sovereignty. This was done in several steps. Before the constitution of 1958, European law was just part of international law. Since the ratification of a treaty must be authorized by a statute, international law was binding, as every other statute, as an expression of the general will, but only as a statute. Therefore, a treaty prevailed over older statutes, but not over more recent ones.

The first change came from article 55 of the constitution of 1958.³⁹ Treaties now prevail also over ancient statutes. Because the word 'treaties' refers not only to international conventions but also to the law made on the basis of treaties by international authorities, European directives

³⁷ Vedel 1991, 'C'est cette plénitude du pouvoir de révision constitutionnelle qui légitime le contrôle de la constitutionnalité des lois. A celui qui se plaint que la loi votée par les représentants de la nation ne soit pas souveraine comme la nation elle-même, on répond que "la loi n'exprime la volonté générale que dans le respect de la constitution". Cette formule justifie le contrôle de la constitutionnalité des lois, mais elle n'a cette vertu que parce qu'elle sous-entend que l'obstacle que la loi rencontre dans la constitution peut être levé par le peuple souverain ou ses représentants s'ils recourent au mode d'expression suprême: la révision constitutionnelle. Si les juges ne gouvernent pas, c'est parce que, à tout moment, le souverain, à la condition de paraître en majesté comme constituant peut, dans une sorte de lit de justice, briser leurs arrêts'.

³⁸ Troper 2003. ³⁹ See footnote 28.

and regulations prevail over statutes. They have not been produced by elected representatives of the French people, and they may even go against the will of those elected representatives. On the other hand, the European treaties carefully avoid mentioning a European sovereign.

However, the Constitutional Council had to reconcile the prevalence established by article 55 with the principle that sovereignty belongs to the French people. As with judicial review, the only way to do it was to promote the general will from the statutory to the constitutional level. The binding force of European law is not explained as an expression of the will of the European authorities. It comes from the French constitution alone and is, therefore, an expression of the will of the French people.

Even if European law prevails over the French constitution, it does so, as we have seen, by virtue of that constitution alone. However, this means, first, that the French people cannot have willed that the core principles of its constitution be submitted to European law, and, second, that the constitution can be amended at any time.

In the modern state, democracy is expressed in the principle that sovereignty belongs to the people. Thus, this construction has the function not only of preserving for the state some power to decide in the last resort, but, also, that of keeping an illusion. The illusion is that, although important decisions are not taken any more by elected representatives of the people, the sovereign has at least authorized them. We may refuse to be persuaded, but we must recognize that the French Constitutional Council, as other European courts, had no other choice.

Sovereignty is not an objective characteristic of the state that one can observe and describe. It is a concept. If it were a concept merely of political science, we could perhaps dismiss it as obsolete, by saying, as many do, that it does not help to give a realistic view of the place and the role of the state in the modern world. But it is also a concept that is part of the language of positive law. It is an element of complex theories that courts use and cannot avoid using in order to decide cases. These theories should not be judged but merely described and explained. They are neither true nor false. They may be more or less coherent or persuasive, but their internal coherence or incoherence does not affect their existence, nor their efficacy. In this sense sovereignty still survives.

8 Sovereignty and after

Neil MacCormick

I

Sovereignty is an interesting and important topic for contemporary Europeans. For some years there has been controversy about what has happened to sovereignty in the context of the European Union. Have member states of the Union lost or ceded sovereignty to the Union, or merely transferred the exercise of certain of their sovereign rights? Has the Union acquired, or is it acquiring, a new sovereignty that will override that of the member states and their peoples? Is there an emerging 'sovereign people' of Europe, or is there merely a multiplicity of peoples who may or may not retain separate popular sovereignties? Is Europe a locus of 'post-sovereignty' or 'late sovereignty', or some other new variant on classical sovereignty?

My previous contributions to this debate¹ have argued for post-sovereignty. The changes in the internal and external constitutional powers and political capabilities of the member states in their relation to the Union amount to an abandonment of key attributes of sovereignty as this was classically understood. Yet this has occurred without the Union's acquiring powers and capabilities amounting to sovereignty in the classical sense. The Union is not a sovereign super-state, nor a sovereign federal union. One day it might become one, but there is no inevitability about this and, in the perspective of the first decade of the twenty-first century, it does not seem very likely to happen. One thing that would make it more probable would be if political and legal thinkers and activists believe that effective government always requires some kind of sovereignty located in an identifiable power centre or constitutional structure. If, on the other hand, it came to seem possible that the government of complex political entities can be genuinely polycentric, without a single power centre that has ultimate authority for all purposes, a different kind of future would open up. What is possible

¹ MacCormick 1993, 1999, 2004.

in human affairs depends in part upon what humans believe to be possible. So it is not a trivial question whether the European Union and its member states are somehow 'post-sovereign' polities.

Is there a possible world, or at least a possible Europe, after sovereignty? If so, is this a possibility that should be welcomed, in the name, perhaps, of subsidiarity and polycentric democracy in the governance of Europe? Or should it be feared and rejected, as eliminating genuine politico-legal responsibility of power-holders, diffusing decision-making in unaccountable ways, and thus defeating any real possibility of European democracy? The stakes are high, and the debate important. This chapter will restate a version of the case in favour of belief in post-sovereignty, though it will do so with important qualifications arising from some of the objections previous versions of the case have met.

II

If one claims that sovereignty or any similar concept has ceased to apply in its traditional sense to entities of the kind to which it has typically been applied, one should check that one's key term is or is not ambiguous or even polysemous. If 'sovereignty' has more than one sense, applying in different ways to different entities, it will be necessary to be specific about the senses and applications that one wishes to challenge. Sovereignty in one sense might be obsolescent without every other sense of the same term also losing contemporary relevance. This means that the first task of the present chapter should be to review the issue of the univocality or otherwise of 'sovereignty'. One leading commentator, Jo Shaw,² suggests that we must characterize it both as a cluster concept and as an essentially contested concept. Let us consider what this means and why it might be so.

Terms we use on the frontier of theory and practice in politics and law tend to become both cluster concepts and contested ones. This is because rival theorists and practitioners structure their arguments around different conceptions of the same concept. Thus they become 'cluster concepts' in that they are susceptible of being understood in terms of several related but not identical conceptions relevant to the field of concern. They are 'contested concepts' in that rival theories may support different conceptions, having different practical or evaluative connotations. Those who favour different values support different conceptions.

In the case of sovereignty, there are at least three dimensions in which clustering and contestation affect the concept. The first is that of the

² Shaw 2003.

object to which we ascribe it. Different such objects exist. The second is that of the normative order in relation to which we ascribe it. Different legal or other normative systems may be appealed to in respect of different issues. The third takes us beyond normative systems, and examines political relationships. Sovereignty does not function only as a jural concept, but can sometimes be presented as a political one.

Let us start with the different objects of ascription. Sometimes sovereignty is regarded as an attribute primarily of the state itself. A 'sovereign state' is one that is fully self-governing and independent of external control, and this condition is the 'sovereignty' of the state. Sovereignty can also refer to the whole congeries of a state's powers. The sovereignty of a sovereign state may thus be conceived as comprising the aggregate of the state's powers, however they are exercised and by whomever. Sovereignty can also characterize an individual or collective power-holder, an entity or agency within a state, such as an emperor, a king, a dictator, or a parliament. That entity or person is then the 'sovereign' of that state. Finally, one must take note of popular sovereignty. Sometimes sovereignty is regarded as belonging to the people of a territory, who are or at least proclaim themselves to be the ultimate self-governing masters of the institutions of the state that holds the territory.

Such plurality of reference is by no means exclusive to the English language. In Chapter 7 of this volume, Michel Troper shows this vividly by reference to the work he cites by Carré de Malberg concerning different ways of ascribing *souveraineté*. Carré de Malberg's insight into French usage is relevant also to 'sovereignty' in English, as nearly equivalent to, if not identical with, the French *souveraineté*. Indeed, the different possible points of ascription that I have identified in the case of 'sovereignty' match pretty well those that Troper finds in the work of Carré de Malberg. This is not an accident, for this chapter has been prepared by recasting remarks from earlier writings that discussed the character of sovereignty as both cluster concept and contested concept in similar but different terms to those derived from Troper's contribution.

The second dimension of ambiguity concerns possible conflicts or differences between normative orders, particularly legal-constitutional ones. Looking at the concept in this way also connects to Troper's account, for he treats the whole discourse of sovereignty as operating only in legal or jural terms. Sovereignty in his and Carré de Malberg's account is to be considered a legal concept and the norms according to which it is understood are legal ones. These might of course be norms in different legal systems. Asking whether a state is a sovereign state in international law is different from asking whether a given

act or decision might violate the sovereignty of a state or one of its organs from the point of view of domestic constitutional law. The powers of the European institutions and any pretension they might have to anything approaching sovereignty could be differently judged in the perspective of a state's constitutional law than if judged in terms of European Union law. Even within a jural perspective, different legal systems might generate different sovereignty-conceptions, or different sovereignty-ascriptions.

The third dimension of ambiguity is that between legal and political sovereignty. Here, we open up a contrast with Troper's exclusively jural conception of French *souveraineté*. There may here be merely a linguistic difference, but perhaps it is better seen as a matter of a fairly deep cultural-historical and related theoretical difference of approach as between French and British thought. Certainly, British sources do clearly justify identifying a further possible source of ambiguity as that between legal and political sovereignty, for they clearly entertain political as well as jural conceptions of sovereignty. A.V. Dicey,³ for example, dismissed John Austin's conception of sovereignty as inadequate for a satisfactory exposition of British constitutional law because Austin treated the political sovereign as though it were legally sovereign. The possibility that sovereignty can be a political as well as a jural concept, and indeed the issue of which between legal and political primacy, are matters that we can trace back in the history of politico-constitutional ideas at least as far as to Hobbes.

So far as concerns popular sovereignty, or claims thereto, sovereignty in some traditions appears as the middle term in the interaction of constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*), or as inherent in the relationship between the people and the state.⁴ An early English language version of this dialectic is found in Daniel Defoe's contention that 'all constituted power is subordinate, and inferior to the power constituting'.⁵

'We the people' who establish a state with constituted organs of government, limited by the terms of our grant of power to them, only become a people by succeeding in establishing a viable constitution. After establishing their state in this way, the people can exercise their sovereignty only through the constitutionally limited acts of government according to the terms of its establishment, or by exercising the power of constitutional amendment that their constitution confers

³ Dicey 1959, pp. 71–7.

⁴ For a splendid discussion of this, see Lindahl 2003, pp. 105–7.

⁵ Defoe 1786, p. 246.

upon them. Thus does absolute popular sovereignty transform itself into limited constitutional sovereignty. In the very moment of its being exercised, it transforms itself.

It seems in any event that there is no single essence of sovereignty that we could pronounce definitively dead or alive for the present or the future either in the European Union or in the world in general. We are dealing with a decidedly polysemous term that expresses a cluster concept containing rival (contested) conceptions according to different theories and value systems. The search for post-sovereignty will have to proceed with some care.

Nevertheless, one can at least say that all conceptions of sovereignty in some way concern power over territory and the ascription of that power to some kind of entity, applying either the norms of some legal order or some analysis of the conditions for the exercise of political power. A further point that one can properly make concerns independence. This is another idea – also ambiguous and contested – that plays a role in nearly all discourses of sovereignty. The idea of independence from entities similar in kind is implicit in the notion of sovereignty. That which is sovereign or claims sovereignty is, or claims to be, independent of other similar entities, and able to act without any permission or authorization from the outside. Sovereigns do not exercise power by virtue of some act of delegation or with some form of permission from any other entity of this kind. This being so, we may add another connected idea. For this independence implies an equality among sovereigns, each being, in a formal sense at least, the equal of every other.

Neil Walker⁶ advises us to reflect closely on the ‘performative’ aspect of sovereignty, and the idea is also stressed by Hans Lindahl in his contribution⁷ to the same volume of essays.⁸ Walker himself, like Michel Troper, is one who doubts whether the world emerging in the new millennium will be a world after sovereignty. What he calls ‘late sovereignty’ will continue to be an essential feature of the legal and political domains for the foreseeable future. The death of sovereignty has been much exaggerated, and ‘post-sovereignty’, though perhaps a fashionable idea, is one that does not really stand up. Human politics may be undergoing transition (they always are) and new conceptions of old concepts may be in transition too, but the utility of such a concept as sovereignty remains.

For my own part, I confess to being a proponent of post-sovereignty. Yet, in the context of a concept so multifaceted as sovereignty, one has always and inevitably to be careful about meanings. To say that we have

⁶ Walker 2003b. ⁷ Lindahl 2003, p. 109. ⁸ Walker 2003a.

passed beyond sovereignty in one or another aspect does not mean that every other aspect is thereby rendered vacuous. 'Which sense of sovereignty do you say has no longer any utility?' is a question properly to be asked of any post-sovereignty theorist. 'Why does it matter?' is a second one.

III

One way of looking at sovereignty considers it the essential adhesive that holds together a political society and enables it to live under a body of shared laws. Thomas Hobbes in *Leviathan* gives the classical version of this idea. Contemplating (after experience of a disastrous civil war in England) the horrible condition human beings experience if they live in circumstances of a war of all against all, he asks how they can escape from this condition. His answer is that all of them must agree together to a covenant under which they transfer all their natural power and right to a common sovereign who will then make laws for them and uphold the laws by using their now-transferred collective power to that end. The sovereign (whether an individual or an assembly) is not a party to the covenant but is empowered by it to act on behalf of the contractors in making and enforcing laws for them. The sovereign creates the conditions of civil peace and establishes rights of property and other rights such that a regime of justice can be maintained in the state thus established.

Effectively, this conception of sovereignty completely subordinates the legal to the political. This becomes even more clear in the later evolution of essentially the same idea in the work of Jeremy Bentham⁹ and John Austin.¹⁰ They also represent laws as the mandates or commands of a sovereign, and they identify the sovereign in terms of what is essentially a political power relationship in a state (or a 'political society', as they called the state). Responding to criticisms of social contract theory by David Hume¹¹ and others, they defined the sovereign solely in terms of a habit of obedience among the population at large, without assuming that this necessarily or even probably has its origins in any kind of explicit or even hypothetical contract. However it may come about, in ordered societies some people – the majority – have to a greater or less extent a habit of obeying commands issued by some person or assembly. The more perfect the obedience, the closer the society approximates to a perfect political society, the less complete the obedience the more there is a tendency to social disintegration or even anarchy. Where there is a

⁹ Bentham 1970. ¹⁰ Austin 1995. ¹¹ Hume 1963.

relatively strong habit of obedience, this can of course enhance the ability of the sovereign to organize agencies of law enforcement (obedient to the sovereign) that ensure the application of sanctions in the event of disobedience to commands. This in turn reinforces general habits of obedience in the society.

The mandates or commands of sovereigns can include those that establish the organization of superior agencies of state as well as lower-order ones requiring conduct by citizens in such departments as criminal law or private law. But even such 'constitutional' laws presuppose the already established existence of the sovereign, grounded simply in the general habit of obedience. On this account, it is clear that political sovereignty, the political relationship of the obedient populace with the commanding sovereign, has priority over any legal relationships. Genuine laws are commands backed by sanctions, and without habitually obeyed sovereigns there are no such laws. Moreover, anything that purports to be a law dividing or limiting sovereign power may in the last resort fail in circumstances of social stress. There has to be a commander in the last resort even if it is not obvious at a given time exactly who this is. Carl Schmitt's¹² adoption of the essentially Austinian perspective on sovereignty makes this clear when he declares that 'sovereign is he who decides in the case of exception'.¹³

A corollary of the theory of internal state sovereignty developed on this basis is a relatively dismissive attitude to international law. Laws among nations, which acknowledge no common superior or sovereign over them, are misdescribed as laws and are in truth no more than customs or aspects of the positive morality observed among international statespersons. Treaties likewise lack the force of genuine law. Not merely is sovereignty primarily political, but normative bases for legal sovereignty such as were postulated by some theorists are simply lacking here.

We shall take up shortly some questions arising from the influence this positivist sovereignty theory exercised in defining the constitutional tradition of the United Kingdom. Nevertheless, independently of that, it is sufficient to record that pure Austinian sovereignty is rightly regarded by contemporary legal theorists as an exploded theory and a burnt-out case. There are better ways of accounting for law, and there are better bases than a 'habit of obedience' to account for the sharing in a political society of some common 'rule of recognition' that facilitates identification of common law binding on citizens and officials alike.¹⁴

¹² Schmitt 1922. ¹³ Compare Dyzenhaus 1997, pp. 42–51.

¹⁴ As H.L.A. Hart (Hart 1994, pp. 50–78) elaborately showed.

Beyond Hart's work, and seeking to repair flaws in it, my own approach proposes adoption of the 'institutional theory of law'¹⁵ as carrying the same general line of argument to a more successful conclusion. The institutional theory depicts law as 'institutional normative order', thereby facilitating a pluralistic approach to law such that different legal systems can be seen to coexist in a complex legal world. We may indeed acknowledge Schmitt's point that conditions of stress may lead to a breakdown in normal legal functioning and there may always be an ultimate political intervention that seeks to restore order even at the expense of previous understood allocations of authority. This does not however explain the essence of law, but exposes one of the limits of law's capability to be a self-sufficient basis for political and social order.

Anyway, the first conception of sovereignty that we should stand ready to declare obsolete, joining many who have already so announced, is the Austinian positivist conception of sovereignty based on a pure political habit of obedience. This is neither original nor surprising.

IV

Easy as it may be to refute Austinian sovereignty, the refutation is not without significance in respect of reflections about sovereignty in the perspective of UK constitutional law and theory, especially when this is considered in the shadow of European Union law. This is, after all, a constitutional tradition that has centred on variations of a similar positivistic theme, as expounded by constitutional jurists of eminence. It may therefore be necessary to consider how to re-interpret the British constitution to make sense of contemporary developments and the contemporary condition of this state given the centrality of the doctrine of parliamentary sovereignty to its constitutional law and tradition. Kenneth Armstrong has remarked that 'sovereignty is, and always has been in transition in the (dis)United Kingdom'.¹⁶ Perhaps there are also different versions of similar dilemmas, and transitions, in other states and legal traditions, and the UK may therefore also have some exemplary interest.

The fundamental doctrine of British constitutional law has classically been the doctrine of the sovereignty of Parliament (properly, 'sovereignty of the monarch [queen or king] in Parliament'). So an appropriate starting point for the present line of inquiry is the English common lawyers' view of the sovereignty of the United Kingdom Parliament.

¹⁵ MacCormick 2007. ¹⁶ Armstrong 2003, p. 350.

Whatever else, this affords one striking instance of the ascription of sovereignty to an entity within a state. Strictly, it is sovereignty of a composite body, namely, 'the Queen in Parliament', that is the monarch acting in procedurally fixed ways along with the two Houses of the Parliament, the Lords and the Commons. But with the growth and finally the hegemony of democracy as the underlying ideology of governance, the House of Commons has become the predominant element in this composite sovereign. At the same time, the electoral power of political parties in a system of representative democracy gives party whips and party leaders a tight grip on the voting behaviour of individual Members of Parliament. Hence, when a party has a comfortable majority in the House of Commons, its leader as Prime Minister can, with the support of a Cabinet each of whose members can be dismissed by that same Prime Minister, acquire a personally predominant position.

However that may be, parliamentary sovereignty in this tradition means the legally unlimited power of Parliament to enact any law it chooses, except one that would have the effect of binding later Parliaments. This legally unlimited power, it has been argued, derived from the manner of establishment of the English kingdom after the Norman Conquest. Power originally acquired by the conqueror eventually transmuted itself into popular power through the growth of Parliament over many generations and through many vicissitudes. Not all countries under monarchical rule acknowledged their monarchy as originating in conquest. Scotland, before the Union of 1707, was home to the idea (never uncontested, as one must acknowledge) of kingship by consent, developing out of older tribal or clan-based forms of rule. This has led to rival interpretations of the British constitution from a Scottish point of view, and some of these pointed to a more contractualist or contractarian theory of the constitution. But we may discount these for present purposes.

The most influential critique of contractual theories of government came from those like Edmund Burke and David Hume, who argued that custom and tradition provided the true underpinning of constitutional government, not express agreement. Constitutions, they pointed out, grow more secure over long times and through long usage rather than at the moment of their first establishment (if such a moment can be found). There are customary rules and practices that in the UK lie behind the power of Parliaments to enact laws and courts to adjudicate upon them. These are the ultimate basis for the exercise of all power. The pre-eminent role assigned to Parliament may make it much to be desired that there be a system of checks and controls, or checks

and balances within the constitutional order to prevent all power being concentrated in one set of hands, or a few. Where a representative law-making assembly shares in the rule-making power, ensuring that those who participate in collectively making the laws are themselves as individual citizens bound equally with others by the laws they make, this is a great safeguard for liberty. But it neither requires nor amounts to a formal limitation on the empowerment of the legislature.

English common law is properly understood as being ultimately and at base a kind of customary law. Certainly, contemporary common law is mainly composed of the law derivable from interpretations of the precedents set by the superior courts of the land in deciding cases. But both the method of interpretation of case law and its ultimate source of authority lie in the general custom of the realm in particular as it is evidenced in the conduct and attitudes of those who exercise various forms of constitutional authority in the various branches of the state. Hence it is not surprising that we find in regular use such expressions as 'the law and custom of the constitution'. Nor is it surprising that constitutional theorists like H.W.R. Wade¹⁷ and legal theorists like H.L.A. Hart¹⁸ ascribe ultimate authority under the constitution to the common observance by the higher judiciary of a rule that they consider ultimately binding on all of them. The rule identified by Wade and Hart, as their interpretation of the long-standing basic doctrine of constitutional law, was that of parliamentary sovereignty. This they understood as the rule that ascribed to the Queen [monarch] in Parliament the power to make or amend any law except one that would deprive any future Parliament of the same unrestricted power of making and amending law. Interestingly, both Wade and Hart assumed that the existence of such a shared rule – Hart's 'rule of recognition' – could exist only as a political fact, being a rule shared 'from the internal point of view' by all or most of the superior officials within the system. As such it could not itself be altered by any lawmaking act, though it could be abolished through a political revolution if it were replaced by some alternative version. The escape from Austin's political basis for sovereignty is, for these thinkers, less than complete.

More recent constitutional thinkers, for example T.R.S. Allan,¹⁹ take this to be too much of a 'plain fact' approach. They argue that one needs a value-based theory of common law reasoning and interpretation to account for the way in which even the highest-level rules and doctrines of constitutional law can come to evolve and develop in the light of changing circumstances. After all, parliamentary sovereignty

¹⁷ Wade 1955. ¹⁸ Hart 1994, p. 111. ¹⁹ Allan 1997.

can be seen as one expression of a commitment to democracy, moreover to relatively unrestricted majoritarian democracy, protecting the common judgment of the political nation from being unduly trammelled by such institutions as judicial review based on some kind of entrenched Bill of Rights. The principles that underlie such a conception of democracy, or those that come to be accepted as importing restrictions or qualifications of it, can justifiably guide new interpretations of the basic rules of the constitution. From the conception of constitutional law as based on essentially customary common law there by no means follows necessarily the purely or ultimately political-but-not-legal conception of the doctrine of sovereignty.

What can be said with confidence, however, is again that the politically rooted common law conception of parliamentary sovereignty developed by thinkers like Wade and Hart following the work of A.V. Dicey seems obsolete. It has become so in the light of the recent evolution of UK constitutionalism that has taken place under the pressure of European developments. In 1973, by virtue of the European Communities Act of 1972, the United Kingdom acceded to membership of the European Economic Community (which has itself in turn become since 1992 an integral part of the 'European Union'). This accession inevitably wrought a breach in the principle that Parliament cannot bind its successors. It is no longer the case that Parliament cannot so amend the law as to deprive a future Parliament of equal and equivalent power to re-amend the law.

It is trite law that the interpretation of the foundation treaties developed by the European Court of Justice, membership of the European Union requires acceptance that both the treaties themselves and laws (regulations or directives) made by the EU institutions are binding and have direct effect in the member states. Under this doctrine of the primacy enjoyed by EU law within the scope of the powers conferred on the institutions as interpreted by the ECJ, a state that accedes to membership has not only to amend its existing law to make it conform to the *acquis communautaire*, that is, the whole body of inherited EU law as of the date of accession. It has also to provide that future changes in EU law will prevail over domestic legislation also. So, as section 2(4) of the UK's European Communities Act 1972 puts it, 'enforceable community rights' have to take effect so as to override 'any enactment passed or to be passed' by Parliament.

In 1991, the House of Lords as the highest judicial authority of the United Kingdom had to decide whether this was effective in domestic law or not. The Merchant Shipping Act 1988 contained provisions relative to fisheries in UK waters which the European Court had held

to be incompatible with the enforceable community rights of non-British nationals concerning fishing in those waters. Did the 1988 Act implicitly repeal section 2(4) of the 1972 Act, or should the 1988 Act be disappplied in relation to nationals of other EU member states in accordance with their 'enforceable community rights'? The House of Lords held that it was proper to disapply the 1988 Act in this case, because the UK's original decision to accede to membership of what was then the European Economic Community necessarily entailed acceptance of the overriding effect of EEC law, both law passed prior to and law passed subsequently to the 1972 Act. Moreover, as Wade²⁰ pointed out, this meant in effect that by the 1972 Act Parliament had abolished the previously asserted and understood power of a later Parliament to repeal or amend any earlier law, whether by express words or by necessary implication. He considered this to have involved a technical revolution.

It has become a topic of discussion, including further judicial consideration of the constitutional issue, how exactly to interpret the current doctrine of the constitution. The upshot seems however to be this: Parliamentary sovereignty remains in effect only in a new and much diluted understanding. According to this, Parliament could expressly repeal the 1972 Act wholly or in part, with a view to establishing a new rule in UK law that would violate some enforceable community right, or indeed with a view to totally revoking UK membership of the EU. Such an enactment would have to be recognized as valid in UK law by UK courts, under this interpretation. But only a deliberate and explicit provision would have this effect and it would have to be contained in an Act of Parliament of a manifestly constitutional kind.

It is worth remarking that the political constraints against any UK government promoting and securing the passage of an Act deliberately violating some community right would be considerable, since this would have the effect of putting the UK into a condition of clear violation of EU law. This would in turn entail the possibility of sanctions being applied and indeed ultimately the possibility of suspension or exclusion from membership of the Union. Total withdrawal from EU membership is a possibility both in terms of domestic law and in terms of EU law according to possible reform currently under consideration. But the political and economic disadvantages of withdrawal from membership still seem too great to make this a serious course for any UK government to contemplate, despite the considerable unpopularity of Union membership in sections of the British press and among many UK citizens.

²⁰ Wade 1996.

The conclusion of all this is that traditional common law sovereignty in the understanding given to it first by Dicey and subsequently by Wade with Hart's support is obsolete. To the extent that the sovereignty of Parliament lies at the heart of UK constitutional law, it does so only in a radically new interpretation. It has to be interpreted in the light of the commitment to EU membership, and thus in the light of the principle of the primacy of EU law over member state law within the spheres of responsibility transferred to the EU and its institutions. It has to be understood as compatible with a substantial transfer of law-making power in respect of the UK to the EU institutions (in which, of course, the UK is an active participant alongside the other member states). While other member states have different constitutional structures and traditions, it seems not unreasonable to conclude that 'sovereignty' so far as it might have been ascribable to the position occupied by the legislature under the constitution of any of them, could not but have undergone a similar transformation under the impact of accession to membership of the EC/EU. Internal sovereigns within the constitutions of EU member states are now seriously diminished sovereigns, and would not qualify as sovereigns at all under the classical understanding expressed most unequivocally in the traditional British doctrine of the sovereignty of Parliament

V

The conception of sovereignty that ascribes sovereignty to the state as an entity existing parallel to other like entities does not necessarily share the fate of the conception that seeks a single internal sovereign with final legal or political power within the state. Let us note again the conceptions of sovereignty under consideration here. It was said above that:

A 'sovereign state' is one that is fully self-governing and independent of external control, and this condition is the 'sovereignty' of the state. Sovereignty can also refer to the whole congeries of a state's powers. The sovereignty of a sovereign state may thus be conceived as comprising the aggregate of the state's powers, however they are exercised and by whomever.

We may briefly remark in relation to the 'aggregate of a state's powers' conception that this is not substantially challenged by the developments we are discussing. Federal systems of government divide the powers of the state both horizontally and vertically, and avoid the establishment of any internal organ of government with sovereign power. But federal states are fully independent members of the international community

and enjoy sovereignty as much as do those with more unitary constitutions along the lines of the UK.

The question for discussion in the EU context concerns what becomes of a member state's sovereignty under the impact of the principles of primacy and direct effect of EU law. In particular, we need to consider the implications of the fact that, in a considerable number of domains, the law-making process of the EU can proceed by way of Qualified Majority Voting (QMV) in the Council, in co-decision with the European Parliament and with the concurrence of the Commission. The upshot of this is that it is possible for the member state's own domestic law to be superseded by legal instruments adopted by the EU subsequently to the state's accession to the Union, and quite possibly rendering inapplicable domestic laws enacted since the date of accession. It is possible for this to occur in cases where the state votes against the EU proposal under QMV, just as much as when it supports the QMV majority. The state can thus become subject to, or can be required to accept into its own legal order, a legal provision which no minister or official of that state has supported, which is opposed in the state's parliament, and which the state voted against in the Council. It could also happen that all the MEPs representing the state may happen to have opposed the law when the European Parliament voted on it.

No doubt, the diplomatic style of intra-EU negotiations, especially those around the Council of Ministers, seeks to avoid such confrontational possibilities, and the likelihood of frequent such occurrences in respect of this or that member state may in fact be low. But it is certainly not non-existent, and the whole point of the development (and currently proposed extension) of QMV has been to prevent the freezing of legal development and to facilitate a more rapid response to proposals for law reform in domains of community law-making. So the principle is indeed that member states have, by agreeing to the treaty reforms that brought in and steadily expanded QMV, deliberately opened themselves to the possibility of becoming bound by laws to which their own governing authorities may be opposed. They will become so bound if, following a proposal from the European Commission, a sufficient majority of other member states, together with a majority of MEPs voting in the European Parliament (in case of co-decision), so decide.

On the face of it, this has all the appearance of a loss of sovereign independence. Law-making for the state is no longer its own internal business entirely. New law can arrive from without, in accordance with decisions taken by other states and EU institutions. This new law has to be treated as binding and as having direct effect. It overrides domestic law made by the domestic legislative process, both laws in force at the

time of a state's accession and laws subsequently made. This does not seem to fit the image of classical state sovereignty.

Certainly, that is not all that has to be said about the matter. It has been the exercise of each state's internal power of constitutional reform, applying its own constitution-amending power, that has validated the state's accession legislation. The states are validly members of the EU because they validly amended their constitutions to make this possible. Moreover, their own constitutional courts and tribunals have made it clear that, when the matter falls to be considered as an issue of the state's constitutional law, any transference of power to the European institutions is only as extensive and effective as the state's own constitution allows. How far it does allow such transference is in turn a matter for decision by the state's constitutional authorities, in particular by the judicial branch, and in particular the constitutional court, where there is one. On this footing, it can be claimed that there is here no true loss of sovereignty, but simply a process of conferral of power by way of delegation under the constitution of each state.

When European institutions make law that binds the state, they do so by virtue of a power constitutionally conferred by the state, valid according to its own constitutional process. This amounts to an exercise of sovereignty, not a derogation from it. The fact that the European institutions, and in particular the European Court of Justice, might interpret the extensiveness and the effect of the law-making power, and thus the impact of laws made in exercise of it, differently and possibly more extensively than national courts does not disturb this argument. Of course there can be conflict between legal systems, and the same question may receive a different answer from different courts working within different systems and possibly applying different interpretative approaches to similar legal materials.

It does, however, remain the case that legal coherence at the EU level is bound to depend on a substantial degree of deference by national courts to the ECJ's interpretation of the common laws of the EU. If it were to come about that there is EU law in its German version, in its British version, in its Estonian version, in its Czech version and so on, with serious differences among these versions, there would effectively cease to be EU law. The whole point of the fundamental decisions about primacy and direct effect would then be lost. The EU works because (or to the extent that) it is a union-under-law, and that the law under which it functions is genuinely common to and shared among member states. Now it may well be that success in functioning thus depends at least as much on wise politics, including wise judicial politics, as upon strict law. The politics of interpretation of EU law both at member-state level

and at the level of the EU institutions matter greatly in sustaining the whole enterprise. An excessive readiness to assert classical sovereignty (or indeed to re-assert parliamentary sovereignty in a traditional way) would subvert the necessary mutually accommodating politics of interpretation that can sustain the integrity and coherence of the Union and its law, thus of the Union as a union-under-law. So far as concerns relations among member states as such, and relations of member states with institutions and of institutions with member states, one seeks surely a politically compromised legal sovereignty. That is preferable to the kind of general autarchy that could emerge from a readiness to assert traditional sovereignty in respect of each state.

Of course, it is not only the states' constitutions that are at issue, and not only the Community and Union treaties considered in their function as a 'constitutional charter' of the Union. For the treaties are indeed treaties and they bind the member states by virtue of international law itself under the principle *pacta sunt servanda*. So when the states interpret their delegation of power to the EU institutions in good faith and seek to uphold a coherent common conception of EU law as common and shared law among themselves, they do no more than comply with international law and exhibit an appropriate spirit of comity among the member states and towards the institutions. This does not point to a deficit in international sovereignty, but simply to its sensible exercise. An important capability of sovereign states is that they can enter into pacts and treaties with each other, both bilaterally and multilaterally, and they can (especially likely in multilateral treaties) establish common institutions and agencies to implement effectively common legal regimes established through treaties. The EU may indeed represent a particularly dense and concatenated example of such institutional implementation, but that does not disturb the point of principle. States exercise their sovereignty by entering into treaty relations. They thereby become subject to new mutual obligations under international law, but such obligations are not fetters on sovereignty so much as willingly accepted consequences of its exercise.

Irrevocability of such obligations might be more problematic. As a matter of general law, the *clausula rebus sic stantibus* is understood as applying to treaty obligations in general. Circumstances can so change that it is legitimate to denounce and depart from a treaty wholly or in part. Hence no incurring of an obligation under a treaty means being permanently and irrevocably bound, no matter what. In this, a treaty regime would differ from a constitution established by the member states of a federal union, where this is understood to preclude a state's unilateral secession from the federal compact. (Such was the, or a,

central issue concerning the constitution of the United States in the context of the Civil War of 1861–5).

Recent developments in the EU show movement of opinion on this issue. The original Rome Treaty was concluded on the basis of its coming into force without limit of time and with a view to promoting an ever closer union of the peoples of Europe. The possibility of a state's choosing to withdraw unilaterally was nowhere contemplated; and, had the original Communities been seen as temporary expedients, the history of Western Europe and subsequently of all Europe would have doubtless been greatly different over the second half of the twentieth century.

Was it then a potentially revolutionary or at any rate a serious change when the Convention on the Future of Europe, in drafting a 'Treaty Establishing a Constitution for Europe' included article 59 (subsequently article 60, after adoption of the Treaty by the European Council and member states in 2004)? This article conferred on each member state the right to withdraw from membership by application of its own appropriate constitutional process. A procedure was established for doing this and for regulating the continuing post-withdrawal relations of the ex-member state with the continuing Union and its members. This provision has survived into the Lisbon Treaty of 2007, and thus into the European Union Treaty.

Taken together with the strong assertion of the 'principle of conferral' of Union powers as stated both in the failed 'Constitution' and successor documents, this may again suggest a certain attitude to sovereignty among member states. The member states want it to be clear that it is they who collectively confer power on the Union and its institutions, doing so by exercise of their treaty-making power. This is not a matter of a *pouvoir constituant* exercised by an inchoate but coming-into-existence 'people of Europe'. Moreover, the Union on which they confer power is a continuing voluntary association of members, who can withdraw from it if they choose, thereby revoking any powers of law-making they have delegated to the Union and its institutions. Implicitly, at least, there is here a reservation of sovereignty on behalf of each state, however unlikely any one of them may be to exercise the right of withdrawal.

Considering this in the light of contemporary debate, the developments most recently considered may well suggest that what is in play is something like what Neil Walker has styled 'late sovereignty' rather than 'post-sovereignty'. Certainly, if we take primarily a legal or jural reading of sovereignty, and focus primarily on the ascription of sovereignty to states as such and to EU member states in particular, this would seem a reasonable conclusion.

We need to remember, however, that a political or mixed jural-political reading is also possible. The political constraints on any member state withdrawing from the Union are considerable, given the possible economic impact and the subsequent problem of relating to a large internal market having sacrificed any effective voice in the making of its law. The political price for Europe and the world of any general movement to withdrawal and to dissolution of the Union would be frightening. The contribution of the Union to the circumstances of peace in Europe cannot be too strongly valued, and the risk of its loss would be appalling. These are the underlying or background realities that make so imperatively desirable the earlier discussed politics of interpretation of EU law at the interface with member state constitutional law. On this account, it does seem that, while legalistically late sovereignty is preserved, there remains a case for the 'post-sovereignty' thesis when this is applied either to the question of internal sovereignty as possessed by parliaments in states, or to the external sovereignty of states in the light of general international law read in the light of the constitutional order both of the member states and of the Union collectively. Assuredly, in the case of a complex and polysemous discourse such as that of sovereignty, and in the light of its character as both cluster concept and contested concept, one cannot assert any simple conclusion. But the post-sovereignty case is not by any means closed.

9 Prolegomena to the post-sovereign *Rechtsstaat*

Patrick Praet

I

A huge scholarly output has problematized the topic of the post-sovereignty condition in general and the emergence of the European Union as a ‘polycentric, pluri-systemic, multi-state legal order’¹ in particular. If sovereignty is the supreme legal authority of the nation to give and enforce the law within a certain territory without exterior interference,² we are witnessing a transformative decline of this authority on a hitherto unprecedented scale with the bulk of member states’ statutes now originating in European harmonization directives or framework decisions. This transformation has especially raised concern with respect to the democratic process and the self-determination of the member states.

However, this chapter does not concern itself with these aspects of the transformation(s) but focuses instead on the possible consequences for the *Rechtsstaat*, the continental conceptualization of the rule of law. The choice of subject matter follows from the *Rechtsstaat*’s undeniable sociological importance and normative potential in various European legal traditions. On the one hand, there is the concept’s centrality as the mutual articulation of two fundamental principles of political philosophy, the state and the law, whereby the law builds the very structure of the state instead of just being an external limitation to it. On the other hand, the *Rechtsstaat* is widely considered to be a safeguard against state encroachment on the civil and political rights of the individual. This original nexus between empowerment and restriction has earned the *Rechtsstaat* ideal its position as one of two touchstones against which state policies and actions are critically evaluated, the other one being the democratic form of government. As a matter of fact, in common continental parlance *Rechtsstaat* and democracy are usually coined together in the ideal of the ‘democratic *Rechtsstaat*’.

Authors’ note: this chapter was written in spring 2009, before the Lisbon Treaty came into force.

¹ MacCormick 1999, p. 105. ² Morgenthau 1948, p. 341.

But whilst the impact of ‘overlapping’ sovereignties, ‘multi-level’ governance etc. on national self-determination is pretty straightforward to decipher, the effect – if any – of ‘pluralist legal orders’ on the discourse and practice of the *Rechtsstaat* is much less obvious. To start with, there is an analytical distinction between the possible conceptualization and impact at the domestic level of the member states and at the supra-national level. From a logical point of view, the legal order of the European Union may conform to the rule of law whilst that of the member states does not, or vice versa. The *Rechtsstaat* may function at the municipal level and be dysfunctional at the international level. Indeed, following a 1–1, 1–0, 0–1 and 0–0 matrix, there are four logically possible combinations between external/domestic sovereignty and the realization/absence of *Rechtsstaatlichkeit*.

Second, there is no single, authoritative definition of *Rechtsstaat*, and different traditions and epochs have taken different approaches (e.g. a strict separation of powers vs. a system of checks and balances, constitutional review vs. supremacy of the parliamentary legislature). The practice at the level of the member states shows no monolithic bloc either: the constitutional principles are firmly established in the political and legal culture of some member states whilst still in an initial phase in others (and this divide does not necessarily coincide with the division between old and new member states, the number of scandals in some founding member states pointing to the contrary).

To complicate analysis further, in one and the same member state there may be compliance in certain fields (e.g. separation of powers, access to justice) and downright violations in others (e.g. respect of minority rights, transparency of government). The same holds true for the European Union. Also, the concept of an exclusively domestic legal order (understood as the absence of external oversight of the rules of the domestic order) is outdated; to some extent all legal orders are post-sovereign. This is particularly relevant for the member states of the European Union that are both destinataries and *pouvoirs constituants* of community legislation.

The absence of an unequivocal logical connection between the locus of sovereignty and the realization of legal goals compels us to an empirical analysis of performance. However, there are no straightforward empirical tests that would allow us to measure a decline or rise in *Rechtsstaatlichkeit*. Nonetheless, we believe that it is possible to discern some core elements and their positive or negative evolution, especially regarding the protection of individuals and the availability of legal remedies. As the outcome of our necessarily limited analysis will demonstrate, the track record of both member states and the

EU is ambivalent, showing excellence in one aspect and deficiency in others.

The first section will deal with the origin and meaning(s) of the concept of *Rechtsstaat* and will try to elucidate the concept by comparing it with its Anglo-Saxon counterpart, the rule of law. Both being ‘essentially contested concepts’³ it is nonetheless possible to identify some core elements and a consensus about the minimum criteria that any *Rechtsstaat* should meet.

In the second section we will subject these criteria to some empirical analysis, especially at the level of the European Union. On the basis of our (mixed) findings in this section, the notion of ‘optimum sovereignty’ is introduced in the third section, holding that the desirability of safeguarding a legal order’s sovereignty might be assessed in terms of *Rechtsstaatlichkeit* and evaluated accordingly. The inspiration for this exercise comes from Alesina and Spolaore’s argument that the optimal size of a country is not a simple unalterable matter of fact but a subject of analysis. In their book *The Size of Nations* (2003) they argue that the optimal size of a country can be determined by a cost–benefit trade-off between the benefits of size (scale economies) and the costs of heterogeneity (disadvantages of ‘one-size-fits-all’ policies). Thus, a particular amount and nature of a given public good may be near-optimal in a small nation with homogeneous preferences but sub-optimal in a larger, less homogeneous nation.

We believe that this insight is valuable for our debate. *Mutatis mutandis*, the optimum level of sovereignty may be determined by a trade-off between the benefits of increased protection of individuals’ rights and the costs of heteronomy. In a country without a domestic tradition of *Rechtsstaatlichkeit*, it may be rational to adhere to a supra-national system, whereas in a legally developed culture, the loss of sovereignty may be too high a price to pay for only a marginal improvement in the public goods offered by the *Rechtsstaat*.

II

Literally thousands of books and articles have been dedicated to the concept of *Rechtsstaat*, but to this day there is no single definition that manages to capture all 25 norms and 139 derived principles that are said to be comprised in the concept.⁴ To begin with, the term itself is not unambiguous: as a matter of fact ‘problems start with the very word’,⁵ neither law nor state possessing fixed boundaries. As a result,

³ MacCormick 1984, p. 66. ⁴ Sobota 1997, p. 34. ⁵ Van Caenegem 1991, p. 185.

the meaning and extension of the concept have evolved considerably since its origin.

The concept of *Rechtsstaat* was first introduced by the German professor and statesman Robert von Mohl (1799–1875). In his influential book *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*⁶ he compared the *gesetzmässige Verwaltung* or law-abiding administration in a *Rechtsstaat* to the arbitrariness of government in an *Obrigkeitsstaat* or authoritarian state. The concept quickly caught on, influencing in particular administrative law by pointing to the need for legal security and predictability in the state's interaction with its citizens. In these early writings, law was exclusively understood in a positivistic sense, free from moral or political influences. Virtually all authors of this period (Bähr, von Gneist, von Gierke and many others too) adhered to von Stahl's famous programmatic outcry: 'The state ought to be a *Rechtsstaat*.'

A prominent theorist of this approach was the German constitutionalist Richard Thoma⁷, to whom we owe a catalogue of the following key principles:

- (1) the omnipotence of statutory legislation;
- (2) the subjugation of the administration to law, including judicial review of administrative action;
- (3) the presence of a legal remedy afforded by a court of law;
- (4) a warranty against wrongful implementation of statutes; and
- (5) the creation of a systematic legal order based upon public law instruments.

Because of its moral neutrality and insistence on strict legality, irrespective of the content of the law, the approach above was dubbed the *formal Rechtsstaat*.⁸

Unfortunately, this commitment to formal procedures alone has proven tragically insufficient under dictatorships that have held substantive standards of justice in contempt but have nonetheless maintained a formal legal apparatus and the appearance of legality. After all, Nazi Germany prided itself on being a national-socialist *Rechtsstaat*, whilst the Soviet Union had its own somewhat idiosyncratic rule of law – the *sotsialisticheskaia zakonnonst* or socialist legality. A direct reaction against the bitter lessons of the past, the German *Grundgesetz* of 1949 kept the requisites of the *Rechtsstaat* in a formal sense, but complemented it with the notion that all state activities, including legislation, are bound by a set of higher principles, including basic rights, substantive liberties and fair procedures.

⁶ Von Mohl 1844. ⁷ Thoma 1910. ⁸ Blaau 1990, p. 78.

This inclusion of substantive criteria of justice, even extra-legal values, has led to the concept of *material Rechtsstaat*⁹, which is sometimes stretched even further to encompass an overall view of society: ‘To sum it up, the democratic *Rechtsstaat* presupposes a constitution based on democracy and fundamental rights, but in addition to this constitutional demand, also requires an active and independent civil society.’¹⁰ A classic synthesis of both material and formal aspects was offered in Klaus Stern’s famous definition: ‘*Rechtsstaatlichkeit* means the exercise of state power on the basis of laws in conformity with the constitution and aimed at maintaining freedom, justice and legal security.’¹¹ An evolution from a mere formal concept to a synthesis that encompasses a set of material principles has also taken place in the continental legal systems that have adhered to the ideal of the *Rechtsstaat* (and usually kept the German term in translation: *estado de derecho*, *stato di diritto*, *État de droit*). It is in the inclusive, substantive variant that the *Rechtsstaat* has often been closely associated with the Anglo-Saxon concept of the rule of law that likewise has given rise to disagreements about its true meaning, with different authors stressing different aspects.¹² This is not the place to explore the origins and meanings of the rule of law. It suffices to say that its resemblance to the concept of *Rechtsstaatlichkeit* varies according to the features included in one’s definition of the rule of law.

Regardless of any possible convergence, a number of differences between the two concepts will always persist. First, a *Rechtsstaat* is subordinated by its own positive law, whereas in the case of the rule of law, the state is subordinated to a plurality of sources and principles, which might even be external or pre-political, up to the point of being assimilated to moral principles. Second, continental thinking has been heavily influenced by the dualism of state and society and the opposition between political and civil spheres. The *Rechtsstaat* functions as an antidote to unchecked state authority, be it in the form of democracy or absolutism. Due to the parliamentary history of Britain, civil and political societies appear less opposed to each other and the rule of law could subsequently be idealized as the fusion of political and individual freedom. Dicey famously claimed that parliamentary sovereignty has overcome the logical antagonism between law and politics: ‘The sovereignty of Parliament, as opposed to other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality

⁹ Böckenförde 1991, p. 66. ¹⁰ Tuori 1992, p. 461. ¹¹ Stern 1984, p. 615.

¹² For overviews of the different meanings, see Goodhardt 1958; Radin 1989; and Bennett 2007.

throughout our institutions evoke the exercise, and thus increases the authority, of parliamentary sovereignty.¹³

Third, the continental *Rechtsstaat* relies on a written constitution and legislative codes as the prime source of legal activism. This contrasts with the enforcing of the individual's rights through judge-made law and precedents in the common law tradition, which, according to Dicey, is the very reason why the English never had a need for a written constitution. Fourth, the (German) *Rechtsstaat* incorporates a rather important obligation for the administration: that of the *Verhältnismässigkeit* or proportionality.¹⁴ This principle needs to satisfy the following two basic criteria. The interference of a measure with a basic right or with the general freedom of conduct must be both appropriate and necessary to the achievement of the stated purpose of the measure. Also, the detriment caused to the individual must not outweigh the advantage of the measure to the public good. This aspect appears entirely missing in any definition of the rule of law. Fifth, whilst there is no dispute that all state authorities, including the legislature, are bound by the (material) imperatives of the *Rechtsstaat*, it is not so clear whether the rule of law doctrine can also serve to limit the power of a representative parliament.¹⁵ In spite of these five differences, the *Rechtsstaat* is compatible with the generally accepted irreducible minimum content of the rule of law as famously formulated in Joseph Raz's eight principles.¹⁶

For the purpose of this chapter, we will have to limit ourselves to a number of irreducible key features¹⁷ of a contemporary *Rechtsstaat*. There is a wide scholarly consensus that the following features are necessary conditions for *Rechtsstaatlichkeit* in the formal sense:

- (1) the principle of legality and the subjugation of all three branches of government to a constitution;
- (2) the separation and differentiation of government power into a legislature, an executive and a judiciary;
- (3) the presence of a legal remedy and an independent judiciary.

These are to be supplemented by two equally important substantive approaches:

- (4) equality before the law;
- (5) a working system of fundamental rights.

When discussing these features we should keep in mind that conceptual differences exist between *Rechtsstaatlichkeit* at the European level,

¹³ Dicey 1959, p. 38. ¹⁴ Stern 1984, pp. 671–5. ¹⁵ Jennings 1952, p. 47.

¹⁶ Raz 1979, ch. 11; Raz 1983, p. 212. ¹⁷ Freckmann and Wegerich 1999, p. 60.

on the one hand, and at the level of the member states, on the other. The legal activity of the member states can further be divided according to its origin, i.e. domestic proper or the transposition of directives and framework decisions. The linguistic question whether a non-state like the EU can technically ever hope to qualify as a law-based state is of lesser relevance since the EC Treaty, albeit an instrument of international law, does constitute the constitutional charter of a community based on the rule of law.¹⁸ One may also notice disparities in national notions and therefore advocate ‘a strict separation between the rule of law as applied in the national legal context and the rule of law to be employed within the system of community law’.¹⁹ However, the treaties and the European Court of Justice (ECJ) have not introduced their own definition of *Rechtsstaatlichkeit*, legality, legal review, etc., but have instead referred back to the members states’ common constitutional traditions and general principles of law,²⁰ thereby avoiding a two-tier conceptualization. In view of the space constraints of this chapter, we must limit ourselves to a few telling examples taken from the EU level only.

III

The foremost, almost tautological feature of any law-based state is the subjugation of government to the law, i.e. that regulations, directives and decisions must meet standards of substantive and procedural legality. In the European Union, the legality debate has taken a somewhat specific form. The occasional infringement of essential procedural requirements notwithstanding, legality is tantamount to the question of competence and adequate legal basis, consecutive treaties requiring both Union and individual institutions to act within the limits of the powers conferred upon them. This requires that action must always be undertaken by the proper institution and be correctly based upon a particular Treaty article. The action has to be necessary, and the reasons for which it has been enacted must be stated in the preamble. Furthermore, in areas which do not fall within its exclusive competence, the EU can take action only in accordance with the principle of subsidiarity, meaning that it can act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states. The rationale for this strict system resides in the limited conferral of competence (‘sovereignty’) and in the different decision-making

¹⁸ Esteban 1999, p. 102. ¹⁹ Kochenov 2009, p. 5.

²⁰ Case 63/72, *Werhan Hansamühle v. Council* [1973] ECR, 1229.

modes that vary according to the concerned ‘pillar’. Keeping this in mind, one can easily understand why having a correct legal basis and community competence have always been central to the judicial review carried out by the ECJ. Oddly enough, though, a direct challenge based on a lack of overall EU competence (as opposed to a lack of competence of individual institutions) has hardly ever been upheld by the ECJ.²¹ (The lack of competence of the Community for a general prohibition of advertising tobacco products was admitted in Tobacco Advertising I C-376/98 but later reversed in Tobacco Advertising II C-380/03.)

The reason may be the very flexible, if not generous, interpretation of competence based on the idea of implied powers according to which ‘the rules laid down by an international treaty presuppose the rules without which that treaty would have no meaning or could not reasonably and usefully applied’.²² It is precisely the extension of this doctrine of implied powers that has elicited stern criticism. A prominent case in point is the *Mangold*-ruling²³ in which the ECJ found the German labour market reform to be inconsistent with the non-discrimination directive 2000/78/EC despite the fact that labour market policy remains a core competence of the member states (and member states had yet another year to transpose it into national law anyway). Another example is the ECJ’s creation *ex nihilo* of an EU competence in the field of criminal law,²⁴ notwithstanding unmistakable treaty provisions excluding it. This was done by stating that the protection of the environment through criminal law should not have been adopted under the third pillar intergovernmental provisions on police and judicial cooperation in criminal matters (which require unanimity), but relying on an implied power under first pillar provisions, which usually require a qualified majority vote of member states and co-decision with the European Parliament.

A further deviation from the overall strict observance of legality is the implementation of policies and allocation of budgets as if the Lisbon Treaty were already in force, a recent example being the Economic Recovery Plan of 26 November 2008.²⁵ In all fairness, these regrettable occurrences have to be considered in the context of the gigantic unproblematic caseload and the overall very consistent practice of the institutions of designating a compulsory legal title for their every action.

²¹ Weatherill 1995, p. 167. ²² Case 8/55, *Fédéchar* (1956) [1956] ECR, 292.

²³ Case 144/04, *Mangold* [2005] ECR I-9981.

²⁴ Case, 176/03 *Commission .l. Council*. OJ C 315, 10.12.2005, p. 2.

²⁵ Com (2008) 800.

IV

Fundamental rights were accepted as general principles of Community law already in 1969. A year later it was famously decided that the protection of fundamental rights in the Communities was to be provided at the level of Community law, which has primacy over national constitutional law.²⁶ Consequently, numerous cases have dealt with the scope and application of fundamental rights. In relation to the theme of our chapter, particular attention needs to be paid to the following features of the present situation.

First of all, there is the so-called question of *multi-level protection*: how will the different actors and instruments work together in the furtherance of the fundamental rights of the individual, more specifically, what are the respective roles of national constitutional courts, the ECJ and the European Court of Human Rights (ECtHR)? It would be a truism to state that the ECtHR has shaped the living contents of fundamental rights in the signatory states (including all twenty-seven member states of the EU) far more than any legislative or executive text ever has. According to Krisch, the ECtHR has ‘begun to resemble a supranational constitutional court with an ever stronger anchoring in the domestic legal orders of Member States and general acceptance as the ultimate arbiter of human rights disputes in Europe and has come to be seen a part of the constitutionalisation process’.²⁷ Indeed there’s no denying this constitutionalization in the sense of ‘polity formation’ on the basis of shared rules, norms and paramount values in the material sense.

Under Article 6, 2 of the Lisbon Treaty, the European Union as a legal entity is to accede to the European Convention on the Protection of Human Rights and Fundamental Freedoms, whilst Article 6, 1 holds that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 (adopted 12 December 2007) which shall have the same legal value as the treaties. With the coming into force of the Lisbon Treaty, there will be several enforceable sources of protection of fundamental rights in each member state. This poses a double organizational challenge: how to structure the future architecture of fundamental rights protection considering the multi-polar constellation of the ECtHR, the ECJ and national constitutional courts as well as the pluralism in legal sources. This pluralism of sources entails a pluralism

²⁶ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR, 825.

²⁷ Krisch, 2007, p. 11.

of dogmatic meaning with the ensuing danger of internal contradictions between definitions at different levels and different treatment undermining legal security. The Bio-Patents-directive case has demonstrated the need for a clear delimitation of human dignity as a fundamental right and the possibility of justified encroachments.²⁸

A second issue that has raised concern is the EU arrest warrant²⁹, which has introduced three novelties into the hitherto reciprocal international agreements in extradition matters. First, most legal systems (with the notable exception of the United Kingdom) are reluctant to extradite their own citizens and have therefore installed a number of safeguards, such as the dual criminality principle. Around half of the EU's member states have even incorporated a wholesale prohibition on extradition into their constitutions and had to amend these before implementation of the framework decision. The most notable case was Germany, where the Federal Constitution Court originally annulled the implementation act because of the 'disproportionate' encroachment on the extradition ban laid down in Article 16, 2 of the Basic Law and the exclusion of recourse to a court guaranteed by Article 19, 4 of the Basic Law.³⁰ The EU arrest warrant dispenses with these safeguards in the case of thirty-two expressly enumerated criminal offences (that are formulated rather non-technically by categories of offences in the Decision, e.g. 'racism and xenophobia') and in those cases the surrender and extradition can be required if the deed is punishable under the law of the requesting state only. In the absence of a harmonization of the criminal law of the member states, this leads to the situation that citizens may have to be extradited for conduct that does not rank as a criminal offence in their home country. This is particularly true in the case of certain types of computer criminality that are punishable in some member states and not in others, e.g., holocaust-denial via websites or the depiction of certain symbols. Not only may the behaviour not meet the material elements of a criminal offence in the home country, it may even rank as a fundamental freedom (free speech) protected by certain member states' constitutions. This poses a serious problem of legal certainty and has given rise to a number of high-profile cases in member states such as Belgium (Verbeke) and the United Kingdom (Toben).

Second, the framework decision is based upon the *counterfactual* premise that there is sufficient convergence in terms of criminal law and policy. The fact that all member states are signatories to the European

²⁸ Case 377/98, *Directive on Bio Patents* [2001] ECR, I-7079.

²⁹ Framework Decision of the European Council of 13 June 2002, on the European Arrest Warrant and the Surrender Process between Member States, 2002/584/JVV.

³⁰ BverfG, 18 July 2005, 2 BvR 2236/04.

Convention on Human Rights (ECHR) does not preclude significant differences in the duration of procedures (and pre-trial arrest periods), powers of the authorities, severity of punishments and detention conditions. Moreover, the simple act of standing trial in a foreign country presents huge practical problems in terms of language barriers, free choice of counsel and visits by relatives, not to mention culinary preferences (see the sarcastic dissenting opinion of Justice Stanislav Balík in the Czech Constitutional Court's decision on the EU Arrest Warrant).³¹ All these elements constitute a serious disadvantage for the accused. Third, there appears to be a contradiction between the 'free movement of suspects' and Article 14, 4 of the EU Charter of Fundamental Rights according to which no citizen may be forced to leave his homeland. This provision envisaged forced expulsion of political opponents and ethnic minorities but is nonetheless framed as an unconditional and inalienable right. Legal practice at different levels will no doubt fine-tune a new equilibrium between habeas corpus and the needs of efficient law-enforcement in a borderless Union. From a rule-of-law perspective this is absolutely necessary, for strict rules concerning arrest and criminal proceedings belong to the very essence of any law-based state.

V

With regard to the separation of powers, the first thing that springs to mind is the well-documented *sui generis*, idiosyncratic legal order of the European Union that goes beyond traditional international law instruments by virtue of the role and powers of its institutions.

The main deviation from a traditional *trias politica* lies in the role of a non-elected body, the Council of Ministers, made up of members of national executives, as main legislator. This absence of a proper parliamentary conceptualization can be traced back to the inter-governmental and international origins of the EEC and the fact that the decision-making powers of the EEC were 'executive' rather than legislative in character. The introduction of the co-decision procedure, today applicable to the majority of legal competences of the European Union, allowed for the coy *parliamentarization* of the European Union's legal order. However, even under the (revised) Constitutional Treaty, the Council will continue to act as the main legislative body and thus infringe the principle of the separation of powers because the overwhelming majority of laws now in force in different EU member states have been decided upon by the EU Council of Ministers and not by a directly elected parliament.

³¹ Pl. US. 66/04.

Second, there is the issue of comitology or the system of delegated legislative powers. The EU Treaty allows the Commission to have delegated authority to oversee the implementation of legislation on the ground, working through committees of different plumage. These literally hundreds of bodies made up of members from the member states, independent experts and representatives from industry are de facto in charge of a great deal of secondary legislation (no less than 2,856 acts in 2006). Before the Comitology Regulation of 2006, the field was entirely beyond the European Parliament's control, as the parliamentary co-legislator could neither formulate nor review the mandate for delegated powers in those situations where the EC Treaty provided for co-decision. Under the new rules the European Parliament is able to call back any item for review previously delegated to the Commission under the ordinary legislative procedure, the so-called regulatory procedure with scrutiny.

Third, there has been repeated criticism of the fact that there is no appropriate hierarchy between the different categories of acts: all secondary law (i.e. regulations, directives, decisions) is on an equal footing, whilst member states do differentiate between laws, ministerial decrees, administrative acts, etc. In spite of the fact that the European Parliament has been continuously demanding the recognition of a superior layer of Community parliamentary legislation above 'normal' secondary law, no hierarchical order has yet been established among the institutions mentioned in the Treaty of Rome.

Furthermore, there is no hierarchical differentiation depending on which 'legislative' procedure is used to adopt a Community act (an act passed under the consultation procedure effectively shares the same legal rank as an act passed under the co-decision procedure) and Article 249 EC does not classify its legal acts according to a constitutional scheme.³² As a result, the institutional perspective or 'grammar' of Community law has been labelled unstructured since both the Council and Commission can speak through regulations, directives or decisions, and different decision-making procedures do not correlate with specific regulatory instruments (and vice versa).³³

Last but not least, there is the European Court of Justice (ECJ) as a source of de facto legislation. Although it cannot bring and rule a case *proprio motu*, it is important to remember that it has been the ECJ, not the Treaty or the different Parliaments, that has established the predominance and the *sui generis* character of the European legal order.³⁴

³² Schütze 2005, p. 8. ³³ Bast 2003, p. 2.

³⁴ Case 26/62, *Van Gend en Loos* [1963] ECR, 1; Case 6/64 *Costa v. ENEL* [1964] ECR, 585.

VI

Another core element of any *Rechtsstaat* is the extent to which the legal system provides remedies against infringement of rights and an independent judiciary to assure legal accountability. In this field the EU has been a remarkable success story by moving away from the classical public international law situation (under which individuals only gained rights from their own internal laws) and by enabling individuals to challenge state actions on the basis of community legislation through the theories of direct effect, supremacy and state liability.

Three questions will grow in importance in the future. First, there is the matter of legal standing and the restrictive rules of individual access to the ECJ. At present only direct and individualized decisions can be challenged by the addressee. Under the new Article 230, to be modified by the Lisbon Treaty, individuals will be able to challenge any act addressed to them provided they can prove that the act is of direct but not necessarily *individual* concern to them and that no implementing measures are required. Under specific conditions, suits can be brought against actions of offices and agencies set up by the institutions. Dropping the need for individual concern may ultimately result in hitherto non-privileged plaintiffs like interest groups and non-governmental agencies achieving the required legal standing to initiate proceedings before the ECJ, which has been anathema until now.³⁵

The second question concerns the extent to which the ECJ is mandating remedies available at member state level to victims of breaches of substantive EC law. The Lisbon Treaty explicitly demands from member states effective remedies within their national legal orders. This demand is in line with an expansion of ECJ-jurisprudence in this area. Over the years, the ECJ has parted from its original position that it was for national courts to decide what remedies would be available. It has introduced a number of principles that have to be met: equivalence, practicality, proportionality and effectiveness. Whilst the ECJ has carefully avoided imposing a specific remedy, the requirement of effectiveness did de facto dictate the appropriate remedy (e.g. interim injunctions) or the amount of compensation payable. The ongoing development of ECJ-jurisprudence in this area nevertheless shows the need for clear boundaries.

The third problematic area is the relationship to other international fora. An episode that has received much attention has been the European Court of First Instance's (CFI) jurisprudence in a number of cases about

³⁵ Case 321/95P [1988] ECR, I-1651.

asset-freezing of suspected terrorists under Community Regulation No. 881/2002, which was adopted pursuant to Security Council resolutions establishing the 1267 sanctions regime. In two nearly identical judgements of 21 September 2005 (cases T-315 Kadi and T-306/01 Yusuf – Al Barakaat) the Court ruled that it was barred from exercising jurisdiction over Regulation No. 881/2002 in order to avoid an indirect review of the Security Council resolutions, which the Regulation meant to implement leaving no discretion to the Community. The CFI stated instead that the Charter of the UN prevailed over any other obligation and that this paramount character of the UN extended to decisions of the Security Council. This widely criticized refusal of judicial remedy resulted in a gross lacuna concerning fundamental rights protection for affected individuals and organizations whose status resembles *civil death*. Luckily, the ECJ has set these judgments aside,³⁶ holding that the right to review a regulation within the Community legal order is ‘a constitutional guarantee forming part of the very foundations of the community’ (paragraph 290) and has finally limited the effects of the attacked regulation for a maximum of three months. In so doing, the ECJ has signalled to the UN that an independent and substantive review of targeted sanctions and the possibility of delisting is long overdue.

VII

All modern constitutions hold to the equality of all citizens before the law, meaning that under this norm public authorities are bound to treat people in comparable situations alike. The original EEC Treaty did not contain a general equality clause but instead identified two forbidden grounds of discrimination, nationality and gender, speaking specifically to the requirement of equal pay.

Fifty years on, the objective has become to eliminate many more inequalities and promote gender equality throughout the EU in accordance with Articles 2 and 3 of the EC Treaty (gender mainstreaming) as well as Article 141 (equality between women and men in matters of employment and occupation) and Article 13 (sex discrimination within and outside the workplace). Gender equality has been supplemented by general anti-discrimination legislation, applicable in other areas than economy and labour. For example, Article II-81 of the Charter of Fundamental Rights prohibits discrimination of all sorts.

From our perspective, the specific way in which the secondary legislation banning discrimination (especially directives 2000/43/EC,

³⁶ Cases 402/05 *Kadi* and C-415/05 *Al Barakaat*.

2002/78/EC and 2004/113/EC) is drafted poses a number of problems. First, these directives have introduced anti-discrimination provisions into civil law (as opposed to labour law) and demand from the member states that they provide effective civil law remedies against horizontal discrimination of all sorts by private persons, including the refusal to deal with other parties. These directives and their transposition laws have sparked great controversy because of their horizontal effect and the obligation for parties to contract, personal preferences notwithstanding. It should be noted that the non-discrimination principle has also found its way into principle 7 and several articles of the Draft Common Frame of Reference (DCFR).³⁷ Second, Article 8, 1 of the Directive 2000/453/EC and Article 9, 1 of the Directive 2004/113/EC reverse the burden of proof. Rather than the plaintiff having to bring proof, the respondent in a case of direct or indirect discrimination will have to prove that there has been no breach of the principle of equal treatment or to invoke justified criteria for exception. Third, key provisions of the directives, including the term 'discrimination' itself, are blanket norms left to the courts' interpretation, thereby increasing legal uncertainty. An approximation to some principles laid out by the ECtHR might be helpful in this respect.

Fourth, anti-discrimination associations are offered *de jure* legal standing to engage in legal proceedings on behalf of victims. The fact that legal action can be undertaken by a third party paves the way for an *actio popularis*. And last but not least there is the much-debated issue of preferential treatment, i.e., permitted discrimination.³⁸ We will not dwell upon the landmark cases *Kalanke*³⁹ and *Marshall* but will simply recall that the strict reading by the ECJ of the grounds of the non-discrimination principle in the *Kalanke* case did not please the political powers and was therefore overturned by explicitly enshrining the possibility of affirmative action in Article 141, 4 of the Treaty of Amsterdam.

VIII

The substantive analysis of the way in which certain core elements of the rule of law are (not) upheld at EU level permits a number of observations with regard to the connection with national sovereignty.

First, the sketched problems at the EU level do not entail the conclusion that the situation must therefore automatically be 'better' at the level of the member states. Nothing conclusive can be said without

³⁷ DCFR, II. – 2:101 to II. – 2:105 and III. – 1:105.

³⁸ Sowell 2004; Howard 2008. ³⁹ Cases 450/93 *Kalanke* and 409/95 *Marshall*.

further empirical research, but the headlines that make it to the international press (e.g. Spanish anti-terrorism laws, French prison conditions, British tolerance of Sharia law, German persecution of home-schooling, Dutch curbing of free speech for parliamentarians, minority issues in several member states, etc.) hardly suggest that member states qualify *en bloc* as better disciples of the rule of law, to say nothing of the de facto disparities between the member states' legal realities as demonstrated by the huge disparities in the number of convictions by the ECtHR. The unspectacular reality seems to be that both the member states' and the European Union's records are sub-optimal in certain fields and up to standard in others. Conversely, the success story of the ECtHR and the EU's insistence on the rule of law in the accession negotiations with the new member states⁴⁰ do not conclusively 'prove' a positive nexus between the permeability of national legal sovereignty and the establishment of the rule of law. Some member states have no doubt benefited a great deal from the imposed 'import' of international standards. One should not forget, however, that these standards were not created *ex nihilo* by the European Union but rather have emanated and evolved from certain member states' constitutional doctrines and from the general principles of law common to all. Even the 'revolutionary' Article 119 of the Treaty of Rome (non-discrimination in labour law) was preceded by the International Labour Organization's Equal Remuneration Convention no. 100 of 1951.⁴¹ In this respect the European level can be described as a giant exchange or a particularly intensive form of rapprochement going beyond traditional legal comparativism or instruments of international law. The optimum level of legal sovereignty therefore differs between member states, some having already established an advanced *Rechtsstaat* early on (e.g. the *Bundesverfassungsgericht* upheld the horizontal effect of fundamental rights as early as 1958 in the Lütth case) while others are still in search of better solutions. It also differs from principle to principle, national systems leading the way in some aspects and lagging behind in others. In other words, there is no one-directional or definitive causal nexus between the sovereignty of a legal order and the qualification as a law-based state. The answer to the question as to whether one should be open to European influence or not should therefore be equally pragmatic: *quidquid bene dictum est ab ullo meum est*, whatever is well said by anyone is mine.

The second important thing to emphasize is how radically the meaning and definition of *Rechtsstaatlichkeit* is changing as a result of the attachment of increasing importance to the material aspect of fundamental

⁴⁰ Albi 2008, pp. 46–69. ⁴¹ Määta 2008.

rights. This development has upset the traditional balance in constitutionalism between the fundamental rights of individuals and the legality of democratic politics. The Charter of Fundamental Rights and the accession to the ECHR under the Lisbon Treaty are important steps in the ongoing prioritization of the legal over the political. Constitutionalism, judicial review and fundamental rights have traditionally been seen as a defensive mechanism against intrusions of politics. This we may call the old-style *Rechtsstaat*. But what we are witnessing today is a *Hyper-Rechtsstaat* in which democratic legal activity is increasingly being subordinated to a 'thick' type of (international) legitimacy based on fundamental rights, which leaves very limited possibilities to change the structure and outcome of policies.⁴² The impact of the *Metock* case ruling⁴³ on the member states' immigration policies regarding nationals of non-member countries who are family members of Union citizens is a fine illustration of this phenomenon. As excessive hyper-modes of phenomena ultimately tend to reveal their own antitheses,⁴⁴ a new equilibrium is necessary to avoid total deadlock. A new 'architecture' of fundamental rights with a new division of competences, a clear hierarchy of sources (including the elucidation of overlapping rights) and the loyal implementation of the subsidiarity principle are all long overdue. This is all the more necessary since the European Union has not installed a level of federal jurisdictions US-style but instead has opted for the view that the national judge is the community judge.

Fourth, the rise of the EU as a supra-national *Rechtsstaat* may have left the impression that the member states cannot but dance to the tune of the European institutions. Fierce battles notwithstanding, it should not be forgotten that the entire European construction, including the supremacy of EU law and the perceived juristocracy of the ECJ, has always been and still remains the expression of the political will of the member states. To paraphrase Carl von Clausewitz, the European level is the continuation of the domestic level by other means. The rationale is that delegating an issue to the EU level insulates it from domestic debate. A fine case in point is the European Arrest Warrant that actually serves no independent integration goal but is there at the behest of overzealous national authorities. The conclusion to be drawn is that the rule-of-law problems we have signalled in this chapter are ultimately symptoms of an attitude of the executives of the member states rather than an expression of truly conflicting sovereignties.

⁴² Hirschl 2004; Gearty 2005; Bellamy 2007; Praet 2007;

⁴³ Case 127/08, *Metock and others*, OJ C 236 of 13.09.2008, p. 4.

⁴⁴ Baudrillard 1988, pp. 144–5.

10 Sovereignty beyond the state

Jüri Lipping

I

We have become accustomed to regard the terms *sovereignty* and *state* as complementary to each other. It is thus unsurprising that the proliferation of current debates on sovereignty occurs against the perceived erosion of state authority in the contemporary world. But is this conceptual linkage the only conceivable option available for political thought? In today's situation, often characterized as the 'decline of the state', perhaps the only way to retrieve the concept of sovereignty in any meaningful sense would be to rethink it altogether outside the classical notion of the modern state. Consequently, if sovereignty is to remain the political concept par excellence, one could be advised to look first at the concept of the political itself. But precisely what kind of ontological possibilities – beyond the territorial state, that is – open up themselves through this shift in perspective? I will explore these issues by outlining the idea of political space as an openness or publicity (*Öffentlichkeit*), and by indicating certain alternative ways of retaining sovereignty within this new, post-foundational conceptual framework.

II

Sovereignty has been the key concept for the modern state since the inception in the sixteenth and seventeenth centuries. Expressions such as *sovereign state* or *state sovereignty* clearly indicate that historically, as well as conceptually, these two terms – sovereignty and the state – have run their course more or less hand-in-hand. In any event, the two outstanding theorists of sovereignty, Jean Bodin and Thomas Hobbes, were also the first original thinkers of the modern state. Bodin, in his treatise *Les six livres de la République*, famously defined sovereignty as 'the absolute and perpetual power of a commonwealth'.¹ And Hobbes responded

¹ Bodin 1986, p. 1

in *Leviathan* by arguing that ‘a Common-wealth, without Sovereign Power, is but a word, without substance, and cannot stand’.² In one way or another, ‘sovereignty’ is juxtaposed to ‘the state’ so that from the outset they appear to form a peculiar liaison in which they reciprocally support, empower and legitimate each other. The territorial state thus claims to be the bearer of sovereignty, while sovereignty in turn emerges as an essential attribute pertaining to the state. Conceptually, perhaps, this might indicate a vicious circle, yet this circle has effectively served as an absolute centre of political thought and political practice for many centuries.

Given this intimate relation, it is unsurprising that the ills of the one also necessarily affect the other. Indeed, for some time now we have been able to observe that the classical paradigm of the (modern) state is undergoing more or less extensive transformations, and these processes have gradually dislocated the entire framework of so-called Westphalian sovereignty. It is unlikely that we will soon witness the ‘withering away of the state’ altogether (as some Marxists would have it), yet there is little doubt that so-called globalization (and similar developments) have considerably diminished the importance and independence of individual states, thereby overstressing the old paradigm of national sovereignty. The state is still at the centre of the political landscape, but beside it there are other and different entities at play. Confronted with this steady erosion of the sovereign power of nation-states, however, it is often argued that sovereignty as such has by no means disappeared but simply changed its form. Whatever names this new form of sovereignty professes – be it global governance, cosmopolitan democracy, transnational citizenship, universal community, contingent sovereignty, empire, or whatever – it is said to be characterized by its gradual withdrawal from the boundaries established for politics by the modern state.

But it should be clear that such conceptual unravelling raises more serious problems than simply displacing sovereignty onto some other level, redefining its meaning, or even splitting it up into several smaller units. It is a mistake to regard concepts as independent, elementary building blocks which might be combined with each other at will. As a rule, concepts do not have a specific meaning or an essential content attached to them prior to their placement within some wider context. Indeed, their sense and reference varies not only temporally – which is rather obvious – but spatially as well, depending on the context and the complicated web of relations these concepts establish between each other, thus forming stable and meaningful frameworks which could be grasped as so many

² Hobbes 1996, p. 245.

conceptual schemas. Along these lines we could argue that mainstream political thought has been dominated by the so-called classical framework of political concepts, where the state (together with its *raison d'état*) has played the central structuring role in determining the rules of the game. What passes in this tradition for political thought is mainly concerned with issues such as the justification of political authority, legitimization of sovereignty and a normative appraisal of the 'good state'.

It would be naïve to think that, having considered all those recent trends and developments, the meaning and function of sovereignty will nevertheless remain the same. A concept cannot change its subject without being itself affected by this shift, without altering consequently its own structure and content. Once the centre becomes unstable, therefore, the entire conceptual edifice itself begins to crumble. In the worst scenario – or in the best, depending on one's viewpoint – it might signal that some sort of conceptual dislocation or paradigm shift is taking place, a certain process of re-articulation of elements, a formation of a new, stable and meaningful structure on the ruins of the previous one.

It is not clear whether we experience today a similar major *horizon shift* in the meaning of social and political concepts as that located by the German historian Reinhart Koselleck somewhere between 1750 and 1850 – the period of crisis and accelerated change, of profound conceptual innovation he called *Sattelzeit* (saddle-time), and which marked for him the process of transition to modernity. Nevertheless, our so-called post-modern condition does constantly provide us with indications of a growing non-correspondence between the old conceptual paradigm, and its changing institutional or social context. The classical framework appears to be increasingly unable to make sense of new phenomena and to serve as a reliable model for novel circumstances. If, in response to these varying modes and orders, one simply tries to look for an accommodation in some makeshift empiricist manner, while at the same time remaining within essentially outdated conceptual schema, then one is bound to perform endless ad hoc repairs to one's schema without much positive prospect. But such realism in political thinking (be it in international relations or elsewhere) remains always, as the saying goes, one step behind reality. What is more, it is positively detrimental, since without some universalistic, visionary and even utopian potential it cannot but lead to a significant narrowing of political possibilities.

What needs to be acknowledged, instead, is that the ongoing disengagement of sovereignty and the state has certain far-reaching consequences for political thought – so that we not only need to redefine sovereignty in the light of new developments, but, perhaps, we need to rethink the very foundations of what passes today for dominant political

thought. Hence, if we want to retain the concept of sovereignty in any meaningful and prospective way, then perhaps the alternative would be to try to rethink it outside the classical notion of the modern state. And, if sovereignty is to remain the political concept par excellence, one could be well advised to look first at the concept of the political itself.

III

The last couple of decades have witnessed a veritable upsurge in scholarly literature dealing with the concept of the political, in one way or another. And alongside it, the term 'ontology' comes to occupy an ever more prominent place in the current politico-philosophical landscape. Broadly speaking, most of the arguments take their departure from the distinction between 'politics' (*la politique, die Politik*), on the one hand, and 'the political' (*le politique, das Politische*), on the other. These theorists of the political, as they are sometimes called, often explicitly or implicitly justify their distinction by recourse to Martin Heidegger's 'ontological difference', that is, the difference between the ontic level of beings and the ontological level of Being as such. In this sense, *politics* corresponds to the ('ontic') practices of conventional and everyday political activity, conceived either as a subsystem or a superstructure of society, while *the political* gestures towards the ontological dimension of the institution and/or dissolution of society. This is how Chantal Mouffe, one of the advocates of the 'return of the political', formulates the distinction in her recent book *On the Political*:

By 'the political' I mean the dimension of antagonism which I take to be constitutive of human societies, while by 'politics' I mean the set of practices and institutions through which an order is created, organizing human coexistence in the context of conflictuality provided by the political.³

In view of all this scholarly attention, and apart from considerable divergences among these thinkers, nonetheless the nature, scope and meaning of the political remain rather unclear. All these theorists basically agree that 'the political' is something which cannot be confined within the limits of the traditional domain of politics. On the contrary, the political is characterized as being excessive, overflowing, conceptually elusive, defiant and difficult to take hold of. Moreover, it is also variously described as uncommon, irregular, extraordinary, exceptional and even singular. In Sheldon Wolin's oft-quoted phrase: 'Politics is continuous, ceaseless, and endless. In contrast, the political is episodic,

³ Mouffe 2005, p. 9.

rare.⁴ But the political is also associated with the dimension of indeterminacy, unpredictability and uncertainty, which reveal the essentially incomplete, unstable and contestable nature of all social structures. It is an index or manifestation of a question, a problem and a crisis, which accompanies and haunts every attempt at the final closure of society, every effort to fix once and for all the meaning of a symbolic order.

From the philosophical perspective, the political becomes situated on the terrain of *post-foundationalism*. Oliver Marchart, in his recent book on post-foundational political thought, has characterized the latter as ‘a constant interrogation of metaphysical figures of foundation – such as totality, universality, essence, and ground’.⁵ This terrain is informed by the recognition of a radical, irreducible contingency in human affairs – the recognition which Kari Palonen has called the ‘Weberian moment’ in political theory.⁶ There exist various figures of contingency which different theorists have employed in order to theorize the political, such as event (Alain Badiou), antagonism and dislocation (Ernesto Laclau), disagreement (Jacques Rancière), undecidability (Jacques Derrida), aleatory encounter (Louis Althusser), and so on. But there is not much clarity as to the nature and specificity of this ‘abyssal ground’ that makes the intervention of the political possible in the first place. The structural variations between the thinkers are significant enough to warrant some further elucidation, which, however, cannot be undertaken here. In any case, these differences should not be underestimated, because political concepts – and the concept of the political so much more – are inherently polemical and therefore represent diverse battlefields where, precisely, their meaning itself is at stake. Agnes Heller has summarized this situation neatly: ‘The controversy over the concept of the political is of a more serious nature than yet another family quarrel among paradigms; it is about the relevance or irrelevance of political philosophy to our times.’⁷ Thus, in order to acquire some additional light in this mayhem of views and ideas concerning the political, we would do better if we turn instead to the original instigators of this whole problematic.

IV

If one is to name the two foremost thinkers of the political within the last hundred years, perhaps the likeliest choice would be Hannah Arendt and Carl Schmitt. It is precisely in reference to these thinkers that the political is discussed as a space of commonality or a field of

⁴ Wolin 1996, p. 31. ⁵ Marchart 2007, p. 2. ⁶ Palonen 1998.

⁷ Heller 1991, p. 336.

relations (*Beziehungsfeld*). They both emphasize that the political has neither substance (*Substanz*) nor sphere of reference (*Sachgebiet*) of its own; that it is inherently plural and that it initially appears only *in-between* men. There is nothing political in man as such; the political condition emerges from the fundamental fact that 'man is not alone in the world', that men are destined to live together and share in a world that is not universe but pluriverse. And the political, precisely, designates this problematic possibility of human being together, which is also the primary fact of human existence on earth.

Keeping in view these striking parallels, it is surprising how little attention the issue of identifying potential similarities and possible convergences between their thoughts has received. The efforts to engage Arendt and Schmitt in some productive exchange of ideas and insights concerning, first and foremost, the nature of the political itself are practically non-existent in contemporary scholarship. Virtually no one has undertaken a detailed study that would examine these two thinkers uncompromisingly in concert and *sine ira et studio*.⁸ It appears almost impossible to mention their names together in one breath; and the mere attempt to integrate their views would most likely be met with a proper disdain or even outrage. Indeed, such an adventure would be written off as a mischievous faux pas at best, or denounced as an act of blasphemy at worst.

The reluctance to jointly discuss their political ideas, let alone attempt to integrate their visions and insights, appears at first sight to be well founded. For their common intuitions, it is argued, proceed in opposite directions and, as a result, give rise to two completely different paradigms or traits of the political. The first emphasizes the associative moment, and the second the dissociative moment, in the formation of political collectivities, as Marchart suggests: 'While the "Arendtians" see in the political a space of freedom and public deliberation, the "Schmittians" see in it a space of power, conflict and antagonism.'⁹ The fact that they both apparently take a critical stance towards liberalism, and modern political trends in general, only adds to the intensity of their mutual incompatibility. The final verdict on this case is well summarized by Dana Villa: 'Insofar as Arendt and Schmitt both assert the autonomy of the political they are, indeed, engaged in parallel projects. The similarity, however, ends there. The core of Schmitt's idea of the political is, of course, the concept of *sovereignty*, a concept Arendt definitively (and repeatedly) repudiates.'¹⁰

⁸ For a fine exception, however, see Kalyvas 2008.

⁹ Marchart 2007, p. 38. ¹⁰ Villa 2007, p. 41.

But the real challenge would consist here precisely in identifying those crucial insights into the nature of the political which point ‘beyond Schmitt’, as it were – the insights, moreover, that could well be articulated, and further developed, within the context of Arendt’s political thought. The point is to demonstrate the fundamental structural correspondence of insights that informs their respective analyses of the political – the correspondence, moreover, which ultimately renders Schmitt and Arendt incompatible. This may sound paradoxical, but between these two political visions, thrown apparently in crossing directions, a space is opened up, where the concept of the political finds its proper abode. The combination of common ground and stark opposition is peculiar indeed, yet it answers precisely to the groundless nature of the political – there is but a name (the political), and behind or beyond it, an essentially unrepresentable (because absent) object, that is, an infinite possibility of whatever.

The crucial thing is to understand that there is no neutral ground, nor any meta-language, that could enable us to balance or to arbitrate between these two partial standpoints. As I have already suggested, the very relationship between Arendt and Schmitt is marked by radical *impossibility*, and this antagonistic nexus, precisely, is what constitutes (that is, opens up the possibility for) the very concept of the political itself. Indeed, every political phenomenon finds itself thus affected, or over-determined, as it were, by this double bind – which also means that it is not possible to remain neutral towards it. The ultimate challenge, in other words, becomes to think this intermediate space, this proper locus of the political, and try to imagine or invent an appropriate conceptual device that would at least render this unwonted situation intelligible.

Slavoj Žižek has recently made an interesting use of the term ‘parallax gap’ to account for the situation where we are confronting ‘two closely linked perspectives between which no neutral common ground is possible’.¹¹ In its ordinary sense, parallax indicates an apparent displacement of an observed object due to a change in observational position that provides a new line of sight. More generally, this term applies to any difference of orientation caused by a shift between two points of view. Philosophically interesting parallax emerges, however, when we have two entirely different viewpoints towards the same object, so that the object itself becomes unrecognizable – in which case we naturally tend to argue that ‘people must be talking about different things’. But the twist is that there is no ‘object’ apart from its frame – every

¹¹ Žižek 2006a, p. 4.

‘world-picture’ is always already enframed, seen through an invisible frame – and the exclusion of the second alternative is an effective, positive condition for an object to appear, and to be seen, literally, in the first place. This distortion by way of exclusion is constitutive, so that, to be precise: ‘We do not have two perspectives; we have a perspective and what eludes it, and the other perspective fills in this void of what we could not see from the first perspective.’¹² The parallax, or dislocation, between the two frames or perspectives that renders the object virtually beyond recognition is the only available index of truth about that very object.

Here, precisely, I would venture to argue that the split between Schmitt and Arendt confronts us with the political parallax par excellence. Their conceptual relationship with regard to the political is at once intimate *and* impossible, reflecting the antagonistic dimension which pervades the very phenomenon of the political. They articulate substantially the same insights in radically different languages, which deny any direct translation. Being absent from each other’s political picture, Arendt and Schmitt represent, as it were, blind spots in one another’s visions – visions, moreover, which are uncommonly directed towards making sense of concrete political experience rather than towards producing some normative ideal of political life. In the same vein, one either sees Arendt or Schmitt, never both of them; and yet together they constitute, to paraphrase Žižek, the matrix which generates the totality of social and political relations.

The task, therefore, is not to overcome this irreducible gap that separates these two thinkers – in itself an entirely idle effort – but to think this gap, this very tension that opens up a space between two limits, in its ‘becoming’. If anything, conceiving of this ‘becoming political’ – which also implies, one is tempted to add, ‘becoming in/human’ – is the ultimate purpose and justification of bringing Schmitt and Arendt together. To think their difference together, i.e., to keep alive that oscillating movement which ceaselessly measures the distance from its own perfection, tracing thus the proper contours of a political space for the human-being-together, would perhaps also be the ultimate challenge of a political thought to come.

V

However, to affirm the existence of the parallax is one thing; it is another to substantiate the ‘truth’ of the object that this parallax is supposed

¹² Žižek 2006b, p. 235.

to deliver. I cannot go into detailed analysis here, so I will, instead, briefly indicate some theoretical intuitions apropos Carl Schmitt, who is the more controversial, and also maybe the less familiar of the two. Indeed, what has so far greatly hindered the reception of Schmitt's ideas is his notorious friend–enemy distinction as the bedrock of the political – a veritable impasse or dead end which apparently does not leave much choice to his readers. Yet, I think there is enough evidence in Schmitt's texts to enable us to navigate past this antithesis, and to uncover beyond it (and perhaps even against Schmitt's own intentions) the crucial insight into the radical nature of the political which I offer here in the form of a Schmittian paraphrase: the concept of the political presupposes the concept of publicity or openness. But how should we conceive of this publicity or this openness, which rather clumsily and imprecisely renders what both Schmitt and Arendt designate in their native German as *Öffentlichkeit*, itself a very evasive and broad term, to be sure? And why should we consider it as a distinctively political space?

In his famous book, *The Concept of the Political*, Schmitt attempts to re-examine the conceptual relationship between 'the state' and 'the political' by arguing against the rather widespread practice of defining the political by reference to the state. Schmitt begins by admitting that the equation between the state and the political might have been reasonable as long as the state possessed an exclusive monopoly over politics. He adds, however, that this great epoch of the *jus publicum Europaeum* – founded as it was on the independence and sovereignty of territorially integrated nation-states – has effectively come to an end. New protagonists and new subjects of the political have meanwhile emerged, displacing the friend–enemy antithesis from the outer borders of political unities into the inner sphere of a body politic itself. This transformative period has dislocated the former coordinates that had hitherto informed political thought, and has robbed the state of its monopoly of the political. All these trends and developments make it necessary to think the political anew and, consequently, to reverse the former conceptual relationship. Thus derives the famous opening sentence of Schmitt's book: 'The concept of the state presupposes the concept of the political.'¹³

But why should we think of an *Öffentlichkeit* as the new terrain of the political, once the state disappears as the positive ground for politics? To recall, according to Schmitt, the political 'does not describe its own substance or domain, but only the intensity of an association

¹³ Schmitt 1996b, p. 19.

and dissociation of human beings'.¹⁴ It is also characterized by him as a relational field – a field of mediation where even the person's 'relation *ad se ipsum* is not possible without a relation to *ad alterum*'.¹⁵ Indeed, already in 1917 Schmitt had argued that the event of incarnation – the truth that God has become man in historical reality – makes visible and symbolically meaningful the recognition that man is not alone in the world: 'man is not alone in the world also in the original sense, that is, he is in the company of other men. Thus he remains in his relation to God in the community and its mediation.'¹⁶ To be in the world means to be with others; likewise, it means that no human society, whatever it may be, can be organized in terms of pure self-immanence.

As Claude Lefort claims, the religious dimension constitutes the relations human beings establish with the world: 'Every religion *states* in its own way that human society can only open on to itself by being held in an opening it did not create.'¹⁷ Indeed, this opening which is not created but is, nonetheless, affirmed is also perhaps what Schmitt has in mind when he discusses the political form of Roman Catholicism as an *Öffentlichkeit*, that is, as a powerfully visible phenomenon in its own right: 'The Kingdom of Jesus, resting not on armed force but solely on the authority of witnessing, and existing for the truth, has never been a mere private affair ... The Martyr's Church was a community ... already in catacombs it was a real church, that is, a particular realm of public order, unbearable for the heathen absolute state.'¹⁸

The reference to the religious community, to the theological transcendence of social life, is neither accidental nor redundant, and it is significant that the treatise where Schmitt discloses sovereignty as a secularized theological concept should bear the title *Political Theology*. But in order to get some elucidation concerning the nature of this *Öffentlichkeit*, we need to turn to Schmitt's late sequel to the above-mentioned treatise, *Political Theology II*. This book undertakes to examine a theological treatise by Erik Peterson, *Monotheism as a Political Problem: A Contribution to the History of Political Theology in the Roman Empire*, which claimed to have conclusively demonstrated, contra Schmitt, that all political theology has long been overcome.¹⁹ Peterson maintained that the Augustinian teaching of the two 'cities' – the city of God and the earthly city – had separated theology and politics, and had thus established a clear distinction between the Church and the state, between the spiritual and the secular. All government becomes worldly

¹⁴ Schmitt 1996b, p. 38. ¹⁵ Schmitt 1996a, p. 51. ¹⁶ Schmitt 1996a, p. 51.

¹⁷ Lefort 1988, p. 222. ¹⁸ Schmitt 1996a, pp. 24–5, note 6.

¹⁹ Peterson 1935.

and, as a consequence, there is no historical reason to claim that the legitimacy of the sovereign came from a transposition of the formula of 'one God – one monarch'. Furthermore, Peterson argued that the chaos that a sovereign needs to prevent was already dealt with philosophically in the doctrine of the Trinity and the solution of the Arian (monotheistic) controversy around the consubstantiality of Father and Son. This was accompanied by the liberation of the Christian faith from the 'bondage of the Roman Empire', and after that there was no need for political theology in the West.

But there is a curious twist here. Namely, one of the so-called Trinitarians, Gregory of Nazianzus, had specifically dealt with the problem of unity, and had claimed that of the three ancient opinions concerning God – anarchia, polyarchia, and monarchia – only the last should be held in honour. However, it was not to be limited to one person since, as Nazianzus claimed, it is possible for unity if at variance with itself to come into a condition of plurality. Peterson thus seems to suggest that the dogma of the Trinity that purported to resolve the Arian controversy over the nature and the status of the Son also effectively solves a profound ontological (or should we say: onto-theo-political?) problem of unity – the problem, namely, that any unity (and every identity) inevitably carries within itself a dualism or indeterminacy which forever threatens it with its imminent disintegration. But this solution is not without its ambiguity, as Schmitt ingeniously points out:

Peterson in his teaching on the Christian Trinity refers decisively to a passage in Gregory of Nazianzus (*Oratio Theologica* iii 2) which revolves around this formulation: The One – *to Hen* – is always in uproar – *stasiazon* – against itself – *pros heauton*. Right in the middle of this most precise formulation of this difficult dogma, we find the word *stasis* in the sense of 'uproar'.²⁰

The surprising transition from stillness to movement thus seems to suggest the impossibility of any constancy (*stasis*) in the Trinity and, by extension, in every unity or oneness. Schmitt himself promptly remarks: 'With this concept an intriguing contradiction of a dialectical nature emerges. *Stasis* means in the first place quiescence, tranquility, standpoint, status; its antonym is *kinēsis*, movement. But *stasis* also means, in the second place, (political) *unrest*, movement, uproar and civil war.'²¹ Commenting on this semantic paradox, Schmitt adds that what we encounter and witness here, right at the heart of the doctrine of Trinity, is a genuine politico-theological *stasiology* – operating as an irreducible reminder that the problem of enmity and of the enemy

²⁰ Schmitt 2008, p. 122. ²¹ Schmitt 2008, p. 123.

could neither be ignored nor ever resolved. In other words, political unity itself is never free from internal antagonisms – the One constantly divides and opposes itself, and it does so in spite of its alleged unity and homogeneity.

Father and Son are not absolutely identical, yet nevertheless they are ‘one’. But as Schmitt contends: ‘If every unity implies a duality and therefore the possibility of uproar, or *stasis*, is immanent, then theology seems to become “stasiology”.’²² Thus, Peterson’s closure is really a closure of monotheistic-monarchist political theology, not of political theology as such. The latter should thus be re-orientated towards the question of political unity (*politische Einheit*) under the condition of plurality, i.e., of democracy: ‘If the formula is no longer: One God – One King, but: One God – One People, and if the political side of political theology is no longer oriented towards the single monarch but towards a people, then we turn to democracy.’²³

VI

But if the question of political form in general, and of democracy in particular, takes shape and becomes visible against the background condition of an *Öffentlichkeit*, then the latter cannot be confused with a much more familiar notion of the ‘public sphere’, as it is typically conceived in opposition to the private sphere, or even to the social sphere of human interaction. Indeed, the notion of a public sphere itself presupposes that the decision as to the dividing line between the public and the private is already made or is already somehow (implicitly or otherwise) operative. *Öffentlichkeit*, understood as a *stasis*, on the contrary, indicates not only the instability of distinctions such as *polemos–stasis*, outside–inside, exteriority–interiority, foreign affairs–domestic politics, public–private, friend–enemy, and so on – but, moreover, it effectively suspends these oppositions *in toto*. It could thus be argued that *stasis* performs a similar role vis-à-vis Schmitt’s work as the word *pharmakon* (simultaneously a poison and a cure, a deadly potion and a salutary medicine) plays in suspending and subverting the distinction between speech and writing in Plato – once we recall Derrida’s famous deconstructive gesture in *Plato’s Pharmacy*.

What is involved in the type of thinking that works by actively suspending or displacing various conceptual antitheses can be glimpsed, for instance, in the way the question of human nature is spelled out in Schmitt’s work. Indeed, he challenges any anthropological optimism

²² Schmitt 2008, p. 126. ²³ Schmitt 2008, p. 72.

and articulates a specific motivation that lies at the basis of every political relationship. The latter is, of course, the famous affirmation of man's evil nature and his inherently malevolent character; as Schmitt claims, 'all genuine political theories presuppose man to be evil'.²⁴ This recognition is vital because it enables the definition of the concept of the political by recourse to the real possibility of physical killing. Thomas Hobbes, for one, had founded his theory of the state on this very insight, arguing that the (pre-political) state of nature is characterized by the ever-present possibility of war of all against all. Hobbes' Leviathan arises as if he were a god protecting his fellow human beings (*homo homini deus*) from the state of nature, in which everyone can in fact become a wolf to his fellows (*homo homini lupus*). But these substantial alternatives or political maxims that articulate two distinct natures of man should not be conceived as constituting mutually exclusive options: that either man is good and trustworthy, or he is evil and needs to be disciplined and contained.

Schmitt is often regarded as a Hobbesian of some sort, yet this is not entirely correct. Hobbes' aim was certainly to overcome this intolerable state of affairs – to neutralize or dissolve the political, as Schmitt would say – and within the framework of *Leviathan* it was truly envisaged that men will become godlike to each other. But Schmitt sees clearly that Hobbes' device for constructing his absolutist commonwealth, the so-called covenant of individual human beings, is of an essentially private nature. His contention is that no genuinely political unity can be established on the basis of an individualistic philosophy. One should also bear in mind that, for Schmitt, political enmity depends neither on egocentric motives nor on instincts of self-preservation. The enemy (or friend, for that matter) is always a public figure, which is why the political condition can only be grasped on the presupposition of publicity or openness of being. There can be no private matters in the sphere of the political, and vice versa: the political is by its very definition public, *öffentlich*.

Taking this into consideration, what is Schmitt's response to the dilemma of human nature? His answer is apparently very simple, even tautological: *homo homini homo*, neither wolf nor god. Which means that human beings, as long as they exist within the space of the political, are indefinite creatures; open to good as well as to evil. They are capable of the greatest injustice as well as the highest sacrifice. This unpredictability goes all the way down and is deeply inherent in the human political

²⁴ Schmitt 1996b, p. 61.

condition. The human thus appears to be a problematic, dynamic and dangerous being, or in the words of political anthropologist Helmut Plessner, ‘a being who in his essence is undetermined, unfathomable, and remains an “open question”’.²⁵ To be sure, this is no solution but only the beginning of a genuine problem, which Schmitt, nonetheless, articulates in an entirely affirmative manner.

Another instance of problematizing or deconstructing certain well-entrenched distinctions comes from a book by Raymond Geuss, *Public Goods, Private Goods*. In his study, Geuss undertakes a genealogical analysis and critique of the contemporary liberal conception of the public–private division by distinguishing a number of senses of this partition that arise in different contexts. Through the fine analysis of distinctive actions performed by historical figures of the ancient world, Geuss demonstrates that the unavailability of some explicit general criteria ultimately undermines liberals’ ability to appeal to the public–private distinction in political debates. Geuss’ conclusion could hardly be less equivocal:

There is no such thing as the public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work. When one begins to look at it carefully, the purported distinction between public and private begins to dissolve into a number of issues that have relatively little to do with one another. It is thus unlikely one could come up with an interesting, general, substantive theory of the public and the private.²⁶

Geuss’ proposal in this respect is the following one: to begin with, we need to have a clear idea of the use to which we wish to put this purported distinction, that is, we need to ask *why* we want to make it at all. And answering this question, Geuss argues, ‘will bring us back to some relatively concrete context of human action, probably human political action, and it is only in the context of connecting the issue of the public and private to that antecedent potential context of political action that the distinction will make any sense’.²⁷ My wager apropos the concept of the political and, by association, the concepts of the state and sovereignty, is a similar one: that in order to productively engage with these issues we need to bring to the fore and discuss the conceptual premises and potentialities involved, indeed, to recover this ‘antecedent potential context of political action’ that both Arendt and Schmitt considered to be the utmost task of political reflection.

²⁵ Quoted in Schmitt 1996b, p. 60. ²⁶ Geuss 2001, p. 106. ²⁷ Geuss 2001, p. 107.

VII

In what remains, I will try to indicate some prospects and opportunities for the concept of sovereignty, as it resurfaces within this new theoretical constellation – within the framework of political space as it has emerged via the concept of the political. This common space of inscription which I suggested we call *Öffentlichkeit* designates a certain fundamental openness of a public space that precedes not only the well-established distinctions between the individual and the community, the private and the public, the social and the political, the inside and the outside, and so on, but also – and perhaps most decisively – the distinction between the One and the Other, which underlies all further divisions and thus constitutes their most radical basis. Now, as we have seen, the difference between these two figures, the One and the Other, should not be conceived as being purely external vis-à-vis each other. The pure externality is in fact already an extrapolation, already a kind of fiction that sustains all the various myths of self-sufficient, autonomous political bodies. But in reality – or should we say, in the Real – the *auton* and the *heteron* are inextricably related, intertwined to the degree that on certain critical junctures their distinctive characteristics begin to lose their specific determination, become essentially undecidable, and ultimately fade into one another.

On this post-foundational terrain, i.e., within the force-field or the relational space of the political, concepts forfeit their hitherto essentialist designations and implications, and turn into differential elements of a new conceptual framework. Thereby, the paradoxical nature of sovereignty comes fully to the fore: the former (absolutist) centre of a political structure transmutes into a horizon of intelligibility – into a borderline concept (*Grenzbegriff*) in Schmitt's sense – that fixes the self-identity and guarantees the consistency of a political community. There have been various attempts to rethink the meaning of sovereignty along these lines, of which probably the most celebrated and contestable is Giorgio Agamben's project of *Homo Sacer*. In a nutshell, as Agamben puts it, the 'paradox of sovereignty consists in the fact that the sovereign is, at the same time, outside and inside the juridical order'.²⁸ The singular site of a sovereign power thus turns out to be the state of exception which provides the figure for a paradoxical topology of the One and the Other: 'In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other.'²⁹

²⁸ Agamben 1998, p. 15. ²⁹ Agamben 1995, p. 23.

In a similar manner, Jens Bartelson has argued that sovereignty has no essence but should rather be understood as a 'discursive practice' which 'functions according to the same logic as the parergon'.³⁰ Sovereignty frames the state into a distinctive territorial unit by establishing a frontier or a border that separates the inside from the outside. It is itself neither the one nor the other but remains, instead, the condition of possibility for both. Sovereignty appears here as an ordering and individuating principle that endows the state with essential self-identity, serving effectively as an agency of territorialization. Perhaps this division – this decision – in relation to political space is something that needs to be covered up, fictionalized, mystified. It may well be that the fictive character of sovereignty is indispensable and that, lacking better and more viable solutions so far, the 'organized hypocrisy' that sustains the international system of sovereign states is likely to stay, as Stephen Krasner has notably argued.³¹ More recently, David Runciman has voiced a similar argument to the extent that 'hypocrisy, though inherently unattractive, is also more or less inevitable in most political settings, and in liberal democratic societies it is practically ubiquitous', and for that reason 'hypocrisy is something we have to learn to live with'.³²

But this pretence aside, there are two faces to every issue, political sovereignty included. And if there cannot be the One without the Other, the latter constantly haunts or revisits this figure of oneness or of unity. Their intricate relationship amounts to a mutual contamination (in Derrida's words) or, pursuing Schmitt's indication, to a condition of *stasis*. The Other is the ontological ground for the One, but is precisely such that it never appears or surfaces in its pure condition, because essentially, it cannot have any positive determination. Hence also, the One thus remains the figure of the problem, and especially so for democracy, because democracy is precisely the figure of plurality, of multiplicity, of being more than one, of being many. The democratic revolution, which for many thinkers signifies the inaugural moment of political modernity, is characterized by opening up the political realm to contingency, unpredictability, novelty and irreducible plurality.

VIII

I have been pondering this apparently abstract relation because it seems to indicate one possible way of dealing with the issue of sovereignty. In relation to the framework delineated above, that would

³⁰ Bartelson 1995a, p. 52. ³¹ Krasner 1999. ³² Runciman 2008, p. 1.

mean disentangling the problem of sovereignty from its strictly pragmatic and/or jurisprudential considerations, and refocusing it on the following question: how is political unity or oneness – *politische Einheit*, in Schmitt's parlance – possible at all? How to shape this irreducible *in-between* of human existence into a whole whilst avoiding those unilateral totalizing effects that such an undertaking inevitably invites? How to inscribe plurality within a political form without, by this very gesture, sacrificing all those political possibilities this plurality entails and exhibits. I have already alluded to a synoptic, enigmatic even, response – or rather, the key to this whole problem – from Schmitt: the One is always in turmoil against itself. And I also proposed that this challenging undertaking be designated a political stasiology, which means that we need to focus not on the theory of state but, instead, on the theory of *stasis*.

This is not entirely novel ground, to be sure, and the promising potential of similar enterprises is testified by wide publicity afforded to such contributions as, for instance, Michael Hardt and Antonio Negri's *Empire*. It may be argued that the rethinking of sovereignty in terms of global, post-modern, imperial circumstances constitutes one of their foremost theoretical contributions and achievements. They claim that this new form of sovereignty – empire – has no actual centre nor outside; it is concerned with the administration of biopolitical production, whereas its fluid, flexible and fragmentary mode of operation effectively resembles the activity of police forces. The intention of the authors, however, is ultimately to overcome empire and destroy its new paradigm of power, because the plane of immanence whereupon they have inscribed their (Spinozist) conception of absolute democracy is, in fact, incompatible with sovereignty. They argue that the constituent power of the multitude cannot be reduced to the unity of a political body and does not submit to the rule of one. All in all, they seem to suggest that the double bind of sovereignty has been effectively overcome: 'We are no longer bound by the old blackmail; the choice is not between sovereignty and anarchy. The power of the multitude to create social relationships in common stands between sovereignty and anarchy, and it thus presents a new possibility for politics.'³³

But the absence of an outside does not necessarily entail the dissolution of the transcendental dimension from the terrain of the social. If anything, it reveals, intensifies and complicates the topological configuration of the political. All the various figures of the excess vis-à-vis the established socio-political structures – the state of nature, the sovereign

³³ Hardt and Negri 2004, p. 336. See also Hardt and Negri 2000.

exception, the constituent power, God the Son, the Other – need to be understood as so many indicators of inherently dynamic, productive and promising factors of public political being. Hardt has rightly remarked that ‘the renewed interest in the concept of sovereignty in the field of political theory is related in part to the analyses of the autonomy of the political that first focused on the work of Hannah Arendt and more recently on that of Carl Schmitt’.³⁴ All things considered, it does appear only natural that for the purposes of rethinking sovereignty we also need to engage their respective insights. Indeed, it is generally acknowledged that, apart from providing highly original reflections on the political, Schmitt and Arendt have also powerfully challenged our accepted and customary views concerning the concept of sovereignty. Schmitt once famously defined the sovereign as the one who decides on the state of exception. And according to Arendt, we need to reject the principle of (popular) sovereignty altogether – not because it has become antiquated or useless, but because it is directly detrimental to the human (political) capacity for action, which itself is nothing but the manifestation of human freedom within the world.

All this is not without its problems, naturally, but it is a venture worth undertaking. The concept of the political thus discloses the ultimately open, public and potential nature of human being together. It is true that Schmitt would prefer to have a sovereign resolve this issue decisively, once and for all, by determining who is the friend and who is the enemy. The point, however, is to recognize in this impossibility the moment of an inherent self-failure that should prompt one, instead of projecting this existential anxiety on to the figure of an enemy, to reconsider one’s status vis-à-vis the other (who is not one), to modify the relationship towards it, and perhaps to redefine, as a result, the basic coordinates of one’s own political being – to recognize, in other words, the pluralism of spiritual life as the authentic source of human political existence, and to try to live up to this condition.

IX

My intention here has been to illustrate how unsavoury conceptual oppositions could effectively be suspended and kept at bay, without the need to succumb to any of the alternatives – without surrendering, in one’s thought, to this ‘blackmail of being for or against’, as Michel Foucault once advised with respect to the legacy of the Enlightenment. On the other hand, this also makes us attentive to how certain antitheses

³⁴ Hardt 2000.

and divisions are always already at work; how they, more or less implicitly, operate in marking and structuring our experiences, opinions and reflections concerning, among other things, diverse phenomena of being in common. In a similar vein, the point in discussing the question of sovereignty does not consist so much in finding further and more sophisticated arguments for either its preservation or abandonment, as in paying careful attention to various divisions it presupposes, distinctions it introduces, decisions it operates, and ideologies it involves.

What I have tried to suggest so far is simply that, if we desire to make sense of what is happening around us today, then, perhaps, we need a new way of thinking about political matters, about the human condition, about being-in-the-world and living-together – and about a whole lot of other issues, more and less abstract. My aim here is simply to outline a certain conception of political space which might serve us to this end. It might also make us think that, after all, human beings are indeed political animals – not because there is something essentially political in human nature, but because Being, as a space of in-between, as a space of spontaneous events, unexpected interventions, contingent possibilities, and not the least, miracles, is itself fundamentally political. And if this is so, then we would certainly do better if we confront it openly.

11 Sovereignty between government, exception and governance

Antonio Negri

I

Within post-modern thought, the concept of sovereignty (formed during late modernity) may be considered to be in crisis from at least three perspectives. First, from the perspective of the *biopolitical* transformation of the concept of sovereignty: as Foucault taught us, we must re-conceptualize the figure of government, shifting considerations of sovereign acts from a context of the production of laws or rules to a context of the production of norms or systems. It is understood that the intrusion of law in everyday life, from political-legal *agencements* on those of the common *bios* is not totalitarian, nor purely coercive, nor even – as Foucault tells us – simply disciplinary. It is a new dynamic of systems that intervene in the unique fabric of social reality and transform law from a disciplinary machine into an apparatus of control and *governance*.¹ Second, sovereign power (or better, the tendency to exhaust the concept) can be analysed according to the schemes offered by Niklas Luhmann and his followers: they have insisted on analysing the fragmentation of law and the crisis of its normative image, and begun to analyse (and sometimes reconstruct) the functional processes of legal structures *outside* state normativity. Proceeding in these terms, these scholars were able to note how every autopoietic system (having criticized autopoieticism) was only illusorily connected to state normativity, while the latter became active in situations of *social autonomy*.² Third (and this too now seems to be mostly taken as given), the concept of sovereignty is weakened when considered from the perspective of international law. In this case, the concept of sovereignty (traditionally linked to national determination) has already been profoundly modified by United Nations legal experts; then, in its most recent phase, the exclusivity of the concept and its articulation in the context of

Translated from Italian by Louisa Parks.

¹ For references to Foucault's works, see Revel 2007, pp. 67 sgg. and *passim*.

² Luhmann 1969; Febbraio and Teubner 1994; Teubner 1997b.

international law have been profoundly *de-structured*.³ This perspective, like the other two positions we have mentioned, leads to the conclusion that the classical concept of national sovereignty has been, if not abandoned, then at least profoundly de-structured to the point that it is no longer definable in Westphalian terms. In any case, we may ask ourselves the following question: what *exactly* do we mean when we speak of abandoning sovereignty? First of all it may be noted that the theoretical experiments that have sought to test this hypothesis cannot be traced back to a single paradigm. Let us examine, therefore, each of these experiments in turn.

In the first (that is, in the biopolitical transfiguration of sovereignty and sovereign government) we witness, as already said, the shifting of the form of commands from laws/rules to norms/systems. What does this change mean? It means that the structural whole of the state of law (*Stato di diritto*) is no longer able to stick to the concrete rules of the normative organization of 'government according to the law' (or its legal processes). According to the authors we are referring to, the deductive character of laws/rules is no longer able to integrate the concrete case, to regulate a unique conflict, to build (continuously and repetitively) trustworthy instruments for the application of the current law. Concrete norms or single systems are thus deployed within processes of *governance*, that is the punctual and specific management of the social balance, tailored to the concrete case. The *efficiency* of the norm assumes a certain prevalence with respect to its *legality*.⁴

In the second experiment we mentioned (which considers the possibility of abandoning normative fragmentation through an alternative reference to 'social constitutionalism'),⁵ the problem of redefining sovereignty becomes even more crucial, and its difficulty even more explicit. 'Social constitutionalism' seeks to operate autonomously outside the state, using dynamic materials that continuously produce innovative, basic processes of the production of law. If (regarded from the viewpoint of the theory of forms of power) Foucault's 'governability' (*gouvernementalité*) is still an attempt to develop a 'bottom-up' democratic synthesis of the process of constituting the universe of legality, and if, therefore, governability introduces a subjective *di contro* system (which could correspond to the processes of modern 'legal institutionalism'), then the position of the Luhmannian philosophers of German public law drops all subjective coherence from the processes illustrated.

³ The reference is essentially to the work of Richard Falk and Danilo Zolo.

⁴ See Mayntz 1999; Bröckling *et al.* 2000; Arienzo 2004.

⁵ See Sciulli 2001 and Teubner 2004. On this subject, the recent volume by De Cristofaro (2007) is important.

The constitution of legality is given only on a horizontal dimension in this Germanic theory (but is also linked to the new European constitutionalism).⁶ The traditional continuity of the legal system (in sovereign regimes) is opposed to the *discontinuity* of the constitutive processes of law, and coherence is opposed to *paradox*. Particularly interesting in this picture is the increasing difficulty of distinguishing between the public and the private. These two categories seem to lose their original characteristics and merge together in a common context, where by common, one should understand essentially a terrain to which every juridical subject has free access. It is clear that behind this conception of the legal process lies a sort of ‘anarchy’: not a force that seeks to destroy the whole, but a plural action that cannot be reduced to unity. Not really anarchy then, but autonomy.

Third, we recalled that the concept of national sovereignty is declining in the theoretical and practical fields of international law. Already in the analyses of United Nations theoreticians, it could be said that the limits posed on national sovereignty and the excesses that United Nations powers were proposing at the global level have become more important than the actions requested of nations to contribute to the unity of the international order.⁷ Today this point of view has been put aside: it is the strength of individual resisters, the asymmetric break in international relations, the continuing accelerated forms of territorial and/or continental coordination, new value scales, etc. which become all-important in the (constantly re-negotiated) fixing of the principles of global power. The San Francisco Charter is mostly irrelevant, not because the claim that the United Nations’ legislation and power to intervene ‘is universal’ has been liquidated, but because the *global interdependence* of nation-states has become so important that it is continually recognized and integrated within partial agreements and new cooperative initiatives, that is within new *intensive* institutional figures in global organization.⁸ The financial crisis of 2008 shows to what extent the integration of the global market obliges states to collaborate in economic regulation and in interventions against the effects of the crisis, well beyond any presumption of sovereignty.

Another question could be posed here: if, in the current post-modern climate, the principle of sovereignty is dissolving, could it however be rebuilt – stripped of every spurious characteristic – abstracted into an unambiguous definition of ‘*exceptionality*’? Could the concept of

⁶ Ladeur 1997.

⁷ Hans Kelsen expressed himself in this direction several times.

⁸ I permit myself to refer the reader to Cocco and Negri 2006, in this case, and in particular to part V.

sovereignty be re-established as the command within that ‘exception’ that allows governments to govern, and sovereignty to reconstruct political action above and beyond the possible chaos of national and international arenas? This is what some legal-philosophical positions rather ambiguously – and very abstractly – propose, sometimes claiming that the strength of exception restores the entire process of the production of law under the auspices of sovereignty, at others recognizing in the emergence of ‘exception’ a new figure of sovereign command.⁹ In the philosophy of public law, Carl Schmitt proceeded on this path in an exemplary manner. Once the concept of sovereignty has been rooted in the concept of the decision, public and/or statute law – he argued – can perfectly easily be articulated between the constant exercise of normative will and the exceptional employment of the decision: the nature of the two processes is the same.¹⁰ But it is a process so abstract (and teleological or – as Kant put it – ‘terroristic’, that is, armed with a radical ethical pessimism, based on a metaphysics of transcendence) as to become instrumental in too many theoretical positions and indifferent to too many ideological standpoints. When a key opens too many doors it can only be a lock pick.¹¹

The critique (in this case a process of comprehension that goes beyond the traditional ossified parameters) should then rearticulate the questions posed here, regarding both the sense of the alleged abandonment of the concept of sovereignty in *governance*, and the hypothesis of the unambiguous re-composition of this abandonment in the category of ‘exception’. To me it seems that the solution to the problem lies in *displacing* the question. That is, if on the one hand the exercise of sovereign power, no matter how overwhelmed, is not weakened in the relationship between the decision and the fragmented, disarticulated and problematic context of normative reality, resorting to ‘*governance*’ to rebuild its efficiency; and on the other hand the concept of sovereignty is not definitively plunged into crisis in confronting normative fragmentation but can still be proposed as an alibi for ‘exception’ – in this case then it must be admitted that while the (apparent) crisis of the concept continues to be expounded, its origins are deeper. That is to say: the concept of sovereignty is in crisis because *it is no longer dominant* with respect to other sources of social legitimacy, to other

⁹ The work of Walter Benjamin, Jacques Derrida and Giorgio Agamben continued in this direction.

¹⁰ Galli 1996.

¹¹ As noted with great efficiency by Plessner (1931), in the polemic that pitted him against Schmitt. On the Kantian definition recalled above, see the second part of Kant 1992.

constituent processes and forces. In effect, what is under discussion (not only because the theory remains unfulfilled but also and above all because history and collective otherness are required) is the modern conception of sovereignty as the affirmation of the One in political command and the organization of society. The figure of Leviathan can no longer fulfil a unitary function (whatever the origin, contractual or institutional, of this unity) with respect to social anarchy and the multitude of subjects.¹²

Thus, the theme to discuss is the displacement of the problem, how to escape the fetish of sovereignty as the concept of government in modernity. The concept of sovereignty is traced here to that of '*crisis*',¹³ as historians often do (via operations that jurists are reluctant to repeat). We are beyond modernity. The crisis penetrates and disjoins the polarities that sovereignty reached in the modern era. Many paths could be followed in deepening this line of research. In fact, a principle of social organization, a value of justice, and a system of power are under discussion. In a context of normative fragmentation, these *dispositifs* often appear contradictory; sometimes independent and disconnected from unity; at other times paradoxical.¹⁴ Now, the point of view we adopt in building our critical hypothesis is that none of these principles can be based on the unitary substance of the Leviathan, each of them must instead be traced to a particular constituent genesis, to independent genealogical figures – this disintegrates the concept of sovereignty. That is to say: we must recognize that the concept of sovereignty is the *result of a struggle*, that its abstract definition represented the peak, the most representative moment, of a victory won by one side over others. To historically determine this affirmation: sovereignty is the product of the victory of the bourgeoisie as a class. What does tracing the concept of sovereignty back to crisis then mean? It means recognizing that victory (once secure) is currently contested, if not already effectively overthrown.¹⁵

¹² The foundations of this affirmation appear to have been laid in the discussions begun in the 1970s by Negri 1977; Offe 1985.

¹³ Our reference is to the work of Reinhart Koselleck.

¹⁴ Teubner 2003; Blecher 2006.

¹⁵ Let it be clear that here, even in reviving a historical materialist viewpoint (relative to the equation of sovereignty and the bourgeois class) we move beyond that same viewpoint. Marxism has in fact moved, around this theme, in an ambiguous manner: on the one hand, the system of taking power (and the corresponding theory of the dictatorship of the proletariat) repeated the concept of sovereign power as found in *Leviathan*; on the other, the theory of the extinction of the state was presented as a hypothesis of rupture and as the dialectic overwhelming every concept of power. For a criticism of this ambiguity in historical materialism, see Negri 2005.

This is a Machiavellian point of view, able to penetrate the current crisis of sovereignty, whose beginnings were described so realistically by that philosopher. According to Machiavelli, it is in the struggle between rich and poor, in the clash, first between a nascent entrepreneurial bourgeoisie and the landed aristocracy, then between those two powers – united by the necessities of power – and the productive proletariat, that the concept of sovereignty is formed. Not as the *transfer* of power from the people to the prince but as the *affirmation* of the prince over the people. This same Machiavellian conception of sovereignty was taken up and developed by Baruch Spinoza when defining democracy. Now, in Spinoza, democracy comes up twice, according to two different perspectives. The first definition of democracy lies within the classical tradition of the theory of ‘forms of government’: as monarchy is government by one, so aristocracy is government by the few, while democracy is government by the many – but what are the many governing? They continue – in this first case – to govern the One. It is no coincidence that the traditional theory of forms of government considers power as the expression of the One, and Bodin was correct to recall that each form of government is a monarchy. The first definition that Spinoza gives of democracy also fits this picture. There is a contract that transfers the power of the multitude to the government of the One. But then there is a second Spinozian definition of democracy: ‘absolute democracy’. This is no longer a government of the One but the totality of the multiple processes that constitute the *commune*. The democracy of the commune is thus ‘absolutely’ opposed to democracy as the management of the One, which it recognizes as a transcendental substance, and therefore an indiscriminate power, a decision that is always totalizing; and rejects it in the name of liberty. Consequently, ‘absolute democracy’, according to Spinoza, becomes an immanent process, a construction that singularities operate from below and the ever re-negotiable solution to conflicts of clashing passions: democracy is thus the system that, through conflict, constitutes a common project.¹⁶

Here is a first strong attack on the definition of sovereignty as decision and exception! This is to say that – if we are building a Spinozian absolute democracy – the nature of power cannot be directly traced to the concept of sovereignty. *Power is always a relationship*: this relationship can be traced back to and concluded with unity, but always an uncertain unity. The *crisis*, the separation, the disjunction, the breaking of the relationship constitutes, that is to say, the ontological structure of each expression of power, of which the eventual *unity* constitutes the representation, or better the ontic event.

¹⁶ See Negri 1991b.

We alluded earlier to the difficulty of tracing the principles of social organization, justice and power to unity. We would not want our perspective of crisis and separation to be considered in the same way as that ‘political realism’ from which political philosophy often draws its strength. The latter is, generally speaking, pure and simple political cynicism, a kind of *libertinage* that unites a judicial and political functionalism with a nihilism of values compatible with existing power.¹⁷ No, we do not share that point of view. When we say *crisis* in our perspective, we speak of real forces pitted against one another. ‘Political realism’ can easily present itself as a weapon on one of the sides in a struggle, or indeed both: but it is a weapon indifferent to the specific contents that alone determine the figure of power. It is not therefore by interpreting the *form* of the conflict that we may define the result of the clash, that is to say the eventual construction of a subject. On the contrary, being within, taking part (to be partisan) and thereby following the constitutive process of a subject through struggle means to gather and develop in a singular and distinct manner the principles of social organization, justice and the conception of power that animate each of the sides involved.¹⁸ At the genesis of the modern state and capitalism, the struggling sides held precise identities and were the carriers of diverse principles of justice, conflicting and sometimes antagonistic, and of different images of the government of the city. It must not be forgotten that *capital too*, like sovereignty, is always made up of a relation. Just as for a sovereign to exist, a subject upon whom to impose commands is necessary, so too for a capitalist to exist, a worker to exploit must also. It is superfluous to add that it is by following the articulations of capitalist development (and the conflicts that configure it), that we may best study the anatomy of the political and the sovereign state.¹⁹

II

That said, let us return once again to the concept of sovereign *exception*. I maintain that this is a purely *quantitative* principle that corresponds to the attempt to maximize force in order to eliminate an adversary

¹⁷ On the relation between political realism and ethical cynicism, see Negri 2006.

¹⁸ In his review of the book by J. Winkelmann on the concept of legitimacy and legality in Max Weber (1952), Arnold Gehlen expressed, in a manner still valid today, the view that the progressive rise in the quality of life has become nothing but a legal claim, thereby opposing himself to the functional concepts of the Weberian theory of law as well as to Carl Schmitt’s (1932).

¹⁹ On this theme we cannot forget the various methodologies that were developed in the sphere of critical Marxism following the Second World War, from Castoriadis and Lefort and their *Socialisme ou Barbarie*, and the Italian ‘operaismo’ of Mario Tronti, to the new historicism of Thompson, and today’s post-colonial studies.

from the constitutive process of political society. This serves to renew the gestures of Attila the Hun and Genghis Khan. It is thus necessary that we wrench philosophers away from the metaphysical illusion of the power of exception! Let me repeat, the latter does not have the qualities that some would wish to attribute to it: that is to say that exception does not represent the ontological essence of power but simply the eventual brutality of the sovereign decision, its ‘terrorism’ – as Kant put it. It recalls Attila the Hun and Genghis Khan – but can such ‘brooms of God’ (as Hegel called them) still appear, or even be imagined, in the complex societies of mature capitalism? The followers of Carl Schmitt, the various Forsthoffs and Mortatis, would recognize the impossibility of this, and so – as we have seen – Gehlen is opposed to Max Weber.²⁰ In the archaeology of exception, could they still recognize the bare and absolute abstraction of the concept of sovereign power, its efficiency and essential nudity? No. Rather than the nudity of the concept it is the simple brutality of the act of force that must be recognized, the elementary violence, never stripped bare, always disguised, for example, by the violent passions of racial hatred, the abuse of gender and economic privilege, and almost always lying within a strong core of more or less economic interests.²¹

However, as already mentioned, these uncouth characteristics of the power of exception are best illustrated in the genealogy of this figure of power when it claims to function in reality, rather than in archaeology. In reality exception is confronted with the fabric of *biopolitics*, which presents itself as the exasperation of the *biopowers* opposed to the democratic constitution of a society invested with biopolitical organization. Nowadays, exception is a reductive and totalizing force attempting to eliminate, to crush, every social complexity and every resistance that emerges in the biopolitical context. And this becomes more violent and ferocious the more the state, in the development of capitalist modernization, penetrates the bonds of social development and politicizes the evolution of productive social forces – transforming production into a vital, reticular, cooperative activity. When Machiavellian opposition between the rich and the poor arises in developed capitalist societies, it quickly spreads. Marx spoke of the ‘real subsumption’ of society by capital to describe the maturing of capitalist development and its capacity to affect all aspects of life. As a consequence of this subsumption, the antagonism found in relations of exploitation is expressed everywhere,

²⁰ See Negri 1977 and Hardt and Negri 1994. For Gehlen on Weber see note 18.

²¹ On the critique of the theory of sovereignty expressed by G. Agamben in his *Homo Sacer*, see Ferrari Bravo 2001, pp. 279–86; Negri 2008, pp. 193 segg.

that is to say it is found not only on sites of production but at every point within the complex social relations that productive cooperation has built.²² Translating this economic diagram into the grammar of state sovereignty, we recognize the powerful extension of the conflict and the dramatic emergence of resistance in every corner of society, at every junction of the networks that organize and configure social production. The latter is by now, in the development of mature capitalism, biopolitically integrated into the supply chains of sovereign power, and it is in this sphere that resistance is seen *everywhere*.²³

The post-modern age holds the merit of having highlighted the exhaustion of the modern concept of sovereignty. It has recognized what has been said above, which is that in the 'real subsumption' of society by capital, when political command itself becomes an articulation of production within social networks, resistance will also emerge throughout society. But, at this point, the post-modern philosophers deepen their analyses, underlining their view that within the totalizing development of capitalist command over social resistance, and therefore within the antagonistic relations appearing everywhere – the effectuality of the crisis is accentuated in a radical manner because the totalization of the relation has removed all *measure*, has faded all proportion, has rendered all definite expression difficult.²⁴ As a consequence, in the political field, it has eliminated all possibility of comparing sovereignty with reality, of adapting commands to obedience, salary (and welfare) to work completed. It is not then by chance that the criticism of the concept of sovereignty (and of the presumption of its actors in professing to unite the principles of justice and social organization) is conducted by the same ruling classes of mature capitalism. These ruling classes will choose, in a crisis, to govern by the many forms and variations of the power of exception.²⁵

Let us reach a conclusion on the points discussed so far. As recent political events (from the fall of totalitarianism to the imperial wars) have demonstrated, the path of sovereign exceptionality is a difficult one to tread. Insistence on the power of exception is used as a threat, a scarecrow, rather than an efficient practice. We may note here, however, that all too often the power of exception is exemplified through the memory of the terrible historical experience of the Nazi death camps. We recall

²² See Negri 1991a.

²³ These are the theses sustained by Hardt and Negri in *Empire* (2000) and *Multitude* (2004).

²⁴ We refer here essentially to the post-modern narratives of Baudrillard and Lyotard.

²⁵ The documents of the *Trilateral Commission* from the 1970s onwards, and American neo-conservative political positions, especially as found in the work of Huntington, demonstrate this new power system.

this to underline once again the mystifying character of the concept of exception, linked to the analysis of the effects of sovereign technologies. The industrial parable of Auschwitz cannot justify it. The dignity of the Jews lay not in submitting ‘resignedly’ to extermination but in reacting to it, in the Warsaw ghetto uprising, in the solidarity of resistance in the camps – and the Holocaust, as the ultimate evil, is best considered only in theological terms, as Hannah Arendt has rightly argued.²⁶

At this point let us seek to understand (and eventually develop) the theoretical operation of displacing the problem of sovereignty as grasped in the above. The criteria according to which this operation may be conducted are known: they consist in developing the hypothesis that every form of social command is the result of the clash between two (or more) forces. Every form of command can therefore be recognized as *crisis management* – and sovereignty can only, from its origins, be defined as the (determinate) overcoming of a crisis. How is it possible to proceed in this direction? It is sufficient to take the current crisis and observe how sovereignty works while constantly attempting to exorcise it – to deny it its social consistency, to reduce it to a ‘systemic element’ – necessary but aleatory. But (we see it once again in the current crisis) the crisis of sovereignty lies in nothing, nor is it the product of anything, more than the *resistance of subjects*. The null result (that is impossible to achieve) of every operation aimed at determining – during a crisis – a synthesis between power and rights, between government and the civil experience of subject-citizen-workers (an equation that was, in modernity, in the era of bourgeois hegemony, a sought-after identity) can be traced back to the resistance of subjects. A consequence arises from this: if sovereignty as the Leviathan cannot work, one nonetheless realizes that there is no void here, that there is never a naked relation of power, because the more one empties the concept of sovereignty the more resistance fills the gap, the more you deny sovereignty the more the principles and powers of democracy emerge. So when it seems that there is no sovereignty, what we are involved in is only a spectral projection, and our perception is disturbed and mystified. Yet the vacuum created by the crisis of sovereignty (whether defined as exception or a mode of governance, as we will argue later) is instead always filled by constituent powers, that is, capacities to claim new rights and express new desires. It should be noted that here, from the point of view of the ruling classes, the reactionary emphasis on the *origins* of power and on the force of *tradition* often triumphs in the clash with the power of resistance. From Burke to the neo-conservatives, reactionary

²⁶ Arendt 1963.

thought has always been expressed in these terms. But this viewpoint must be turned upside down, because here it is resistance that stands out, expressed within the very location that sovereignty aims to vacate. Resistance emerges inside the void/crisis of sovereignty/power to which exception seeks to be the definitive violent alibi and which – as we will see – governance seeks to substitute.

Foucault took sides with those who argue that sovereignty can no longer discipline society and systems of control always end in exception. It is on this point that this research clashes with nihilism – that is the point where we all clash with nihilism. What answer does Foucault propose? What proposal will we fix on? A first approach consists in accepting that we place ourselves in that void of origins and principles that, although spectral, is no less real, and proceed from there. Reflecting on this condition and commenting on the Foucauldian gesture, Deleuze asked the following:²⁷ must we accept (when faced with the void, in the nihilist condition) that all choices, all principles are equal? Answer: no. The void that is the origin of sovereignty is nevertheless marked on a stage that has no ‘outside’. There is at least, on the other hand, an ontological ‘inside’ and a ‘low point’ in the geometry of power. It is from here that both Deleuze and we choose to start again. It is the notion of the *system* that arises here. System: that is a material, social, affective and cognitive mechanism of the production of subjectivity, or the origin of every move towards principles. An origin that can only be political. In fact, Deleuze adds that: ‘We belong to systems and act within them.’ To act within systems: this means reorienting knowledge from the origin to the becoming, from the crisis of sovereignty to becoming a democracy. A second definition stems from this proposal for a system: the aim of our action within the system is not to re-affirm what we are, it is not to repeat the identical, but to affirm the Other. But here a third point is put forward. When we advance in this direction we discover (with Foucault) the new nature of political power – how it makes itself an active producer of real, constituent power, a movement constituting principles oriented towards becoming. The *performative* quality of the system is initially organized in bad behaviour and systems of resistance, but then progresses to organize more and more new, ontologically determined, horizons. Does this not herald the process of social construction from whose questioning we began? Is this not the real *opposite* of exception?²⁸

²⁷ Deleuze 1992, pp. 159–68.

²⁸ The cross-reference is once again to Michel Foucault who writes for the first time on the concept of the ‘system’ in Foucault 1977.

Once this has been recognized, we must overcome one last objection from those who believe that *constituent power*²⁹ (because that is what we are now speaking of) acts in a relationship of homology (inverse but equivalent) alongside the power of exception. Constituent power too is seen as an extra-judicial, irrational and arbitrary force, or a decision tailored to and functional for the law that this builds. To respond to this objection, it is again necessary to return to method. When, in the preceding discussion, we insisted on the fact that when faced with crisis the only solution is to start from scratch, building straight up from resistance and the recognition of the Other, the definition of method also became a material element of the research. In fact, it is in traversing this ground (as indicated by method) that the *recognition of the common* is achieved. We must once again thank Foucault and Deleuze for pointing out this insight that – through difference and desire, resistances and the collective production of subjectivity – uncovers the common as the construction of a political power based on singularities and the expression of productive force. This is the *substance* of constituent power. The method is always open to the Other, other places and other times, sequences of construction of the commons of men. From the (partial and in some aspects defective) revelation of the common as origin, from the ecological *Umwelt* to commons-making, from the recognition of natural elements of common existence to the affirmation of the common figure (technological and ontological) of the metamorphosis of our contemporary being – this is the principal path. The methodical *performance* thus becomes a sort of constituent power – not, as the jurists would have it, as a primary but extra-judicial act, but as immanent, permanent, basic production, constantly renewed and inexhaustible.³⁰

We thus assume that resistance creates institutions in terms of form, content and functions – no longer from a methodical viewpoint but from a substantial one, no longer from a hypothetical viewpoint but from a constructive one. And that resistance determines the content of norms, their interpretation and – as a consequence – the capacity to understand their diversity (according to ever-changing rules). Constituent power is an *other thing*, rich and strong before the ‘exceptional’ reduction of sovereignty.

III

In providing a critique of the concept of the ‘power of exception’, we risk leaving aside the other issue on which the present crisis of sovereignty

²⁹ Negri 1999. ³⁰ On this subject see Hardt and Negri 2009.

hinges: *governance*. Such an oversight may lead us to a dead end in our reasoning, as it means we undervalue (or simply ignore) the essential determination that the criticism of sovereignty offers us: its implicit, irrepressible *dualism*. *Governance* allows us to transfer our criticism onto this ground, and force the defence of the concept of sovereignty into a corner. *Governance* thus becomes, at this juncture, not only the object but the necessary path of the critique. This is the final translation of the concept of sovereign government and the form of its substitute. Some criticisms of the concept of *governance* will therefore be advanced.

What exactly is *governance*? Let us assume that (as we have seen thus far in identifying and criticizing the state of exception) fragmentation and excesses are now central to the phenomenology of the sovereign state. True, systems theories, for example, speak of processes of ‘constitutionalisation without the State’ (departing from considerations of phenomena of globalization), and have identified the constitution of an ‘aleatory government of contingency’ in the transfer of decision-making powers from ‘government’ to *governance*.³¹ Indeed, the fragmented development of legal functions – at both domestic and international levels, in both administrative and political fields (and it is important to recall that local/global micro/macro relations can be retained in their immanence) – can no longer be contained in a single systemic frame.³²

Recognizing this systemic ‘incontinence’ does not mean re-evaluating or re-inventing an ‘institutionalist’ line that would see command functions rebuilt from below, but rather recognizing the rise of a chaotic situation in which instances of *governance* double and/or multiply. All this liberates forces that overflow the contexts from which they derive. These exceeding forces, which live in the interstices of the fragmented system, are products of the conflicts and clashes among different rationalities and genealogies of norms.³³ The passage from government to *governance* infringes the unitary regulation of the systems of public law. When we consider this turning point we must analyse all its facets: it represents the passage from a unitary and deductive rule to a plastic and pluralist norm. We should not be surprised if, within this system, in the dynamic and multiple flow of normative production, exception is occasionally resorted to. But we should not exaggerate the importance of such incidents. What is really important in this process is the impossibility of blocking resistances that oppose the linear development of a centralized legal will. This confirms the perception of the rupture we have already underlined.

³¹ Teubner 2005. ³² Fischer-Lescano and Teubner 2004. ³³ Teubner 2006.

At this point in the argument it must be recognized that Luhmann's legal 'systemism' (for example) anticipated this description of the dynamics of fragmentation – that it somehow solicited the analysis with a strong gesture, beginning from the awareness of the 'asymmetrical' and the critical presence of normative flows and instances of self-organization. Yet once this strong gesture has been recognized, it is necessary to add that this theoretical operation hides a 'libertine', borderline sceptical, attitude (of the 'everything must change for nothing to change' variety). In sum: a highly 'cynical' option in the sense abused by Machiavelli, rather than embracing the power of the unorganized, the asymmetric and the autonomous. This theoretical attitude (which we assume here to be typical and which we consider a general rule in post-structuralist positions) appears to constitute the basis for every theory of *governance*. It is nevertheless important that we ask ourselves whether these innovative elements should be considered not as marginal effects produced by deconstruction but, on the contrary, as reconstructive and constitutive tensions that may penetrate the heart of an 'ontology of the present'.³⁴

With this we arrive at the final point in our reasoning. Once *governance* has been determined and described in this manner, it is clear that the social (and legal) relation it constructs is entirely horizontal: *force against force*. The theory of sovereignty sees that in this it has, so to speak, returned to the relationship of force from whose synthesis it began. At any rate, at this point we must specify the concept of governance as we did the power of exception: in one as in the other we cannot define the 'force against force' relation in an abstract manner. Force always counts *for* something. There is no exercise of force that is not in some way *teleological*, that does not aim at something. The suspicion may emerge that here, by evoking finalistic horizons, we seek to make dialectic moves. But this is not the case. It is certainly true that when antagonistic forces clash and gain results that often pass for mediation, this process apes dialectic. But the antagonistic forces in conflict here are always and only *affirmative*, the confrontation is never an 'overcoming', there is no *Aufhebung*. The history of institutions is a history of confrontations. The process of institutionalization is devoted to receiving resistance, or to anticipating predicted resistance. Often it succeeds in neither: as a consequence institutional and/or normative monsters are born. The current historical (and legal) condition is characterized

³⁴ I take the liberty, on this point, of alluding to the formidable philosophical efforts of R. Schürmann (1996) to identify the concept of 'creative exception' within the annulment of theoretical alternatives of modern philosophy. Should not an analogous alternative be developed within the modern crisis of legal theories?

precisely by this fragmentation, sometimes paradoxical and/or monstrous, of the normative horizon.

Within and against this contingency, *governance* presents itself as a mature fruit. Everything seems easier, smooth and quick with *governance*! There will be no more *government*: *governance* supplants it perfectly! But there is a *but*, a big but! Which is that *governance* will remain a dualistic process, an inconclusive relation between forces, and between action and reaction. Its paradoxical character consists in the fact that it can only function when one pole is stronger than the other. But in the biopolitical dimension, where short cognitive and practical processes lead (as we have seen) to the construction of the common, the reappearance of a hegemonic force is, in some aspects, scandalous. Certainly *governance* endures, but until when?

Force against force: let us seek to consider this relation not on formal but material grounds. Here the relation between contrasting and diverse forces really introduces itself: certain forces insist on the consistency of processes, while others present themselves as projects for innovation. Reaction against progress? At other times this would have been said, citing – for example – the tense confrontation between power and counter-powers around the conquest and management of the administration. But this can no longer be said, certain aspects of the situation have now been made less dramatic and *governance* has been established. The revelation of the dualism of the power that runs through *governance* no longer seems scandalous. The rupture is definitive and universally adopted. Yet the question remains: under what conditions does *governance* take place? Who wins in the relation of force outlined by *governance*? If in the bourgeois and capitalist interpretation *governance* presents itself (without alternative or remnant) as the will for state and/or authoritarian re-composition against the power and resistance of the adversary, it must nevertheless be admitted that the legal relation continues to manifest a certain duality. Which goes to say: the balance between the attempt to close the relationship between *governance* and the power of resistance by keeping it open turns out to be extraordinarily difficult to achieve. Why? The answer can only be found within the ontology of that same relationship.

Let us return, therefore, to content. On one side we have a *governance* that expresses the necessity of command, on the other we have a *constituent power* (diffuse and irreducible) that presents itself as resistance and common innovation. When the relationship becomes too violent, *governance* is open to the temptation of transforming itself into the ‘power of exception’; on the other hand, constituent power presents itself in an even stronger manner as resistance. There is an *ontological*

imbalance between *governance* and constituent power. Against *governance*, constituent power offers itself as permanent and common, and must be recognized here as a force that is no longer extra-judicial but legitimate in unifying resistances within a dynamic and innovative opposition. We call the total of the resisting/constituent forces that are built as an ontological innovation of the social bond the *common*.

Unlike the power of exception, then, *governance* recognizes constituent power as the active element in the construction of institutional and legal processes. But *governance* can exist only when it is *stronger* than the constituent process. If *governance* still commands, it will command only so long as constituent power does not itself become hegemonic. How could such a turnaround happen? Asking oneself this is to ask how the common experience of liberty may become central in the animation and fulfilment of the present of constituent power.

An exemplary (and pedagogical) observation on the formation of the common: we are referring to an experience that takes place in the struggles around the ecological balances of social becoming. What does this consist of? It consists of the understanding that through the multitude of singularities a fundamental, common element is given, and that is the necessity to maintain the conditions for the reproduction of life (avoiding suffocation through industrial overload, to be able to eat and drink healthy substances, the avoidance of more or less artificially produced epidemics, etc.). There is therefore a biological, ecological *common* that is recognized by the singularities and which unites them. Let us move on now from examples and ecological pedagogy to reality and social activity. We have said that there is no common if there is no dynamic agreement among the singularities: the ecological experience offers us a motive in the defence of life and human reproduction. But we must go beyond the ecological example and affirm that *there is no common if there is no constituent power*. Or better, that there is a common³⁵ (including the natural and the ecological) only where there is constituent power. Man is not only nature, the citizen is already beyond nature (not denying but transforming it), and a large share of productive man is artificial (but this artificiality has become a new, powerful 'nature'). Technology constitutes our cooperative being, knowledge and language exist only when we are together. When we constitute the common, we build the world. This is the point where the hegemony of the common breaks *governance* to propose *common institutions*. These include the same insistence on singularities (on the singularity of the man who works, communicates, suffers and rejoices ...) as on the ecological conditions of life, but their

³⁵ On these themes, see Negri 2003; Hardt and Negri 2009.

strength lies in the fact that the world is rebuilt in such a way that nature itself is turned inside out (like a sock!) by the capacity of each person to move together, to walk with the Other, to build in common.

Law can only be the normative system of this common building of a common life. Norms can only be born from common decisions (not general, nor abstract, but singular and concrete) on the conditions of the production of life. Beyond sovereignty (and exception as its alibi, beyond *governance* as the replacement of sovereignty) lies the common power of singularities in the determination of the forms of communal life.³⁶

³⁶ On the spatiality of 'living together' see generally the works of Saskia Sassen.

12 Conclusion: vocabularies of sovereignty – powers of a paradox

Martti Koskeniemi

I

Having read the preceding chapters, one will have no problem in concluding that the time of sovereignty is hardly over and that, whatever changes our political or juridical languages may undergo in the foreseeable future, ‘sovereignty’ will remain part of them. Whether this be in terms of naming a good we desire, attacking the inadequacy of some of its institutional realizations, or in other ways trying to make sense of our experience, ‘sovereignty’ will continue to structure and direct our legal and political imagination, hovering, as many of the chapters in this volume highlight, obscurely in the frontier between the two. It is, as Kalmo and Lipping write, precisely this ‘limit’ aspect of sovereignty that intrigues us, the way it points to the insufficiency of ‘law’ or ‘politics’ if considered in their own terms as autonomous languages or self-regulating systems of thought. My sense is that sovereignty’s continued attraction – despite the many ways in which we have learned to be critical of its manifestations – depends precisely on the way it points across that boundary into some ‘fundamental’ aspect of the world that we are vaguely aware of but is never quite captured by the normal vocabularies we use to address our political or legal experience. The word ‘transcendental’ might not be out of place here, if only to remember Hans Kelsen’s brilliant attempts to resolve the sovereignty puzzle at a time of incipient legal and political collapse.¹ His suggested solution – sovereignty as the validity of the legal system (*Rechtssouveränität*) – may not seem very plausible in the eyes of today’s institutional pragmatist. If sovereignty persists, it does this as a desire to approach that ‘fundament’, whether an origin or an objective, fact or a concept, a rule or a decision, a desire whose fulfilment in a post-modern time has become (perhaps thankfully) very difficult. On good days, we live as bureaucrats, politicians or academics without having to worry about sovereignty’s dark sides. But

¹ Kelsen 1928a and 1928b.

as soon as things begin to go less well and the complex institutions and explanations we have created so as not to have to resort to it crumble and fall, we immediately seize its seductive appeal.

One theme haunting these chapters, but also somehow deferred by or eluding them, is that of power. Sovereignty was surely born out of a desire to understand and explain power, but also to claim, legitimize and challenge power, a tool of analysis and polemics simultaneously. Which I suppose is why the vocabularies that address sovereignty in this book – law, history, politics, international relations, globalization studies – never quite suffice fully to capture its meaning. It is as if there were some *excess* in sovereignty that resists being contained in any single technical vocabulary. This is not a novel experience. ‘Sovereignty’, wrote Jean Bodin in 1576, a time when the Western vocabulary of politics was being invented, ‘is the absolute and perpetual power of a commonwealth’.² ‘Absolute and perpetual’ – this is how the ensuing tradition learned to think about the power addressed by sovereignty. And yet, the more we pursue Bodin’s ideal view of the early-modern commonwealth and the authority of its ruler, the more we find them completely bound by history and geography – the prince is not permitted to alienate parts of the territory – as well as theology and ethics (despite the apparently shocking neutrality of his ‘politique’ politics) – that is, divine and natural law. Bodin, a modern commentator has written, ‘does not for a second try to deny that there exists a natural law that is valid independently of the will of the sovereign and of which the latter makes himself the instrument and the function’.³ But not only is that which is ‘absolute and perpetual’ both limited and directed by something outside it. Sovereignty, in whichever register we like to think of it, always points to and receives its power from some further notion or structure which, in that sense, is even more ‘absolute and perpetual’ than it. When Bartolus examined the emergence of independent commonwealths in northern Italy in the thirteenth and fourteenth centuries he may still have had religious reasons to articulate this in purely *de facto* terms. His student Baldus of Ubaldis, however, felt no scruple about receiving that independence – and introducing a modern notion of sovereignty – from a *ius gentium* that would authorize a ‘free people’ to rule itself independently of any superior.⁴ In this way, sovereignty becomes completely subservient to *ius gentium*, natural and divine law, and the one who

² Bodin 1992, p. 1.

³ Spitz 1998, p. 61. Likewise, Grimm 2009, pp. 18–20, 25–6.

⁴ See Canning 1987, pp. 104–13.

wields it has to bow to the authority of those who are entitled to determine what these notions might mean at any moment. Intellectual and legal histories often operate with an opposition between the vocabularies of ‘sovereignty’ and ‘law’, the former highlighting the prince’s freedom of action, the latter the ways of his being bound. In so doing, they overlook the important Foucauldian point about ‘freedom’ being always constrained by a sense of the alternatives between which one has to choose and the internalized hierarchies that enable one to make the choice. Even that most insistent representative of absolutism, King James I of England, in *The Trew Law of Free Monarchies* (1598), received his divine right from the Bible and from natural law by which he became ‘a naturall Father to all his Lieges at his Coronation’. But as he immediately added, ‘his fatherly duty is bound to care for the nourishing, education and vertuous government of his children’.⁵ One tends to think of absolute sovereignty as ‘arbitrary’ freedom – but as any parent knows, nothing is further from the parental relationship.

In these early moments of the life of sovereignty we are witnessing a secular transformation of the series of old paradoxes having to do with the idea of divine omnipotence. From where does God’s omnipotence derive? Or in Foucauldian terms: which discourse may authoritatively determine the meaning, for us, of God’s omnipotence? One need not agree with Carl Schmitt that ‘all concepts of the modern doctrine of the state are secularised theological concepts’.⁶ But if there is one concept in which awareness of its religious pedigree helps to analyse its meaning and use, and above all its paradoxes, it is that of sovereignty.⁷ As a proto-theological notion – and Kelsen treated it as such in his ironic attacks on Schmitt and those of his persuasion – it is both present and absent (like God) at the same time, so large that we cannot see it as against the details of the world it has created. All we see is the routine of the *potestas ordinata* that manifests itself in the daily routine of our institutions – neither ‘absolute’ nor ‘perpetual’ in any meaningful sense. And yet, once those routines come under stress, we immediately begin the hesitant grapple towards some secular equivalent of the *potestas absoluta*, a justification or a theory that enables the re-founding of routine as the relative (and non-threatening) truth of what we do.⁸ Not the least of the paradoxes of sovereignty as ‘absolute and perpetual’ is that we seem able to believe in it only as long as it is not captured within institutions or discourse – that is to say, as long as it avoids

⁵ King James VI and I 1994, p. 65. ⁶ Schmitt 2005.

⁷ This is the famous point in Kantorowicz 1957/1997.

⁸ See further Courtenay 1990.

being infected by all the uncertainties and criticisms that we routinely address against the latter. But of course, there is no way it could be treated outside discourse. Hence the inevitable sense of the ‘excess’ of sovereignty – the way it finally eludes professional analysis and calls for performance – that will be the substance of this chapter.

Lawyers, historians, political theorists, sociologists or philosophers are of course able to illuminate the many ways in which sovereignty is or has been spoken of in our political and legal institutions. But they are also unable finally to establish their own authority to speak on it. As soon as the quest for the explanatory authority of a discipline is addressed, something like an apparently endless epistemological regress begins. The moves are well-known: from law to politics: ‘the foundation of law resides in a *pouvoir constituant*’ – it is a ‘political question’; from politics to history: ‘all we need to know of politics we can read from Thucydides and Machiavelli’; from history to sociology: ‘genealogies are only synchronic arrangements of interlocking systems of the “social”’; from sociology to psychology: ‘it is all in the way identities get formed and reformed’; from psychology to philosophy: ‘well, identities are a product of language’ and finally from philosophy back to law as Jürgen Habermas and Jacques Derrida appeal to international law and the United Nations as an antidote for the world-transforming policies of the single superpower.⁹ The circle of deferrals from one language to another is not only a reflection of the existential insecurity of academic specializations (although it is that, too) but of the fact that the question of sovereignty, understood as a question of ‘absolute and perpetual power’, always raises the question of the power of discourse that cannot be treated within discourse itself. I have no doubt that learning the different vocabularies of sovereignty is a useful act of enlightenment (‘the sovereignty of reason’). It will also make us more efficient users of those languages and the connotations of ‘absoluteness and perpetuity’ that go with them. But it does not rid us from the experience of excess. We shall remain unable to tame and constrain sovereignty within definite limits.

II

Many of the chapters in this volume adopt a *juridical* vocabulary to address sovereignty. This is particularly obvious in the case of those that examine the nexus between the European Union and its member states – the old European theme of sovereignty as the problem of the

⁹ See Borradori 2003 and my review: Koskenniemi 2003a.

power of the (European) state. As ‘sovereignty’ is here translated into an issue of jurisdictional division, it appears lost somewhere in the endless corridors of Berlaymont or those of member governments. Europe, as Krasner and MacCormick almost say, is now post-sovereignty. But there is an aspect of whistling in the dark in this way of treating sovereignty – pretending that something else is central to integration other than the use of power among and by Europeans. However, none of the chapters adopting this point of view fail to mention the point, as if in passing, perhaps to placate the sensibilities of the nationalists still parading in Europe’s remoter corners, that after all, the EU is a creation of its member states – decisions taken by their constitutionally empowered institutions – and that at least to that extent the Brussels practices are a result of the use of sovereign power by European states. This recapitulates the old international law argument to square the circle of sovereignty and a binding international legal order, made, as Praet points out, already in the first case by the first international tribunal, the Permanent Court of International Justice (PCIJ) in the *Wimbledon* case in 1923: that a state bound by its treaties is not an *encroachment* on but an *effect* of its sovereignty.¹⁰ To renounce ‘sovereign rights’ is not to give up ‘sovereignty’. How serious is this point?

This argument that defers sovereign power into the past – namely the moment when competence was assigned to the international institution by its founding treaty – has been used in innumerable situations and can be almost seen as a founding argument for modern international law.¹¹ It was present in the international jurisprudence of the 1960s and 1970s that dealt with the claim of Third World states that their ‘permanent sovereignty over their natural resources’ entitled them to nationalize foreign oil companies with compensation determined by their domestic laws. Unsurprisingly, the (often Western) arbitrators held that it was of course true that those states were sovereign but it did not follow that they could discard their obligations: they had concluded the resource extraction contracts as part of their sovereignty and could

¹⁰ The passage is worth quoting *in extenso*: ‘The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty’, *Case of the S.S. Wimbledon*, PCIJ Ser A. 1 (1923), 25. See also Klabbers 1999, p. 345.

¹¹ That is to say, the ‘autolimitation’ form first presented in Jellinek 1880.

not now go back on their word. They were bound not irrespective of their sovereignty but as a consequence of it.¹²

In its recent decision concerning the compatibility of the Lisbon Treaty with German sovereignty, the German Constitutional Court (*Verfassungsgericht*) took exactly the same view. ‘The safeguarding of sovereignty’, the Court stated, ‘does not mean per se that a number of sovereign powers which can be determined from the outset or specific types of sovereign power must remain in the hands of the state’. German sovereignty continues to reside in Germany (although a number of ‘sovereign powers’ may no longer do so) but is exercised jointly with the other member states.¹³ This is a practical confirmation of the polysemy that MacCormick and others detect at the heart of sovereignty – its compatibility with very different compilations of sovereign right: different states have bound themselves differently.

The juridical vocabulary reaches its limit in the curious doctrine – adopted by all the legally oriented chapters in this volume – that states themselves are the origin of the ties that bind them, and that this is precisely why they are binding. We can see the paradoxical character of this doctrine in the 1933 case concerning the effort to create a customs union between Germany and Austria that the former (and future) allies feared would unduly expand German influence in Europe. The allies took Austria to the PCIJ, claiming that the plan violated Austria’s obligations under the Treaty of St. Germain of 1919 and the related Geneva Protocol of 1922 in which Austria had agreed ‘not to alienate its independence’ by economic or other means. The allies argued that the union would unduly limit Austria’s freedom of action – Austria responded predictably that if it were unable to negotiate economic arrangements that were in its interests, then it could not really be independent at all.¹⁴ The case raised the awkward issue of whether ‘sovereignty’ meant full freedom to negotiate treaties – including treaties that would perhaps permanently limit the freedom of operation of the state. In the EU, we have of course given an affirmative answer to this question (though perhaps with crossed fingers behind our backs). Can a sovereign really be able to alienate its sovereignty in a permanent way? The problem-setting seems as frustrating as a little boys’ quarrel over whether God’s omnipotence might mean that He is able to create a stone so heavy that He Himself could not lift it up.¹⁵

¹² See, for example, *Dispute between Texaco Overseas Petroleum Company v. the Government of the Libyan Arab Republic*, XVII ILM 1978 § 63–69 (24).

¹³ BVerfG 2 Bv E 2/08, 30 June 2009, § 248.

¹⁴ PCIJ, *Austro-German Customs Union* case, Ser A/B 41 (1931), *dispositif*, 14.

¹⁵ See further, Koskenniemi 2005, pp. 240–5.

III

As the juridical vocabulary reaches its limit, it pushes sovereignty to the realm of the *historical*. It is true that states used to be sovereign but they have now exhausted that sovereignty (or at least their 'sovereign rights') in the act that set up the institutions of the European Union. From a juridical perspective, this would immediately seem to raise the issue of the power to withdraw that act. As MacCormick writes, the Lisbon Treaty now opens that possibility but neither he nor the others consider when or under what conditions this might be done in the future. In a way, sovereignty hides in this silence – the *potestas absoluta* cannot be named for fear that it would actually emerge from the dark. Hence the whistling.

Sovereignty is often treated as a historical topic. It is somehow more comfortable as an object of debates about the past than about the present (and certainly about the future). Chapters 1 and 2 by Skinner and Baranger illuminate how that concept and the past it covers become understandable if situated as part of a struggle waged over who or what institution ought to 'possess' it. Skinner surveys the projection of sovereignty from the ruler to the people and then to the fictitious entity of the state in the context of British fights over the place of supreme power while Baranger situates sovereignty as a part of French seventeenth-century legal battles – the search for the 'marks of sovereignty' coalescing with the effort to create such marks. Such narratives do what historical vocabularies do at their best – namely detach their readers from the intuitive sense that any present configuration of power is always somehow necessary. They show that how we think of sovereignty today is always a more or less arbitrary outcome of concrete struggles and 'past futures', freeing our imagination to think about our own situation differently. It is precisely in the vein of different-thinking that Negri proposes to attach sovereignty in the conditions of globalization to the 'multitude' or the 'empire', yet further 'fictitious entities' whose invocation is inseparable from the performative act of creating them.

History as the kind of genealogies performed by Skinner and Baranger becomes ideology critique, opening up the sense of political possibility by exposing the contingency of the past. They show how in past political worlds 'sovereignty' has been understood to reside in one place or another as the object of the desires of ambitious men (of course invariably men – just as all the authors in this volume are men. Whatever else 'sovereignty' may be, at least it is a macho topic). But it also easily slides into a displacement – implying that sovereignty is no longer part of today's polite conversation. If in the past it was the object of men's

ambitions, today it has been transformed into an abstraction – the competence of the institutions of the European Union, or perhaps, as Praet states following generations of ‘formalist’ lawyers, into the ‘sovereignty of the law’ itself, Kelsen’s *Rechtssouveränität*. In such a mode it becomes a logical postulate or perhaps a (transcendental) hypothesis that we have to accept on the strength of the point that without it, everything else we know of the law (including its ‘validity’) would not make sense.¹⁶ It is easy to see the attraction in the removal of sovereignty from the state to the ‘law’ among inter-war liberal jurists, often of Jewish descent, faced with emerging totalitarianisms. But is there historical sense to a notion such as ‘sovereignty of the law’? Perhaps if that expression were understood as a shorthand for the power of the juristic class – in which case Skinner’s genealogy could be continued by moving the point of projection from the fiction of the state to the ever so concrete actors operating inside it: perhaps the political, perhaps the economic or the juridical elite.

IV

The search for a *sociological* understanding of sovereignty would then be a search for the group of human beings whom present theory and practice lift into the position of the ‘ultimate’ decision-makers. There is much reason to continue the recent efforts to understand the European Union not so much in terms of the onward march of great principles, teleologies of the slow unfolding of the French revolutionary heritage, as in terms of ‘who was where and when’. A study of the constitution of the legal elites that have populated the EU since the Schumann Plan, occupying key positions in the Commission and the European Court of Justice, and that have carried out their academic guerrilla operations within universities so as to set up something like ‘EU law’ as part – perhaps a leading part – not only of the law school curriculum but also of the European government is desperately called for.¹⁷ International law, for example, was always a construction of the imagination of ambitious and well-situated lawyers and its ups and downs have reflected closely the rise and fall of particular (liberal) sensibilities about the international world. As Dezalay and Garth pointed out some time ago, there emerged in the latter half of the twentieth century a transnational legal order that was wholly the result of the thinking and acting of a

¹⁶ The transcendental point of course comes from Kant’s critical theory. The Kantian and neo-Kantian view of sovereignty is today nicely discussed in Minkinen 2009.

¹⁷ For a useful beginning, see Vauchez 2008, pp. 128–44.

small group of commercial lawyers in American law firms.¹⁸ It is high time to narrate 'Europe', too, in terms of the growth of a worldwide (for clearly, some of the most influential European lawyers are not *European* lawyers) class of professionals in EU law.

But how powerful would a sociology be that would seek to locate sovereign power in some more or less identifiable place as an institution or 'class'? As Kalmo, Lipping and Negri suggest, in their somewhat different ways, an aspect of the post-modern situation has been the increasing sense of the 'fragmentation' of traditional social wholes in a way that has made it impossible to identify any single point of power as the holder of 'sovereignty'. What sociology has had to offer is the theory of the functional differentiation that suggests that instead of homogeneous structures of social hierarchy we find autonomous social and epistemic systems that create something like limited or mini-sovereignties within themselves – 'autopoietic' structures of, say, 'law', 'politics', 'science', 'sports', 'entertainment' and so on, each seeking operative closure against the others both within and beyond the constitutional semantic of the state.¹⁹ The expression 'sovereignty' might not, however, be out of place in order to begin to think of such systems, often presenting themselves in cognitive terms, as *political projects* akin to the nation-states at least in the sense of being both solipsistic and imperialistic – that is to say, being so coded as to see only themselves and their own preferences and mechanically translating those into the preferences of everyone.²⁰

In this respect, the 'transnational' (including the juridical monstrosity of 'transnational law') would not be very different from the old 'international' inasmuch as both would now appear as carriers of particular kinds of agency (the nation or the 'regime'), engaged in hegemonic struggles in the sense of seeking to make the particular it represents seem the universal. We know now that the concern of the representatives of traditional diplomacy over the 'fragmentation' of international law cannot be alleviated by enhanced coordination under nation-states in the UN or elsewhere in the old system – fragmented as the latter have been into representatives of particular interests and positions.²¹ But the good news is that the epistemic sovereignty now claimed by the various universally inclined expert-regimes ('trade', 'environment', 'finance', 'development', 'security',

¹⁸ Dezalay and Garth 1996.

¹⁹ The classic here is, of course, Luhmann 2004, e.g. pp. 408–12.

²⁰ See Fischer-Lescano and Teubner 2004, p. 999.

²¹ This is the famous 'erosion of the State from above and below' (i.e. from the international world and the civil society). For discussion, see Zumbansen 2009.

'human rights', etc.) is equally undermined by the irreducible indeterminacy of the knowledge systems they represent. Even if a worldwide 'trade' regime and its concomitant structure of 'trade experts' were to take on momentarily the garb of the sovereign, succession wars between trade experts (free traders, fair traders, financial advisers or trade and development experts) would soon undermine it. The new regimes are no more the homogeneous carriers of a unified ethos than the nation-state ever was. Each is a platform of disagreement, in-fighting between factions and constantly pointing outside itself as the source of its constitutional power.²²

Here, it seems to me, alongside the juridical and the historical, the sociological vocabulary also reaches its limit. With the dispersal of the state and the single, unitary realm of the 'European' or the 'international', including the disaggregation of the various knowledge-systems and regimes into sectional factions, not only modes of public law and narratives of geopolitics but also blueprints of global governance come to their end. The realm of the 'social' itself now appears engulfed in the unending spiral of reflexivity that locates it, too, as just another system or a vocabulary for addressing the world, an act of seizing power by a certain group of native language speakers (globalization experts, Luhmannian sociologists etc.) – as solipsistic and imperial as all the others. When the whole world is described as competing languages, each of the languages understood as an instrument of struggle, what then becomes of *that* language of description? Even a conscious effort to fly from the paradoxes of sovereignty will only lead deeper into them. This is Lipping's 'post-foundational' situation, which I have identified as the excess of sovereignty.

V

And what about the '*political*'? The register of the political is that of sovereignty par excellence, directly addressing struggle and desire, the openness and closure of the polis. But even as the above authors accept that sovereignty is about projection and struggle, they do not engage in an analysis of the conditions of that struggle in the present. An exception is Hent Kalmo's chapter on sovereignty in the conditions of the Baltic republics, which puts into question the analytical significance of the very notion. The political struggle that these countries waged within the Soviet Union had to do with the re-establishment of their lost sovereign statehood. When they finally re-emerged as independent

²² I have dealt with these points in much more detail in Koskenniemi 2007.

actors in the early 1990s, however, this was not as ‘new’ states but as ‘old’ ones whose sovereignty – so it was stated – had continued from the 1920s, although suspended during the long years of the Cold War, now characterized as ‘Soviet occupation’. What this suggests is that, as a matter of constitutional law and international personality, the Baltic States had been sovereign for fifty years (1940–90) under which period, however, they had exercised no sovereign attributes (and no power) whatsoever. Their sovereignty was retrospectively projected on them as part of a present political effort by which the new elites established their authority by invoking a shared sense of a longstanding injustice.²³

It is yet another of the paradoxes of sovereignty that, even as its core sense links to the possession of ‘absolute and perpetual’ power, it may also be linked with the complete absence of any such power. Not only the case of the Baltic republics but also the cases of Kuwait under Iraqi occupation in 1990, or those of Burma or Lebanon under the civil wars or indeed today’s Somalia, testify to the persistence of sovereignty in complete or almost complete absence of any effective power – just as that of Taiwan provides an illustration of the opposite case.²⁴ Now ‘sovereignty’ becomes a mere notion or desire, a fiction in a sense even stronger than Skinner’s, not the marker of an entity’s sociological thickness but of the needs of present politics. It may be that this is what sovereignty always meant: a manifestation of a political ethos – Protestantism, decolonization, self-determination, anti-globalization. This highlights it as a moral principle, a polemical weapon with no necessary juridical or sociological core. This is surely what EU lawyers have known all along – that the presence of (formal) sovereignty may be compatible with the complete absence of say in matters such as foreign trade, once thought to have been crucial for sovereign policy-making. Are Abkhazia and South Ossetia, Chechnya or Kosovo sovereign states or are they not? The practices of recognition that vary from state to state in regard to these – as well as many other – cases confirm Troper’s conclusion that sovereignty ‘is not an empirical element’. It is neither a historical nor a sociological fact but part of a political vocabulary whose point is not to register aspects of the world but to achieve them: to preserve or change a status quo, to support or oppose particular contestants.²⁵ The appropriate register to deal with sovereignty and statehood, those cases suggest, is not sociology but politics, sometimes

²³ See further Koskenniemi and Lehto 1992, pp. 190–8.

²⁴ For such and other case studies, see James 1986.

²⁵ At least, this is what I suggest on the basis of the case-analyses of recent experience in state succession in Koskenniemi 2000.

a politics of entrenchment but also (as in the case of decolonization or anti-globalization) contestation.

Krasner wonders about the durability of what he describes as the decoupling of the ‘logic of appropriateness’ (i.e. normative ideas) from the ‘logic of consequences’ (i.e. ideas about facts). This decoupling is another way of expressing the experience that the international world is a field of politics in which different actors use the vocabulary of sovereignty to support or to challenge some actual configuration of ‘consequences’. ‘Hypocrisy’ describes the experience of an *unjustified* decoupling, the failure of sovereignty as a justifying principle, and usually works as a prologue to critique and the suggestion that sovereign power should more plausibly reside somewhere else than where it now appears to be.

The tension between the reality of power and its official justification is of course nothing new and often results from contradictory pressures under which political language has to work. As Piirmäe reminds us, it was strikingly present in the political theory of early modernity where the Spanish writers of the Second Scholastic such as Francisco de Vitoria or Francisco Suárez justified the power of the ruler as emanating from the people to whom God had given *dominium* and the right of self-determination and who then had more or less freely (with the constraints of the social world, compressed in a theory of natural law) delegated their sovereignty to the king, together with the non-derogability of that delegation. At the time of the Second Scholastic, that argument was constructed with a twofold effect in mind: to oppose the theory of divine right invoked by kings such as James I while still supporting a firm central power against popular demands such as those made by *comunero* rebels in Castile in 1521–2. It is quite remarkable that in his 1528 *Relectio* on Civil Power Vitoria could both derive sovereign power from the people (so as to oppose Lutheran views about its divine pedigree) and still cite St Paul to the effect that ‘Whosoever resisteth the power [of the sovereign] resisteth the ordinance of God, and they that resist shall receive to themselves damnation.’²⁶

For Jesuits such as Suárez or Cardinal Bellarmine, who were making these arguments at the beginning of the seventeenth century, the political point was to support the pope’s coercive (and not merely directive) power against ‘incorrigibly wicked’ secular rulers – after all it was natural that the Church would have final say on what was included in the divine act that allocated *dominium* to the people and which thus also determined the scope of the powers that had been transferred to the

²⁶ ‘On Civil Power’ in Vitoria 1991, § 8 (16).

prince.²⁷ In the case of the European Union or other international institutions today, the argument about the place of ultimate power (and the locus of sovereignty) can only with difficulty be linked with any such specific political objective – that is to say, any other objective than that supported by the groups of elite lawyers in those institutions. It is useful to remember that the European Court of Justice (ECJ) derived the supremacy of European over national laws from a series of consciously bold interpretative acts and that this achieved ‘a significant transfer of national sovereignty from member state to the European level’ *against* the views of member states.²⁸

As pointed out above, work has begun only recently to decipher the power of the legal elites from Monnet and Schumann to the fantastic re-readings of the Rome treaties by the ECJ in cases such as *Van Gend en Loos* and *Costa/ENEL*, so as to bring about the principles of supremacy and direct effect and the redescription of EU treaties as fundamental rights instruments in polemical juxtaposition against the Maastricht judgments of the German Constitutional Court. In such manoeuvres, and those more recent ones referred to by Praet, we see the modern legal establishment engaged in hermeneutic practices not unlike those carried out by early-modern scholastics distinguishing between *potestas ordinata* and *potestas absoluta*, *dominium iurisdictionis* and *dominium proprietatis*, fighting over the question of ultimate power and by so doing attaining the status of epistemic gatekeepers to that power.²⁹ If *ordinata* and *absoluta* may seem to capture well the relationship between the EU and its member states (Brussels bureaucracy dealing with the mundane management of political normality, the powers of the member states setting in at moments of crisis) and the distinction between *dominium iurisdictionis* and *dominium proprietatis* laying out the structure of modern ordoliberalism (the use of private property in conjunction with paternalistic government), the one lesson that the history of sovereignty seems to provide is that whatever else theology may achieve, at least it solidifies the power of theologians.

Political struggles are waged over the meanings of words and what such expressions as ‘supremacy’ or ‘subsidiarity’, ‘direct effect’ or ‘fundamental rights’ mean is today authoritatively fixed by a legal class whose position is homologous to that of the Dominicans and Jesuits of

²⁷ See especially, ‘A Defense of the Catholic and Apostolic Faith’, Book III, ch. xxiii, in Suárez 1944, pp. 685–702.

²⁸ See Alter 2002, p. 182.

²⁹ Vitoria, in fact, had no doubt where epistemic sovereignty lay. For ‘[t]he office and calling of a theologian is so wide, that no argument or controversy on any subject can be considered foreign to his profession’, ‘On Civil Power’, in Vitoria 1991, p. 3.

sixteenth and early seventeenth-century Spain. In European law, but also in the innumerable workshops examining the intricacies of global governance, ever more ingenious distinctions are being made so as to capture the baroque struggles for authority in conditions of confessional split and pressure of unity against the alien. To bring this practice into the light, juridical and historical vocabularies are certainly needed for opening the way to alternative institutional futures. But this is not the same as asking the question about present power. Where is it? Where should it be?

These questions cannot be answered by juridical or historical studies. Nor is sociology helpful if the social description itself is dependent on evaluative judgments regarding what is essential and non-essential in the empirical world (e.g. whether it is the routine or the moment of stress that discloses the heart of the matter – the eternal controversy between Schmittians and their detractors).

The sociological register identifies the sovereign in Carl Schmitt's famous terms as that organ, institution or person who 'can decide on the exception'. This view would not examine the Court of Justice in Luxembourg or the Commission or Council in Brussels. It would certainly not believe *Rechtstaatlichkeit* to be more than ideological obfuscation. The register would instead try to penetrate the sociological normality of the legal order or theories of competence or jurisdiction. It would try to find out on what that normality depends – and that can only be revealed in moments of stress, as MacCormick agrees. Who should send in the police? Or indeed the army?

VI

The chapters in this volume hardly touch the nexus between sovereignty and military power – and when they do so, it is mainly in terms of the seventeenth-century struggles that led to the Peace of Westphalia. And even that moment does not seem interesting as a synchronic cut into a momentary configuration of power but as an occasion to reflect on the theory of the just war. Sovereignty is undoubtedly connected with the right to wage (just) war. Initially, as Piirmäe reminds us, any theory of sovereignty seems to conflict with the view of just war as punishment, an instrument of the objective order. But just as the earlier opposition between sovereign freedom and the binding force of treaties was unstable (because binding force was a consequence of sovereign freedom), here, too, the worst injustice is always an assault on sovereign freedom – an assault whose existence and gravity cannot be determined from the outside of that (violated) sovereignty itself, as

generations of 'realist' students of international relations have pointed out.³⁰ That wars are fought for 'security' undermines the neat historical distinction it has been customary to make between (positivist) periods when warfare was a state privilege and (naturalist) ones in which states needed an official justification. Few states have ever gone to war 'arbitrarily' and to believe that law is able to fix a stable frontier between just and unjust causes is to miss the historical lesson where *honestum* and *utile* turn from objective data to matters of perspective, even feeling, and finally merge together.³¹ Bartelson addresses the embarrassing interdependence between justice and force by taking up the question of the *nomos* (without that name, however) through what he calls the 'double bind', conventionally associated with the Hobbesian dialectic of protection and obedience. This now is the way in which a sociological register of sovereignty reveals its political bias: the principle of ultimate authority (sovereignty) residing in the fact of being able to provide protection – sending in the police (or the army), in other words. Skinner, Piirmäe, Krasner and Bartelson all circle around something like this (realist) view of sovereignty that takes us far from the jurisprudence of the European Court of Justice or the reports and laws despatched by the automated legislator at Brussels. But they refrain from discussing the identity against whom 'protection' might be needed – a discussion that rather embarrassingly seems to point to another register of normative speech that was long held to have been past, that of empire.

Considering questions such as 'whose security' and 'security against what' immediately brings to awareness the polemical nature of sovereignty in cases in which – as is likely – analysis would demonstrate that the security of some is only attainable at the cost of the security of others. Focusing on Europe and the EU, the most obvious blind spot in the chapters in this volume is their absence of any awareness of the Third World in any other role than as Krasner's 'pre-modern' realm of endless corruption and conflict – interesting predominantly as the source of insecurity in the West. Ever since the 1960s, it has been well understood that formal sovereignty in the Third World is compatible with a return in the West to the old ways of 'informal empire', the use of commercial links and collaborationist elites for tying the formerly colonial world into novel relations of dependence. With the recent emergence of the theme of 'security' (if not strictly a historical derivative of

³⁰ The view that whether something is a violation of sovereignty (for example sovereign 'honour') can only be the result of self-interpretation by the sovereign is vigorously defended in Hans Morgenthau's doctoral dissertation, see Morgenthau 1929, pp. 62–72, 119 et seq.

³¹ See especially Gentili 1933, pp. 31–3 and 58–61.

'sovereignty', at least part of the same family of ideas) into a principal platform over which international politics is waged, a focus on military control of events and populations in the Third World has again become part of the exercise of Western external sovereignty. This need not be thought of as an outcome of the spread of a new militarism. The exercise of sovereignty was always justified in terms of all kinds of moral good, beginning with the *mission civilisatrice*. This enabled environmentalists, for example, to speak in the 1990s of 'collaborative sovereignty' as a code word for removing jurisdiction over the use of (especially Third World) resources to international institutions. In the past decade, the Canadian initiative on 'Responsibility to protect' has sought a redefinition of (peripheral) sovereignty so as cater to Western humanitarian sensibilities, always obscurely related to the wish to exert global control.³² Do the war in Afghanistan, the Israeli–Palestine conflict, the conflicts in the Congo or around the African Great Lakes area raise the question of sovereignty? If they do (and it is hard to see why they should not) then the chapters in this volume have not noticed them and the question of who is secure, and against what or whom security is being sought, somehow falls by the wayside in dominant vocabularies.

But focus on the military aspects of security has long been downplayed in relation to other concerns. A wide notion of 'security' was introduced into the mainstream of politics in the 1990s in order to empower security experts to extend their jurisdiction in economic, humanitarian and ecological matters.³³ As a counter-operation an even wider notion of sovereignty followed Foucault and turned the spotlight of analysis on to the epistemic structures and forms of disciplinary control implicated in that changed reading of 'security'. One outcome was to turn from the view of power as a *limit* (the traditional sovereign) to power as an *enabler*, tracking the way in which today's politics is less about preventing subjects from doing what they want than creating a subjectivity whose wants may be conditioned on (economic) ideas about 'freedom' and 'interest'.³⁴

Such a 'biopolitical' turn would take the study of sovereignty away from the register of public law and the state and into more elusive and complex realms where the very categories of the state and the subject, the public and the private, knowledge and faith, political and non-political, are constituted. In Vitoria, Suárez and the other early-modern Catholic political theorists such distinctions presupposed a theological

³² As brilliantly analysed in Orford 2009.

³³ I discuss this transformation in Koskenniemi 1995.

³⁴ See Foucault 1997, pp. 213–34 and Foucault 2005, pp. 53–72, 271–90 and *passim*.

frame in which whatever took place in the realm of government and politics needed to be assessed from the perspective of the care of souls (*regnum animarum*). Recent studies of early Christian spiritual practices suggest that they continue into modern government, taking place less through the external symbolisms of the sovereign than through individuals' 'subjection' to controlled mechanisms of identity-formation.³⁵ That is Negri's suggestion, too, but he still refrains from undertaking an examination of the conditions of the formation of the 'multitude' and the 'empire' that, he seems to suggest, might cancel out many of those foundational distinctions and the governmental practices they uphold. Lipping argues for 'openness' in a post-modern world in which there would be no fixed categories, so that political contestation (whether or not carried out by the use of the term 'sovereignty') would be unlimited. But surely such 'super-liberalism' is hard to maintain in a world in which religion is still the most important source of conflict, as Western Christianity finds itself in a worldwide struggle with Islam. Or perhaps this is a theology, too, that hides itself in an academic idiolect: Lipping, after all, celebrates the power of miracles. And as he suggests, the practice of making and collapsing distinctions would continue from Salamanca to the academies of the West in a post-foundationalist terrain in which sovereignty is constantly created anew.

But perhaps politico-theological reflection on the metaphysical ground on which society's constitutive distinctions are formed was always too far from analysis of (or indeed participation in) any *actual* struggle: Afghanistan, Iraq, Congo, Israel–Palestine, Caucasus again. Like history, deconstruction opens up imaginative possibilities by celebrating contingency. But it does not answer the question about what to think of the present world. Lipping and Negri are surely right when they suggest that the distinctions of friend/enemy, public/private, rule/exception, sovereignty/anarchy exercise a Manichean blackmail. In fact, there are no choices to be made. The distinctions describe an existential condition, a series of themes over which power is exercised and in which 'sovereignty' appears as that which can maintain the stability of some opposition, if always only for a moment. This kind of deconstruction is necessary, but it is still the antechamber of politics; gladiators fixing their weapons on the evening before entering the arena. But gladiators do not wield power. They may come to understand this, but only at the moment when the gates are thrown open and it is already too late.

³⁵ This type of (Foucauldian) study of government – 'beyond sovereignty' – is conducted in Senellart 1995 and Agamben 2008.

VII

Sovereignty persists as an instrument of analysis and polemics. The excess of sovereignty, we may now assume, results from the way in which the latter always infects the former. There is no analysis of sovereignty that remains unaffected by the polemical intentions of its author. Let me conclude by becoming openly polemical. Sovereignty's persistence is surely due to the positive words we associate it with – words such as self-determination, nationhood, independence. These words and the histories they invoke conflict with the experience of many peoples around the world today. Whatever else 'globalization' may mean, at least it signifies the informal government of an increasing number of people and things outside the structures of formal statehood. It is today widely assumed that questions of economic distribution, environmental protection, security and human rights, along with a host of others, are 'essentially global' and therefore ought to be managed by global networks of knowledge and expertise, outside the anachronistic structures of sovereign statehood. In debates among liberal intellectuals and professionals since the First World War, 'sovereignty' has been predominantly seen through its dark side – as a functionally inept and morally corrupt form of absolutism that is used only by domestic elites in order to hide from well-founded international criticism.³⁶

As against sovereignty, globalization means the increasing authority of technical and economic vocabularies and systems of expertise that seek to 'manage' global problems so as to attain optimally effective solutions. International organizations and informal networks of governance produce increasing amounts of 'regulation' that determines the conditions in which most people lead their lives and whose authority is 'derived not from its origin but from its purpose'.³⁷ It is produced without regard to and often specifically against the language of sovereignty. Sovereignty, it is sometimes claimed, should not stand in the way of producing 'democracy', or 'rule of law' or 'human rights' or 'security', if necessary by 'transformative occupation' by benevolent (Western) occupiers.³⁸ The arguments are well known. They stem from the view that acceptable authority depends above all on the outcomes of rule and that these ought to be measured empirically, by reference to the degree to which they provide for the welfare or security of human individuals. The soft language of 'legitimacy', in which the projects of governance

³⁶ The critique of sovereignty is well known. I discussed it some years ago in Koskenniemi 1994.

³⁷ Loughlin 2005, p. 373 and Klabbers 2009, pp. 99–106.

³⁸ For two opposing assessments, see Harris 2006 and Bhuta 2005.

are wrapped, seeks to turn de facto power into authority without lapsing into ethics and morality (too abstract and controversial) or law (too formalistic), though registering outcomes and individuals' feelings about them.³⁹ These new forms of power – global, informal and 'legitimate' – are the new sovereignty; they enthrone managers where there used to be kings and emperors. And why might this not be just fine? Let me end with an example.

Imagine that an informal global network – 'Supernova' – developed the best techniques of security and welfare-production in the world (whatever that might mean) and that nothing produced in national universities or research facilities came anywhere near it. Imagine then that Supernova agreed to raise the standard of life and security in, say, Finland, or Burkina Faso, to levels that could not even be imagined under the status quo, but only on condition of being granted 'sovereignty' over Finland and Burkina Faso. Would this be sufficient to draw the ultimate conclusion of the critiques of sovereignty – that if you were measurably better off under 'Supernova' than under your government, then Supernova indeed merited such sovereignty? What should law or political theory say? Should they take the bargain offered by Supernova as the only *rational* solution and apply it over the heads of the Finns and the Burkinabe for their own good?

I suppose most of us would agree that this would be a nightmare solution. Why? Because we have an intuitive sense of social life as something else, and more than the production of security or welfare, and that the acceptable exercise of authority is something other than the production of good outcomes. For authority is not simply about outcomes but also about selfhood and relationships to others. There is an ideal of authority that takes the perspective of every person's growing up and becoming part of a community that one has reason to think of as one's 'own' not only because that is where one has lived but because one has been a participant in its collective self-formation. This ideal looks upon social life not just as a platform for carrying out objectives such as security and welfare, or obeying those in power (which is usually the same thing) but as participation in decision-making about matters such as what 'security' and 'welfare' might mean and which of their alternative forms of realization might be appropriate, with the knowledge and resources that one is ready to think authoritative in the community of one's interlocutors, irrespective of what others might think of them. There is nothing eccentric about thinking in this way. It is the platform on which not only the anti-globalization movement but also

³⁹ See Koskenniemi 2003b.

the German Constitutional Court speaks: German sovereignty (like the sovereignty of Finland or Burkina Faso) is simply another name for German democracy.⁴⁰ 'It is true', the German Court states, 'that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained'. That maintenance is important not because of any mystical power in sovereignty (as the Court goes out of its way to make clear) but because on it stands the Germans' 'ability to politically and socially shape the living conditions on their own responsibility'.⁴¹

We all know the many well-founded critiques of sovereignty. But there is a bright side to sovereignty that describes the character of collective life as a *project* – a set of institutions or practices in which the forms of collective life are constantly imagined, debated, criticized and reformed, over and again. The wish to participate in such a project is defeated and lost in the replacement of sovereignty by 'global governance' and its cognates.⁴² Attending to outcomes or empirical feelings of legitimacy cannot articulate a collective self-formation in which one's preferences and 'purposes' are formed and reformed in collective decision-making processes and in which *they are not expected to remain stable over time*. 'Effective governance' assumes that humans beings are born ready-made, with stable and unchanging preferences, always acting with a view to maximizing utility. This is a familiar image, of course. But it is a limited, passive and sad image.

'Sovereignty' is just a word. Its meaning has appeared differently in different contexts of space and time and like any institutional word it can be used for good and for ill. The West has become very conscious of its problems, and blind to its attraction to others. But we do grasp its attraction sometimes in polemical confrontations over the sense of 'globalization', the emergence of transnational networks of private interest and the occupation of the spheres of politics by economic and technical vocabularies and preferences. In such contexts we sometimes invoke sovereignty to express frustration and anger about the way what present themselves as unavoidable necessities of a global modernity are diminishing the spaces of collective re-imagining, creation and transformation. At those moments it might be useful to remember that this was what sovereignty meant for those who struggled against theocratic rule in early-modern Europe, stormed the Bastille at the peak of the

⁴⁰ Grimm 2009, p. 123. ⁴¹ BVerfG, Decision 30 June 2009, para 226.

⁴² I have made these points more extensively in Koskeniemi 2009, pp. 405–16.

Enlightenment or invoked it to support decolonization in the twentieth century. Today, it stands as an obscure representative against disillusionment with global power and expert rule. In the context of war, economic collapse and environmental destruction, sovereignty points to the possibility, however limited or idealistic, that whatever comes to happen, one is not just a pawn in other people's games but, for better or for worse, the master of one's own fate.

Bibliography

- Abelin, J.P. (1635–1738). *Theatrum Europaeum*, Frankfurt.
- Agamben, Giorgio (2005). *State of Exception*, trans. Kevin Attell, Chicago.
- Agamben, Giorgio (1998). *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford.
- (2008). *Le règne et la gloire. Homo Sacer II.2*, Paris.
- Albi, Anneli (2008). 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums', *European Law Journal* 15, pp. 46–69.
- Alesina, Alberto and Spolaore, Enrico (2003). *The Size of Nations*, Boston.
- Allan, T.R.S. (1997). 'Parliamentary Sovereignty: Law, Politics, and Revolution', *Law Quarterly Review* 113, pp. 443–52.
- Almain, Jacques (1706). *Tractatus de autoritate ecclesiae* in Jean Gerson, *Opera Omnia*, ed. Louis Ellies du Pin, 5 vols., Antwerp, vol. II, cols. 976–1012.
- Alter, Karen J. (2002). *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford.
- Angell, Norman (1914). *The Foundations of International Polity*, London.
- Ankersmit, F.R. (2007). 'Political Representation and Political Experience: An Essay on Political Psychology', *Redescriptions* 11, pp. 21–44.
- Anon. (1647). 'Manifest Oder Summarischer Bericht [1644]' in *Theatrum Europaeum*, ed. J.P. Abelin, Frankfurt.
- Aquinas, St Thomas (1964–1981). *Summa Theologiae*, London and New York.
- Arendt, Hannah (1963). *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York.
- Arienzo, Alessandro (2004). 'Dalla corporate governance alla categoria politica di governance' in *Governance*, ed. Gianfranco Borelli, Naples, pp. 125–62.
- Armstrong, Kenneth (2003). 'United Kingdom – Divided on Sovereignty' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 327–50.
- Ashley, R.K. and Walker, R.B.J. (1990). 'Reading Dissidence/Writing the Discipline. Crisis and the Question of Sovereignty in International Studies', *International Studies Quarterly* 34, pp. 367–416.
- Augustine, St (1998). *The City of God Against the Pagans*, ed. R.W. Dyson, Cambridge.
- Austin, John (1995). *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble, Cambridge.
- Ayala, Balthazar (1912). *De jure et officiis bellicis et disciplina militari*, Washington, DC.
- Badinter, Robert (2003). *Une constitution européenne*, Paris.

- Baldwin, Geoffrey (2004). 'Reason of State and English Parliaments, 1610–42', *History of Political Thought* 25, pp. 620–41.
- Bartelson, Jens (1995a). *A Genealogy of Sovereignty*, Cambridge.
- (1995b). 'The Trial of Judgment: A Note on Kant and the Paradoxes of Internationalism', *International Studies Quarterly* 39, pp. 255–79.
- (1996). 'Short Circuits: Society and Tradition in International Relations Theory', *Review of International Studies* 22, pp. 339–60.
- (2001). *The Critique of the State*, Cambridge.
- Bast, Jürgen (2003). *On the Grammar of EU Law: Legal Instruments*, New York University, Jean Monnet Working Paper 9/2003.
- Baudrillard, Jean (1988). *Selected Writings*, ed. Mark Poster, Stanford.
- Baumgold, Deborah (1988). *Hobbes's Political Theory*, Cambridge.
- (1993). 'Pacifying Politics: Resistance, Violence and Accountability in Seventeenth-Century Contract Theory', *Political Theory* 21, pp. 6–27.
- Beaud, Olivier (2007). *Théorie de la fédération*, Paris.
- Beaulac, Stéphane (2003a). *The Power of Language in the Making of International Law*, Leiden.
- (2003b). 'Emer de Vattel and the Externalization of Sovereignty', *Journal of the History of International Law* 5, pp. 237–92.
- Behnen, Michael (1986). 'Der gerechte und der notwendige Krieg. "Necessitas" und "Utilitas reipublicae" in der Kriegstheorie des 16. und 17. Jahrhunderts' in *Staatsverfassung und Heeresverfassung in der europäischen Geschichte der frühen Neuzeit*, ed. J. Kunisch, Berlin, pp. 43–106.
- Bellamy, Richard (2000). *Rethinking Liberalism*, London and New York.
- (2003). 'Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 167–89.
- (2007). *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, Cambridge.
- Bennett, Marc (2007). 'The "Rule of Law" Means Literally What it Says: the Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law', *Australian Journal of Legal Philosophy* 32, pp. 90–113.
- Bentham, Jeremy (1970). *Of Laws in General*, ed. H.L.A. Hart, London.
- (1988). *A Fragment on Government*, ed. J.H. Burns and H.L.A. Hart, intro. Ross Harrison, Cambridge.
- Besson, Samantha (2005). 'Review of Walker, N. (ed.). "Sovereignty in Transition"', *International Journal of Constitutional Law* 3, pp. 147–56.
- Bevir, Mark (2008). 'What is Genealogy', *Journal of the Philosophy of History* 2, pp. 263–75.
- Bhuta, Nehal (2005). 'The Antinomies of Transformative Occupation', 16 *European Journal of International Law*, pp. 721–40.
- Bickerton, C.J., Cunliffe, P. and Gourevitch, A. (eds.) (2007). *Politics without Sovereignty*, London.
- Blaau, Loammi C. (1990). 'The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights', *South African Law Journal* 107, pp. 76–96.
- Blackstone, Sir William (1765). *Commentaries on the Laws of England*, vol. 1: *Of the Rights of Persons*, Oxford.

- Blackstone, William (1979). *Commentaries on the Laws of England (1765–1769)*, Chicago.
- Blecher, Michael (2006). ‘Law in Movement. Paradoxontology, Law and Social Movements’ in *Human Rights and Capitalism*, ed. Janet Dine and Andrew Fagan, Cheltenham, pp. 80–114.
- Boccalini, Traiano (1626). *The new found politike*, trans. William Vaughan.
- Böckenförde, Ernst-Wolfgang (1991). ‘The Origin and Development of the Concept of the Rechtsstaat’ in *State, Society and Liberty*, New York, pp. 47–70.
- Bodin, Jean (1951). *Oeuvres philosophiques de Jean Bodin – texte établi*, translated and published by P. Mesnard, Paris.
- (1962). *The Six Bookes of a Commonweale*, ed. Kenneth D. McRae, Cambridge, MA.
- (1986). *Les six livres de la République*, ed. Christiane Fremont, Marie-Dominique Couzinet and Henri Rochais, Paris.
- (1992). *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, ed. Julian H. Franklin, Cambridge.
- Borelli, Gianfranco (1993). *Ragion di stato e Leviatano*, Bologna.
- Borradori, Giovanna (2003). *Philosophy and Terror. Dialogues with Jürgen Habermas and Jacques Derrida*, Chicago.
- Bosanquet, Bernard (1910). *The Philosophical Theory of the State*, 2nd edn, London.
- Botero, Giovanni (1630). *Relations of the most famous kingdomes and commonwealths thorowout the world*, trans. Robert Johnson, London.
- Boucher, David and Vincent, Andrew (2000). *British Idealism and Political Theory*, Edinburgh.
- Bozeman, Adda (1984). ‘The International Order in a Multicultural World’ in *The Expansion of International Society*, ed. Hedley Bull and Adam Watson, Oxford, pp. 387–406.
- Bramhall, John (1643). *The Serpent Salve*, n.p.
- Brett, Annabel S. (1997). *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge.
- Bröckling, U., Krasmann, S. and Lemke, Th. (2000). *Gouvernementalität der Gegenwart. Studien zur Ökonomisierung des Sozialen*, Frankfurt.
- Brownlie, Ian (1998). *Principles of Public International Law*, 5th edn, Oxford.
- Brunkhorst, Hauke (2004). ‘The Right to War: Hegemonial Geopolitics or Civic Constitutionalism’, *Constellations* 11, pp. 512–26.
- Brunsson, Nils (1989). *The Organization of Hypocrisy: Talk, Decisions and Actions in Organization*, Chichester.
- Bryce, James (1901). ‘The Nature of Sovereignty’ in *Studies in History and Jurisprudence*, vol. II, Oxford, pp. 49–111.
- Bull, Hedley (1990). ‘The Importance of Grotius in the Study of International Relations’ in *Hugo Grotius and International Relations*, ed. Hedley Bull and Adam Roberts, Oxford, pp. 65–93.
- (1995). *The Anarchical Society. A Study of Order in World Politics*, Houndmills, Basingstoke.
- Burke-White, W.W. (2002). ‘A Community of Courts: Toward a System of International Criminal Law Enforcement?’, *Michigan Journal of International Law* 24, pp. 1–102.

- Burns, J.H. (1989). 'Bentham and Blackstone: A Lifetime's Dialectic', *Utilitas: A Journal of Utilitarian Studies* 1, pp. 22–40.
- (1992). *Lordship, Kingship and Empire: The Idea of Monarchy 1400–1525*, Oxford.
- Bynkershoek, Cornelis van (1930). *Quaestiones juris publici*, Oxford.
- Cairns, John W. (1984). 'Blackstone, an English Institutionalism: Legal Literature and the Rise of the Nation State', *Oxford Journal of Legal Studies* 4, pp. 318–60.
- Calhoun, Laurie (2002). 'Legitimate Authority and "Just War" in the Modern World', *Peace & Change* 27, pp. 37–62.
- Caney, Simon (2005). *Justice Beyond Borders: A Global Political Theory*, Oxford.
- Canning, Joseph (1987). *The Political Thought of Baldus de Ubaldis*, Cambridge.
- Carré de Malberg, Raymond (1920–1922). *Contribution à la Théorie générale de l'Etat*, Paris.
- Cassese, Sabino (2002). *La crisi dello stato*, Rome and Bari.
- Center for Global Development (2003). *Challenging Foreign Aid: A Policymaker's Guide to the Millennium Challenge Account*.
- Chayes, Abram and Chayes, Antonia H. (1995). *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, MA.
- Christopher, Paul (1994). *The Ethics of War and Peace. An Introduction to Legal and Moral Issues*, Upper Saddle River.
- Cocco, Giuseppe and Negri, Antonio (2006). *GlobAL, biopotere e lotte in America Latina*, Rome.
- Cochran, Molly (1999). *Normative Theory in International Relations. A Pragmatic Approach*, Cambridge.
- Cohen, Jean (2004). 'Whose Sovereignty? Empire versus International Law', *Ethics & International Affairs* 18, pp. 1–24.
- Cohen, Samy (2006). *The Resilience of the State*, London.
- Collier, Paul (2007). *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*, New York.
- Collingwood, R.G. (1989). *Essays in Political Philosophy*, Oxford.
- Combacau, Jean (2000). 'La souveraineté internationale de l'État dans la jurisprudence du Conseil constitutionnel français', *Cahiers du Conseil constitutionnel*, no. 9, pp. 113–8.
- Cooper, Robert (2003). *The Breaking of Nations: Order and Chaos in the Twenty-first Century*, New York.
- Courtenay, William J. (1990). *Capacity and Volition. A History of the Distinction between Absolute and Ordained Power*, Pergamo.
- Cox, Michael (2004). 'Empire, Imperialism, and the Bush Doctrine', *Review of International Studies* 30, pp. 585–608.
- Craig, Paul (2001). 'Constitutions, Constitutionalism and the European Union', *European Law Journal* 7, pp. 125–50.
- Crawford, James (2006). *The Creation of States in International Law*, 2nd edn, Oxford.
- Crevelde, Martin van (1999). *The Rise and Decline of the State*, Cambridge.
- Crown Agents (n.d.). *Mozambique Customs Reform Programme 1997–2006*, London.

- Dahbour, O. (2006). 'Advocating Sovereignty in an Age of Globalization', *Journal of Social Philosophy* 37, pp. 108–26.
- Daly, James (1971). 'John Bramhall and the Theoretical Problems of Royalist Moderation', *The Journal of British Studies* 11, pp. 26–44.
- De Cristofaro, Ernesto (2007). *Sovranità in frammenti: La semantica del potere in Michel Foucault e Niklas Luhmann*, Verona.
- Defoe, Daniel (1786). *The History of the Union between England and Scotland*, London.
- De Luca, Luigi (1946). *Stato e Chiesa nel pensiero politico di G. Botero*, Rome.
- Del Vecchio, Giorgio (1935). *La Crise de l'État*, Paris.
- Deleuze, Gilles (1992). 'What is a dispositif?' in *Michel Foucault, Philosopher*, ed. Timothy Armstrong, New York, pp. 159–68.
- Denzer, Horst (1972). *Moralphilosophie und Naturrecht bei Samuel Pufendorf*, Munich.
- Department for International Development (DfID) (2004). 'Proxy List of Fragile States' in *Why We Need to Work More Effectively in Fragile States*.
- Derathé, Robert (1988). *Jean-Jacques Rousseau et la science politique de son temps*, 2nd edn, Paris.
- Dezalay, Yves and Garth, Bryant G. (1996). *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago.
- Dicey, Albert Venn (1959). *Introduction to the Study of the Law of the Constitution*, 10th edn, Basingstoke.
- Dickmann, Fritz (1971). *Friedensrecht und Friedenssicherung*, Göttingen.
- Digest of Justinian* (1985). Ed. Theodor Mommsen and Paul Krueger, ed. and trans. Alan Watson, 4 vols., Philadelphia.
- Döring, Detlef (1995). *Samuel Pufendorf: Kleine Vorträge und Schriften*, Frankfurt.
- Downing, Calybutte (1634). *A Discourse of the State Ecclesiasticall of this Kingdome, in relation to the Civill*, 2nd edn, Oxford.
- Doyle, Michael (1986). *Empires*, Ithaca, NY.
- Duchhardt, Heinz (2000). 'War and International Law in Europe: Sixteenth to Eighteenth Centuries' in *War and Competition Between States*, ed. P. Contamine, Oxford, pp. 279–99.
- Duhamel, Olivier (2003). 'Discussion with Ph. De Villiers on the European Constitution', *Le Figaro*, 17 November.
- Dwan, Renata and Bailey, Laura (2006). *Liberia's Governance and Economic Management Assistance Programme (GEMAP)*, Washington, DC, World Bank, Fragile States Group.
- Dyson, Kenneth H.F. (1980). *The State Tradition in Western Europe*, Oxford.
- Dyzenhaus, David (1997). *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford.
- Elbe, Joachim von (1939). 'The Evolution of the Concept of Just War in International Law', *American Journal of International Law* 33, pp. 665–88.
- Elshtain, Jean Bethke (1985). 'Reflections on War and Political Discourse. Realism, Just War, and Feminism in a Nuclear Age', *Political Theory* 13, pp. 39–57.

- (2003). *Just War against Terror. The Burden of American Power in a Violent World*, New York.
- Epron, Quentin (2006). *La manière française du droit – contribution à l’histoire des méthodes juridiques de l’Humanisme aux pré-Lumières*, Paris.
- Esteban, Fernandez (1999). *The Rule of Law in the European Constitution*, The Hague.
- Failed State Index (2007). *Foreign Policy and the Fund for Peace*.
- Falk, Richard (1999). *Predatory Globalization. A Critique*, Cambridge.
- Fastenrath, Ulrich (2000). ‘States, Extinction’ in *Encyclopedia of Public International Law*, ed. R. Bernhardt, vol. iv, North Holland, pp. 669–72.
- Febbraio, Alberto and Teubner, Günther (1994). *State, Law, and Economy as Autopoietic Systems*, Milan.
- Ferrajoli, Luigi (1997). *La sovranità nel mondo moderno*, 2nd edn, Rome and Bari.
- Ferrari Bravo, Luciano (2001). ‘Homo Sacer’ in *Dal fordismo alla globalizzazione*, Rome, pp. 279–86.
- Filmer, Sir Robert (1991). *Patriarcha and Other Writings*, ed. Johann Sommerville, Cambridge.
- Finnemore, Martha (2005). ‘Fights about Rules: the Role of Efficacy and Power in Changing Multilateralism’, *Review of International Studies* 31, pp. 186–207.
- Fischer-Lescano, Andreas and Teubner, Günther (2004). ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, *Michigan Journal of International Law* 25, pp. 1047–58.
- Forsyth, Murray (1991). ‘State’ in *The Blackwell Encyclopaedia of Political Thought*, ed. David Miller, revised edn, Oxford, pp. 503–6.
- (1992). ‘The Tradition of International Law’ in *Traditions of International Ethics*, ed. Terry Nardin and David R. Mapel, Cambridge, pp. 23–41.
- Foucault, Michel (1977). ‘Preface’ in *Anti-Œdipus: Capitalism and Schizophrenia*, Gilles Deleuze and Félix Guattari, New York, pp. xi–xiv.
- (1997). ‘Il faut défendre la société’. *Cours au Collège de France 1975–1976*, Paris.
- (2003). ‘Society Must Be Defended’. *Lectures at the Collège de France 1975–1976*, New York.
- (2005). *Naissance de la biopolitique. Cours au Collège de France, 1978–1979*, Paris.
- Fowler, Michael R. and Bunck, Julie Marie (1995). *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, University Park, PA.
- Franklin, Julian H. (1973). *Jean Bodin and the Rise of Absolutist Theory*, Cambridge.
- (1991). ‘Sovereignty and the Mixed Constitution: Bodin and his Critics’ in *The Cambridge History of Political Thought 1450–1700*, ed. J.H. Burns and Mark Goldie, Cambridge, pp. 298–328.
- Freckmann, Anke and Wegerich, Thomas (1999). *The German Legal System*, London.
- Fukuyama, Francis (2004). *State Building: Governance and World Order in the 21st Century*, Ithaca, NY.
- Fulbecke, William (1602). *The pandectes of the law of nations*, London.

- Galli, Carlo (1996). *Genealogia della politica: Carl Schmitt e la crisi del pensiero politico moderno*, Bologna.
- Garais, Carl von (1883). *Allgemeines Staatsrecht*, Freiburg and Tübingen.
- Garnett, George (1994). 'Editor's Introduction' in *Vindiciae, contra tyrannos*, ed. and trans. George Garnett, Cambridge, pp. xix–lxxvi.
- Gauchet, Marcel (1995). *La révolution des pouvoirs. La souveraineté, le peuple et la représentation 1789–1799*, Paris.
- Gauthier, David P. (1969). *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes*, Oxford.
- Gearty, Connor (2005). *Can Human Rights Survive?*, Cambridge.
- Gentili, Alberico (1933). *De iure belli libri tres*, Oxford.
- Geuss, Raymond (1999). 'Nietzsche and Genealogy' in *Morality, Culture and History: Essays on German Philosophy*, Cambridge, pp. 1–28.
- (2001). *Public Goods, Private Goods*, Princeton.
- Gihl, Torsten (1913). *Sverige och västmakterna under Karl X Gustafs andra krig med Danmark*, Uppsala.
- Glaziou, Yves (1993). *Hobbes en France au XVIIIe siècle*, Paris.
- Goldstone, J.A., Gurr, T.R., Harff, B., et al. (2000). *State Failure Task Force Report: Phase III Findings*, McLean, VA: Science Applications International Corporation.
- Goodhardt, Arthur (1958). 'Rule of Law and Absolute Sovereignty', *University of Pennsylvania Law Review* 106, pp. 943–63.
- Grimm, Dieter (2009). *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin.
- Gross, Leo (1948). 'The Peace of Westphalia, 1648–1948', *American Journal of International Law* 42, pp. 20–41.
- Grotius, Hugo (2005). *The Rights of War and Peace*, ed. Richard Tuck, Indianapolis.
- Gruber, Lloyd (2000). *Ruling the World: Power Politics and the Rise of Supranational Institutions*, Princeton.
- Guastini, Riccardo (2000). 'La primauté du droit communautaire: une révision tacite de la Constitution italienne', *Les Cahiers du Conseil Constitutionnel*, no. 9, pp. 173–84.
- Haggenmacher, Peter (1983). *Grotius et la Doctrine de Guerre Juste*, Paris.
- (1990). 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture' in *Hugo Grotius and International Relations*, ed. Hedley Bull and Adam Roberts, Oxford, pp. 133–76.
- Hall, William E. (1924). *A Treatise on International Law*, Oxford.
- Harding, Alan (2002). *Medieval Law and the Foundations of the State*, Oxford.
- Hardt, Michael (2000). 'Sovereignty, Multitudes, Absolute Democracy: A Discussion between Michael Hardt and Thomas Dumm about Hardt and Negri's Empire', *Theory & Event* 4.
- Hardt, Michael and Negri, Antonio (1994). *Labor of Dionysus: A Critique of the State-Form*, Minneapolis.
- (2000). *Empire*, Cambridge, MA.
- (2004). *Multitude: War and Democracy in the Age of Empire*, New York.
- (2009). *Commonwealth*, Cambridge, MA.

- Harris, Grant T. (2006). 'The Era of Multilateral Occupation', *Berkeley Journal of International Law* 24, pp. 1–78.
- Hart, H.L.A. (1983). *Essays in Jurisprudence and Philosophy*, Oxford.
- (1994). *The Concept of Law*, 2nd edn. with a postscript edited by Penelope A. Bulloch and Joseph Raz, Oxford.
- Hayward, John (1603). *An Answer to the First Part of a Certain Conference, Concerning Succession*, London.
- (1607). *A Report of a Discourse Concerning Supreme Power in Affaires of Religion*, London.
- Hegel, Georg Friedrich Wilhelm von (1991). *Elements of the Philosophy of Right*, Cambridge.
- Held, David (1999). 'The Transformation of Political Community: Rethinking Democracy in the Context of Globalization' in *Democracy's Edges*, ed. Ian Shapiro and Casiano Hacker-Cordón, Cambridge, pp. 84–111.
- (2005). 'Principles of Cosmopolitan Order' in *The Political Philosophy of Cosmopolitanism*, ed. Gillian Brock and Harry Brighouse, Cambridge, pp. 10–27.
- Heller, Agnes (1991). 'The Concept of the Political Revisited' in *Political Theory Today*, ed. David Held, Cambridge, pp. 330–43.
- Henkin, Louis (1968). *How Nations Behave: Law and Foreign Policy*, New York.
- (1995). *International Law: Politics and Values*, Dordrecht, Boston and London.
- Hertz, Noreena (2001). *The Silent Takeover: Global Capitalism and the Death of Democracy*, London.
- Hexter, J.H. (1973). *The Vision of Politics on the Eve of the Reformation: More, Machiavelli, and Seyssel*, New York.
- Hinsley, Francis H. (1986). *Sovereignty*, 2nd edn, Cambridge.
- Hirschl, Ron (2004). *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, MA.
- Hobbes, Thomas (1996). *Leviathan*, ed. Richard Tuck, Cambridge.
- (2008). *Leviathan*, ed. Richard Tuck, revised student edition with corrections, Cambridge.
- Hobhouse, Leonard T. (1918). *The Metaphysical Theory of the State: A Criticism*, London.
- Holliday, Ian (2003). 'Ethics of Intervention: Just War Theory and the Challenge of the 21st Century', *International Relations* 17, pp. 115–33.
- Höpfl, Harro (2004). *Jesuit Political Thought: The Society of Jesus and the State, c.1540–1630*, Cambridge.
- Houston, Alan Craig (1991). *Algernon Sidney and the Republican Heritage in England and America*, Princeton.
- Howard, Erica (2008). 'The European Year of Equal Opportunities for All: Is the EU Moving Away From a Formal Idea of Equality?', *European Law Journal* 14, pp. 168–85.
- Hume, David (1963). 'Of the Original Contract' in *Essays, Moral Political and Literary*, Oxford, pp. 452–73.
- Hurrell, Andrew (2005a). 'Pax Americana or the Empire of Insecurity', *International Relations of the Asia-Pacific* 5, pp. 153–76.

- (2005b). 'Legitimacy and the Use of Force: Can the Circle be Squared?', *Review of International Studies* 31, pp. 15–32.
- Huysmans, Jef (2006). 'International Politics of Exception: Competing Visions of International Political Order between Law and Politics', *Alternatives* 31, pp. 135–65.
- Israel, Fred L. (ed.) (1967). *Major Peace Treaties of Modern History, 1648–1967*, vol. 1, New York.
- Jackson, John H. (2003). 'Sovereignty-Modern: A New Approach to an Outdated Concept', *American Journal of International Law* 97, pp. 782–802.
- Jackson, Robert H. (2007). *Sovereignty. Evolution of an Idea*, Cambridge.
- Jahn, Beate (2005). 'Kant, Mill and Illiberal Legacies in International Affairs', *International Organization* 59, pp. 177–207.
- James, Alan (1986). *Sovereign Statehood. The Basis of International Society*, London.
- James, W.E. (2002). *A Note on Pre-Shipment Inspection of Imports*, Washington, DC.
- Jaume, Lucien (1983). 'La théorie de la "personne fictive" dans le *Léviathan* de Hobbes', *Revue française de science politique* 33, pp. 1009–35.
- (1986). *Hobbes et l'Etat représentatif moderne*, Paris.
- Jellinek, Georg (1880). *Die rechtliche Natur der Staatenverträge*, Vienna.
- (1922). *Allgemeine Staatslehre*, Berlin.
- Jennings, Ivor (1952). *The Law and the Constitution*, London.
- Johnson, James Turner (1975). *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200–1740*, Princeton.
- (1980). *Just War Tradition and the Restraint of War. A Moral and Historical Inquiry*, Princeton.
- (2006). 'The Just War Idea: the State of the Question', *Social Philosophy & Policy* 23, pp. 167–95.
- Jordan, Bill (1985). *The State: Authority and Autonomy*, Oxford.
- Jouannet, Emmanuelle (1998). *Emer de Vattel et l'émergence doctrinale du droit international classique*, Paris.
- Kagan, Robert (2003). *Paradise and Power. America and Europe in the New World Order*, New York.
- Kaldor, Mary (2002). 'Cosmopolitanism and Organized Violence' in *Conceiving Cosmopolitanism. Theory, Context, and Practice*, ed. Steven Vertovec and Robin Cohen, Oxford, pp. 268–78.
- Kalyvas, Andreas (2008). *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, Cambridge.
- Kamm, Frances M. (2004). 'Failures of Just War Theory: Terror, Harm, and Justice', *Ethics* 114, pp. 650–92.
- Kant, Immanuel (1992). *The Conflict of Faculties*, Lincoln.
- Kantorowicz, Ernst (1951). 'Pro Patria Mori in Medieval Political Thought', *American Historical Review* 56, pp. 471–92.
- (1957/1997). *The King's Two Bodies. A Study in Medieval Political Theory*, Princeton.
- Kaufmann, D., Kray, A. and Mastruzzi, M. (2005). 'Bottom Quintile of Aggregate Governance Rankings' in 'Weak States and Global Threats?', *Governance Matters* IV.

- Keefer, Scott Andrew (2006). 'Building the Palace of Peace: the Hague Conference of 1899 and Arms Control in the Progressive Era', *Journal of the History of International Law* 8, pp. 1–17.
- (2007). 'Building the Palace of Peace: the Hague Conference of 1907 and Arms Control before the World War', *Journal of the History of International Law* 9, pp. 35–81.
- Keen, Maurice H. (1965). *The Laws of War in the Late Middle Ages*, London.
- Kellison, Matthew (1621). *The Right and Jurisdiction of the Prelate, and the Prince*, n.p.
- Kelsen, Hans (1911). *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, Tübingen.
- (1928a). *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 2nd edn, Tübingen.
- (1928b). *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, Tübingen.
- (1929). 'La naissance de l'Etat et la formation de sa nationalité. Les principes, leur application au cas de la Tchécoslovaquie', *Revue de droit international* 2, pp. 613–41.
- (1942). 'The Law as a Specific Social Technique', *University of Chicago Law Review* 9, pp. 75–97.
- (1960). 'Sovereignty and International Law', *Georgetown Law Journal* 48, pp. 627–40.
- Kennedy, David (1986). 'Primitive Legal Scholarship', *Harvard International Law Journal* 27, pp. 1–98.
- King James VI and I (1994). *Political Writings*, ed. Johann Sommerville, Cambridge.
- Klabbers, Jan (1999). 'Clinching the Concept of Sovereignty: Wimbledon Redux', *Austrian Review of International and European Law* 3, pp. 345–67.
- (2009). 'Law-making and Constitutionalism' in *The Constitutionalisation of International Law*, ed. Jan Klabbers, Anne Peters and Geir Ulfstein, pp. 99–106.
- Klesmann, Bernd (2007). *Bellum solemnne. Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts*, Mainz.
- Kochenov, Dimitri (2009). 'The EU Rule of Law: Cutting Paths through Confusion', *Erasmus Law Review* 6, pp. 5–24.
- Koh, Harold H. (1997). 'Why Do Nations Obey International Law?', *The Yale Law Journal* 106, pp. 2599–659.
- Koskenniemi, Martti (1994). 'The Wonderful Artificiality of States', *Proceedings of the American Society of International Law* 22, pp. 22–9.
- (1995). 'The Police in the Temple. Order, Justice and the UN; A Dialectical View', *European Journal of International Law* 5, pp. 325–48.
- (2000). 'Present State of Research' in *La succession d'États: La codification à l'épreuve des faits / State Succession: Codification Tested against the Facts*, ed. Pierre Michel Eisemann and Martti Koskenniemi, The Hague, pp. 89–168.
- (2003a). 'Book review. Giovanna Borradori (ed.), *Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida*', *German Law Journal* 10, pp. 1087–94.

- (2003b). 'Legitimacy, Rights and Ideology: Notes towards a Critique of the New Moral Internationalism', *Associations. Journal for Legal and Social Theory* 7, pp. 349–74.
- (2004). 'International Law as Political Theology: How to Read Nomos der Erde?', *Constellations* 11, pp. 492–511.
- (2005). *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge.
- (2007). 'The Fate of International Law. Between Technique and Politics', *The Modern Law Review* 70, pp. 1–32.
- (2009). 'Miserable Comforters: International Relations as New Natural Law', *European Journal of International Relations* 15, pp. 395–422.
- Koskenniemi, Martti and Lehto, Marja (1992). 'La succession d'États dans l'ex-URSS en ce qui concerne particulièrement les relations avec la Finlande', *Annuaire français de droit international* 38, pp. 179–219.
- Krasner, Stephen D. (1993). 'Economic Interdependence and Independent Statehood' in *States in a Changing World: A Contemporary Analysis*, ed. Robert H. Jackson and Alan James, New York, pp. 301–21.
- (1999). *Sovereignty: Organized Hypocrisy*, Princeton.
- Krieger, Leonard (1977). 'The Idea of Authority in the West', *American Historical Review* 82, pp. 249–70.
- Krisch, Nico (2007). 'The Open Architecture of European Human Rights Law', LSE Law, Society and Economy Working Papers 11/2007, 34 pp.; also in *Modern Law Review* 71, pp. 183–216.
- Krupp, Tyler (2008). 'Genealogy as Critique?', *Journal of the Philosophy of History* 2, pp. 315–37.
- Kunisch, Johannes (1991). 'Der Nordische Krieg von 1655–1660 als Parabel frühneuzeitlicher Staatenkonflikte' in *Rahmenbedingungen und Handlungsspielräume europäischer Außenpolitik im Zeitalter Ludwigs XIV*, ed. H. Duchhardt, Berlin, pp. 9–42.
- Ladeur, Karl-Heinz (1997). 'Post-Modern Constitutional Theory: A Prospective for the Self-Organising Society', *Modern Law Review* 60, pp. 617–29.
- Lansing, Robert (1921). *Notes on Sovereignty*, Washington, DC.
- Laski, Harold J. (1917). *Studies in the Problem of Sovereignty*, New Haven.
- (1919). *Authority in the Modern State*, London.
- (1931). *The Foundations of Sovereignty, and Other Essays*, London.
- Latham, Robert (2000). 'Social Sovereignty', *Theory, Culture & Society* 17, pp. 1–18.
- Lauterpacht, Hersch (1948). *Recognition in International Law*, Cambridge.
- Le Bret, Cardin (1689). *Les oeuvres de messire C. Le Bret ...Contenant son traité de la souveraineté du roy (...)*, Paris.
- Leander, Anna (2005). 'The Market for Force and Public Security: the Destabilizing Consequences of Private Military Companies', *Journal of Peace Research* 42, pp. 605–22.
- Lefort, Claude (1988). 'The Permanence of the Theologico-Political?' in *Democracy and Political Theory*, Minneapolis, pp. 213–55.
- Leibholz, Gerhard (1965). 'Sovereignty and European Integration' in *Politics and Law*, Leiden, pp. 214–34.

- Leira, Halvard (2007). 'At the Crossroads: Justus Lipsius and the Early Modern Development of International Law', *Leiden Journal of International Law* 20, pp. 65–88.
- Lesaffer, R. (2001). 'War, Peace, Interstate Friendship and the Emergence of the *ius publicum Europaeum*' in *Frieden und Krieg in der Frühen Neuzeit: die europäische Staatenordnung und die aussereuropäische Welt*, ed. W.E. Voss, Ronald G. Asch and Martin Wrede, Munich, pp. 87–113.
- Levack, Brian P. (1973). *The Civil Lawyers in England 1603–1641: A Political Study*, Oxford.
- (1988). 'Law and Ideology: the Civil Law and Theories of Absolutism in Elizabethan and Jacobean England' in *The Historical Renaissance: New Essays on Tudor and Stuart Literature and Culture*, ed. Heather Dubrow and Richard Strier, Chicago, pp. 220–41.
- Lewis, George C. (1898). *Remarks on the Use and Abuse of Some Political Terms*, Oxford.
- Lieberman, David (1989). *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge.
- Lindahl, Hans (2003). 'Sovereignty and Representation in the EU' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 87–104.
- Livy (1600). *The Romane Historie Written by T. Livius of Padua*, trans. Philemon Holland, London.
- Lobban, Michael (2007). *A History of the Philosophy of Law in the Common Law World, 1600–1900*, Dordrecht.
- Locke, John (1988). *Two Treatises of Government*, ed. Peter Laslett, Cambridge.
- Loughlin, Martin (2003). *The Idea of Public Law*, Oxford.
- (2005). 'The Functionalist Style in Public Law', *University of Toronto Law Journal* 55, pp. 361–403.
- Loyseau, Charles (1608). *Traité des Seigneuries*, Paris.
- Luhmann, Niklas (1969). *Legitimation durch Verfahren*, Frankfurt.
- (2004). *Law as a Social System*, ed. F. Kastner, R. Nobles, D. Schiff and R. Ziegert, trans. K. Ziegert, Oxford.
- Määta, Paula (2008). *Equal Pay: Just a Principle of the ILO?*, Tampere.
- MacCormick, Neil (1984). 'Der Rechtsstaat und die Rule of Law', *Juristen-Zeitung* 2, pp. 65–70.
- (1993). 'Beyond the Sovereign State', *Modern Law Review* 56, pp. 1–18.
- (1999). *Questioning Sovereignty: Law, State and Practical Reason*, Oxford.
- (2004). 'Questioning Post-Sovereignty', *European Law Review* 29, pp. 852–63.
- (2007). *Institutions of Law*, Oxford.
- Machiavelli, Niccolò (1640). *Nicholas Machiavel's Prince*, trans. Edward Dacres, London.
- MacNeill, Jim (1991). *Beyond Interdependence: The Meshing of the World's Economy and the Earth's Ecology*, Oxford.
- Maitland, F. W. (2003). *State, Trust and Corporation*, ed. David Runciman and Magnus Ryan, Cambridge.
- Malcolm, Noel (2007). *Reason of State, Propaganda, and the Thirty Years' War: An Unknown Translation by Thomas Hobbes*, Oxford.

- Mansfield, Harvey C. (1996). *Machiavelli's Virtue*, Chicago.
- March, James G. and Olsen, Johan P. (1989). *Rediscovering Institution: The Organizational Basis of Politics*, New York.
- Marchart, Oliver (2007). *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau*, Edinburgh.
- Marek, Kristina (1954). *Identity and Continuity of States in Public International Law*, Geneva.
- Maritain, Jacques (1969). 'The Concept of Sovereignty' in *In Defence of Sovereignty*, ed. Wladyslaw J. Stankiewicz, New York, pp. 41–64.
- Matanock, Aila M. (2008). *Learning to Share: Under What Conditions States Delegate Governance*, unpublished paper, Stanford University, Political Science Department.
- Mattei, Rodolfo de (1979). *Il problema della 'ragion di stato' nell'età della controriforma*, Milan.
- Mayntz, Renate (1999). 'La teoria della governance: sfide e prospettive', *Rivista italiana di scienza politica*, 1, pp. 3–21.
- McLean, Janet (2003). 'Government to State: Globalization, Regulation, and Governments as Legal Persons', *Indiana Journal of Global Legal Studies* 10, pp. 173–97.
- (2005). 'Divergent Legal Conceptions of the State: Implications for Global Administrative Law', *Law and Contemporary Problems* 68, pp. 167–87.
- Mény, Yves (2002). 'Constituer l'Europe', *Le Monde*, 28 February.
- Meyer, J.W., Boli, J., Thomas, G.M. and Ramirez, F.O. (1997). 'World Society and the Nation-State', *American Journal of Sociology* 103, pp. 144–81.
- Middleton, Kenneth William Bruce (1952). 'Sovereignty in Theory and Practice' in *In Defence of Sovereignty*, ed. Wladyslaw J. Stankiewicz, New York, pp. 132–59.
- Minkkinen, Panu (2009). *Sovereignty, Knowledge, Law*, London.
- Molina, Luis de (1615). *De iustitia et iure*, Antwerp.
- Montesquieu, Charles de (1951). *Œuvres Complètes*, text presented and annotated by R. Caillois, Paris.
- (1989). *The Spirit of the Laws*, Cambridge.
- Moravcsik, Andrew (2002). 'In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union', *Journal of Common Market Studies* 40, pp. 603–24.
- Morgenthau, Hans J. (1929). *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, Leipzig.
- (1948). 'The Problem of Sovereignty Reconsidered', 48 *Colum. L. Rev.*, pp. 341–65.
- (1966). *Politics among Nations*, 4th edn, New York.
- Morris, Christopher W. (1998). *An Essay on the Modern State*, Cambridge.
- (2004). 'The Modern State' in *Handbook of Political Theory*, ed. Gerald F. Gaus and Chandran Kukathas, London, pp. 195–209.
- Mouffe, Chantal (2005). *On the Political*, London and New York.
- Müllerson, Rein (1998). 'Law and Politics in Succession of States: International Law on Succession of States' in *Dissolution, Continuation and Succession in Eastern Europe*, ed. Brigitte Stern, The Hague, pp. 5–32.

- Myers, Robert J. (1996). 'Notes on the Just War Theory: Whose Justice, Which Wars?', *Ethics & International Affairs* 10, pp. 116–30.
- Naim, Moises (2005). 'Broken Borders', *Newsweek*, 24 October.
- (2005). *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*, New York.
- Näsström, Sofia (2003). 'What Globalization Overshadows', *Political Theory* 31, pp. 808–34.
- National Intelligence Council (2008). *Global Trends 2025: a Transformed World*, Washington, DC.
- Neff, Stephen C. (2005). *War and the Law of Nations. A General History*, Cambridge.
- Negri, Antonio (1977). *La forma-Stato*, Milan.
- (1991a). *Marx Beyond Marx. Lessons on the Grundrisse*, New York and London.
- (1991b). *The Savage Autonomy: The Power of Spinoza's Metaphysics and Politics*, Minneapolis.
- (1999). *Insurgencies: Constituent Power and the Modern State*, Minneapolis.
- (2005). *Books for Burning*, London.
- (2006). *Political Descartes*, London.
- (2008). 'The Political Monster: Power and Naked Life' in *In Praise of the Common*, ed. Cesare Casarino and Antonio Negri, Minneapolis, pp. 193–218.
- Nicholson, Peter P. (1990). *The Political Philosophy of the British Idealists: Selected Studies*, Cambridge.
- Nussbaum, Arthur (1943). 'Just War – A Legal Concept?', *Michigan Law Review* 42, pp. 453–79.
- O'Donovan, Oliver (2003). *The Just War Revisited*, Cambridge.
- Offe, Claus (1985). 'New Social Movements: Changing Boundaries of the Political', *Social Research* 52, pp. 817–68.
- Orford, Anne (2009). 'Jurisdiction without Territory. From the Holy Roman Empire to the Responsibility to Protect', *Michigan Journal of International Law* 30, pp. 981–1015.
- Osiander, Andreas (2001a). 'Sovereignty, International Relations and the Westphalian Myth', *International Organization* 55, pp. 251–87.
- (2001b). 'Before Sovereignty: Sovereignty and Politics in ancien régime Europe', *Review of International Studies* 25, pp. 119–45.
- Ost, François and Kerchove, Michel van de (2002). *De la pyramide au réseau? Pour une théorie dialectique du droit*, Brussels.
- Othmer, Sieglinde (1970). *Berlin und die Verbreitung des Naturrechts in Europa*, Berlin.
- Palladini, Fiammetta (1990). *Samuel Pufendorf, discepolo di Hobbes*, Bologna.
- Palonen, Kari (1998). *Das 'Webersche Moment'. Zur Kontingenz des Politischen*, Opladen.
- Parker, Henry (1642). *Observations upon some of his Majesties late Answers and Expresses*, London.
- Parkin, Jon (2007). *Taming the Leviathan: The Reception of the Political and Religious Ideas of Thomas Hobbes in England 1640–1700*, Cambridge.
- Pasini, Dino (1965). *Riflessioni in tema di sovranità*, Milano.

- Patterson, Eric (2005). 'Just War in the 21st Century: Reconceptualizing Just War Theory after September 11', *International Politics* 42, pp. 116–34.
- Pauly, Louis W. and Grande, Edgar (2005). 'Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Order' in *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century*, ed. Louis W. Pauly and Edgar Grande, Toronto, pp. 3–21.
- Pennington, Kenneth (1976). 'The Canonists and Pluralism in the Thirteenth Century', *Speculum* 51, pp. 35–48.
- Perrow, Charles (1986). *Complex Organizations: A Critical Essay*, 3rd edn, New York.
- Peters, Anne (2007). 'The Globalization of State Constitutions' in *New Perspectives on the Divide Between National and International Law*, ed. J. Nijman and A. Nollkaemper, Oxford, p. 251–308.
- Peterson, Erik (1935). *Der Monotheismus als politisches Problem: Ein Beitrag zur Geschichte der politischen Theologie im Imperium Romanum*, Leipzig.
- Philpott, Daniel (1997). 'Ideas and the Evolution of Sovereignty' in *State Sovereignty: Change and Persistence in International Relations*, ed. Sohail H. Hashmi, Pennsylvania, pp. 15–47.
- Piirimäe, Pärtel (2010). 'War and Polemics in Early Modern Europe' in *Exploring Cultural History. Essays in Honour of Peter Burke*, ed. Filippo de Vivo, Melissa Calaresu and Joan-Pau Rubiés, Aldershot.
- Pitkin, Hanna Fenichel (1967). *The Concept of Representation*, Berkeley.
- Plato (1894). *Plato's Republic – the Greek Text*, ed. Benjamin Jowett, Oxford.
- Plessner, Helmuth (1931). *Macht und menschliche Natur*, Berlin.
- Poggi, Gianfranco (1978). *The Development of the Modern State: A Sociological Introduction*, London.
- Posner, Richard (2007). *Countering Terrorism*, Stanford.
- Poulantzas, Nicos (ed.) (1976). *La Crise de l'État*, Paris.
- Praet, Patrick (2007). 'Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte', *Rechtstheorie* 38, pp. 367–78.
- Prokhovnik, Raia (2007). *Sovereignties. Contemporary Theory and Practice*, New York.
- Pufendorf, Samuel (1706). *Le droit de la nature et des gens*, trans. Jean Barbeyrac, Amsterdam.
- (1717). *Of the Law of Nature and Nations*, trans. Basil Kennett, 3rd edn, London.
- (1934). *De jure naturae et gentium*, Oxford.
- (1995). 'Gundaeus Baubator Danicus [1659]' in *Samuel von Pufendorf: Kleine Vorträge und Schriften. Texte zu Geschichte, Pädagogik, Philosophie, Kirche und Völkerrecht*, ed. D. Döring, Frankfurt.
- (2009). *Two Books of the Elements of Universal Jurisprudence*, Indianapolis.
- Rabb, Theodore K. (1998). *Jacobean Gentleman: Sir Edwin Sandys, 1561–1629*, Princeton.
- Radin, Margeret Jane (1989). 'Reconsidering the Rule of Law', *Boston University Law Review* 69, pp. 781–819.
- RAMSI (n.d.). www.ramsi.org/node/5.
- Rauschenberger, Walther (1921). 'Die staatsrechtliche Bedeutung von Staatsstreich und Revolution', *Zeitschrift für öffentliches Recht* 2, pp. 113–30.

- Rawls, John (1971). *A Theory of Justice*, Cambridge, MA.
- Raz, Joseph (1979). *The Authority of Law. Essays on Law and Morality*, Oxford.
- Regan, Richard J. (1996). *Just War. Principles and Cases*, Washington, DC.
- Rengger, Nicholas (2002). 'On the Just War Tradition in the Twenty-First Century', *International Affairs* 78, pp. 353–63.
- (2005). 'The Judgment of War: on the Idea of Legitimate Force in World Politics', *Review of International Studies* 31, pp. 143–61.
- Report of the Study Group of the International Law Commission (2007). *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, finalized by Martti Koskenniemi, Helsinki, 2007.
- Revel, Judith (2007). *Dictionnaire Foucault*, Paris.
- Rosanvallon, Pierre (2000). *La démocratie inachevée: histoire de la souveraineté du peuple en France*, Paris.
- Rosenau, James N. (2003). *Distant Proximities: Dynamics Beyond Globalization*, Princeton.
- Rosenkrantz, Gundaeus (1659). *Dissertatio juridico-politica de Legato Suecicus durante obsidione Hafniensi a Rege Daniae jure detento*.
- Ross, Alf (1947). *A Textbook of International Law*, London.
- (1960). 'On the Concepts of "State" and "State Organs" in Constitutional Law' in *Scandinavian Studies in Law*, vol. v, pp. 111–29.
- (1961). 'Validity and the Conflict between Legal Positivism and Natural Law' in *Revista Jurídica de Buenos-Aires*, IV, repr. in *Legal Positivism*, ed. Mario Jori (1992), Dartmouth, pp. 46–88.
- (1965). 'Scandinavian Law' in *Sovereignty within the Law*, ed. Arthur Larson et al., London, pp. 107–22.
- Rousseau, Jean-Jacques (1964). *Oeuvres Complètes – Du Contrat Social; écrits politiques*, Paris.
- (1997). *The Social Contract and Other Later Political Writings*, Cambridge.
- Runciman, David (1997). *Pluralism and the Personality of the State*, Cambridge.
- (2000). 'What Kind of Person is Hobbes's State? A Reply to Skinner', *The Journal of Political Philosophy* 8, pp. 268–78.
- (2003). 'The Concept of the State: the Sovereignty of a Fiction' in *States and Citizens*, ed. Quentin Skinner and Bo Strath, Cambridge, pp. 28–38.
- (2008). *Political Hypocrisy: The Mask of Power, from Hobbes to Orwell and Beyond*, Princeton.
- Rupp, Teresa (2000). 'Damnation, Individual and Community in Remigio dei Girolami's *De Bono Communi*', *History of Political Thought* 21, pp. 217–36.
- Russell, Frederick H. (1975). *The Just War in the Middle Ages*, Cambridge.
- Sabel, Charles F. and Zeitlin, Jonathan (2007). 'Learning Difference: The New Architecture of Experimentalist Governance in the European Union', *European Governance Papers*, no. 2.
- Sadurski, Wojciech (2008). "'Solange – chapter 3": Constitutional Courts in Central Europe', *European Law Review* 14, pp. 1–35.
- Sagan, Scott (1993). *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons*, Princeton.

- Sandys, Edwin (1605). *A relation of the state of religion and with what hopes and pollicies it hath beene framed, and is maintained in the severall states of these westerne parts of the world*, London.
- Sassen, Saskia (1996). *Losing Control? Sovereignty in an Age of Globalization*, New York.
- Schilling, Theodor (1996). 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', *Harvard International Law Journal* 37, pp. 389–410.
- Schmidt, Georg (1999). *Geschichte des alten Reiches: Staat und Nation in der Frühen Neuzeit, 1495–1806*, Munich.
- Schmitt, Carl (1922). *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Munich and Leipzig.
- (1932). *Legalität und Legitimität*, Munich and Leipzig.
- (1950). *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Cologne.
- (1996a). *Roman Catholicism and Political Form*, trans. Gary L. Ulmen, Westport, CT.
- (1996b). *The Concept of the Political*, trans. George Schwab, Chicago and London.
- (2005). *Political Theology. Four Chapters on the Concept of Sovereignty*, ed. and trans. G. Schwab, intro. by T. Strong, Chicago.
- (2008). *Political Theology II: The Myth of the Closure of Any Political Theology*, trans. Michael Hoelzl and Graham Ward, Cambridge.
- Schofield, Philip (2006). *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford.
- Schröder, Peter (1999). 'The Constitution of the Holy Roman Empire After 1684: Samuel Pufendorf's Assessment in His *Monzambano*', *The Historical Journal* 42, pp. 961–83.
- Schupp, Johann Balthazar (1657). 'Ambrosii Mellilambii Send-Schreiben, An einen Vornehmen Cavallier. Betreffend Die Schwedische und Polnische Waffen'.
- Schürmann, Reiner (1996). *Des hégémonies brisées*, Toulouse.
- Schütze, Robert (2005). *Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's Regime for Legislative and Executive Law-making*, Maastricht.
- Schwarzenberger, Georg (1957). 'The Forms of Sovereignty', *Current Legal Problems* 10, pp. 264–95.
- Sciulli, David (2001). *Corporate Power in Civil Society: An Application of Societal Constitutionalism*, New York.
- Senellart, Michel (1995). *Les arts de gouverner. Du regimen médiéval au concept du gouvernement*, Paris.
- Shapcott, Richard (2001). *Justice, Community and Dialogue in International Relations*, Cambridge.
- Shaw, Jo (2003). 'Sovereignty at the Boundaries of the Polity' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 461–500.
- Shaw, Malcolm N. (1997). *International Law*, 4th edn, Cambridge.
- Sidgwick, Henry (1897). *The Elements of Politics*, 2nd edn, London.
- Sierra Leone (n.d.), *Statute of the Special Court for Sierra Leone* at www.sierra-leone.org/specialcourtstatute.html.

- Skinner, Quentin (1978). *The Foundations of Modern Political Thought*, 2 vols., Cambridge.
- (1999). 'Hobbes and the Purely Artificial Person of the State', *The Journal of Political Philosophy* 7, pp. 1–29.
- (2002). *Visions of Politics*, 3 vols., Cambridge.
- (2007). 'Hobbes on Persons, Authors and Representatives' in *The Cambridge Companion to Hobbes's Leviathan*, ed. Patricia Springborg, Cambridge, pp. 157–80.
- (2009). 'A Genealogy of the Modern State', *Proceedings of the British Academy* 162, pp. 325–70.
- Slaughter, Anne-Marie (2004). 'Disaggregated Sovereignty: Toward the Public Accountability of Global Government Networks', *Government and Opposition* 39, pp. 159–90.
- (2005). *A New World Order*, Princeton.
- Slomp, Gabriella (2006). 'Carl Schmitt's Five Arguments against the Idea of Just War', *Cambridge Review of International Affairs* 19, pp. 435–47.
- Smith, David (1994). *Constitutional Royalism and the Search for Settlement c. 1640–1649*, Cambridge.
- Sobota, Katharina (1997). *Das Prinzip Rechtsstaat*, Tübingen.
- Sommerville, Johann (1991a). 'Introduction' to Sir Robert Filmer, *Patriarcha and Other Writings*, Cambridge, pp. ix–xlv.
- (1991b). 'Absolutism and Royalism' in *The Cambridge History of Political Thought 1450–1700*, ed. J.H. Burns and Mark Goldie, Cambridge, pp. 347–73.
- (1999). *Royalists and Patriots: Politics and Ideology in England 1603–1640*, 2nd edn, London.
- Sowell, Thomas (2004). *Affirmative Action around the World: A Comparative Study*, New Haven.
- Späth, Konrad (2005). 'Inside Global Governance: New Borders of a Concept' in *Criticizing Global Governance*, ed. Markus Lederer and Philipp S. Müller, New York, pp. 21–45.
- Spitz, Jean-Fabien (1998). *Bodin et la souveraineté*, Paris.
- Spruyt, Hendrik (1994). *The Sovereign State and Its Competitors*, Princeton.
- Stern, Klaus (1984). *Staatsrecht der Bundesrepublik Deutschland*, Band I, 2nd edn, Cologne.
- Stewart, P. and Rice, S. (n.d.). 'Today's Weak and Failing States', Center for Global Development and Brookings Institution.
- Strange, Susan (1996). *The Retreat of the State: the Diffusion of Power in the World Economy*, Cambridge.
- Suárez, Francisco. (1944). *Selections from three works: De Legibus, ac deo legislatore, Defensio fidei catholicae...., De Triplici virtute....*, Oxford.
- (1975). *De Civili Potestate (III. 1–16)* in *De Legibus*, ed. Luciano Pereña, Madrid.
- Sunstein, Cass (1996). *Legal Reasoning and Political Conflict*, Oxford.
- Tesón, Fernando R. (1997). *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn, New York.
- Teubner, Günther (1997a). 'The King's Many Bodies: the Self-Deconstruction of Law's Hierarchy', *The Law & Society Review* 31, pp. 763–87.

- (1997b). *Global Law without a State*, Aldershot.
- (2003). 'Der Umgang mit Rechtsparadoxien: Derrida, Luhmann, Wiethölter' in *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, ed. Christian Joerges and Günther Teubner, Baden Baden, pp. 22–45.
- (2004). 'Societal Constitutionalism: Alternative to State-Centered Theory' in *Transnational Governance & Constitutionalism*, ed. Christian Joerges, Inger-Johanne Sand and Günther Teubner, Oxford, pp. 3–28.
- (2005). *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, Rome.
- (2006). 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', *Modern Law Review* 69, pp. 327–46.
- Thoma, Richard (1910). 'Rechtsstaatsidee und Verwaltungsrechtswissenschaft', *Jahrbuch des öffentlichen Rechts* 4, pp. 196–218.
- Thompson, Helen (2006). 'The Case for External Sovereignty', *European Journal of International Relations* 12, pp. 251–74.
- Thurloe, John (1742). *A Collection of State Papers*, London.
- Toulmin, Stephen (1992). 'The Limits of Allegiance in a Nuclear Age' in *Just War Theory*, ed. Jean Bethke Elshtain, New York, pp. 280–98.
- Toyoda, Tetsuya (2009). 'La doctrine vattelienne de l'égalité souveraine dans le contexte neuchâtelois', *Journal of the History of International Law* 11, pp. 103–24.
- Troper, Michel (2001). *La théorie du droit, le droit, l'Etat*, Paris.
- (2003). 'The Logic of the Justification of Judicial Review of Legislation', *International Journal of Constitutional Law* 1, pp. 99–121.
- (2008). 'Identité constitutionnelle' in 1958–2008. *Cinquantième anniversaire de la Constitution française*, ed. Bertrand Mathieu, Paris, pp. 123–31.
- Tuck, Richard (1987). 'The "Modern" Theory of Natural Law', in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden, Cambridge, pp. 99–121.
- (1993). *Philosophy and Government, 1572–1651*, Cambridge.
- (1999). *The Rights of War and Peace. Political Thought and the International Order From Grotius to Kant*, Oxford.
- Tukiainen, Arto (1994). 'The Commonwealth as a Person in Hobbes's *Leviathan*', *Hobbes Studies* 7, pp. 44–55.
- Tully, James (1995). *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge.
- Tuori, Kaarlo (1992). 'Four Models of the Rechtsstaat' in *Öffentliche oder private Moral? Festschrift für Ernesto Garzón Valdés*, ed. Werner Krawietz and Georg Henrik von Wright, Berlin, pp. 451–64.
- Turegano Mansilla, Isabel (2007). 'A vueltas con la noción de soberanía: Reflexiones sobre la contribución de Ernesto Garzón Valdés', *Doxa* 30, pp. 199–203.
- Ullmann, Walter (1949). 'The Development of the Medieval Idea of Sovereignty', *English Historical Review* 64, pp. 1–33.
- United States (2006). *National Security Strategy*, Washington, DC.
- Vahlas, Alexis (2005). 'Souveraineté et droit de retrait au sein de l'Union européenne', *Revue du droit public* 6, pp. 1565–600.

- Van Caenegem, Raoul C. (1991). *Legal History: A European Perspective*, London.
- Vattel, Emerich de (1760). *The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, London.
- Vauchez, Antoine (2008). 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)', *International Political Sociology* 2, pp. 128–44.
- Vedel, Georges (1992). 'Schengen et Maastricht (à propos de la décision n°91–294 DC du Conseil constitutionnel du 25 juillet 1991)', *Revue Française de Droit Administratif* 8, pp. 173–84.
- Verges, Jean (2002). 'Réflexions sur le constitutionnalisme de l'Union européenne' in *L'identité de l'Europe*, ed. Wolfgang Graf Vitzthum and Marc Pena, Aix en Provence.
- Verhoeven, Joe (2008). *Considérations sur ce qui est commun. Cours général de droit international public (2002)*, Recueil des cours, vol. CCCXXXIV, Académie de droit international, Leiden and Boston.
- Verzijl, J.H.W. (1969). *International Law in Historical Perspective, Part II: International Persons*, Leiden.
- Villa, Dana (2007). 'The "Autonomy of the Political" Reconsidered', *Graduate Faculty Philosophy Journal* 28, pp. 29–45.
- Vincent, Andrew (1987). *Theories of the State*, Oxford.
- Vindiciae, contra tyrannos* (1994). Ed. and trans. George Garnett, Cambridge.
- Viroli, Maurizio (1992). *From Politics to Reason of State. The Acquisition and Transformation of the Language of Politics 1250–1600*, Cambridge.
- Vitoria, Francisco de (1917). *De Jure Belli (De Indis)*, ed. James Brown Scott, Washington, DC.
- (1991). 'On the Law of War' in *Political Writings*, ed. J.L. Anthony Pagden, Cambridge.
- Von Mohl, Robert (1844). *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, 2nd edn, Tübingen.
- Wade, H.W.R. (1955). 'The Basis of Legal Sovereignty', *Cambridge Law Journal* 14, pp. 172–94.
- (1996). 'Sovereignty – Revolution or Evolution', *Law Quarterly Review* 112, pp. 568–75.
- Wæver, Ole (1995). 'Identity, Integration and Security. Solving the Sovereignty Puzzle in E.U. Studies', *Journal of International Affairs* 48, pp. 389–431.
- Walker, Neil (ed.) (2003a). *Sovereignty in Transition*, Oxford and Portland.
- (2003b). 'Late Sovereignty in the European Union' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 3–32.
- Walker, R.B.J. (1990). 'Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice' in *Contending Sovereignties*, ed. R.B.J. Walker and S.H. Mendlovitz, Boulder and London, pp. 159–85.
- (1995). 'From International Relations to World Politics' in *The State in Transition: Reimagining Political Space*, ed. Joseph A. Camilleri, Anthony P. Jarvis and Albert J. Pasolini, Boulder, pp. 21–38.
- Walzer, Michael (1977). *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, New York.
- (2004). *Arguing about War*, New Haven.

- Ward, Ian (2003). 'The End of Sovereignty and the New Humanism', *Stanford Law Review* 55, pp. 2091–112.
- Ward, Paul W. (1928). *Sovereignty: A Study of a Contemporary Political Notion*, London.
- Weatherill, Stephen (1995). *Law and Integration in the European Union*, Oxford.
- Weber, Cynthia (1995). *Simulating Sovereignty*, Cambridge.
- Weber, Cynthia and Biersteker, Thomas J. (ed.) (1996). *State Sovereignty as Social Construct*, Cambridge.
- Weber, Max (1984). 'Legitimacy, Politics and the State' in *Legitimacy and the State*, ed. William Connolly, Oxford, pp. 32–62.
- Weigel, Georg (2003). 'The Just War Tradition and the World after September 11' in *Logos* 5, pp. 13–44.
- Weiler, Joseph H.H. (1999). *The Constitution of Europe*, Cambridge, MA.
- (2002). 'A Constitution for Europe', *Journal of Common Market Studies* 40, pp. 563–80.
- Weinstein, J.M., Porter, J.E. and Eizenstat, S.E. (2004). 'On the Brink: Weak States and US National Security', Commission on Weak States and US National Security.
- Weiss, Thomas (2007). *Humanitarian Intervention: Ideas in Action*, London.
- Wendt, Alexander (1999). 'A Comment on Held's Cosmopolitanism', in *Democracy's Edges*, ed. Ian Shapiro and Casiano Hacker-Cordón, Cambridge, pp. 127–33.
- Werner, W.G. and de Wilde, J.H. (2001). 'The Endurance of Sovereignty', *European Journal of International Relations* 7, pp. 283–313.
- Wheeler, Nicholas J. (2000). *Saving Strangers; Humanitarian Intervention in International Society*, Oxford.
- Willoughby, William (1896). *An Examination of the Nature of the State*, New York and London.
- Wind, Marlene (2001). *Sovereignty and European Integration: Towards a Post-Hobbesian Order*, New York.
- Witte, Bruno de (2006). 'Sovereignty and European Integration: The Weight of a Legal Tradition' in *Relocating Sovereignty*, ed. Neil Walker, Aldershot, pp. 491–520.
- Wolin, Sheldon (1996). 'Fugitive Democracy' in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib, Princeton, pp. 31–45.
- Ziller, Jacques (2003). 'Sovereignty in France: Getting Rid of the *Mal de Bodin*' in *Sovereignty in Transition*, ed. Neil Walker, Oxford, pp. 261–78.
- Žižek, Slavoj (2006a). *The Parallax View*, Cambridge, MA.
- (2006b). 'A Plea for a Return to *Différance*', *Critical Inquiry* 32, pp. 226–49.
- Zumbansen, Peer (2009). 'Post-regulatorisches recht: Chronik einer angekündigten Karriere' in *Soziologische Jurisprudenz. Festschrift für Gunther Teubner*, ed. G.-P. Calliess, A. Fischer-Lescano, D. Wielsch and P. Zumbansen, Berlin, pp. 627–43.

Index

- absolutist theory of the state, 27–30
Afghanistan, 104
Agamben, Giorgio, 200
aid programmes, 106
Alesina, Alberto, *The Size of Nations*, 171
Allan, T.R.S., 160
Almain, Jacques, 33
analytical approach to identify meaning of
 sovereignty, 47
Angell, Norman, *The Foundations of
 International Polity*, 43
Ankersmit, Frank, 43–4
Answer (Hayward), 29–30
apparition, as aspect of sovereignty, 49
Aquinas, Saint Thomas
 just war, 66–7
 legitimate authority, 91–2
Arendt, Hannah, 23, 203, 214
 comparison with Schmitt on thoughts
 on ‘the political’
 scarcity of, 190–3
Arian controversy, 195–7
Armstrong, Kenneth, 158
Augustine of Hippo, Saint, 89
Austin, John, 41, 154, 156–7
Austinian positivist sovereignty, 156–8
authorization of sovereign, meaning of, 36–7
Ayala, Balthazar, 70, 72–3

Baldus de Ubaldis, 223
Baltic States, endurance of the identity,
 124–5, 231–2
Baranger, Denis, 13
Bartelson, Jens, 2, 14, 201, 236
Bartolus de Saxoferrato, 223
Bellamy, Richard, 15
bellum iustum, see just war
bellum solenne, 73–4, 78–9
Bentham, Jeremy, 40–1, 156–7
Béze, Theodore de, 33
Blackstone, Sir William, 40
Boccalini, Traiano, 32–3

Bodin, Jean, 49, 51–2, 66, 68–9, 223
 Les Six Livres de la République, 28–9, 186
body politic, 28
Bosanquet, Bernard, 42
Bosnia, alternatives when sovereignty rules
 failed to provide desirable outcome,
 98–9
Botero, Giovanni, 31
Bramhall, John, 34
Breaking of Nations (Cooper), 97
Brownlie, Ian, 121, 123
Bull, Hedley, 65, 74
Bynkershoek, Cornelius van, 75, 79

Cajetan, Thomas, 92
Carré de Malberg, Raymond, 21, 137–9,
 153
China, promotion of sovereignty, 101
cluster concepts, 152
Collingwood, R.G., 2
Combacau, Jean, 142
Commentaries on the Laws of England
 (Blackstone), 40
complementary empire-state, 65
constituent power, and exception, 216
Constitutional Council of France,
 136–7
contested concepts, 152
contracting out of state functions, 106–8
Cooper, Robert, 102
 The Breaking of Nations, 97
Coquille, Guy, 52
criminality, and pre-modern states, 104,
 105
Czech Constitutional Court, Lisbon
 Treaty, 129–30

d’Aube, François Richer, 38
Dacres, Edward, 28
de Wilde, Jaap H., 7
Defoe, Daniel, 154
delegation of power, 55

- Deleuze, Gilles, 215, 216
 democracy, and sovereignty, 134
 democratic *Rechtsstaat*, 169
 Democratic Republic of Congo, 104
 Dicey, A.V., 154, 173–4
Discourse of the State Ecclesiastical
 (Downing), 30
 divine right of kings, 29
 domestic sovereignty, 96
 Downing, Calybutte, 30
 Downing, George, 76–7
 Doyle, Michael, 86
 Duchhardt, Heinz, 75–6
- East Timor, mixed tribunals, 107
 Elshtain, Jean Bethke, 84–5
 Just War against Terror, 85
 emanation, 55
 English common law, 160
 Epron, Quentin, 52
 estates, 31
 Estonia, endurance of identity, 124–5
 EU arrest warrants, 178
 European Court of Human Rights, 43
 European Court of Justice, 126–7
 European Union, 18–21
 and crisis of the State, 132–3
 and *Rechtsstaat*
 deviations from legality, 173–5
 equality of citizens before the law,
 182–3
 EU arrest warrants, 178
 extradition, 178–9
 fundamental rights, 177–8
 remedies against infringement of
 rights, 181–2
 separation of powers, 179–80
 as post-modern world, 102–3
 compromising members' Westphalian/
 Vattelian sovereignty, 97
 de facto political or economic
 independence of members, 134
 democratic deficit, 134
 difference from confederation, 140–1
 legality of UK withdrawal, 162
 national sovereignty of member states,
 183–5
 need for legal concept of sovereignty to
 describe member states, 134, 150
 by assessment of powers possessed
 and exercised by states, 135–7,
 141
 by examination of concepts used in
 language of law, 137–9, 141–50
 prevalence of European law, 144–50
 right of states to withdraw, 166–8
 supremacy of EU or member states'
 national law, 126–8
 external sovereignty, 65–6
- failed states, 103–4
 as deviation from conventional
 sovereignty, 97
 Falk, Richard, 16
 Filmer, Sir Robert, 29
 force against force, 218, 219
 formal *Rechtsstaat*, 172
 Foucault, Michel, 8, 215, 216
 fragmentative space, 22
 France, empowerment of laws and the
 sovereign, 147–50
 free states, 32–3
 French constitution (1946), 141–2
- Gauchet, Marcel, 9
 general theory of the State, 115
 Gentili, Alberico, 72, 73
 German Constitutional Court, 227
 Geuss, Raymond, 199
 global community, 82, 87
 global empire, 82, 86–7
 globalization, and sovereignty,
 241–2
 governance, 216–21
 Gratian, 89
 Gregory of Nazianzus, 196
 Grotius, Hugo, 65, 68, 70–5, 92–3
- habit of obedience, 156–7
 Hardt, Michael, 15, 202, 203
 Hart, H.L.A., 119–21, 127–8, 160
 Hayward, John, 30
 Answer, 29–30
 Hegel, Georg Friedrich Wilhelm von,
 19
 Heller, Agnes, 190
herrschaft, 137, 144–50
 Hinsley, F.H., 2, 10
 Hobbes, Thomas, 34–7, 56–8, 156, 186–7,
 198
 Hobhouse, L.T., 42
 Holland, Philemon, 32
 Holocaust, 213–14
 Hong Kong, alternatives when sovereignty
 rules failed to provide desirable
 outcomes, 99
 Hostiensis, 90
 House of Commons, power of, 159
 Hubner, Martin, 38
 Huguccio, 90
 Hussein, Saddam, potential control over
 oil prices, 110

- incompletely theorized agreements, 3
 indivisibility of sovereignty, 137–8, 142–4
 Indonesia, contracting out of customs collection, 106
 institutional theory of law, 158
 interdependence, 5–7
 international law
 and negotiation of treaties, 225–7
 and sovereignty, 205–6, 207
 and state creation, 116
 as construction of the imagination of well-situated lawyers, 229–30
 international legal sovereignty, 96
 international sovereignty, and international law, 139
 invincible error, 72
 Isidore of Seville, 89
iusta causa, 66–7
- Jackson, Robert, 16
 James I, king of England, 224
 James VI and I, 29
 James, Alan, 12
 Jellinek, Georg, 115–18
Just and Unjust Wars (Walzer), 83–4
 just war
 current problems with, 81–2
 duties imposed upon neutrals, 74–5, 77–8
 historical development of, 66–71
 justification on both sides, 71–2
 objective justice, 72
 subjective justice, 72
- Kellison, Matthew, 29
 Kelsen, Hans, 118, 126, 222, 224
 Kennet, White, 38
 Klesmann, Bernd, 71
 Knollys, Richard, 28–9
 Koselleck, Reinhart, 188
 Koskenniemi, Martti, 4, 8, 73–4
 Kosovo, mixed tribunals, 107
 Krasner, Stephen, 6, 18, 19, 201, 233
- Lansing, Robert, 5
 Laski, Harold, 11, 42
 Latvia, endurance of identity, 124–5
 Le Bret, Cardin, 51
Traité de la Souveraineté du Roi, 53
Le droit des gens (Vattel), 38, 39–40
Le Relationi Universali (Botero), 31
 Lefort, Claude, 195
 legal approach, 4
 legitimate authority
 and the right to war, 82–3
 history of, 88–94
 in contemporary just war theory, 83–8
 rethinking in response to contemporary challenges, 94–5
- Lesaffer, Randall, 77
Leviathan (Hobbes), 34–7, 56–8, 156, 186–7, 198
 Lewis, G.C., 3
 Liberia, 104
 external authority in core government agencies, 106
 Lipping, Jüri, 23
 Lisbon Treaty, 129–30
 Lithuania, endurance of identity, 124–5
 Locke, John, *Two Treatises of Government*, 59–62, 69
 Loyseau, Charles, *Traité des Seigneuries*, 51
 Luhmann, Niklas, 205
- MacCormick, Neil, 21, 22, 133
 Machiavelli, Niccolò, 28, 210
 Maitland, F.W., 42
Mangold-ruling, 176
 Marchart, Oliver, 190, 191
 Marek, Kristina, 124
 Maritain, Jacques, 1
 material *Rechtsstaat*, 172–3
 mixed tribunals, 107
 modern world, countries, 100
 Montevideo Convention (1933), 126
 Morgenthau, Hans J., 23
 Mouffe, Chantal, 189
 Mozambique, contracting out of customs collection, 106
 multitude, 15
- nation, 28
 Negri, Antonio, 15, 16–17, 202, 238
 North Korea, nuclear weapons, 108
 nuclear weapons, threats from, 108–9
- Observations* (Parker), 33
Öffentlichkeit, 23, 186, 194, 200
 and theology of the Trinity, 195–7
 distinction from public sphere, 197
 oil resources, nationalization of, 226–7
 optimum sovereignty, 171
 organized hypocrisy
 in current political life, 96
 of sovereignty, 98
- Palonen, Kari, 190
 parallax gap, 192–3
 Parker, Henry, *Observations*, 33
 Parliament (UK)

- ability to repeal or amend earlier law, 161–2
- ability to bind future Parliaments, 161
- sovereignty of, 158–9
- Patriarcha* (Filmer), 29
- Peace of Westphalia, 97–8,
 - see also Westphalian/Vattelien sovereignty
- Peterson, Erik, 196
- Philosophical Theory of the State* (Bosanquet), 42
- Piirimäe, Pärtel, 13–14
- Plessner, Helmut, 199
- political societies, 156–7
- political sovereignty, 156–7, 231–5
- political, the, distinction from politics, 189–90
- politics, distinction from the political, 189–90
- popular states, 30–1
- populist theory of the state, 31–3
- Posner, Richard, 109
- post-modern world
 - countries, 100
 - European Union, 102–3
- post-sovereignty, 151–2, 168
- Praet, Patrick, 23
- pre-modern world
 - challenges to rest of world, 104–5
 - countries, 100–1
 - failed states, 103–4
 - gap between state capacity and state responsibilities, 105–6
 - threats posed by, 110–13
 - energy supplies and prices, 110
 - support for terrorist activities, 109
 - weapons of mass destruction, 108–9
- Prime Minister (UK), power of, 159
- Public Goods, Private Goods* (Geuss), 199
- Pufendorf, Samuel von, 15–18, 38–40, 69–70, 79
- pure fact approach, 4
- Qualified Majority Voting (EU), 163–7
- Ragguagli di Parnasso* (Boccalini), 32–3
- Rawls, John, 45
- Raz, Joseph, 174
- realm, 28
- Rechtsstaat*
 - and European Union
 - deviations from legality, 173–5
 - equality of citizens before the law, 182–3
 - EU arrest warrants, 178
 - extradition, 178–9
 - fundamental rights, 177–8
 - remedies against infringement of rights, 181–2
 - separation of powers, 179–80
 - comparison with rule of law, 173–5
 - importance of, 169
 - multiplicity of approaches to, 170–1
 - origins of concept, 171–3
- recognition, as aspect of sovereignty, 48–9
- recta auctoritas*, 66–7
- recta intentio*, 66–7
- Regan, Richard J., 85–6
- Regional Assistance Mission to the Solomon Islands (RAMSI), 106–7
- Relation* (Sandys), 31
- Right and Jurisdiction of the Prelate, and the Prince* (Kellison), 29
- Romans, transition from monarchy to free state, 32
- Rosanvallon, Pierre, 15
- Rosenau, James, 22
- Ross, Alf, 1, 19, 120, 147
- Rousseau, Jean-Jacques, 8–9
 - Contrat Social*, 62–3
- Runciman, David, 201
- Sagan, Scott, 108
- San Francisco Charter, 207
- Sandys, Edwin, 31
- Sattelzeit*, 188
- Schilling, Theodor, 126–7
- Schmidt, Georg, 65
- Schmitt, Carl, 20, 23, 70, 71, 157, 198, 203, 208, 224, 235
 - comparison with Arendt of thoughts on ‘the political’ 190–3
 - The Concept of the Political*, 194–9
- Schwarzenberger, Georg, 5
- Scotland, interpretations of British constitution, 159
- secession, 116
- Shaw, Jo, 152
- Sidgwick, Henry, 41
- Sierra Leone, 104
 - mixed tribunals, 107
- Six livres de la république* (Bodin), 28–9, 186
- Size of Nations* (Alesina and Spolaore), 171
- Skinner, Quentin, 12–13, 15–16
- Slaughter, Anne-Marie, 17
- slave, definition under Roman law, 32
- social constitutionalism, 205, 206–7
- souveranität*, 137, 141–2

- sovereign
 as a representative
 meaning of authorization of, 36–7
 representing whom?, 35–6
 exception, 211–16
- sovereignty
 abstraction into ‘exceptionality’, 207–8,
see also sovereign exception
 ambiguity between legal and political,
 154
 and de facto political or economic
 independence, 134
 and globalization, 241–2
 and juridical vocabulary, 225–7
 and military power, 235–8
 and multiple frames of legal reference,
 128–31
 and power, 223–4, 225
 as ‘absolute and perpetual’, 225
 as a historical topic, 228–9
 as a liminal concept, 114, 222
 as argument over allocation of power,
 7–10
 as central to politics, 2
 as contested cluster concept, 152–5
 as contested concept, 1
 as unified phenomenon, 47–8
 association of land with, 125–6
 biopolitical transfiguration, 205, 206
 comparison with human rights, 54
 conflicts between normative orders,
 153–4
 core elements of, 96
 definitions, 2–3, 214
 evolution of rules and practices of,
 97–8
 identifying marks of, 52–4
 in context of *Öffentlichkeit*, 200–4
 legal/political nature of, 3–4
 metaphysical approach to identify
 meaning of, 47
 multiplicity of vocabularies, 222–5
 need for historically informed analysis,
 10–12
 need for redefinition, 186–9
 objects of ascription, 153
 of contemporary countries, 99–101
 organized hypocrisy of, 98
 self-evidence of, 56–7, 59
 sociological understanding of, 229–31
 unity vs plurality, 14–18
- Spinoza, Baruch, 210
- Spolaore, Enrico, *The Size of Nations*,
 171
- Spruyt, Hendrik, 18
staatsgewalt, 137
- state
 endurance of the identity, 122–5
 genealogy of term
 absolutist theory, 27–30
 Hobbes’ fictional theory, 34–7
 mid-18C onwards, 40–4
 populist theory, 31–3
 Samuel Pufendorf, 38–40
 legal definition of, 118–21
 legality of emergence of, 114–15
 to reintroduce the fictional theory, 44–6
- state creation
 as being part of question of defining a
 state, 118–19
 as matter of fact not law, 117–18
 as similar to the act of incorporation,
 118
 by delegation by another state, 116–17
 by international law, 115–16
 by reliance on the law of the newborn
 state itself, 117
 date of birth being dependent on
 perspective, 121–2
- state practice, August 1658 Swedish attack
 on Denmark, 75–9
- state/status of rulers, 27–8
- Stern, Klaus, 173
- Suárez, Francisco, 29, 233
De bello, 67–8
- subsidiarity, 175
- Sunstein, Cass, 3
- Supernova (imagined global network),
 240–1
- Sweden, attack on Denmark in August
 1658, 76–9
- Taiwan, alternatives when sovereignty rules
 failed to provide desirable outcomes,
 99
- Thoma, Richard, 172
- Thompson, Helen, 65
- Toulmin, Stephen, 85
- Traité de la Souveraineté du Roi* (Le Bret),
 53
- Traité des Seigneuries* (Loyseau), 51
- Troper, Michel, 21
- Tully, James, 2–3
- UK sovereignty, and EU membership,
 158–63
- unitary approach, 13
- United Nations
 impact on sovereignty, 139–40, 205–6,
 207
 Responsibility to Protect, 105
- universitas, 33

- USA
2006 National Security Strategy, 112
promotion of democracy over
sovereignty, 101
- Vattel, Emer (Emerich) de, 75, 94, 97
Le droit des gens, 38, 39–40,
see also Westphalian/Vattelien
sovereignty
- Vienna Convention, impact on sovereignty,
140
- Villa, Dana, 191
- Vitoria, Francisco de, 71–2, 92, 233
- von Mohl, Robert, 172
- Wade, H.W.R., 160, 162
- Walker, Neil, 155
- Walker, R.B.J., 10
- Walzer, Michael, 83–4
- Ward, P.W., 9
- weapons of mass destruction, threats
from, 108–9
- Weber, Cynthia, 11
- Weigel, Georg, 86
- Weiler, Joseph, 19
- Werner, Wouter G., 6–7
- Westphalian/Vattelien sovereignty, 79–80,
96, 97
criticisms of, 64–5, *see also* Peace of
Westphalia
- Willoughby, Westel, 125
- Wolin, Sheldon, 189–90
- Žižek, Slavoj, 192