Sovereign Equality and Moral Disagreement

PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER

BRAD R. ROTH
## Contents

*Acknowledgments* ix

1. A Different Sovereignty Discourse: Sovereign Equality as a Response to Disagreement 3
   I. Sovereignty Discourses 3
   II. Why Invoke the Language of Sovereignty? 6
   III. Neither Moral Relativism nor Natural Justice: Sovereignty Equality as a Legal Response to Moral Disagreement 11
   IV. The Equal Sovereignty of Weak States 13
   V. Human Rights as a Shield, or a Sword? 15
   VI. The Way Forward 17

2. The Project of International Legal Order 19
   Introduction 19
   I. Moral and Practical Considerations in the Crafting of Legal Standards 23
   II. Moral and Practical Considerations in Adjudication of International Law 32
      A. POSITIVISM, NATURALISM, AND THE SOURCES OF INTERNATIONAL LAW 32
      B. THE JURIDICAL ROLE 37
      C. THE NATURE OF PUBLIC LAW 39
   III. Moral Obligations to Comply with Existing International Law 42
      A. THE OBLIGATION TO OBEY LAW AS SUCH 42
      B. THE OBLIGATION TO OBEY INTERNATIONAL LAW AS SUCH 44
      C. OVERCOMING THE PRESUMPTION: MORAL JUSTIFICATIONS FOR BREACH 50
   Conclusion 52
3. The International Law of Sovereign Equality  53

   Introduction   53

   I. The Many Meanings of Sovereignty   57
      A. SOVEREIGNTY AS AN EMPIRICAL CONDITION   58
      B. SOVEREIGNTY AS A POLICY IMPERATIVE   60
      C. SOVEREIGNTY AND DOMESTIC LEGALITY   62
      D. SOVEREIGNTY AND INTERNATIONAL LEGALITY: THE SOVEREIGN EQUALITY REGIME   67

   II. The Persistence of “Antiquated” Sovereignty Within International Law   69
      A. THE RECOGNIZED SOURCES OF LAW   70
      B. THE INTERFACE BETWEEN THE INTERNATIONAL AND DOMESTIC LEGAL SYSTEMS   71
      C. THE FUNDAMENTAL STRicture AGAINST COERcIVE INTERVENTION   77

   III. Self-Determination and Non-Intervention   80
      A. POPULAR SOVEREIGNTY AND EFFECTIVE CONTROL   81
      B. PEOPLES AND TERRITORIAL UNITS   85

IV. Assertions of Normative Hierarchy in International Law   88

   Conclusion   91

4. Global Pluralism and Conflicting Political Moralities  93

   Introduction   93

   I. The Elusive Consensus on Universal Norms   95

   II. Culture-Based Pluralisms   98
      A. WALZER AND RAWLS   98
      B. REJECTING CULTURE-BASED PLURALISM   100

   III. The Moral Justification of a Non-Culture-Based Pluralism   103
      A. COLLECTIVE SELF-DETERMINATION AND MORAL DISAGREEMENT   103
      B. THE MORAL SIGNIFICANCE OF THE STATE   107
         1. Deontological Liberalism and the Moral Devaluation of the State   107
         2. Compulsory Collective Decisions and the Conditions of Human Flourishing   111
         3. Proliferating Rights, Clashing Duties, and Political Decisions   115
      C. PLURALISM AT THE FAR END: POLITICAL CONFLICT AND THE PHYSICAL INTEGRITY OF THE PERSON   117
      D. PATRIOTISM AND THE DUTY TO UPHOLD A COMMUNITY’S POLITICAL INDEPENDENCE   121

   IV. Moral Disagreement as the Foundation of a Pluralist Global Order   124
      A. THE MORAL IMPLICATIONS OF DISAGREEMENT   124
      B. THE POLICY JUSTIFICATION OF A NON-CULTURE-BASED PLURALISM   126
      C. THE LEGAL TERMS OF A BOUNDED PLURALISM   128

   Conclusion   130
5. Reconciling the Non-Intervention Norm with the
"Responsibility to Protect" 133

Introduction 133
I. The Challenge to the Premises of the Charter Peace and Security System 135
II. Rationalizing the Use of Force Outside the Charter Framework:
Three Jurisprudential Approaches 143
   A. BENDING THE LAW: POLICY-ORIENTED JURISPRUDENCE 144
   B. BREAKING THE LAW: POSITIVISM FOR MORALISTS 151
   C. HUMANITARIAN INTERVENTION AND THE PROGRESSIVE
      DEVELOPMENT OF THE LAW 157
III. Overselling the Responsibility to Protect: The Dangers of Disparaging Constraints
   on Empowered Moralism 162
   Conclusion 167

6. Secessions, Coups, and the Effective Control Doctrine 169

Introduction 169
I. Effective Control and the Assessment of Secession Questions 172
   A. "RECOGNITION" AND INTERNATIONAL LEGAL STATUS: CONSTITUTIVE AND
      DECLARATORY APPROACHES 172
   B. EFFECTIVITY AS AN ASPECT OF THE TRADITIONAL CRITERIA OF STATEHOOD 174
   C. SELF-DETERMINATION OF PEOPLES IN NON-COLONIAL CONTEXTS 181
   D. NONCONSENSUAL DISSOLUTION OF FEDERAL STATES:
      THE BADINTER IMPROVISATION 186
   E. KOSOVO AND BEYOND: THE INEVITABILITY OF AD HOC RESPONSES
      TO SECESSION CRISES 193
II. Effective Control and the International Status of Coup Regimes 200
   A. POPULAR SOVEREIGNTY, IDEOLOGICAL PLURALISM, AND THE EFFECTIVE
      CONTROL DOCTRINE 200
   B. TOWARD A DOCTRINE OF GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 205
      The Haiti and Sierra Leone Cases 205
   C. THE ANTI-COUP PROCLAMATIONS OF REGIONAL ORGANIZATIONS 208
   D. THE NEW WAVE OF REJECTION OF COUP REGIMES: HONDURAS AND MADAGASCAR 213
   Conclusion 218
   THE DECLINE OF THE EFFECTIVE CONTROL DOCTRINE AND THE ABSENCE OF A
   COHERENT SUBSTITUTE 218
7. Coming to Terms with Ruthlessness: State Sovereignty and International Criminal Law in Domestic Courts 221

Introduction 221
I. Impunity as a Dirty Word 224
II. Championing Legality in a Ruthless World 229
III. Law and Morality in Retrospective and Extraterritorial Prosecution 235
   A. POSITIVISM, NATURALISM, AND THE RULE OF LAW 235
   B. NULLUM CRIMEN SINE LEGE 241
   C. JURISDICTIONAL LIMITATIONS AND IMMUNITY RATIONE MATERIAE 244
   D. THE DOCTRINE OF STRICT INTERPRETATION (LENITY) 246
IV. Extraordinary Circumstances: Rule-of-Law Standards in Judging the Unrechtsstaat 252
V. International Legality and the Criminalization of Ordinary Human Rights Violations 261
Conclusion 270

8. Concluding Observations: The Enduring Need for a Pluralist Global Legal Order 273

Introduction 273
I. Eschewing Liberal-Democratic Norms as the Basis for Acknowledging State Authority 275
II. Locating Anti-Impunity at the Periphery, Not the Core, of the International Legal Order 283
A Final Word 289

Table of Cases 291
Index 293