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I. Land rights and aboriginal sovereignty

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SYMPOSIUM ON ABORIGINAL LAND RIGHTS

In 1988 Australia celebrated two hundred years of European settlement. At its annual conference the Australian Division of the Australasian Association of Philosophy marked the occasion with a symposium on claims by Aboriginal people for compensation arising out of that settlement. The two papers below were presented at the symposium and were subsequently accepted for publication by the previous Editor. Though they are appearing well after the bicentennial events, the issues they address remain topical both in Australia, in New Zealand which in 1990 is celebrating its founding one hundred and fifty years ago with the signing of the Treaty of Waitangi, and in other countries where European settlement impacted on indigenous peoples [Ed.].

I. LAND RIGHTS AND ABORIGINAL SOVEREIGNTY

Janna Thompson

When the First Fleet arrived at Sydney Cove in 1788 the officials planted the British flag on Australian soil and 'took possession', as they put it, of the colony of New South Wales. In taking possession they were declaring that the eastern part of Australia was under British sovereignty. As one legal scholar put it, 'The invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood.'¹ The assumption of sovereignty was carried out according to accepted practice. At that time, and on into our century, it has been customary for European powers to establish sovereignty over lands where political authority of a European kind does not exist.

In taking possession the first settlers were also declaring that the land of New South Wales henceforth belonged to the Crown. This act of possession was not customary. In most of their other colonies Britain and other European powers were prepared to acknowledge that the native people were the owners of the land, and settlers were expected to negotiate with these owners before establishing settlement and to pay them some form of compensation for

¹ As said by R.T. Latham in 1937. Quoted in Henry Reynolds, *Law of the Land* (Harmondsworth: Penguin, 1987), p. 1.

taking over their land. No such requirement was ever placed on the settlers in Australia and whatever land was left for the use of Aborigines was regarded as a gift rather than something to which they were entitled.²

It is understandable that those people who support the campaign for Aboriginal land rights are especially concerned with undoing and making compensation for what they regard as a gross injustice: the dispossession of Aborigines from the land that they owned. The debate about ownership raises some familiar and difficult legal and philosophical questions about the basis for rights of property, what these rights entail and what, if anything, is due to the descendants of those who have been wrongly dispossessed.³

What I will be concerned with, however, is not the question of ownership but the question of sovereignty: the question of whether the British were entitled to declare sovereignty over Australia and its inhabitants. The fact that they were following a practice accepted among European powers suggests that according to international law, as it existed, they were doing nothing wrong. But the moral question of whether they were justified in doing what they did remains to be answered. An enquiry into the moral justification for an action performed 200 years ago is by no means irrelevant to our present concerns. Some of the most serious disputes in the world concern questions of sovereignty: questions about what group of people has the right to use and control a particular territory and what that entitlement rests on. Though this paper focuses on the issue of Aboriginal land rights, what is said about sovereignty will have implications for other disputes.

As far as the question of Aboriginal land rights is concerned, an enquiry into sovereignty and its justifications has a bearing on how we understand the present position of Aborigines and what we think they have a right to claim. I think it can be argued that the most important thing which the Aborigines lost on that fateful day in 1788 was not their ownership of the land but their sovereignty over it. Whether they retained rights of ownership or not, native people in lands occupied by European settlers have invariably ended up living on the margins of white society, occupying land which no one else wants (and then only as long as no one else wants it). The treaties governments have made with them have been ignored or violated, compensation has either never been paid, or when it has, it has never

² Reynolds argues (op. cit.) that British assumption of ownership was based on false beliefs about Aborigines and the Australian continent: e.g. that the land was largely empty of people. These beliefs were soon discovered to be false, but by then a particular way of dealing with the Aborigines had become ingrained in the life of the colony and in the expectations of the settlers. Only recently has an Australian government shown any signs of officially recognising that Aborigines originally owned the land.

³ Some of these problems are discussed by David Lyons in 'The New Indian Claims and Original Rights to Land' in *Reading Nozick: Essays on 'Anarchy, State and Utopia'*, ed. Jeffrey Paul (Totowa, N.J.: Rowman and Littlefield, 1981), pp. 355-379. In the Australian context some of the issues are discussed by Reynolds (op.cit.) and in Ken Baker, ed., *The Land Rights Debate: Selected Documents* (Melbourne, Institute of Public Affairs, Policy Issues, n. d.); C.D. Rowley, *Recovery: The Politics of Aboriginal Reform* (Melbourne: Penguin, 1986); Max Charlesworth, *The Aboriginal Land Rights Movement* (Richmond: Hodja, 1984).

adequately made up for the loss of their land. The Indians of North America and the Maoris of New Zealand may be in a better legal position today than Australian Aborigines because of treaties and promises made to their ancestors by colonial governments. But the situation of the American Indians, the Maoris and the Aborigines is similar and their common problems seem to stem from the fact that the territories they once controlled were subjected to European control and colonisation. What then is sovereignty? And why has the loss of it been so fateful?

Property and Sovereignty

The concept of property and the rights associated with property have been much discussed by philosophers. 'Sovereignty' has not received nearly so much attention, and it is therefore necessary to say something briefly about what it is and what it is supposed to entail. There are a number of uses of the word, but as I shall understand it, 'sovereignty' is the exercise by a people—whether a clan, a tribe or a nation—of control over a particular territory through their political and social institutions. Having control over a territory means being able to establish the law of the land. And the law of the land determines in its turn the parameters of property ownership: i.e. what entitlements individuals and groups in a society have to use the land and its resources for their own purposes, and what rights and responsibilities ownership entails.⁴ Property ownership and sovereignty are different: The people of a nation may exercise sovereignty over their territory through their courts and political institutions even though a large part of the land is owned by foreigners and multi-national companies. A nation may assume sovereignty over a territory, as did the British in India, without dispossessing people from their land (though by making the law the British did change the conditions of ownership).

What above all determines the nature of sovereignty are the rights associated with it. It is generally assumed that a people who exercise sovereignty over a territory have certain entitlements which outsiders ought to respect. These entitlements are defined by international law, by that body of doctrine called Just War Theory and by what people commonly regard as the rights of nations. According to these doctrines and customary ways of thinking, violations of sovereignty are always difficult to justify. In particular, the aggressive invasion of the territory of one people by the people of another is almost always regarded as wrong. Michael Walzer in his account of Just War Theory finds only two basic exceptions to this general rule. One country may be justified in attacking and invading another in order to prevent a gross violation of human rights, or it may launch a pre-emptive

⁴ The relationship between property and sovereignty raises a number of questions which have sometimes been debated by philosophers: the question, for example, of whether individuals have natural entitlements to property which the laws of any society ought to recognise. My view is that there is no such natural right, but I do not argue for this here.

strike in the case where it is clear that the other is on the brink of making an aggressive attack.⁵

It is also generally assumed that people who exercise sovereignty have a right to determine the uses of the resources of their territory within the framework of the law that they have established. They can trade as they please with outsiders and make the agreements and alliances which suit them. Those who exercise sovereignty are also assumed to have the right to determine who can come and live in their territory and to insist that these people obey the law of the land. Virtually all sovereign powers impose restrictions on immigration and believe that they are within their rights to do so.

The entitlements associated with sovereignty are similar to the entitlements we associate with owning property. Property rights include the right of owners not to suffer invasion, to be able to use their possessions as they see fit, to extend hospitality to whom they wish and exclude others. Nevertheless there are some important differences between the entitlements associated with property and those associated with sovereignty. Not only does exercising sovereignty mean having the ability to make the law which governs property-ownership, among other things, but in addition the rights within a territory which having sovereignty entails are inalienable. Property can be bought or sold according to the wills of those concerned. Children and descendants are not in general legally entitled to demand that the property of their parents be passed on to them. But it is generally regarded as illegitimate or impossible for a group of people or their government to sell or give away their sovereignty to another (though they may legitimately sell their rights over a colony or an uninhabited area; and others may illegitimately force them to give up their sovereignty.) This suggests that according to our understanding of the rights of sovereignty, it is presumed that the descendants of those who exercise it do have an entitlement to have it passed on to them. Sovereignty is something held by a people in perpetuity.

In taking over Australia, the British declared themselves the makers of the law of the land; they assumed for themselves the right to determine how the resources of Australia would be developed and used, and the right to determine who would be allowed to settle on the land. In so doing they ensured that the native inhabitants would become a beleaguered people in the land that they formerly controlled. For even if the British had recognised Aboriginal ownership of land, the Aborigines, like native people in other lands, would have found themselves bargaining from a position of weakness. Subject to an alien law, having no control over settlers flooding into the country, they would have had little choice but to retreat in front of the onslaught, salvaging as much for themselves as possible, or resisting and facing the consequences.

Why then should we not regard the British takeover of Australia, along with other colonial invasions, as an unjustified violation of the sovereignty

⁵ Michael Walzer, *Just and Unjust Wars* (Harmondsworth: Penguin, 1980), Chapters 5, 6.

of another people? Aboriginal societies had clearly established a law for their land, and thus would seem to be entitled to the rights associated with sovereignty. None of the reasons which Just War Theory offers as a ground for a justified invasion seems to apply in this case. The fact that the native inhabitants were not able effectively to resist this invasion does not help to justify it any more than a rape becomes justified if the victim is unable to fight back.

Possibly the British would have argued that Aborigines did not have sovereignty over the territory they occupied and therefore did not have the rights associated with sovereignty. Those who argue in this way are giving 'sovereignty' a much narrower meaning than I have given it. They are assuming that sovereignty, properly speaking, can only be exercised through the institutions of a state, and that those people who do not have a state do not exercise sovereignty over the territory they occupy. Indeed international law is mostly about the relations between states, and those who are concerned with Just War Theory, like Walzer, simply assume that they are talking about relations between states. But why should this assumption be made?

Presumably the reason why a state is regarded by its citizens and the rest of the world as having the entitlements of sovereignty is because of the ability of its government and institutions to make and enforce the law in its territory, to protect the people who live under its rule, and preserve and maintain the values and way of life which are important to them. However if social and political institutions of other kinds can perform the same function, there seems no reason for denying that people with these institutions also exercise sovereignty through them. It should be added that the fact that Aboriginal Australia was not one political unit, but rather a collection of units, does not seem to constitute a reason for denying that Aboriginal communities exercised sovereignty anymore than the fact that Europe is not one political unit would constitute a reason for ignoring the entitlements of the people in its separate states.

But because Aborigines did not have a state in the European sense their territory was bound to become an object for European exploitation. A justification that has often been given for British assumption of sovereignty is that if the British had not declared Australia to be theirs, some other European nation would have taken it over. However, if the occupation of Australia is to be regarded as something other than an exercise of Realpolitik (which simply declares moral considerations out of bounds) then some further justification has to be offered. Perhaps it could be argued that since Britain was the one which undertook the task of protecting Australia and its native inhabitants from being ravaged and exploited by pirates, entrepreneurs and European powers it deserved compensation for its trouble. Let us allow that this is so. But this argument does not justify the British takeover; it does not justify the loss of sovereignty which the Aborigines suffered. For it is not generally believed that sovereign people who have incurred a debt have to pay it through loss of their sovereignty to others.

We are back, then, to the problem of justifying what seems, from

assumptions usually made about rights associated with sovereignty, to be unjustifiable: the takeover of Australia and of other territories by European powers. If a justification cannot be found, then we have to conclude that the invasion of Australia by British forces and settlers was as unjustified as any conquest by an aggressive power of its weaker neighbours. Such a conclusion will affect how we think about the events which the Bicentenary is supposed to commemorate and it may affect what we believe Aborigines are now entitled to. If, on the other hand, we are prepared to insist that the British invasion of Australia was legitimate then this will have implications for our views about sovereignty and the entitlements associated with it—implications which we may find unwelcome. The following can therefore be regarded as not simply a discussion of attempts to justify the colonisation of Australia but also as a critical examination of customary assumptions made about the rights associated with sovereignty.

Justification of the Rights of Sovereignty

What gives a people a title to the use and control of a territory? Franciscus de Victoria in the context of a discussion of Spanish activities in Central and South America in the 16th Century, says that people can be said to have dominion over a territory and have the entitlements associated with this dominion if they are in possession of it and control it through their political institutions and if they haven't obtained it by illegitimate means (e.g. by stealing it from others).⁶ As a justification for sovereignty this formula is subject to an objection similar to the one which has often been raised against Locke's attempt to found the right of property on what an individual has taken for his own use: why should a group of people have the right to possess a territory in perpetuity and keep everyone else from using it simply because they got there first? In his discussion of the reasons for the prohibition against aggression Walzer in *Just and Unjust Wars* provides the beginning of an answer to this question.

Walzer finds the basis for the entitlement that people have over their territory in the 'common life they have made'. 'Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life.'⁷ Given that such a common life exists the people who share

⁶ Franciscus de Victoria, *De Indis Noviter Inventis (On the Indians Lately Discovered)*, trans. John Bate (Carnegie Endowment for International Peace, Oxford: Clarendon Press, 1934), Sec. I. Many of the arguments in my paper are a repetition of those which occur in this remarkable work which was written in 1532. It is obvious that the idea that sovereignty is only rightful if the land hasn't been taken from others is problematic: the territories now in the possession of most existing states have been acquired originally by conquest or dispossession. And it may be the case that mainland Aborigines dispossessed an earlier group of people. Two things can be said here: 1) The fact that sometime in their past a group of people took over land from others does not provide a justification for someone else taking over their land; 2) If land is in the possession of a group of people for a period of time, then they have rightful sovereignty.

⁷ Op. cit., p. 54. See also Walzer's 'The Moral Standing of States: A Response to Four Critics' in *Philosophy and Public Affairs*, V. 9, n. 3 (1980), pp. 209-229.

it have a right to the territory they inhabit for the same reason that an individual has a right to space free from intruders. People who have a common life have to have somewhere to live it. 'It is for the sake of this common life that we assign a certain presumptive value to the boundaries that mark off a people's territory and to the state that defends it.'⁸ There is, of course, nothing in what he says which couldn't be applied to people who do not have institutions of state in the modern sense.

But what's so important about being able to maintain a common life? If we take it, as most modern philosophy does, that it is individuals, their pleasures, pains, desires and values, which are the object of moral concern, then the answer to this question seems plain. A common life shapes the identity of persons. It determines or influences their values, their aspirations, their ideas about why they are and how they should relate to other people. To take away from a person his or her common life is therefore to take away something that he or she is likely to regard as enormously important. She may regard it as worse than taking away her life. The fact that individuals do regard their common life as something important and worth preserving is a good reason from a moral point of view for allowing them to do so. It is not, of course, a sufficient reason. A respect for people's desire to maintain their common life does not mean that forms of common life are beyond criticism, or that all of them are equally good, or that individuals might not be better off if they altered or gave up the common life which they presently have. It does not mean that interference in a people's way of life is *never* justified. If, for example, the common life of a group of people promotes hatred and aggression toward outsiders, then those who are threatened may be justified in requiring (by use of force, if necessary) that the group changes its way of living.⁹ But once we acknowledge the importance to individuals of maintaining their common life, then intervention, except for the purpose of self-defence, will almost always be ruled out—for reasons both practical and moral.¹⁰

Whether our morality is based on a respect for persons and their right to determine their own ends and ways of living, or on a concern for their feelings and preferences, the violation of a common life cannot usually be justified. Practically speaking, attempts to force people to change their way of life will usually fail to have the desired effect. The people concerned are bound to resist. They will learn the new ways that are forced upon them reluctantly, resentfully, and probably imperfectly. They will tenaciously cling to their old values. The failure of the efforts to assimilate Aborigines into the way of life of European settlers suggests that attempts to force people to give up their traditional way of life—however well intentioned

⁸ Ibid., p. 57.

⁹ Thus the Allies were probably right to require the Germans and the Japanese to change those aspects of their way of life which seemed to be responsible for their aggression. However, it would have been illegitimate to require that they give up their common life altogether or surrender their sovereignty in perpetuity.

¹⁰ As I argue below, intervention may also be justified to protect minority groups from oppression.

they may be—are likely to do more harm to them than good.

Respect for a people's common life does not logically require that they ought to be allowed to exercise sovereignty. It has been possible for people to maintain a common life without having control over territory and the ability to make the laws of the land (as have the Jews of the diaspora). But there are good empirical reasons for thinking that having the rights of sovereignty is the best means, in the world as it is, of protecting a common life and being able to pass it on to descendants. Groups which are forced to live under a law which is not of their making run the risk of persecution or assimilation (as have the Jews of the diaspora).

Given that exercising sovereignty is in general the most reliable way for people to protect their common life, it is understandable why the entitlements which are usually associated with sovereignty are thought to be so important and so inviolable. To invade other people's territory is not only to threaten their lives and their property but also to threaten their common life. To require people to accept large numbers of new settlers in their territory can also be a serious threat to their common life. In the case of the Aborigines the loss of sovereignty and the loss of their ability to maintain their common life are clearly connected. The colonial occupation of lands like Australia did interfere drastically with the ability of native people to live as they chose. So if an attempt to justify colonialism is to succeed it must give reasons for believing that this kind of interference is justified.

Can Colonialism be Justified?

Philosophers and others have sometimes argued that establishing European settlements in territories like Australia is no violation of the rights of the native inhabitants, because these people have more than enough land for their own uses, and can legitimately be asked (or forced, if necessary) to settle more closely or to allow Europeans to take charge of what they do not need. Locke and many others have argued in this way.¹¹

But the argument is open to an obvious objection: whether land is going to waste or not depends on the nature of the labour of the people and not simply on the capacity of the land. Hunting and gathering people require more territory to carry on their way of life than do people in an agricultural society, and an agricultural society cannot support the same number of people as an urbanised industrial society. The territories which Europeans thought were virtually empty were in fact generally carrying as large a population of native people as they could carry. Forcing such people to settle more closely meant either reducing their numbers or destroying their way of life (or both).

¹¹ 'There are still great tracts of land to be found, which the inhabitants thereof, not having joined with the rest of mankind in the consent of the use of their common money, lie waste, and are more than the people who dwell on it, or can make use of, and so still lie in common.' (*Second Treatise on Government*, Para. 45) Since it lies in common, others can rightly appropriate it.

Perhaps it can be argued, however, that Aborigines and other native people were not entitled to the use and control of the land that they occupied because they were not using it as well or as intensively as it could be used. Many of those who have argued for colonialism argue on those grounds. Henry Sidgwick in *Elements of Politics* insists that no community has exclusive right to the enjoyment of its resources. Though the entitlements associated with sovereignty, he agrees, ought generally to be respected among civilised people, uncivilised people have no moral right to the territory they inhabit, though they ought to be compensated for the loss of their lands if possible. 'It does not indeed seem to me that a moral right of savages to their hunting-grounds can be allowed in the interest of the human race, to override the claim of civilised races to expand.'¹² The argument could be construed as a utilitarian one: the European settlers because of their superior social organisation and technology could use the land much more productively than the Aborigines and for the benefit of many more people. By being able to settle in Australia, European settlers would make themselves better off than they could have been if they had stayed in the old country; they would also benefit people in other countries by growing wool, mining gold and so forth. Eventually their labour would even benefit the Aborigines who would become assimilated to European culture and would be much better off than they were before.¹³

Many of the assumptions on which this argument is based can be questioned. It is not clear that those settlers who came as convict labourers or those who settled and went broke on the drought-ridden plains of Australia were better off than they would have been if they had stayed home. It can be doubted whether these settlers contributed anything essential to the world. It can be argued that the higher productivity which European farmers managed to achieve on Australian soil has so severely damaged native ecological systems that the land is in danger of being ruined forever. Most of all, it is doubtful whether Aborigines now or in the past are better off as the result of the European invasion. But let us skirt around these minor objections and get to the main point: can a violation of sovereignty be justified on the utilitarian grounds which Sidgwick offers?

Utilitarian arguments have the nasty habit of turning in the hands of those who use them and delivering consequences which they do not welcome. The British pacifist and philosopher, C.E.M. Joad, who in the days before the outbreak of World War II was casting desperately about for a way of preventing the conflict, hit on the idea that Britain should give part of Australia to Japan. The reasons he gives are comparable to the reasons Sidgwick and others have used to justify colonialism: Japan is an overpopulated and dynamic country; and its people need room to expand.

¹² Henry Sidgwick, *Elements of Politics*, 2nd ed. (London: Macmillan, 1897), p. 256.

¹³ Native people, Sidgwick assumes, will eventually be assimilated into European society, will be 'educated to the habits of steady labour' and will benefit accordingly.

Australia is underpopulated and its people can be made to settle more closely.¹⁴

Ignoring the British arrogance inherent in this suggestion—the assumption that Britain can dispose of Australia as it pleases—the argument from a utilitarian point of view ought to be taken seriously. We could add that since the Japanese are highly industrious and productive, accustomed to using to the maximum all available materials, that they would be able to use Australian resources more productively than the native inhabitants, thus benefitting themselves and the whole world. Australians would also eventually benefit from their activity, especially if they became assimilated into Japanese society. If giving some or all of Australia to the Japanese can also prevent major world conflict, then surely our utilitarian calculation of the benefits of this policy must go up by at least several notches.

Is it merely chauvinism which makes us want to reject Joad's suggestion? If we do want to reject it then there are two ways to do so: We could insist that utilitarianism gives us the wrong answer in cases like this; that central to our morality ought to be a respect for peoples, as well as a respect for persons. This means that sovereignty should not be violated against the will of a people for the sake of the general good. Or alternatively, we might argue that the desire of individuals to maintain their common life ought to weigh much more heavily than utilitarians like Sidgwick have weighed it. Whichever way we choose, colonialism remains unjustified.

But surely Sidgwick is right to insist that people do not have exclusive right to the enjoyment of their resources or the right to dispose of them as they please. I think there are at least two types of cases where we would be inclined to say that people should be required to share their resources with others, or should be prohibited from using their resources in a particular way.

People who are well supplied with resources have a moral obligation to help impoverished or desperate people in other countries. This means that if individuals or a group of people within a country are no longer able to live a decent life where they are, either because they are being persecuted by their government or because their land will no longer support them, then wealthy countries are obligated to take them in, if this is the most feasible way of helping them. On the other hand, it is illegitimate for a government to try to solve its social problems by forcing people to emigrate (as did the British when they set up convict settlements in Australia). Nor is it legitimate for people to demand entry to another country simply because they no longer want to live where they are or because there seem to be more opportunities elsewhere.

People should be prohibited from using their resources as they please if in doing so they would be drastically interfering with the lives, health

¹⁴ C.E.M. Joad, *Guide to Modern Wickedness* (London: Faber and Faber, 1938): 'To concede to Japan a large slice of Australian territory that the British are unable to populate would satisfy at once the demands of justice and the dictates of expediency', p. 179.

or common life of the people in another country. If, for example, their industrial processes are causing serious pollution problems in other countries, then they should do something to prevent the harm they are doing. The interdependence of the people of the world, the fact that the activities of people in one country are increasingly likely to affect the well being of people in another, may eventually force us to modify some of our ideas about the rights associated with sovereignty—with consequences for international law, our customary practices and even Just War Theory.¹⁵

So our conception of what sovereignty entails is not unchallengeable and may come under increasing pressure in the future. But whatever revisions of our ideas the future holds, colonialism, as it was practised by the British in Australia, remains unjustified. Australia did not contain any resources which the British or anyone else desperately needed, and even if it had, they might have been obtained through an agreement with the native people. Those who settled in Australia were generally not stateless people; and although some of them were able to make a better life here than they could have in their native country, few would have found it impossible to remain where they were.

Utilitarian arguments do not provide a way of justifying colonial practice. But other, non-utilitarian considerations have sometimes been brought in in order to make the case. Colonialists have often believed that they are justified in doing what they are doing because they are members of a superior race and representatives of an advanced culture; whereas Aborigines, in their opinion, are an inferior race with a primitive culture. Like animals, native people have been thought to be beings with fewer rights who can be legitimately supplanted. Sidgwick's reference to the superior entitlements of civilised people suggests this line of reasoning. The argument doesn't carry much weight today among thoughtful people, mainly because it has been established that it is based on bad biology and bad anthropology. Theories claiming the superiority of particular races have long since been shown to be false. The idea that Aboriginal culture is more primitive, that its language, its laws, its institutions and religion are more child-like or immature than the language and culture of Europeans, has been discarded by anthropologists and linguists. But once we have rejected 19th Century views about racial and cultural superiority it becomes difficult to make sense of the view that one culture or people are superior to another. In what respect? And once we start trying to select criteria, it becomes clear that objective comparisons are not easy to make. To the extent that they are possible it is by no means a foregone conclusion that European culture will turn out to be in every, or any, respect superior.

¹⁵ Charles Beitz in *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) argues more radically that the resources of our interdependent world ought to be distributed according to the principles of Rawls' theory of justice. This means he argues that a defensive war may not always be justified: '... a war of self defence fought by an affluent nation against a poorer nation pressing legitimate claims under global principles (for example, for increased food aid) might be unjustifiable ...' (176)

However, the question of whose culture and way of life is superior is beside the point. If people are entitled to sovereignty because of the importance to them of maintaining their common life, then surely this entitlement is not affected by what we think of their culture, anymore than an individual's entitlement to privacy is affected by our judgments about what she does with it.

This conclusion, it will be argued, must be modified. Some things that people do to themselves or each other in their societies or in their private lives are immoral, harmful and ought to be stopped. There are (or have been) practices carried on by people in some places which most of us would agree are morally reprehensible: footbinding of women, the practice of suttee, cannibalism, human sacrifice, exposure of infants, or in the case of Aboriginal society, ritual spearing or forcing girls to marry tribal elders.¹⁶ If these practices are evil, then surely it is the duty of others to stop them. Many people regard it as a good thing that the British largely stamped out the practice of suttee in India and footbinding in China.

If the eradication of injustice or evil is to serve as a justification of colonialism then we must argue like Walzer that what people in a society do to each other can be grounds for a violation of their sovereignty. However, there are significant differences between the cases which Walzer has in mind and the evils that colonial governments are trying to prevent. Walzer is clearly thinking about those cases where a group, persecuted by their government or by others in the society, desperately wants help and welcomes outside intervention. But the practices of native people are generally accepted by all, including the victims of them, who share the same cultural values; and even where there is opposition to these practices within the society, those who object would not necessarily welcome outside intervention. Most people would prefer to deal with what they object to in their society in their own way.

In any case, there is a question of what kind of violation of sovereignty is justified in order to prevent evil. Just War Theory allows that force can be used to remedy injustice, whether committed against outsiders or against people living within a society, but it also insists that once the injustice is remedied the intervention must cease. Remedying injustice or preventing evil does not seem to be a good reason for taking over the sovereignty of a territory in perpetuity, settling people on land that belonged to others or trying to force native people to adopt a radically different way of life.

What Interventions are Justified?

Neither utilitarian considerations nor a duty to prevent evil can justify the

¹⁶ These are the practices which are often mentioned by those critical of Aboriginal society. See for example Hugh Morgan, 'Religious Traditions, Mining and Land Rights' (Speech, May 1984) printed in Ken Baker, ed., *The Land Rights Debate* (op. cit.). Some people will argue that these practices, and other native practices listed, are not evil in the context of the society (or not seriously evil). I am assuming for the sake of argument that some of them are.

dispossession of Aborigines from the sovereignty they exercised over the land on which they lived. Unless some other justification can somehow be found for colonialism, we must conclude that what Britain did in 1788 was morally indefensible.¹⁷ But having reached this conclusion my argument provokes two difficult questions. The first is the question of what interventions, if any, the people of one society are justified in making into the lives of those in another society. If the British, and other European powers, had been prepared to act morally in relation to the Aborigine people, then what should they have done? The second question is more directly relevant to our present position: what can Aborigines living today rightly claim in reparation for the violation of their ancestors' sovereignty? I will not be able to answer these questions fully but the following discussion brings out some of the issues which have to be considered.

Does a respect for the sovereignty exercised by a people rule out any intervention in their lives whatsoever? Captain Cook said of the Aborigines he encountered: 'They didn't wany anything we gave them. All they wanted was that we should be gone.' Let us suppose that the relevant European powers at the time were willing to take the wishes of the Aborigines seriously. Australia would henceforth be declared out of bounds to settlers, traders, adventurers, mineral prospectors. A few anthropologists might be let in from time to time to keep informed about the wishes of the natives. In other words, Aborigines would be protected and isolated from outside interference in the way that animal communities are sometimes protected in wilderness reserves.

The analogy provokes what I think is a strong objection to this policy of total non-intervention: that this is no way of treating other human beings. To treat people as human, it has been argued, is to treat them as individuals with whom we can communicate: exchange ideas, make agreements, engage in mutual criticism, tell stories, etc. It would thus not be treating people as human beings to isolate them in such a way as to make this kind of exchange impossible, and Aborigines as rational beings should be able to recognise that it is not in their interest to be left strictly alone.

It follows that the policy of total non-intervention is not justified. I have, however, two important doubts about this conclusion. The first comes from the recognition that intervention not only spreads ideas, it also spreads disease. It could be argued that the worst blow to Aborigines and their culture was not their contact with European settlers but their contact with European diseases. I do not know how to weigh this serious disadvantage associated with contact between peoples against the advantages of contact. Secondly, the notion that universal communication and critical discussion among groups are valuable presupposes that people are similar enough in their interests and their views of what is good and right so that the ideas of each are

¹⁷ A distinction has to be made between what the British collectively did and the responsibility of British officers or settlers as individuals for British policies and the harm done to Aborigines. Here I am talking about the responsibility of the British collectively. Why and to what extent individuals should regard themselves as responsible for repairing the harm done by a collective is something I discuss briefly below.

intelligible to and applicable by all. But this may not be true. For example, people whose identities as individuals are inseparable from their position in a kinship group, a clan or a tribe may not find Western ideas about individual rights or the equality of individuals intelligible, much less plausible. If this is so, why should we suppose that anything good is being accomplished by insisting on exposing them to these ideas?

However, if it is accepted that total non-intervention is wrong or impractical, it remains to be considered what kind of intervention could be justified. The discussion suggests that being able to make a legitimate intervention will depend upon finding a satisfactory trade-off between doing what is beneficial to Aborigines as human beings, and not doing what will seriously disrupt the common life that they value.¹⁸

I want to suggest that a respect for the sovereignty of other people requires that what is beneficial and what is harmful to them be decided by the people concerned. This is certainly what we would want in our own case. This means that we can't *force* people to learn about the benefits of Christianity, critical rationality, private enterprise or socialism. What we can do is to try to persuade them that our ideas, values and ways of doing things are of interest to them and provide them with opportunities for learning about them. Similarly, they should be able to do the same for us. If this formula for peaceful intervention is taken seriously, then it must be admitted that a satisfactory adaptation of cultures to each other would probably take generations of contact.

We can conclude, then (while taking note of the reservations stated) that it would have been legitimate for the British to establish contact with Aboriginal groups, to try to make mutually beneficial agreements with them, to give them the opportunity of learning whatever they wanted from us and us the opportunity to learn from them. This kind of contact would undoubtedly have required the British to set up bases of operation on Aboriginal land and I think it could be argued that they would have been justified in doing this whether the Aborigines liked it or not. But there is a long distance between this kind of contact and colonialism as it was practised in Australia and elsewhere.

It has to be acknowledged that this whole discussion about what was justified in 1788 and what was not will strike some people as being somewhat ludicrous in view of what the British did do—and what we feel that they, or someone else, were bound to do. The arguments which I have offered against colonial invasion (like the arguments de Victoria put forward over four hundred years ago) rest on values and principles which are the products of Western civilisation. But colonialism, too, is a product of Western

¹⁸ Franciscus de Victoria argued (*De Indis*, op.cit., Sec. II, xxxi) that it was not lawful for Spaniards to force the Indians of the New World to accept Christianity. But he insisted that the Spanish were entitled to preach the gospel to the Indians and could defend this entitlement by force. The Spanish were not entitled to take over Indian land, but they were entitled to trade with Indians and to use resources which the Indians did not use and could defend this right (Sec. III, xxxviii).

civilisation, and colonisers have never been swayed by the moral principles on which our society is supposed to rest. In the case of colonialism, the gap between the dictates of morality and customary practice has been spectacularly wide. To determine why this has been so requires another kind of enquiry.

Aboriginal Land Rights

Given that the British did what they did, what can Aborigines now demand in reparation for the violation of the sovereignty of their ancestors?¹⁹ The problems which arise in answering this question are similar to those which arise in other cases where injustice has been committed by past generations. On what basis can Aborigines make a claim for reparations? On the basis that they are the heirs of those who were in rightful possession of the land? But we non-Aborigines can also make a claim to be the rightful possessors on the grounds that we have assumed our control in a legitimate way, either by being born here or by being accepted as immigrants. How can presently existing Aborigines claim reparations when they were not the ones who were dispossessed? And how can they claim reparations from us when we are not the ones responsible for the injustice. (Most of us are not even the descendants of the British officials and settlers who arrived in 1788.) How can events that happened two hundred years ago have any bearing on the responsibilities and entitlements of people today?

There are, I think, two ways in which the past does affect our responsibilities. The past is relevant to our present moral responsibilities, first of all, because events of the past have causally brought about present relationships between people. The disadvantages which the Aborigines now suffer are to a large extent the result of past injuries done to Aborigines—not simply the result of the brutal way in which Aborigines have often been treated by white settlers, but also of the violation of Aboriginal sovereignty by the British. Aborigines can rightly demand reparation for injuries they themselves are still suffering as the result of this violation. They can demand reparation from *us* because we have a general duty to aid the disadvantaged, and more particularly because we have a responsibility for the institutions and attitudes of our society which are still causing harm to Aborigines.

The past is also relevant to our responsibilities in the present because the attitudes of people to the past make it relevant. To belong to a people, to be part of a common life, is not simply to relate to presently existing people in a particular way but to have an attachment to past and future generations, to regard oneself as carrying on the traditions and values of the past, keeping faith with those who have gone before, and transmitting

¹⁹ I have chosen to use the term 'reparation' rather than the more familiar 'compensation' because reparations are what are paid for violations of sovereignty, and because 'compensation' (probably more than 'reparation') carries with it the suggestion that people ought to be brought back to the condition they were in before the harm was done—which in this case is inappropriate and impractical.

these traditions and values to one's children. Given that maintaining a common life is important to individuals, then they ought to be able to pass it on to their children, providing that there is no good reason (of the sort already discussed) for preventing them from doing so. Because of their ancestors' loss of sovereignty, Aborigines of today, those to whom their culture and tradition are still important, suffer a spiritual as well as material deprivation as the result of past events. They cannot keep faith with their ancestors and adequately pass on what they believe is important to their children; and we have discovered no good reason why they should be prevented from doing this. Aborigines would probably still suffer from this kind of deprivation even if they were to receive good housing, better education, employment, equal opportunities. Of course this spiritual deprivation would cease to exist if Aborigines became completely assimilated into white society. But the assimilation policies of the past have proved ineffective both because of the racism of white people and because many Aborigines have wanted to cling to their own cultural identity. The fact that many have done so in spite of all the attempts made to discourage them is a demonstration of how important it is to individuals to maintain their common life.

People who suffer from spiritual deprivation because of their relation to the past can rightly claim what is required for this deprivation to be overcome. What this means exactly will depend on their circumstances, their needs and desires, and the needs and desires of others who also have an entitlement to be where they are. Many Aborigines have suffered and still suffer from the consequences of being subject to laws, and forced to adapt to ways of life, which they find alien. In this respect their situation seems different from that of Italian, Chinese, Lebanese and other settlers who have sometimes suffered from prejudice and persecution in Australia. These settlers can probably manage to maintain what they want of their way of life within the legal, political and social framework of Australian society; in any case, they have chosen to immigrate. Aborigines have had a much more difficult time maintaining their common life in Australian society, and they have not chosen their fate.

Therefore, the granting to Aboriginal communities of rights over land seems to be the most appropriate way of offering reparation for the harm done, both because this is what these communities desire, and because the use and control of land gives people an opportunity to live as they want to live. But if having land is going to allow Aborigines to overcome their spiritual deprivation and maintain the life they want, then 'land rights' must mean more than merely owing land. The demand for Aboriginal sovereignty which has become common in some Aboriginal communities is an attempt to formulate a conception of land rights adequate to the needs which many Aborigines have.

As long as Aborigines remain citizens of Australia then they cannot exercise 'sovereignty' in the usual sense of that term; they will not be autonomous. Nevertheless, their control over land could be such that they have some of the entitlements customarily associated with sovereignty: the entitlement

to live by their own law, as far as their internal affairs are concerned, to control the resources of their land and determine who can enter and settle on it; the right to retain their land in perpetuity, so that they can be assured of handing down their entitlements to their descendants. What exactly these entitlements should entail is something that would have to be negotiated between Aboriginal communities and the Australian Government as the representative of the Australian people.

Aborigines are entitled to claim land rights from us because an appreciation of the importance to individuals of their common life ought to be central to our moral concerns. But we have another, more particular, reason for being concerned with this matter. We, too, like to think of ourselves as a people and not simply as a collection of individuals whose ancestors were dumped here, or who gravitated here for one reason or another. Part of what it means for individuals to become a people is for them to take responsibility for what their institutions do and for what the people of their society have done in the past. If individuals who call themselves Australian are not willing to do this then there is no such thing as the Australian nation and the attempt to celebrate its foundation is not only an affront to Aborigines but an exercise in absurdity.

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