

# **Sovereignty and sustainability: friends or foes?**<sup>1</sup>

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Ever since the 1648 Peace of Westphalia ending the Thirty Years' War established the legal basis for the modern nation-state, the legal norm of state sovereignty has assisted but also frustrated efforts at multilateral cooperation in pursuit of common objectives that transcend national borders. Insofar as it provided a basis for international peace and the internal stability necessary for promoting the political and economic development of sovereign states, sovereignty was instrumental to securing the material bases for domestic prosperity more constructive international engagement. By offering some measure of protection from external threats, sovereignty allowed states to engage their neighbors in mutually beneficial exchanges such as those arising from cooperation without threats to territory or political independence. Through the vessel of the nation state, which would later come to serve interests of self-determination as early modern conceptions of sovereign authority gave way to democratic aspirations, sovereignty helped to usher in a democratic age. Later, it would serve emancipatory interests against imperial and colonial rule, asserting prerogatives of popular and independent rule against powers that opposed both. Historically, sovereignty has served as a progressive force in modern politics.

Now, and for reasons to be explored in this paper, sovereignty often finds itself aligned against progressive change and emancipatory politics. As a result, some critics have come to view sovereignty as an outmoded and ultimately regressive concept, pointing to its use by those with interests in maintaining an oppressive and/or environmentally unsustainable status quo against pressures and conditions that would call for its curtailment or at least substantial revision. The purpose of this paper is thus to examine these pressures, to consider their relation to the principle that they seek to challenge and modify, and to consider whether sovereignty is inherently opposed to progressive change or whether an evolved construction of the principle might be able to accommodate such demands. To what extent does state sovereignty in the current international system help to advance sustainability imperatives, such as the protection of biodiversity or the mitigation of climate change, and to what extent does it stand as an obstacle to

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such efforts? Where sovereignty in its conventional form stands as an obstacle to such imperatives, can we identify a reformed or evolved conception of the principle that would better suit such objectives? These are questions to which the discussion in this paper shall now turn.

### **Sovereignty as Principle and in Practice**

As an international legal norm, sovereignty claims a *prima facie* right against coercive interference in its domestic affairs by foreign agents. The right can be overridden, for example when a state commits large-scale abuses of its resident peoples, which is often thought to justify humanitarian intervention to protect those vulnerable to such abuses. Other occasions that might allow sovereignty norms to be overridden are discussed further below. It protects only against significantly coercive interference, including acts or threats of military force or interference in processes of selecting government officials. Whether it is threatened by less coercive means such as economic pressures like sanctions or embargos or diplomatic pressures is a matter of some contention but is typically thought not to prohibit *soft power* interventions designed to persuade or shape preferences without coercion.<sup>3</sup> This distinction between coercive and non-coercive (or between hard and soft) power is likewise contested and shall be further discussed below. Similarly, the range of activities that is protected as among the domestic affairs of a people offers another area of contestation, with implications for how a state may manage its territorial resources as well as its treatment of resident aliens.

In practice, sovereignty is most frequently invoked to protect states, but for reasons to be explored further below is better construed as a collective right of peoples, which are principals for which states are agents, and is related to their right of self-determination. Where states reflect the will of their people, sovereignty is exercised simultaneously through both states and peoples, and no conflict exists between sovereignty and self-determination. Insofar as states do not always represent the collective will of their people but can nonetheless be sovereign, the two principles are separable. Autocratic states can be sovereign while denying self-determination.

Sovereignty is typically thought to contain three elements: jurisdiction within a territory, control over membership in the polity, and control over territorial resources. Jurisdiction applies to members as well as non-members within territorial borders and is typically exercised through

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<sup>3</sup> Joseph Nye (2004), *Soft Power: The Means to Success in World Politics* (New York: Public Affairs).

law and other administrative functions. While some exceptions are not thought to diminish the sovereignty of a state or its people—diplomatic immunity from most ordinary criminal charges, for example—threats to jurisdiction would include outside interference in national elections or undue influence upon government officials from foreign sources of power or authority. External sources of power or authority do not threaten sovereignty when they have been internally authorized, as with ratified treaties and sources of international law like conventions and other legal agreements. Because states rather than governments authorize such external constraints upon domestic jurisdiction, later governments are no less sovereign for being bound by them, even if some (e.g. the Trump administration with the Paris Agreement) seek to justify their disregard for such authorized legal constraints by reference to their impacts upon sovereignty.

Control over membership is limited to authority over immigration through which new members may be admitted to the political community and others may be granted permission to visit, reside or work within the territory, or be eligible some state services. Seldom does this apply to new members born to existing ones, as birthright citizenship is a common (if currently) contested constraint on this dimension of sovereignty, and the border control that states exercise is asymmetrical, applying to entry but not to exit (rights to emigrate, except for those whose freedom of movement is restricted as part of criminal punishment, are absolute). As Sarah Song has argued, state sovereignty cannot be used to deny entry to some necessitous migrants, and the principle of *non-refoulement* prevents states from returning refugees to their countries of origin when this would threaten their lives or seriously jeopardize their well-being.<sup>4</sup>

### **Sovereignty as Foe? The Debate over the CBD**

As an international legal norm, sovereignty can frustrate efforts to protect biodiversity, control pollution, and sustainably manage natural resources. In its strong form, sovereignty insists upon primacy over all internal matters for national governments, rejecting pressures from other states to participate in cooperative environmental governance efforts. The United States, for example, frequently adopts a very strong conception of sovereignty against participation in multilateral environmental governance efforts, from the Convention on Biological Diversity (CBD) to the Kyoto Protocol and Paris Agreement on climate change. In citing national sovereignty as a motivating reason for rejecting a U.S. role in these cooperative international

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<sup>4</sup> Sarah Song (2018). *Immigration and Democracy* (New York: Oxford University Press).

schemes, critics of such efforts have implicitly associated particular kinds of policy objectives with threats to national sovereignty, in some cases despite explicit and intentional framing to avoid conflicts with the principle as conventionally understood.

Debates over ratification of the CBD illustrate the direction that opponents of multilateral environmental governance have sought to develop the sovereignty principle. The Convention, which was negotiated alongside the UN Framework Convention on Climate Change at the 1992 Earth Summit in Brazil, aims to conserve biological diversity throughout the world, sustainably use its components, and to equitably share the benefits of earth's genetic resources. Importantly, its main principle, articulated in Article 3, aims to protect state sovereignty:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Adhering to the conventional distinction between internal affairs that are fully protected against interference by the terms of the CBD and those policies or practices that allow for transboundary environmental impacts from activities carried out within the boundaries of nation-states, Article 3 was intended to assuage the worries of those seeking to prevent multilateral environmental agreements from restricting the traditional prerogative of states to willfully degrade their own environments and deplete their natural resource stocks if they wished.

Arguably, effective biodiversity protection would have required a significantly retooled conception of the principle in which sovereign peoples have only a prerogative to injure themselves, not other persons, peoples, or nonhuman life that resides within national territories or is affected by actions undertaken under national policies. Here, sovereignty refers to a power to command or control forces or events in the world insofar as this control affects only the sovereign body, not all events, forces, or entities within a territorial space. Such a conception would follow J.S. Mill's distinction between self-regarding and other-affecting actions, viewing state sovereignty's core imperative as a kind of collective harm principle whereby a people's right of self-determination includes the prerogative to make imprudent decisions that risk environmental harm to members of the polity but not to non-members. One can imagine objections to even such a constricted view of sovereignty: collective decisions by a majority or powerful minority within a society to transfer environmental risk onto a vulnerable and disadvantaged group within its territory are aptly characterized as instances of environmental

injustice and condemned for their abuse of power rather than viewed as protected if regrettable byproducts of collective autonomy. But such a moderate conception would allow more external interference and principled constraint in a state's domestic environmental policies than does the CBD, prohibiting unsustainable resource management policies that deplete natural capital to the detriment of nonhuman inhabitants of threatened ecosystems or future generations of humans.

With the earth in the midst of a sixth mass extinction event, and the first anthropogenic catastrophe for the planet's biodiversity, a more critical examination of the principles ordering human-environment interactions may be needed to avoid what Elizabeth Kolbert estimates may lead to a loss of between 20 and 50 percent "of all living species on earth" by the end of this century.<sup>5</sup> Any international order that allows sovereign states to exploit their natural resources and degrade their ecosystems with no limit other than the CBD's prohibition of spillover effects onto neighboring territories may be viewed as complicit in this pernicious anthropogenic threat to the diversity of life on the planet. In addition to migratory species that transcend national borders and so are placed at risk if governments fail to protect their territorial habitats against impacts from resource extraction or other forms of development, many species of flora and fauna whose habitats lie entirely within the territories of single nation-states are placed at risk by a conception of sovereignty as strong as that accommodated by Article 3.

Indeed, an even stronger conception of sovereignty has been urged by anti-environmental populists like Donald Trump and Jair Bolsonaro, both of whom cite the principle on behalf of their domestic deregulatory and anti-environmental agendas. Elected president of Brazil in 2018, Bolsonaro pledged during his campaign to lift protections against Amazonian deforestation, with one economic model predicting a 268 percent increase over 2017 levels of deforestation within Brazil as the likely result.<sup>6</sup> Since Brazil is home to 30 percent of the planet's tropical rainforests and ten percent of all species of life on the planet, Bolsonaro's agenda is expected to intensify biodiversity threats. Importantly, Bolsonaro has suggested that he will invoke state sovereignty against international pressures to protect the Amazon, as he did during the campaign on behalf of his threatened withdrawal from the Paris Agreement.<sup>7</sup> Like Trump's fusion of right-wing

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<sup>5</sup> Elizabeth Kolbert (2014). *The Sixth Extinction: An Unnatural History* (New York: Henry Holt and Co.).

<sup>6</sup> Aline C Soterroni, et al (2018). *Environmental Research Letters* 13 074021.

<sup>7</sup>"Bolsonaro fears that combating global warming takes Brazilian sovereignty out of the Amazon", says expert. UOL News, 31 October 2018. Online: <https://noticias.uol.com.br/ultimas->

populism and international isolation in the U.S. context, Bolsonaro's invocation of sovereignty has little to do with democratic self-rule and is aimed primarily at undermining or circumventing external mechanisms of accountability and serving the resource exploitation interests of a tiny cadre of economic elites. Indeed, the assertion of state sovereignty against international efforts to protect the environment is among U.S. ideological exports to countries like Brazil.

The debate over ratification of the CBD within the U.S. Senate illustrates this tension within the principle of sovereignty, as its interpretive flexibility and essentially contested nature open it to serving widely divergent political agendas. During the first ratification push in 1992, Senator Don Nickles (R-OK) claimed that "they [developing countries] want our money with only vague accountability and they want our technology for free," identifying concerns over intellectual property rights and U.S. sovereignty as his two primary objections to the treaty. Two op-eds entered into the *Congressional Record* by Nickles unpack this concern about national sovereignty in the treaty's finance mechanism. One in *USA Today* alleged that the treaty would "deny the USA and other industrial nations control of the dollars they donate to conservation," while another from the *New York Times* claimed that "money will be allocated to conservation projects through a financing mechanism controlled by the parties to the treaty, mostly the poor countries." According to this view, state sovereignty is threatened whenever the finance mechanisms of international organizations are independent of or otherwise not dominated by donor states. Such a strong conception of sovereignty would obviously be inimical to U.S. participation in other multilateral environmental treaties.

When ratification was reconsidered two years later, GOP opposition was again expressed in terms of sovereignty, in the process widening the incompatibility between the conception of sovereignty wielded by Senators opposed to the treaty and any meaningful U.S. participation in international environmental protection efforts. Senator Conrad Burns (R-MT) claimed that the CDB "could give a panel outside the United States the right to dictate what our environmental laws should say. That is wrong." Not to be outdone, Senator Larry Craig (R-ID) alleged that "environmentalists will stop at nothing in their zeal to extend the power of the [Endangered Species Act], regardless of the disruption and damage which results," and Senator Kay Baily Hutchinson (R-TX) added that ratifying any treaty that would require implementation of its

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[noticias/rfi/2018/10/31/bolsonaro-teme-que-combate-ao-aquecimento-global-tire-soberania-brasileira-da-amazonia-diz-especialista.htm?cmpid=copiaecola](https://noticias/rfi/2018/10/31/bolsonaro-teme-que-combate-ao-aquecimento-global-tire-soberania-brasileira-da-amazonia-diz-especialista.htm?cmpid=copiaecola)

“essential nuts and bolts” at an international conference of the parties, which if allowed would mean that the Senate “will have given away one of its major constitutional authorities and will have betrayed the trust of the American people.”

Beyond rejecting any international sharing of power over governance of the treaty’s finance mechanism, the conception of U.S. sovereignty advanced by the Senate GOP during this 1994 debate over the CBD rejected the establishment of any multilateral governance powers through the convention as an affront to sovereignty. If accepted, this construction of sovereignty would in practice nullify all international law and the authority of any multilateral institution, and with it any sort of U.S. participation in cooperative international environmental protection efforts. This, despite the fact that sovereignty as conventionally understood allows for the empowerment of multilateral executive authority necessary for a treaty regime’s implementation. Such powers form an essential component of international cooperation, without which treaties are impossible, and are fully legitimate when ratified by bodies like the Senate. Indeed, their authorization through treaty ratification constitutes a key exercise of sovereignty rather than an affront to it. Craig’s comparison of the CBD to the Endangered Species Act—an authorized statute that embodies rather than threatens national sovereignty, but which Craig opposes for ideological reasons—betrays the motive and substance of this GOP construction of strong sovereignty, in which Senators hoped to cloak an isolationist and deregulatory agenda and to claim greater power over foreign policy against a president of the opposing party.

Indeed, the CBD was carefully negotiated so as to avoid interfering in recognized and legitimate national sovereignty interests, and as such should not threaten the principle as conventionally understood. As William Snape III notes:

Contrary to the rhetoric of some extreme ideologues who seemingly oppose involvement in any multilateral cooperative endeavor, the CBD creates a global structure that is implemented with wide latitude and discretion at the national level, specifically allows for negotiation (or rejection) of annexes or protocols, does not mandate binding dispute settlement and provides connection with other accepted international agreements.<sup>8</sup>

While opponents may have grounded their opposition in terms of sovereignty, their aims likely had little to do with enhancing popular self-determination over U.S. internal affairs and much to do with pressure from the biotechnology industry, which opposed the treaty’s subordination of

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<sup>8</sup> William J Snape III (2010) “Joining the Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up.” *Sustainable Development Law & Policy*, Spring 2010, 6-16, 44-47.

intellectual property rights to other rights recognized by the convention. According to then-EPA Administrator William Reilly, in a July 1992 memorandum, an operative from the Bush White House undermined his pro-conservation negotiating position at the Rio Earth Summit when “elements of that industry convinced the State Department, Vice President's office and White House that the Convention did threaten them.”<sup>9</sup> Sovereignty, which in its standard construction enjoys wide support within international law and politics, merely provided a more acceptable pretext for treaty opponents than did their true aim of protecting corporate profits.

The view of sovereignty on display in the U.S. Senate’s rejection of the CBD combines two related claims about state power and authority. The first takes any formal limit upon state power, including any kind of power sharing with other states or the creation of any legislative, executive or judicial power beyond the nation-state, as an inherent threat to sovereignty. U.S. opponents of the United Nations, the Paris Agreement, and International Criminal Court often cite sovereignty concerns in justification of their rejection of such institutions, irrespective of the substantive merits that they might provide. Strong sovereignty dogmatists reject all bilateral and multilateral agreements, all international organizations and institutions, and any other source of power or authority as infringements upon sovereignty. While not necessarily isolationist—advocates of this view are often hawks when it comes to the unilateral use of military force to advance national economic or strategic interests or against other perceived threats to national hegemony and (perhaps hypocritically) tend to support institutions of neoliberal economic globalization—this view insists upon full control over the terms of engagement with other states.

The second claim concerns the basis or objective of such engagement, as this is closely associated with this strong conception of sovereignty even if conceptually distinct from it. In rejecting the CBD, for example, Senators identified potentially foregone profits to U.S firms as among their objections to participation in the treaty, suggesting an additional constraint on international engagement. By this view, which is often associated with realism and contrasted with idealism in international relations, states may only use their power in international politics to promote their own economic or strategic interests. Ethical or altruistic objectives, like the protection of human rights or the promotion of human development, would by this view threaten the strong sovereignty advocated by opponents of the CBD. Sovereign states are in this sense

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<sup>9</sup> Robert F. Blomquist (2002)., “Ratification Resisted: Understanding America's Response to the Convention on Biological Diversity, 1989-2002,” *32 Golden Gate U. L. Rev.*: 493-586, p. 533.



equivalent to individual ethical egoists, resolving all external actions to narrow self-interest and participating in cooperative endeavors only insofar as these maximize national interests. Profits accruing to private industry like biotechnology, according to this conception of sovereignty, are treated as equivalent to or a source of national economic interests, while biodiversity protection or mitigation of anthropogenic environmental change are treated as illegitimate objectives.

Both claims are ideological and are largely peripheral to sovereignty as conventionally constructed. Rejecting idealism in international relations and rejecting multilateralism and the binding force of international law have been frequent if inconsistent strategies of ideological conservatives in the U.S., with the neoconservative embrace of post-war Iraqi nation-building a notable departure from both. The two claims are practically related in that establishing international institutions to which other states could voluntarily consent or sharing power with other states in bilateral or multilateral treaties often requires some concession to the interests of other participating states rather than insistent pursuit of narrowly-construed national economic and strategic interests only, but they remain conceptually distinct. Like the Platonic philosopher king, a benevolent hegemon could altruistically serve the interests of all states without sharing any power with them, so the first kind of sovereignty claim is insufficient for the second to be realized. Nor is it necessary, at least for non-hegemonic states, which must typically concede some power to other states or to multilateral institutions in order to realize the benefits of mutually advantageous cooperation.

One might contrast a dogmatic conception of sovereignty, in which national governments assert the primacy of their authority over all matters within their borders while also holding to realist principles by which they only enter into international agreements when they expect net benefits from doing so, with a more pragmatic view in which international cooperation is not seen as inherently threatening to state authority and those realist principles are not always or necessarily applied. Under the former view, a state would only participate in a multilateral climate change mitigation treaty framework if it expected the domestic benefits of its participation to exceed its domestic mitigation costs of participation, whereas under cooperative sovereignty a different calculus could be used. For example, a cooperative state could participate if it viewed the objective as important and the allocation of burdens under the treaty framework as fair, even if that state expected its domestic costs to exceed its domestic benefits, or could view its future participation as required by considerations of historical justice, as a matter of its

responsibility for historical emissions, or of distributive justice, as being relatively affluent while poorer states were more vulnerable to climate change.

Note that in the above distinction it is not sovereignty itself that makes states claiming strong sovereignty into such poor cooperators, but is rather their realist bent by which only the economic or security interests of the state or its citizens could justify ceding any power to an oversight body by which national compliance with the terms of bilateral or multilateral treaties could be enforced. One might thus retort that sovereignty is therefore not the relevant obstacle, but rather the selfish orientation of the state's foreign policy prevents its being able to enter into cooperative efforts with other nation-states. This would be fair enough, except that sovereignty as a norm has come to be so closely associated with these realist premises (as realism is also so closely wedded to post-Westphalian sovereignty) that the two cannot be dissociated.

### **Trump and the Sovereignty Principle**

As seen in the episode surrounding ratification of the CBD and elsewhere, the U.S. has routinely invoked its sovereignty on behalf of refusals to cooperate in international efforts to protect biodiversity, slow climate change, punish war crimes, and protect the rights of children, to name just a few occasions. In announcing the U.S. withdrawal from the Paris Agreement and renunciation of its pledges to the Green Climate Fund, for example, President Donald Trump cited national sovereignty on behalf of his rationale for refusing to participate:

Foreign leaders in Europe, Asia, and across the world should not have more to say with respect to the U.S. economy than our own citizens and their elected representatives. Thus, our withdrawal from the agreement represents a reassertion of America's sovereignty.<sup>10</sup>

Characterizing the Paris Agreement “a massive redistribution of United States wealth to other countries,” Trump suggests that sovereignty requires countries to refuse participation in treaty efforts that could potentially cost participating countries more than they receive in domestic benefits, asserting what Posner and Weisbach term “international Paretianism” as an element of sovereignty itself.<sup>11</sup> As with the GOP Senators' rejection of the CBD, realist premises about

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<sup>10</sup> *Statement by President Trump on the Paris Climate Accord* (June 1, 2017). Online at: <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>

<sup>11</sup> Eric A. Posner and Cass R. Sunstein (2015), *Climate Change Justice* (Princeton University Press).

what constitutes a legitimate objective in international relations are smuggled into a conception of sovereignty by which issues of legitimate authority are conflated with ones about objectives.

Trump's efforts to reshape the principle to embrace his economic nationalism and political isolationism can be seen elsewhere, as well. In a 2017 speech before the UN, he used the word sovereignty ten times, claiming it to occupy a central place in what might be termed the Trump Doctrine. Treating his address like a stump speech before his fawning base, he claimed: "In foreign affairs, we are renewing this founding principle of sovereignty. Our government's first duty is to its people, to our citizens — to serve their needs, to ensure their safety, to preserve their rights, and to defend their values." In a 2018 address before the General Assembly that provoked both gasps of shock and laughter, in which he used the term six times, he announced that the U.S. "will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy."<sup>12</sup> Clarifying that his view of sovereignty rejected the authority of all international institutions, including convention-based international law and ratified treaties to which the U.S. is legally bound, he claimed that "America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism."

Since the Paris Agreement was negotiated under the 1992 UN Framework Convention on Climate Change, to which the U.S. is a signatory, it had already been properly authorized and so involved no infringement upon sovereignty as conventionally construed. The U.S. was legally a party to the Agreement—which contained no binding commitments or enforceable powers—and could not legally withdraw until 2018 under its terms. After months of internal debate within the administration about whether to formally and prematurely withdraw or to remain within the Paris framework while ignoring its mitigation commitments, Trump followed the counsel of advisors seeking to do the greatest damage to international law and withdrew. His proposed revision to the concept of sovereignty in his rationale for doing so is thus best understood as an attack upon the rule of law, as among the constraints on presidential power, for binding later presidential administrations to treaties ratified under previous ones. Not only would Trump's conception of the principle appear to reject the authority of all multilateral agreements and international law, it views sovereignty to be in conflict with the binding nature of the rule of law itself, in a domestic as well as international context. His willful ignoring of the emoluments clause, his preference

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<sup>12</sup> Full text: Trump's 2018 UN speech transcript. Politico (September 25, 2018). Online at: <https://www.politico.com/story/2018/09/25/trump-un-speech-2018-full-text-transcript-840043>.

for “acting” officials rather than properly approved ones, and other hostile rejections of U.S. law limiting executive power or enabling institutional oversight all reflect his view of sovereignty.

In this sense, Trump’s conception of sovereignty most closely resembles the view espoused by early modern political theorist Jean Bodin, for whom sovereignty requires that absolute power be vested in the person of a monarch (or *sovereign*). Bodin’s conception, as with Trump’s, treats any constraint upon executive power as a threat to sovereignty, as “sovereignty given to a prince subject to obligations and conditions is properly not sovereignty or absolute power.”<sup>13</sup> As Joan Cocks notes, this early modern conception stands in sharp contrast to the view of sovereignty as a guarantor of freedom or popular self determination characteristic of its later modern conception. “In a nutshell,” she writes, capturing Trump’s view of sovereignty as well as Bodin’s, “the good of sovereign power for the Prince is such recognized superiority that he can impose his will on society without encountering inside that society the legitimate or effective opposition of another human will.”<sup>14</sup> The conception of sovereignty on display in the Trump Doctrine, that is to say, calls for a return to a pre-modern worldview in which kings rule by divine right, where the absolute monarchy defended in Hobbes’ *Leviathan* is too democratic and egalitarian, and where law and other institutional constraints upon executive power are anathema to sovereignty itself rather than embodiments of it.

### **Faulting Conventional Sovereignty**

The conception of sovereignty on display in rejection of environmental treaties like the CBD or Paris Agreement, which typically rely upon “globalist” conspiracy theories and endorse an often xenophobic insularity through which national interest do not merely outweigh those of other states or foreign nationals so much as entirely subsume or replace them. This “America-First” (or “Brazil-First”) view by which sovereignty is used to protect not only against outside interference in domestic policy but also in conventional forms of pluralism and accountability stands in marked tension with defensible conceptions of the principle. When sovereignty became the vehicle through which conservative Senators sought in the 1990s to resist the efforts at multilateral environmental governance by the Clinton administration, the escalation of that

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<sup>13</sup> Jean Bodin (1992). *On Sovereignty: Four chapters from The Six Books of the Commonwealth*, ed. and trans. by Julian H. Franklin (New York: Cambridge university Press, p. 6.

<sup>14</sup> Joan Cocks (2014). *On Sovereignty and Other Political Delusions* (New York: Bloomsbury), p. 31.

conflict between branches of government over international environmental policy claimed a tenable view of state sovereignty among its victims. Seeking to deny the president any authority to negotiate international agreements—a power that is clearly granted within the Constitution, which affords the Senate only a secondary “advice and consent” role—those Senators began a process of redefining sovereignty to undermine rather than protect national self-determination and to proscribe any cooperative multilateral efforts to protect our shared environment, which those Senators opposed on ideological grounds.

Leaving aside the “globalist” conspiracy theories and longing for pre-modern absolute monarchy inherent in the Trump Doctrine’s conception, mainstream conceptions of sovereignty likewise collide with imperatives of sustainability. For example, the *permanent sovereignty* principle, which was first articulated with UN General Assembly Resolution 1803 in 1962 and reaffirmed in Common Article 1 of the Covenant on Civil and Political Rights (CCPR) and Covenant on Economic, Social and Cultural Rights (CESCR) four years later, assigns natural resource rights to peoples within the territory in which those resources are located, rather than allowing wealth from their extraction and exploitation to be transferred by states to foreign interests with no benefits from their extraction and sale accruing to the people. Resolution 1803 notes that such resource rights are to be “exercised in the interest of their national development and the well-being of the people of the state concerned,” which as Article 47 of Covenant on Civil and Political Rights and Article 25 of Covenant on Economic, Social and Cultural Rights states entails the right to “utilize fully and freely their natural wealth and resources.”

Developed in response to patterns of resource exploitation by which residents of resource rich developing countries saw little or no benefit from the extraction and export of natural resources by foreign states and multinational corporations, permanent sovereignty seeks to ensure some public benefit from private resource extraction and depletion, granting management authority over territorial resources to states with the explicit charge that these be exercised in a manner that benefits the people. Under this principle, states could transfer ownership or use rights over some territorial resources so long as this provided some benefit for local people, understood in terms of advancing economic and political self-determination.<sup>15</sup> In practice, this “resource privilege” has been exercised by states rather than peoples themselves, with what

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<sup>15</sup> Schrijver, N. (1997). *Sovereignty over natural resources: balancing rights and duties*. New York: Cambridge University Press.

Thomas Pogge describes as “disastrous effects in those many poor countries where the resource sector constitutes a large segment of the national economy.”<sup>16</sup>

Of primary interest here is the permission that it grants under the umbrella of sovereignty to virtually unlimited resource extraction, including and especially the fossil fuel resources that cause climate change and drive local air and water pollution. This element of conventional state sovereignty was reaffirmed in the CBD at the request of states concerned about the impact of international conservation efforts upon their domestic resource industries and is on display in Article 3 as excerpted above. While gesturing toward a constraint against causing cross-border environmental externalities (states have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction“), the CBD expressly affirms a conception of sovereignty whereby development of territorial fossil fuels is a matter for national governments only, not one for global (climate change) governance. Consistent with the conventional interpretation of sovereignty as granting unlimited command and control within a defined territory to the people or its legitimate governmental agent, the CBD sought to assure reluctant state parties that international conservation and biodiversity efforts would not interfere in their prerogatives to deplete their mineral resources and degrade their domestic environments.

One might of course point to this clause in Article 3 as recommending constraints upon resource development when these contribute to global environmental change—constraints that would be consistent with the interpretation of sovereignty as collective freedom consistent with something like Mill’s harm principle—in which case the territorial limits of sovereignty might be thought to prohibit resource exploitation that caused transboundary environmental harm, as fossil fuels inherently do. But Article 3 is widely recognized *not* to carry this implication: fossil fuel development contributing to climate change is permitted as an aspect of permanent sovereignty. Instead, a December 2017 report of the CBD’s Subsidiary Body on Scientific, Technical, and Technological Advice recommends the “mainstreaming of biodiversity into the energy and mining sectors” through the dissemination of best practices and technical assistance rather than prohibitions or regulations upon extractive industries or practices. Despite noting that “the burning of fossil fuels is widely known to be a major cause of climate change, presenting a

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<sup>16</sup> Thomas Pogge (2008). *World Poverty and Human Rights*, 2nd edition (Cambridge: Polity Press), p. 336.

significant impact on biodiversity globally” and that energy resource extraction can also “have large direct impacts on biodiversity and ecosystem services,” these impacts are not considered to warrant the kinds of international restrictions that a strong reading of Article 3 might suggest.<sup>17</sup>

Such tensions between the conventional conception of sovereignty and international biodiversity efforts ought to give pause to the supposition that the two can coexist. The CBD allows for the destruction of critical habitats through domestic natural resource extraction practices in deference to the sovereignty concerns of participating states (or nonparticipating ones, since the U.S. is not a party), undermining its core purpose. It allows for the unlimited extraction and export of fossil fuels, which are the primary culprits behind the planet’s fifth mass extinction, again prioritizing sovereignty over biodiversity or ecological sustainability. Insofar as this deference to sovereignty is likely to comprise the CBD’s most serious limitation, we may wonder whether biodiversity protection is compatible with a world of sovereign states at all. Insofar as greenhouse gases transcend national borders but international laws seeking to reduce their emission cannot, sovereignty as conventionally understood may threaten our ability to maintain the environmental conditions for democratic self-determination to flourish rather than allowing that quintessentially modern expression of popular sovereignty.

### **Greening sovereignty**

One might wonder whether *any* conception of sovereignty could accommodate interests in preventing massive biodiversity loss or catastrophic climate change. Given the scope and scale of these environmental objectives, one might further suggest that *any* tenable view of state sovereignty *must* accommodate these interests or be abandoned, as no longer serving the interests of protecting peace and prosperity for which it was originally conceived. In this section, I shall aim to sketch an evolution of the principle that is compatible with its recent extension in other areas and which at least reduces the tensions between sovereignty and sustainability. For lack of a better term, this *progressive sovereignty* describes a conception that on the one hand seeks to protect the collective interests of peoples as they are typically organized into nation-states while also protecting against the kinds of anthropogenic global environmental threats that implausibly strong conceptions of sovereignty have in recent years been invoked against.

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<sup>17</sup> <https://www.cbd.int/doc/c/d9d0/7a53/95df6ca3ac3515b5ad812b04/sbstta-21-inf-09-en.pdf>.

In order to develop a progressive conception of sovereignty applicable to multilateral environmental agreements like the CBD or Kyoto Protocol, we might examine how the concept has evolved in response to other concerns about how strong conceptions of the principle might undermine its constructive intent. Starting with the atrocities committed during World War II, nations have developed a body of international humanitarian law designed to condemn (with an eye toward preventing) war crimes and crimes against humanity. Finding its first articulation in the Nuremberg Trials but soon after encapsulated by the 1949 Universal Declaration of Human Rights, the notion of universal and inviolable rights against pernicious human-caused threats to basic human security grew over the latter half of the 20<sup>th</sup> Century to also include less basic right protections, through for example the 1966 ICCPR and the ICESCR from that same year.

While the doctrine of human rights did not immediately threaten state sovereignty, and indeed such sovereignty interests were also legally instantiated in the UN Charter that would later give force to those rights as well as in expressions of human collective rights to territorial integrity and national self-determination, it did introduce a counterpoint to them. Human rights are valid normative and aspirational legal claims for all persons and peoples, regardless of their countries of origin or the recognition of those rights by their home governments. Insofar as the UN Charter sought simultaneously to instantiate and strengthen state sovereignty interests by affirming territorial integrity and establishing an international quasi-legislative body composed by member states and to increase protections embodied within human rights, it set up a tension that would be delegated to the Security Council for resolution and eventually resolved through the weakening of sovereignty through the doctrine of humanitarian intervention. Given the context of atrocities committed within sovereign states during World War II, the UN Charter affirmed the importance of sovereignty for warding off hostile foreign threats to territory and in collective security but also identified aspirational interests that could be threatened by the abuse of sovereign power and which could require its curtailment.

Half a century later, in response to the growing concern about humanitarian crises occurring within the borders of sovereign states, the International Commission on Intervention and State Sovereignty (ICISS) released its *Responsibility to Protect* report in 2001, promoting a progressive reinterpretation of sovereignty principles. The report contained two core principles. First, it stressed that sovereignty not be construed only as a negative right against outside interference but also in terms of positive obligations, claiming that “the primary responsibility



for the protection of its people lies with the state itself.” While this principle doesn’t challenge the fundamental nature of sovereignty so much as orient it toward human rights objectives, it sets up the second principle, which identifies humanitarian intervention as a remedy for states failing in their obligations to protect their people.

Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>18</sup>

The Report, upon acknowledging the instrumental value of sovereign states in maintaining a just international order, emphasized that a changing international environment required a recognition of sovereignty’s “dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state” (1.35).

Rejecting strong formulations that would allow sovereignty to override human rights imperatives (noting that “the defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people”), the Report frames its recommendations as a shift in emphasis in rather than a fundamental revision to the principle. Nevertheless, its assertion of a right to intervene in the internal affairs of states in some cases remains controversial, with opponents typically claiming undue infringements upon national sovereignty on behalf of their opposition or against its invocation. Its subtle redefinition of the sovereignty principle aimed to relocate it within a rights framework with a democratic core, as an embodiment of popular sovereignty and self-determination rather than as a pretext for enhancing the power of states to abuse their people. In this sense, it shifts power from states as agents to the people that are their principal. As Cocks writes, “attaining freedom from monarchical power, which in real life proved more oppressive than Bodin and Hobbes Theorized, has seemed to people in many centuries and many regions to be synonymous with wresting the prerogatives of sovereign power for themselves.”<sup>19</sup> The R2P Doctrine merely provides international assistance in achieving this objective of popular sovereignty.

The redefinition of popular sovereignty as fulfilling legitimate human rights objectives and of working toward the realization of rather than undermining popular sovereignty and democratic self-determination can be termed “progressive” in that it seeks the principle’s further

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<sup>18</sup> <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>19</sup> Cocks (2014), p. 36.

evolution away from justifying sovereign power as domination and redirecting it to serve modern interests in securing freedom. Such a progressive redefinition of sovereignty and its related concepts can be seen in Allen Buchanan's work on secession, for example. As Buchanan has argued, territorial integrity (as part and parcel of sovereignty) serves "the most basic morally legitimate interests" of its residents "in the preservation of their rights, the security of their persons, and the stability of their expectations."<sup>20</sup> As among the set of territorial rights that accrue to states that legitimately inhabit a defined territory, alongside sovereignty, the principle of territorial integrity guarantees an effective jurisdiction within a bounded territory that persists over time within which a people may exercise political authority. Territorial integrity creates the conditions under which effective sovereignty is possible, which in turn makes possible the kind of legal order upon which the rights and other interests of persons depend.

But sovereignty and territorial integrity must also be bounded by imperatives of justice and human rights, Buchanan maintains, while also being instrumental to them. Sovereignty and territorial integrity may be necessary conditions for rights-protecting state institutions, but they are not sufficient for this purpose. For this reason, Buchanan urges a "progressive interpretation" of territorial integrity by which only legitimate states have this prerogative protected under international law, citing the large-scale abuse of human rights as "guidance" for identifying existing states as illegitimate. One might expand this account to apply to the full set of territorial rights—including sovereignty, border control, and territorial resource rights—such that they are viewed as applying only under conditions compatible with the maintenance of an international order capable of maintaining them over time.

A related strategy for reconciling the apparently competing demands of sovereignty and sustainability, then, would be to expand such a progressive interpretation of the principle to include environmental protection imperatives. One could, for example, amend the second RTP principle to add severe resource scarcity or environmental degradation to the list of drivers of the "serious harm" that that could potentially trigger an international intervention. This approach would follow proposals to broaden the definition of refugees to include those threatened not only by violent conflict or persecution but also environmental migrants forced to flee by threats to their lives and livelihoods by sea level rise, droughts, or other environmental changes. Adding

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<sup>20</sup> Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs*, Vol. 26, No. 1. (Winter, 1997), pp. 31-61, p. 47.

environmental to the existing conflict-based drivers could broaden the category in such a way that maintains the integrity and rationale for the principle—protecting persons and people in their basic human rights—while also explicitly identifying the full range of threats to these.

Robyn Eckersley proposes such an expansion in the form of an “ecological intervention” by which the international community might legitimately intervene in the internal affairs of a sovereign state if necessary to prevent grave environmental harm. In many ways, an ecological intervention would follow the legal and moral logic of a humanitarian intervention: that while states have primary responsibility for protecting the integrity of their territorial ecosystems, in some cases their failure to adequately do so would trigger an international intervention, by force if necessary. This would also entail what Buchanan terms a progressive interpretation of state sovereignty that allows for control over legitimate internal matters, including some but not all territorial natural resource development prerogatives and some but not all impositions of risk from environmental harm caused by a state’s environmental or energy policies.

Most clearly compatible with existing legal norms, Eckersley suggests, would be actions necessary for preventing transboundary environmental harm originating within the territory of some sovereign state (e.g. “a Chernobyl-like nuclear explosion” in which “military intervention may be the only means of preventing an imminent transboundary ecological disaster”). Since sovereignty doesn’t protect against threats beyond state borders, no legal exception to it would be needed in such a case. Less clearly in line with existing norms, but compatible with R2P interpretations of them, would be what Eckersley terms “eco-humanitarian intervention,” where intentional damage to the environment (“ecocide”) is used against targeted peoples (e.g. “the decimation of the marsh region, the homeland of the Ma’dan, or Marsh Arabs, by Saddam Hussein’s Baathist government”). Lest compatible with existing legal norms would be ecocide (or “crimes against nature”) that don’t involve human victims, which as Eckersley notes is “the most challenging” as it “directly appeals to a moral referent beyond humanity.” Nonetheless, such an extension of R2P principles to protect biodiversity “is no longer unthinkable,” for many of the same reasons that the ICISS advocated the evolution of state sovereignty norms.

Similarly, Catriona McKinnon proposes the human rights crime of *postericide*, or the “intentional or reckless conduct fit to bring about the near extinction of humanity.”<sup>21</sup> As with the

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<sup>21</sup> Catriona McKinnon (2017) Endangering humanity: An international crime?, *Canadian Journal of Philosophy*, 47:2-3, 395-415, p. 405.

R2P Doctrine, it identifies strong state sovereignty as in tension with human rights objectives and seeks to reconcile the two through a progressive redefinition of sovereignty. Like Eckserley, she argues that the further evolution of sovereignty that she proposes has only become thinkable as the result of large scale anthropogenic environmental atrocities. She argues:

Human security only contingently requires a Westphalian world order. If well-ordered states are instrumental to human security then the arguments I make here also count as arguments for protecting the security of well-ordered states, which means protecting their sovereignty.”<sup>22</sup>

Asserting the critical role of ecological integrity in maintaining the material conditions needed for meaningful exercises of popular sovereignty and self-determination, and counterposing these to exercises of state sovereignty that erode such conditions, McKinnon seeks to progressively evolve the principle away from its premodern incarnation and toward a principle that is suitable for governing relationships between nation-states under contemporary contexts and conditions.

One need not go so far as to defend ecological intervention in cases of “crimes against nature” to appreciate how environmental concerns require an evolution of sovereignty norms away from the strong conceptions still invoked by some against the CBD and Paris Agreement. Military force is not obviously compatible with ecological imperatives, as Daniel Duedney notes against proposals to attach a security frame to global environmental problems like climate change. At the same time, for states to invoke sovereignty against participation in multilateral agreements begs the question of what sovereignty should and should not be allowed to protect or advance, and wielding it on behalf of national policies that degrade the environment or deplete natural resources requires more than just an assertion of the principle.

In the context of climate change, for example, the invocation of sovereignty on behalf of Trump administration policies that roll back or undo Obama-era efforts to reduce emissions from automobiles and coal-fired power plants would require some additional analysis than has been provided by the administration or its apologists. Legally, the United States entered into the Paris Agreement under the auspices of the 1992 UN Framework Convention on Climate Change, so it required no additional ratification by the Senate and involved no diminution of its sovereignty. Sovereign states can enter into treaties that bind them beyond the terms of those governments that negotiate or ratify them, and legally delegate administrative discretion to Conferences of the Parties without requiring line-item Senatorial ratification of each of its terms.

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<sup>22</sup> McKinnon (2017), p. 403.

### **Concluding thoughts**

At issue is *who* or *what* is sovereign, which mere reference to the term state sovereignty does not fully resolve. A state is an apparatus that can be alternately controlled by governments of different parties, so if sovereignty attaches to states the elective decision by one government to participate in a multilateral environmental treaty would not threaten the sovereignty of a later government of the same state, as the persistence of the state itself connotes a lasting permission that cannot be later criticized as an infringement upon its sovereignty. States may be able to legally withdraw from such treaties (although it is not clear that prohibitions against this violate sovereignty when it is merely a particular government rather than the state itself that seeks to do so), but cannot justify such withdrawal from sovereignty itself. Insofar as sovereignty originates in the people and is only contingently entrusted to states as agents through which the popular will and the rights and interests of the people remain paramount, and since governments are only temporary agents within those states, a legitimately enacted sovereign commitment to a treaty framework can bind future governments without any limitations on sovereignty.

More generally, we must understand operative legal and political principles as subject to a process of evolution and adaptation to changing conditions, which include new social demands for inclusion or political independence as well as changing environmental conditions. Given its origin in early modern resistance to democratic modernity and its instantiation in a Westphalian order that was still under the sway or premodern notions of chivalry and divine right monarchy, we should be impressed by the concept's malleability and adaptability rather than frustrated by those who ahistorical and disingenuous invocation of sovereignty is meant to reinforce and ossify oppressive institutions rather than empower emancipatory ones. It is a matter of great urgency whether or not the modern state system, with its legal and normative principles like sovereignty, can adapt to changing political and environmental conditions. Some critics, of course, insist that it cannot, urging their preferred systems of social and political organization in its place, whether these are to operate at larger or smaller scales than that at which sovereignty now functions. Perhaps they are correct, and the state system is both complicit and beyond repair, in which case they too will need a conception of sovereignty that can be attached to the locus or power that replaces it. How the principle must evolve to meet contemporary challenges is thus independent of its limitations as currently used, demanding such critical reconception.