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# CONSTRUCTING SOVEREIGNTY BETWEEN POLITICS AND LAW

Tanja E. Aalberts

# Constructing Sovereignty between Politics and Law

**Tanja E. Aalberts**



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# Constructing Sovereignty between Politics and Law

This book explores the interplay between sovereignty, politics and law through different conceptualizations of sovereignty. Despite developments such as European integration, globalization and state failure, sovereignty proves to be a resilient institution in contemporary international politics.

*Constructing Sovereignty between Politics and Law* investigates both the continuity and change of sovereignty through an examination of the different ways it is understood; sovereignty as an institution; as identity; as a (language) game; and as subjectivity. In this illuminating book, Tanja Aalberts examines sovereign statehood as a political-legal concept, an institutional product of modern international society, and seeks an interdisciplinary approach that combines international relations and international law. This book traces the consequences of this origin for the conceptualization of sovereign statehood in modern academic discourse, drawing on key jurisprudence and international treaties, and provides a new framework to consider the international significance of sovereignty.

As an innovative approach to a critical institution, *Constructing Sovereignty between Politics and Law* will be of interest to students and scholars of international relations, international relations theory and international law.

**Tanja E. Aalberts** is Assistant Professor of International Relations at Leiden University, the Netherlands.

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Intelligibles? What exactly is it that we so imagine? What, *qua* 'sovereign', *are* these sovereign states? ... Why 'sovereign'? Is this an inquiry into the uses of a word, or, is it an investigation into the nature of social reality, of social arrangements in the social universe in its contemporary condition? The latter, not the former, surely.

Charles A.W. Manning (1962)  
*The Nature of International Society*, p. 166



## Series editor's preface

Politics fetishizes politics. Sociology fetishizes society. Anthropology fetishizes culture. Geography fetishizes space. International Relations fetishizes sovereignty, as does International Law. Any concepts and methods-class discusses it. Any theory of IR has to come to grips with it. Any book series in IR has to have books on it. Tanja Aalberts knows better than to join the search for the holy grail. Instead, she scrutinizes the maps and routes of others, with a view to taking stock of what they have found out. The result is a nice overview of who's in the running and what kind of maze they have gotten themselves into.

Aalberts hails from the land of Grotius and trained in Britain. She has well fulfilled the British IR ideal of making oneself conversant with International Law (IL). One result of this is that she is on the board of one of that discipline's leading journals, *The Leiden Journal of International Law*. Another is that this book is constantly in dialogue not only with IR, but also with IL. Here we may, for example, learn that the nexus between sovereignty and responsibility dates back to Leibniz, who hatched the idea of the International Legal Person. In the second half of the seventeenth century, International Law had to account for a set of new agents – the princes, and in particular the German princes, of what were becoming sovereign states – and the answer was to confer on them the right to participate in diplomacy by making them legal subjects. Having been given the right to participate, they also became subsumed under International Law. They became subjects in the double sense of that term; agents with subjectivity, but also subjected to law. Aalberts effortlessly puts this idea, and many others, into conversation with IR debates. She notes, for example, James Crawford's legal understanding of the state as a legal fact of the same kind as a treaty; it is a legal status attaching to a certain state of affairs by virtue of certain rules. She also notes how eminent international lawyer Ian Brownlie has criticized colleagues for not maintaining a clear separation between sovereignty understood as a description of legal personality and sovereignty as a term for the various rights that go with this personality. She also wheels out what remains the key legal definition of the state, a legal definition that is not given sufficient contextual and critical attention by IR scholars. It hails from the Montevideo Convention and runs like this:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

Chapter 2 discusses the Westphalian narrative as a founding myth of international political life over the last couple of centuries, up to and including Kenneth Waltz's understanding of it as the right to decide for oneself. The problem with this narrative is that it reifies sovereignty – it makes it into a fact of nature instead of treating it as what it is, namely a human artifact. Steven Krasner's well-known attempt at disassembling the idea of sovereignty is criticized for breaking the concept into four without putting it together again, and for trying to make it flexible but actually fixing it: 'At the bottom-line, Krasner's account is not as flexible as he would like it to be, as it still focuses on sovereignty (in its Westphalian, or domestic, etcetera disposition) as a descriptive and empirical given in terms of its different kinds or components' (p. 38). This runs against Aalberts' socially informed understanding of sovereignty as a concept that is continuously being renegotiated by the quotidian practices of statesmen, diplomats, lawyers and academics.

Every subsequent chapter concentrates on a principal map-maker – someone who has charted social life in general – and one or more searchers – people who have used that chart to hunt for the meaning of sovereignty. Sometimes, as in the case of Alexander Wendt, the map-maker and the searcher are one and the same person. Sometimes, the map-maker is someone who took no interest in International Relations whatsoever, like Wittgenstein, and the searchers have only an implicit or even a tenuous relation to him, as do Charles Manning and Robert Jackson, respectively.

Chapter 3 is the chapter that discusses the English School. Its map-maker, Hedley Bull, is criticized on a number of scores, principally for taking note of it as a principal institution of world politics but not really elaborating on it (he subsumed it under International Law). He and other members of the English School are also criticized for not making up their mind whether sovereignty is a regulative or a constitutive principle of international relations. Chapter 4 discusses sovereignty as identity. Its protagonist is Wendt, who holds that being sovereign is 'nothing more than having exclusive authority over a territory, which a state can have all by itself'. Wendt is criticized for maintaining the bad habit of reifying the state and also sovereignty despite his protestations to the contrary, as well as for being individualist rather than relational. Chapter 5 looks at what Aalberts refers to as the discursive quality of sovereignty (this is where Wittgenstein comes in: sovereignty must, as must all concepts, be understood through its use). Chapter 6 concentrates on the effects of sovereignty, and particularly, as a productive power-laden concept, it confers responsibilities on agents. To Foucault, the late twentieth-century state was an effect of multiple governmentalities, with sovereignty being the subjectivity that emanated from successful governance. What it means to be

sovereign at any one given time is also what it means to be a productive member of society at any one given time.

While Aalberts clearly has her own agenda in this book – she wants to make IR more of a socially and legally informed social science – she also demonstrates an appealing pluralism. Disparate theories and understandings are brought into contact, frequently with stimulating results. IR would be a better place to state inquiries if more people followed her example in this regard.

Iver B. Neumann

# Acknowledgements

While the image of the lonely academic writer is as clichéd as it is true, her product thankfully is as much the outcome of a social process too. This book would not have been possible without the academic encouragement and practical support of several people that have crossed its path at various stages. My greatest debt of gratitude is owed to Jaap de Wilde and Wouter Werner, who together introduced me to the fascinating subject areas of International Relations (IR) and International Law (IL) during my BA degree, who made it possible to turn my interests into an academic career, and whose commitment, inspiration and cheerfulness continue to make academia such a fun and stimulating endeavour. To no small extent this is also thanks to the VIEW research group that we launched, and which has always provided a candid and supportive setting to discuss work in progress. I am particularly grateful to Erna Rijdsdijk, Maarten Rothman and Jorg Kustermans, who have read numerous versions of various chapters and whose constructive criticisms were a great and continuous stimulus to sharpen my argument. This also counts for Rens van Munster, my partner in the constructivist crime, who was a great PhD-buddy for sharing the ups and downs of the process, and for having long-distance intellectual exchanges. Faaeza Jasdanwalla has always been a great and reliant support from our base in Aberystwyth.

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More than they are themselves aware of, this book and its author last but not least owe a great deal to the encouragement, diversion and endless patience of friends and family as I kept promising that it would be finished in just one more month, or week, or weekend. A very special word of gratitude is for my parents, Daan and Margriet Aalberts for their incalculable moral and loving hands-on support during these continuous years of studying. Elly and Jo Meeuwsen are the dearest parents-in-law I could wish for, and their loving commitment, too, enables me to combine my professional career with being a mum. Daan and Lise have been the most precious gifts, who remind their mother every day of life's true priorities, yet also enabled me to work quietly and finish this manuscript during too many weekends. This book is dedicated to Lourens. Being my love, anchor and companion, he deserves more than I could possibly express here.

Tanja Aalberts  
Hilversum,  
1 October 2011

# Abbreviations

ECJ	European Court of Justice
ECR	European Court Reports
GA	(United Nations) General Assembly
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice (replacing the PCIJ since 1946)
ILC	International Law Commission
ILP	International Legal Personality
IR	International Relations (as an academic discipline)
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
PCIJ	Permanent Court of International Justice (1922–1946)
RIAA	(United Nations) Reports of International Arbitral Awards
SC	(United Nations) Security Council

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# 1 Introduction

Despite (or due to?) its death long and often foretold, sovereignty continues to boggle the minds of International Relations (IR) and International Law (IL) scholars and practitioners alike. On the one hand, it involves issues like globalization and European integration, which apparently undermine the supreme authority and (legal) independence of the sovereign state. On the other hand, it is the condition of postcolonial statehood, and more specifically its failures, which does not fit the neat picture of internal authority and external equality as the dual sides of the sovereignty coin.

The story is renowned, and more or less the defining narrative of both International Relations and International Law as disciplines, and as such the ostensibly unproblematic starting point for inquiries. ‘1648’ is symbolic of the flying start of the society of independent and equal states, which allegedly was completed at the globalization of the states system during the final wave of decolonization after the Second World War. From that time onwards the world was nicely organized in one category: sovereign states. With the notorious exception of Antarctica (as well as the continuing controversies over its Northern twin), every square metre of the globe’s soil is part of one or other exclusive state’s jurisdiction. However, if sovereignty connotes a distinction between inside and outside, combining internal order with external anarchy, the post-war globalization of the ‘Westphalian model’ coincided more or less with its dispersion. The proliferation of supra- and transnational governance structures and the anarchy found in a worrying number of predominantly postcolonial states stand at loggerheads with everything sovereignty is believed to entail according to the disciplinary chronicles.

This has resulted in intellectual confusion and ensuing incessant debates between those who claim sovereign statehood to be a redundant or outmoded concept, versus those who focus on the state’s unchanged resilience as key actor and principle, despite the challenges. Indeed, for a concept that has been declared desolate, redundant and outmoded for decades, sovereignty is still surprisingly present both in international practice and in academic discourse of advocates and opponents in International Relations theory and International Law alike.<sup>1</sup> While Benn’s (1955: 122) timely suggestion to eradicate ‘so Protean a word’ in a way was both sensible and pragmatic in terms of the