

## The Evolving Concept and Institution of Sovereignty

### Challenges and Opportunities

Biong Kuol Deng

Sovereignty has continuously metamorphosed over the years in terms of its norms and practices. This evolving character of sovereignty has been hailed by those who advocate a responsible and accountable sovereign authority, and lamented by those who are strictly wedded to the Westphalian concept of sovereignty. However, this evolutionary process does not necessarily diminish the fact that, since the advent of the Westphalian state, sovereignty has been used as a shield and sword to justify states' policies and actions. It is argued in this policy brief that the weakening of state sovereignty and the prominence and institutionalisation of people's sovereignty will be a welcome development, in terms of governance fundamentals, on the African political and socio-economic development scene. Indeed, it may be a key to addressing Africa's chronic political, socio-economic and human development challenges.

#### Introduction

Sovereignty as a concept has evolved over the years in terms of its legitimising attributes. The concept has undergone a series of deconstruction and reconstruction processes, a fact that defies the notion that sovereignty, as a concept, is a fixed or permanent feature in terms of its norms and practices.<sup>1</sup> This metamorphosing character of sovereignty has been hailed by those who advocate a responsible and accountable sovereignty, and lamented by those who are strictly wedded to

the Westphalian concept of sovereignty.<sup>2</sup> However, this evolutionary process does not necessarily diminish the fact that, since the advent of the Westphalian state, sovereignty has been used as a shield and sword to justify states' policies and actions.

In this respect, the discourse on the contested notion of sovereignty can be historically traced to the Westphalian state and the advent of a colonial state, in terms of the countries of the south, including African countries. Colonised and marginalised peoples of the world violently and peacefully

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contested the legitimacy of colonial states, with a view to establishing their own sovereign states.

Indeed, liberation movements the world over contested the Westphalian sovereignty of a colonial state, a dream that they eventually realised by liberating their countries from the yoke of colonialism. In this way, they successfully contributed to the development of the right of self-determination, as a concept, in international law. The paradox, though, is that, despite the rhetoric about the liberation doctrine that enshrines fundamental freedoms, human rights and the empowerment of the colonised peoples, the post-independence African states, and by definition the post-Westphalian states, have weirdly clung to the Westphalian sovereignty vis-à-vis the citizens with concomitant calamities and disasters.

Thus, sovereignty as a concept and institution is central to the discourse on the legitimacy of states' functions and their impact on the rights of its citizens. While the Hobbean social contract theories, in which state sovereignty was anchored, granted rudimentary elements of legitimacy to the state in the 21<sup>st</sup> century, the post-Westphalian state has to immerse itself in the sociology of rights in order for it to earn its legitimacy from its citizens and the international community. This human rights paradigm on sovereignty has transformed and reconstructed the concept of sovereignty to an extent that positivists, who glorify states' functions and security in a presumed anarchic world, express their deep concerns about the eventual and unacceptable weakening of state sovereignty.<sup>3</sup>

Indeed, many post-independence African states have continued to raise the flag of sovereignty to justify their pernicious actions against their citizens; a fact that has turned their citizens into hapless victims and hostages in their own countries and blemished their legitimacy claims. Almost all African countries continue to institutionalise state sovereignty that they inherited from colonial powers, rather than national sovereignty, which implies people's sovereignty or what others dub as popular sovereignty.<sup>4</sup> In this way, Africa as a region and a people has remained powerless, marginalised and somewhat irrelevant in terms of the centres of powers in the world because of the entrenched state sovereignty that has been failing to empower African peoples and, instead, reinforced and retrenched neo-colonialism. As Green observes:

... developing-country elites have often been bag carriers for the colonial powers, weakening their own role in building national identities. But global

integration raises this to a new level. The danger is that elites across the developing world are becoming most at home shopping in Miami or mixing with the powerful in Washington, New York or London, and less willing or able to help build development in their own countries.<sup>5</sup>

Notwithstanding, Asia is strikingly and starkly different from Africa in that most of its states have merged state sovereignty with that of national sovereignty; hence, the empowerment of Asian peoples and their effective competition on the world stage in terms of economic fundamentals and political powers.

It is thus argued in this policy brief that the weakening of the state sovereignty and the prominence and institutionalisation of people's sovereignty, in terms of governance fundamentals, will be a welcome development on the African political and socio-economic development scene.

## Sovereignty and its Legitimising Effects

The origin of sovereignty can be traced to the Westphalian state in the 16<sup>th</sup> century in Europe. The Westphalian state system was anchored in the treaties that were signed in 1648 in Westphalia to end a 30 year war in Europe with a view to achieving peace, security and political stability in Europe. The basic principle, among others, that underlined these treaties was that sovereign states are equal and independent. In this respect, a sovereign state has three basic characteristics: a permanent population; defined territory; and a functioning government. This principle underscores the notion that a sovereign state has the authority to act independently over its own territory to the exclusion of other states.<sup>6</sup>

Indeed this principle, in effect, informed and laid down the foundation of modern international law, especially the 1945 United Nations (UN) Charter, which has enshrined and recognised the sovereign equality and independence of all member states of the UN.<sup>7</sup> Indeed, the Charter exhorts the UN not to interfere in matters that are essentially within the jurisdiction of any state.<sup>8</sup> The Organisation of African Unity (OAU) Charter religiously adopted this definition and, thus, it declared non-interference in another state's affairs and that the sovereign authority of a member state was sacrosanct.

Evans observes that this concept of sovereignty was reinforced with the effective end of colonialisation and emerging sovereign states in

the developing world, in which “state sovereignty remains a passionate article of faith, particularly in the countries of the developing world.”<sup>9</sup>

What then is sovereignty? And what does it connote and signify from the perspective of international law? In response to these questions, it has to be noted that the sphere of sovereignty has witnessed many changes since its advent in terms of its interpretation as a concept. Suffice to say that actors make sovereignty what they want it to be. However, the continuous discourse on the relevance of a particular interpretation helps in forging a consensus with respect to the international relations system.

The classical definition of sovereignty centres on the state as a legal entity. In this respect, the state is a legal person with all the rights and obligations under international law. J Crawford notes that sovereignty means “totality of international rights and duties recognised by international law.”<sup>10</sup> Jean-Jacques Rousseau defines the sovereign as the absolute power to make the law: “The sovereign is the sum of its constituents and the will of the sovereign and of its individual members is by necessity congruent, and thus it is indivisible.”<sup>11</sup> Professor Louis Henkin of Columbia University, New York, defines sovereignty as, “Sovereignty means many things, some essential, some insignificant, some agreed, some controversial, others that are not warranted and should not be accepted.”<sup>12</sup> Thomas Paine of the US does not see any contradiction between sovereignty and rights. According to him, free individuals can transfer sovereignty to an authority or government with a view to protecting their rights. On the other hand, Edmund Burke, the epitome of today’s realist or positivist, argues that “government can claim people’s obedience because it exists as a community of memory beyond the lives of individuals. It is a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”<sup>13</sup> Claussen and Nichol define sovereignty as:

... an institution to be a relatively stable collection of practices and rules defining appropriate behaviour...As such, sovereignty and its associated norms constitute the means by which states, and increasingly other actors, pursue goals, share meanings, communicate with each other, criticise assertions and justify actions.<sup>14</sup>

What underline these sovereignty perceptions is the notion of rights, obligations and duties that are integral to the universal concept of sovereignty. While state sovereignty continues to predominate,

it does not necessarily absolve the state from protecting its citizens and residents, and promoting international peace and security in the context of political, social, economic and cultural rights.

## Sovereignty and Post-Cold War Era

The perception of sovereignty has shifted and metamorphosed remarkably as a result of the mono-polar world order in the post-Cold War era, the reign of globalisation, the emerging of an overwhelming neo-liberal market economy, and the advent of regional integrations. Pursuant to these developments there have been numerous reconstructions and reconceptualisation of sovereignty as an institution.<sup>15</sup>

As a result, the discourse on sovereignty has been heightened, in which positivists have raised an alarm that sovereignty was losing its role as the *Grundnorm* of international relations. The proponents of state sovereignty continue to resist this remarkable and significant change in the perception of sovereignty. This perceptive transformation or change in the concept of sovereignty has not drastically moved away from the classical definition of sovereignty, but rather has strongly reiterated, reasserted and re-emphasised the obligations and duties of sovereign states with respect to the protection and upholding of citizens’ and residents’ rights.

Claussen and Nichol catalogue a number of reasons that have precipitated what others termed as an erosion of sovereignty as a *Grundnorm* of international relations:

...that the grounds for sovereignty’s erosion were laid in the humanitarian interventions of the period; that the post-modern emphasis on de-centeredness had influenced conception of sovereignty; that weak structures of state authority had undermined sovereignty by inviting external forces to correct or replace them; that the rise of alternative forms of governance had begun to threaten the very concept of ‘international’ in international relations; and that the demise of the nation-state threatened to diminish sovereignty as an organisational concept.<sup>16</sup>

The International Commission on Intervention and State Sovereignty (ICISS), in its report titled, ‘The Responsibility to Protect,’ in late 2001, reconceptualised sovereignty as follows:

...sovereign states have the primary responsibility for the protection of their people from avoidable

catastrophe – from mass murder, rape, starvation – but when they are unable or unwilling to do so, that responsibility must be borne by the wider community of states.

The African Union (AU) Constitutive Act (Article 4) has shifted from the non-interference doctrine of the OAU to the non-indifference doctrine in cases of genocide, crimes against humanity and war crimes. In effect, the AU Constitutive Act has reconceptualised the absolute sovereign authority of the AU member states.

This reconceptualisation of sovereignty has necessitated the reassertion of the self-determination doctrine which, in effect, calls for the respect of people's sovereign rights. While the doctrine of self-determination is as old as the French Revolution and the American Revolution in the 18<sup>th</sup> century,<sup>17</sup> the application of this doctrine became more pronounced in the fight against colonialism by the marginalised and colonised peoples of the world. These two revolutions established a new political order which was based on a new conception of sovereignty that vested sovereignty with the people and its representatives. As Depaigne noted:

The sovereign is no longer the king, but the nation. Sovereignty is tied to human rights. The sovereign derives its legitimacy from the freedom and well-being of its constituent parts: the individuals. This relation is reciprocal. Human rights legitimise the sovereignty of the nation and, in turn, this sovereignty legitimises human rights.<sup>18</sup>

The Universal Declaration of Human Rights (UDHR), Article 21 (3) refers to the will of the people as the basis of the authority of government. In other words, state sovereignty should not derive its legitimacy from the control of a specific territory per se, but also the will of the people it purports to be under its control must be respected and the main source of its legislation. Pursuant to the same goal, Article (1) of the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) provides:

- All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,

based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

- The State Parties to the present Covenant, including those having responsibility of the administration of Non-self-governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations.

These two International Covenants and the UDHR constitute the Bill of International Human Rights. They are, thus, the core of the international human rights law. The people must have a say in the running of the state's affairs, especially on issues that relate to their human dignity, fundamental freedoms and human rights. Governments that purport to be the mirror of their peoples are legally and politically obliged not only to protect their citizens, but also to respect the political will of their citizens. In many a time African governments abysmally fail to protect their citizens in terms of intra-conflicts, but also to accept the will of people in terms of governance fundamentals, especially election results or outcomes.

## Contemporary Typologies of Sovereignty

Pursuant to the post-modern changing perception of sovereignty, scholars in the field of international relations have developed different typologies of sovereignty from the perspective of state sovereignty. Kathleen Claussen and Timothy Nichol have classified sovereignty into three broad qualifiers:

- Collectivity of Sovereignty
- Divisibility of Sovereignty
- Contingency of Sovereignty.<sup>19</sup>

## Collectivity or Collective or Pooled Sovereignty

The pooled and collective sovereignty connotes the entrusting of member states of specific national and international affairs to a collective entity or body. This entity has the trust of its members that it will serve their best interests regarding the areas it has been mandated to act on. The European Union (EU) comes to mind in this respect. Its member states have delegated the EU to act on their behalf with respect to particular issues, with a view to protecting their interests in terms of

creating a stable and fruitful cooperation among its members.

The UN, especially its Security Council (UNSC), enjoys a collective and pooled sovereignty on the issues of peace and security in the world. UN member states have conceded some part of their sovereign authority to the UNSC to act on their behalf on the issues of peace and security.<sup>20</sup>

The current discourse on the united states of Africa may ultimately lead to the establishment of a pooled or collective sovereignty by African countries. The challenge, though, is that African member states' lukewarm approach to the continental integration may have a lot to do with the fear of losing their individual sovereign authority and wanting to cling to their current sovereignty. However, while regional economic communities (RECs) are yet to achieve political federation, they have somewhat established cooperative frameworks among their state members in terms of freedom of movement and socio-economic development.

## Divisibility of Sovereignty

This qualifier signifies the reconstruction of sovereignty to accommodate some normative frameworks that have been occasioned by political realities and realignments. The notion of sharing sovereign authority by internal actors is usually used as a conflict resolution tool. Divided sovereignty provides a better option for the disputing parties as far as the conflict involved is concerned.

The divisible sovereignty triggers the dismantling of the sovereign authority into different components which, together, form a full sovereignty. In effect, the actors agree to create different levels of sovereign authority that those concerned will enjoy. This means that the sovereign responsibility can be shared by states and sub-states, and regional and international organisations. Ferguson and Mansbach argued that there was a major gap in the literature on world politics that an average reader of newspapers should be aware of. According to them, "that gap was the growing importance of non-state groups and organisations that are not recognised as sovereign governments. It simply was no longer possible, we concluded, to ignore groups ranging from terrorist bands to great corporate empires."<sup>21</sup>

This reconstruction of sovereignty as an institution has been necessitated by the need to draw a distinction between a national sovereignty and a state sovereignty. While the former puts the

population at the center of sovereignty, the latter focuses mainly on the territorial integrity.

Under this qualifier, Claussen and Nichol have developed variations or different adjectives of sovereignty: disaggregated sovereignty; late sovereignty; earned sovereignty; imperial sovereignty; pluralistic sovereignty; constrained sovereignty; phased sovereignty; limited sovereignty; and partial sovereignty. While each variation of sovereignty signifies a certain reality, they all point to the transformation that has occurred as far as state sovereignty is concerned. For the purpose of this policy brief, three variations are exemplified by concrete cases in which sovereign authority has been divided: earned sovereignty; constrained sovereignty; and phased sovereignty.

## Earned sovereignty

It entails conditional and progressive devolution of sovereign powers from a state to a sub-state; that is, the sub-state acquires a temporary status until it eventually gets full sovereignty. The Machakos Protocol that the Sudan government and the Sudan People's Liberation Army and Movement (SPLA/M) signed on 20 July 2002, recognises the southern Sudanese right to self-determination. Indeed, the Comprehensive Peace Agreement (CPA) in the Sudan has actually created two systems in one country until 2011, when southern Sudanese will exercise the right of self-determination in a referendum in 2011, either to remain in a united Sudan or opt for a new entity altogether.<sup>22</sup>

The Polisario Liberation Movement of the Sahara Arabic People, which waged a war of liberation against Spain, has earned sovereignty for the people of the Western Sahara Republic (WSR). Unfortunately, efforts for the people of the WSR to exercise their right of self-determination have continuously been foiled and impeded by the Moroccan claim over the sovereignty of the Western Sahara territory. What is paradoxical about Morocco's claims is that a considerable number of members of the OAU, of which Morocco was a member until it left the OAU, recognised the WSR as a decolonised state through armed struggle by the people of Western Sahara. However, Morocco's western supporters continue to support its claim, hence the current impasse.

The Somaliland Republic is also a case in point. It is currently exercising its sovereign authority within a defined territory minus international recognition. It came into existence through home-grown and indigenous political negotiations among clans, which culminated in the establishment of the Somaliland Republic, a state that is yet to be recognised by any country. However, it has established

peace and security within its territory and mobilised its indigenous resources to build its economy since, it does not receive any international aid.

East-Timor successfully snatched its sovereignty from Indonesia through the support of the international community, especially the UN. In terms of the Tamil nation's struggle against the government of Sri Lanka, Rudrakumaran argued that the struggle of the Tamil nation is not different from the struggles of South Sudan, Montenegro, Northern Ireland and Bougainville of Papua New Guinea, since these areas are not relics of colonialism but rather parts of independent countries: thus, although the international community employs concepts as 'earned sovereignty,' 'phased out sovereignty,' and 'conditional sovereignty' in these conflicts, its insistence that the Tamil-Sinhala conflict on the island of Sri Lanka be resolved within a united country creates a perception that the international community is applying a double standard.<sup>23</sup>

### Constrained sovereignty

Constrained sovereignty occurs when the state is constrained by a collective entity from exercising its sovereign authority. The case in point is the status of Kosovo vis-à-vis the Federal Republic of Yugoslavia, whose sovereign authority has been constrained first by NATO and now by the UN.

### Phased sovereignty

Phased sovereignty is usually precipitated when a sub-state exercises its right of self-determination to acquire full sovereignty. The cases in point are those states that were part of the former Federal Republic of Yugoslavia and those of the Soviet Union, which became independent after the collapse of the Cold War.

The international acceptance of these qualified sovereign powers points to the fact that there have been significant structural changes as far as sovereignty as an institution and the geopolitical and legal landscape are concerned.

### Contingency

Under this qualifier, the exercise of a full sovereignty depends and is contingent upon the sovereign authority complying with, and respecting, all national and international norms and standards, especially international human rights standards. In this respect, conditional and contingent sovereignty calls for a policy intervention on the basis of pre-set legal criteria, with respect to the behaviour of a state or sub-state.

It outrightly rejects the notion of non-interference in another state's affairs, even when there are serious violations of human rights. The clause of the OAU Charter that strictly prohibited the non-interference in internal affairs of a member state clearly played into the hands of African dictators and political tyrants by committing atrocities, including genocide, crimes against humanity and war crimes.

Indeed, the contingent or conditional sovereignty developed out of the conflict between humanitarian intervention principles and the norms of non-interference. This discourse on this conflict has generated a lot of views on both sides. Those who support the humanitarian intervention maintain that gross human rights violations should negate sovereignty defense that violators thereof usually invoke in order to avoid accountability for the crimes committed.

This point is pertinent to the current discourse on the International Criminal Court's (ICC) issuance of a warrant of arrest against the President of the Republic of the Sudan, Mr Omar Hassen Al Bashir. Those who oppose this indictment base their argument on, among other things, the absolute concept of sovereignty, which grants immunity against all crimes against the sitting President. On the other hand, the advocates for indictment of the President of the Sudan invoke the conditional and contingent sovereignty in that the President forfeited his sovereign immunity by engaging in genocide, crimes against humanity and war crimes against his own citizens that he is constitutionally and under international and humanitarian laws mandated to protect. Besides, the Rome Statute does not exempt anybody from prosecution in terms of genocide, crimes against humanity and war crimes.<sup>24</sup>

The contingent or conditional sovereignty has also recently been invoked by the proponents of the war against terrorism. Indeed, the attack on 11 September 2001 against targets in the US has prompted interventionist the US's foreign policies. These policies seek to link the collective action with the traditional concept of sovereignty with a view to justifying President Bush's Pre-emptive Strikes Doctrine.

The current US Administration maintains that those norms of sovereignty, with respect to non-intervention in another state's affairs, are applicable in cases when such member states are harbouring terrorists, or are in the process of acquiring weapons of mass destruction. Instead, it argues, international norms should be reconceptualised with a view to forcing such states, and verifying that they are not engaging in such activities. Thus,

failure by these states to produce compelling evidence warrants pre-emptive military strikes.

In effect, this 'Doctrine' recommends that the norms that deal with state responsibility should supersede traditional sovereignty norms. Thus, this proposed reconstruction of sovereignty seeks to establish a normative shift from the traditional non-intervention to intervention.

## Conclusion

Sovereignty as a concept or institution is continuously being reconstructed, reshaped and reconceptualised, with a clear shift from traditional sovereignty. This process of change creates new international norms in international relations systems, which is not necessarily a bad thing as long as these changes address conceptual, institutional and structural challenges in the international system.

The reconceptualisation of state sovereignty as a people's sovereignty is a welcome development, especially in the context of African states which are, in effect, Euro-centric entities, since a vast majority of their citizens are not necessarily participating in the actual running of state affairs. Thus, the right of self-determination should inform this reconstruction in terms of political identity, and assist and help in resolving conflicts on the continent.

This perpetual reconstruction of sovereignty is critical and it certainly informs the discourse on implant Euro-centric states in Africa, and the call for the establishment of truly African states that promote their own history, cultures, languages, laws and socio-economic development models.

The qualifiers (collectivity, divisibility and contingency of sovereignty) have helped in articulating the evolving normative consensus of sovereignty as an institution, and the constant shift in the reconstruction of sovereignty as a concept.

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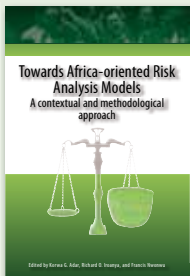
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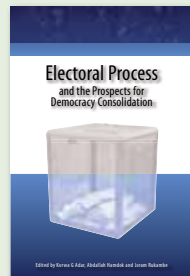
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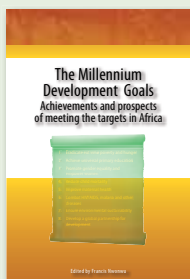
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