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978-0-521-76585-5 - Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism

Jean L. Cohen

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## GLOBALIZATION AND SOVEREIGNTY

Sovereignty and the sovereign state are often seen as anachronisms; *Globalization and Sovereignty* challenges this view. Jean L. Cohen analyzes the new sovereignty regime emergent since the 1990s evidenced by the discourses and practice of human rights, humanitarian intervention, transformative occupation, and the UN targeted sanctions regime that blacklists alleged terrorists. Presenting a systematic theory of sovereignty and its transformation in international law and politics, Cohen argues for the continued importance of sovereign equality. She offers a theory of a dualistic world order comprised of an international society of states, and a global political community in which human rights and global governance institutions affect the law, policies, and political culture of sovereign states. She advocates the constitutionalization of these institutions, within the framework of constitutional pluralism. This book will appeal to students of international political theory and law, political scientists, sociologists, legal historians, and theorists of constitutionalism.

JEAN L. COHEN is Nell and Herbert Singer Professor of Contemporary Civilization and Political Theory in the Department of Political Science at Columbia University where she has been teaching political theory for over twenty-five years. She has taught courses on sovereignty, the state, global constitutionalism, and global justice for the past ten years. She is the author of *Class and Civil Society: The Limits of Marxian Critical Theory* (1982); *Civil Society and Political Theory* (co-authored with Andrew Arato, 1992); and *Regulating Intimacy: A New Legal Paradigm* (2002).

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## PREFACE

I was motivated to write this book by two contradictory trends beginning in the second half of the twentieth century. The first is the growing importance of the discourses of human rights, cosmopolitanism, global constitutionalism, and democracy, along with the proliferation of international covenants, United Nations (UN) resolutions and international courts focused on promoting and enforcing them. The second is the use of these discourses and institutions to legitimate (or spur) the development of novel forms of hegemonic international law, new imperial formations, global hierarchies, and transgressions of existing international law by the powerful. Since the early 1990s the Janus-faced nature of humanitarian and “democratic” interventions, transformative occupations, and increasingly activist, intrusive, legislative, and at times rights-violating resolutions of the United Nations Security Council (UNSC) in the “war on terror,” has become evident. The intervention in Kosovo and the American war in Iraq are the two most obvious early examples. These events triggered my interest in international political and legal theory along with my determination to decode the ideological discourses on both sides of the conundrum just described.

It is striking that irrespective of whether one’s focus is on the first or the second trend, many analysts of legal and political globalization assume that the rules of international law based on the principles of sovereign equality, non-intervention, self-determination, and domestic jurisdiction are anachronistic today, as is the frame of an international society of sovereign states. Indeed it is claimed that both the concept of sovereignty and the ideal of the sovereign state should be abandoned. The task today, apparently, is to constitutionalize or fight institutional expressions of global right depending on one’s diagnosis and point of view, not to defend rules and concepts that allegedly no longer fit the contemporary constellation.

Such claims are useful to those seeking to do an end-run around restrictions on the international use of force. But they are also invoked by people deeply concerned with human rights, the rule of law, constitutionalism, and with what is now called the state’s and the international community’s “responsibility to protect.” Indeed, juridification and “constitutionalization” in the international/global domain are also Janus-faced processes and

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discourses: both enabling (by helping constitute) and limiting new and older global powers and new freedoms and counter-powers. At the heart of these conflicting and ambiguous trends and projects lies a paradox: the sovereign state form has been globalized, but the international organizations (IOs) states have created in part to secure non-aggression and sovereign equality are morphing into global governance institutions (GGIs) whose expanding scope and reach, in conjunction with human rights discourses and law, seem to place the very ideal of the sovereign state and the principles of sovereign equality, self-determination, and non-intervention into question. So do the geopolitical and socio-economic imperatives of size facing twenty-first-century polities. The international legal rules and principles devised to minimize the aggressive use of force and ensure domestic political autonomy are under threat while global decision-makers and the new forms of collectively authorized intervention in the name of humanitarian justice do not seem to be under any legal restraints or democratic controls. These developments spurred the emergence of the discourse and project of the constitutionalization of international law. But if constitutionalism entails hierarchy of norms, legal sources, and institutional authority, then the constitutionalization of international law and international organizations seems incompatible with state sovereignty. This is the conundrum my book addresses.

I try to move between ideological and infeasible utopian positions on both sides of the statist/cosmopolitan divide. I do so by rethinking the concepts of sovereignty and constitutionalism so as to come up with a workable conception of each, and by reflecting on the issues of legality and legitimacy that sovereignty, global governance, and human rights claims pose in the epoch of globalization. Thus this book does not fall neatly into any camp, be it statist or cosmopolitan, pluralist or monist, sovereigntist or global-constitutionalist. I turn to the more basic questions that these divides gloss over. Are human rights and sovereign equality really antithetical? Should the discourse of sovereignty (popular or state) be abandoned and replaced by global governance talk? Or is the latter simply the new hegemonic discourse of emergent imperial formations? Must the project of global constitutionalism entail the demise of the sovereign state, replacing a pluralist international system with a monistic, cosmopolitan world order? Or is there a coherent way to understand our epoch as permanently and productively dualistic: as undergoing a transition to a new sovereignty regime in which sovereign states (in a plural international society) and global governance institutions (referencing the international community) coexist, and in which constitutionalism and democracy on both domestic and international levels have an important role to play? And why does this matter?

This book tries to answer these questions by developing a theoretical framework based on the core intuition that human rights and sovereign equality are two key principles of our current dualistic international political



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system and that both are needed for a better, more just, and more effective version of that system. The hope is that with an adequate conception of sovereignty, constitutionalism, and of international human rights discourses and practices, we can develop feasible projects to render global governance institutions and all states more rights-respecting, democratic, and fair. The discourse of constitutionalization is, in my view, appropriate to this context. But it is time to soften the rigid hierarchical Kelsenian approach, and to develop a conception that acknowledges constitutionalism's inherently pluralistic dimensions as well as its requirement of unity and coherence: both are needed for any legal system to merit the label "constitutionalist." I thus embrace the novel idea of constitutional pluralism but see it as quite compatible with the principle of political autonomy of self-governing political communities at the heart of sovereignty, and with the principle of sovereign equality that still structures our international order. I argue that ours is a dualistic world order, comprised of an international society of sovereign states and a globalizing political system referencing an international community populated by global governance institutions, transnational actors, and courts as well as states. The question facing us is how to order and reform this dualistic system so that the achievements of democracy, constitutionalism, and justice are not lost, but rather, made available to everyone. The focus of this book is the conundrum of legality and legitimacy facing the premier GGI in the world today: the UN Charter system.

Thus the shift from civil society (the focus of my first two books), and privacy and equality law in the domain of intimacy (the focus of the third) to issues surrounding sovereignty and the state is not so terribly odd. One has to follow the path that new forms of power and injustice and new possibilities for freedom and fairness take, in order to intervene productively in the important debates and conflicts of our time. No one book can do everything, however, so this book leaves to the side the issues and injustices generated by contemporary forms of capitalist globalization as well as the challenges posed by increasingly powerful transnational and domestic religious organizations, to the secular liberal-democratic constitutional welfare state. Domestic legal and political sovereignty is certainly at stake in both, and I have already begun to work on the latter problematic. But this book lays the groundwork by focusing on rethinking the concept of sovereignty in analytic and normative terms, and assessing the fate of the sovereign state in the context of globalization.

Like all of my books, this one, too, was long in the making. I began working on sovereignty at the turn of this century, teaching courses on related topics at Columbia University and abroad. I thank my graduate students in those early seminars, for being wonderful and inspiring interlocutors and for their insights and questions, which helped me develop my ideas. Among those

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PREFACE

who participated and whose patience and intelligence are well worth commending are Adam Branch, Axel Domeyer, Alex Gourevitch, Jennifer Hudson, Ronald Jennings, Hanna Lerner, Raider Maliks, Bajeera McCorkle, Christian Rostboll, and Ian Zuckerman.

My first article on the topic, “Whose Sovereignty? Empire Versus International Law,” appeared in *Ethics and International Affairs* in 2004, and I thank Christian Barry, at the time the editor of the journal, for encouraging me and for featuring the piece so centrally. I am also grateful for the terrific response I received from so many readers. This inspired me to pursue my interest in the field. But many colleagues and friends heard me present or commented on earlier drafts of various chapters whom I want very much to thank. Among these are Jose Alvarez, Eyal Benvenisti, Samantha Besson, Nehal Bhuta, Hauke Brunkhorst, Hubertus Buchstein, Mary Dietz, Andreas Fischer-Lescano, Rainer Forst, Robert Howse, Andreas Kalyvas, Regina Kreide, Claude Lefort, Frank Michelman, Terry Nardin, Yoav Peled, Pierre Rosanvallon, Michel Rosenfeld, Kim Scheppele, Ann Stoler, John Tasioulas, Ruti Teitel, Gunther Teubner, and Alain Touraine.

Many conferences (too many to provide a full list) and institutional affiliations helped me to refine and develop my ideas. I presented versions of various chapters at several American Political Science Association meetings, at three sessions of the yearly conference, “Philosophy and the Social Sciences,” held in Prague, the Czech Republic, and at various conferences on sovereignty at Columbia University, including two organized by myself: “Rethinking Sovereignty” in 2003, and “Republic and Empire” in 2009, where the discussions with the conference participants were truly first-rate and enormously helpful. I benefited greatly by participating in a conference organized by Ruti Teitel on “Post Conflict Constitution-Making” at New York Law School in 2006, where I presented an early version of Chapter 4 on occupation law. I presented a very early version of the first part of Chapter 5 at the 2007 workshop of the journal *Constellations*, and another version at the international workshop on “Democratic Citizenship and War” organized by Noah Lewin-Epstein, Guy Mundlak, and Yoav Peled at Tel Aviv University in 2007. I presented the second part of Chapter 5, on the Kadi case, at a subsequent conference on “Constitution-Making in Deeply Divided Societies” organized by Amal Jamal and Hanna Lerner, also at Tel Aviv University and also at Sciences Po in Paris, France. I thank the organizers of these conferences for the opportunity to present and discuss my ideas with first-rate international scholars. The feedback by Eyal Benvenisti at the latter conference was invaluable. I wish also to mention the RECON working group in Norway for inviting me to give the plenary lecture at its conference on “Constitutionalism Beyond the State” in October, 2010, where I engaged in fruitful conversations with John Erik Fossum and Erik Eriksen, among others, on yet another version of portions of Chapter 5. I presented versions of

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Chapter 3 on human rights at the President's Conference of the American University in Paris to which Richard Beardsworth invited me, in spring 2009; to the Istanbul Seminars organized by Reset Dialogues also in spring 2009; and at the Carnegie Council in fall 2009. On all of these occasions the discussion was first-rate and very helpful.

Without Columbia University's generous leave program and supportive atmosphere it would not have been possible for me to write this book. My thanks to the Reid Hall Faculty in Residence program in Paris, France, a Columbia University affiliate, for institutional support during the summer of 2003 and the fall semester of 2004 for providing me the time, the space, and the support to work on my project. I also thank the University of Sciences Po in Paris, France for twice hosting me (2004, 2009) as a Visiting Professor and enabling me to interact with French colleagues in a productive way in discussions about international political theory. My time as a Visiting Distinguished Professor at the Johann Wolfgang Goethe Universität in Frankfurt during the winter of 2008 was very helpful in affording me the opportunity to discuss my work with German and other international colleagues and students and I thank Rainer Forst for making this possible. Finally I am most grateful for the invaluable opportunity I was given to present a version of all the chapters in the book, with the exception of Chapter 2, at the Collège de France in Paris, France. I was honored by the invitation to give a distinguished lecture series there during the month of May 2008. This was an invaluable occasion as it helped me systematize my work and my ideas and thus to develop this book project. I want to thank Pierre Rosanvallon for this wonderful opportunity. Finally I am also grateful to the University of Toronto Law School where I was a Visiting Distinguished Professor in January 2009. I received wonderful feedback from very excellent students and colleagues in a mini-seminar on related topics. I thank Nehal Bhuta and David Dyzenhaus for this.

Portions of Chapter 1 appeared as "Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective," in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), pp. 261–282. An early and rather different version of Chapter 3, titled "Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization," appeared in *Political Theory*, 36 (August 2008), 578–606. The basic argument of Chapter 4 appeared as "The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for 'Interim Occupations,'" in the *New York Law Review*, 51 (2006–7), 497–532. Chapter 5 is a revision and composite of three separate publications, one of which appeared in *Constellations*, 15 (2008), 456–484, under the title, "A Global State of Emergency or the Further Constitutionalisation of International Law: A Pluralist Approach"; another, "Security Council Activism in the Age of the War on Terror: Implications for Human Rights, Democracy and

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Constitutionalism,” appeared in Y. Peled, N. Lewin-Epstein, G. Mundlak, and J. Cohen (eds.), *Democratic Citizenship and War* (New York: Routledge, 2011, pp. 31–53); and a third, “Constitutionalism Beyond the State: Myth or Necessity?” in *Humanity*, 2 (Spring 2011), 127–158. A very small piece of Chapter 2, “Rethinking Federation,” appeared in the online journal *Political Concepts: A Critical Lexicon* (Fall 2011).

Most of all, and as always, I thank my husband and my colleague Andrew Arato. Without his support, patience, advice, and brilliant insights, this book would not have been written. And now, to my great delight, I have the pleasure of thanking another family member who has become a peer and a colleague: Julian Arato. His help and advice regarding the legal material in this book has been invaluable.

The love and encouragement given to me by my husband and my son has been indispensable to me. I dedicate this book to them.

*Jean L. Cohen*