Global Governance: Sovereignty Reinvented in The Context of Territorial Claims

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Abstract

This paper examines recent developments in the area of sovereignty and territorial claims and in the light of competing and apparently irreconcilable territorial claims both in the Middle East and other areas of the world, proposes a treaty-based regime in which the existing claims of sovereign states are recognized but are not, for the duration of the treaty regime, implemented.

This enables vital inter-state co-operation to develop in key areas of law (e.g. trade, public health, customs, cyber-security) without negating the existing claims of competing states.

Notwithstanding the conceptual limitations of this approach (often described as "sovereignty-lite"), in practical terms it may offer a path forward based on stable (albeit incomplete) regimes and effective inter-state co-operation.

This paper suggests that such an approach would be most effective in regions with shared geographies, histories and/or cultures, such as the GCC.

Keywords: sovereignty, territorial claim, Westphalia,

Introduction

One of the greatest challenges facing contemporary human societies, including Arab and Gulf societies, is development of the rule of law in the context of disputed territorial claims. For security, peace and stability to be sustainable, human society requires a means by which such claims can managed between states without reducing the effectiveness of the institutional apparatus of any state.

This challenges the Westphalian notion of sovereignty, which is an all or nothing notion i.e, one state "wins" while another "loses". After a relatively stable period of approximately 50 years after WW2, it appears that global order is moving towards great instability and possibly also towards greater conflict, with the return of geopolitics and heightened nationalism in almost all of the major states in the system, with the structural instabilities and inequalities of global capitalism, and with new and disruptive patterns of social and political mobilization. Legal institutions, which are typically structured around Westphalian notions of sovereignty, are often inadequately equipped to respond preemptively to territorial claims, and existing legal institutions are often already under immense stress with the frequent invocation of terms such as gridlock, stagnation, or fragmentation.

This is true even of the most hitherto successful institutions (such as the EU); it is also true of some of the most fundamental sets of legal rules (such as those relating to the use of force); and it is true even of those areas where the alleged 'imperatives' of global cooperation have seemed most evident (as with water security between Palestine and Israel).

Over the last few years, increased politicization is certainly visible at the domestic and regional levels in several GCC states, with new forms of domestic political pressures emerging. Consider, for example, the boycott of Qatar, and increased tension between Saudi Arabia and Iran. This increased politicization is also visible at the international level, with direct geopolitical rivalries (South China Sea, Ukraine, NE Asia), increased contestation at the regional level, and the spill-over of such geopolitical rivalries into other areas such international economic relations such as trade and foreign investment, particularly in infrastructure designed to deliver prosperity both in urban areas and to more vulnerable isolated populations in Arab and Islamic states.

With such challenges increasingly evident in domestic politics, it is hardly surprising that the scramble for solutions often includes calls for reform of domestic legal and/or political institutions.

This paper will address three questions: First, what are the drivers of the present impetus for reform? Although nationalism and identity politics stress what is particular and distinctive, the fact that these changes are occurring is many different places across the world strongly suggest that systemic factors and forces are at play. So we need to think about how best, analytically, to make sense of these systemic drivers. And we need to place them in a broader and longer-term historical perspective. Does it make sense to think in terms of analogies with the 1930s or the 1970s?

Second, how has the idea of the global rule been understood in the GCC? Before concluding that the only choice is between a particular view of the so-called global liberal order and renewed conflict and chaos, we need to ask about the different roles that international law has played, or might play, within a far more strongly global international society. And third, what can we learn from looking in more detail at the issues of territorial claims and sovereignty?

What we learn about the capacity of different areas of law and governance to withstand and even prosper in turbulent times offers new insights into newly emerging paradigm of sovereignty reinvented and suggests one possible path forward for nations embroiled in territorial disputes, system of "sovereignty-lite" based on the principles of the 1959 Antarctic Treaty System. Before proceeding, it is, however, necessary to understand the current concept of sovereignty, on the basis of which most states developed.

The Sovereignty Paradigm

Traditionally, international law focused on recognizing and preserving each state's sovereignty. It was premised on the freedom of control over activities within each state's jurisdiction. Since the early 1990s, however, there have been several significant challenges to international law and to the system of international relations which is premised on that law.

The classical nation state, which emerged from the Treaty of Westphalia more than three hundred years ago, is no longer the sole actor in international relations. Multinationals, NGOs, individuals and regional groups have all influenced international relations and some developing countries now wield considerable political and economic power. In 1979, Henkin predicted:

> In the final quarter of the twentieth century the character and significance of international law will…be importantly influenced by the Third World. The aspirations, the ideas and the rhetoric of the new majority – "self-determination", "the elimination of all forms of racial

> discrimination," "the common heritage of mankind" (in the seabed), "the new economic order" – have become political currency and are shaping and reshaping the effective law[1].

Forty years later, the common heritage of mankind, which Henkin attributed to the seabed, has been extended by international law to all natural resources. Racial discrimination is almost (although not completely) universally unlawful and self-determination is recognized as the legitimate goal of the few remaining territories which are not yet independent. Clearly, there have been significant changes to the classical international legal order, but further change may be necessary if territorial claims which spiral into international conflicts are to be averted. The Westphalian model, for example, lacks any process by competing territorial claims may be resolved pre-emptively. The International Court of Justice (ICJ) may, in certain circumstances issue an advisory opinion but such opinions typically seek to prevent conflicts escalating and not necessarily to resolve competing claims, and are not, in any event, binding.

Already, some areas of law – in particular international human rights law and international environmental law – recognize that the state-centered model of international law, on which the international regime is premised, is not fully adequate in those areas of activity. As early as 1992, for example, before the 1992 Convention on Biological Diversity (CBD) had been agreed, Bragdon suggested that effective conservation of biodiversity will require modification of traditional principles of sovereignty[2]. She argued that the traditional legal order "must evolve or be suspended"[3], but suggested that states could maintain the vital aspects of sovereignty and would be able to exercise "..all those rights to which they are entitled as subjects of international law, limited only by a new obligation provided by a broader interpretation of state responsibility that encompasses not only environmental harm but also health"[4].

In fact, such an obligation would constrain the exercise of many of the rights which derive from sovereignty since the experience of the CBD in the period 1992-2018 demonstrates that prevention of environmental harm and safeguarding of environmental health affects many aspects of national political, economic and social life.

(1) L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed.) (New York: Columbia University Press, 1979), xiii.
(2) See S. H. Bragdon, 'National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity' (1992) 33 *Harvard International Law Journal* 381.
(3) Ibid 391.
(4) Ibid 392.

Over the 30 or so years, several scholars have identified fundamental changes in the international legal order[5]. In 2000, Weiss identified a growing consensus on human rights, but disagreement over the roles of the WTO, the World Bank and the IMF and the impact of their promotion of globalization and economic growth on social and environmental issues[6]. Weiss argued that the growing number of international agreements and the continuing primacy of the state in international relations provided evidence that traditional international law remained valid. However, states are no longer the sole focus of international law so international law must be redefined to accommodate non-state actors and non-binding instruments.

This, according to Weiss, raises three important issues[7]: the need for new actors to be accountable and for new norms to be legitimate; the need for consensus about the level or location of authority (i.e. local, national or international) at which norms should be negotiated; and the need for international law to reflect "commonly held values"[8] in order that a unified system be maintained. Weiss' reviewed several issues (e.g. globalization, the role of NGOs), from which she identified three emerging characteristics of international law: the increasing legalisation of international relations; the blurring of public and private international law; and the integration of international and domestic law. For Weiss, two challenges emerge from this.

First, there is a need to develop mechanisms to monitor the accountability of states, the private sector and NGOs and a corresponding need to build processes for legitimating the norms which have been developed by transnational actors.

Second, there is a need to establish a process to determine the level of authority appropriate to each issue. Weiss concluded that while there is a growing consensus about certain common values (e.g. the importance of transparency, accountability, the protection of human rights, environmental protection), consensus has not emerged on many important issues, and issues important to some states have been ignored. For states to have and maintain political will to implement international agreements, binding or non-binding, those agreement must be perceived as equitable.

(5) See, for example, C. Ku, *Global Governance and the Changing Face of International Law* (2001) ACUNS Reports and Papers No. 2; P. Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527; E. B. Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345.

(6) E. B. Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345.

(7) Ibid 346.

(8) Ibid.

International law has permeated society to a greater extent than ever before, but agreements which disregard or compromise the interests of states are likely to be ignored by those states. That is particularly so in cases in which states have sufficient economic and military capacity to enable them, if they so decide, to support their own breaches of international obligations with the threat or use of economic sanctions or military action.

In 2001, Sands identified similar themes emerging in international law(9). He argued that traditionally, international law regulated relations between states but it now serves a broader range of societal interests and encompasses non-state parties. This, according to Sands, challenges some of the basic assumptions which have informed the international system at least for the last century. Citing US and English cases from the late nineteenth century, Sands demonstrated how historically, international law governed a world order in which states were the only actors and where the need to protect sovereignty was paramount.

This, according to Sands, promoted a legal order which was controlled by the establishment of a limited number of ground rules and respect for the equal sovereignty of all states. Any attempt by a tribunal or other external institution to restrict sovereignty beyond the essentials necessary for the civilized conduct of international discourse would destabilize that order because nations would not tolerate interference in their affairs. This order has been challenged by at least two areas of international law – human rights and environment – which developed in the late twentieth century. Inherent in those developments was a developing public awareness of international law, the availability of mechanisms to facilitate transparency and accountability and the emergence of international civil society.

Sands used two cases, Pinochet's extradition to Spain which was considered by the UK House of Lords (which was, at that time, the UK's highest domestic court), and the prohibition by the US of imports of shrimp from four Asian countries, which was considered by the Appellate Body of the WTO, to demonstrate how international law is changing. First, both cases reflect a recognition that what one state does within its territory can be of legitimate interest to another state(10). This is because local acts have been internationalized and the legal understanding of national boundaries is changing. Second, both cases originated with acts which were not taken by the executive part of

(9) P. Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527.

(10) Ibid 535.

government and which government had been unable to stop through political actions or applications before national courts(11). Third, a significant role was played by national and international courts, notwithstanding that the law on both cases was vague or ambiguous(12).

Traditionally, courts would have sought a clear rule and applied that rule to the facts of the case, limiting sovereignty only to the extent that it was essential to do so. In the absence of such a rule, courts would have assumed that the international community did not intend to fetter sovereignty. In both cases, courts intervened notwithstanding the absence of express rules. For Sands, both decisions are not turning points in international law but are part of a continuum of development which can be traced back to the establishment of the UN and beyond.

Four factors, according to Sands, influenced this development in the 1980s and 1990s. Those factors are: globalisation; technological innovation; democratization; and privatization. These correspond closely with the factors identified by Weiss. Sands argued that three developments in particular challenge some of the most basic assumptions about international law; the increased role of non-state actors; the implications of the increase in the body of rules of international law; and the proliferation of international courts and tribunals. In the Shrimp case, the amicus briefs prepared by NGOs became part of the written record on the basis of which the Appellate Body reached its decision.

This was the first WTO/GATT case in which this occurred. This is significant because the WTO (and its predecessor, the GATT) is an intergovernmental institution which envisaged no role for non-state actors so the inclusion of non-state material suggests a growing recognition that state-only international process is no longer appropriate when issues are relevant to broader sections of civil society. Judge Rosalyn Higgins of the International Court of Justice questioned whether greater participation represents the democratization of international law or its degradation(13). It is too early to answer that question, but it is clear that the nature of international law is changing rapidly.

(11) Ibid.
(12) Ibid 536.
(13) R. Higgins, 'The Reformation of International Law' in R. Rawlings (ed.), *Law, Society and Economy: Centenary Essays for the London School of Economics 1895-1995* (London: Oxford University Press, 1997), 207, 215.

Sands argued that the proliferation of international law and international tribunals has resulted in duplication and inconsistencies between different laws. The decentralized international system encourages the adoption of bilateral, regional and global instruments without reference to an overall structure. This leads to generalities, ambiguity and compromise. For Sands, the key question is: what is to be done when norms in two or more areas appear to conflict with each other? International law was traditionally presented as a series of separate subjects – the law of the sea, air law, human rights, environment, economic development.

Clearly, this is no longer accurate. In the Shrimp case, the WTO Appellate Body had to choose between the competing objectives of free trade and environmental protection. In Pinochet, it was a choice between the long-standing sovereign immunity of heads of states and the requirement to give full effect to international commitments on human rights. Objections to both, on the grounds of interference in sovereignty, were overruled not on the basis of an international instrument or a long standing presumption of customary international law which limited sovereignty in the respective areas of activity, but on the basis of "an interpretative approach which sought to ascertain and then apply the presumed values of the international community"(14).

This leads Sands to identify a common thread running through much of the changing law – the willingness of the judiciary, national and international, to fill in what they perceive as gaps in international law. Sands argues that the international judiciary has demonstrated that it is unwilling to defer to traditional notions of sovereignty and state power and that its decisions are now informed by a set of international values, capable of being enforced at national level. This "judicializes" international relations and has a double effect. First, national courts consider the possibility of international appeals. Second, international decisions are removed from the political control of states and jurisdiction is exercised by a new international judiciary. States thus lose some control of international law making since, as with every court, the line between interpreting law and making new law is not clear. This, according to Sands, has pitfalls because an international judiciary has been created, it is not directly accountable to any identifiable body, and it lacks long term planning or strategy.

For Sands, human rights and environmental protection have long been the catalyst for many of these developments in international law. Both areas

(14) Sands, 552.

have linked local communities to international law in a way that was never before anticipated. Traditionally the community of international lawyers was small, was located largely within academia and government, was informed by sovereignty, and those notions to separate issues in international law, such as the law of the sea or air law. This has changed beyond recognition. International environmental law, for example, now encompasses trade, intellectual property, sustainable development and human rights. It extends from local communities to UN fora, upwards and downwards, and is regulated, largely ineffectively by a piecemeal collection of international instruments interpreted by local, national and international courts. Sovereignty remains central to the international system, but notions of sovereignty are changing rapidly and the path forward is not yet clear, particularly not in controversial areas such as water security throughout the Middle East.

Drivers of Reform

In 2001, Ku discussed the changing nature of international law(15) and reached conclusions that are directly relevant to territorial claims. She argued that the purpose of international law is to manage by systemic change and adaptation the conflict generated by power and politics. Treaties are a tool used for this purpose and are also an expression of the solution reached by the international process. When that process fails, treaties are not agreed or agreements which are reached are unenforceable from the outset. Ku argued that the effective operation of law (national and international) required that three elements be aligned: first, a legal concept that is sufficiently developed for it to be communicated clearly; second, a structure or framework that can support the operation of law such as the GCC; and third, political consensus and will of the system's members to use the law. Recent events, nationally and internationally, confirm that none of these factors apply universally throughout all members of the United Nations but may, perhaps, apply in a number of regional blocks.

In fact, as early as 1979, Henkin recognized the earlier concepts of sovereignty were no longer appropriate to some aspects of international relations and observed "..sovereignty has also grown a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worth in it, a mythology that is often empty and sometimes destructive

(15) C. Ku, *Global Governance and the Changing Face of International Law* (2001) ACUNS Reports and Papers No. 2.

of human values"[16]. Thirty years later, both Sands[17] and Weiss[18] argued that international law was changing to accommodate non-state interests and to reflect non-state values. Sands described those as "universal values". Weiss is more reticent. This may be appropriate since those values appear to change according to the issue at stake. What is, however, clear is that international law has changed considerably in the last forty years, and particularly so in the last twenty. Ku argued that while NGOs have been involved in negotiations, they do not wield power.

Consequently, power remains with the state. This has two important implications. First, state power must be recognized as legitimate since under the existing systems of international law and international relations, it is states who participate in international processes on behalf of their citizens. For Ku, this means that NGOs must not seek to push law beyond the limits to which states will go. As evidence to support this, Ku cited the actions of the Peace Leagues of the 1930s which demanded actions from Britain which ultimately undermined their own goals. Second, long term commitments by key states are required for effective institution building and the development of law.

In the context of territorial claims, it is important to note that key states are not necessarily global powers. For example, in the Golan Heights dispute, which in the simplest terms is a territorial dispute between the sovereign states of Syria and Israel, while both states are important in a regional context, their importance on the international stage derives largely from the values for which each stands, and not from their economic power. There are many states in similar positions i.e. in military or economic terms, they are relatively politically insignificant at global level but the values for which they stand carry global significance. Few examples are more poignant than the position taken by New Zealand, a small Pacific state with limited global influence, which following a deadly attack on one of its mosques on 15 March 2019, was recognized globally for its personification of the values of tolerance, diversity and inclusion.

The challenge for international lawyers – law-makers, law-enforcers – is one of accommodating the sovereign equality of all states with the desires, legitimate or otherwise, of leading economic and military powers. At the same, time, according to Ku, leading powers must realise that power alone is not sufficient

(16) Henkin, 21.

(17) See P. Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *New York University Journal of International Law and Politics* 527.

(18) See E. B. Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345.

to operate effectively and that their interests require the effective operation of structured frameworks, such as the GCC, that international cooperation can provide.

Ku argued that the extent to which international law will succeed in resolving particular problems depends on whether the regimes it establishes meet the above three-fold test of legal effectiveness. If one or more of those three factors is misaligned, power and law may be too far apart to support the successful establishment of a new regime. Many territorial disputes reflect this. Power (in terms of sovereignty over territory) lies with some of the wealthiest and also some of the poorest nations of the world.

Another form of power, the financial resources and technology needed by those nations to provide water and food security for their populations, lies with the wealthiest nations. Some of the poorest nations would comply with international commitments if they had the resources to do so. Others would not. Forty years ago, it would have been accurate to write that in the global north, most countries are willing to comply with international obligations, at least to the extent that those obligations do not impact their economic prosperity whereas in the south, many nations were not yet sufficiently developed to have capacity to honour all their international commitments.

The result - the treaty-making extravaganza of the 1990s – created an international legal system in which treaties and organizations have proliferated but are so separate from the roots of economic and military power that little has been achieved.

Ku concluded that the effectiveness of international law depends on an accurate assessment of the power bases and political contexts in which legal standards and obligations must operate. This assessment will vary according to the political issue at stake. For key issues, such as water disputes, the assessment has proved to be too complex for the existing international system. Consequently, some initiatives have emerged at local level[19] but at international level, little progress has been made.

At that level, law has provided a framework for political discourse. When major states accept that framework as legitimate, collective progress towards common solutions for regional and global issues is possible. This leads to the expansion of the international agenda from its origins in the elimination of war to a broad range of economic, political and social issues. However,

(19) Typically such initiatives are small scale water management projects within individual villages or communities.

a small number of states have challenged the legitimacy of the international framework to address territorial disputes, arguing instead that power is the ultimate tool.

At the same time, the international legal framework has not demonstrated its willingness to grapple with the most complex issues and has instead sought to prevent the escalation of disputes (e.g. in Golan Heights, Kashmir, Cyprus) instead of actually seeking to resolve those disputes.

In response to this statement, in 2001 using biodiversity as a proxy for large territorial disputes, Kunich[20] analysed the legal protection afforded to hotspots[21] (i.e. ecosystems which contain "exceptional concentrations of species with exceptional levels of endemism"[22] and which "face exceptional degrees of threat")[23]. Since many species have not yet been identified, hotspots are characterised by uncertainty so Kunich discussed the significance of 10 international environmental agreements[24] to 28 hotspots[25] in the light of that uncertainty, and identified from that analysis problems inherent in the international law approach. Kunich identified several difficulties – imprecise or discretionary treaty obligations or both, lowest common denominator agreements, overlapping and inconsistent treaties, ineffective compliance and enforcement mechanisms.

Kunich also criticised the "wiggle room"[26] in some international agreements which allows parties to expand and develop their economies at the expense of natural resources. Kunich, however, went much further than earlier writers. In addition to suggesting the usual range of sanctions, he argued that given the

(20) J. C. Kunich, 'Fiddling Around While the Hotspots Burn Out' (2001) 14 *Georgetown International Environmental Law Review* 179.

(21) The term "hotspot" was coined by Meyers in 1988. See N. Meyers, (1988) 8 *Environment* 187.

(22) Ibid 187.

(23) Ibid.

(24) The international environmental agreements are: CBD; CITES; WHC; Apia, Berne, Bonn, Ramsar and Western Hemisphere Conventions; ASEAN Agreement; and the African Nature Convention.

(25) The hotspots are: Madagascar; Atlantic Coast Brazil/Atlantic Forest Region; Western Ecuador/ Choco-Darien-Western Ecuador; Colombia; Western Amazonia Uplands/Tropical Andes; Eastern Himalayas/Mountains of South-Central China; Peninsular Malaysia/Northern Borneo/Sundaland; Philippines; New Caledonia; Southwestern Ivory Coast/Guinean Forests of Western Africa; Eastern Arc Mountains and Coastal Forests of Tanzania/Kenya; Western Ghats of India and Sri Lanka; Cape Floristic Province of South Africa; Southwestern Australia; California Floristic Province; Central Chile; Hawaii/Polynesia/Micronesia; Mesoamerica; Caribbean; Brazilian Cerrado; Mediterranean Basin; Caucasus; New Zealand; Succulent Karoo of South Africa; Wallacia; Papua New Guinea; Congo River Basin/Democratic Republic of Congo; and Indo-Burma. Some writers do not consider Papua New Guinea and the Congo to be hotspots because the threat to biodiversity in both is lower than it is in other sensitive regions.

(26) Kunich, 261.

intensity of the threat and the disregard of poachers and loggers for the rule of law, military intervention, either by a UN or a US force, would be the most effective, if not the only, means by which corruption could be addressed and conservation obligations in large, remote and dangerous hotspots could be enforced[27].

Such intervention, according to Kunich, would be justifiable under international law on the grounds on which humanitarian intervention is currently undertaken[28]. Kunich added: "..the nation in need would have to be receptive, but under some circumstances it is the only way to accomplish an important objective"[29].

Kunich's proposal is more extreme than those of other scholars, but it reflects a growing international recognition that the combination of UN processes and international agreements has failed to avert territorial disputes and has also failed to fully engage with the complex political and economic circumstances which exist in many of the world's most fragile regions. In fact, Kunich concluded by acknowledging that "the piecemeal method of international persuasive methods"[30] is unlikely to achieve success on a global basis.

In 1992 at UNCED, there was insufficient agreement about sovereignty over natural resources and the right to development for there to be any serious agreement on issues as complex and as economically critical to many countries as the conservation of biological diversity, including forests. Dr Mahathir Mohamed, Prime Minister of Malaysia, summarized this in these terms: "The poor countries have been told to preserve their forests and other genetic resources on the off-chance that at some future date something is discovered which might prove useful to humanity. This is the same as telling those poor countries that they must continue to be poor because their forests and other resources are more precious than themselves"[31].

Mahathir's subsequent comment on the economic reality of some of the ideas mooted at UNCED is similar: "When the rich chopped down their own forests, built their poison-belching factories and scoured the world for cheap resources,

(27) Kunich, 260.

(28) For humanitarian intervention and international law see, for example, S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); J. L. Holzgrefe and R. O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); J. M. Walsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004).

(29) Kunich, 260.

(30) Kunich, 262.

(31) UN Document A/CONF.151/26/Rev.1, Vol. III, 233.

the poor said nothing…Now the rich claim a right to regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous"[32]. It is in proposals such as Kunich's that the extent of the north/south divide is most evident. Writing in 2004 about the legitimacy under international law of international intervention on humanitarian grounds, Kennedy argued "..our culture has lost access to the sort of transcendental external standpoint which could sustain a sincere humanitarian practice of judgment"[33]. Kunich's proposal suggests that this external standpoint is missing too from disputes over territorial sovereignty.

Global Rule and the GCC: Religion and Engagement with International Law

Many of the GCC member states have a long-standing commitment to the rule of law. Some, for example, cite the Constitution or Charter of Medina, drafted by Prophet shortly after his arrival in Medina following the Hijra from Mecca, in 1AH, as a document central to the development of their own legal system. Others go back further, referring to the Code of Ur-Nammu 2112-2095 BC, the Lipid Ishtar Code 1934-1924 BC, the Laws of Eshnunna and the Code of Hammurabi of Babylon, the Code of Bocchoris of Egypt 718-712 BC, the Judaic scriptures, Dracco's Code 621 BC and Roman Law.

Common to all these approaches is recognition of the rule of law, of good governance and of some form of equality before the law. Perhaps more important, the strength of many of these codes/laws was derived from the shared geographies, histories and cultures of the peoples to whom the law applied. Arguably, some values were shared by the parties to the treaties of the early 20th century, such as the Treaty of Versailles 1919, but by 1945 the emerge of many newly independent sovereign states resulted in greater diversity in geographies, history and culture and consequential reduction in the role of shared values, such as those that are derived from religious roots. Such shared values, typically based on Islam, are still an important feature of the GCC but are less common in other parts of the world.

There is now small but growing stream of literature which analyses the failure of the international system to engage with religion, and in particular with Islam, and suggests that this failure has contributed to the recent failures of

(32) Ibid.

(33) D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004), 310.

the international system to resolve territorial disputes(34). Westphalia separated religion from statecraft, so this disengagement is hardly surprising, but four hundred years later, it became clear that international law had ignored, to its peril, the potent influence of religion in many regions of the world. In the early 1990s, Huntington analysed world politics after the fall of communism and argued that seven or eight major "civilizations"(35), only one of which is in the west, have replaced nations and ideologies as the driving force in global politics(36).

He argued that modernisation is not necessarily westernisation, that economic progress has been accompanied by a revival of religion, that post-Cold War politics emphasizes religious and ethnic nationalism over ideology and that the lack of leading core states, or the failure to agree on the identify of those core states, hampers the growth of the Arab and Islamic world. For Huntington, future conflict will take place at the fault lines between cultures and civilisations and on geopolitical fault lines e.g. in Afghanistan and Pakistan.

Huntington's analysis remains controversial but his central points – that the influence of the west is waning because of growing resistance to its values and that there is an increasing threat of violence from renewed conflicts between countries and cultures that base their traditions on religious faith – are relevant to international territorial disputes. This is because the failure of international law to engage with religion has led to a failure to fully understand values which influence many local communities, a failure to appreciate the principles which underpin non-western legal systems, and perhaps most importantly, a failure to harness the strengths of various religious traditions to resolve difficulties which other processes have failed to resolve.

(34) See, for example, S. Appleby, *The Ambivalence of the Sacred: Religion, Violence and Reconciliation* (Lanham: Rowman and Littlefield, 2000); P. L. Berger (ed.), *The Desecularization of the World: Resurgent Religion and World Politics* (Washington DC: Ethics and Public Policy Center, 1999); J. D. Carlson and E. C. Owens (eds.), *The Sacred and the Sovereign: Religion and International Politics* (Washington DC: Georgetown University Press, 2003); F. Petito and P. Hatzopolous (eds.), *Religion in International Relations: The Return from Exile* (New York: Palgrave Macmillan, 2003); D. Philpott *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: OUP, 2012); D. Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 *World Politics* 206; S. M. Thomas, 'Taking Religious and Cultural Pluralism Seriously' (2000) 29 *Millennium: Journal of International Studies* 815; S. M. Thomas, 'The Global Resurgence of Religion, International Law and International Society' in M. W. Janis and C. Evans (eds.), *Religion and International Law* (London: Kluwer Law International, 1999); M. D. Toft, D. Philpott and T. S Shah *God's Century: Resurgent Religion and Global Politics* (Norton, 2011);

(35) Huntington's "civilizations" are Western, Eastern Orthodox, Latin American, Islamic, Chinese, Japanese, Hindu and African.

(36) S. P. Huntington, 'The Clash of Civilizations' (1993) 72(3) *Foreign Affairs* 22. Huntington subsequently developed his article into a book: S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

There are four reasons why religious institutions could be influential in resolving complex territorial issues(37).

First, those institutions are often well established and have a pervasive influence in the community. Second, those institutions may serve as an apolitical force for change based on a respected set of values. Third, those institutions may have unique leverage for reconciling conflicting parties, including an ability to rehumanise relationships. Fourth, those institutions may have the capacity to mobilize local, national and international support and to operate effectively at each of those levels.

Building on Huntington's work, in 1994 Johnston suggested that following the end of the Cold War, new conflicts would derive from "..clashes of communal identity, whether on the basis of race, ethnicity, nationality or religion"(38) and would tend to occur at "fault lines between rival nationalities or in situations where societies are suffering from the strains of economic competition and rising expectations"(39). These, according to Johnston, are the most intractable sources of conflict and are the sources to which conventional diplomacy is least suited. This corresponds closely with the challenges facing emerging nations.

Many of the world's most fragile regions – Afghanistan, Pakistan, Indonesia, Philippines, Central and West Africa – are located on geopolitical fault lines and are undergoing rapid economic development at a pace which far exceeds that which government is capable of regulating.

In addition, widespread ethnic conflict has led to the destruction of natural resources and consequential dislocation of local communities, political instability has limited the capacity of government to intervene, and widespread corruption has limited the effectiveness of any intervention which is attempted. For Johnston, the solution requires "..an understanding of the emotional stakes of the parties, which are often deeply rooted in history, and their respective interpretations of first principles such as self-determination, justice, and freedom."(40).

This, Johnston argues, necessitates a move towards a new paradigm of international relations, which extends beyond the Westphalian state-centric

(37) See D. Johnston and B. Cox, 'Faith-Based Diplomacy and Preventative Engagement' in D. Johnston (ed.), *Faith-Based Diplomacy: Trumping Realpolitik* (Oxford: Oxford University Press, 2003), 14.

(38) D. Johnston, 'Introduction: Beyond Power Politics' in D. Johnston and C. Sampson (eds.), *Religion, The Missing Dimension of Statecraft* (Oxford: Oxford University Press, 1994), 3.

(39) Ibid.

(40) Ibid.

focus and accommodates NGO interactions at sub-national and individual levels[41]. The existing system of international relations, that of real politik, has failed to offer an appropriate path forward, economic competition has resulted in massive deforestation and ethnic conflict has displaced local communities and separated them from their traditional livelihoods.

Approximately ten years later, in 2003, Johnston developed his argument further by demonstrating how in certain specific situations, religious institutions have mediated conflict and prevented violence[42] using the tenets of the major world religions of the regions in which those conflicts were located. This process, which is known as faith-based diplomacy, is a form of Track II (i.e. unofficial) diplomacy which integrates the dynamics of religious faith with the conduct of international relations[43].

This is important because by 2002 (i.e. shortly after 9/11), it was clear that some of the principles on which the international legal system is based had become outdated but the vacuum which this created had not yet been filled. At about that time, Jenkins predicted that the twenty first century will be the century in which "..religion replaced ideology as the prime animating and destructive force in human affairs, guiding attitudes to political liberty and obligation, concepts of nationhood and of course, conflicts and wars"[44]. As Johnston recognised, the faith-based diplomacy which he proposed is not a comprehensive solution to the problems facing the international system, but it may complement existing processes and mechanisms and offer a path forward in certain limited situations in which other processes and mechanisms have failed[45].

In particular, it may offer a means by which the knowledge and skills developed from certain small-scale projects in specific locations (e.g. local water management) can be transferred to different countries without challenging the principles of sovereignty on which those states are founded or developing yet another expensive international process to facilitate that transfer.

This emphasis on small scale projects managed by peoples with shared geographies, histories and cultures, is consistent with Duffield's analysis of

(41) D. Johnston, 'Looking Ahead: Towards a New Paradigm' in Johnston and Sampson, 333.
(42) D. Johnston (ed.), *Faith-Based Diplomacy: Trumping Realpolitik* (Oxford: Oxford University Press, 2003).
(43) For Track II and faith-based diplomacy, see D. Johnston, 'Introduction: Realpolitik Expanded' in Johnston, 15.
(44) P. Jenkins, 'The New Christianity' *Atlantic Monthly* October 2002, 54.
(45) D. Johnston, 'Introduction: Realpolitik Expanded' in Johnston, 10.

the relationship between development and conflict[46]. Duffield examined the nature of current conflicts, together with the systems of global governance that have emerged in response to those conflicts. This is important because the UN emerged in response to World War II and subsequently extended its mandate to govern a broad range of international issues, including first environmental protection and later specifically forests.

Duffield argued that widespread commitment of donor governments, aid agencies and multilaterals indicates that war is now part of the development discourse and that notions of development have been transformed in that process. Conflict is now understood to arise from development malaise, so underdevelopment is seen as a source of instability. The transformation of social systems of developing countries is beyond the capacity, and more importantly, beyond the legitimate role, of individual legal systems and governments. Consequently, individual governments, security forces, aid agencies, multinationals and UN agencies have become part of an emerging system of global governance.

The outcome is that the west does not relate to the GCC "as if the latter were a science laboratory"[47]. Instead, the GCC often reflects "policy decisions and aid fashions"[48] that have been formulated elsewhere. North/south and Islamic/ Non-Islamic issues appear to be expanding rather than diminishing, as lawyers discover new layers of complexity and in response, and political leaders flex their military and economic power instead of engaging in a meaningful way with the parties to territorial disputes. Detailed discussion of specific territorial disputes is beyond the scope of this paper, but it is noteworthy that analysis of such disputes continues to generate a vast body of scholarship[49] but no clear path forward for the states involved in such disputes.

Reinventing Territorial Claims and Sovereignty: "Sovereignty-Lite"

Recognizing that many territorial disputes are so deeply embedder that rapid resolution may be impossible, the next section of this paper proposes a treaty-

(46) M. Duffield, *Global Governance and New Wars: The Merging of Development and Society* (London: Zed Books, 2001).

(47) Ibid 264.

(48) Ibid.

(49) See, for example, J. Kinnimont *The Gulf Divided: The Impact of the Qatar Crises* (Chatham House, 2019); L.Khatib and L. Sinjab *Syria's Transactional State: How the Conflict Changed Syria's Exercise of Power* (Chatham House, 2018); R. Mansour and P.Salisbury *Beyond Order and Chaos: A New Approach to Stalled State Transformations in Iraq and Yeman* (Chatham House, 2019); Y. Mekelberg and G. Shapland *Israeli-Palestinian Peace-making: The Role of the Arab States* (Chatham House, 2019); S. Vakil *Iran and the GCC: Hedging, Pragmatism and Opportunism* (Chatham House, 2018).

based regime in which the existing claims of sovereign states are recognized but are not, for the duration of the treaty regime, implemented. Described as "sovereignty-lite", this approach enables vital inter-state co-operation to develop in key areas of law (e.g. trade, public health, customs, cyber-security) without negating the existing claims of competing states. Notwithstanding the conceptual limitations of this approach, in practical terms it may offer a path forward based on stable (albeit incomplete) regimes and effective inter-state co-operation. This paper suggests that such an approach would be most effective in regions with shared geographies, histories and/or cultures, such as the GCC.

This "sovereignty-lite" approach was developed by the 1959 Antarctic Treaty System (ATS). Although there had been early attempts to reach the Antarctic, the region is isolated, inhospitable and incapable of supporting long-term population so it is doubtful that it meets the criteria for statehood of Article 1 of the Montevideo Convention, 1933. Nonetheless, by the 1950s several nations had made territorial claims over the region, motivated in part by the minerals and other resources believed to be located under the ice and in part by the symbolism of reaching the last place on earth – the final frontier. At a time at which Cold War tensions were high, the ATS achieved a remarkable break-through international law by pioneering the approach whereby a territorial claim is not rebutted but is set aside, for practical purposes, as if it were suspended mid-air while practical matters continue.

Signed in Washington on 1 December 1959 by the twelve countries whose scientists had been active in and around Antarctica during the International Geophysical Year (IGY) of 1957-58, the ATS entered into force in 1961 and now has 53 parties. Central to the Treaty is Article1 which states "Antarctica shall be used for peaceful purposes only". Article 2 states "Freedom of scientific investigation in Antarctica and cooperation toward that end … shall continue" and Article II provides for the exchange of scientific information "Scientific observations and results from Antarctica shall be exchanged and made freely available".

Among the signatories of the Treaty were seven countries - Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom - with territorial claims , sometimes overlapping. Other countries do not recognize any claims. The US and Russia maintain a "basis of claim". All positions are explicitly protected in Article IV, which preserves the status quo:

> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to

> territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.
>
> To promote the objectives and ensure the observance of the provisions of the Treaty, "All areas of Antarctica, including all stations, installations and equipment within those areas … shall be open at all times to inspection" (Art. VII).

For 60 years, since 1959, this regime has permitted the use of the Antarctic by the seven competing states and is agreed to have worked effectively. Central to its success is the recognition, but not implementation of the competing territorial claims i.e. nations maintain their claims but agree not to implement or otherwise further them. Earlier in its history, much of the success of the ATS regime was attributed to the inaccessibility of the region. It is, however, now possible to live in the region throughout the year and as ice melts, accessibility increases. Every year, the parties meet Every year the Treaty Parties meet "for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering and recommending to their Governments measures in furtherance of the principles and objectives of the Treaty" (Article IX). The 2019 meeting will be held in the Czech Republic in July 2019. In 2018, parties met in Argentina, in 2017 in China.

Could this sovereignty-lite approach be a model for the resolution of territorial disputes elsewhere in the world? In some regions, aspects of this model, those being shared or joint water commissions, already manage or regulate the use of shared watercourses. Examples include the Great Lakes Commission which manages the Great Lakes watercourse between the United States and Canada and the Mekong River Commission, which works with the governments of Cambodia, Lao, Vietnam and Thailand to manage water in that region.

How might such a model operate in the Middle East? Could it, as this paper proposes, be a means by which competing claims of sovereignty over disputed territory be recognized but not implemented? Could, for example, Syria and Israel agree a treaty whereby competing claims over contested territory were protected as a matter of international law (i.e. neither party is required to abandon its claim), in return for which both parties agree and – critically importantly – agree to comply with certain clearly defined obligations.

Those might include, for example, provisions/institutions for water

management, food security, public health, border management (e.g. border observers) and the management of cross-border trade (with defined parameters). Would such a treaty be most effective if it were formulated as a bilateral treaty between Syria and Israel or might it benefit from the inclusion of other parties? If the latter, should they be regional parties (e.g. GCC nations) or larger global states (e.g. United States, China, India)?

There would be merit, this paper argues, in entering into such an agreement for a limited period of time (e.g. 30-50 years) after which a review could be undertaken. By that time, it is unlikely that anyone involved in the review would have been deeply involved in the earlier conflict so tensions might be lower than they currently are. Exploration of the practicalities of implementing such a proposal is a matter for governments, not scholars, but the purpose of this paper is to suggest that at the very least, this system has maintained stability for 50 years in a fragile region of the world and so may be capable of being transposed, in a form adapted to the needs of the region, to parts of the GCC.

Often such proposals are made to the international community by smaller states, such as Kuwait, New Zealand and Ireland, who typically lack the military prowess of the world's superpowers but who have a long-term commitment to the rule of law and whose commitment to nurturing and upholding stability in the multilateral system is widely recognized. Might Kuwait, for example, develop such a proposal for international consideration?

Conclusion

The Westphalian legal order, which was based on independent, sovereign and territorially defined states, allowed each state to pursue its own interests within its sovereign territory and gave each state equality within the global system. International law emerged as "the body of rules and principles of action which are binding upon civilised states in their relations with one another"[(50)]. That classical view of international law distinguished clearly between international and domestic law and between public and private international law.

Public international law, the domain of sovereign states, provided a body of customary law and series of binding instruments, the purpose of which was to govern relationships between states. The framework was "stylized,

(50) J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edition by H. Waldock) (Oxford: Clarendon Press, 1963), 1.

hierarchical and static"[51], it assumed that states agree to international treaties when those treaties correspond with state interests, and that having agreed to a treaty, states comply with that treaty by implementing it within their sovereign territory. If or when a state fails to comply, mechanisms for the resolution of international disputes are available and sanctions will deter and punish offenders[52].

Throughout the last two decades, international law has been challenged repeatedly[53]. In 1948, the three hundredth anniversary of the Peace of Westphalia, Gross wrote of the Westphalian system of international law:

> Such an international law, rugged individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration – these are among the legacies of the settlement of Westphalia. That rugged individualism of states ill accommodates itself to an international rule of law reinforced by necessary institutions[54].

In the same article, Gross predicted the need to find a way "..of harmonizing the will of major states to self-control with the exigencies of international society which, by and large, yearns for order under law"[55]. Writing in 1948, Gross was referring to the collapse of the League of Nations, the establishment of the United Nations, the jurisdiction of the Nuremberg and Tokyo Tribunals which tried those charged with offences against Allied prisoners of war, and the reconstruction of post war Europe. More than fifty years later, the tension between the will of major states and the need for order under law remains unresolved. By the beginning of the twenty-first century, globalisation had forced the "rugged individualism" of states into an uneasy compromise within the UN system, but events of the period since 9/11 demonstrate that the UN system is poorly equipped to resolve (as against monitor) complex territorial disputes, particularly as some of those issues challenge the principles of sovereignty on which international law is premised.

Territorial disputes are at the heart of notions of sovereignty. "A people

(51) E. B. Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555, 1558.

(52) H. K. Jacobson and E. B. Weiss, 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project' (1995) 1 *Global Governance* 119, 122.

(53) This section builds on my 2018 paper, *Guarantees of International Peace and Security: The Role of the United Nations Security Council in the Settlement of International Disputes.*

(54) Gross, 40.

(55) Gross, 41.

without land are nothing" stated the High Court of Australia in Mabo v Queensland (an Australian state) (1992), a judgment in which it was held that indigenous land rights were not nullified by subsequent land grants made by the (English) Crown. That relationship between people and land is, and has been for thousands of years, at the core of our being. Look around us here in Kuwait: we see the legacy of thousands of years of Empires – Greek, Ottoman, British and French - the damage caused by a more recent invasion, and the reconstruction of Kuwait, a geographically small nation, to its role on the UN Security Council in 2018. Is it implausible to argue that were territorial claims to be recognized by "frozen", as provided in the 1959 Antarctic Treaty for that region of the world, that progress would be possible within the parameters, albeit modified parameters, of international law?

Table of Contents