Chapter 7

Rival jurisdictions

The promise and loss of sovereignty

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Introduction

After Sovereignty, the title of this collection of essays, invites accounts of sovereignty in the mode of both quest and loss. As quest, sovereignty is engaged as a promise, a promise of sovereignty to come; as loss, the narrative is of a time of sovereignty that has passed, whether mourned or disputed. The story of quest and loss told here relates to the Third World claim for Permanent Sovereignty over Natural Resources (‘PSNR’) in its relation to international law and the international domain. But rather than sovereignty as such, in our view what is sought and lost is a meeting place of equal sovereigns or of laws.

This claim, although made long ago, still has relevance today. It bears a direct connection to how investment disputes are defined and adjudged. It relates to recent attempts by several states to withdraw from ‘universal’ investment arbitration mechanisms, and it is echoed in the attempts by many nations to reject the conditionality of international financial institutions such as the International Monetary Fund (IMF). However, for us, the claim to PSNR primarily serves here as a heuristic for thinking about a way to engage (the modern inheritance of sovereignty) both theoretical and practical, as a mode of political and legal action.

To follow the usual caricature a little, within theories of the international, questions of sovereignty are regularly divided between the concerns of power and of (territorial) space, on the one hand, and of the normative, on the other. This latter concern is sometimes expressed in the transcendental idioms of autonomy, freedom and the ‘universals’ of international law. But as our reading of the claim to PSNR and its unexpected outcome demonstrates, lost, or at least hard to hear, in these idioms is the understanding of sovereignty as political and legal relation. Our concern lies here — with the modes and manners of coming into and being with law — in short the repertoires of jurisdictional action through which sovereignty is a conduct, practised as a technology of authorization and government.

The shape of our analysis has in many respects been influenced by the work of Jean-Luc Nancy. Nancy has done much to re-figure the placing of the
political and the legal in terms of an inter-subjective relation of 'being with others' (mitsein). For Nancy, the experience of community is always relational and affective (erotic); it is relations of amity and enmity that bring the common place of political discourse and social action into being. Paul Carter has termed this originary sociability of community the 'middle ground' since it involves the creation of a relation with others by sharing the space of the world. It is through reflecting on this aspect of the political and legal relations, the movement between the 'middle ground' and the meeting place of international law, that we consider the claim to PSNR and the claim to sovereignty.

As Nancy has pointed out, the 'inter' or 'between' of international law also marks out a form of association and a way of 'being with others'. What interests Nancy in this formulation is the way that the ontological character of international law is in some senses, a 'common space devoid of law' or at least devoid of either a higher or a foundational law (Nancy 2000: 105). Our understanding of the grounding of the international is thus social and affective, inter-subjective and dyadic. In this respect, the middle ground is law-full in that it marks the point of engagement or creation of relations. It is also lawless in that the coming together does not follow a pre-given law. In Carter's formulation, this middle ground is 'mythopoetic' in the sense that it is not a rigid logic, but is rather a pattern we could live by (Carter 2007: 431–32; 2002: Ch 4). As we shall explain, we name this space through jurisdiction. Jurisdictional ground is not given; it is posited or created in the relation: the creation of a space of encounter. We do not take such a 'middle ground' as producing a ground for law – the formation of the social and legal space of the 'inter' never arrives fully formed, nor performs according to law – but it is part of the work of the grounding of jurisdiction.

To draw out the movement between the mythopoetic (and ontological) sociability of community and the institutional (and ontic) meeting places of the international domain, the usual understandings of jurisdiction need to be somewhat reconfigured. As commonly understood in the domain of international law, for example, the question of jurisdiction might be expressed in terms of the competence of a national versus international authority either to judge or to exercise authority in a particular matter. In the lexicon of international law, the basic formulation of this question is the question of 'domestic jurisdiction', or what authority or sphere of action a state may reserve for itself without international scrutiny. This gives an account of sorts, of the meeting place of laws, but it is one in which jurisdiction comes after sovereignty, and implicitly after the domain of the international. In contrast, in our discussion, the language of jurisdiction has a performative quality. We follow jurisdiction as an originary (or originating) moment of law; as juris-diction – or speaking the law – it brings community into speech and into law. As will be investigated more fully, the sovereign, and sovereignty, is an effect (and affect) of jurisdiction.

This formulation is slightly out of joint with a number of the more usual ways of theorizing international law. For example, it stands a little apart from the form of argumentation engaged by discussions of sovereignty's disappearance or resurgence on the basis that such discussions equate sovereignty automatically with the nation-state. Similarly, it is agnostic about discussions of whether sovereignty is a normative concept, whether imperial, constitutional or cosmopolitan. We are not avoiding the questions engaged by these analyses as such. Instead, we are attempting to redescribe the issues engaged in jurisdictional terms in order to draw out some of the complexities of how certain conduct is authorized and shapes the international domain.

The object of our enquiry or why we want to hold onto the idea of jurisdiction is precisely to enable us to offer an account of the modes and technologies of authorization which not only operate 'within' the international but also institute it. Our account draws on older traditions of speaking of jurisdiction than the more familiar usages mentioned above, but the point of connection with these more familiar modes of thinking is that the question of authority, jurisdiction and authority are both central aspects of sovereignty. While it is usual today to view sovereignty as linked to the world by jurisdiction, in our view, it is also necessary to pay attention to the sense in which the sovereign and sovereignty are a product of jurisdiction. The sovereign is given the power to speak in the name of the law. But in a sense, speaking directly of sovereignty already assumes the existence of authority; since it precludes paying attention to how authority is claimed, exercised and rendered effective, both nationally and internationally. By telling the story of the claim to PSNR – a story usually told in the language of sovereignty – in the language of jurisdiction, we wish to show that there are more modes of authorization than simply the assertion of sovereign will against the 'international community'.

The practical objective of a consideration of such practices of authorization is to (re)connect jurisdictional thinking in the international domain to questions of conduct. Put differently, we wish to find a way to act, particularly once it becomes clear that it is harder to achieve sovereignty and easier to lose than might be imagined. A (broader) repertoire of jurisdictional thinking can help us to produce accounts of sovereign action. Determining the course of such conduct depends on linking jurisdiction to responsibility – here a responsibility to the forms of law.

This chapter is therefore attentive to the idioms of jurisdiction, and so follows some of the ways in which the claims to PSNR follow and dispute rival modes of authorization of sovereignty, and of the international. The political and legal claims to PSNR reveal the seductions and dangers of ordering the international domain around claims of national sovereignty. Paying attention only to national sovereignty and its attendant difficulties has reflected the focus from the modes of authorization operative in the international domain, and indeed, which give shape to that domain. In other words, focusing on

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sovereignty has distracted us from seeing the shape and pattern of the emergence of an international jurisdiction whatever the formal juridical status of that practice. This account of jurisdiction (indirectly) engages the fantasy of the Westphalian settlement as a 'community' of equally sovereign nation-states without an overarching sovereign.

The point of connection between this essay and the themes of the book is therefore to offer an account of the way in which jurisdiction precedes, or comes before, sovereignty as a mode of authorization (and government) through the constitution of a community and its laws. The narrative of promise and loss after sovereignty, is told here as one of the performance, or conduct, of 'rival jurisdictions'. In following this narrative through the history of the claims to PSNR, the praxis or 'prudence' that we address is the question of how to engage with the international, and the question of responsibility in relation to an international jurisdiction.

Sovereignty and the claim to PSNR

One of the more striking features of the post-1945 formulations of post-colonial political and economic independence by the Third World has been the linking of the claim of national sovereignty with the promise of justice and development. In this formulation, international law and sovereignty were marked as the sites of the struggle for, and institutionalization of, international justice, development and economic growth. These aspirations and their associated claims are the heirs of both Enlightenment and Empire – part vision of universal values of freedom (and self-determination) and part the embedding of the social, economic, and political forms and interests of the dominant powers of the international order. For many, linking Enlightenment and Empire has followed a reluctant dynamic in which the local, the temporary and the national are found to be in need of transformation. This twin parentage explains both the specific terms of the claim to PSNR, animated by the Enlightenment promise, and the conduct of states more conscious of the imperial lineage of that promise, such as Mexico and the Soviet Union, which were politically sympathetic but strategically at odds with the claim.

As is well rehearsed by now, beginning in the 1950s and continuing through the 1960s, the Third World launched an initiative claiming 'Permanent Sovereignty over Natural Resources' (PSNR'). The claim is usually understood as having made little headway in achieving its own objectives of asserting control over the assets and economies of the Third World. The story of PSNR is commonly told in the same breath as the demands for a New International Economic Order (NIEO) and the conventional account of its failure binds the two things together inextricably. The story usually tells of an excessively radical set of demands which briefly took flight on the international stage due to an economic boom in the North, a concomitant rise in commodity prices, a brief moment of Third World unity brought on by the oil crisis and a consequent sense of vulnerability in (some of) the North (Spero and Hart 2003: 243). However, as commodity prices revealed themselves to be cyclical rather than ascending, the solidarity between the oil producers and the non-oil producers dissolved, cartels in relation to non-oil commodities proved to be difficult to form and, so the story goes, the feelings of vulnerability in the North diminished. The shouts of discontent became less audible and finally the economic tidal wave of the debt crisis drowned the last few voices out altogether.

The story told is one of sovereignty sought and lost in a clash between the 'domestic' and the 'international', or of a conflict between sovereignty tout court, and international law. In some respects, it is illuminating, particularly in relation to what may have produced the conditions in which the Third World's demands could initially be heard. However, it is instructive to re-read the demands for Permanent Sovereignty over Natural Resources and the responses to those demands from the industrialized states as a story of the conduct of rival modes of authorization or jurisdictions. Such a re-conceptualization opens up the possibility of understanding the international as itself a 'jurisdictional' space in our terms. The claim to PSNR can be figured in terms of a 'middle ground', or the opening of a space of legal relations. But that ground is effaced in subsequent international discourses about compensation and debt. For us, the example also provides a point of reflection on the sorts of meeting places – and rival jurisdictions – which have been established in the international domain.

The claim to PSNR was first introduced at the United Nations (UN) in 1952 by Chile (to the Human Rights Commission) in the context of the principle of self-determination. Its more controversial launch happened in the same year at the UN General Assembly (Abi-Saab 1991: 600). The demand was part of the claim for independence based on both colonial exploitation and the granting of concessions on unfavourable terms (Hossain 1984: ix). In the General Assembly's seventh session, Uruguay put forward a draft Resolution originally entitled 'Economic Development of Under-developed Countries'. A key assertion was the right to nationalize the ownership and exploitation of natural resources.


4 Ibid.
Capital-importing countries were wary of foreign investment because it seemed to be 'imperialism writ small' (Schwarzenberger 1967: 111). Bolivia had just nationalized its tin industry and the Guatemalan government was preparing to nationalize the properties belonging to United Fruit. Nationalization was also a live issue in Argentina, Chile and Mexico (Kellogg 1955: 6) and the Resolution itself took place while the Iranian oil controversy was ongoing. Influenced by Marxist analyses of global political economy, dependency theory, and what was understood as the 'contradictory and exploitative character of the integration of [Third World] “states” into the capitalist world economy' (Saull 2005: 256), many in the Third World believed the key to economic independence lay in national ownership of the available forms of production.

In theory, at least, such a strategy seemed to offer both the possibility of subordinating the economic to the political sphere and the possibility of rejecting foreign domination. The Resolution could therefore be understood as motivated by a desire to reject both colonial and capitalist forms of rule (Saull 2005: 256). Largely because of the anti-capitalist element of this rejection, and despite America's formally anti-imperialist stance, the US delegation to the UN's debates on PSNR 'fought the resolution vigorously from the moment it appeared' (Kellogg 1955: 4). Those claiming the right to PSNR, and through it the ability to choose a state's own economic system, were attempting to rely on the sanctity of a national sphere in contrast to an international sphere, to protect a state's right to choose a (communist-socialist) regime of public ownership as opposed to a (liberal capitalist) regime of private property.

However, despite the sovereign ground of the claim, the response emanated not from the position of another state or group of states, but from 'the international'. Indeed, the key response of Western states was to posit themselves as the international community (if not the 'world') (Pahuja 2009: 200) and to construct the demand for PSNR as being in opposition to existing obligations arising under international law. The asserted legality focused on two matters: compensation and the idea that principles of international law already applied to the situations at hand. These principles included most notably the principle of *pacta sunt servanda*, which required that states respect agreements entered into. The invocation of the obligation 'to observe agreements in good faith' referred, of course, to the concession agreements and contracts which had provoked the claim in the first place. But the key controversy in the context of the claim to PSNR became compensation. For us, the claim also marks a significant formulation of grounding the relations of the international domain, linking participation to questions of credit, of promise, and of trust and justice.

The fact that compensation could become the lightning rod of the dispute was due in part to the framing of the control of natural resources in terms of property rights. The West asserted a right to compensation on the grounds that it was required under pre-existing international law. Indeed, despite objecting to the term 'nationalization' in the 1952 draft Resolution, most rich states did not contest the right to nationalize as an attribute of sovereignty, but only on condition that compensation was payable. In the view of the West, an obligation to compensate was already the effect of international law. Such was the confidence of the West that the international was 'its' domain that even after the passing of Resolution 1803, which referred only to 'appropriate compensation' (UN General Assembly 1952), Stephen Schwebel, legal advisor to the USA's delegation to the Seventeenth General Assembly of the UN, was keen to reassure the (American Bar Association) reader that 'appropriate compensation' in the Declaration means 'prompt, adequate and effective' compensation, the USA's preferred formulation, and that 'the Declaration's affirmation of the binding character of foreign investment agreements is of great importance' (Schwebel 1963: 463).

On the other side of the argument were the Third World states, most of which did not deny the principle of compensation per se. Rather, most states argued that 'appropriate compensation' was indeed payable but that internationally determined, market-based, standards were not 'appropriate'. Many Third World states and their supporters pointed out that in practical terms the 'prompt, adequate and effective' compensation being argued for by Western states would have had the perverse effect of rendering the relevant nationalization domestically legitimate but fully compensable internationally. The implications of this were visible to many and it was a particularly sore point in the debates given the (post-)imperial context of, and the unfair concession
agreements which were the impetus for, the claim. However, most were will-
ing to admit the principle of compensation in an abstract sense (Abdul 1952:
257), arguing for ‘appropriate’ compensation determinable by the nation-state
undertaking the nationalization and which took historical circumstance and
economic capacity into account (Sornarajah 2004: Pt. X).

But despite the concession as to the principle of compensation, the battle over
what kind of compensation was payable and in whose gift it was to decide was
long and bitter. Over time, as the optimism around decolonization and the promise
of change was replaced by the cynicism and disappointment of the succeeding
decades, the positions became more entrenched. Indeed, by the time the
Charter of Economic Rights and Duties of States was passed as a resolution at
the UN General Assembly in 1974, no reference to international standards was
mentioned in connection with the right to nationalize at all. Compensation for
the same was required to be ‘settled under the domestic law of the nation-
alizing state’ (UN General Assembly 1974). As a result, the question of what
‘appropriate’ compensation means is doctrinally unresolved to this day. 8

Thinking with jurisdiction

Thus far the claim for PSNR has been presented as one that falls more or less
into a well-established pattern. Political independence was asserted as the main goal
with the assumption being that economic independence would follow. This
assertion of independence was phrased in terms of the ‘new’ international
legality and its elaboration of sovereign equality in the conviction that it would
give rise to the free choice of a state’s economic system (Abi-Saab 1991: 599). This
claim followed the path of the doctrines of sovereignty grounded in the Euro-
pean tradition, which engendered the belief that a ‘sovereign’ state was at least
‘omni-competent within its borders’ (Werramantry 2004: 105). Within
this Westphalian inheritance, the international promises itself as a meeting
place of sovereigns, a sphere of liberal government – innocent or co-opted –
engaged in developing ethical, political and economic relations in a mixed
domain of enmity and amity. Much therefore depended on being able to hold
onto distinct concepts of national sovereignty and international ‘government’.

But sovereignty turned out to be a particularly difficult assertion to make in
a forum defined by (international) law. In this context, the Third World was
trying to assert sovereignty as an ability to speak the law for itself. In this
vision, international law was projected as something like a ‘meeting place’, or
open space structured by international law, but not necessarily ‘full’ of law, or
fully regulated by law. However as it turns out, the juridical shape of the

8 M. Sornarajah (2004) The International Law on Foreign Investment, 2nd edn,
Cambridge: Cambridge University Press, p. 436. Writing in 2004, he stated that ‘[t]his
discussion is based on the acceptance of the fact that there is no clear principle as to
compensation for nationalization in international law at the present time.’
determining its scope. Indeed, many doctrines of international law exist to represent law's authority at the limit.\(^9\)

In an account focusing on sovereignty, or what we might call the 'sovereign account', the work of property (via the demand for compensation) in the international domain might be viewed critically as concealing a sovereign in an order that claims to have no sovereign. In other words, both the ascending and descending versions of a sovereign account of international order (whether mainstream or critical) assume a sovereign. The question implicit in both accounts: 'who is the sovereign of international law?' makes sense only in a situation where questions of power have been fully stabilized or pre-supposed in an agreed order of international law. However, as the brief narrative of the authorization of international norms of compensation suggests this was precisely what was — and continues to be — disputed. The more important questions turn on issues of who authorizes law and how? These are questions of jurisdiction (and techniques of government). In re-telling the claim of PSNR, jurisdiction makes audible the exercise of authority and the figuration of the international through the modes and forms of conduct.

**Jurisdiction over development**

In the context of PSNR the question of who decides and how was decisively institutionalized by linking the government of the international domain to the economics of development. The specific question of state succession or by what decolonizing states should be bound was referred in 1962, by the General Assembly, to the International Law Commission (ILC) (Craven 2007). But by the time the ILC came up with the two relevant conventions in 1978 and 1983, most states had already decolonized and state practice was usually in conflict with the treaties.\(^10\) Capital exporting states, by way of contrast, were making attempts in other fora, concurrent with the debates over PSNR, to concretize obligations at international law to protect foreign investment, to pay 'prompt, adequate and effective' compensation for any nationalizations, and to respect agreements entered into before independence.

Against this background, when the claim to Permanent Sovereignty arose, the Bank refused to engage with the specific political demands being made by the Third World. As we know, these demands were being articulated in the language of political sovereignty, and the ability 'freely to choose and develop [one's own] political, social and economic systems' (UN General Assembly 1970).

In contrast to this ostensibly disinterested stance in relation to the 'political' question of Permanent Sovereignty over Natural Resources, the Bank was willing to consider the question of foreign investment (Starke 1966: 5). In 1966, the International Centre for the Settlement of Investment Disputes (ICSID) was established at the World Bank. This body was meant to arbitrate in the encouragement of foreign investment through encouraging arbitration according to international standards. Most states were reluctant to submit themselves and their disputes to arbitration (Fatouros 1962–63: 289). Consistent with their position in the PSNR debates, Latin-American states objected to it on the basis that it went against the Calvo doctrine (Schrijver 1997: 185–86) according to which investment disputes should be adjudicated according to the national laws of the country in which the investment is located (Calvo 1896).

Ultimately, the claim to PSNR and the response to it were re-shaped as concerns 'international economic development'. In our view, this re-shaping created the possibility for a new — international — jurisdictional formation. Once this characterization was operative, the Bretton Woods Institutions (BWIs) were able authoritatively to include the issue within their remit. Once the issue was justifiably within their sphere of concerns, the BWIs could generate knowledge around it as an issue of 'development' based on the projected 'normacy' of certain forms of social, economic and political organization, and the 'universalism' of certain concepts. The developmental knowledge generated, both fed into the expanding and proliferating machinery of development, and provided the basis for and substance of BWI interventions.

Equally pointed for our present story is development of new lending policies within the IMF and World Bank. During the debt crisis of the 1970s and 1980s the IMF stipulated that debtor states had to agree to certain financial conditions including devaluation of the currency, reduction in public spending to increase debt servicing, raising taxes and raising tariffs. The debt crisis deepened, and as a result of the conditions stipulated by the Fund, social tensions in indebted countries were reaching boiling point through the fracture of the social compact precipitated by cuts in public spending (Peet 2003: 77; Walton and Seddon 1994). By 1985, worried about the implications of political unrest in the context of the Cold War, the United States government had put forth the 'Baker Plan' that established further loans and debt rescheduling conditional on 'Structural Adjustment Policies' jointly devised and administered by the Fund and the Bank.\(^11\) The relevant conditions included obligations around

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9 The International Court of Justice (ICJ), for example, tends to fill any lacunae in the system of laws by reference to the 'law of civilized nations' or 'general principles'. It is reflected in the insistence of the ICJ that it possesses the compétence de la compétence, or the ability to determine its own jurisdiction. Paradoxically, it is even reflected in the doctrine of non liquet, or absence of applicable law. Arguably even the seminal Lotus Case, which determines that sovereignty is only limited by principles which are specifically in existence, is an instance of filling the potential void (of laws yet to be) with something (in the form of a rule about the absence of rules) which even though not 'legal' (political sovereignty) is defined as a space of non-legality by law. Lotus Case (France v Turkey) (Judgment) [1927] PCIJ (see A) No 10.

10 Vienna Convention on Succession of States in Respect of Treaties (1978) and Respect of State Property, Archives and Debts (1983).

11 Named after the Secretary of the US Treasury at the time.
foreign investment in ways that specifically negated the demands made in the claim to PSNR. This raft of measures included the privatization of state-owned enterprises and investment liberalization, meaning allowing unrestricted access for foreign investors. It was during this period that the Latin-American states, which had previously fiercely resisted international arbitration, joined ICSID in masse (Schrivjer 1997: 85–86).

Thus, on one level, the story ends with something close to coercion. But arguably, through the embedding of the question within development discourse, the interventions could be presented as something other than simply coercive political interventions directed at serving the interests of the capital exporting states and their wealthiest companies. In this respect, the response by the West to the Third World’s assertion in the political arena was crucial to the (re)characterization of the issues raised by PSNR as international, economic, and developmental. As stated above, this (re)characterization of response enabled the formation of a new jurisdictional space in the international arena. This jurisdictional space is effectively concerned with the capacious and problematic concept of development, and is emblematic of the character of the post-colonial international space.

To return to the lexicon of sovereignty, one way others have understood what we are thinking through here as the new jurisdiction institutionalized in the BWIs, has been as a ‘hollowing out’ or ‘erosion’ of the sovereignty of Third World states by the BWIs. Implicitly, this account is unwritten by a vision of sovereignty as a material power that can be exercised and possessed only by one, whatever the formal juridical status of that power. The move such analyses repeatedly make is to analyse the formal claim of sovereignty as being met by a ‘realist’ account of power. A more sophisticated variant of this is the dehistoricized ‘postmodern’ sovereignty depicted in texts such as Empire in which the formal claim of sovereignty is met by the power of Capital (Douvinas 2007: Ch 4; Hardt and Negri 2000). What is of interest in these accounts is what happens to the form of law. When sovereignty becomes (or remains as) will, law is figured as command. It is this formulation that allows the international to be figured as universal or transcendent. Likewise, in such accounts, jurisdiction becomes the expression of will or the medium through which sovereignty is expressed.

For us, such accounts occlude what Nancy might think of as the structuring of the ontological meeting place of international law, or what Carter might think of as the ‘layering’ or mythopoetic of the ‘middle ground’ of international law. Thus rather than rush to view the international domain or international law as universalising and transcendent, our account is concerned to slow the response to the claim to PSNR and its outcomes in order to track the way in which a space and practice of authority has been created by and exercised through the BWIs. This claim to authority and its effective exercise are practices of jurisdiction. The subject matter of this jurisdiction is development. What our approach can reveal, and what is crucial here and perhaps key to the condition of post-colonial (international) legality, is the way in which property and debt create a meeting place of law. They are the means by which a jurisdiction, or authority to speak in the name of law, is created, even though it looks as though they are the subject matter of a pre-existent, formal legal regime. Thus a regime of private property (and internationalized debt) is one of the several rival jurisdictional modes that organize the legal, political, and economic aspects of the international domain.

The triptych of the assertion of a right to Permanent Sovereignty over Natural Resources, nationalization, and the embedding of the whole within the notion of ‘development’ established a successful jurisdiction. Within this jurisdiction the meeting place of the international was (and continues to be) elaborated around property, debt, and financial security rather than the formal honouring of promises (pacta sunt servanda). If the jurisdictional meeting place envisioned by PSNR was a political–legal space then the meeting space of the jurisdiction of the BWIs is predominantly economic. Here the point of meeting is a ‘world economy’ – framed for the most part through the liberal capitalism of the ‘developed’ states. Where PSNR was presented by the Third World as the question that was to give shape to the international, in the jurisdiction of the BWIs the PSNR became patterned into questions of investment.

In some respects the meeting place elaborated through the jurisdiction of BWIs mimics mediaeval jurisdictional forms more than modern state forms of jurisdiction. It provides what we might think of as a practical sovereignty that ties jurisdiction over a subject matter to a specific institution. It gains its authority from a universal account of the economic form of the international (Orford 2009). The character of the jurisdiction over development also shares some of the orientation of jurisdiction of conscience, or interior truth. Where

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And in any case, if the effortless intellectual superiority of the Western economists was not enough to persuade developing countries ... [A] simple lever was available to force them to do so: conditionality. Loans by both the IMF and the World Bank came to be dependent on adopting policies consistent with the [Washington] consensus. The debt crisis of the 1980s had severely limited the room of developing countries to manoeuvre in negotiations with international organisations. Pressure to comply was applied in the hundreds of polite and brusque ways so familiar to international bureaucrats.


the political–legal meeting place of the claimants to PSNR figured a civil space of external order and negotiation, the jurisdiction of development by contrast figures its meeting place in relation to an ideal of development as truth and a narrative of improvement. This gives inner purpose, and conscience, to the meeting place of the world economy. Here, in this way, it could be argued that the meeting place takes on an interior ethical form governed by the relations of creditor and debtor (Beard 2007: 27–52).

One outcome of our retelling is to understand the way in which the promise or Westphalian fantasy of a meeting place of equal sovereigns was recast in and as a hierarchical jurisdiction. A second outcome is that once we recognize what the BWIs do in terms of jurisdiction, or an authority to speak the law, they become something other than simply offices, or institutions that administer debt. Instead, they become an ‘office’ of government in the sense of having a collection of duties and responsibilities to exercise a jurisdiction over development (Condren 2007). Duties and responsibilities imply something more than the ‘technical expertise’ that we more commonly associate with the BWIs. They may provide us with a point of engagement with conduct that takes us further than both critique and technique.

Concluding remarks

Our chapter and the book opened with a concern about the framing of sovereignty. The international sphere has been beset by claims of the loss of (national) sovereignty and the rise of a new sovereignty in the international domain. These concerns have marked the space of much political and legal theory in recent years. For some this new sovereignty marks the emergence of Empire. Whether the Emperor turns out to be America, Capital, or some as yet to be named Great Power, what is at stake within such political–legal theory is a sovereignty of power. For others, the ‘new sovereignty’ marks the opportunity for a new cosmopolitanism, binding together international law and a world civil society founded on individual cosmopolitan human rights, whether legal or moral (Douzinas 2008: 1; Habermas 2003).

Critics of both Empire and Cosmopolitanism have worried about the elevation of both the power of the new Emperor and the values that figure cosmopolitan normativity. Lost, for critics of Empire are not simply national sovereignty and, say, the ability to claim PSNR, but also the ability to act in the name of the national sovereign against, for example, the interests of Capital. The critics of Cosmopolitanism continue to struggle with the threat of an imperial moral globalism that does little to resist the elevation of particular interests and values into (false) universals or versions of a new global ‘community’, constitution, or transnational ‘democracy’.

Our first response to this analysis has been neither to elevate, nor renovate a (new) theory of sovereignty or normativity but to slow – and to chasten – current critical responses through a consideration of the difficulties of formulating legal – and indeed lawful – relations. Paying attention to the formulation of rival jurisdictions (or ability to speak the law) in this instance allows an analysis of how two international jurisdictions came into being. We have made visible the way that the playing out of the rivalry between the jurisdiction of sovereigns and the jurisdiction of the world economy brought with it a certain practice of legal relations. This stands in contrast to the ‘sovereign’ account that presupposes the international and a ‘subject matter’ over which a jurisdiction can be exercised. Indeed, while the disputed claims for PSNR were engaged in terms of rival sovereignties, when they are framed in terms of rival jurisdictions it is possible to get a sense of how the engagement of the claim was conducted and why it may have had the outcome it did. The point was not to deny that the BWIs were, and are, creating a new hegemony but to point out how this was done in terms of the way a specifically legal relation has been established and conducted.

Whether the jurisdictional practice of the BWIs has come to express the form of an emergent international order, imperial or otherwise, remains open to question. It is certainly arguable that the voice of development and economic growth articulated, and continues to articulate, both the grounds and purpose of the jurisdiction, or authority to ‘speak the law’. The jurisdictional practice of the BWIs (and of international arbitration) has permitted a form of universal authorization of the work of the BWIs. It is this that provides the point of orientation of our first account of jurisdictional responsibility. Where pragmatist and realist approaches to international law have been sceptical of the ability of law to shape relations in the international sphere, we suggest that the space of the international is constituted by jurisdiction(s). This understanding of the international as a positive site of jurisdictional engagement brings with it a certain responsibility, both in the sense of the ‘politics’ of the jurisdiction that shaped the claim for PSNR, but also in the sense of the more specific institutional responsibility for the forms of engagement and social relation that the practice of a jurisdiction engenders.

Our second response to the analysis of the international presented here takes us back to the formulation of the ‘middle ground’ by Carter and Nancy: Their work has been used to give a mythopoetic or generative account of the jurisdictional space of law. In our articulation, it is the patterning of the sociality of ‘being with’ that gives shape to the middle ground. This coming into relation might be viewed as the originary work of jurisdiction. Rather than present this as an ideal form of sociality or as a critical horizon, our account of the jurisdictional space has considered the middle ground as a mode of patterning of social relations. It is one that is entwined with the institutional (or ontic) story of the meeting place of international law. In so far as the ‘middle ground’ provides some distance from the instituted meeting places of international law, we have used it as a heuristic narrative device to show the particular form of enclosure and grounding sought in the ordering of rival jurisdictions that developed around the claim for PSNR. From this perspective it is worth noting
that both the sovereign political–legal meeting place and the world economic meeting place share some of the same forms of enclosure: the acceptance of the features of commodification or the property form of resources; the separation between the economic and the political; and an economic account of compensation.

The story told here has thus pointed to the claim to PSNR being presented in terms of rival jurisdictions. This has been figured not simply as a matter of rival political aspirations or of competing relations between national and international fora. Our chapter has attempted to draw out the sense in which the rival jurisdictions offer rival accounts of the authorization of the meeting place of law. This drawing out seems particularly poignant to us in the context of decolonization and the promise of a post-colonial international law. In writing in the idiom of jurisdiction, we have offered a story about the continuing engagement by (post-colonial) states with questions of sovereignty and possibilities for the (re)formation of the post-colonial international domain. Thinking about jurisdictional responsibility in the quest for sovereignty reminds us both of the material and practical form that sovereignty takes. If nothing else, the insistence on the jurisdictional character of sovereignty and the jurisdictional form of the international domain serves as a reminder of the stakes in the movement “after sovereignty”. Paying attention to the middle ground that patterns the international foregrounds the particular and diminished understanding of “being in common” that has informed the new jurisdictions of the international domain.

Bibliography


Betcha, M. R. (Mexican Representative), UN Doc A/C.2/SR.231, 6 December 1952.


Chapter 8

After sovereignty

Spectres of colonialism

Bryan Hogeveen*

... my kids are going to raise kids to fight for a country that will allow them to live with dignity forever

(Bill Wilson, CBC, 1983)

The future can only be for ghosts. And the past

(Derrida, 1994: 37)

Introduction

Aboriginal peoples today are haunted by centuries’ old injustices. During five centuries of European occupation, the indigenous peoples of Canada have: been ravaged by invading armies almost to the point of extinction; had their spiritual beliefs and religious systems disrupted and devalued by missionaries; had their languages obfuscated by cultural imperialists; been subject to abject poverty and over-representation in euro-colonial carceral institutions (Alfred 1995). This paper does not concern, or fully confront, these egregious conditions. Rather, I am interested in how they turn on, and return to, questions of sovereignty. I engage with the locution ‘after sovereignty’ in two ways: first, as coming in the aftermath of imperialist usurpation; second, as the ‘to come’ – a messianic promise. In this paper, I deconstruct, if you will, Canadian sovereignty as it relates to an intrusion into, and gets grafted onto, the lives of indigenous peoples.

The 29th of June 2007 witnessed Aboriginal peoples from across Canada holding a national day of action during which many called for sovereignty. Starting from the position of its contemporary discursive limits we can see this is an impossible demand. Impossible, because sovereignty does not share. Reading alongside Jacques Derrida’s oeuvre, however, we are apt to say that this impossibility, this aporia intrinsic to the demand, is the very place of inquiry. It implores an opening up when ‘things’ seemingly close down upon themselves. Insofar as the Canadian state stands arrogantly above and disregards United Nations admonitions of their treatment of indigenous peoples, often in the name of a supremacist nation-state sovereignty, this dogma simultaneously begs an opening (Leitch 2007).

* Thank you to the spectres present in my horizon of being.