
Sovereignty and the Authority to Use Force

2.1 Introduction

Formal procedures always reflect and respond to past practices. Despite the flurry of law-making and institution-building over the last two decades, the current international legal system still fundamentally derives from the way statehood and state sovereignty were perceived in the immediate post-World War II period. This state-centric system is increasingly out of step with the changing nature of what might be called global politics as well as the changing nature of political violence: ‘new wars’, the role of and increased political activities by non-state actors (civil society, international governmental agencies, multinational corporations, as well as armed and extremist groups), growing interconnectedness at all levels, the communicative revolution, the importance and intransigence of transnational problems (climate change, poverty, pandemics, environmental degradation and air pollution, financial crisis, displacement and movement of peoples, war itself) not to mention prevailing norms and ideas. The dissonance between the formal rules of international society (and the ways of changing those formal rules) and everyday experience has given rise to questionings and claims for reinterpretations of the rules.

Some scholars suggest that the process of globalisation implies the beginning of the end of state sovereignty – a move towards a global constitution for the human community in which states are becoming an anachronism. Others argue that state sovereignty remains and should remain the lynchpin of the international legal system; a view that is associated with this latter position is the suspicion that the growth of global institutions is merely cover for empire – for expanding the power of dominant states.¹ We share the position articulated by Jean Cohen that

¹ For a discussion of these two positions, see Cohen, Jean 2012. *Globalization and Sovereignty*. Cambridge University Press.

different historical periods are characterised by ‘shifting sovereignty regimes’.² State sovereignty continues, at least formally, to underpin the international legal system augmented by an emerging set of global rules and institutions, such as those that relate to individuals as subjects of law and including judicialisation. How we interpret the nature of the current sovereignty regime – the changing meaning and substance of sovereignty – depends, we suggest, on different understandings of world order, which are linked to our different models of security.

We make the argument that the most salient change in the nature of state sovereignty has to do with the role of organised violence. Sovereignty has always been associated with the authority to use force (*jus belli*) although it is only in the modern, post-Westphalian period³ that the state has been considered the only institution with the authority to use force and thus holds the monopoly of legitimate organised violence. Moreover, the use of force by the state was supposed to be confined to law enforcement at home (regulated by the social contract, constitutionalism and the rule of law) and war abroad (regulated by international law principles of statehood and the use of force). Nowadays, the relationship between state sovereignty and the authority to use force is undergoing profound and complex challenges in light of far-reaching changes in the global context – changes that are only to some degree reflected in formal rules. How these changes are understood is closely linked, we argue, to our different models of security. Thus the interplay of these different models has and will have profound implications for the character of world order.

This chapter introduces some of the key concepts that shape thinking about international affairs – sovereignty, right authority and world order – and attempts to chart the different ways these concepts are changing in ‘these global times’. The next part introduces the external and internal aspects of sovereignty and how these are linked specifically in relation to war. It then traces the evolution of the concept of sovereignty and draws attention to some of the ways in which globalisation has affected and continues to affect the distinction between the external and internal aspects

² *Ibid.*

³ This refers to the 24 October 1648 Treaty of Westphalia, a peace treaty between the Holy Roman Emperor and the King of France and their respective allies. There is a large literature on the significance of the Treaty on the development of the European statehood, the concept of sovereignty and international law. For an overview see, for example, Fassbender, Bardo 2011. ‘Westphalia, Peace of (1648)’, in Wolfrum, Rudiger (ed.). *Max Planck Encyclopedia of Public International Law*. Vol. X. Oxford University Press.

of sovereignty and what this might imply for the international legal system. The third part of the chapter outlines the changing nature of what is known in just war theory as 'right authority' – ideas about who or what can legitimately authorise the use of force. It describes the shift from religious to secular authority in the seventeenth and eighteenth centuries, the shift from just war concepts to legal regulation of force in the nineteenth century, and from national (state) authority to international authority in the twentieth century. It then discusses current understandings of right authority and, in particular, the specific role of the United Nations Security Council (SC) in authorising the use of force and the problems of legitimisation. The chapter concludes by outlining how different ideas about world order and the nature of state sovereignty are associated with the different models of security described in the previous chapter.

2.2 The Changing Nature of Sovereignty

2.2.1 *The Great Divide*

The modern concept of state sovereignty encapsulates what International Relations theorists call the Great Divide. As Hinsley explains in his classic text on sovereignty:

Applied to the community, in the context of the internal structure of a political society, the concept of sovereignty has involved the belief that there is absolute political power within the community. Applied to the problems which arise in relations between political communities, its function has been to express the antithesis of this argument – the principle that internationally, over and above the collection of communities no supreme authority exists.⁴

Thus the 'Great Divide' consisted of a distinction between domestic order (civil society) peopled by individuals, norms, law and politics and an external state of nature or anarchy composed of autonomous states that pursue their national self-interest, where there is no single authority.⁵

The Great Divide was a distinction that had its origin in Greek and Roman ideas about the nature of political community and was later to be found both in classical Islamic thought and in the ideas of the European

⁴ Hinsley, F. H. 1986. *Sovereignty*. Cambridge University Press, 2nd ed., 158.

⁵ Clarke, Ian 1999. *Globalisation and International Relations Theory*. Oxford University Press; Walker, Rob 1992. *Inside/Outside: International Relations as Political Theory*. Cambridge University Press.

Enlightenment. Classical Islamic thought distinguished between the realm of Islam (*dar al-Islam*) and the realm of war (*dar al-harb*).⁶ The realm of Islam was that of a community characterised by a political authority, whose authority derived from the rule of law (*Shari'a*) and a social contract (*Bay'a*); in contrast, the external realm of war referred to an arena of irrationality and ignorance where there was no overarching political authority and tribal conflict was endemic.⁷

This distinction between the realm of Islam and the realm of war was paralleled by the distinction in European Enlightenment thought between civil society (meaning at that time a legally ordered political community) and the state of nature.⁸ Civil society, like the realm of Islam, was a political community with a single political authority, based on a rule of law and a social contract. The state of nature was an arena without any political authority, where human beings were more or less prone to violence, depending on the assumptions about human nature made by different Enlightenment thinkers. For a pessimist like Thomas Hobbes, who drew on his experience of the English civil war, it was 'warre, as is of every man, against every man' a condition of 'continual fear, and danger of violent death' in which 'the life of man is solitary, poor, nasty, brutish and short'.⁹ For John Locke, violence arose when there was no way of arbitrating differences of interpretation of the law of nature (understood as God's will imprinted on human consciousness).¹⁰ In other words, human beings are not purely selfish; they are moral beings who may disagree about the content of morality. These different assumptions about human nature gave rise to different versions of the social contract; for Hobbes, men (and he was talking about men) gave up their freedom in the state of nature in exchange for security; for Locke, the social contract was also about liberty and private property.¹¹

⁶ See, for example, Kelsay, John 1993. *Islam and War: A Study in Comparative Ethics*. John Knox Press; Al-Fadl, Khaled Abou 1999. 'The Rules of Killing at War: An Enquiry into Classical Sources', *The Muslim World* 89(2): 144–57.

⁷ Ezzat, Heba Raouf and Kaldor, Mary 2005. 'Not Even a Tree: Delegitimizing Violence and the Prospects for Pre-Emptive Civility', in *Global Civil Society: 2006–2007*. Sage, 18–41, 28.

⁸ See Kaldor, Mary 2003. *Global Civil Society: An Answer to War*. Polity Press, chapter 2.

⁹ Hobbes, Thomas (1998; 1651). *Leviathan*. Gaskin, John Charles Addison (ed.). Oxford University Press, ch. xiii, para. 9.

¹⁰ Locke, John (1998; 1690). *Two Treatises of Government*. Laslett, Peter (ed.). Cambridge University Press.

¹¹ Carole Pateman suggests that the social contract was 'fraternal'; it was brothers replacing fathers rather than a change in gender relations. See Pateman, Carole 1988. 'The Fraternal Social Contract', in Keane, John (ed.). *Civil Society and the State*. Verso.

Feminists suggest that the inside/outside is a gendered distinction in which the state is construed as a male subject combating other males abroad yet in control of the domestic arena, which might be either patriarchal and repressive or alternatively a freer and gentler arena.¹² One can draw a parallel between the outside/inside distinction, the external and internal aspects of sovereignty, and the public/private distinction in domestic law,¹³ whereby the private domain remains unregulated. On this reading, sovereignty can be conceived as a 'shield' behind which states (and men) can preserve their privacy either to 'protect' domestic civil society or to seek to hide human rights violations and other atrocities.¹⁴

For some Enlightenment philosophers, external war was a necessary condition for domestic order. Theorists of civil society, for example, Adam Ferguson and Alexis De Tocqueville, feared the atomism and individualism of modern societies that were no longer held together through kinship relationships; for them war was a way of generating domestic social solidarity and instilling a sense of public duty.¹⁵ This does not mean that they considered the international realm to be necessarily anarchic. Ferguson, for example, thought that European states, characterised by civil societies, fought wars in a more 'civilised' way, by which he meant in accordance with agreed international rules.¹⁶

A stronger version of this argument was taken up by Hegel, who believed the fundamental unit for study to be the nation-state as the 'political vehicle for the cultural and psychological aspirations of peoples'.¹⁷ For Hegel, external sovereignty creates the basis of internal authority. Hegel argues that the state is established through crisis and war and that it is only through self-sacrifice that the citizen understands the

¹² MacKinnon, Catharine 1989. *Toward a Feminist Theory of the State*. Harvard University Press; Knop, Karen 1993. 'Re/Statements: Feminism and Sovereignty in International Law', *Transnational Law and Contemporary Problems* 3; Charlesworth, Hilary and Chinkin, Christine 2000. *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press. This analogy between the state and the individual (male) person impacts upon the construction of the principles relating to the use of force, as discussed in the following chapters.

¹³ Pateman, Carole 1988. *The Sexual Contract*. Stanford University Press.

¹⁴ Henkin, Louis 1994. 'The Mythology of Sovereignty', in MacDonald, Ronald St. John (ed.), *Essays in Honour of Wang Tieya*. Martinus Nijhoff, 351–358, 351.

¹⁵ Ferguson, Adam (1995; 1767). *An Essay on the History of the Civil Society*. Cambridge University Press; De Tocqueville, Alexis (2003; 1835). *Democracy in America and Two Essays on America*. Penguin Books.

¹⁶ Ferguson, *op. cit.*, 193.

¹⁷ Neff, Stephen C. 2003. 'A Short History of International Law', in Evans, Malcolm (ed.), *International Law*. Oxford University Press, 31–58, 47.

primacy of the state. Indeed, it is during war that the state acts as an individual and the role of the citizen is subsumed in the state. Thus it is through war rather than through any social contract that individual freedom and social solidarity are reconciled. War, says Hegel, is necessary to preserve the 'ethical health of peoples. . . . Just as the movement of the ocean prevents the corruption which would be the result of perpetual calm, so by war people escape the corruption which would be occasioned by a continuous or eternal peace'.¹⁸ Hegel argues that 'sacrifice for the sake of the individuality of the state is the substantive relation of all the citizens, and is, thus, a universal duty'.¹⁹

A twentieth-century exponent of this argument was the Nazi legal theorist Carl Schmitt. The central proposition of Carl Schmitt's *The Concept of the Political (Der Begriff des Politischen)* is that 'the political' is defined by the friend-enemy distinction. As a constitutional lawyer, Schmitt was preoccupied with what lay beyond law. He was deeply critical of the positive law tradition of the nineteenth century while similarly unaccepting of the natural law argument – the idea that certain universalistic norms underpin law. For him, all law is 'situational', and his answer to the question of what lies beyond law had to do with political and historical circumstances. In particular, he argued that sovereignty was above the law and that sovereignty in turn is underpinned by the concept of the political. The first sentence of *The Concept of the Political* reads: 'The concept of the state presupposes the concept of the political'.²⁰ But what is the meaning of political? For Schmitt, it seems to derive from the notion of a political community defined by conflict.²¹ In common with other theorists, Schmitt argued that different fields of human endeavour are characterised by binary distinctions: good and evil in the case of morality, beautiful and ugly in the case of aesthetics, profitable and unprofitable in the case of economics. In the case of politics, the defining binary distinction is the friend and enemy distinction, which has to include the 'real physical possibility of killing'.²² Hence domestic order was intrinsically linked to external war, and in so far as

¹⁸ Hegel, Georg Wilhelm Friedrich. (1996; 1896 (in English) and 1820 (in German)). *Philosophy of Right*. Dyde, Samuel Waters (trans.). Prometheus Books, 331.

¹⁹ *Ibid.*, 334–335.

²⁰ Schmitt, Carl (1976; 1927). *The Concept of the Political*. Schwab, George (trans.). Rutgers University Press, 1.

²¹ See Kaldor, Mary 2013. 'Identity and War', *Global Policy* 4(4): 336–346.

²² Kaldor, *op. cit.* ('Identity in War').

international law was relevant, it was as the positive law made by states rather than through any assumption of universal morality.

Schmitt argued that in the nineteenth century wars were 'bracketed', that is to say, fought in a restrained way according to international rules. The claim for universal morality in the twentieth century, he argued, explained the devastating character of twentieth-century wars comparable to holy wars of an earlier era, as we discuss below. It has been observed that the Schmittian view of international law – that it is to be seen from the perspective of national interests – has been revived by some contemporary, primarily American international lawyers who consider international law to lack legitimacy when 'compared with the legitimacy of national democratic governance'.²³

The alternative stream of thought that goes back to the Greek stoics is the cosmopolitan position in which domestic freedom is linked to international harmony rather than anarchy. The Roman law concept of *jus gentium* (law of nations) was the law applicable to all peoples as opposed to the *jus civile*, applicable only to Roman citizens. The former combined customary law of the local communities that lived around the Mediterranean and presupposed some shared universal norms.²⁴ Liberal political theorists from the seventeenth century onwards, who assumed a 'social contract' for the institution of government and the protection of individual rights along the lines put forward by John Locke, also envisaged the construction of a liberal international order linked to the rise of domestic civil society, in which force was increasingly limited to policing actions and the enforcement of justice. Many developed their own perpetual peace schemes.²⁵ One of the best known is Immanuel Kant's proposal, who drew

²³ Wulfrum, Rüdiger (2008). 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in Wulfrum, Rüdiger and Röben, Volker (eds.). *Legitimacy in international Law*. Springer, 1–24, 2. Examples of this approach, or 'school' of international law, modernised through rational choice theory include Glennon, Michael 2010. *The Fog of Law: Pragmatism, Security, and International Law*. Stanford University Press; Goldsmith, Jack and Posner, Eric 2005. *The Limits of International Law*. Oxford University Press.

²⁴ Roman writers did not always distinguish the *jus gentium* and *jus naturale* – the universal law of nature, which derived from Greek philosophers. The only context in which the difference became pertinent was slavery, which was universally practiced in the ancient world but regarded by some as contrary to the laws of nature. Jolowicz, Herbert Felix and Nicholas, Barry 1972. *Historical Introduction to the Study of Roman Law*. Cambridge University Press, 3rd ed., 100–105.

²⁵ See Archibugi, Daniele 1992. 'Models of International Organisation in Perpetual Peace Projects', *Review of International Studies* 18(4): 295–317.

on Jean-Jacques Rousseau's description of the Abbé St Pierre's²⁶ scheme for perpetual peace. Kant took the view that the construction of civil society in the Enlightenment sense would be possible only if it were universalised. Indeed, while he argued that a republican constitution was a condition for perpetual peace, he also thought that a fully functioning civil society was not possible except in the framework of what we would now call a global civil society. According to Kant: 'The problem of establishing a perfect civil society is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved'.²⁷ War necessarily represented an infringement of civil freedom; it was expensive, destructive and uncertain. Indeed, Rousseau had suggested in his description of the Abbé St Pierre's scheme for peace through federation that war was the device through which rulers sustained their power, providing a 'pretext' for taxation and for obedience²⁸. These thinkers were not necessarily utopian or determinist; Kant took the view that if a scheme for perpetual peace were not adopted either by chance or by deliberate action, a 'hell of evils' would overtake the world.²⁹

The different schools of thought in International Relations originate in these different understandings of the relationship between domestic order and external anarchy. Classic realist thinking conceives the international arena in Hobbesian terms and denies the relevance of international law except as a tool for national interest. The English school of International Relations, deriving from the work of Hedley Bull and Martin Wight, suggests that even though there exists no single authority, states do constitute members of an international system based on agreed rules.³⁰ Among contemporary English School

²⁶ Rousseau, Jean-Jacques 1917. *A Lasting Peace through the Federation of Europe and the State of War*. Vaughan, Charles Edwyn (trans.). Constable and Company.

²⁷ Kant, Immanuel 1991. 'Idea for a Universal History with a Cosmopolitan Purpose', in *Kant's Political Writing*. Nisbet, H. B (trans.). Cambridge University Press, 41–53, 47.

²⁸ Rousseau, Jean-Jacques (1991; 1756). 'Abstract and Judgement of Saint-Pierre's Project for Perpetual Peace', in Hoffman, Stanley and Fidler, David P. (eds.). *Rousseau on International Relations*. Clarendon Press. The same point had been made by earlier thinkers on war and peace, especially Erasmus.

²⁹ Kant, *op. cit.*, 48. Indeed, Jürgen Habermas has argued that a 'hell of evils' did indeed overtake the world. Habermas, Jürgen 1997 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight' in Bohman, James and Lutz-Bachmann, Matthias (eds.). *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. MIT Press.

³⁰ Bull, Hedley 2012. *Anarchical Society: A Study of Order in World Politics*. Columbia University Press and Palgrave Macmillan, 4th ed.; Wight, Gabrielle and Porter, Brian (eds.) 1994. *International Theory: The Three Traditions*. Leicester University Press.

theorists, a distinction is drawn between pluralists, who assert norms of non-intervention, and solidarists, who argue that human rights norms do override sovereignty in some instances.³¹

In contrast to the realist conceptions of International Relations, whether we are talking about traditional realists, pluralists or solidarists, the Kantian position is often described as idealist or cosmopolitan. While there are overlaps with a solidarist view of International Relations, the cosmopolitan strand of thinking departs from the insistence on the pivotal significance of state sovereignty (though it does not deny some version of sovereignty) and gains increasing relevance in the context of the contemporary blurring of the Great Divide associated with the phenomenon known as globalisation. It is worth noting that the term 'cosmopolitan' should not be conflated with humanism;³² cosmopolitanism celebrates the different ways of being human –hence it necessarily entails multiculturalism and pluralism. Indeed, one can argue that the Kantian position, as interpreted here, involves a deconstruction of the structural binaries between inside and outside or friend and enemy that underpin Western bases of power and that have been stressed in critical theories, including feminist and post-colonial theories.

2.2.2 *The Evolution of Sovereignty*

The term 'sovereignty' is said to have originated with Jean Bodin in his work *Six Livres de la République* published in 1576. It was taken up by Hugo Grotius in *De Jure Belli ac Pacis (The Laws of War and Peace)* published in 1625. According to Grotius: 'That power is called sovereign whose actions are not subject to the control of any other power so as to be annulled at the pleasure of any other human being'.³³ Along with the almost contemporary Spanish legal theorist, Vitoria (died 1546), Grotius argued that authority had to do, above all, with war-making: 'The acts of the sovereign executive power of a directly public kind are the making of peace and war and treaties and the imposition of taxes and other

³¹ See Hurrell, Andrew 2008. *On Global Order: Power, Values and the Constitution of International Society*. Oxford University Press; Wheeler, Nicholas 2002. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford University Press.

³² See Appiah, Anthony 2000. *Cosmopolitanism: Ethics in a World of Strangers*. Norton.

³³ Grotius, Hugo (2003; 1625). *The Rights of War and Peace*. Campbell, Archibald Colin (trans.). Elibron Classics, 62.

exercises of authority over the persons and property of its subjects, which constitute the sovereignty of the state'.³⁴

The concept of state sovereignty was 'invented by absolutist theorists in an absolutist age'.³⁵ It is associated with the rise of centralised authorities in Europe that were increasingly independent of international authorities, such as the Pope or the Holy Roman Emperor. 'It is a legal structure that came about to manage the disintegration of a community', earlier described as 'the world state of medieval Christendom'.³⁶ Despite their independence from each other, the establishment of domestic governance structures did depend in practice on recognition by others, although these were other states, or other forms of political entity such as city states, rather than higher authorities. It was Grotius who was one of the first to draw attention to the importance of international law, the 'law of nations', within which sovereignty, the 'oldest subject in international law',³⁷ is situated. States became accepted as the principal bearers of international legal personality, and conventional narratives of the modern international legal system emphasise the concept of statehood and states' sovereign rights and obligations in wartime and peace; the essentially internal concept of sovereignty thus became entwined with the notion of the 'sovereign state'. Indeed, Michael Walzer argues that the rights of states derive from the social contract within states in which individual rights are transmuted into state rights in exchange for protection against external encroachment and life and liberty at home.³⁸

State sovereignty is not a 'fact' but the ascription of status that depends on conformity to the international framework of rules.³⁹ What has changed over time is those rules: the need for recognition,⁴⁰ the criteria

³⁴ *Ibid.*, 61.

³⁵ Keohane, Robert 2008. 'Discussion Following Presentations by Rudiger Wulfrum, Robert Keohane, Alain Pellet and Anthony D'Amato', in Wulfrum, and Röben (eds.), *op. cit.*, 93–108, 93.

³⁶ Abi-Saab, Georges 2008. 'The Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy', in Wulfrum and Röben (eds.), *op. cit.*, 109–131, 112.

³⁷ Henkin, Louis 1994. 'The Mythology of Sovereignty', in MacDonald, Ronald St. John (ed.), *Essays in Honour of Wang Tieya*. Martinus Nijhoff, 351–358.

³⁸ Walzer, Michael 2015. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. Basic Books, 5th ed.

³⁹ Kratochwil, Friedrich 2012. 'Leaving Sovereignty Behind: An Inquiry into the Politics of Post-Modernity', in Falk, Richard, Juergensmayer, Mark and Popovski, Vesselin. *Legality and Legitimacy in Global Affairs*. Oxford University Press, 127–148, 134.

⁴⁰ Crawford points out that while sovereignty was 'merely the location of power within a particular territorial unit' there was no need for recognition by other external entities.

for recognition and the nature of the regimes that make up the international system. As Kratochwil points out, status was loosely connected to the capacity to act, or, as it is sometimes depicted, there is a link between *de jure* sovereignty (legal status) and *de facto* sovereignty (capacity to act).⁴¹ In the early post-Westphalian period, status was linked to control of land and noble lineage. In the nineteenth century, control over peoples through the apparatus of the state and empire-building became more important, and, in the twentieth century, the notion of popular will – self-determination – became a salient criterion. In the late twentieth and early twenty-first century, human rights and the politics of nationalisms have become increasingly relevant, but often opposing, factors, which have ‘transfigured “sovereignty”’.⁴² The rules of international law have correspondingly shifted along with the changing substance of such claims.

Alongside other rules relating to sovereign states, for instance, diplomatic relations, treaty-making, acquisition of territory and jurisdiction, the laws relating to the use of force have shifted. In the post-Westphalian period, the international rules legitimated war-making by sovereigns. Indeed, the emergence of the modern state in Western Europe was closely associated with war-making: ‘a state has a monopoly on violence within a bordered territory’. The border must precede the social contract (giving rise to internal sovereignty) as otherwise no-one would know to whom the contract applies. But the state must defend those borders, ‘for it is here where communities meet, that the social contract has no force . . . the sovereign function is necessarily, i.e., structurally, both law [internal] and war [external]’.⁴³ The state is thus described by Charles Tilly as a ‘coercion-wielding institution’; Anthony Giddens has similarly called it a ‘bordered power container’.⁴⁴ Grotius pointed out that war is not condemned according to the Law of Nations – a war that conforms to the Law of Nations ‘is called just or perfect’.⁴⁵ The just war tradition remained the dominant framework for

Recognition had no place in international law until the middle of the eighteenth century. Crawford, James 2006. *The Creation of States in International Law*. Oxford University Press, 2nd ed., 12.

⁴¹ Kratochwil, *op. cit.*, 134. However, recognition may continue even where the capacity to act has been lost, as, for instance, with government in exile.

⁴² *Ibid.*, 135.

⁴³ Kahn, Paul W. 2013. ‘Imagining Warfare’, *European Journal of International Law* 24: 199–226, 202–213.

⁴⁴ Tilly, Charles 1992. *Coercion, Capital and European States: AD 990–1992*. Wiley-Blackwell; Giddens, Anthony 1985. *The Modern State and Violence*. Polity Press, 119.

legal analysis through the seventeenth and eighteenth centuries, although a shift was taking place on the ground; perfect (just) wars were distinguished from 'imperfect' (unjust) wars.⁴⁶ The former engaged certain rules and recognised practices, while the latter were 'excluded from the category of war altogether'. They were understood in different terms, such as reprisals. Individual self-defence was similarly understood as 'an inherent natural law right, distinct from war and exercisable by unjust parties as well as by just ones'.⁴⁷ These measures then perceived as short of war underwent different legal trajectories as they were further conceptualised in the twentieth century.⁴⁸

From the seventeenth century onwards, wars between European states were interspersed with periods of peace, whose contours were established by post-war settlements. 'At the end of every war since the end of the eighteenth century', says Hinsley, 'the leading states made a concerted effort, each one more radical than the last, to reconstruct the system on lines that would enable them, or so they believed, to avoid a further war'.⁴⁹ To this end peace settlements were standardised during the seventeenth century. They sought compromise between the warring parties and were non-judgemental, typically encompassing cessation of military hostilities, title to captured property, freeing of prisoners of war and amnesty.⁵⁰ Earlier post-war settlements such as the 1648 Peace of Westphalia itself or the Peace of Utrecht, a complex of treaties signed between 1713 and 1714 that brought an end to the wars of Spanish succession, had made similar provision. These settlements could be considered as a sort of social contract among states that provided the basis for international legitimacy – an 'initial get-together' (to use Hannah Arendt's term for explaining legitimacy)⁵¹ at an international level. But, as discussed below, and as continued in the post-World War II

⁴⁵ Grotius, *op. cit.*, 36.

⁴⁶ Neff, Stephen 2005. *War and the Law of Nations: A General History*. Cambridge University Press, 95 ff.

⁴⁷ *Ibid.*, 126.

⁴⁸ On self-defence see Chapter 4; reprisals were determined to be illegal by the UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Resolution 2625, 24 October 1970.

⁴⁹ Quoted in Ikenberry, John G. 2011. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. Princeton University Press, 11.

⁵⁰ Neff, *op. cit.* (*War and the Law of Nations*), 117.

⁵¹ Arendt, Hannah 1972. *Crises of the Republic*. Harcourt Brace Jovanovich.

settlement, not all states were equal in these 'get-togethers', which were dominated by the great powers of the day.⁵²

The nineteenth and early twentieth centuries were the high tide of state sovereignty and its manifestation – legal positivism. As expressed by the Permanent Court of International Justice (PCIJ) in the *Lotus* case, '[r]estrictions upon the independence of States cannot therefore be presumed'. In this laissez-faire era, states could only be in violation of international law if the accusing state could point to a positive principle prohibiting the action in question.⁵³ In this regard 'war reached its pinnacle of legal prestige'.⁵⁴ It was accepted as a regular instrument of policy whereby states each protected their own vital national interests. Accordingly, once war was declared, a set of legal principles came into play with respect to both the parties and third states that were bound by – and benefitted from – the rules of neutrality. This is what Schmitt meant by 'bracketed' wars.⁵⁵

The victors against Napoleon and hence the major powers of the day (Austria, Russia, Britain and Prussia) convened in Vienna in 1815 to seek ways to manage Europe through maintaining the balance of power and their own interests, the so-called Concert of Europe. This hierarchical albeit informal arrangement – 'the first model of international government'⁵⁶ – was aimed at both ensuring that no single nation gained supremacy and maintaining stability in Europe.⁵⁷

Especially in the nineteenth century after the 1815 settlement at Vienna, these periods of European peace allowed for the expansion of state power: territorially through overseas empire building (notably given legitimacy by the supposed 'civilising mission' of the 1885 Congress of Berlin)⁵⁸ and internally through the construction of the administrative state. Long periods of peace⁵⁹

⁵² Simpson, Gerry 2004. *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*. Cambridge University Press.

⁵³ *The Case of the SS Lotus (France v. Turkey)*, PCIJ Series A, No. 10, judgment of 7 September 1927, para. 44.

⁵⁴ Neff, *op. cit.* (*War and the Law of Nations*), 161.

⁵⁵ See Kaldor, *op. cit.* ('Identity and War').

⁵⁶ Mazower, Mark 2012. *Governing the World: The History of an Idea, 1815 to the Present*. Penguin Press.

⁵⁷ Simpson, *op. cit.*, chapter 4.

⁵⁸ 'Versions of the civilizing mission were used by all the actors who participated in imperial expansion'. Anghie, Anthony 2004. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, 96.

⁵⁹ Uprisings and conflicts against colonial powers were disregarded as wars and thus as not disrupting the period of peace. They were perceived as being internal unrest and were responded to with extreme violence.

made possible growing interconnectedness in trade and communications, industrialisation and technological advances. Transnational groups emerged whose organised campaigning also sought the strengthening of international legal regulation. For example, the Anti-Slavery Society (founded in 1839 and originally called the British and Foreign Anti-Slavery Society) sought and campaigned for the worldwide abolition of slavery. In 1864 the actions of Henri Dunant, shocked by the humanitarian cost of the aftermath of war that he witnessed after the battle of Solferino (1859), led to the founding of the International Red Cross (International Committee of the Red Cross) and the commencement of the codification of the modern 'laws of war'.⁶⁰ At the end of the century, at the Hague Peace Conferences of 1899 and 1907, which were the first of what we now call global summit meetings, peace groups organised parallel sessions and even published a newsletter. They argued for peaceful methods for the settlement of disputes in place of war and hoped for the establishment of international adjudication, which transpired after World War I with the creation of the PCIJ,⁶¹ even though the Court was not accorded compulsory jurisdiction because of the insistence on state sovereignty. It remains the case that jurisdiction of the successor International Court of Justice (ICJ) rests upon state consent.⁶²

Thus the paradox of the growth of the modern state was that it contributed, on the one hand, to domestic prosperity and democratisation as well as growing interconnectedness, transnational civil society and increased inter-governmental agreements, and, on the other hand, to brutal colonialism, the genocide of American, African and Australian native tribes, and destructive wars: 'The state was simultaneously the vehicle for peace and war, for life and death. The logic of law pointed to individual well-being as the ground for legitimacy, while sovereign presence depended upon citizens being willing to kill and be killed'.⁶³ The

⁶⁰ This process began with the adoption of the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. Geneva, 22 August 1864. This was revised and replaced by new versions, culminating in the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (*Geneva Convention I*). See Chapter 6

⁶¹ *Covenant of the League of Nations*, 28 April 1919, article 14; *Statute of the Permanent Court of International Justice*, 16 December 1920, 6 LNTS 379, 390.

⁶² *Statute of the International Court of Justice*, 26 June 1945, article 36.

⁶³ Kahn, *op. cit.*, 205; cf. "The term "sovereignty", for example, has a long-standing and troubling history: from the times of Jean Bodin (1530–1596) and of Emerich de Vattel (1714–1767) up to the present, in the name of State sovereignty – unduly and inadvertently diverted from inter-State to intra-State relations – millions of human beings were sacrificed'.

militarism and nationalism that culminated in the wars and genocides of the twentieth century have to be explained in terms of the profound contradictions of state sovereignty.

Post-World War II

In the aftermath of two world wars, the establishment of the United Nations Organization, preceded by the League of Nations in the inter-war period, formally reaffirmed the principle of sovereign equality of states in the UN Charter, article 2 (1). Although undermined by the privileged position of the five permanent members of the Security Council (UN Charter, articles 23 and 27), the principle of the sovereign equality of states was given expression through the one state/one vote basis of voting in the General Assembly (UN Charter article 18) and, after 1955, practical acceptance of the principle of universal membership of the Organisation. States are designated as equal, autonomous entities. Equality between sovereign states denotes a horizontal not a vertical relationship; no one sovereign state has authority over other states, which must respect each other's boundaries and refrain from interference in their domestic affairs.⁶⁴ Of course, power dynamics – economic, military and political inequality – undermine this formal position.

The principle of sovereign equality is upheld by corollary principles such as the prohibition of the use of force in international relations against the territorial integrity or political independence of another state (UN Charter, article 2 (4)) and the obligation to settle disputes peacefully (UN Charter, article 2 (3)). Unlike in the League Covenant, the principles for the maintenance of international peace and security were made applicable to non-members (article 2 (6)), and no provision was made for voluntary withdrawal from the Organisation.⁶⁵ State sovereignty was further entrenched by the end of colonialism: 'sovereignty was the watch-cry for the principle of self-determination'.⁶⁶ The League of Nations had

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Reports 99, judgment of 3 February 2012 (per dissenting opinion of Judge Trindade, para. 163).

⁶⁴ UN Charter, article 2 (7) prohibits UN intervention in matters within the domestic jurisdiction of states. 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'; UN GA Resolution 2625, *op. cit.*

⁶⁵ UN Charter, articles 5 and 6 provide for suspension of membership and expulsion from the Organisation for persistent violation of the principles of the Charter.

⁶⁶ Henkin, Louis 1999. 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', *Fordham Law Review* 68: 1-14, 1.

been established on the assumption of the continuation of colonial rule. This premise was continued, albeit in weakened form in the United Nations,⁶⁷ but which also included among its purposes the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' (UN Charter, article 1 (2)). A major – if not the major – development in post-1945 international law has been the acceptance – and limitation – of the right to self-determination. Self-determination as expounded by both Woodrow Wilson and Lenin was perceived of as applicable to European peoples in the break-up of the Ottoman and Austro-Hungarian empires in the wake of World War I. Although the colonial territories of the defeated powers were placed under the League mandate system rather than being conferred as colonies, the League Covenant recognised the continuation of 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world' (article 22).⁶⁸

In addition, with the creation of new states by the peace settlement of 1919, thereby giving effect to some nationalist demands, a form of international protection was accorded to some individuals through the conclusion of treaties for the protection of national minorities. These minority treaties were limited. They applied only to those minorities identified by the treaties while others were not accorded such international recognition or protection (for example, the Kurds). But, like the mandate system, they did provide for (limited) international supervision and redress, but through the advisory jurisdiction of the PCIJ rather than through individual rights themselves. Nevertheless, the jurisprudence of the PCIJ made an important contribution to the concept that individuals could have rights bestowed by treaty⁶⁹ and to the international legal understanding of equality.⁷⁰

The year 1945 saw changes to both minority protection and the mandate system. Protection of national minorities was no longer given particular emphasis but was subsumed within the general notion of

⁶⁷ Under the Trusteeship system; UN Charter, Ch. XI, articles 73 and 74.

⁶⁸ On the history and application of the mandate system see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Europe*. Oxford University Press, 2015.

⁶⁹ *Polish Postal Service in Danzig*, PCIJ Series B No. 11, advisory opinion of 16 May 1925.

⁷⁰ See, for example, *Minority Schools in Albania*, PCIJ Series A/B No. 64, advisory opinion of 6 April 1935, para. 64: 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.

human rights.⁷¹ The UN trusteeship system (which replaced the mandate system) recognised the obligation to promote the progressive development of each territory placed under the system 'towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'.⁷² Although article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷³ affirmed the right to self-determination, such claims of non-self-governing peoples were inspired by nationalist movements, in many cases rooted in the nineteenth century, anti-racism and anti-colonialism, rather than by human rights *per se*. Indeed, despite humanitarian antecedents to what might be termed the international human rights movement, it is argued that the latter did not fully emerge until after the achievement of self-determination for most colonised territories.⁷⁴ The achievement of self-determination did not guarantee the enjoyment of human rights for those in newly independent states, notwithstanding constitutional protections in many instances. Rather, the concept entrenched the sovereign equality of such states within their existing boundaries as determined by the colonial powers, the doctrine of *uti possidetis*.⁷⁵ The legal insistence on the territorial integrity of the newly independent sovereign states was upheld in practice as demonstrated by the lack of international support for Biafra, East Timor, Western Sahara and Bougainville as their claims were violently resisted by Nigeria, Indonesia, Morocco and Papua New Guinea, respectively. This legal resolve has been weakened in the wake of claims

⁷¹ Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations Treaty Series, vol. 199, 171, is the only provision in the UN Covenants directed at minority protection. It is cast in terms of the right of individuals belonging to minorities not to 'be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. See also *Framework Convention for the Protection of National Minorities*, Strasbourg, 1 February 1995, European Treaty Series, No. 157.

⁷² UN Charter, article 76.

⁷³ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, United Nations Treaty Series, vol. 993, 3.

⁷⁴ Moyn, Samuel 2011. *The Last Utopia: Human Rights in History*. Belknap Press; for a rejoinder to this view see Alston, Philip 2013. 'Does the Past Matter? On the Origins of Human Rights', *Harvard Law Review* 126(7): 2043–2081.

⁷⁵ *Case Concerning the Frontier Dispute* (Burkina Faso v. Mali), 1986ICJ Reports 554, 22 December 1986, para. 20: 'the principle of intangibility of frontiers inherited from colonization'.

for self-determination outside the European 'salt water' colonial context that have provided the justification for many of the 'new wars' of the 1990s and the early twenty-first century, in places like Sudan, the former Yugoslavia or the South Caucasus. Nevertheless, these claims tend to be based on group identities – nationalist or ethnic principles – rather than on human rights. The recognition of new states created out of the break-up of the former Yugoslavia and USSR in the 1990s, the separation of Eritrea from Ethiopia in 1991, the independence of Timor Leste in 2002 and of South Sudan in 2011 have all further undermined the grip of prior colonial history on the principle of territorial integrity.⁷⁶

The principle of non-intervention in the domestic affairs of states in article 2 (7) of the UN Charter has parallels with the principle of non-intervention in family affairs, and like the latter, this is beginning to change. In the case of states, sovereignty was limited by the exception relating to the application of enforcement measures under UN Charter chapter VII. This embryonic notion of international governance is furthered by articles 24 and 25, giving primary responsibility for the maintenance of international peace and security to the SC and making Council decisions binding upon member states. While the significance was not fully recognised at the time, further constraints on state action were introduced by the stipulation of the promotion of respect for human rights as a purpose of the Organisation.⁷⁷ The development of normative human rights standards was progressed through the adoption of the Universal Declaration of Human Rights (1948), the Genocide Convention (1948) and the two International Covenants adopted by the General Assembly in 1966 (the ICCPR and ICESCR). The coming into force in 1976 of the ICCPR and ICESCR was an indication of the greater place of human rights, and accordingly constraints on state sovereignty, in at least the rhetoric of international affairs in the last quarter of the twentieth century, as well as in domestic affairs through their incorporation into national legal systems. As discussed

⁷⁶ Colonised territories – penetrated, exploited and subjected to violence – contrast with the masculine state. Liberation struggles against colonial rule and the quest for sovereignty by previously colonised peoples may be analogised to the fight for women's suffrage and equality, which were also resisted as disruptive to the existing hierarchical order.

⁷⁷ UN Charter, articles 1(3), 55 and 56. Article 68 allows for the setting up by the Economic and Social Council (ECOSOC) of a commission for the promotion of human rights. Without this institutional allocation of responsibility, the history of human rights within the UN might have been very different.

in Chapter 3 the development of individual complaints procedures meant that state actions could be directly challenged in international or regional judicial or quasi-judicial bodies.⁷⁸ That this inroad into sovereignty remains especially contested with respect to the status of women within the state is shown by the many reservations to the Convention on the Elimination of All Forms of Discrimination against Women⁷⁹ and the continued assertion of the ‘domestic jurisdiction’ exception. It has been argued that ‘[t]he fact that the international community is progressively moving from a sovereignty-centred to a value-oriented or individual-oriented system has left deep marks on its scope and meaning’.⁸⁰ The role of non-governmental organisations (NGOs), as they were now called, in pressing for their own inclusion⁸¹ and for that of human rights in the post-war settlement could be said to have anticipated the growing salience of non-state actors in the spread of global norms in the current period.⁸²

The above discussion demonstrates the fluidity of sovereignty. Nowadays sovereignty is often expressed in contingent or conditional terms,⁸³ for instance, in failed or weak state settings where state power

⁷⁸ For example, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights or ECHR), 4 November 1950, as amended by Protocols Nos. 11 and 14, article 34; *Inter-American Convention on Human Rights*, 22 November 1969, article 44; *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights*, 9 June 1998, articles 5 and 34; ICCPR, *op. cit.*, First Optional Protocol, 16 December 1966; ICESCR, *op. cit.* Optional Protocol, 18 June 2008.

⁷⁹ Connors, Jane 2012. ‘Reservations’, in Freeman, Marsha, Chinkin, Christine and Rudolf, Beate, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*. Oxford Commentaries on International Law.

⁸⁰ Tomuschat, Christian 1999. ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law’, in *Collected Courses of the Hague Academy of International Law* 281: 9–438, 25.

⁸¹ UN Charter, article 71: ‘The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence’.

⁸² Keck, Margaret E. and Sikkink, Kathryn 1998. *Activists beyond Borders: Advocacy Networks in International Politics*. Cornell University Press; Finemore, Martha and Sikkink, Kathryn 1998. ‘International Norm Dynamics and Political Change’, *International Organization* 52: 887–917.

⁸³ ‘There are two components to contingent sovereignty. The first is the extent to which a country enjoys sovereign rights and privileges, which has been described as the principle of *conditional sovereignty*. The second is the standards that may be used to distinguish among sovereign nations; call it *differentiated sovereignty*’; Council on Foreign Relations, ‘UN Divided’, Winter 2005–2006, www.cfr.org/international-organizations-and-alliances/un-divided/p9434.

is not operative in certain areas or where international rules relating to non-intervention are deemed not to apply to them,⁸⁴ or where the international community has taken responsibility for key elements of state provision.⁸⁵

Global Governance, Global Civil Society and New Wars

The creation of international intergovernmental institutions had been underway since the nineteenth century, especially with respect to communications and transport. Within the Cold War framework, much like the inter-imperial framework of the nineteenth century, the post-war period witnessed a dramatic growth in interconnectedness at all levels – political, economic and cultural – and this had a profound impact on the actual character of states. Following the ICJ's opinion in 1949 that the UN is a subject of international law, enjoying objective international legal personality,⁸⁶ it has been accepted that the same is true of other international institutions. More and more international and regional inter-governmental institutions were established, generally based on inter-governmental agreements. Interconnectedness both reflected and facilitated the expansion in trade and the huge improvements in travel and communication. At the regional level greater economic and political integration has been pursued, notably in Europe but also elsewhere.⁸⁷

Indeed, the establishment of what was to become the European Union had many parallels to the peace projects of Abbé St Pierre and Immanuel Kant, as discussed above. The founders of the European Economic Communities (now European Union) were determined to prevent another war on European territory. The method they adopted was gradual economic integration starting with the integration of the coal and steel industries of the protagonists of World War II and evolving into the present day European Union. The European Union can be considered a political experiment, a kind of model for global governance

⁸⁴ Elden, Stuart 2006. 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders', *SIAS Review of International Affairs* 26: 11–24.

⁸⁵ The Independent International Commission on Kosovo 2000. *Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford University Press, 271.

⁸⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174, advisory opinion of 11 April 1949.

⁸⁷ Regional arrangements outside Europe include the African Union; the Economic Community of West African States; the Andean Community of Nations; South America's trade block, Mercosur; and the Caribbean Community, CARICOM.

rather than a new and larger nation-state; it is somewhere between a state and an intergovernmental organisation.⁸⁸ It involves the pooling of sovereignty and intensified interconnectedness in many aspects of economic and social life. Membership of international organisations constrains both internal and external state sovereignty. For instance, the supra-national European Union has direct law-making powers binding upon its member states and exclusive competence in some issues of foreign affairs. In 2015 demands made of the Greek government in return for an economic bailout were in opposition to the will of the Greek people as expressed in elections and a referendum. Although the façade of sovereignty was maintained through the adoption of the terms by the Greek parliament,⁸⁹ in this instance, sovereignty became highly contingent. The British vote to leave the European Union in a referendum in June 2016 (BREXIT) may mark a reversal of what had seemed up until then an inevitable process of increased interconnectedness and contingent sovereignty.

The EU is not the only inter-governmental organisation characterised by elements of supra-nationality. Some SC decisions, notably those with respect to sanctioned behaviours,⁹⁰ impact directly upon citizens of member states. International organisations may engage in international law-making without the direct consent of member states, thus undermining the nineteenth- and early twentieth-century voluntarist model of international law.⁹¹ Under the World Trade Organisation compulsory dispute settlement has become accepted.⁹² International bodies have exercised the full powers of a state (legislative, executive and judicial) in territories pending statehood.⁹³

Associated with the emergence of an embryonic global governance (and of course a global market) is the emergence of global civil society,

⁸⁸ See Kaldor, Mary 2012. 'The EU as a New Form of Political Authority: The Example of the Common Security and Defence Policy', *Global Policy* 3(s.1): 79–86.

⁸⁹ Maltezou, Renee and Koutantou, Angeliki, 'Greek Parliament Approves Bailout Measures as Syriza Fragments', *Reuters*, 16 July 2015, www.reuters.com/article/2015/07/16/us-euro-zone-greece-idUSKBN0P40EO20150716.

⁹⁰ See Chapter 3.

⁹¹ Boyle, Alan and Chinkin, Christine 2007. *The Making of International Law*. Oxford University Press, chapter 3.

⁹² As per the Dispute Settlement Understanding of the *Marrakesh Agreement Establishing the World Trade Organization*, 1994. See further Chapter 8.

⁹³ The UN Interim Administration Mission in Kosovo (UNMIK), created pursuant to UN SC Resolution 1244, 10 June 1999; UN Transitional Administration in East Timor (UNTAET), created pursuant to UN SC Resolution 1272, 25 October 1999.

both in the Enlightenment sense of a legally constituted political authority based on legitimacy and in the contemporary sense of the growing importance of NGOs and social movements in influencing politics at a global level.⁹⁴ The English School of International Relations scholars tend to refer to world society to explain the growing role of non-state actors in upholding international norms.⁹⁵ The dramatic expansion of the internet, mobile telephony and social media underpins the proliferation of global networks at and across all levels of society. These emerging non-state political linkages are not necessarily benign or cosmopolitan. The growth of transnational fundamentalist and nationalist movements has been associated with the evolution of new wars.⁹⁶

It is often argued that civil society in the contemporary sense needs a state; it needs to be protected by commitment to the rule of law that guarantees freedom of association and that, in turn, is influenced by and, indeed, constituted through civil associations. But it can also be argued that the emerging international framework of rules and institutions provides the conditions for civil society to function across borders so as to further strengthen that framework. What has been described as a 'partnership' between international governmental organisations and civil society serves to legitimise both;⁹⁷ the former's decisions and work may be better understood where there is effective engagement with the latter, who can benefit through working within the international machinery provided. Even though non-state actors are formally excluded from treaty-making, they have had an influence on a growing raft of treaties in such areas as weapons law (such as the Partial Test-Ban Treaty, Biological and Chemical

⁹⁴ 'Civil society groups must also be civically minded', which excludes from this discussion other non-state actors such as terrorists, criminal gangs and militia; Pfaffenholz, Thania, Kew, Darren and Wanis-St. John, Anthony, 'Civil Society and Peace Negotiations: Why, Whether and How They Could Be Involved', *Oslo Forum* 06, 67.

⁹⁵ Clarke, Ian 2007. *International Legitimacy and World Society*. Oxford University Press.

⁹⁶ See Kaldor, Mary and Muro, Diego 2003. 'Religious and Nationalist Militant Groups', in Anheier, Helmut, Glasius, Marlies and Kaldor, Mary (eds.). *Global Civil Society*. Oxford University Press, chapter 7.

⁹⁷ In August 2000, then-UN Secretary-General Kofi Annan stated: 'I believe these global policy networks, capable of bringing together Governments, civil society and the private sector, are the most promising partnerships of our globalizing age. They work for inclusion and reject hierarchy. They help set agendas and frame debates. They develop understanding and disseminate knowledge'; Secretary-General Kofi Annan's Opening Address to the Fifty-Third Annual Department of Public Information (DPI)/NGO Conference, August 2000, www.un.org/dpi/ngosection/annualconfs/53/sg-address.html.

Weapons Conventions and the Land Mines and Cluster Munitions Treaties),⁹⁸ international criminal law (the Rome Statute of the International Criminal Court) and human rights law.⁹⁹ They also play significant and influential roles in monitoring, supervision and implementation of such treaties, in participation in global summit meetings and in commencing and intervening in strategic litigation that challenges state power.

If bounded civil society was linked to the construction of modern rights-based states, then global civil society could be said to be linked to the construction of global governance. Particularly important in this respect is the human rights regime. In the 1970s and 1980s the human rights movements increasingly gave substance to the norms that underpin the growing body of international human rights law, directly contributing to the waves of democratisation that were then taking place in Latin America, Africa and Eastern Europe.¹⁰⁰

Of course, critics argue that global civil society is dominated by the rich and powerful, primarily from the global North (including, for instance, Australia and Japan) and that it constitutes a false promise of democratisation and legitimisation that detracts from democracy at a national level.¹⁰¹ Ken Anderson and David Rieff, for example, criticise the hubris of any notion of global politics. They argue that the idea of global civil society is a dangerous fallacy given the absence of representative institutions at a global level. They suggest that the various groups and organisations that call themselves 'global civil society' claim to represent world opinion and to substitute for the functioning of representative democracy at national levels and that this claim is profoundly anti-democratic. In particular, they suggest that global civil society becomes equated with a particular group of what might be described as cosmopolitan universalists, standard-bearers of 'environmentalism, feminism, human rights, economic regulation, sustainable development'.¹⁰² These 'social movement missionaries' have arrogated to

⁹⁸ See Chapter 7. ⁹⁹ Boyle and Chinkin, *op. cit.*, chapter 2.

¹⁰⁰ Keck and Sikkink, *op. cit.*; Kaldor, *op. cit.* (*Global Civil Society*).

¹⁰¹ See, for example, Brown, Chris 2001. 'Cosmopolitanism, World Citizenship and Global Civil Society', *Critical Review of International Social and Political Philosophy* 3(1): 7–27; Chandler, David 2004. *Constructing Global Civil Society: Morality and Power in International Relations*. Palgrave Macmillan; Baker, Gideon and Chandler, David (eds.) 2005. *Global Civil Society: Contested Futures*. Routledge.

¹⁰² Anderson, Kenneth and Rieff, David 2004. 'Global Civil Society: A Sceptical View', in Anheier, Helmut, Glasius, Marlies and Kaldor, Mary (eds.). *Global Civil Society 2004/5*. Sage.

themselves a supposed legitimacy that does not and cannot reflect the aspirations of individuals world-wide. Their influence on international law-making, such as the Landmines Treaty or the International Criminal Court, is also decried as that of the political lobbying of elite pressure groups that have no claim to democratic participation.¹⁰³ Others have suggested that global civil society is a way of legitimising the global market. Ronnie Lipschutz uses the Foucauldian term 'governmentality' to describe the activities of global NGOs, who ineffectively try to regulate the global market through campaigns about labour or environmental standards in the absence of state regulation.¹⁰⁴ They end up becoming part of the texture of globalisation, the way of thinking that allows for tacit acceptance of current global arrangements; they generate the 'mentality' of governance that underlies the exercise of power at a global level. They do not challenge the constitution of global power, only the way that power is distributed. Underlying this argument is the notion that globalisation is about the demise of state power and democracy at national levels and about the dominance of the market and the associated global inequalities.¹⁰⁵

These arguments also seem to reflect a nostalgia for the primacy of the state. Yet the era of state dominance was also an era of terrible wars and totalitarianism,¹⁰⁶ when civil society only really functioned in small privileged parts of the world. Indeed, it could be argued that the existence

¹⁰³ Anderson, Kenneth 2000. 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society', *European Journal of International Law* 11: 91–120.

¹⁰⁴ Lipschutz, Ronnie D. 2005. 'Power, Politics and Global Civil Society', *Millennium: Journal of International Studies* 33(3): 747–769; see also Lipschutz, Ronnie D. and Rowe, James K. 2005. *Globalization, Governmentality, and Global Politics: Regulation for the Rest of Us?* Routledge.

¹⁰⁵ For a view on economic globalisation and markets from the global south see Oji, Elizabeth and Ozioko, M. V. C. 2011. 'Effect of Globalization on Sovereignty of States', *African Journals Online* 2, www.ajol.info/index.php/naujil/article/download/82410/72564. See also Pahuja, Sundhya 2013, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge University Press.

¹⁰⁶ Referring to the work of Ernst Casserer, Judge Cancado Trindade in the ICJ noted the 'twentieth century myth of the State' which was explained by 'the deleterious influence of traces of Machiavellian thinking (dismissal of, or indifference to, ethical considerations), of Hobbesian thinking (indissoluble links between the rulers and those ruled, with the subjection of the latter to the former), and of Hegelian thinking (the State as the supreme historical reality that has to preserve itself, the interests of which standing above anything, irrespective of any ethical considerations)'; *Germany v. Italy, op. cit.* (per dissenting opinion of Judge Cancado Trindade, para. 161).

of bounded civil society depended on a 'state of nature' elsewhere. Even if it were desirable, it is no longer possible to insulate civil society territorially since there are new communities and new loyalties that cross borders and new levels of authority assisted by new technologies

The underside of the emergence of global civil society is the spread of new wars. As elaborated in the previous chapter, new wars involve the spread of networks of extremist nationalist and religious groups often linked to transnational criminality. New wars tend to spread in areas where states are weak generally as a consequence of the opening up of authoritarian states to globalisation. If the emergence of global civil society represents 'inside' elements in the 'outside' – the spread of norms and politics in the international arena – then new wars could be said to constitute the 'outside' or anarchy and violence coming 'inside'. Instead of a territorial distinction between civil society (at home) and war (abroad) new wars and global civil society inhabit a shared 'globalised' space.

Summary

The erosion of the Great Divide through growing economic, cultural and social connectedness, the recognition that a wider range of actors exercise power on the international plane (individuals, international institutions, NGOs, criminal gangs, terrorists, multinational corporations), and that de-territorialised actions (for instance, in cyberspace) also affect power relations, have all led to multiple claims of the end of sovereignty, or at least its changed nature. For instance, Chayes and Chayes talk about the 'new sovereignty', the idea that:

sovereignty no longer consists in the freedom of states to act independently in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. . . . Sovereignty in the end is status – the vindication of a state's existence as a member of the international system.¹⁰⁷

In reality this was always the case. The whole point of Westphalia is that it was a negotiated settlement: when neither of the sides in the bruising religious war (the 'Thirty Years War') could prevail, 'they sought a way out . . . through a legal structure . . . that would allow the co-existence of potentially antagonistic units'.¹⁰⁸ As we have noted, a

¹⁰⁷ Chayes, Abram and Chayes, Antonia Handler 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press, 27.

¹⁰⁸ Abi-Saab, *op. cit.*, 112–113.

legal structure based upon absolutist forms of sovereignty within state borders assumes violence in protecting those borders from external threat – real or perceived – including especially from unwanted persons, as well as permitting repression at home. In the current epoch there are again arguments reminiscent of Kant for some form of global governance,¹⁰⁹ the constitutionalisation of the international order,¹¹⁰ to recognise international law as offering multi-layered and integrated forms of governance constituting ‘a common legal order for [humanity] as a whole’.¹¹¹ Such a legal order would not necessarily see the end of the Great Divide, but the difference between inside and outside would be conceived differently and serve the interests of peace and human rights; in Habermas’ terms a constitutionalised international legal order would ‘render[s] war as a legitimate means of resolving conflicts . . . impossible, because there cannot be “external” conflicts within a globally inclusive commonwealth’.¹¹² Habermas argues that by uniting to form a ‘large state body’, sovereign states would promote their citizens to world citizens and submit themselves to a ‘higher authority’. Others reject any such concept (apart from its current impracticability) by pointing to the inevitably non-democratic nature of any such a legal order,¹¹³ or of the constituent members of such a higher authority,¹¹⁴ or by arguing that sovereign equality represents a constraint on the most powerful states.¹¹⁵ Yet, in the context of globalisation, it is difficult to go backwards (if indeed ideals of sovereign equality ever actually existed). As we develop throughout this book, the more likely alternative to a global legal order, where the inside of law and civil society becomes an integral part of the outside,

¹⁰⁹ These ideas revert to those of Kant for a form of ‘world federalism’ or ‘cosmopolitan constitution’, that is ‘a lawful federation under a commonly accepted international right’. See Brown, Garrett Wallace 2009. *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution*. Edinburgh University Press, 91.

¹¹⁰ Dunoff, Jeffrey and Trachtman, Joel (eds.) 2009. *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge University Press.

¹¹¹ Tomuschat, *op. cit.*

¹¹² Habermas, Jürgen 2006. *The Divided West*. Cambridge: Polity Press.

¹¹³ See, for example, Delahunty, Robert J. and Yoo, John 2009. ‘Kant, Habermas and Democratic Peace’, *Chicago Journal of International Law* 10: 437–473.

¹¹⁴ For instance, the UN would be inherently unsuited to such a role given the non-democratic nature of the governing regimes of many of its member states, including two of the permanent SC members.

¹¹⁵ For a succinct discussion of the different views of constitutionalism and their critiques see von Bogdandy, Armin 2006. ‘Constitutionalism in International Law: Comment on a Proposal from Germany’, *Harvard International Law Journal* 47: 223–242.

is the nightmare spread of global anarchy within states as well as outside through persistent and spreading new wars.

This is not an argument for the end of sovereignty.¹¹⁶ The state remains 'at the heart of the international legal system'.¹¹⁷ However, the expansion of the numbers and powers of other actors means that the state is not the only form of authorised power, and nor should it be. The development of an embryonic system of global governance provides a check on state activities including the right to make war and to repress citizens. Civil society both depends on the extension of the system of global governance as a basis for its activities and, at the same time, helps to constitute the system, just as in the past the state and bounded civil society were mutually constitutive. It is true that, as yet, the enforcement of international standards sought by civil society is weak, although communicative action has proved important in opening up closed societies as in Eastern Europe, Latin America and the Middle East. In practice, enforcement or compliance, as discussed in the next chapter, depends both on a coercive apparatus and on the role of civil society as a site for constructing legitimacy. In the international arena, where the coercive apparatus is weak, the role of global civil society is all the more important both in underpinning regulatory procedures and in pressing for more effective forms of enforcement. Global civil society is certainly not representative and reflects power inequalities in and across societies as a whole just as is the case in domestic contexts, but its existence does give rise to a public debate at global levels (facilitated and augmented by social media) and a form of accountability based on public awareness.

In other words, the rules within which sovereignty is constituted are changing. In so far as these rules have to do with the prohibition of war and the promotion of human rights, sovereignty has been legally limited both internally and externally. As we argue in this book, different understandings of the rules are associated with different conceptions of sovereignty, which in turn are related to the different models of security set out in Chapter 1; the implications of current changes will depend on how those different understandings evolve.

¹¹⁶ van Veen, Erwin 2007. 'The Valuable Tool of Sovereignty: Its Use in Situations of Competition and Interdependence', *Bruges Political Research Papers* 3.

¹¹⁷ Higgins, Rosalyn 1993. *Problems and Process: International Law and How We Use It*. Oxford University Press, 39.

2.3 Right Authority and the Legitimate Use of Force

Authority is distinct from other concepts such as persuasion, coercion and power. In the words of Ramesh Thakur:

Power is the capacity simply to enforce a particular form of behaviour. Authority signifies the capacity to create and enforce rights and obligations which are accepted as *legitimate* and binding by members of an all-inclusive society.¹¹⁸

The term *authority* is increasingly used to describe new forms of political institutions at both local and global levels, applied by scholars of international affairs and development studies.¹¹⁹ However, it has a long trajectory in the major cultural traditions where ‘right authority’ is a crucial criterion for judging the legitimacy of the use of force. Or to put it another way, the use of force is deemed legitimate only if it is authorised by a recognised authority. The private use of force is prohibited except in individual self-defence defined in extremely constrained ways, or in culturally acceptable ways such as the chastisement of infants, or wives, or traditional responses to feuds.¹²⁰ With respect to political force, or the public use of force, all three monotheistic religions (Judaism, Christianity and Islam) traditionally drew a distinction between holy war (authorised by God or His representatives on earth) and just war (authorised by secular political authorities). Thus in Judaism a distinction is drawn between obligatory war and voluntary war. Obligatory war is the war that God ordered to kill all the Canaanites; since this is no longer applicable, the only wars are voluntary wars, which are circumscribed by rules about when they can be authorised and how they should be fought.¹²¹ In classical Islamic thought, ‘there is no theology . . . of “holy war” in the sense of the

¹¹⁸ Thakur, Ramesh 2012. ‘Law, Legitimacy and the United Nations’ in Falk *et al.*, *op. cit.*, chapter 2, 47 (italics added).

¹¹⁹ Peters, Birgit and Schaffer, Johan Karlsson 2013. ‘The Turn to Authority beyond States’, *Transnational Legal Theory* 4(3): 315–35.

¹²⁰ It is such variations regarding what constitutes acceptable force that is challenged by the universality of human rights. See for example the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (The Istanbul Convention), 12 April 2011. Article 12(5) stipulates: ‘Parties shall ensure that culture, custom, religion, tradition or so-called “honour” shall not be considered as justification for any acts of violence covered by the scope of this Convention’.

¹²¹ Solomon, Norman 2006. ‘The Ethics of War: Judaism’, in Sorabji, Richard and Rodin, David (eds.). *The Ethics of War: Shared Problems in Different Traditions*. Ashgate Publishing, 108–137.

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concept as used in the Catholic faith since there was nothing along the lines of an institution of papal authority that could make determinations on the divine status of a war'.¹²² A distinction is drawn between offensive wars to extend Islam (authorised by the Caliph in the Sunni tradition or by the 'hidden imam' in the Shi'ia tradition) and defensive wars authorised by political authorities. The term *jihad* refers to war fought for a legitimate cause and with legitimate means and is therefore close to just war in the Western tradition; it is a defensive war authorised by political authorities. In the Qur'an the word *jihad* is used to describe the struggle for the ultimate virtues of Islam, in the sense of testimony, as in Christian ethics; and the word used to describe military affairs is *qital*, which was governed by strict laws of war and imposes limitations on fighting. Thus, *jihad* is not necessarily a violent act; on the contrary, it is first and foremost a peaceful endeavour and struggle.¹²³ An International Law Association Committee Report concludes that

Jihad, 'holy exertion', has to be in God and not just for God; in other words, it must be conducted within a divine framework and thus be in harmony with all the spiritual and ethical qualities that pertain to that framework; only on this condition will God guide the mujahideen along the appropriate paths, whether the exertion in question be conducted in the realm of outward warfare, moral and social endeavour, intellectual and scholarly effort, or, at its most profound, spiritual struggle against that greatest enemy, one's own congenital egotism.¹²⁴

In the medieval Western (Christian) tradition, just war was distinguished from holy war in that it was authorised by secular authorities, and both the justification for war and the conduct of war were restrained by a set of rules based on canon law as well as the chivalric code. Holy war, by contrast, could be authorised by religious authorities and was waged against non-Christians. This is why the Crusades were so bloody: when the Crusaders sacked Jerusalem, some 65,000 'heathens' were killed. It was not because the wars were fought against non-Europeans; rather, the Crusaders believed themselves to be fighting a holy cause (or on holy authority), which was therefore not restrained by what was then understood as *in bello* rules. Interestingly, Angeliki Laiou describes how the Eastern Church never developed a concept of holy war; on the contrary, a

¹²² International Law Association, Committee on Islamic Law and International Law, *The Hague Conference Report*, 2010, 12.

¹²³ Al-Fadl, *op. cit.* ¹²⁴ *Ibid.*, 15.

just war was purely defensive with the goal of peace and not the eradication of the enemy. She explains this difference in socio-economic terms. In the West, aristocrats were a fighting class who extended their wealth through violence. In the Byzantine Empire, the aristocracy were administrators for whom peace made economic sense.¹²⁵

In most traditions, internal rebellions against a rightful authority are condemned. But whereas in the Islamic tradition restraints on war applied even more stringently because internal rebellions involved conflicts among Muslims, in the Western tradition the opposite was the case. Luther's views on the German peasants' revolt (1524–1525) have been widely quoted: 'No matter how just their complaints, a peasants' victory would mean lawlessness, disorder, bloodshed and suffering'. Thus, the rebels should be treated not as soldiers but as criminals, and Luther urged the nobility to employ their armies to 'stab, kill and strangle' the peasants as though they were rabid beasts.¹²⁶ International lawyers barely concerned themselves with civil wars before the nineteenth century.¹²⁷ It was only when such instances began to come onto the legal agenda, for instance, the American civil war, that rebels began to be accorded some of the protections of the rules of war.¹²⁸

In the Islamic tradition, by contrast, binding regulations applied to wars between Muslims provided the rebels were considered to have a plausible reason for fighting based on a valid interpretation of the Islamic sources (*Ta'wil*). Thus, tribal reasons or greed were not plausible. The rebels also had to be sufficiently well-organised and powerful (*Shawka*):

As the jurists put it, without the requirement of *Shawka*, anarchy and lawlessness will spread. . . . They contend that without the requirement of *Shawka*, every corrupt person will invent or fabricate a *Ta'wil* and claim to be a *Baghii* (a legitimate rebel).¹²⁹

¹²⁵ Laiou, Angeliki 2006. 'The Just War of Eastern Christians and the Holy War of Crusaders', in Sorabji and Rodin, *op. cit.*, 30–43. A highly influential thinker was St. Basil of Caesarea, who punished soldiers who killed in war with three years' abstention from communion.

¹²⁶ Kelsay, *op. cit.*, 79. ¹²⁷ Neff, *op. cit.*, 16 (*War and the Law of Nations*).

¹²⁸ General Orders No. 100 (Lieber Code), 24 April 1863, articles 149 ff.: see especially article 152: 'When humanity induces the adoption of the rules of regular war to ward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power'.

¹²⁹ Al-Fadl *op. cit.*, 148.

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Of course, in the Western tradition, there was always a republican stream of thought, of which Jean-Jacques Rousseau was the most famous exponent, which had a much more citizen-based conception of justice. In this tradition, law comes before war, and citizens have a duty to disobey and resist invasion, occupation and tyranny.¹³⁰

In the Western transition to modernity, scholars influential in framing international law such as Vitoria (1483–1546) and Grotius (1583–1645) were responsible for the ‘dethroning of religion’¹³¹ whereby religious authority was no longer the right authority for the use of force. Vitoria recognised the power to wage war as a sovereign (non-Papal) prerogative. He made the point that a universal natural law deriving from secular sources applies to all people, including non-Christians such as the indigenous peoples whom the Spaniards came up against in their colonial enterprises.¹³² Likewise, for Grotius, a just or perfect war was one fought by a sovereign authority, which also had just cause: ‘Wars undertaken by public authority are attended with certain effects of right, and have the sanction of public opinion in their favour. But they are not the less criminal when made without just cause’.¹³³

The significance of the Peace of Westphalia was not, as is often assumed, the birth of the modern state and the establishment of the modern conception of sovereignty. According to Ian Clarke, the earlier Peace of Augsburg in 1555 had established the basic template of state sovereignty. Rather, the significance of Westphalia had to do with the secularisation of legitimacy. The basis of legitimacy shifted ‘from a predominantly moral/theological one to one rooted in conceptions of legality’.¹³⁴ This shift was, of course, linked to the growing authority of the state in relation to both religious authorities and private wars. Indeed, it was associated with the emergence of what might be described as the modern state and the establishment of a monopoly of legitimate violence.

¹³⁰ Nabulsi, Karma 2006. ‘Conceptions of Justice in War: From Grotius to Modern Times’, in Sorabji and Rodin, *op. cit.*, 44–60.

¹³¹ Johnson, James Turner 1981. *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. Princeton University Press.

¹³² However, he also brought Christian principles into this secular system of international law; hence the non-Christian native peoples could not be sovereign. The use of force against them was justified by Vitoria on the grounds that international law (as formulated by the Europeans) included a right to travel to distant lands. Therefore ‘any Indian attempt to resist Spanish penetration would amount to an act of war, which would justify Spanish retaliation’. Cited in Anghie, *op. cit.*, 22 ff. On Vitoria’s analysis non-Christians could not – were ‘inherently incapable’ – of waging a just war.

¹³³ Grotius, *op. cit.*, 74. ¹³⁴ Clarke, *op. cit.*, 49 (*Legitimacy in International Society*).

It can be argued that the current period since the end of World War II is as momentous for notions of authority as was the period prior to Westphalia.

2.3.1 *Collective Security and the UN Security Council*

The United Nations Charter signalled a fundamental break with classic notions of state sovereignty as it pertained to the use of force in international relations. It marked a potential shift from national to international authority, to legal and institutional regulation, as significant as the shift from religious to secular authority in the Peace of Westphalia. Under the UN Charter regime, except in the case of self-defence, armed force could only be used if authorised by the UN Security Council 'to maintain or restore international peace and security'.¹³⁵ States were still entitled to use force internally, even though this has been increasingly constrained by the emerging human rights regime and recognition by the SC that violations of human rights can constitute a threat to international peace and security.¹³⁶

Legal steps were first undertaken to reduce war and subsequently to prohibit it after the cataclysm of World War I.¹³⁷ The Covenant of the League of Nations made any war, or threat of war, a matter of concern to all members of the League, and State parties had agreed to seek other peaceful means of resolving disputes likely to lead to rupture.¹³⁸ In 1928 States party to the Kellogg-Briand Pact condemned 'recourse to war . . . and renounce[d] it, as an instrument of national policy in their relations with one another'.¹³⁹ Failure by the League to take firm action

¹³⁵ UN Charter, articles 39 and 42.

¹³⁶ Kress notes that related questions of whether a state may use force against internal violent challenge to governmental authority and whether the government can seek external assistance against such challenge are addressed primarily in terms of human rights; Kress, Claus 2014. 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law* 1: 11–54.

¹³⁷ However, Article 1 of the *Convention (III) Relative to the Opening of Hostilities*, The Hague, 18 October 1907, requires contracting powers to 'recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war'.

¹³⁸ *Covenant of the League of Nations*, 28 April 1919, articles 11 and 12.

¹³⁹ *General Treaty for Renunciation of War as an Instrument of National Policy* (Pact of Paris), 27 August 1928, article 1.

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against Italy in Abyssinia (Ethiopia), Japan in Manchuria and aggressive action by Nazi Germany leading to the outbreak of World War II signified the need for a stronger legal commitment against the use of force. The London Charter, the decree issued on 8 August 1945 that set down the laws and procedures by which the Nuremberg trials were to be conducted, included crimes against peace (article 6), 'namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties' within the jurisdiction of the Nuremberg Tribunal. This – not genocide – was the focus of the war crimes trials. Later in the same year the drafters of the UN Charter 'determined to save succeeding generations from the scourge of war',¹⁴⁰ and the primary purpose of the post-1945 legal order as set out in article 1 of the UN Charter was the maintenance of 'international peace and security'.

The UN Charter scheme for state security is upheld by three central legal pillars. First is the obligation on states to settle their disputes in such a way that international peace and security are not endangered;¹⁴¹ second is the prohibition of the threat or use of force against the territorial integrity and political independence of any state;¹⁴² and third is the collective security system whereby the SC is accorded the primary responsibility for the maintenance of international peace and security.¹⁴³ UN chapter VI on peaceful methods of dispute resolution such as mediation tends to be given less importance in assessments of the Council than Chapter VII, which deals with coercive measures.

UN Charter chapter VII provides that in response to a 'threat to the peace, breach of the peace, or act of aggression' (article 39), the SC can authorise economic¹⁴⁴ and military measures (articles 41 and 42) to restore 'international peace and security'. Under the Charter design, states were to make available to the Council 'armed forces, assistance, and facilities' for its own military force (article 43). Such forces have never materialised; through over sixty years of practice it is now accepted that the SC can authorise states or a regional organisation to use force in pursuit of Charter objectives,¹⁴⁵ or work in partnership with them. Regional arrangements are provided for in chapter VIII but are made subordinate to the Council by the requirement that any enforcement

¹⁴⁰ UN Charter, article 39. ¹⁴¹ UN Charter, article 2 (3) and chapter VI.

¹⁴² *Ibid.*, article 2 (4). ¹⁴³ *Ibid.*, article 24. ¹⁴⁴ On sanctions see Chapter 3.

¹⁴⁵ For the SC's evolving interpretation of 'threat to international peace and security' see Chapter 5.

action they undertake must be with its authorisation, although in practice such action has also received subsequent endorsement.¹⁴⁶

Under the Charter vision of collective security there was in effect a return to the just war concepts of 'just authority' and of 'just cause' secured through military means.¹⁴⁷ In the words of the International Commission on Intervention and State Sovereignty (ICISS) 'The authority of the UN is underpinned not by coercive power, but by its role as the applicator of legitimacy'.¹⁴⁸ Security Council-authorized action is – as with just war – a form of law enforcement, but is not triggered by a violation of international law, but by the threat or actuality of a dangerous political situation. In this sense it is reminiscent of the powers asserted by the Great Powers under the Concert of Europe.¹⁴⁹ But unlike that system, other states (including non-member states) are required to comply with the SC's decisions,¹⁵⁰ amounting to 'an express prohibition against neutrality in UN enforcement actions'.¹⁵¹ Nor is Council-authorized enforcement action required to be defensive. In this respect, international law enforcement presupposes military force in contrast to domestic law enforcement that is based on policing. Thus it reinforces the reliance of states on military structures for security.

As is well recognised – and demonstrated by the many instances of armed conflict that have erupted since 1945 – this legal framework has not been entirely successful in its purpose of 'sav[ing] succeeding generations from the scourge of war'. One reason for this reality is the Council's geo-political composition, which is reminiscent of the Great Power 'legalised hegemony' of the Concert of Europe.¹⁵² The permanent members (the United States, the Soviet Union – now Russia – China, France and the United Kingdom) dominate decision-making and are able to exercise their veto power on non-procedural matters,¹⁵³ and, especially during the Cold War, this has stymied coordinated international

¹⁴⁶ See Chapter 5 (actions by ECOWAS in Liberia and Sierra Leone).

¹⁴⁷ Heathcote, *op. cit.*, 35.

¹⁴⁸ Report of the International Commission on Intervention and State Sovereignty 2001. *The Responsibility to Protect*. International Development Research Centre (ICISS Report), para. 6.9.

¹⁴⁹ Neff, *op. cit.*, 323–324 (*War and the Law of Nations*).

¹⁵⁰ UN Charter, article 2 (6) (non-members); article 25 (members).

¹⁵¹ Neff, *op. cit.*, 325 (*War and the Law of Nations*).

¹⁵² Simpson, *op. cit.*, 68: 'the existence within an international society of a powerful elite of states whose superior status is recognised by minor powers as a political fact giving rise to the existence of certain constitutional privileges'.

¹⁵³ UN Charter, article 27 (3).

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action.¹⁵⁴ Even after the relaxing of Cold War tensions, the use or threat of the veto impedes principled decision-making. A second reason is that the SC lacks an independent capacity to act and is dependent on the readiness of key states to contribute resources to actions that it has authorised. In numerous cases the willingness to ensure adequate resources to allow effective and efficient performance of the Council's mandate has been lacking. A third and perhaps most important reason is that threats to international peace and security were envisaged in a classic state-centric framework, as an attack (or apprehended attack) by one state against another state. Contemporary forms of violence rarely fit this framework and nor is the type of enforcement envisaged in the Charter appropriate in these new settings. General economic sanctions and the use of classic war-fighting military force are forms of collective enforcement that affect innocent victims caught up in violent situations. Indeed, as will be discussed in subsequent chapters, this type of enforcement often exacerbates civilian insecurity and may contribute to the escalation of violence.

2.3.2 *The Legitimacy of the Security Council*

The end of the Cold War ushered in high hopes for the future of Council-authorized collective action. Indeed, the 1991 Gulf War appeared to conform to classic conceptions of threats to international peace and security, representing a collective response to an invasion by one sovereign state (Iraq) against another (Kuwait).¹⁵⁵ But as it turned out, the experience of the conflicts in the Balkans and in Africa was to be much more typical of the kinds of political violence to which the 'international community' was asked to respond.¹⁵⁶ Four significant developments in the SC's role took place in the following two decades. First, the Council began to authorise military intervention in response to a much wider range of issues. As discussed in Chapter 5, it interpreted threats to international peace and security broadly to encompass *inter alia*

¹⁵⁴ For an overview of enforcement action prior to the end of the Cold War see Wills, Siobhán 2009. *Protecting Civilians: The Obligations of Peacekeepers*. Oxford University Press, 6–19.

¹⁵⁵ UN SC Resolution 678, 29 November 1990 (Iraq-Kuwait), para. 2 authorised 'Member States cooperating with the Government of Kuwait' to use 'all necessary means' to end Iraq's occupation of Kuwait.

¹⁵⁶ Kaldor, Mary 2013. *New and Old Wars: Organized Violence in a Global Era*. Polity Press, 3rd ed.

humanitarian suffering and a military coup against a democratically elected government, essentially authorising the use of force without state consent in what international law terms a non-international conflict – that is to say, internal affairs.¹⁵⁷ The adoption of the concept of a ‘Responsibility to Protect’ by the General Assembly in 2005¹⁵⁸ provided the basis for the SC’s authorisation of intervention in Libya in 2011, explicitly based on the concept and without the Libyan government’s consent.¹⁵⁹ Secondly, the Council introduced a number of innovations in the mechanisms for dealing with political violence, often under pressure from campaigning groups, which focussed on both individual protection and individual responsibility. Protective devices included the idea of humanitarian corridors, no-fly zones and safe havens; individual responsibility was addressed through targeted or smart sanctions,¹⁶⁰ as well as through the establishment of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, a hybrid tribunal in Sierra Leone and other domestic criminal law institutions *inter alia* in Timor Leste and Cambodia. The Council has thus engaged the language of accountability, justice and the rule of law,¹⁶¹ not directly provided for in the Charter with respect to its functions.¹⁶² And thirdly, the SC became much more visible politically, made possible by twenty-four-hour news availability and social media coverage. This was especially true in the run-up to the 2003 Iraq war, when the Council refused to authorise an American intervention and when US Secretary of State Colin Powell’s presentation to it of the case for war was broadcast across the world.

The fourth development has been the adoption of what have been termed ‘legislative measures’, resolutions imposing legally binding

¹⁵⁷ See Chapter 5.

¹⁵⁸ UN GA Resolution 60/1, 24 October 2005 (‘World Summit Outcome Document’); UN SC Resolution 2150, 16 April 2014 reaffirms paras. 138 and 139 of the World Summit Outcome Document.

¹⁵⁹ UN SC Resolution 1973, 17 March 2011.

¹⁶⁰ A significant step in this regard was the adoption of UN SC Resolution 1267, 15 October 1999, imposing sanctions targeted at the Taliban and Osama bin Laden and those associated with him.

¹⁶¹ See Chapter 10.

¹⁶² In a 2014 statement, the Council President stated: ‘The Security Council reaffirms . . . its continued recognition of the need for universal adherence to and implementation of the rule of law, as well as emphasis on the vital importance it attaches to promoting justice and the rule of law as an indispensable element for peaceful coexistence and the prevention of armed conflict’; Statement by the President of the Security Council 2014/5, 21 February 2014.

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obligations upon individuals and states.¹⁶³ The former involve such sanctioning measures as freezing of assets and travel bans; the latter requires states to adopt legislation to prevent the financing of terrorist activities¹⁶⁴ and to adopt and enforce measures against the proliferation of weapons of mass destruction to non-state actors.¹⁶⁵ These resolutions both replicate treaty provisions, thus making them binding upon states that have chosen not to become parties to the relevant treaty, and filling gaps in the treaties.¹⁶⁶ However, there have been positive consequences in that more states have become parties to the Financing of Terrorism Convention.¹⁶⁷

States are required to report to and are subject to scrutiny by a range of Council committees, including sanctions committees and the counter-terrorism committee. The largely unreviewable SC intrusion into areas traditionally regarded as within a state's domestic jurisdiction has been a major factor in the blurring of the line between international and domestic law. This has lessened individuals' protections against arbitrary actions (for example, being listed by the Council as a terrorist suspect or Al Qaida associate) and has raised tensions between a US-dominated international legal order and the European legal order,¹⁶⁸ between the SC and regional human rights bodies¹⁶⁹

¹⁶³ Legislation 'signifies the enactment of prospective, general and abstract rules of conduct that bind all the subjects in the unlimited future, whenever the contingencies they provide for obtain'. Abi-Saab, *op. cit.*, 117.

¹⁶⁴ Commencing with UN SC Resolution 1373, 28 September 2001, which was adopted in the wake of the terrorist attacks of 11 September 2001.

¹⁶⁵ Commencing with UN SC Resolution 1540, 28 April 2004.

¹⁶⁶ This expansion of SC power was immediately remarked upon; see, for example, Szasz, Paul 2002. 'The Security Council Starts Legislating', *American Journal of International Law* 96: 900–905; Alvarez, Jose 2003. 'Hegemonic International Law Revisited', *American Journal of International Law* 97: 873–888; Talmon, Stefan 2005. 'The Security Council as World Legislature', *American Journal of International Law* 99: 175–193.

¹⁶⁷ *International Convention for the Suppression of the Financing of Terrorism*, UN GA Resolution 54/109, 9 December 1999.

¹⁶⁸ Most notably through the Kadi case; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case C-402/05 P and C-415/05, [2008] ECR I-06351. See De Búrca, Grainne 2010. 'The European Court of Justice and the International Legal Order after Kadi', *Harvard International Law Journal* 51; Kokott, Juliane and Sobotta, Christoph 2012. 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' *European Journal of International Law* 23: 1015–1024.

¹⁶⁹ *Nada v. Switzerland*, ECtHR GC, application no. 10593/08, judgment of 12 September 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR application no.5809/08, judgment of 21 June 2016.

and between states of nationality or residence of targeted individuals and third states that have suffered financial disadvantage through the enforcement of sanctions on other states. In response the Council has progressively introduced some process safeguards such as through the establishment of an ombudsperson¹⁷⁰ to whom listed persons can submit a request to be delisted. The ombudsperson can make a recommendation to the sanctions committee. However, recommendations are not necessarily acted upon, and the ombudsperson does not have jurisdiction over all sanctions regimes. The adequacy of this process with respect to human rights norms has been criticised by, for instance, the UN Human Rights Council special rapporteur on counter-terrorism, who concluded that 'the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the [Sanctions] Committee'.¹⁷¹ His proposal that the position be renamed the Office of the Independent Designations Adjudicator to entrench the independence of its position from the Council has not been implemented.

These developments have enhanced the SC's role and visibility, but they have also weakened its legitimacy. In the words of Jean Cohen, they 'are Janus-faced: while in some instances they prevent or help rectify humanitarian disasters and protect human rights, in others they lead to the evisceration of the rule of law and constitutionalism on all levels of the international political system, and undermine the foundational Charter principles of sovereign equality and human rights'.¹⁷² Many commentators have noted that the SC's authority suffers from a perception of profound lack of legitimacy,¹⁷³ and that this loss of legitimacy has acquired prominence precisely at a time when the Council has

¹⁷⁰ UN SC Resolution 1730, 19 December 2006, states the UN SC's commitment 'to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions'; UN SC Resolution 1904, 17 December 2009 creates the ombudsperson. The detailed mandate of the ombudsperson is set out in Annex II of the resolution; see also UN SC Resolution 1989, 17 June 2011; UN SC Resolution 2083, 17 December 2012; UN SC Resolution 2161, 17 June 2014.

¹⁷¹ 'Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism', Report to the UN GA 67/396, 26 September 2012.

¹⁷² Cohen, *op. cit.*

¹⁷³ See generally de Wet, Erika 2004. *The Chapter VII Powers of the United Nations Security Council*. Hart Publishing; Wheatley, Steven 2006. 'The Security Council, Democratic Legitimacy and Regime Change in Iraq', *European Journal of International Law* 17(3): 531–551.

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emphasised accountability and the rule of law for others.¹⁷⁴ Thakur, for instance, identifies a quadruple legitimacy deficit – performance, representational, procedural and accountability. In performance terms, as will be discussed in subsequent chapters, the SC has either failed to act in a timely fashion as in the case of the 1994 Rwandan genocide or in Darfur in western Sudan, or else the mandated means have not been appropriate for the protection of civilians as, we will argue, was the case in Bosnia and Libya. Moreover, the Council is charged with double standards, for example, for authorising intervention in Libya but not in other humanitarian tragedies such as Chechnya or Syria, or failing to sanction Israel for breaches of international law such as those arising from its construction of the wall in the Occupied Palestinian Territory, as advised by the ICJ,¹⁷⁵ while imposing sanctions on other states. A related critique is the inconsistency of its members or of the SC acting as a whole. For instance, in the context of nuclear non-proliferation it is argued that the Council's nuclear weapon states (in practice the P5) disregard their obligations under article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT), as endorsed by the ICJ,¹⁷⁶ while castigating and sanctioning other nuclear weapon states, non-parties to the NPT, for testing nuclear weapons.¹⁷⁷ Since North Korea is not a party to the 1996 Comprehensive Nuclear Test Ban Treaty (which in any case is not in force) and withdrew from the NPT in January 2003,¹⁷⁸ it is not breaking any treaty obligation in testing, although it is in violation of resolutions adopted by the SC. The Council states that such testing constitutes a challenge to the NPT and has demanded that North Korea return to the treaty regime. It has not similarly sanctioned the nuclear programmes of other states, for instance, Israel, Pakistan and India, raising the accusation of

¹⁷⁴ Caron identifies five challenges to the legitimacy of SC grouped under the headings of 'perception of dominance of the Security Council by a few states' and 'perception of unfairness surrounding the veto'; Caron, David 1993. 'The Legitimacy of the Collective Authority of the Security Council', *American Journal of International Law* 87: 552–588.

¹⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 136, advisory opinion of 9 July 2004.

¹⁷⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 226, advisory opinion of 8 July 1996, paras. 102–103.

¹⁷⁷ UN SC Resolution 2094, 7 March 2013.

¹⁷⁸ *Treaty on the Non-Proliferation of Nuclear Weapons* ('NPT'), 1 July 1968, article X provides for withdrawal in the exercise of national sovereignty, 'if a state decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country'.

selectivity.¹⁷⁹ The SC procedures lack transparency, with the major decision-making taking place outside the formal sessions, in which pre-agreed positions are reiterated. Such positions are largely those agreed by the permanent members, with non-permanent members complaining of exclusion. The vast majority of resolutions are also sponsored by permanent members; the corollary of this is that it is the permanent members who carry the burden of membership and perform the bulk of the work. The SC is not open to civil society, except through the Arria formula,¹⁸⁰ and other persons (for instance, the special representatives of the Secretary-General, special rapporteurs of the Human Rights Council) attend by invitation. The SC is not formally accountable to the General Assembly and thus is accountable politically only to the member states. Although the ICTY appellate chamber has asserted that the Council must act within the purposes and principles of the Charter,¹⁸¹ the ICJ has rejected any such power of review.¹⁸² The Council remains essentially not subject to review by any institutional body. Other tribunals have generally sought to avoid confrontation by failing to find any conflict between states' obligations under SC resolutions and other obligations under international law, such as human rights obligations necessitating such review.¹⁸³ However, this compromise position is becoming tenuous.¹⁸⁴ Eyal Benvenisti argues strongly that the substance and processes of decision-making by the Council (along with other international institutions) should be subject to legal constraints in the same ways as domestic decision-makers in accordance with the rule of law.¹⁸⁵ In his terms, sovereigns are the

¹⁷⁹ UN SC Resolution 1172, 6 June 1998 condemns tests by India and Pakistan and 'urges' them to become parties to the NPT.

¹⁸⁰ Arria-formula meetings were initiated in 1992. They allow SC members to have an informal exchange of views with people whom they consider it would be beneficial to hear. Meetings are informal and confidential. See UN Secretariat 2002. 'Background Note on the "Arria-Formula" Meetings of the Security Council Members', *UN SC Working Methods Handbook*, www.un.org/en/sc/about/methods/bgarriaformula.shtml.

¹⁸¹ *Prosecutor v. Dusko Tadic*, ICTY IT-94-AR72, 2 October 1995, para. 28.

¹⁸² *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (Preliminary Objections), ICJ Reports 9, judgment of 27 February 1998.

¹⁸³ *Al-Jedda v. the United Kingdom*, ECtHR GC application no. 27021/08, judgment of 7 July 2011; *Kadi case*, *op. cit.*

¹⁸⁴ *Al-Dullimi and Montana Management Inc. v Switzerland*. ECtHR GC, application no. 5809/08, judgment of 21 June 2016.

¹⁸⁵ Benvenisti, Eyal 2014. *The Law of Global Governance*. Brill, Nijhof.

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‘trustees of humanity’¹⁸⁶ and must be accountable for their exercise of power. Erica de Wet has added a further dimension to non-reviewability of SC decisions, what she terms their lack of contestability, whereby decisions of the Council can be terminated only by the Council.¹⁸⁷ She acknowledges that if this were not the case, member states would be able to make their own determinations as to when the aim of SC decisions had been achieved, opening the way for further uncertainty and differing conclusions depending on states’ interests. Nevertheless, this means that in practice ‘an open-ended Security Council decision remains incontestable, as long as it has the support of one permanent member’.¹⁸⁸ This has particular applicability to economic sanctions, for instance, those applied against Iraq in 1990¹⁸⁹ in response to the invasion of Kuwait. By 2000 it was evident that even the application of the humanitarian exception to the sanctions regime was not safeguarding the lives and health of Iraqi people, in particular children.¹⁹⁰ Yet affected individuals, or their representatives, could not challenge the sanctions regime.

The Council’s geo-political composition, the lack of any accountability to local populations or to global public opinion, and the intrusive and non-transparent legislative measures adopted in the wake of 9/11 have greatly weakened the UN in the eyes of many. The ICISS (the body that proposed the Responsibility to Protect) recognised this reality and linked it to both the need for reformed membership and a code of restraint in the exercise of the veto in situations of humanitarian crisis.¹⁹¹ Similar issues were raised in the context of the UN reform process embarked upon by then Secretary-General Kofi Annan in the early years of the millennium. Despite suggestions for reform, the proposals for strengthening the UN in the 2005 Outcome Document supported only ‘early reform of the Security Council . . . in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions’.¹⁹²

¹⁸⁶ Benvenisti, Eyal 2013. ‘Sovereignty as Trusteeship for Humanity — Historical Antecedents and Their Impact on International Law’, *American Journal of International Law* 107: 295–333.

¹⁸⁷ de Wet, *op. cit.*, 140. de Wet also considers the legitimacy defects of lack of transparency, participation and efficiency.

¹⁸⁸ *Ibid.*, 141. ¹⁸⁹ UN SC Resolution 661, 6 August 1990.

¹⁹⁰ Gordon, Joy 2010. *Invisible War: The United States and the Iraq Sanctions*. Harvard University Press.

¹⁹¹ ICISS report, *op. cit.*, paras. 6.19–6.21.

¹⁹² World Summit Outcome Document, *op. cit.*, paras. 152, 153.

A decade later the process for reform is ongoing in the UN GA Intergovernmental Negotiations on Security Council Reform, which involves extensive government submissions and discussions through an 'inclusive and transparent' process.¹⁹³

Thus, since the middle of the last century, a profoundly important shift has taken place in the authority to use force. States no longer have the unilateral right to authorise the use of the force despite certain exceptions to be discussed in subsequent chapters: 'Right authority' has shifted from the state to the SC. But the Council is itself composed of states, and a privileged position is reserved for those powers that were considered the Great Powers in the aftermath of World War II. Moreover, it lacks accountability either to citizens or to legal processes. The paradox is that the shift to international authority for the use of force is hugely weakened by its lack of legitimacy.

2.4 Alternative Conceptions of World Order and the Transformation of Sovereignty

The term 'globalisation' is hotly contested. But what scholars who study globalisation share is a preoccupation with what this phenomenon means for the future of the state and the concept of sovereignty. Those who equate globalisation with the spread of a global market tend to assume that states are losing their autonomy and becoming less powerful; sovereignty in the sense of supreme power has been undermined.¹⁹⁴ Some enthusiasts welcome this trend, while others seek its reversal. Those who understand globalisation as increased interconnectedness in all fields (for example political, cultural, social, economic, civil) or as a fundamental change in global consciousness (our awareness of a single human community) suggest that a transformation is underway in which states increasingly become one node in a global framework of governance, though there are, of course, differences about the significance of the

¹⁹³ Letter from the President of the General Assembly, *Intergovernmental Negotiations on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters*, 15 July 2015, www.centerforunreform.org/sites/default/files/PGA%20Letter%20to%20MS%20IGN%20%2B.pdf.

¹⁹⁴ Ohmae, Kenichi 1990. *The Borderless World: Power and Strategy in the Interlinked Economy*. Collins; or Friedman, Thomas 2000. *The Lexus and the Olive Tree*. Harper Collins; Hirst, Paul, Thompson, Grahame and Bromley, Simon 1999. *Globalization in Question: The International Economy and the Possibilities of Governance*. Polity Press.

node.¹⁹⁵ For example, Anne-Marie Slaughter suggests that states are becoming disaggregated, whereby parts of governments are increasingly tied into networks that perform many of the governance functions formerly performed by states. In the case of the judiciary, for example, she suggests that a combination of constitutional cross-fertilisation, the increasing relevance of international law for national courts, the growing importance of human rights law, and increased transnational litigation are all components of an emerging judicial network. Other transnational institutions that reduce the monopoly of power of states include banks, multinational corporations, the internet and sporting bodies such as the International Olympic Committee or FIFA. Globalisation, Slaughter suggests, involves three shifts: from national to global, from government to governance and from unitary to disaggregated states.¹⁹⁶

Our argument is that the changing character of sovereignty is closely bound up with the authority to use force. States remain the legal repositories of sovereignty; they are independent legal persons under international law, and they are the primary players in the making of international law, including the responsibility to negotiate international treaties and participate in institutional decision-making. Despite some albeit limited, legal recognition of the rights and duties of other actors such as international governmental organisations, multinational corporations and NGOs, militias, paramilitary groups and individuals, the supremacy of states in the international legal system has still not been seriously challenged. The state is still formally perceived as a unitary entity, and there remains a single model of statehood, but with some *de facto* limitations of sovereignty for 'failed' or 'rogue' states. This has had a number of consequences in contemporary international governance: for example, in shaping the international regulatory framework, limiting participation in international fora, excluding non-state actors from its ambit and constraining doctrinal and institutional change. Although the actions of non-state actors impact upon decision-making with respect to the use of force – both against them as in the War on Terror and ostensibly at least in their protection as in the Responsibility to Protect and Human Security – the law relating to the use of force remains

¹⁹⁵ Held, David, McGrew, Anthony, Goldblatt, David and Perraton, Jonathan 1999. *Global Transformations: Politics, Economics and Culture*. Polity Press; Shaw, Martin 2000. *Theory of the Global State: Globality as an Unfinished Revolution*. Cambridge University Press; Scholte, Jan Art 2000. *Globalization: A Critical Introduction*. Palgrave Macmillan.

¹⁹⁶ Slaughter, Anne-Marie 2004. *A New World Order*. Princeton University Press.

centred around states.¹⁹⁷ The primacy of state sovereignty as embodied in the requirement of consent weakens the international legal system, for instance, through the absence of compulsory jurisdiction before the ICJ and the scarcity of other adequate enforcement mechanisms.

But the absolutist character of sovereignty is increasingly constrained in the context of globalisation and through the multiple roles played by non-state actors. We argue that states are adapting to these changes in different ways and that a key determinant is how the authority to use force – and against whom – is interpreted. In what follows, we outline how the different models of security described in the previous chapter are associated with different conceptions of sovereignty and thus of world order.

The Geo-Political Model

The first model is a traditional idea of state sovereignty associated with what Robert Cooper calls the 'modern' state.¹⁹⁸ These are states which retain the monopoly of force both domestically and internationally and possess a capacity to use force unilaterally in an international context in pursuance of what they perceive as their national interest. These states may act unilaterally in self-defence, or through organisations such as the United Nations, NATO, the Organization of American States or the Commonwealth of Independent States,¹⁹⁹ but still insist that they operate within the framework of international law. Whereas in the past such states would have assumed that the use of force to further national interest was legitimate, since World War II, interventions that are undertaken tend to be couched in legalistic language. They strongly defend the norm of non-intervention, as least as concerns other states, and envisage a world order peopled by states with Great Powers acting as guarantors. Russia, China and India are perhaps the classic exponents of the Geo-Political conception, upholding the concept of territorial integrity and the right to use force internally and, in some cases, externally according to what is considered to be in their national interest – Georgia, Ukraine, Syria, for example, in the case of Russia²⁰⁰ and the land and maritime claims in the South China Sea in the case of China. This could be

¹⁹⁷ For analysis of the extent to which rules relating to the use of force have shifted from the Westphalian system; see Kress, *op. cit.*

¹⁹⁸ Cooper, Robert 1996. *The Post-Modern State and the World Order*. Demos.

¹⁹⁹ Regional arrangements are provided for in the UN Charter, chapter VIII.

²⁰⁰ Or outside the neighbourhood, as in the case of Russian intervention in Syria in 2015.

described as a classic realist conception of international order, even though it formally accepts an international law framework.²⁰¹ Sovereignty remains situated in the classic distinction between 'inside' and 'outside' even though the 'outside' is somewhat constrained by international law as it developed after World War II.

The *War on Terror* Model

Although the United States, supported by realist scholars such as Morgenthau,²⁰² has for a long time articulated the Geo-Political model, for example, in the Monroe Doctrine, there has always been a strand of thinking linked to ideas of American exceptionalism. Thus both World War II and the Cold War were framed not as Geo-Political conflict but as struggles for human rights and democracy. The neo-conservative thinkers who came to the fore in the aftermath of 9/11 espoused the idea that force could be used against the acts of non-state actors (as well as those of states) for democratic transformation, and this, in their conception, is legitimate. Thus the model underlying the War on Terror is one in which American state sovereignty can be combined with intervention in other states, proxy wars, the construction of military bases overseas and the current drone campaign. The American model does not reject international law or argue that morality trumps law; rather it justifies this model, as will be discussed in subsequent chapters, in terms of a legal framework, which involves a stretching of the concept of self-defence and a strange reinterpretation of parts of international humanitarian law. This model involves a conception of world order based on uni-polar hegemony that operates within a framework of rules laid down and/or interpreted by the global hegemon. According to Habermas, the revolutionary claim of the neo-conservatives is that if 'the regime of international law fails, then the hegemonic imposition of a global liberal order is justified even by means that are hostile to international law'.²⁰³

The language of exceptionalism fits the Schmittian idea that sovereignty is the monopoly to decide on the exception; hence rules can be overridden or interpreted selectively and flexibly in exceptional times, such as those associated with the global threat presented by terrorists.

²⁰¹ Kingsbury, Benedict 1997. 'A Grotian Tradition of Theory and Practice? Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull', *Quinnipac Law Review* 17: 3–34.

²⁰² Morgenthau, Hans 1965. *Politics among Nations: The Struggle for Power and Peace*. McGraw-Hill, 6th ed.

²⁰³ Habermas *op. cit.*, 45, fn 25.

While most associated with US policy, other states too claim the justifications of the War on Terror when it is expedient for them to do so.

The *Liberal Peace* Model

This model is multilateralist but state centric, placing the emphasis on the norm of non-intervention. Peace is understood as peace between states, or quasi- states as in the case of conflicting groups – that is to say, the warring parties in a conflict are treated as legitimate actors using force for political purposes as though they were states at least in waiting. It is a collective concept that trumps human rights and/or justice. This model is associated with peacemaking through peace agreements, peacebuilding and peacekeeping. It is favoured by what Robert Cooper calls ‘post-modern’ states²⁰⁴ or what Ian Clarke calls globalising states.²⁰⁵ These are states that maintain their monopoly of force domestically but do not have the capacity or the will to use force externally, except in the context of multilateral missions. These states are usually linked to regional or international institutions – the European Union, the African Union, the Organization of American States, as well as the United Nations and a range of other organisations. These are states with an interest in global security because they cannot guarantee national security unilaterally. They understand that their role is increasingly as members of an international system where they can influence the rules but cannot act as they please. This model draws implicitly on the pluralist strand of English School thinking of International Relations, assuming a denser framework of rules than the Geo-Political model. In this model, state sovereignty remains the pivot of the international system, in conjunction with global governance institutions, but that sovereignty is exercised in a framework that precludes the international use of force except when authorised by the SC.

The *Responsibility to Protect* Model

The Responsibility to Protect model emphasises the obligations of sovereignty, the shift ‘from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties’.²⁰⁶ The state’s primary responsibility is to ensure the security of its citizens. If it fails

²⁰⁴ Cooper, *op. cit.*

²⁰⁵ *Ibid.*; Clarke, *op. cit.* (*Globalisation and International Relations Theory*).

²⁰⁶ ICISS Report, *op. cit.*, para. 2. 14.

to do so, that sovereignty becomes contingent, and, in extreme instances, the responsibility shifts to the international community. It is accordingly also multilateralist but less state-centric than the Liberal Peace because the norm of non-intervention can be overridden by SC authorisation in cases where states fail to protect their populations, notably against cases of genocide, ethnic cleansing and massive violations of human rights (crimes against humanity). In this model the Council's role is more significant than in the Liberal Peace model. Indeed, Orford suggests that the Responsibility to Protect model is the way that the UN acquires executive power.²⁰⁷ Thus it is a model of multi-polar hegemony based on a framework of international law that echoes notions of just war. Responsibility to Protect might be said to correspond to the solidarist strand of English school thinking, and, indeed, it is a concept that is embraced by scholars who define themselves in these terms.

The *Human Security* Model

Human Security is the Kantian cosmopolitan model where peace is combined with human rights. It is also multilateralist and has considerable overlaps with both the Liberal Peace and the Responsibility to Protect models, but in the Human Security model multilateral institutions are much more accountable to global civil society than in the Liberal Peace model. In contrast to the Liberal Peace, state sovereignty is conditional on human rights, but, in contrast to the Responsibility to Protect, law enforcement is based on human rights rather than just war assumptions.

These different conceptions are summarised in Table 2.1.

All these models except for Human Security assume that war is a legitimate phenomenon and that states are the only actors that can decide either unilaterally or collectively when military force can be used. They differ as to the rules about how and when classic military force is used apply in the international arena. As expounded in the previous chapter, there is a distinction between the use of force in the international arena, which involves war, the use of military force against a collective enemy and the use of force domestically, which is considered policing against individual criminals (in the case of a rights-based society) or against individual dissidents (in the case of repressive societies). Parallel to this distinction is another between the external instrument of peace and

²⁰⁷ Orford, Anne 2011. *International Authority and the Responsibility to Protect*. Cambridge University Press.

Table 2.1 *Security Models and World Order*

	Authority to Use Force	Rules governing the Use of Force	World Order	Underlying Philosophical Assumption
Geo-Politics	Unilateralist in case of self-defence	<i>Jus ad bellum</i> self-defence; collective enforcement action if SC vote secured	Multi-polar (Great Powers)	Classical Realism
War on Terror	Unilateralist (although support through 'coalitions of the willing')	'Just War' externally but intervention in other internal situations	Uni-polar hegemony	Schmittian exceptionalism
Liberal Peace	Multilateralist	Treats 'new wars' as 'old wars'	Multi-polar and multilateralist	Pluralist realism
Responsibility to Protect	Multilateralist	Just War and Human Rights	Multi-polar hegemony	Solidarist Realism
Human Security	Multilateralist	Human Rights	Global Governance	Cosmopolitanism

diplomacy (between collective entities-states) and politics and justice (within states). Only the Geo-Political model sustains these distinctions. The War on Terror, Liberal Peace and Responsibility to Protect models all bring the 'outside inside' in different ways. The War on Terror uses the instrument of war for policing purposes – the 'inside' of other states, whether to impose democracy or to kill terrorists. The Liberal Peace model uses the external instrument of diplomacy and peacemaking in new war contexts that are both inside and outside. Responsibility to Protect also uses the instrument of war for internal purposes, specifically human rights violations. Only the Human Security model brings the 'inside' 'outside', as will be developed in Chapter 11, using methods more akin to policing for dealing with violations of human rights, including armed attacks. In the remainder of this book, we will make the argument that the use of classic 'outside' instruments in response to new wars tends to intensify their violence and duration; this is the basis for the practical case for a Human Security approach.

2.5 Conclusion

In this chapter, we have argued that we are living through a period of fundamental change in the nature of state sovereignty that is exemplified in the changing relationship of the state to the use of force in both procedural and substantive terms. Sovereignty, as we explain, was an expression of the 'Great Divide' between the inside and the outside. The use of force internally was constrained by law and constitutionalism (even if this was instrumentalised for tyrannical purposes) and externally by just war criteria expressed in diverse cultures and emerging international law. In procedural terms, there are profound contradictions between notions of sovereign equality and human rights, between the prohibition of war and the various exceptions, and between the shift of formal authority from the national to the international and the geopolitical composition of the Security Council. In substantive terms, there are contradictions between the growing interconnectedness and disaggregation of states associated with the emergence of global governance, global civil society and globalising states, on the one hand, and, on the other, new forms of political violence associated with the use of force by powerful states acting unilaterally or through coalitions, the spread of physical insecurity in weak or failing states, the increasing attacks by networks of extremist non-state actors, and the legitimacy deficit of the United Nations, especially of the SC. The populist attempt to reclaim closed concepts of national sovereignty, as proposed by Donald Trump or the proponents of BREXIT in the United Kingdom, cannot reverse the process of globalisation; rather they are likely to bring the outside of war and anarchy inside.

Such contradictions do offer openings for agency. But how that agency is exercised is different for different actors. With the prohibition on war contained in the UN Charter, the Great Divide has been eroded, and law and constitutionalism have become increasingly important outside and as the inside is increasingly integrated both practically and legally in the wider international framework. While the Geo-Political model adheres to a classic concept of sovereignty, each of the other models involves a blurring of inside and outside though in different directions that are expressed in different understandings of international law. These will be spelled out throughout the remainder of this book.

The next chapter elaborates what is understood by international law, and later chapters investigate the different directions in which

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international law is changing according to the different models we have outlined. In other words, we are in the midst of a far-reaching debate about the direction of international law and the shape of world order. This book explores the different strands of that debate as it relates to war and violence.

PROOF