ROUTLEDGE ADVANCES IN INTERNATIONAL RELATIONS AND GLOBAL POLITICS

Sovereignty and the Responsibility to Protect

The power of norms and the norms of the powerful

Theresa Reinold

ROUTLEDGE

Sovereignty and the Responsibility to Protect

This book explores how the bedrock institution of today's global order – sovereignty – is undergoing transformation as a result of complex interactions between power and norms, between politics and international law.

This book analyzes a series of controversial military interventions into the internal affairs of "irresponsible sovereigns" and discusses their consequences for the rules on the use of force and the principle of sovereign equality. Featuring case studies on Kosovo, Darfur, and Afghanistan, it shows that frames from one discourse (for example the debate over the responsibility to protect) have been imported into other discourses (on counter-terrorism and nuclear non-proliferation) in an attempt to legitimize a bold challenge to the global legal order. Although the "demise" of sovereignty is widely debated, this book instead seeks to "deconstruct" sovereignty by explaining how this institution has been reconstituted by global powers whose hegemonic law-making activities have popularized the notion of sovereignty as responsibility.

Drawing on international relations theory, international law and sociology, *Sovereignty and the Responsibility to Protect* develops a truly interdisciplinary perspective on the transformation of sovereignty and will be of strong interest to students and scholars in these fields.

Theresa Reinold is a postdoctoral researcher at the Wissenschaftszentrum Berlin, Germany, and is currently a visiting scholar at Harvard University, USA.

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Abbreviations

AMIS	African Union Mission in Sudan
AU	African Union
BBC	British Broadcasting Corporation
CFC	Ceasefire Commission
CIA	Central Intelligence Agency
CNN	Cable News Network
CPA	Comprehensive Peace Agreement
CTC	Counter-Terrorism Committee
DPA	Darfur Peace Agreement
ECOWAS	Economic Community of West African States
ESS	European Security Strategy
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
GA	General Assembly
GCR2P	Global Centre for the Responsibility to Protect
G-77	Group of 77
G-8	Group of Eight
HIL	Hegemonic international law
HLP	High-Level Panel on Threats, Challenges and Change
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICG	International Crisis Group
ICID	International Commission of Inquiry on Darfur
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IL	The discipline of International Law
ILC	International Law Commission
IO	International organization
IR	The discipline of International Relations
ISAF	International Security Assistance Force
JEM	Justice and Equality Movement
NAM	Non-Aligned Movement

NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NIE	National Intelligence Estimate
NMD	National Missile Defense
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NSC	National Security Council
NSS	National Security Strategy
OAS	Organization of American States
OAU	Organization of African Unity
OEF	Operation Enduring Freedom
OPLAN	Operation Plan
PIPA	Program on International Policy
PKK	Kurdistan Workers' Party
P-5	Permanent Five (UN Security Council)
R2P	Responsibility to protect
SC	Security Council
SLM/A	Sudan Liberation Movement/Army
SLM/AW	Sudanese Liberation Movement (Abdul Wahid faction)
SLM/MM	Sudanese Liberation Movement (Minni Minawi faction)
UK	United Kingdom
UN	United Nations
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNIFIL	United Nations Interim Force in Lebanon
UNMIS	United Nations Mission in the Sudan
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSCOM	United Nations Special Commission
US	United States
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WFM	World Federalist Movement
WMD	Weapons of mass destruction
WTO	World Trade Organization

1 Introduction

Kosovo is a sovereign state in the Central Balkans with a population of roughly two million people. Its territory covers 10,877 square kilometers and its capital is Pristina. At least so they say at the German Federal Foreign Office.[1] Russians, by contrast, do not know a state called Kosovo. Russia has refused to recognize Kosovo's sovereignty and has called Western support for Kosovo's independence "immoral and illegal" (quoted in Weir 2008). Russians do know, however, two newly sovereign states called South Ossetia and Abkhazia (Levy 2008) – entities which are conspicuously absent from the Federal Foreign Office website's country list. This is puzzling indeed. If sovereignty were an objective fact, it would follow that an entity either is sovereign or it is not. Then whence the confusion regarding the status of entities such as Kosovo, South Ossetia, and Abkhazia? Ruling out the possibility that an oblivious intern at the Federal Foreign Office simply forgot to update the website, one is bound to conclude that sovereignty is not an objective fact, because, if it were, then the educated people in the Russian and German foreign ministries would certainly know it when they saw it.

What then, *is* sovereignty? On the most general etymological level, sovereignty signifies supremacy, derived from the Latin word *supremitas.* Sovereignty means that there is a final locus of authority within a political community. Yet this definition does not tell us very much about why some entities are considered sovereign while others are not, even though they exercise supreme authority over a given piece of territory.[2] The answer can only be that sovereignty's existence or non-existence depends on its intersubjective recognition by other actors. Yet not only sovereignty's presence or absence, but also its content (i.e., its component norms) depend on the intersubjective understandings that states attach to it. Hence, sovereignty has no timeless, transcendental essence. This insight has given rise to a now well-established academic discourse over the socially constructed nature of sovereignty. Representatives of this school of thought conceive of sovereignty as an inherently social concept whose existence and content depends on recognition by, and reproduction in the practice of, other actors.[3]

Despite sovereignty's historically contingent character, attempts at definition, i.e., at capturing its "essence," have been numerous. In the literature it is common to distinguish between the internal and external consequences of

sovereignty, depending on whether one is referring to the relation between a state and its citizens (subordination), or the relation between a state and its peers on the international stage (coordination). The former means that a state exercises supreme authority over all other authorities within a given territory – F.H. Hinsley speaks of "final and absolute authority in the political community" (1966: 26) – whereas the latter designates a state's independence of other states (Kelsen 1960: 5, 37ff.). The government of a sovereign state is assumed to be both supreme and independent. The latter, it is often claimed, constitutes a logical extension of the former, because a state which claims to exert a monopoly on violence and sole jurisdiction within its territory to the exclusion of all other states is bound in logic to accord the same prerogatives to other states.

These attempts to capture the nature of sovereignty describe an ideal-typical state of affairs, however; and history shows that the aspirations embodied in the concept of sovereignty have frequently been compromised in practice. This book therefore seeks to "deconstruct" sovereignty, i.e., it explores how the intersubjective understandings attached to the institution of sovereignty have evolved after the end of the Cold War, and discusses to what extent the concept of sovereignty as responsibility has gained traction internationally. Focusing on this relatively brief – albeit highly dynamic – period of time has the advantage of sparing me from retracing in detail the long and tortuous history of the institution of sovereignty, a task which has already been accomplished masterfully by others – witness F.H. Hinsley's (1966), Jens Bartelson's (1995), and Hendrik Spruyt's (1994) standard treatments of the topic. This book picks up where these genealogies of sovereignty left off – after the end of the Cold War – which, sovereignty-wise, has been a period of geopolitical upheaval marked by the calling into question of hitherto prevailing *doxai* regarding the rules of the road in international relations. Since the 1990s – triggered by a wave of interventionism in the internal affairs of states such as Iraq, Liberia, Sierra Leone, Serbia, etc. – a discourse over the sovereign responsibilities of nation-states has taken hold, which has led to a calling into question of certain norms embodied in the institution of sovereignty. The ascendance of the concept of sovereignty as responsibility has challenged the United Nations (UN) Charter's *laissez-faire* approach to sovereignty, which places a premium on values such as equality, non-interference, and non-use of force. Sovereignty as responsibility implies that sovereign states not only possess certain privileges, but also a set of corollary responsibilities for the protection of their citizens as well as the protection of the rights of other states within their own territory. States which fail to live up to these responsibilities, so the argument goes, forfeit some of their sovereign prerogatives. In the context of the debate over sovereignty as responsibility, two developments are particularly striking: the assertion by the United States and its allies of qualitative distinctions between states (democratic v. non-democratic, responsible v. irresponsible, rogue v. civilized states, etc.), and the calling into question of the rules governing the use of force. In the empirical chapters, these developments will be examined more closely. I will disaggregate the debate over sovereignty as responsibility into three different – albeit partially interdependent – discourses

and discuss to what extent the "norms" touted in these discourses have actually hardened into customary international law. As norms do not appear out of thin air, the concept of agency, i.e., the law-making role of (hegemonic) norm entrepreneurs, figures prominently in this book's narrative about the transformation of sovereignty. In this context, the interaction between power and norms, between politics and law, is assumed to be of particular relevance, a nexus which has been addressed by a recent wave of constructivist scholarship on "sovereignty games" (see, e.g., Aalberts 2004; Aalberts 2010; Adler-Nissen 2011; Adler-Nissen and Gammeltoft-Hansen 2008; Werner and De Wilde 2001). Deeply influenced by the "linguistic turn" in International Relations (IR) theory, this strand of scholarship dismisses realist thinking about sovereignty and anarchy as reductionist. Realist conceptions of sovereignty, constructivists charge, succumb to the "descriptive fallacy," i.e., the erroneous assumption that language (and hence sovereignty discourses) merely reflect, but do not constitute, reality. Constructivists have therefore suggested that we should understand sovereignty as the product of speech acts which establish "the claimant's person as an absolute authority," and hence legitimize the speaker's exercise of power (Werner and De Wilde 2001: 287). Since sovereignty is a claimed status, and since the illocutionary force of this claim depends on the intersubjective recognition granted (or denied) by other actors, "it tends to be at stake always" (ibid.). The added value of analyzing sovereignty games as a series of speech acts is that this perspective exposes the disciplinary power which inevitably inheres in discourses about sovereignty:

> [S]hifting the attention away from the traditional, essentialist question of what sovereignty *is* and the attendant allegedly 'neutral' way of depicting sovereignty, to '*how* does it work', opens up a new and potentially more fruitful empirical agenda. When research focuses on what sovereignty *does*, it can expose how state practice indeed applies the prototype of the Westphalian state in order to discipline the members of the international order.… Such a focus helps to return substance to international relations by considering the power relations that underlie the notion of sovereignty and quasi-sovereignty, and the rights and duties states are subject(ed) to when they are designated as 'rogue,' 'quasi,' or 'failed' states.
>
> (Aalberts 2004: 256)

Being relegated, *qua* speech acts, to the status of second-class sovereigns has tangible consequences for the governments of these rogue, failed, or otherwise "defective" states, as vital sovereign prerogatives might be withdrawn as a result of such designation. This book focuses on the withdrawal of the right to be free from outside military intervention, i.e., it looks at instances in which the concept of sovereignty as responsibility is carried to its logical extreme. While sovereignty as responsibility is a multifaceted concept which could be examined from a variety of different angles, there are good reasons to focus on the *ultima ratio* of military enforcement: military intervention constitutes a hard case. If states

are willing to take *all* means at their disposal – including war – to enforce the fulfillment of sovereign responsibilities, then this provides a strong indicator that states' understanding of sovereignty has undergone fundamental transformation; that we have indeed moved "beyond Westphalia."[4]

As noted above, shifts of such fundamental importance do not occur in a vacuum but necessitate drivers, i.e., agents of change. It is thus crucial to identify the primary norm entrepreneurs behind the transformation of sovereignty. Social scientists wishing to explain a particular empirical phenomenon are usually faced with an infinity of potential explanatory factors. This book deliberately focuses on the hegemonic law-making contribution of the United States, which admittedly implies simplifying a rather complex empirical matter, but this is what theories do, they

> lay bare the essential elements in play and indicate necessary relations of cause and interdependency. … Whatever the means of simplifying may be, the aim is to try to find the central tendency among a confusion of tendencies, to single out the propelling principle even though other principles operate, to seek the essential factors where innumerable factors are present.
>
> (Waltz 1979: 10)

In this book I posit that the law-making influence of the United States is such a "propelling principle." Hegemonic law-making is a knife that cuts both ways, however: powerful states may be the drivers of institutional change, but they may also impede legal change which they believe runs counter to their interests – hegemonic law-making can thus be both constructive and destructive. This book's focus on the jurisgenerative role of a single, albeit extremely powerful actor is likely going to meet some frowns in the legal-formalist academic community. However, as will be spelled out in Chapter 2, even though the law retains a certain degree of autonomy from the sphere of politics, power disparities do influence the evolution of customary law, or international structure, as constructivism would have it. Yet power has long been an underappreciated factor in the investigation of processes of norm development – on the one hand, because the assumption of sovereign equality still informs much of international legal scholarship, and on the other hand, because the dominant paradigms in IR-theory have long conceptualized power and norms as two mutually exclusive categories. This book, by contrast, adopts a sociologically attuned approach to international law, one that acknowledges that the power of norms and the norms of the powerful are two sides of the same coin – an approach for which Samuel Barkin (2003) coined the term "realist constructivism." Realist constructivism looks "at the way in which power structures affect patterns of normative change in international relations and, conversely, the way in which a particular set of norms affect power structures" (ibid.: 337). The first part of the equation – the influence of power structures on normative change – finds its political expression in the Bush administration's concept of "transformational diplomacy" which

> not only reports about the world as it is, but seeks to change the world itself. … [T]he greatest threats now emerge more within states than between them. The fundamental character of regimes now matters more than the international distribution of power. … So, I would define the objective of transformational diplomacy this way: to work with our many partners around the world, to build and sustain democratic, well-governed states that will respond to the needs of their people and conduct themselves responsibly in the international system. … We on the right side of freedom's divide have a responsibility to help all people who find themselves on the wrong side of that divide.
>
> (Rice, C. 2006)

How exactly the United States has exercised this responsibility, and with what effects on the international legal architecture – especially regarding the rules on the use of force – will be analyzed in the following chapters. The period of investigation is from 2001 to 2008, i.e., it comprises the two terms of the Bush administration, but also includes sporadic references to the Obama administration's foreign policy.

Chapter 2 lays the theoretical groundwork for the subsequent case studies. It adopts an interdisciplinary perspective, merging insights from both International Law (IL) and International Relations (IR) into an agent-based account of institutional transformation. After discussing the obstacles of and opportunities for interdisciplinary cooperation I will sketch how constructivists and international legal scholars conceptualize institutional transformation. The norms constituting the institution of sovereignty specify the basic parameters of legitimate state action; therefore, a reinterpretation of sovereignty that emphasizes the responsibilities of its holders is likely to have significant repercussions on the international system as a whole. Agents – by conducting humanitarian interventions, by waging preventive wars, by hunting down terrorists in the *domaine reserve* of other states, or by opposing, supporting, or acquiescing in these acts – contribute to the emergence of the concept of sovereignty as responsibility, which in turn creates behavioral expectations and circumscribes the scope of legitimate action in the future. Despite this book's focus on the law-making influence of powerful states the contributions of other actors (such as non-governmental organizations (NGOs), international organizations (IOs), epistemic communities, etc.) to the debate over sovereignty as responsibility are not to be discounted. These actors play a crucial role as agenda-setters and have without a doubt influenced prevailing conceptions of the moral purpose of the state. While their contribution to the transformation of sovereignty will be touched upon in the empirical chapters, the theory chapter is devoted to fleshing out the law-making role of powerful states, which are assumed to exercise a disproportionate influence on the norms constituting the institution of sovereignty. I will first explain why these actors – by virtue of their hard *and* soft[5] power resources – have an edge over other potential norm entrepreneurs in shaping international law. Secondly, I will discuss whether the rules according to which customary law is made are currently