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Suganami, Hidemi

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tel: +44 1970 62 2400
email: is@aber.ac.uk

Understanding sovereignty through Kelsen/Schmitt

HIDEMI SUGANAMI*

Abstract. Kelsen and Schmitt, two leading legal theorists of the twentieth century, constitute a powerful pair that sheds light on the intertwining of politics and law in the phenomenon of sovereignty. Although their conceptions of sovereignty are far apart, they are interconnected as different ways of making sense of the same social phenomenon, or what I call the ‘practice of sovereignty’, whereby an ultimately unauthorised authority continuously authorises itself as the authority and the rest by and large accept this, acquiesce in this, or are made to do so. Having clarified their differences and interconnection, I explore some of the implications of the two writers’ differing conceptions of sovereignty and of the practice of sovereignty that underlie them.

Introduction

Sovereignty is a notoriously elusive concept and it is the aim of this article to try to arrive at a better understanding of it through the reading of Kelsen and Schmitt, two leading legal theorists of the twentieth century.¹

Faced with the often confused discussions about sovereignty, some academic specialists suggest that the word ‘sovereign(ity)’ appears in different contexts and means different things. This was already noted by Jellinek when he observed: ‘The sovereign organ within a state and the sovereign state are two totally different things’.² A somewhat more detailed discussion is found in Manning, an early contributor to the conceptual analysis of sovereignty within the discipline of International Relations:

What all too many writers seem not to notice is that by this same term, sovereignty, there are commonly connoted more concepts than one. To state, as Austin did, that sovereignty in Britain lies with the monarch, the lords and the electorate, acting in their collective, or

* This article has gone through two fairly radical revisions. I am grateful to Jenny Edkins, Andrew Linklater, Rob Walker, Howard Williams, Michael Williams, and Pete Wright for their comments and criticisms.

¹ My focus here is on ‘state sovereignty’ but, I will argue, this is sustained by a broader practice of sovereignty, which also underlies other authorities. Informative works on Kelsen and Schmitt include: David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

² Georg Jellinek, *Allgemeine Staatslehre*, 3rd edn. (Bad Homburg von der Höhe: Gentner, 1960), p. 458.

corporate, capacity as ‘the sovereign number’, may or may not be found illuminating. But it is quite different from saying, with equal propriety, that sovereignty belongs in the case of Britain, as in that of other sovereign states, to the state as such, as an international person, a performer upon the international stage. And to say that the sovereignty of the sovereign state suffers abatement each time a new obligation is accepted is to use the term in a third kind of context and a third sort of widely accepted sense. What, when used in this third sense, is sovereignty but the sum total, at any given moment, of a states [*sic*] existing liberties? Sovereignty in this third context is a variable residue, composed of those of its original legal freedoms with which the state has not found occasion to part.³

According to this way of thinking, there are domestically *and* internationally relevant senses of the word ‘sovereignty’ and there is more than one meaning internationally. Sovereignty-sense-number-one, to paraphrase Manning, points to the supreme political authority within a state; sovereignty-sense-number-two refers to the quality that makes a state an international person; and sovereignty-sense-number-three is the sum of international legal freedoms a state enjoys at any particular moment.

This line of thinking I tentatively call ‘nominalism’ in this article in contradistinction to ‘essentialism’. Unlike the latter, the former denies the existence of the one true meaning of ‘sovereignty’ and suggests that ‘sovereignty’ is a name attaching to different substances.⁴ ‘Nominalism’, as defined here, can help us avoid dogmatic ‘essentialism’, but it does not always work well. Among the relatively recent, and widely-cited, works on sovereignty within the field of IR, Krasner’s *Sovereignty: Organized Hypocrisy* illustrates this point well.⁵

In addition to what he calls ‘domestic sovereignty’, corresponding to Manning’s sovereignty-sense-number-one, Krasner identifies three internationally relevant senses of ‘sovereignty’. These are ‘international legal sovereignty’, ‘Westphalian sovereignty’ and ‘interdependence sovereignty’. The first of these corresponds roughly to Manning’s sovereignty-sense-number-two. The second – or what Krasner also calls ‘the principle of autonomy’⁶ – is roughly equal to the state’s (supposed) freedom to do as it pleases within its territory. The third is roughly interchangeable with national autarky/territorial impermeability.

When I compare Manning’s and Krasner’s classificatory schemes, it strikes me as significant that neither of Krasner’s latter two types (‘Westphalian sovereignty’ and ‘interdependence sovereignty’) finds a place in Manning’s list of possible senses of ‘sovereignty’. Clearly, Manning knew that ‘sovereign’ states did not have ‘sovereignty’ in either of these two senses. It is also my view (*and* Krasner’s as well) that there has been no such thing as a Westphalian sovereign state in his sense. It is unsurprising therefore that he finds this ‘sovereignty’ regularly ‘violated’. He is right to say that his Westphalian model is empirically inaccurate (and also right to note that the principle of non-intervention has been violated from time to time). But his key contention that states engage in ‘organized hypocrisy’ by pretending to respect

³ C. A. W. Manning, ‘The Legal Framework in a World of Change’, in B. Porter (ed.), *The Aberystwyth Papers: International Politics 1919–1969* (London: Oxford University Press, 1972), p. 308.

⁴ I am aware that this is not how philosophers distinguish ‘nominalism’ and ‘essentialism’, but I prefer these terms to, say, ‘pluralism’ and ‘monism’.

⁵ The following summary is based on my reading of Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

⁶ Krasner, *Sovereignty*, p. 82.

the ‘governing principle, autonomy’⁷ is based on an erroneous assumption that the principle of *complete domestic autonomy* ever existed in the relations of sovereign states.

As James points out, ‘anyone with even the most cursory acquaintance with international law knows that sovereign states’ do not have complete domestic autonomy – of the sort Krasner feeds into *his* conception of Westphalian sovereignty.⁸ Bodin, well-known for his definition of ‘sovereignty’ as ‘absolute and perpetual power’, also famously added: ‘If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princes of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations’.⁹ Even Vattel, a strong advocate of sovereign equality and non-intervention, stated: ‘if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid’.¹⁰ Moreover, as Krasner himself acknowledges, even the ‘Peace of Westphalia contained extensive provisions for religious toleration between Catholics and Protestants in Germany’. It was, he adds, ‘precisely the fact that rulers . . . accepted internationally legitimated restraints on their own right to act as they pleased within their own territory, that made it possible to escape the state of nature resulting from sectarian warfare’.¹¹ There was then no principle of *complete* domestic autonomy, no such thing as the Westphalian sovereign state in Krasner’s sense, and hence no hypocrisy either.

What this example illustrates is this: that what I am tentatively calling here a nominalist approach to the concept of sovereignty will not help us understand the subject better if the analyst makes up the various meanings of the word ‘sovereignty’ *as s/he likes* in disregard of the historically contingent institutional structure of the world (or of what could plausibly be presented as such). Krasner’s ‘Westphalian sovereignty’ never was an aspect of the institutional structure even of the Westphalian world.

This is my key reason for drawing attention to the work of Kelsen in this article as he is, to my mind, among the most meticulous interpreters of the world’s institutional structure, domestic and international included. In this article, I contrast Kelsen’s conception of sovereignty with that of Schmitt, whose ideas have drawn considerable attention among some IR specialists recently in part because of his connection with one of the founding figures of the discipline, Morgenthau.¹²

For my part, I want to compare Schmitt and Kelsen for a number of reasons. For one thing, Schmitt, unlike Kelsen, was an essentialist; rather than presenting a set of contextual paraphrases of the term ‘sovereignty’, Schmitt formulated what to him

⁷ *Ibid.*, p. 152.

⁸ Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986), p. 229.

⁹ Jean Bodin, *Six Books on the Commonwealth*, abridged and translated by M. J. Tooley (Oxford: Blackwell, 1967), pp. 25, 28.

¹⁰ Emmeric de Vattel, *The Law of Nations*, trans. by C. G. Fenwick (Washington, DC: Carnegie Institution, 1916), II, iii, 56.

¹¹ Krasner, *Sovereignty*, pp. 33, 82.

¹² See, for example, Michael Williams, *The Realist Tradition and the Limits of International Relations* (Cambridge: Cambridge University Press, 2005).

was the *essence* of sovereignty as a political phenomenon. So the contrast is interesting. Moreover, despite his stature as an eminent legal theorist of the twentieth century with some important messages to impart, Kelsen has been almost entirely neglected in the contemporary IR discussion of sovereignty; and there is also a case for presenting Schmitt's ideas, with some precision, to the IR audience to whom they are still relatively unfamiliar – especially when some key aspects of Schmitt's argument appears worryingly relevant to understanding contemporary practices of sovereign states. But, more fundamentally, I compare Kelsen and Schmitt because no pair that I can readily think of, from among the more recent contributors to the debates about state sovereignty, quite matches this pair in enabling us to consider the intertwining of law and politics in the phenomenon of sovereignty so economically and forcefully.

In this article, I am also interested exploring what sovereignty may *mean* in the sense of what may *follow from* (differing conceptions of) sovereignty. For instance, does non-intervention really follow from sovereignty as is commonly asserted in standard IR texts and regular foreign policy pronouncements? Does state sovereignty necessarily breed arbitrary violence as is increasingly feared in the current political climate of 'war on terror'? Is sovereignty a relatively benign factor or, on the contrary, a pernicious one for the pursuit of international or cosmopolitan goals? By way of bringing some order to the field cluttered with contentious opinions, I want to see what follows from the two rather different, though interconnected, conceptualisations of sovereignty found in the writings of Kelsen and Schmitt – for, I believe, their contending conceptions shed valuable light on the presence of divergent views about the implications of sovereignty.

In the next section I explain Schmitt's notion of sovereignty, how it relates to his other ideas, especially the sovereign right of war. I note in passing a close affinity between Schmitt's notion of sovereignty and Morgenthau's. I move then to Kelsen's idea of sovereignty which, by contrast, does not entail any substantive sovereign rights at all. In explicating Kelsen's idea, I refer, in passing, to the argument of his Vienna School followers, Verdross and Kunz, and briefly compare their view of state sovereignty with a closely related formulation by Manning and his English School disciple, James. This is not because I specially want to spell out the English School view of sovereignty (which, incidentally, is not unified). I refer to Manning and James, the latter being the most dedicated analyst of sovereign statehood within the English School, simply because they help us understand better Kelsen's position and its relationship with Schmitt's. I then move on to show that, despite the apparent disjunctions in these writers' views of 'sovereignty', they all share an understanding of a key aspect of our social life, or what I shall call 'the practice of sovereignty', the precise meaning of which will be explained later. I argue that in this sense their divergent renditions of 'sovereignty' are interconnected. In the final section, I briefly examine some standard contentions about sovereignty's implications, paying attention to Kelsen's and Schmitt's conceptions as well as what unites the two.

I should enter a few disclaimers at this point. First, it is not my aim here to present a historical survey of the changing conceptions of 'sovereignty',¹³ much less to

¹³ Compare Janice E. Thomson, *Mercenaries, Pirates & Sovereigns* (Princeton, NJ: Princeton University Press, 1994); Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995); Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social*

explore a timeless definition of it,¹⁴ or to engage in the survey of the contemporary IR literature on sovereignty.¹⁵ My purpose is to analyse Schmittian and Kelsenian conceptions of sovereignty, examine how they interrelate, and, on that basis, to build a first step towards a more careful analysis of the implications of sovereignty. Second, this article is an exercise in conceptual analysis. Empirical study which builds on such an analysis is contemplated, but goes beyond the scope of the present article. Third, I focus here on state sovereignty and do not deal with national or popular sovereignty. However, the advocates of popular or national sovereignty may endorse the division of the world into sovereign states, or they may be critical of it; either way, they, too, will need to think carefully about state sovereignty and its implications.¹⁶ Fourth, due to space limitation, I will not deal with the question of the erosion (or otherwise) of state sovereignty in the face of the increased role of non-state actors¹⁷ – although, in my view, the Kelsen-Schmitt contrast also gives an important insight into the reason why the debate on this issue remains inconclusive.

Schmitt, the political, and the sovereign right of war

Schmitt's idea of 'sovereignty' is grounded in his concept of 'the political'.¹⁸ For him, 'the political' is a category of human activity comparable with 'the moral, aesthetic, and economic' in that they each involve an antithetical distinction. In morality, the final distinction may be between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable. Since these distinctions are independent of one another, the corresponding realms, according to Schmitt, are mutually independent.

In his considered view, the specifically 'political' distinction, upon which 'political' actions and motives are rooted, is that between friend and enemy.¹⁹ And, according

Identity, and Institutional Rationality in International Relations (Princeton, NJ: Princeton University Press, 1999); Hideaki Shinoda, *Re-Examining Sovereignty: From Classical Theory to the Global Age* (Houndmills, Basingstoke: Macmillan Press, 2000); Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2001); Constantin Fasolt, *The Limits of History* (Chicago, IL: The University of Chicago Press, 2004).

¹⁴ Philpott identifies 'supreme authority within a territory' as the core meaning of 'sovereignty' which, according to him, is 'broad enough to encompass much of the diversity, but discrete enough to be useful'. Philpott, *Revolutions*, p. 16. This serves his purpose well. By contrast, this article seeks a much finer analysis of two key conceptions of sovereignty and their implications, and it will not do to stop at a rough idea.

¹⁵ One example of this is John Hoffman, *Sovereignty* (Buckingham: Open University Press, 1998), which, however, I did not find very helpful.

¹⁶ In Philip Cunliffe's view, 'Popular sovereignty . . . cannot belong to the body of the people separate from the state'. Whether 'the state' in this context has to be a 'sovereign' state, and in what sense, is an interesting question. See Cunliffe, 'Sovereignty and the Politics of Responsibility', in Christopher J. Bickerton, Philip Cunliffe and Alexander Gourevitch (eds.), *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: London University College, London Press, 2007), pp. 39–57 at p. 50.

¹⁷ See a succinct summary in Philpott, *Revolutions*, pp. 24–5; and, in more detail, an excellent collection of essays, Rodney Bruce Hall and Thomas J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

¹⁸ The following is based on my reading of Carl Schmitt, *The Concept of the Political*, trans. by George Schwab (Chicago, IL: The University of Chicago Press, 1996), pp. 25–7.

¹⁹ Schmitt uses 'he' to refer to 'the enemy' but, he says, '[t]he enemy is not the private adversary whom one hates'; '[a]n enemy exists only when . . . one fighting collectivity of people confronts a

to him, 'the political' is an independent category because, he argues, none of the other distinctions, such as good and evil, is *necessary* or *sufficient* for this distinction. He adds that, measured in terms of the degree of intensity of bonding, '[t]he distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation'.²⁰

Intriguingly, however, Schmitt envisages that human motives other than the political may be 'sufficiently strong' to bring about the emergence of the friend-and-enemy (or 'political') grouping. But he also suggests that those motives 'intensify' to the political level such that the motives are 'no longer *purely* religious, moral, or economic, but *political*'?²¹ There is some confusion here. On the one hand, non-political motives may be strong enough to make the contending groups 'political'; on the other hand, such motives may intensify to the level where the groups become 'political'. This tends to suggest that it is the mere intensity of association/dissociation that constitutes 'the political'; but then the political will no longer be a distinct category.²²

One possible answer to this puzzle is found in the following consideration. Schmitt explains that a class in the Marxian sense ceases to be something purely economic and becomes a political factor when, for example, Marxists approach the class struggle seriously and treat the class adversary as a real enemy and fight him either in the form of a war of a state against state or in a civil war within a state.²³ He then adds: 'The real battle is then of necessity no longer fought according to economic laws but *has . . . its political necessities and orientations, coalitions and compromises, and so on*'.²⁴ Here Schmitt appears to subscribe to a fairly common conception of the political as necessarily involving 'prudence'. The antithetical distinction constituting 'the political' in Schmitt's thinking may therefore be '*prudent-imprudent*' *from the viewpoint of the survival of the political entity and its identity*. This interpretation is supported by his suggestion that 'the politically reasonable course [could] reside in avoiding war',²⁵ where the adverb, 'politically' can be understood to mean 'along the prudent-imprudent axis'. Some such modification appears necessary to make sense of Schmitt's elusive concept of 'the political' as a distinct category.

Be that as it may, the distinctive function of politics, according to Schmitt, is to draw a line between friend and enemy and to decide whether or not an extreme situation has arisen, necessitating the resort to war and other emergency measures, such as the suspension of the constitution. This is the basis of his well-known definition of 'sovereign' as 'he who decides on the exception'.²⁶ To illustrate how the key concepts work in his scheme, Schmitt wrote that under Bismarck there was no

similar collectivity'. Importantly, 'the enemy' is not a 'foe' that has to be annihilated: 'the enemy' is a public enemy 'who fights against us', who needs only to be 'compelled to retreat into his borders'. Schmitt is critical of such crusading ideas as 'war to end all wars' or 'war fought in the name of humanity'. Schmitt, *The Concept*, pp. 28, 29n, 36, 54.

²⁰ Ibid., p. 26.

²¹ Ibid., p. 36, emphasis added.

²² See Martti Koskeniemi, *The Gentle Civilizer*, p. 436, on Morgenthau's influence on Schmitt on this point. I do not think, however, that Schmitt can be said to have abandoned the idea of the political as a distinct category.

²³ Schmitt, *The Concept*, p. 37.

²⁴ Ibid., p. 37, emphasis added.

²⁵ Ibid., p. 33.

²⁶ Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. by George Schwab (Cambridge, MA: MIT Press, 1985), p. 5.

effective opposition by the Church, the trade unions or other such non-state groups against the government of the German Reich if, in some extreme cases, it wanted to wage war. This, for Schmitt, showed the presence of ‘sovereignty’, a ‘political entity’, a ‘decisive entity’, ‘the supreme, that is, in the decisive case, the authoritative entity’.²⁷

It is not entirely clear from the relevant passage, however, where precisely Schmitt thought this ‘sovereignty’ was located; who *he* was that, in Schmitt’s own formula, possessed ‘sovereignty’. Was it Bismarck? Was it the government of the German Reich? Or was it the Reich itself? That this is not entirely clear is itself significant – for it tends to show that Schmitt was not centrally concerned with the juridical questioning regarding the precise location of sovereignty at any rate in the works cited here.

Following Schmitt closely, however, Morgenthau wrote:

that authority within the state is sovereign which in case of dissension among the different law making factors has the responsibility for making the final binding decision and which in a crisis of law enforcement, such as revolution or civil war, has the ultimate responsibility for enforcing the laws of the land. That responsibility must rest somewhere – or nowhere, but it cannot be both here and there at the same time . . . If it rests nowhere . . . in times of constitutional crisis either one of the constitutional authorities will usurp that responsibility, or else revolution will invest somebody, a Napoleon or a Council of People’s Commissars, with supreme authority to end chaos and to establish peace and order.²⁸

But, for Schmitt, it was the nature of the grouping that was more important than the question of who the sovereign was/was to be within it. He wrote:

that grouping is always political which orients itself toward this most extreme possibility [of war]. This grouping is therefore always the decisive human grouping, the political entity. If such an entity exists at all, it is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.²⁹

Here Schmitt is talking of the entire grouping as a sovereign political entity. Moreover, in his view, the sovereign quality of a political entity resides there continuously although it is in times of crisis that it most clearly manifests itself.

In short, the state, when it functions and qualifies as a properly political entity, is the supreme authority in the sense of the authoritative-entity-in-decisive-cases that makes decisions to resort to war against its enemy, internal or external, when it judges it necessary to do so. For Schmitt, therefore, the right to resort to war is intrinsic to the state as a political entity: ‘To the state as an essentially political entity belongs the *jus belli*’.³⁰

This was in fact a fairly common view before the First World War and perhaps especially so in Germany.³¹ The main contention then was that this primordial right of sovereign states to declare war to settle international disputes, unresolved by diplomacy, should not be compromised by stipulating new pacifist-inspired

²⁷ Schmitt, *The Concept*, pp. 43–4.

²⁸ Hans J. Morgenthau, ‘The Problem of Sovereignty Reconsidered’, *Columbia Law Review*, 48 (1948), p. 361.

²⁹ Schmitt, *The Concept*, p. 38.

³⁰ *Ibid.*, p. 45.

³¹ A good example is found in Karl von Stengel, *Weltstaat und Friedensproblem* (Berlin: Reichl, 1909).

international legal obligations. But such a view was not confined to ‘bellicist’ writers. It is well known, for example, that the US refusal to join the League of Nations was partly based on the claim that the US Congress’s constitutional right to declare war should not be compromised. Now, in its ‘war on terror’, the US argues that the constitutional right of the President as the Commander-in-Chief entitles him to sanction (what amounts to) torture in interrogation, notwithstanding the Convention against Torture and the relevant US statute that implements its international legal obligation in this regard.³²

Kelsen, Völkerrechtsunmittelbarkeit, and constitutional independence

Kelsen is well-known for his hierarchical view of the law and his insistence that the state is nothing other than a personification/hypostatisation of a national legal system.³³ He took seriously the question of whether national legal systems were logically prior to (and in that sense, higher than) the international legal system or, on the contrary, the latter was logically prior to (and higher than) the former. He considered that ‘sovereignty’ was a quality attributable exclusively to the highest legal system,³⁴ so that, in his view, there were only two theoretical alternatives: either national legal systems were sovereign or the international legal system was.³⁵

Setting up the problem in this way, Kelsen, however, came to the view that whether positive international law is logically prior to/higher than national legal systems in the hierarchy of norms is undecidable on any objective grounds. For him, this was a matter of subjective choice based on differing world views.³⁶ Despite this indecision, he added one important observation: if international law is to be thought of as being logically prior to/higher than national legal systems in the worldwide hierarchy of norms, then the international legal system is ‘the highest sovereign legal order’; but if ‘the states – that is, the national legal orders – are nevertheless referred to as “sovereign”, then this “sovereignty” can only mean that the national legal orders are subordinated *only* to the international legal order’.³⁷

Verdross and Kunz, however, went beyond Kelsen and argued that the logical primacy of the international legal system over national legal systems can be demonstrated objectively.³⁸ This amounts to an assertion that the international legal

³² See Office of Legal Counsel, US Department of Justice, ‘Memorandum for Alberto R. Gonzales, Counsel to the President – Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A’, 1 August 2002.

³³ Hans Kelsen, *Pure Theory of Law*, trans. by Max Knight (Berkeley, CA: University of California Press, 1970), pp. 221–78, 286–319.

³⁴ Kelsen, *Pure Theory*, p. 199.

³⁵ This is a *theoretical* question about how to make sense of international/national law. It should not be confused with a substantive *legal* question regarding the consequences of a possible conflict between international law binding a particular state and the national law of that state. See further Kelsen, *Pure Theory*, pp. 328ff.

³⁶ He contrasted subjectivism (atomism, egoism) and objectivism (a society-centred view) as underlying the two opposing interpretations. He warned that subjectivism would lead to the view that only one state is sovereign, but did not think that this was a scientifically untenable interpretation. Kelsen, *Pure Theory*, pp. 339ff.

³⁷ *Ibid.*, p. 217; emphasis original.

³⁸ Their (in my view correct) argument was that the primacy-of-national-law view could not explain the binding nature of customary international law without recourse to a fiction that it was based on

system (or its hypostatisation, the international legal community) is ‘sovereign’. However, in line with Kelsen’s acknowledgement, Verdross and Kunz also suggested that there was a sense in which states could be called ‘sovereign’, but that ‘sovereignty’ then could only mean sovereign states’ ‘*Völkerrechtsunmittelbarkeit*’ (‘being in unmediated contact with/directly obligated by international law’). It is important to note that *Völkerrechtsunmittelbarkeit* is a status or ‘a fullness of competences’,³⁹ and not itself a set of legal rights. What rights sovereign states have will need to be determined in the light of the historically contingent content of the law of which they are unmediated subjects.⁴⁰

This line of thinking accords with Kelsen’s rejection of the doctrine of the fundamental rights of states.⁴¹ State sovereignty entails no specific legal rights for, in his view, they can only derive from the law and the rights of states can only be identified through an analysis of historically contingent positive international law. There is therefore no such thing as fundamental rights of states that are trans-historical and intrinsic to the very idea of the state. The right of war, contrary to Schmitt’s contention, is not intrinsic to state sovereignty – for there is no right that is intrinsic to it, according to Kelsen.

Amplifying Kelsen’s thinking, Kunz explains: ‘Sovereign Britain was, in 1914, free to go to war, but not in 1933; sovereign Brazil, which is neither bound by the League of Nations Covenant nor by the Kellogg Pact, was free to do so even in 1933’.⁴² Furthermore, ‘[t]he domestic affairs are not such in virtue of their inherent nature and cannot be determined a priori – no affair is necessarily a “domestic affair” – but only by analyzing the positive international law. In 1933, the treatment of her minorities is a domestic affair for France, but not for Poland; but in *both* cases this is so in virtue of the supraordinated international law.’⁴³ And, Kunz adds, it was Kelsen’s merit to have shown ‘that the “equality” of [sovereign] states is possible only under the supposition that international law is supraordinated to the single states . . . all states are “equal” because they are all subordinated in the same way to international law’.⁴⁴ Thus, not even so-called ‘sovereign equality’ is an inherent right of sovereign states, but only a historically contingent institutional fact that all sovereign states are equally bound by positive international law.⁴⁵

states’ tacit consent; and that it failed to explain why international law was binding on states after revolutionary changes of their constitutions. Josef Kunz, ‘The “Vienna School” and International Law’, in Kunz (ed.), *The Changing Law of Nations: Essays on International Law* (Ohio State University Press, 1968), p. 85.

³⁹ Kunz, ‘The “Vienna School”’, p. 85.

⁴⁰ In addition to sovereign states, insurgents in a civil war have long been recognised in international law as subjects with certain rights and duties. There are other entities in world politics which international law may be said in some exceptional cases to confer a very limited degree of international legal personality/competence, for example, the UN, individuals and companies. See Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th edn (London: Routledge, 1977), pp. 91–108. But a ‘fullness of competences’ in international law belongs exclusively to sovereign states.

⁴¹ Kelsen, *General Theory of Law and State*, trans. Anders Wedberg, reissue (New York: Russell & Russell, 1961), pp. 248–54.

⁴² Kunz, ‘The “Vienna School”’, p. 86. In the absence of a relevant legal constraint, Kunz is saying, states are *free* to go to war. By contrast, Schmitt’s contention was that sovereign states had a fundamental *right* of war. What Kelsen denies, and Schmitt seems to insist on, is the very possibility of such a *right* prior to international law.

⁴³ *Ibid.*, p. 86.

⁴⁴ *Ibid.*, p. 86.

⁴⁵ Kelsen, *General Theory*, pp. 252–4.

Central to the Vienna School's conception of state sovereignty outlined above is the distinction between a member state of a federal union and the federal union itself. It is argued that the former is not a sovereign entity because it is not in direct contact with international law whereas the latter is sovereign because international law binds it directly.⁴⁶ This way of contrasting those states which are 'sovereign' and those 'states' which are not is also found in Manning and James.⁴⁷ As Schmitt explains, '[i]n the newly founded German Reich it became necessary after 1871 to advance a principle for distinguishing the authority of member states from the federal state. On the basis of this principle, the German theory of the state distinguishes between the concept of sovereignty and the concept of the state'.⁴⁸ It is interesting that the Vienna School of Jurisprudence and the English School of International Relations appear both to have inherited the idea of sovereignty – rooted in the historically specific experience of nineteenth-century Germany – as that which, *among other things*, distinguishes a federation from its member states.

However, neither Manning nor James equates sovereign statehood with *Völkerrechtsunmittelbarkeit*. For Manning, 'sovereign statehood' does not mean 'unmediated subordination to international law' for, logically, it would be possible for there to be sovereign states without them creating an international society governed by international law. Therefore, 'international law' cannot be conceptually integral to the definition of 'sovereign statehood'.⁴⁹ 'Sovereignty' of the 'sovereign state', for Manning, is definable not in terms of 'subordination to international law' but in terms of what he called 'constitutional insularity or self-containedness'⁵⁰ – or what James, following Manning, later called 'constitutional independence'.⁵¹

The interconnection of Kelsen and Schmitt

The view that international law (or international legal community) is sovereign – a view towards which Kelsen was sympathetic (and Verdross and Kunz accepted) – and Schmitt's view of state sovereignty based on the concept of the political appear so wide apart as to be unbridgeable. But, as I explain below, the two conceptions are aspects or effects of their different ways of making sense of a social universe they experience or assume in common.

It is important to note that the single most important principle which guides Kelsen's thinking is the logical principle of 'no "ought" from "is"' associated with Hume: only a norm can beget a norm, Kelsen insists, so that any norm or normative system must be traced back logically to the highest norm of all, or what he called 'the

⁴⁶ *Ibid.*, pp. 308–28; Kunz, 'The "Vienna School"', pp. 98ff.

⁴⁷ See, in particular, James, *Sovereign Statehood*, pp. 26–30.

⁴⁸ Schmitt, *Political Theology*, p. 17.

⁴⁹ Manning, 'The Legal Framework', p. 307.

⁵⁰ *Ibid.*, p. 308.

⁵¹ James, *Sovereign Statehood*. According to him, the word 'sovereignty' is used to mean a number of things, but *when it is used to refer to the condition of the membership of international society* it means the state's constitutional independence. It is worth noting here that, even though international law does not form part of James' articulation of the concept of sovereign statehood, what he interprets as a key institutional feature of the world does, namely the idea that the world is organised as a society of sovereign states which has a *clear* membership rule.

basic norm'.⁵² Kelsen, as we saw, considered that the logical primacy of international law over the national legal systems could not be demonstrated objectively. But he clearly sympathised with the idea of the primacy of international law.⁵³ When he tentatively accepted that the positive international legal system was indeed higher than national legal systems, he argued that the basic norm of all legal systems must, in that case, be the basic norm of positive international law. And he argued that this basic norm 'establishes custom among states as a law-creating fact'⁵⁴ and stipulates that '[t]he States ought to behave as they have customarily behaved'.⁵⁵

But the whole intellectual enterprise of seeking the origins of positive legal norms in the so-called basic norm is doomed. All it achieves is a redundant circular reassurance that when we consider a legal system to be a source of obligation, it is implicit in our thought that we ought to treat that system as a source of obligation. It is unsurprising therefore that Kelsen eventually came close to abandoning his doctrine of the basic norm altogether.⁵⁶ But if we take the view that the enterprise of looking for a normative foundation of positive law is bound to fail, we will have to accept *some version* of the idea, associated earlier with Jellinek (1960: 337ff), of 'the normative power of the factual'.⁵⁷ Positive legal norms stem from certain factual situations; they have their origins in facts.⁵⁸

One of the factual conditions necessary for the operation of the law is identified by Schmitt, according to whom the authoritative decision regarding the friend/enemy distinction is the key, for this sustains a political community (and its legal system) by protecting it (and its fundamental laws) against an external, as well internal, enemy. The rest is routine; but the routine is made possible by the exceptional circumstances in which critical decisions to use violence against the enemy are taken in the sovereign act of the political community.

One important qualification needs to be entered here. Schmitt was in fact dismissive of the idea of the 'normative power of the factual' which, in Jellinek's version, gave a psychological explanation of the emergence of customary law.⁵⁹ The contention here, however, is simply that the operation of the law depends, among

⁵² Kelsen, *Pure Theory*, p. 193.

⁵³ Kunz, 'The "Vienna School"', pp. 87–8.

⁵⁴ Kelsen, *Pure Theory*, p. 216.

⁵⁵ Kelsen, *General Theory*, p. 369. The legal validity of customary international law derives from this basic norm. One of the customary legal principles is *pacta sunt servanda*, from which flows treaty-based international law. Another is what Kelsen calls the principle of effectiveness, which acknowledges a constitution that is, by and large, effectively a legally valid one. From a valid national constitution then follow all the national legal norms and decisions: Kelsen, *General Theory*, pp. 366ff. The idea that positive international law contains within it the principle of effectiveness is tantamount to the idea that international law acknowledges certain facts (such as a successful revolution or *coup d'état*) as creating legal obligations. Kelsen needs to claim that positive international law contains the *principle* of effectiveness to sustain his subscription to the Humean position.

⁵⁶ Kelsen came to acknowledge that his basic norm was a fiction – as 'the ought' of the basic norm was not backed by a will. See Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968), p. 158.

⁵⁷ Jellinek, *Allgemeine Staatslehre*, pp. 337ff.

⁵⁸ It does not follow that the content of the law can be entirely arbitrary. According to Hart, certain facts of life shape a range of general principles which it is rational/functional for national legal systems to incorporate. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). It does not follow either that it is impossible or inappropriate to try to assess the ethical validity of positive law.

⁵⁹ Schmitt, *Political Theology*, p. 3; Jellinek, *Allgemeine Staatslehre*, pp. 337ff.

other things, on *the fact* that sovereign political decisions are made. Decisions, of course, involve making a judgement each time – very unlike the process Jellinek himself had in mind under the rubric of the ‘normative power of the factual’.

It may be supposed that, according to Schmitt, sovereign power is a dormant potentiality that becomes activated in the face of critical circumstances. Schwab writes that Schmitt’s ‘sovereign slumbers in normal times but suddenly awakens when a normal situation threatens to become an exception’.⁶⁰ But this picture obscures the fact that, according to Schmitt, the state of exception is a matter for a sovereign *decision* (and not mere *acknowledgement*) and also neglects the constant operation of sovereignty in routine circumstances.

The state of exception, in which the routine operation of the law is suspended, is not radically discontinuous with the routine, but only an extreme case where the element of decision integral to, and necessarily present to varying degrees in, the operation of any normative system, is maximalised. According to Agamben, Schmitt maintained that a (legal) ‘decision can never be derived from the content of a norm without a remainder’.⁶¹ Application of law to concrete cases is not like a logical subsumption of a particular under the general, but reflective, enunciative and backed by institutional powers – a point which, it is important to notice, Kelsen also acknowledged.⁶² The state of exception, in which the element of decision integral to any operation of the law is maximalised, however, differs from anarchy and disorder; in the state of exception, ‘order in the juristic sense still prevails’ as ‘the state remains, whereas law recedes’.⁶³ The routine circumstance, then, is where the law operates more or less fully within the order present in the state.

Schmitt’s sovereignty then is not a dormant potential that becomes suddenly activated in the face of crises, but embedded in a routine practice – what I wish to call ‘the practice of sovereignty’ – whereby an ultimately unauthorised authority continuously authorises itself as the authority and the rest by and large accept this, acquiesce in this, or are made to do so. I say ‘ultimately unauthorised’ here in the sense that there is no independently valid ‘basic norm’ that validates the authority. Of course, the state authority’s rule is invariably accompanied by some justificatory account in terms of security, democratic participation, independence from the oppressor, racial or ethnic unity, a good/correct form of life, and so on. But, in my view, the essence of the practice of sovereignty lies in the fact that the justification, integral to the practice of sovereignty, is never complete yet the authority is asserted and by and large accepted, though not unchallenged.⁶⁴

We should note here that Kelsen’s doctrine of the basic norm (as a commanding principle of a legal system) is a way of restating (or articulating) what goes on in the minds of ‘the rest’ when they, perhaps even forgetting that they are acquiescing, conceive of the ultimately unauthorised authority as the authority. And the idea of

⁶⁰ Schmitt, *Political Theology*, p. xviii.

⁶¹ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL: University of Chicago Press, 2005), p. 36.

⁶² Kelsen, *Pure Theory*, pp. 348ff. According to him, the idea that legal norms have only one true meaning is a fiction; for the law to be operative, it must be interpreted by a law-applying organ; and the law-applying organ’s interpretation – which he says is ‘necessarily authentic’ – is not an act of cognition, but of will, involving discretion.

⁶³ Schmitt, *Political Theology*, p. 12.

⁶⁴ Such a practice is widespread in society and is not confined to the operation of the state. ‘State sovereignty’ and the ‘practice of sovereignty’ are not the same.

the sovereign international legal system – towards which Kelsen was sympathetic, and to which Verdross and Kunz subscribed – derives from the Vienna School’s singularly ‘normativistic’ belief that for an unauthorised authority at the national level to be treated as an authority at all, it must *logically* be deemed to have received authorisation from a higher system of norms, that is, the system of positive international law.

Here I may add that the more empirically-minded members of the English School have eschewed such ‘normativism’. Thus, according to Manning:

The authority of the state derives . . . from its constituted power; its power from the disposition towards it of those over whom it claims authority. What Austin called ‘the habitual obedience of the bulk of the community’, and what MacIver called ‘the will for the state’, is basic to the very existence of the state – and is the source of its power, and hence of its authority.⁶⁵

And, according to James: ‘legitimacy in governed societies is finally based on nothing more – but nothing less – than a significant congruence between the *decisions* of those who purport to rule and the actual behaviour of their alleged subjects’.⁶⁶

The conceptions of sovereignty advanced by Schmitt and Kelsen appear far apart; yet they are, in their own ways, trying to make sense of their common experience of the social universe in which the practice of sovereignty is deeply embedded. One way to express this point may be to say that the two legal theorists’ differing conceptions of sovereignty are commensurate at the level of their social ontology.

Implications of sovereignty

I have so far examined two conceptions of sovereignty, Kelsen’s and Schmitt’s, and identified the practice of sovereignty as uniting the two conceptions ontologically. By Kelsen’s conception I mean his idea of state sovereignty as *Völkerrechtsunmittelbarkeit*; and by Schmitt’s I mean his idea of the state as an authoritative entity in decisive cases. I want now to take a brief look at what sovereignty *means* in the sense of what *follows from* it. In particular, I want to offer a critical observation on some widely accepted notions: that non-intervention follows from sovereignty and that state sovereignty stands in the way of internationalist and cosmopolitan projects while breeding arbitrary violence domestically.⁶⁷ Due to space limitation, however, the discussion centres on conceptual elucidation.

Non-intervention

It is usually taken for granted that the principle of non-intervention is a consequence of state sovereignty.⁶⁸ Does the concept of state sovereignty logically entail the

⁶⁵ Manning, ‘The Legal Framework’, p. 307, emphasis original.

⁶⁶ James, *Sovereign Statehood*, p. 155, emphasis added.

⁶⁷ I am using a blanket term ‘to follow from’, which covers at least three distinct items: (supposedly) logical entailments of a particular conception of sovereignty; empirical effects of the prevalence of a certain conception of sovereignty; and empirical effects of the practice of sovereignty. I say ‘supposedly’ because, as will be explained, there is a problem with the idea of a logical entailment of a concept. See W. V. O. Quine, ‘Two Dogmas of Empiricism’, in his *From a Logical Point of View: Logico-Philosophical Essays*, 2nd edn. (New York: Harper & Row, 1961), pp. 20–46.

⁶⁸ For example, we find in one North American textbook that I picked at random: ‘Sovereignty . . . means that states are not supposed to interfere in the internal affairs of other states’. Joshua

principle of non-intervention, however? If we follow Kelsen, the answer is clearly in the negative: what a state legally ought or ought not to do to another state can only be answered by interpreting positive international law. There can be no *a priori* answer to the range of circumstances, if any, under which states may legally resort to forceful intervention.⁶⁹ Thus, for example, the question of whether and under what conditions it is legally permissible for states to resort to humanitarian intervention is not one that can be answered by analysing the concept of state sovereignty itself (or, for that matter, the idea of ‘humanity’). The argument to the effect that the principle of non-intervention is implicit in the concept of sovereignty only works by first unconsciously/unreflectively feeding the principle into the concept and then deducing it from the concept on a mistaken belief that the principle was there *a priori*.

The following analogy may be instructive here. If two people are ‘married’ to each other, we may suggest that it follows logically from the very idea of ‘marriage’ that one of the two, and only one of the two, is a male person. But this is only true in a world in which heterosexual marriage alone counts as ‘marriage’. And it is this social convention that makes us say that one, and only one, of a married couple is a male person. In other words, what is claimed to be a logical implication of a concept has been read into the concept in advance of our logical operation by the convention under which we live.⁷⁰ This is exactly analogous to the case where the principle of non-intervention is said to be logically implicit in the very concept of state sovereignty.

A related argument to the effect that the principle of non-intervention is implicit in the *principle* of sovereignty, which is central to Vincent’s classical work on the subject, is no better.⁷¹ Having defined ‘sovereignty’, in line with Hinsley’s oft-quoted formula,⁷² as a state of affairs in which ‘there is a final and absolute political authority in the political community’ and ‘no final and absolute authority exists elsewhere’, Vincent concludes: ‘[i]f a state has a right to sovereignty, this implies that other states have a duty to respect that right by, among other things, refraining from intervention in its domestic affairs’.⁷³ However, Vincent does not explain whether or on what grounds states can be said to have a right to sovereignty in his sense. Kelsen would respond that this right, like the duty of non-intervention itself, is located in (historically contingent) positive international law. If the principle of sovereignty logically entails the principle of non-intervention, it is because positive international law gives the former a (historically contingent) substantive content – that sovereign states must be free of forceful interference by other states against their political

Goldstein, *International Relations* (New York: Longman, 2004), p. 90. Quoting Mohammed Ayoob, Cunliffe writes that sovereignty ‘acts as a “no trespassing” sign protecting the exclusive territorial domain of states’. Cunliffe, ‘Sovereignty and the Politics of Responsibility’ (see n. 16 above), p. 38.

⁶⁹ The same point can be made on the basis of James’s observation that ‘sovereignty’ understood as ‘constitutional independence’ is a factual condition, *Sovereign Statehood*, p. 48. From the mere fact of a given state’s constitutional independence, no international legal principle can logically follow regarding whether and under what conditions its independence ought to be respected by other sovereign states. For this, we need to know the law itself.

⁷⁰ The more powerful the convention, the less we realise that it is the force of the convention that is doing much of the logical work. The most powerful of all may be logical principles themselves.

⁷¹ R. J. Vincent, *Nonintervention and International Order* (Princeton, NJ: Princeton University Press, 1974), *passim*.

⁷² F. H. Hinsley, *Sovereignty* (London: Watts, 1966), p. 26, emphasis original.

⁷³ Vincent, *Nonintervention*, p. 14, emphasis original.

independence and territorial integrity – of which, it should be clear, Vincent's principle of non-intervention is a simple restatement.

Vincent's insistence that the principle of sovereignty comes first, from which the principle of non-intervention is logically deducible, is part of his rhetorical move to accord a fundamental status to the principle of non-intervention within the contemporary system of sovereign states. But the exact content of the principle of non-intervention is historically contingent and it is partly through finding out what it prohibits that we come to know what rights sovereign states enjoy within a given system or 'what sovereignty *means*' in that system.

It is, of course, only a short step from this Kelsenian stance to the position to which IR constructivists and institutional historians subscribe – that sovereignty (or 'what sovereignty *means*' in the sense in which we are discussing the subject) is a historically contingent social and political product, a dependent variable. Thus Christian Reus-Smit views 'sovereignty as a variable, practically constituted institutions, its precise content and political implications varying with time and context'; and Janice Thomson suggests strikingly, 'If international relations theory is to produce a theory of change, there is no better place to begin than with sovereignty'.⁷⁴

Schmitt would of course reject such a non-essentialist line of thinking about sovereignty. He characterised the enemy as he who 'intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence'.⁷⁵ Repulsing and fighting such an enemy, according to him, is a *right* of any sovereign state. It is unclear whether Schmitt considered that a correlative duty not to 'negate his opponent's way of life', that is, duty of non-intervention, follows on from the primordial right of sovereignty.⁷⁶ But, more fundamentally, it is unclear whether the right to repulse, in Schmitt's sense, is meant to be an international legal right and whether the duty of non-intervention, if he did indeed consider this to be a correlative duty, was also an international legal obligation. He merely asserted, as if it is in the nature of things, that such a right *is*. He could perhaps be understood as saying that international law *needs to* acknowledge such a (to his way of thinking, primordial) right, but I suspect his claim was stronger. For Schmitt, this right was primordial because he saw the essence of the political in human intergroup enmity, conflict and violence.⁷⁷

Regarding what I have called the 'practice of sovereignty' – whereby an ultimately unauthorised authority continuously authorises itself as the authority and the rest by and large accept this, acquiesce in this, or are made to do so – it is difficult to know what follows from it and, in particular, whether this has had any causal impact on the content of international law with respect to non-intervention. But the practice of sovereignty would appear at least consonant with the practice of non-intervention between the authorities. Furthermore, the legitimacy of the authorities would be

⁷⁴ Reus-Smit, 'Human Rights and the Social Construction of Sovereignty', *Review of International Studies*, 27 (2001), p. 538; Thomson, *Mercenaries*, p. 153. See also Cynthia Weber, *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (Cambridge: Cambridge University Press, 1995); and Thomas J. Biersteker and Cynthia Weber (eds.), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996).

⁷⁵ Schmitt, *The Concept*, p. 27.

⁷⁶ On Schmitt's idea of non-intervention between a number of Great Power blocs, see his *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* (Berlin: Deutscher Rechtsverlag, 1939).

⁷⁷ See Williams, *The Realist Tradition*, p. 89, note 23.

reinforced by the enshrinement of the principle of non-intervention in the system of norms that govern their relationships. We may therefore expect the principle of non-intervention to become broadly accepted by sovereign authorities.

However, if there emerges a hegemonic authority or a hegemonic bloc, it may try to universalise a pursuit of certain values which it claims are integral to its legitimacy, for example, the pursuit of certain human rights. Such a universalistic self-assertion of a hegemonic authority, while not entirely undermining the principle of non-intervention, may come to alter its application in a range of circumstances as we witnessed in the nineteenth century Great Power practice of intervention. It is also possible that some qualifications to the general principle of non-intervention come to be accepted – along the lines envisaged, among others, by Nick Wheeler⁷⁸ – through a gradual emergence of a more worldwide consensus regarding what clearly delegitimises an authority to govern.

In summary, a commonly held view that the principle of non-intervention follows straightway from state sovereignty conceals a number of problems. Schmitt's conception of sovereignty, as containing the right to repulse interveners, may or may not be thought to entail a correlative duty not to intervene in the first place. But a more basic problem with the Schmittian line lies in the uncertainty regarding the legal standing of his alleged sovereign rights. Importantly, the Kelsenian conception of state sovereignty (or its variant found in Manning/James) does not logically entail the legal principle of non-intervention and points to the historically contingent nature of the substance of legal norms relating to sovereign governance and limits to intervention. In the world of sovereign states, there may be a strong tendency for the general principle of non-intervention to become accepted internationally, but its precise content is historically variable, depending on the material and ideational circumstances that prevail.

Sovereignty's pernicious effects

State sovereignty is often assumed to get in the way of developing international co-operation.⁷⁹ There is also a cosmopolitan critique of state sovereignty as inherently exclusionary.⁸⁰ Furthermore, there is a view that subjection of life to arbitrary violence is an unavoidable consequence of state sovereignty. Here I wish to make some brief observations on each of these common contentions in turn.

We may begin by noting that there is nothing in the Kelsenian conception of sovereignty to prevent sovereign states from concluding any treaty that widens or deepens international cooperation. Sovereign states can also agree to a treaty

⁷⁸ N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

⁷⁹ In one popular textbook of IR, we find: 'Sovereignty and the legal principles derived from it shape and reinforce international anarchy'. Charles W. Kegley, Jr. and Eugene R. Wittkopf, *World Politics: Trend and Transformation*, 7th edn. (Houndmills, Basingstoke: Macmillan, 1999), p. 507. See also M. R. Fowler and J. M. Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park, PA: Pennsylvania State University Press, 1996), pp. 157ff.

⁸⁰ Andrew Linklater, 'Citizenship and Sovereignty in the Post-Westphalian State', *European Journal of International Relations*, 2 (1996), pp. 77–103; *The Transformation of Political Community* (Cambridge: Polity Press, 1998).

that accords supranational competences to an overarching body, or even, under exceptional circumstances, to sign off their sovereign statehood altogether. There is, in other words, no necessary limit to the range or level of cooperation that could in principle take place between *at present* sovereign states. But, of course, the growth of international cooperation is a slow process because states would generally be hesitant to reduce *the legal freedoms they currently enjoy* – which, as Manning had noted in a passage quoted earlier, is one possible meaning of ‘sovereignty’.

The related idea of state sovereignty as ‘constitutional independence’ may, however, be thought to hinder a cosmopolitan pursuit to reduce those areas in which the outsiders are treated differently from the insiders.⁸¹ But there is nothing in the idea that a given political community is constitutionally independent which logically forces a conclusion that it cannot pursue a policy that takes into account the welfare of its outsiders – along the lines famously envisaged by E. H. Carr among others.⁸² It may be asked how far along this path a sovereign state can proceed without ceasing to be a sovereign state. The Kelsenian approach would reply that it would not lose its sovereign status until it joins a federation or perhaps become part of a neo-medieval institutional arrangement.⁸³ Until that point is reached, cosmopolitan goals are pursued without thereby contradicting the juristic status of the sovereign states concerned.

Of course, this by no means suggests that sovereign states will be easily persuaded to pursue cosmopolitan goals. In general, they would be just as keen to preserve their existing freedom to treat citizens and foreigners differentially as they are to maintain their current international legal liberties. But at least they could not present a supposed conceptual incompatibility between cosmopolitan policies and state sovereignty as a reason for their inability to implement them. Nor do those who argue for the pursuit of cosmopolitan policies need to feel that state sovereignty as such, in the Kelsenian sense, would get in the way.

However, if the Kelsenian conception of state sovereignty is relatively benign, or at least neutral, with respect to the possibility of the furtherance of internationalist and cosmopolitan goals, that may be a sufficient reason for doubting the relevance of the Kelsenian conception to the practice of international politics. The thought here is that state sovereignty *does* get in the way of internationalist and cosmopolitan projects and that therefore any conception of state sovereignty that fails to reveal this is inadequate. A more adequate conception, it may be suggested, is found in the writings of Schmitt.

What follows *strictly logically* from the Schmittian conception of sovereignty in relation to international cooperation and cosmopolitan projects is hard to spell out precisely, however. In his view, sovereign political communities are those which have a freedom, readiness, and capacity to decide for themselves whether and when to fight against whom.⁸⁴ This does not mean that international politics is always warlike. Schmitt wrote:

⁸¹ Linklater, ‘Citizenship’, pp. 94–5, p. 100, note 11, referring to James’s work.

⁸² E. H. Carr, *The Twenty Years’ Crisis 1919–1939* (London: Macmillan 1939).

⁸³ On neo-medievalism, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn. (London: Palgrave, 2002), pp. 245–6.

⁸⁴ De Gaulle’s decision to equip France with an independent nuclear force and withdraw French forces from NATO is one illustration of the Schmittian conception of sovereignty.

It is by no means as though the political signifies nothing but devastating war and every political deed a military action, by no means as though every nation would be uninterruptedly faced with the friend-enemy alternative vis-à-vis every other nation. And, after all, could not the politically reasonable course reside in avoiding war?⁸⁵

Even in the world in which the Schmittian conception prevails, particular wars may be avoided out of expediency.

Nevertheless, it is hard to suppose that Schmittian sovereigns, determined to maintain their countries' freedom, readiness, and capacity to decide 'whether and when to fight against whom', would be seeker-afterers of mutual gains through institutionalised international collaboration – for at the rock-bottom, international politics, according to his conception, is in the Hobbesian state of war.⁸⁶ Furthermore, Schmitt's conception of sovereignty, which attaches central importance to the political community's ability to draw a line between its friend and enemy, would not be conducive for any cosmopolitan project to take root – for, according to that conception, the outsiders are at least as likely to be an enemy as a friend.

The foregoing discussion is not meant to reject Kelsen in favour of Schmitt. Importantly, Kelsen's conception of state sovereignty enables us to note that states are subject to customary international law, one of whose key principles is that treaties only bind those who give them consent. Sovereign states can, and do frequently, hinder the progress of international and cosmopolitan projects by refusing to give them their consent.

It may at this point be felt that we have finally reached the essence of state sovereignty – that the state, as Kenneth Waltz opines, 'decides for itself how it will cope with its internal and external problems'.⁸⁷ This line of thinking is consonant with what I have been calling the practice of sovereignty: the subjects by and large defer to their authority, not to others. There is also an obvious truth in Waltz's formulation in that any decision a sovereign state takes is formally attributed to the state and to no other entity. However, crucially, states never *decide for themselves* if by this is meant that they act in a social vacuum, entirely disregarding other (state and non-state) entities and their own identities which are necessarily socially constructed. As Ned Lebow rightly notes, 'sociopaths aside, actors are neither egoistic nor autonomous as those terms are understood by rational choice theories'.⁸⁸ Sovereign states are autonomous only in their formal legal status.

What, finally, can we say of a possible relationship between sovereignty and arbitrary violence? It is difficult not to take this relationship seriously, especially when we learn, for example, about the Guantanamo Bay, the shooting of Jean Charles de Menezes in July 2005, and so on.

The best way to make sense of the relationship between state sovereignty and arbitrary violence of this sort is not to separate the Kelsenian and Schmittian conceptions of sovereignty, but to consider what unites and underlies them. I have suggested that these conceptions can be seen as effects or aspects of the two ways of

⁸⁵ Schmitt, *The Concept*, p. 33.

⁸⁶ See Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) on limited transformative potentials of an international system from the more warlike towards the more peaceable.

⁸⁷ Kenneth N. Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979), p. 96.

⁸⁸ Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders* (Cambridge: Cambridge University Press, 2003), p. 311.

making sense of the ‘practice of sovereignty’ – a routine practice whereby an ultimately unauthorised authority continuously authorises itself as the authority and the rest by and large acquiesce in this. Subjection of life to arbitrary violence, or its constant possibility that becomes a reality in extreme forms at various times and places, would seem embedded in such a practice. For the authority, originally unauthorised, is bound to have resorted to arbitrary violence in its formative stages and may have perpetuated that violence in its continued existence.⁸⁹ In order to implement its authority, the authority is in need of the law, but in order to defend itself, the authority may need to suspend it in part in (what it judges to be) critical circumstances. Furthermore, the routine operation of the law may itself involve violence seen as arbitrary from some extra-legal standpoint.

If, therefore, the practice of sovereignty is closely, and perhaps inescapably, intertwined with the infliction of arbitrary violence, it should also be acknowledged that there are gradations; some types of sovereign states, under certain kinds of conditions, produce more arbitrary violence, and are more prone to do so, than others in other kinds of circumstances, and not everyone is subjected to the same kind of arbitrary violence as everyone else. It would not help to ignore this,⁹⁰ but, of course, the differentiating conditions cannot be identified without a detailed empirical study.

Short of embarking on such investigations, what we could say is this: with the practice of sovereignty, the possibility of arbitrary violence is constantly present but its actual instances may tend to be concealed from everyday observations. The practice of sovereignty would lead at times to extreme manifestations of this possibility when certain conditions are met. But if the practice of sovereignty is a *sufficient condition* of the *possibility* of arbitrary violence (and its actualisation under relevant conditions), it follows, by the force of logic, that the *possibility* of arbitrary violence (and its actualisation under those conditions) is a *necessary condition* of the practice of sovereignty. The implication is alarming: the continuation of the practice of sovereignty *requires* the *possibility* of arbitrary violence (and its actualisation under relevant conditions). A version of this alarming view of sovereignty is found in the recently much-discussed works of Agamben, for example.⁹¹

To say, however, that the continuation of the practice of sovereignty requires the *possibility* of arbitrary violence and its actualisation under relevant conditions is, of course, not the same as saying that any *particular* manifestation of such a potentiality, such as the concentration camp, is a necessary condition for the practice of sovereignty: certain requisite conditions must be met in order for the possibility of arbitrary violence to actualise and manifest itself in any concrete forms.⁹²

⁸⁹ Karena Shaw, ‘Creating/Negotiating Interstices: Indigenous Sovereignties’, in Jenny Edkins et al., *Sovereign Lives: Power in Global Politics* (London: Routledge, 2004), pp. 165–87.

⁹⁰ See Judith Butler, *Precarious Live: The Powers of Mourning and Violence* (London: Verso, 2004), p. 68.

⁹¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998). See also Edkins, *Sovereign Lives*.

⁹² This point is obscured when it is stated, for instance, that ‘[s]overeign power produces and is itself produced by trauma: it provokes wars, genocides and famines’. Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge: Cambridge University Press, 2003), p. xv.

Conclusion

In this article, I have examined two conceptions of sovereignty – those of Schmitt and Kelsen – and have argued that, despite their apparent irreconcilability they are effects or aspects of two different ways of making sense of the same social practice of sovereignty.

Kelsen's conception is relatively benign and points to the historically contingent (and therefore potentially evolving) content of international law, giving an impetus to a historical study of the evolution of legal norms. His conception also shows why there is no logical or conceptual contradiction in pursuing international and cosmopolitan projects within the framework of sovereign states. Against this, Schmitt's stance is that, in the world of sovereign states, the sovereign right of war and the right to repulse interference are/ought to be enshrined in the system of norms that govern international relations. If such a view strikes us too statically Hobbesian, Schmitt's conception is nevertheless effective in reminding us of what is concealed in Kelsen's 'pure theory of law' – that the operation of a legal system regularly involves extra-legal decisions and judgements and that a routine operation of the law presupposes the ability and willingness of the state to suspend the operation of the law in critical circumstances in accordance with its own judgement and decision.

Thus it appears that the two authors' contending conceptions of sovereignty represent different entries into the subject that lead to divergent conclusions about what sovereignty means. The prevalence of Schmittian conception would undoubtedly undermine the pursuit of international and cosmopolitan projects. But it would not do to say the Schmittian conception should therefore be suppressed. The Kelsenian and Schmittian conceptions are linked by the underlying practice of sovereignty, which appears inescapably to be intertwined with the *possibility* of arbitrary violence – although how it produces its concrete manifestations could not be understood without a detailed historical and sociological analysis.