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### Re-Discovering an Older Sovereignty

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# Re-Discovering an Older Sovereignty

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Jeremy Geddert

October 17, 2016

*Sovereignty: Moral and Historical Perspectives*. James Turner Johnson. Washington, DC: Georgetown University Press, 2014.

On August 7, 2014, the mood in Cambodia was filled with anticipation. The United Nations-endorsed Extraordinary Chamber in the Courts of Cambodia was to pronounce its verdict on the last two living members of Pol Pot's murderous regime. After thirty-five long years of impunity, these co-conspirators would be brought to account for leading what is often described as full-scale genocide. Yet the Court did not convict Nuon Chea and Khieu Samphan of genocide, nor could it legally have done so. The accused shared an ethnicity with their victims, and the 1948 UN Genocide Convention outlaws only mass killings that attempt to exterminate a different race. It mattered not that they had helped to murder one-quarter of the Cambodian population in a notably nasty and brutish reign, one made short only due to the successful intervention of Vietnam after four years.

Indeed, one might argue that the Vietnamese who deposed Pol Pot's regime in 1979 were the violators of international law. The UN Charter condemns any first use of international force as illegal aggression. The single exception is outlined in the aforementioned Genocide Convention, an immunity inapplicable to this case. Did not the Vietnamese violate Cambodia's foundational right of sovereignty, the ostensible supreme principle of international society?<sup>[1]</sup>

These conundrums form the backdrop to James Turner Johnson's recent offering *Sovereignty*. Johnson is well-familiar to students of the just war tradition. His magisterial *Ideology, Reason, and the Limitation of War* and *The Just War Tradition and the Restraint of War* together provide perhaps the best historical account of the just war tradition. Since then, he has helpfully applied the tradition to contemporary dilemmas such as nuclear warfare and trans-national terrorism. In this work, he turns his attention to the principle of sovereignty in whose defense alone war is often thought to be justified today. The result is a concise, lucid, and readable history. But it also outlines a reconception of this dominant yet unsettled construct of political thought.

Most commentators trace the origins of sovereignty to the 1648 Peace of Westphalia, which brought to a conclusion the so-called long century of religious wars. This new international order, often thought to have midwived the modern nation-state, was grounded in a posture of moral agnosticism. No longer would nations claim that justice enjoined them to exercise force outside their own borders. Sovereignty meant independence from external standards, and each nation would now have immunity to act as it saw fit within a carefully delimited jurisdiction.

*Sovereignty* offers an alternative history that suggests an older provenance. In Johnson's account, the now-familiar Westphalian order did not inaugurate a new concept; rather, it "built on concerns and arguments already voiced" (103). However, Johnson suggests that this development was a mixed blessing. This modern approach truncated the traditional conception by substantially excising its pre-existing moral components. A recovery of this older view of sovereignty as responsibility would help to address the conundrums of the current one.

Johnson begins by outlining the pre-history of sovereignty in the three Augustinian political goods of justice, peace, and order. His skillful interweaving of this political trinity begins with justice as the guiding star of Augustine's politics. This light re-orientates the pagan whose pursuit of glory is but large-scale robbery of what is due to God alone. The sword – whether of punishment or of war – is legitimate only if used to serve a trans-political standard. Second, Augustine's peace is not Hobbes' formal "absence of external [violent] impediments", but rather "the absence of strife that comes into being...when a just order is maintained" (162). Peace is thus wedded to a substantive conception of the just ends of politics. For example, a leader may promote peace through the just war criterion of "right intention", which requires not only an absence of malice but also a positive commitment to the restoration of post-war peace.<sup>[2]</sup> Finally, both justice and peace require an order in which the use of the sword is limited to the ruler. The private use of force for one's own individual purposes is inevitably "tainted by *cupiditas*". To avoid this temptation, public responsibility for the common good becomes the special role of the governor (13).

This emphasis on a just public order grounds the proper origins of sovereignty in the twelfth-century canonists. Their recovery of Roman law brings the attendant concept of *jus*, whose many translations include "subjective right". Hence, Augustine's orderly restriction of justified force to the prince now becomes a right of sovereignty. However, this *jus* is not the familiar modern individual right that applies equally to all. Rather, its powers depend on the holder's status, role, and responsibilities. For example, just as a knight's particular *jus* of employing force is part of the chivalric code of conduct, a governor's *jus* places on him powers and obligations unique to his position. Furthermore, the ruler's responsibility does not originate from a formal grant by the community, but inheres in the substantive nature of government. Hence, sovereignty is fundamentally a responsibility "to and for the moral order itself, understood as an order in accord with the natural law, which itself [is] conceived as a manifestation of the divine will as embedded in the natural order" (19-20).

Aquinas further develops this conception of natural law through his incorporation of Aristotelian teleology. Politics is a prerequisite for the natural perfection of rational and social animals: a "natural bonding among persons for their common good" (36). Sovereignty protects the commonweal and, in the words of d'Entreves, "thus participates intellectually and actively in the rational order of the universe" (40). A tyrant who begins to order the sword to his own private good involuntarily ceases to be sovereign, no matter how effective his secret police.

This licenses the possibility of rebellion to install a true sovereign. Nonetheless, Aquinas advocates rebellion only in the worst of cases, because even the vindication of justice cannot disregard the value of order that sovereignty is meant to protect.

In Johnson's account, Franciscus de Vitoria begins to chart a new direction. Vitoria never denies that sovereignty is exercised *for* the people, but he adds that it is constituted in the choice *of* the people. The prince now becomes the "authorized representative of the commonwealth" (49). This subtle shift leads to an important implication: sovereignty is first and foremost a responsibility to the people, rather than to God or to the rational order of reality. Moreover, Vitoria writes at a time in which European societies are coming into contact with foreign societies and thus interacting without a shared conception of human flourishing. Against the excesses of Spanish imperialism, Vitoria defends the natives' natural rights of "true dominion" even if they fail to grasp the true Christian-Aristotelian teleology of politics (104-05). Sovereignty begins to drift from its mooring in natural law.

Just as Aquinas synthesizes the work of the canonists, Hugo Grotius systematizes and entrenches the shifts in international thought from Vitoria onward. The oft-styled "father of modern international law" separates positive law from natural law in his *Law (not "morality") of War and Peace*. Likewise, his concept of "legal war" appears as a positivistic, value-neutral prerogative of sovereign states (Christian or otherwise). Furthermore, Johnson reads in Grotius a reduction of war to the exercise of the state's right to self-preservation. Grotius' lengthy treatment of punitive war no longer flows from a vindication of an overarching justice, but merely from the quest to punish violators of territorial integrity. In sum, sovereignty is no longer about "the way government is exercised" but rather about "the inviolability of the state's territory from incursions" (153). The conceptual modern machinery of sovereignty is now available and only awaits user fatigue with the old model.

Spectacular disasters like the Thirty Years' War tend to stoke dissatisfaction with the status quo and uproot institutions that preserve it. Its concluding Treaty of Westphalia retroactively diagnosed the problem as religious-inspired interference and ordered a radical treatment of mutual quarantine. For almost three centuries, this regimen prevented a repeat outbreak (with the rather notable exception of Napoleon's secular crusade through Europe.) Yet Johnson points out that modern non-teleological sovereignty brought two critical shortcomings of its own. First, its moral agnosticism led to near-constant low-level wars of conquest. Second, its tolerant international outlook allowed sovereigns to willfully mistreat their own populations with impunity.

Advocates of Westphalia have attempted to mitigate these two sizable side effects without overturning its original diagnosis and prescription. In regard to the first difficulty, Article 2(4) of the UN Charter outlaws the "threat or use of force against the territorial integrity or political independence of any State."<sup>[3]</sup> However, as Johnson notes, such measures to address the first shortcoming only exacerbate the second. After all, the stronger the doctrine of nonintervention, the greater the impunity for domestic tyrants. The UN attempted to address the second half of the dilemma in its 1948 Genocide Convention, and more recently in its 2005 endorsement of the "Responsibility to Protect" (R2P). Johnson follows his five chapters on the

history of sovereignty with two chapters of application, one of which is the cautiously hopeful treatment of this new doctrine. He argues that several of its elements unconsciously draw on just war approach to “just cause”. However, he notes that UN member states were unwilling to cede the necessary elements of sovereignty to institute collective triggering and enforcement mechanisms. Moreover, he insightfully points out that R2P is conceptually grounded in human rights law, which led to the Westphalian order that has given rise to these problems in the first place.

If the Westphalian paradigm seems to have intractable tensions, might we aim to recapture elements of the older conception of sovereignty as responsibility? Johnson suggests that it would be good to try. In the spirit of the just war tradition, he concludes that sovereignty is better understood as a means to define and control the use of force than to prevent it. Nonetheless, he acknowledges the complexity of such a task in a pluralistic world. In fact, his other chapter of application is entitled “Finding common ground in the diversity of civilizations”. He notes that the richer concept of sovereignty as responsibility to the common good was only possible due to a shared conception of a higher moral order. This has been a challenge for the West ever since the sixteenth-century colonial encounter “set in motion a fundamental empirical test of the genuine universal nature of this conception of natural law” (105). Perhaps for this reason, he stops short of entirely rejecting the Westphalian approach, noting that “the strengths of the one tend to counter the faults of the other.” This leads him to wonder: “might it be possible to pull them together, producing a combined result that is better than either by itself?” (156).

Two of the thinkers to grapple most fully with the practical universality of natural law were the ones that Johnson identifies as progenitors of Westphalia: The tentative Vitoria and the enthusiastic Grotius. One wonders whether these two thinkers might actually contain resources to assist in taking up Johnson’s charge. Vitoria was likely the first major figure to suggest that natural law standards provided a shared (if thinner) language of justice between civilizations, thus avoiding the approach of hegemony manifested in amoral Westphalian wars of conquest. Likewise, Grotius’ concept of natural religion allows for a shared (if thinner) conception of eternal punishment that guarantees international promises, as well as a hope of eternal felicity to inspire exercise of the responsibility to protect. More foundationally, Grotius’ twin categories of “strict” and “wider” justice respectively make room for the protection of formal rights and the promotion of a higher substantive standard by which to exercise those rights. His development of a formal, positivistic dimension to sovereignty might show a recognition of the value of order (just as Aquinas argues that many unjust human (positive) laws should be borne with patience). If Grotius sees Westphalian sovereignty as a beginning rather than an end, he may in fact be more akin to Johnson’s take on Suarez: “seeking to preserve the traditional approach in a new world” (58).

Perhaps the pathologies of the Westphalian order might be better illuminated by reference to Jean Bodin and Thomas Hobbes, for whom (unlike Grotius) sovereignty must be perpetual and absolute. Johnson’s account might be fruitfully put in conversation with these interlocutors. Nonetheless, it is a testament to the depth of Johnson’s insight that he identifies the

architectonic questions at hand, especially Grotius' treatment of natural and positive law (which is overlooked even by most Grotius scholars).[4] His brief but excellent treatment of the classic and modern conception of subjective rights (*jus*) is also alone worth the price of admission. Where current discourse struggles to imagine the common good as anything but the aggregation of individual rights, Johnson fleshes out a richer alternative.

Modern political thought argues that attaining peace and order require us to narrow our conception of political justice. Westphalian sovereignty enables this process by muffling voices outside (and above) one's borders. It is easy to forget its price tag, which includes costs to our understanding of political action. It should be unsurprising that the 1648 Treaty of Westphalia is soon followed by the 1651 *Leviathan*, whose international state of nature envisions no good use of political power and recommends its effective abolition. This view is amplified in Kenneth Waltz's argument that nuclear weapons (that twenty-first-century leviathan) are a great force for peace. But the classical task of political thought is not to eliminate political power but to render it legitimate. Indeed, Vietnamese power (made possible by sovereignty) saved countless Cambodian lives from grave injustice. The survivors were more concerned about avoiding unjust graves than about determining whether their attempted killers technically qualified as *genocidaires*. If state sovereignty is to be a good thing, it ought not to forget the ultimate sovereignty of the good. Johnson's argument that justice, peace, and order are richer by reference to each other points the reader toward this higher source. For this among many reasons, *Sovereignty* is a welcome contribution to the philosophy of international politics.

## Notes

[1] See United Nations Charter, Chapter I, Article 2(1). Available at <<http://www.un.org/en/sections/un-charter/chapter-i/index.html>>

[2] See also James Turner Johnson, "Just War Theory, As It Was and Is," in *First Things* 149 (January 2005).

[3] United Nations Charter, Chapter I, Article 2(4). Available at <<http://www.un.org/en/sections/un-charter/chapter-i/>>.

[4] I would also recommend Johnson's fine article "Grotius' Use of History and Charity in the Modern Transformation of the Just War Idea," in *Grotius*, Vol. 2, ed. John Dunn and Ian Harris (Lyme, NH: Edward Elgar Publishing, Inc., 1997).