



Talk delivered at the launch of Annette Culley's book *State Responsibility in International Law* at the Department of Foreign Affairs, Immigration and Trade for the Federal Republic of West Papua

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Annette Culley was in Darwin when this book was conceived. She was attending a public talk at which the Foreign Minister, Julie Bishop, was speaking. She noticed her friend Peter, a man she knew from the West Papua activist community and a West Papuan himself, waving his arm, trying to get Julie Bishop's attention.

As the story goes, he was studiously ignored as though Julie Bishop could tell that coming her way was a question she didn't want to answer. She did manage to finish the talk, and leave the stage without having to confront Peter's question in front a room full of people. But she did not manage to make a totally clean getaway. In the aftermath of the talk, Peter found her amongst the mingling masses and presented to her his question – “Madam Foreign Minister”, I imagine he said, “when is the Australian government going to start speaking out against what is happening to the people of West Papua?”

Sadly, Julie Bishop gave Peter nothing more than her canned answer, the answer she flips to the press or the public whenever she's asked—she said

Australia would be doing nothing for the people of West Papua because Australia was not in a position to infringe upon the sovereignty of Indonesia.

Annette heard this answer and wasn't convinced that Indonesian sovereignty really created such an impenetrable shield. She spoke to a friend of hers who was an international lawyer, and was then even less convinced. So Annette decided to take matters into her own hands. In the spirit of a true librarian, Annette started doing some research. Her research became a book, and the book is a rejection of that dismissive answer handed out by Julie Bishop.

State Responsibility in International Law is Annette Culley's refutation of the claim that the government of one state cannot intervene in the affairs of another sovereign nation, with respect to sustained violations of human rights. Through a comprehensive perusal of international law, Annette concludes that actually, states do have a right to intervene in the affairs of other state in order to mitigate the systematic attack on the human rights of a population. She goes even further, in fact, and says that under the international legal framework, not only do third states have a right, they may also have an obligation.

To frame the questions that Annette addresses, we have to understand where Julie Bishop's answer comes from—

So where does it come from, this idea that one state cannot intervene in the affairs of another sovereign state? What is this ironclad creature called a "sovereign state?"

The myth of sovereignty refers to the Peace of Westphalia of 1648 as the alleged originating moment of statehood as we know it. The Westphalian Peace treaties were signed by European heads of state to bring an end to the carnage of the 30 years war—the war that was, up until that point, Europe's most catastrophic and total conflict.

The Westphalian principle is that all states would respect the integrity of each other's territory, they would not invade each other, and they wouldn't tell each other how to govern. Instead of competition between Popes and Emperors for influence over ever-more vast tracts of territory, the Westphalian system would rely on a balance of power between nominally equal political entities, to keep any one of them from becoming too powerful, too greedy, too covetous of the others' resources. The idea of sovereignty under this model is that if states stayed out of each other's business and each other's territory, there would be no war. Or, at least, less war.

WWI and WWII put a resolute end to this hope that state sovereignty could guarantee peace. It didn't put an end to the concept of sovereignty as the definitive feature of statehood, though, or the idea that state sovereignty is the major organising principle of the international system. It did, however, change the context in which sovereignty was to be understood.

In 1945, at the end of the Second World War, the UN charter was brought into force, and the UN Charter served as the foundation for a system of international institutions and rules dedicated to the peaceful resolution of disputes – for example, it established the International Court of Justice where states could bring disputes before a panel of judges to be adjudicated when diplomacy failed, instead of resorting to armed conflict. It also established a legal framework and institutions of collective security, like the general prohibition on the use of force under art 2(4) of the UN Charter and the quasi-executive body, the Security Council that either grants or denies states the right to use force within the territory of another state.

Over the course of the 20th century, international institutions with varying degrees of influence over the domestic matters of individual states have proliferated—we've seen the development of the World Trade Organisation

and its Dispute Settlement Body which enforces trade agreements that bind states; the International Tribunal for the Laws of the Sea; global financial institutions like the International Monetary Fund and the World Bank. There is the International Criminal Court, which is currently undertaking examinations and investigations into matters relating to over twenty countries. There have been international or internationalised war crimes tribunals for Rwanda, the former Yugoslavia, Sierra Leone, Cambodia and Lebanon, holding heads of state to account for using the state apparatus to commit mass crimes against their own populations. There are mechanisms like the Universal Periodic Review before the UN Human Rights Council where states are examined and evaluated on their human rights record by other member states. There are 9 key human rights treaties, each with its own treaty body, some of which can receive individual complaints from victims of violations and make recommendations on their behalf to state governments; and there are countless trade agreements that have facilitated a globalised economy whereby every one country's economy, society and ways of life are shaped by the international economy, for better or, indeed, for worse.

What a state does within its own borders is very much the business of international law and international institutional authority.

On one view, this international system has eroded the concept of sovereignty: states are now subject to international treaties, agencies and officers that assert a kind of authority over state governments—an authority that is often rebuked by wilful politicians using phrases like “Australia is sick of being lectured to by the UN” when they're called out on their record of torturing asylum-seekers. In popular discourse, the international system can be experienced or expressed as an infringement of a state's sovereign authority.

On another view, states are bound to rules and institutions purely on their own undertaking. States create international law and state representatives populate international agencies and institutions. The authority of international law is actually derived from the sovereign authority of states. States choose whether or not to sign a treaty, and only if they do sign and ratify, are they bound.

This is a different concept of legal authority than what we find under domestic law. I am bound by the laws of Australia whether I like it or not.

However, the reason I am bound is because the governments of Australia have supreme law-making authority, and I don't. Domestic law and international law may be slightly different concepts, but both conceptions are based on the same premise: state power is the ultimate source of legal authority, whether it binds me or binds itself.

All's to say, state sovereignty is still the pre-eminent concept of the international system. States cannot intervene at random in the affairs of another country. So Julie Bishop was not completely wrong.

The idea of the Post-WWII Charter system of international law, though, is that there is an international system that can influence states, but states cannot intervene in each other's affairs on an ad hoc basis, certainly not without the consent of the host government. If they did, the story goes, all pre-Westphalian hell would break loose.

But herein lies the tension. State sovereignty, while the fundamental organising principle of the international system, is something of a legal fiction because in our globalised and highly integrated world, what happens within the borders of one country does effect, directly or indirectly, the situation in other countries.

What happens in Syria or Eritrea creates refugee flows that can dramatically change the economic and political climates in European countries. The crises in Yemen, Somalia, Afghanistan, Iraq and Libya create havens for disenfranchised extremist groups that spill over into neighbouring countries—Pakistan, Egypt, Mali, Nigeria—and destabilise governments and put people’s lives in danger. These extremist groups that thrive in war torn environments also affect the safety, politics, law and even the liberalism of Western countries in different ways.

The environmental devastation and massive rates of pollution in one part of the world lead to extreme weather that ravages another. The poorly managed banking sector in one powerful country will devastate economies all over the region or world. To maintain a market in consumer goods, indeed a food supply, one country is dependant upon the economies of many other countries’ and their manufacturing or agriculture industries and labour force.

So while the international legal system may still premise itself on the concept of state sovereignty, these phenomena don’t. One country’s actions or inaction, within its own borders quickly become another country’s problem, or opportunity, or responsibility.

And governments know this. Powerful states intervene in the domestic affairs of other states as a matter of course. This takes many forms—foreign aid, for example, delivered with the consent of the host government, but often with conditions attached; bilateral investment treaties signed between wealthy countries and developing countries to enable foreign corporations, often extraction companies, wide access to another state’s natural resources, removing its wealth from the local economy, usually with little or no compensation to the local people, and rendering the government accountable

not to its own people but primarily to international arbitration tribunals that protect foreign corporate interests first. Further still, diplomatic pressure can lead governments of less developed countries to pass economic or social policies that are more aligned with the ideological commitments of a neighbouring powerful country or international economic institution than they are with the political culture or needs of the people.

So Annette Culley is right to question Julie Bishop's line that Australia cannot intervene in the domestic affairs of another sovereign nation. After all, if that were strictly the case, Julie Bishop would be out of a job.

There are many ways that the decisions made within the borders of one state have political and economic consequences for other states; and there are many ways that powerful states who are likely to feel those consequences economically, ideologically or strategically, can and do influence the domestic policies of less powerful states to align them with their own economic and political interests. Such is the world of international relations.

But Annette wants to look at this dynamic from a specific angle. Firstly, she is looking at the question of human rights—the rights of individuals, the interests of people. When a state government or government agency, let's say, the military of the government of Indonesia, is committing widespread and sustained violations against the rights of the people of West Papua, the question is what CAN, what SHOULD, and what MUST a country like Australia do about that?

Annette draws out two lines of argument in her book. The first follows the laws of state responsibility that spell out the circumstances under which a state is responsible for conduct committed by its agents. This, placed alongside

an array of human rights treaties, traces responsibility to the government of Indonesia for the human rights violations committed by its armed forces, and arguably even the corporations that are displacing indigenous communities, and destroying livelihoods, when these corporations are enabled and protected by the military and government officials.

The second line of argument is what *right* under international law does a third state like Australia have to intervene against the violations being committed by Indonesia against a people who are formally within the jurisdiction of the Indonesian government—say, West Papuans. Annette traces the evolution of the right of standing that third states have to bring attention to and even demand accountability for human rights violations committed by another country within its own territory.

And then there is the third question that Annette’s argument guides us towards, which is whether there is not just a right for a third state to demand accountability, but an obligation under international law for a third state, Australia, to consider and act upon the violations being committed by another state, Indonesia.

And this was at the heart of Peter’s question posed to Julie Bishop in the aftermath of that talk in Darwin— **what can we do to compel the Australian government to recognise in its diplomatic relations or under law the violations of human rights that the TNI are committing against the people of West Papua?**

Can we say that Australia has an obligation to recognise or acknowledge in some form the rights of non-Australian persons?

If there is an obligation, what is the nature of that obligation, and what are the implications of such an obligation?

The question is clear morally, but legally it's not straight-forward. To elucidate the complexity, I will transplant the question into another context—

Does Australia have an obligation under international law, for which it can be held accountable, to the people of Syria? Yemen? Saudi Arabia? Palestine? Turkey? South Sudan? Democratic Republic of Congo? Egypt? Eritrea? Venezuela? Guatemala? Russia? Georgia? Tajikistan? Nepal? Philippines? Myanmar? China? The United States? And on...

Maybe it does, but it really depends on how you understand the nature of the obligation.

Australia cannot be held legally responsible for human rights violations happening all over the world. Such an obligation would be impossible to fulfil and therefore meaningless.

But Australia can certainly be held politically and morally accountable for its own contributions towards violations, for example

- through its unconditional aid to the Indonesian military which is the primary instrument of repression of the Papuan people; even while acknowledging that West Papuan people seeking asylum in Australia for political reasons are refugees;
- it must ensure greater accountability for the delivery of humanitarian aid, ensuring that aid goes directly to Papuans instead of being intercepted and sold by the military before it arrives.
- It can be held to account for Australian corporations operating overseas, that are infringing upon the human rights and land rights of labourers and villagers.

So what is the legal argument to be made?

Annette Culley's book provides the legal framework through which these questions can be analysed and an argument can be built. Annette takes the reader through the key ICJ cases; the Articles on the Responsibility of States for Internationally Wrongful Acts; through discussion of the key human rights treaties and relevant provisions that entitle states to make complaints about violations of human rights committed by other states; and for the evolution of the doctrine of responsibility to protect.

Annette is asking an important question—what can *we* do *here* to protect the rights of others, especially when our government is in some way contributing to their violation? International law is a powerful vocabulary to use against a government—after all, these are the principles, *these are the laws*, that the government itself agreed to be bound to.

There is no moral argument to be made for tolerating violations of human rights and repression of a people, for looking the other way when those violations are happening on your doorstep, especially when they are perpetrated to such a degree and in such direct and indirect ways against a people that it is arguably leading to their extinction as a culture.

As Annette points out in her book, obligations *erga omnes* are obligations owed to the international community as a whole. Certain norms of international law—the prohibition on the use torture, on genocide—are absolute. No state has a right to violate them under any circumstances. Human rights are rights that are intrinsic to all human beings by virtue of their being human.

These are rights that are possessed by all of humanity; and that all of humanity has an interest in protecting and promoting and respecting.

Because all of humanity is insulted when these rights are violated; the conscience of all of humanity is shocked. That's why we all, through our governments, have an interest and standing to complain when these rights are violated, and a right to demand something better, no matter where these violations are happening in the world or which government is the perpetrator.

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