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The Changing Structure of International Law: Sovereignty Transformed?

David Held

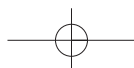
Classic Sovereignty

[...]

The doctrine of sovereignty developed in two distinct dimensions: the first concerned with the “internal,” the second with the “external” aspects of sovereignty. The former involves the claim that a person, or political body, established as sovereign rightly exercises the “supreme command” over a particular society. Government – whether monarchical, aristocratic, or democratic – must enjoy the “final and absolute authority” within a given territory. The latter involves the assertion that there is no final and absolute authority above and beyond the sovereign state. States must be regarded as independent in all matters of internal politics and should in principle be free to determine their own fate within this framework. External sovereignty is a quality that political societies possess in relationship to one another; it is associated with the aspiration of a community to determine its own direction and politics without undue interference from other powers (Hinsley 1986).

The sovereign states system became entrenched in a complex of rules that evolved, from the seventeenth century, to secure the concept of an order of states as an international society of sovereign states (Bull 1977). The emergence of a “society” of states, first in Europe and later across the globe, went hand in hand with a new conception of international law that can be referred to as the “Westphalian regime” (after the peace treaties of Westphalia of 1648), but that I simply refer to as the classic regime of sovereignty. The regime covers the period of international law and regulation from 1648 to the early twentieth century (although elements of it, it can be argued plausibly, still have application today). Not all of its features were intrinsic to the settlement of Westphalia; rather, they were formed through a normative trajectory in international law that did not receive its fullest articulation until the late eighteenth and early nineteenth centuries, when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society (see Crawford and Marks 1998).

The classic regime of sovereignty highlights the development of a world order in which states are nominally free and equal; enjoy supreme authority over all subjects and objects within a given territory; form separate and discrete political orders



with their own interests (backed by their organization of coercive power); recognize no temporal authority superior to themselves; engage in diplomatic initiatives but otherwise in limited measures of cooperation; regard cross-border processes as a “private matter” concerning only those immediately affected; and accept the principle of effectiveness, that is, the principle that might eventually makes right in the international world – appropriation becomes legitimation (see Falk 1969; Cassese 1986, 396–9; Held 1995, p. 78).

To emphasize the development of the classic regime of sovereignty is not to deny, of course, that its reality was often messy, fraught, and compromised (see Krasner 1995, 1999). But acknowledging the complexity of the historical reality should not lead one to ignore the structural and systematic shift that took place from the late sixteenth century in the principles underlying political order, and their often bloody reality. States struggled to contain and manage people, territories, and resources – a process exemplified both by European state formation in the seventeenth and eighteenth centuries and by the rapid carving out of colonies by European powers in the nineteenth century.

Four important corollaries to the development of the classic regime of sovereignty should be emphasized. In the first instance, the crystallization of international law as interstate law conferred on heads of state or government the capacity to enter into agreements with the representatives of other states without regard to the constitutional standing of such figures; that is, without regard to whether or not heads of state were entitled by specific national legal arrangements to commit the state to particular treaty rights and duties. Second, interstate law was indifferent to the form of national political organization. It accepted “a *de facto* approach to statehood and government, an approach that followed the facts of political power and made few inquiries into how that power was established” (Crawford and Marks 1998, 72). Absolutist regimes, constitutional monarchies, authoritarian states, and liberal democratic states were all regarded as equally legitimate types of polity.

The third corollary involved the creation of a disjuncture between the organizing principles of national and international affairs. In principle and practice, the political and ethical rules governing these two spheres diverged. As liberal democratic nation-states became slowly entrenched in the West, so did a political world that tolerated democracy in nation-states and nondemocratic relations among states; the entrenchment of accountability and democratic legitimacy inside state boundaries and the pursuit of reasons of state (and maximum political advantage) outside such boundaries; democracy and citizenship rights for those regarded as “insiders” and the frequent negation of these for those beyond their borders (Held 1999, 91). The gulf between *Sichtlichkeit* and *Realpolitik* was taken for granted.

The fourth corollary to the classic regime of sovereign international law concerns the delegitimation of all those groups and nonstate actors who sought to contest territorial boundaries, with paradoxical consequences. Stripped of traditional habitats and territories by colonial powers and hegemonic interests, such groups often had no alternative but to resort to coercion or armed force in order to press their claims to secure homelands. For they too had to establish “effective control” over the area they sought as their territory if they were going to make their case for international recognition (see Baldwin 1992, 224–5).

The retreat and defeat of European empires from the late nineteenth century, the spread of democratic ideas throughout the world’s regions in the twentieth century,

and the establishment of new transnational and multilateral forms of organization and activity throughout the last one hundred years have altered the political and legal landscape (see Held and McGrew, Goldblatt, and Perraton 1999, chs. 1, 2). The questions are: Has a new framework of international law been established? Has the balance changed between the claims made on behalf of the states system and those made on behalf of alternative political and normative positions?

Liberal International Sovereignty

The hold of the classic regime of sovereignty was dislodged within the boundaries of nation-states by successive waves of democratization (Potter et al. 1997). While these were primarily aimed at reshaping the national polity, they had spillover effects for the interstate system (Bull 1977). Although it was not until after the Second World War that a new model of international regulation fully crystallized, the regime of liberal international sovereignty has origins which can be traced back further. Its beginning is marked by attempts to extend the processes of delimiting public power to the international sphere and by attempts thereafter to transform the meaning of legitimate political authority from effective control to the maintenance of basic standards or values that no political agent, whether a representative of a government or state, should, in principle, be able to abrogate. Effective power is challenged by the principles of self-determination, democracy, and human rights as the proper basis of sovereignty. It is useful to highlight some of the legal transformations that have taken place – in the domains of war, war crimes, human rights, democratic participation, as well as the environment – which underlie this shift. In the main, these transformations have been ushered in with the approval and consent of states, but the delegation and changes in sovereignty have, it will be seen, acquired a status and momentum of their own.

Rules of warfare and weaponry

The formation of the rules of warfare has been based on the presupposition that, while war cannot be completely abolished, some of its most appalling consequences, for soldiers and citizens alike, should be made illegal. The aim of these rules is to limit conduct during war to minimum standards of civilized behavior that will be upheld by all parties to an armed conflict. While the rules of warfare are, of course, often violated, they have served in the past to provide a brake on some of the more indiscriminate acts of violence. The major multilateral conventions governing war date back to the Declaration of Paris of 1856, which sought to limit sea warfare by prohibiting privateering, and to specify the conditions under which a blockade could be said to be effective with determinate legal consequences. Important milestones include the Geneva Convention of 1864 (revised in 1906), the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929 and 1949 which, together, helped codify humane treatment for the wounded in the field, acceptable practices of land warfare, the rights and duties of the parties to a conflict and of neutral states and persons, and a plethora of rules governing the treatment of prisoners and the protection of civilians. In addition to these and other regional treaties, the behavior of belligerents is, in

principle, circumscribed by elements of customary international law and by a general acknowledgment of a “law of humanity” forbidding “unwarranted cruelty or other actions affronting public morality” (Plano and Olton 1988, 193; see Byers 1999).

The rules of warfare form an evolving framework of regulations seeking to restrain the conduct of parties to an international armed conflict. The rules are premised on the “dual notion that the adverse effects of war should be alleviated as much as possible (given military necessities), and that the freedom of the parties to resort to methods and means of warfare is not unlimited” (Dinstein 1993, 966). These guiding orientations and the agreements to which they have given rise mark, in principle, a significant change over time in the legal direction of the modern state; for they challenge the principle of military autonomy and question national sovereignty at one of its most delicate points – the relation between the military and the state (what it is that each can legitimately ask of the other) and the capacity of both to pursue their objectives irrespective of the consequences.

Conventions on the conduct of war have been complemented by a series of agreements on the use of different types of weapons, from the rules governing the use of dum-dum bullets (the Hague Convention, 1907) and the use of submarines against merchant ships (the Paris Protocol of 1936) to a whole range of recently negotiated agreements on conventional and nuclear, chemical, and biological weapons (see SIPRI 1999). As a result, arms control and regulation have become a permanent feature of international politics. Agencies for arms control and disarmament (or sections within foreign ministries) now exist within all the world’s major states, managing what has become a continuous diplomatic and regulatory process (see Held and McGrew, Goldblatt, and Perraton 1999, 123–33). Many recent agreements, moreover, have created mechanisms of verification or commitments that intrude significantly on national sovereignty and military autonomy. For example, the 1993 Chemical Weapons Convention, a near-universal disarmament treaty, creates an international inspectorate to oversee its implementation (anxiety about which filled the U.S. Senate with complaints about “surrendered sovereignty” (Wright 2000)). Accordingly, it is not unreasonable to claim that the international laws of war and weapons control have shaped and helped nurture a global infrastructure of conflict and armaments regulation.

War crimes and the role of the individual

The process of the gradual delimitation of state power can be illustrated further by another strand in international legal thinking that has overturned the primacy of the state in international law and buttressed the role of the individual in relation to and with responsibility for systematic violence against others. In the first instance, by recognizing the legal status of conscientious objection, many states have acknowledged there are clear occasions when an individual has a moral obligation beyond that of his or her obligation as a citizen of a state (see Vincent 1992, 269–92). The refusal to serve in national armies triggers a claim to a “higher moral court” of rights and duties. Such claims are exemplified as well in the changing legal position of those who are willing to go to war. The recognition in international law of the offenses of war crimes, genocide, and crimes against humanity makes clear that acquiescence to the commands of national leaders will not be considered sufficient grounds for absolving individual guilt in these cases. A turning point in this regard was the decisions taken by

the International Tribunal at Nuremberg (and the parallel tribunal in Tokyo). The tribunal laid down, for the first time in history, that when *international rules* that protect basic humanitarian values are in conflict with *state laws*, every individual must transgress the state laws (except where there is no room for “moral choice,” i.e., when a gun is being held to someone’s head) (Cassese 1988, 132). Modern international law has generally endorsed the position taken by the tribunal and has affirmed its rejection of the defense of obedience to superior orders in matters of responsibility for crimes against peace and humanity. As one commentator has noted: “since the Nuremberg Trials, it has been acknowledged that war criminals cannot relieve themselves of criminal responsibility by citing official position or superior orders. Even obedience to explicit national legislation provides no protection against international law” (Dinstein 1993, 968).

The most notable recent extension of the application of the Nuremberg principles has been the establishment of the war crimes tribunals for the former Yugoslavia (established by the UN Security Council in 1993) and for Rwanda (set up in 1994) (cf. Chinkin 1998; *The Economist* 1998). The Yugoslav tribunal has issued indictments against people from all three ethnic groups in Bosnia and is investigating crimes in Kosovo, although it has encountered serious difficulty in obtaining custody of the key accused. (Significantly, of course, ex-President Slobodan Milosevic has recently been arrested and brought before The Hague war crimes tribunal.) Although neither the Rwandan tribunal nor the Yugoslav tribunal have had the ability to detain and try more than a small fraction of those engaged in atrocities, both have taken important steps toward implementing the law governing war crimes and, thereby, reducing the credibility gap between the promises of such law, on the one hand, and the weakness of its application, on the other.

Most recently, the proposals put forward for the establishment of a permanent international criminal court are designed to help close this gap in the longer term (see Crawford 1995; Dugard 1997; Weller 1997). Several major hurdles remain to its successful entrenchment, including the continuing opposition from the United States (which fears its soldiers will be the target of politically motivated prosecutions) and dependency upon individual state consent for its effectiveness (Chinkin 1998, 118–19). However, [...] the court will be formally established and will mark another significant step away from the classic regime of sovereignty and toward the firm entrenchment of the framework of liberal international sovereignty.

The ground which is being staked out now in international legal agreements suggests that the containment of armed aggression and abuses of power can be achieved only through both the control of warfare and the prevention of the abuse of human rights. For it is only too apparent that many forms of violence perpetrated against individuals and many forms of abuse of power do not take place during declared acts of war. In fact, it can be argued that the distinctions between war and peace and between aggression and repression are eroded by changing patterns of violence (Kaldor 1998a and b). The kinds of violence witnessed in Bosnia and Kosovo highlight the role of paramilitaries and of organized crime and the use of parts of national armies that may no longer be under the direct control of a state. What these kinds of violence signal is that there is a very fine line between explicit formal crimes committed during acts of war and major attacks on the welfare and physical integrity of citizens in situations that may not involve a declaration of war by states. While many of the new forms of warfare do not fall directly under the classic rules of war, they are massive violations

of international human rights. Accordingly, the rules of war and human rights law can be seen as two complementary forms of international rules that aim to circumscribe the proper form, scope, and use of coercive power (see Kaldor 1998b, chs. 6, 7). For all the limitations of its enforcement, these are significant changes that, when taken together, amount to the rejection of the doctrine of legitimate power as effective control, and its replacement by international rules that entrench basic humanitarian values as the criteria for legitimate government.

Human rights, democracy and minority groups

At the heart of this shift is the human rights regime (see Held 1995, ch. 5; Held and McGrew, Goldblatt, and Perraton 1999, ch. 1). The basic elements of this regime [...] are set out in table 1. [...] Three interrelated features of the regime are worth dwelling on: (1) the constitutive human rights agreements; (2) the role of self-determination and the democratic principle that were central to the framework of decolonization; and (3) the recent recognition of the rights of minority groups.

On (1): The human rights regime consists of overlapping global, regional, and national conventions and institutions (see Donnelly 1998; Evans 1997). At the global level, human rights are firmly entrenched in the International Bill of Human Rights, the building blocks of which are the UN Declaration of Human Rights of 1948 and the Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, which were

Table 1 A selected list of human rights initiatives and agreements

Date	
Jun 1945	Charter of the United Nations
Jun 1946	UN Commission on Human Rights
Dec 1948	Genocide Convention/Universal Declaration of Human Rights
Nov 1950	European Convention on Human Rights
Jul 1951	Convention Relating to the Status of Refugees
Dec 1952	Convention on the Political Rights of Women
Sep 1954	Convention on the Status of Stateless Persons
Sep 1956	Convention Abolishing Slavery
Jun 1957	ILO's Convention on the Abolition of Forced Labor
Nov 1962	Convention on Consent to Marriage
Dec 1965	Convention on the Elimination of Racial Discrimination
Dec 1966	International Covenants on Economic, Social, and Cultural Rights/Civil and Political Rights; Optional Protocol
Nov 1973	Convention on the Suppression of Apartheid
Jun 1977	Two additional protocols to the Geneva Conventions
Dec 1979	Convention on the Elimination of all Forms of Discrimination against Women
Dec 1984	Convention against Torture
Nov 1989	Convention on the Rights of the Child
May 1993	International Criminal Tribunal for the Former Yugoslavia
Nov 1994	International Criminal Tribunal for Rwanda
Jul 1998	UN conference agrees treaty for a permanent International Criminal Court

Source: UN and *The Economist* 1998

adopted in 1966 and came into force in 1976. These were complemented in the late 1970s and 1980s by the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child. The UN Commission on Human Rights is responsible for overseeing this system and bringing persistent abuses to the attention of the UN Security Council. In addition, the International Labor Organization is charged, in principle, with policing the area of labor and trade union rights.

Within most of the world's regions there is an equivalent legal structure and machinery. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is particularly significant. For it was designed to take the first steps toward the "collective enforcement," as its preamble states, of certain of the rights enumerated in the Universal Declaration. The European agreement, in allowing individual citizens to initiate proceedings against their own governments, is a most remarkable legal innovation. Although its implementation has been far from straightforward and is fraught with bureaucratic complexities, it seeks to prevent its signatories from treating their citizens as they think fit, and to empower citizens with the legal means to challenge state policies and actions that violate their basic liberties. Human rights have also been promoted in other regions of the world, notably in Africa and the Americas. The American Convention on Human Rights, which came into force in 1978, and the African (Banjul) Charter of Human and People's Rights (1981), were useful steps in this regard. But perhaps as important in promoting human rights, if not more so, have been the multiplicity of political and international nongovernmental organizations (INGOs) that have actively sought to implement these agreements and, thereby, to reshape the ordering principles of public life (see Held and McGrew, Goldblatt, and Perraton 1999, ch. 1).

On (2): There is a notable tendency in human rights agreements to entrench the notion that a legitimate state must be a state that upholds certain core democratic values (see Crawford and Marks 1998). For instance, in Article 21 the Universal Declaration of Human Rights asserts the democratic principle along with enumerated rights as a common standard of achievement for all peoples and nations (see UN 1988, 2, 5). Although this principle represented an important position to which anticolonial movements could appeal, the word "democracy" does not itself appear in the Declaration and the adjective "democratic" appears only once, in Article 29. By contrast, the 1966 UN International Covenant on Civil and Political Rights (enacted 1976) elaborates this principle in Article 25, making a number of different declarations and other instruments into a binding treaty (see UN 1988, 28). According to Article 25 of the Covenant:

Every citizen shall have the right and the opportunity, without...unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country.

The American Convention on Human Rights, along with other regional conventions, contains clear echoes of Article 21 of the Universal Declaration as well as of Article

25 of the Covenant on Civil and Political Rights, while the European Convention on Human Rights is most explicit in connecting democracy with state legitimacy, as is the statute of the Council of Europe, which makes a commitment to democracy a condition of membership. Although such commitments often remain fragile, they signal a new approach to the concept of legitimate political power in international law.

On (3): Since 1989 the intensification of interethnic conflict has created an urgent sense that specific minorities need protection (renewing concerns voiced clearly during the interwar period). In 1992 the United Nations General Assembly adopted a Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. Proclaiming that states “shall protect the existence and national, cultural, religious and linguistic identity of minorities,” the Declaration sets out rights for members of minorities to be able “to participate effectively in cultural, religious, social and public life.” While the Declaration is not legally binding, it is widely regarded in the UN system and in some leading INGOs (Amnesty International, Oxfam) as establishing a future trajectory of international legal change. In other contexts, the impetus to secure protection for minority rights is also apparent. Within the Council of Europe, a Charter for Regional and Minority Languages and a Framework Convention for the Protection of National Minorities have been elaborated. Moreover, the Organization for Security and Cooperation in Europe has adopted a series of instruments affirming minority rights and has founded the office of High Commissioner for National Minorities to provide “early warning” and “early action” with respect to “tensions involving national minority issues” (Crawford and Marks 1998, 76–7).

Changes in human rights law have placed individuals, governments, and nongovernmental organizations under new systems of legal regulation – regulation that, in principle, is indifferent to state boundaries. This development is a significant indicator of the distance that has been traveled from the classic, state-centric conception of sovereignty to what amounts to a new formulation for the delimitation of political power on a global basis. The regime of liberal international sovereignty entrenches powers and constraints, and rights and duties, in international law that – albeit ultimately formulated by states – go beyond the traditional conception of the proper scope and boundaries of states, and can come into conflict, and sometimes contradiction, with national laws. Within this framework, states may forfeit claims to sovereignty if they violate the standards and values embedded in the liberal international order; and such violations no longer become a matter of morality alone. Rather, they become a breach of a legal code, a breach that may call forth the means to challenge, prosecute, and rectify it (see Habermas 1999). To this end, a bridge is created between morality and law where, at best, only stepping stones existed before. These are transformative changes that alter the form and content of politics, nationally, regionally, and globally. They signify the enlarging normative reach, extending scope, and growing institutionalization of international legal rules and practices – the beginnings of a “universal constitutional order” in which the state is no longer the only layer of legal competence to which people have transferred public powers (Crawford and Marks 1998, 2; Weller 1997, 45).

But a qualification needs to be registered at this stage in order to avoid misunderstanding. The regime of liberal international sovereignty should not be understood as having simply weakened the state in regional and global legal affairs. The intensification of international law and the extension of the reach of human rights instruments

do not signal alone the demise of the state or even the erosion of its powers. For in many respects, the changes under way represent the extension of the classic liberal concern to define the proper form, scope, and limits of the state in the face of the processes, opportunities, and flux of civil life. In the extension of the delimitation of public powers, states' competencies and capacities have been, and are being, reconstituted or reconfigured – not merely eroded (see Held and McGrew, Goldblatt, and Perraton 1999, "Conclusion"). [...]

Environmental law

The final legal domain to be examined in this section is the law governing the environment, wildlife, and the use of natural resources. Within this sphere the subject and scope of international law embrace not just humankind as individuals but the global commons and our shared ecosystems. While attempts to regulate the trade and use of rare species date back over a hundred years, the pace of initiatives in environmental regulation has quickened since the end of the Second World War (Hurrell and Kingsbury 1992). The first convention on the regulation of international whaling was signed in 1946, and early treaties on the international carriage of toxic substances, minor habitat protection schemes, and some regulation of the international nuclear cycle were agreed in the 1950s and 1960s. However, it was only in the late 1960s and early 1970s that the extent and intensity of international environmental regulation began to increase significantly (see Held and McGrew, Goldblatt, and Perraton 1999, ch. 8). The key moment in this regard was the 1972 Stockholm conference on the international environment sponsored by the UN Environment Program. This was the first occasion at which multilateral agencies and national governments gathered to consider the whole panoply of shared environmental problems and the proper scope of the response.

Throughout the 1970s and 1980s, the regulation of international waters and the control of marine pollution became extensively institutionalized with the adoption and ratification of the London Dumping Convention (1972), the MARPOL convention on ship pollution (1978), the UN Convention on the Law of the Sea (1982), and a multiplicity of regional seas agreements on cooperation and control of pollution (the Helsinki, Barcelona, Oslo, and Paris conventions as well as the UN regional seas program). At the heart of the classic conception of sovereignty, natural resources were regarded as legitimately falling under the sovereign authority of states on the condition that whoever possessed a resource, and exercised actual control over it, secured a legal title (see Cassese 1986, 376–90). Although this principle has been extended in recent times to cover the control of resources in a variety of areas (including the continental shelf and "economic zones" that stretch up to 200 nautical miles from coastal states), a new concept was expounded in 1967 as a means for rethinking the legal basis of the appropriation and use of resources – the "common heritage of mankind."

Among the key elements of this concept are the exclusion of a right of appropriation; the duty to use resources in the interest of the whole of humanity; and the duty to explore and exploit resources for peaceful purposes only. The notion of the "common heritage" was subject to intense debate in the United Nations and elsewhere; it was, nevertheless, enshrined in two seminal treaties, the 1979 Convention on the Moon and Other Celestial Bodies and the 1982 Convention on the Law of the Sea.

Introduced as a way of thinking about the impact new technologies would have on the further exploitation of natural resources – resources that were beyond national jurisdiction on the seabed or on the moon and other planets – its early advocates saw it as a basis for arguing that the vast domain of hitherto untapped resources should be developed for the benefit of all, particularly developing nations. As such, the introduction of the concept was a turning point in legal considerations, even though there was considerable argument over where and how it might be applied. It was significantly revised and qualified by the 1996 Agreement relating to the Implementation of Part XI (of the Law of the Sea).

Further significant conventions were signed in the 1980s and 1990s to combat the risks flowing from degraded resources and other environmental dangers, including the international movement of hazardous wastes (the Basel Convention in 1989), air pollution involving the emission of CFCs (the Vienna and Montreal Protocols in 1985 and 1987) as well as a range of treaties regulating transboundary acid rain in Europe and North America. Alongside these agreements, environmental issues became points of contention and the focus of regional cooperation and regulation in the EU, the Nordic Council, NAFTA, APEC, MERCOSUR, and other areas.

Against the background of such developments, the impetus was established for the 1992 Rio conference (and for the Kyoto meeting in 1997). Conducted under the auspices of the UNEP and involving negotiations between almost every member state of the UN, Rio sought to establish the most far-reaching set of global environmental agreements ever arrived at. The Rio Declaration took as its primary goal the creation of “a new and equitable global partnership through the creation of new levels of cooperation among states, key sectors of societies and people” (UNEP 1993, vol. 1, 3). Principle 7 of the Declaration demanded that states cooperate “in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem”; and Principle 12 called for “environmental measures addressing transboundary or global environmental problems” which should, “as far as possible, be based on an international consensus” (1993, 4, 5). The results included conventions on biodiversity, climate change and greenhouse emissions, the rain forests, and the establishment of international arrangements for transferring technology and capital from the North to the South for environmental programs (see UNEP 1993).

Rio committed all states to engage “in a continuous and constructive dialogue,” to foster “a climate of genuine cooperation,” and to achieve “a more efficient and equitable world economy” (UNEP 1993, 14; and cf. 111, 238). Traces of the concept of the “common heritage” can be found in its many documents, as it sought to create a new sense of transborder responsibility for the global commons and signaled the urgency of establishing a legal order based on cooperation and equity. Implementation of its many agreements has, of course, been another story. Agreement on the scope and scale of environmental threats was difficult to achieve, as was anything resembling a consensus on who is responsible for creating these and how the costs should be allocated to ameliorate them. Even where agreement was possible, international organizations have lacked the authority to ensure it is upheld. Other than through moral pressure, no mechanism exists for forcing recalcitrant states into line, and the latter retain an effective veto over environmental policy via inaction and indecision. The Rio Declaration had a great deal to say about “the new global partnership” tackling transborder problems that escape national jurisdiction, but it offered little precision on the principles of accountability and enforcement. Accordingly, while international

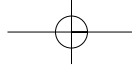
environmental law constitutes a large and rapidly changing corpus of rules, quasi-rules, and precedents that set down new directions in legal thinking, the implications of these for the balance between state power and global and regional authority remain fuzzy in many respects. International environmental treaties, regimes, and organizations have placed in question elements of the sovereignty of modern states – that is, their entitlement to rule exclusively within delimited borders – but have not yet locked the drive for national self-determination and its related “reasons of state” into a transparent, effective, and accountable global framework. The limits of the liberal international order may have been reached. For while this order seeks the means and mechanisms to delimit and divide public power, it does not have a legitimate and adequate basis to tackle the transborder overspill of national decisions and policies, and the collective problems that emerge from the overlapping fortunes of national communities. Whether this is a contingent inadequacy or a necessary feature of the conceptual resources of liberalism is a matter to which this paper will return.

The Achievements of Liberal Sovereignty

The classic regime of sovereignty has been recast by changing processes and structures of regional and global order. States are locked into diverse, overlapping, political and legal domains – that can be thought of as an emerging multilayered political system. National sovereignty and autonomy are now embedded within broader frameworks of governance and law in which states are increasingly but one site for the exercise of political power and authority. While this is, in principle, a reversible shift, the classic regime of state sovereignty has undergone significant alteration. [...] It is useful to rehearse and emphasize the most substantial changes before reflecting on the difficulties, dilemmas, and limitations of these processes.

The most substantial points can be put briefly. Sovereignty can no longer be understood in terms of the categories of untrammelled effective power. Rather, a legitimate state must increasingly be understood through the language of democracy and human rights. Legitimate authority has become linked, in moral and legal terms, with the maintenance of human rights values and democratic standards. The latter set a limit on the range of acceptable diversity among the political constitutions of states (Beitz 1979, 1994, 1998). [...]

At the beginning of the twenty-first century, each of the four main corollaries of the system of interstate law is open to reevaluation – that is, recognition of heads of state irrespective of their constitutional standing; international law’s de facto approach to sovereignty; the disjuncture between considerations of appropriate rules and organizations for domestic politics and those thought applicable in the realm of *Realpolitik*; and the refusal to bestow legitimacy or confer recognition on those who forcefully challenge established national regimes or existing boundaries. Today, the legitimacy of state leadership cannot be taken for granted and, like the constitutional standing of a national polity, is subject to scrutiny and tests with respect to human rights and liberal democratic standards (Crawford and Marks 1998, 84–5). In addition, the growth of regional and global governance, with responsibility for areas of increasing transborder concern from pollution and health to trade and financial matters, has helped close the gap between the types of organization thought relevant to national and transnational life. Finally, there have been important cases where



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governments within settled borders (such as the Southern Rhodesian government after its unilateral declaration of independence in 1965) have remained unrecognized by the international community while, at the same time, national liberation movements have been granted new levels of recognition or respect (for example, the ANC in the late 1980s during the closing stages of apartheid in South Africa). In addition, some struggles for autonomy have been accepted by significant powers, for instance the Croatian struggle for nationhood, prior to borders being redrawn and recast.

Boundaries between states are of decreasing legal and moral significance. States are no longer regarded as discrete political worlds. International standards breach boundaries in numerous ways. Within Europe the European Convention for the Protection of Human Rights and Fundamental Freedoms and the EU create new institutions and layers of law and governance that have divided political authority; any assumption that sovereignty is an indivisible, illimitable, exclusive, and perpetual form of public power – entrenched within an individual state – is now defunct (Held 1995, 107–13). Within the wider international community, rules governing war, weapon systems, war crimes, human rights, and the environment, among other areas, have transformed and delimited the order of states, embedding national polities in new forms and layers of accountability and governance (from particular regimes such as the Nuclear Nonproliferation Agreement to wider frameworks of regulation laid down by the UN Charter and a host of specialized agencies) (see Held and McGrew, Goldblatt, and Perraton 1999, chs. 1, 2). [. . .]

An Assessment of Liberal Sovereignty

The political and legal transformations of the last fifty years have gone some way toward circumscribing and delimiting political power on a regional and global basis. Several major difficulties remain, nonetheless, at the core of the liberal international regime of sovereignty that create tensions, if not faultlines, at its center. In the first instance, any assessment of the cumulative impact of the legal and political changes must acknowledge their highly differentiated character because particular types of impact – whether on the decisional, procedural, institutional, or structural dimensions of a polity – are not experienced uniformly by all states and regions.

Second, while the liberal political order has gone some way toward taming the arrogance of princes and princesses and curbing some of their worst excesses within and outside their territories, the spreading hold of the regime of liberal international sovereignty has compounded the risks of arrogance in certain respects. This is so because in the transition from prince to prime minister or president, from unelected governors to elected governors, from the aristocratic few to the democratic many, political arrogance has been reinforced by the claim of the political elites to derive their support from that most virtuous source of power – the *demos*. Democratic princes can energetically pursue public policies – whether in security, trade, technology, or welfare – because they feel, and to a degree are, mandated so to do. The border spillover effects of their policies and agendas are not prominent in their minds or a core part of their political calculations. Thus, for example, some of the most significant risks of Western industrialization and energy use have been externalized across the planet. Liberal democratic America, geared to domestic elections and vociferous interest groups, does not weigh heavily the ramifications across borders of its choice of fuels, consumption

levels, or type of industrialization – George W. Bush’s refusal after his election in 2001 to ratify the Kyoto agreement on greenhouse gas omissions being a case in point. From the location of nuclear plants, the management of toxic waste, and the regulation of genetically modified foodstuffs, to the harvesting of scarce resources (e.g., the rain forests) and the regulation of trade and financial markets, governments by no means simply determine what is right or appropriate for their own citizens, and national communities by no means exclusively “program” the actions and policies of their own governments.

Third, the problem of spillover consequences is compounded by a world increasingly marked by “overlapping communities of fate” – where the trajectories of each and every country are more tightly entwined than ever before. While democracy remains rooted in a fixed and bounded territorial conception of political community, contemporary regional and global forces disrupt any simple correspondence between national territory, sovereignty, political space, and the democratic political community. These forces enable power and resources to flow across, over, and around territorial boundaries and escape mechanisms of national democratic control. Questions about who should be accountable to whom, which socioeconomic processes should be regulated at what levels (local, national, regional, global) and on what basis do not easily resolve themselves and are left outside the sphere of liberal international thinking.

Fourth, while many pressing policy issues, from the regulation of financial markets to the management of genetic engineering, create challenges that transcend borders and generate new transnational constituencies, existing intergovernmental organizations are insufficient to resolve these – and resolve them legitimately. Decision-making in leading IGOs, for instance the World Trade Organization (WTO) and the International Monetary Fund (IMF), is often skewed to dominant geopolitical and geo-economic interests whose primary objective is to ensure flexible adjustment in and to the international economy (downplaying, for example, the external origins of a country’s difficulties and the structural pressures and rigidities of the world economy itself). Moreover, even when such interests do not prevail, a crisis of legitimacy threatens these institutions. For the “chains of delegation” from national states to multilateral bodies are too long, the basis of representation often unclear, and the mechanisms of accountability of the technical elites themselves who run the IGOs are weak or obscure (Keohane 1998). Agenda-setting and decision procedures frequently lack transparency, key negotiations are held in secret, and there is little or no wider accountability to the UN system or to any democratic forum more broadly. Problems of transparency, accountability, and democracy prevail at the global level. Whether “princes” and “princesses” rule in cities, states, or multilateral bodies, their power will remain arbitrary unless tested and redeemed through democratic processes that embrace all those significantly affected by them.

Fifth, serious deficiencies can, of course, be documented in the implementation and enforcement of democratic and human rights, and of international law more generally. Despite the development and consolidation of the regime of liberal international sovereignty, massive inequalities of power and economic resources continue to grow. There is an accelerating gap between rich and poor states as well as between peoples in the global economy (UNDP 1999). The human rights agenda often has a hollow ring. The development of regional trade and investment blocs, particularly the Triad (NAFTA, the EU, and Japan), has concentrated economic transactions within and between these areas (Thompson 2000). The Triad accounts for two thirds to three

quarters of world economic activity, with shifting patterns of resources across each region. However, one further element of inequality is particularly apparent: a significant proportion of the world's population remains marginal or excluded from these networks (Pogge 1999, 27; see UNDP 1997, 1999; Held and McGrew 2000).

Does this growing gulf in the life circumstances and life chances of the world's population highlight intrinsic limits to the liberal international order? Or should this disparity be traced to other phenomena – the particularization of nation-states or the inequalities of regions with their own distinctive cultural, religious, and political problems? The latter are contributors to the disparity between the universal claims of the human rights regime and its often tragically limited impact (see Pogge 1999; Leftwich 2000). But one of the key causes of the gulf lies, in my judgment, elsewhere – in the tangential impact of the liberal international order on the regulation of economic power and market mechanisms. The focus of the liberal international order is on the curtailment of the abuse of political power, not economic power. It has few, if any, systematic means to address sources of power other than the political (see Held 1995, pt. 3). Its conceptual resources and leading ideas do not suggest or push toward the pursuit of self-determination and autonomy in the economic domain; they do not seek the entrenchment of democratic rights and obligations outside the sphere of the political. Hence, it is hardly a surprise that liberal democracy and flourishing economic inequalities exist side by side. [See chapter 44 for an exploration of the implications of these arguments.]

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