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# Mobilising uncertainty and the making of responsible sovereigns

TANJA E. AALBERTS AND WOUTER G. WERNER\*

**Abstract.** The past few decades have witnessed a fundamental change in the perception of threats to the security of states and individuals. Issues of security are no longer primarily framed in terms of threats posed by an identifiable, conventional enemy. Instead, post-Cold War security policies have emphasised the global and radically uncertain nature of threats such as environmental degradation, terrorism and financial risks. What are the implications of this transformation for one of the constitutive principles of international society: state sovereignty? Existing literature has provided two possible answers to this question. The first focuses on the alleged need for states to seek international cooperation and to relax claims of national sovereignty. In Ulrich Beck's terminology, this would amount to a transformation of sovereign states into 'cosmopolitan states'. The second takes the opposite position: in response to uncertain threats states rely on their sovereign prerogatives to take exceptional measures and set aside provisions of positive law. In Beck's terminology, this would amount to the creation of a 'surveillance state'. None of these two answers, however, does justice to the complex relation between sovereignty, power and (international) law. As this article will show, the invocation of radical uncertainty has led to a transformation in sovereignty that cannot be captured in terms of the cosmopolitan/surveillance dichotomy. What is at stake is a more fundamental transformation of the way in which sovereignty is used to counter threats. Based on a study of the UN Counterterrorism Committee, this article demonstrates how state sovereignty is used as a governmental technology that aims to create proactive, responsible subjects.

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## Introduction

The end of the Cold War has fundamentally altered the security agenda by changing perceptions of danger and threat. Whereas mainstream International Relations (IR) theory analyses this caesura in terms of changing power structures and the new security reality presented by a uni- or multipolar constellation, what is even more telling is how this change of (in)security reveals epistemological assumptions that underlie our understanding of danger, threats, and security. The danger posed by the enemy can no longer be captured in terms of the precise amount of warheads and the evaluation of the threats voiced by the enemy. Rather, contemporary threats (especially global terrorism) are presented as radically uncertain, as ‘unknown-unkowns’ that escape existing conventions, norms, and risk-assessments. At the same time there is a somewhat paradoxical combination of, on the one hand, threats that are perceived as radically uncertain and, on the other, a certainty that the threats are potentially catastrophic and beyond repair. And because of the catastrophes that loom large, there is not time for gathering knowledge to support our hunches, but we have to act now. Hence the frequent resort to the precautionary principle in contemporary politics.

The imagery of radically uncertain, yet potentially catastrophic threats has once more resulted in debates about one of the key constitutive principles of the international society to date: state sovereignty. Scholars such as Beck have argued that global terrorism has blurred traditional distinctions such as internal/external, thereby rendering the nation-state ‘a zombie category’ within the emergent world risk society.<sup>1</sup> In the face of global threats such as terrorism or environmental degradation, Beck argues, the concept of the state and its sovereignty must be renegotiated, and be understood independently from previously dominant ideas that linked sovereignty to autonomy.<sup>2</sup> According to Beck, states should give up exclusive claims for sovereignty and transform into cosmopolitan states, that seek international cooperation, share sovereignty, and open up to the interests of the world at large (global politics).<sup>3</sup> Of course, with hindsight it is easy to criticise Beck’s optimism about the transformations that could take place in international politics. Many scholars have counterbalanced his vision about democratisation and the cosmopolitan opportunities of world risk society by exposing its less positive consequences in terms of imperial reinventions of liberty and democracy, securitisation of difference, and notably the predominance of exceptional practices beyond the law.<sup>4</sup> Post 9/11 policies of targeted killing, preventative detention,

<sup>1</sup> Ulrich Beck, ‘The Terrorist Threat: World Risk Society Revisited’, *Theory, Culture & Society*, 19 (2002), pp. 39–55 at p. 47. For a criticism of his application of zombie categories, see Mitchell Dean, *Governing Societies: Political Perspectives on Domestic and International Rule* (Maidenhead: Open University Press, 2007).

<sup>2</sup> Beck, ‘The Terrorist Threat’, p. 48.

<sup>3</sup> *Ibid.*, pp. 48, 50.

<sup>4</sup> Claudia Aradau and Rens Van Munster, ‘Taming the Future: The Dispositif of Risk in the War on Terror’, in Louise Amoore and Marieke de Goede (eds), *Risk and the War on Terror* (London and New York: Routledge, 2008), pp. 23–40. See also Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); Rens van Munster, ‘The War on Terrorism: When the Exception Becomes the Rule’, *International Journal for the Semiotics of Law*, 17 (2004), pp. 141–53; Jef Huysmans, ‘International Politics of Insecurity: Normativity, Inwardness and the Exception’, *Security Dialogue*, 37 (2006), pp. 11–29; R. B. J. Walker, ‘Lines of Insecurity: International, Imperial, Exceptional’, *Security Dialogue*, 37 (2006), pp. 65–82.

anticipatory self-defence, or terrorist blacklisting indeed proved to be a far cry from the open-minded, cosmopolitan spirit advocated by Beck. Instead, security concerns trump civil and political rights while the rule of law is hollowed out.<sup>5</sup>

We want to contribute in two ways to the ongoing discussion on world risk society, terrorism, and sovereignty. *Contra* Beck, we argue that the disengagement of sovereignty and autonomy is not unique to world risk society, but that sovereignty has always implied a particular relationship between freedom and responsibility. This argument is not based on a positivist account of the world which reifies the statist paradigm and treats sovereign statehood as given and ontologically prior to international community. On the contrary: we argue that sovereignty is a dynamic concept that has always been used for the creation of disciplined, responsible sovereign subjects within the international legal order. Sovereignty can thus also be used as a tool to manage an uncertain future. *Contra* many of Beck's critics we argue that the fight against terrorism cannot be fully grasped in terms of exceptional sovereign practices that transgress or suspend the rule of law, both domestically and internationally. Law has played an important role in the articulation and legitimation of policies that set out to forestall risks that are perceived as uncertain and yet potentially catastrophic.<sup>6</sup> On the one hand, this indeed means it has repeatedly been politicised; transformed into an instrument at the disposal of sovereign wills and national interests. On the other hand, this article will show that in response to the 9/11 attacks, international law has also been used to create institutional mechanisms that put states under an obligation to adapt their legal systems in order to prevent possible terrorist activities. In this light, it is quite understandable that it is possible to mobilise uncertainty, not to bypass law and reinforce state autonomy, but to create legal institutions that redefine what it means to be a sovereign state in an era of global terrorism.

In order to substantiate our arguments, this article proceeds as follows. The first section sets out the intrinsic relation between sovereignty and responsibility within the international legal regime, arguing that one of the core functions of state sovereignty has always been the creation of disciplined subjects who understand the relation between freedom and responsibility. The second section discusses how the rise of (perceived) global risks, such as environmental degradation and terrorism, has affected the way in which sovereigns can be held accountable. It shows how the traditional (legal) regime of state responsibility has been supplemented and supplanted by more managerial forms of accountability. One of the prime examples of this development is the Counter-Terrorism Committee (CTC) that was created by the Security Council. The last part of the article discusses how this shift in regulating practices builds on and transforms the traditional understanding of sovereignty.

<sup>5</sup> These practices rather fit Beck's description of surveillance states, see Beck, 'The Terrorist Threat', p. 49.

<sup>6</sup> For insightful analyses of the transformation (rather than suspension) of law in Guantanamo Bay as an exceptional space, see Fleur Johns, 'Guantanamo Bay and the Annihilation of the Exception', *European Journal of International Law*, 16 (2005), pp. 613–35; and Claudia Aradau, 'Law Transformed: Guantanamo and the "Other" Exception', *Third World Quarterly*, 28 (2007), pp. 489–501.

### The nexus between sovereignty and responsibility

The concept of sovereignty is generally defined in terms of independence and autonomy; as providing protection for the state's freedom against outside interferences.<sup>7</sup> The emphasis on freedom and independence has led some authors to conclude that sovereignty is essentially an anti-social concept, which is antithetical to international accountability, world order, and international law. Whereas this perspective might not seem surprising given the rationalist and methodological individualism that have dominated the discipline of IR theory for so long, similar readings of sovereignty as logical opposite to international legal regimes also transpire within international law. Berman, for example, has argued that 'different conceptions of international society result depending on whether, and to what extent, law or sovereignty is granted ultimate primacy'.<sup>8</sup> In a more radical fashion, Cassese presents us with what seems to be a clear choice: 'either one supports the rule of law, or one supports State sovereignty'.<sup>9</sup>

Such individualistic or anti-social readings of state sovereignty, however, fail to do justice to one of its crucial functions: the creation of responsible, disciplined subjects in a society which lacks centralised mechanisms for legislation, adjudication, and enforcement.<sup>10</sup> Take for example the classical usage of sovereignty as the prerogative of states to declare and wage wars, which prevailed in (European) international society roughly until the First World War.<sup>11</sup> As the classical reading puts the decision to declare and wage war exclusively in the hands of the sovereign, it is easily misunderstood as the negation of the rule of law in international affairs. In reality the function of sovereignty was quite the opposite: it helped to transform the religious and civil wars of the 16th century into international, regulated wars between sovereign states.<sup>12</sup> The importance of this transformation is illustrated, *inter alia*, in the difference between the (at least formally) highly regulated land wars between European sovereigns and the rather unregulated wars that European sovereigns waged in colonial territories.<sup>13</sup>

Similarly, the notion of international legal personality was introduced by Leibniz in the 17th century not to create a normatively free sphere in which states could operate. On the contrary, the idea of the State as a sovereign legal person was coined in an attempt to civilise power. More specifically, the concept of international legal personality was advocated as a way to recognise the new power configurations in Europe, and to bring the newly arising powers within an

<sup>7</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999). See also the treatment of the International Court of Justice in the *Nicaragua case* (Nicaragua vs. US of America), *Merits*, ICJ Reports, 1986.

<sup>8</sup> Nathaniel Berman, 'Sovereignty in Abeyance, Self-Determination and International Law', *Wisconsin International Law Journal*, 7 (1986), pp. 390–443.

<sup>9</sup> As quoted in Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), p. 56.

<sup>10</sup> Wouter G. Werner, 'State Sovereignty and International Legal Discourse', in Ige F. Dekker and Wouter G. Werner (eds), *Governance and International Legal Theory* (Leiden: Martinus Nijhoff, 2004), pp. 125–57.

<sup>11</sup> For an analysis see Stephen Neff, *War and the Law of Nations. A General History* (Cambridge: Cambridge University Press, 2005).

<sup>12</sup> Kalevi J. Holsti, *The State, War, and the State of War* (Cambridge: Cambridge University Press, 1996); Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2006), *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, trans. G. L. Ulmen of Carl Schmitt (Duncker & Humblot, Berlin, 1950).

<sup>13</sup> Schmitt, *Nomos of the Earth*.

overarching normative structure. Through the assignment of a specific, privileged status, the normative order constituted its own sovereign subjects and presented them as the principal bearers of international responsibility. As Nijman has argued: ‘... the concept of international legal personality functioned to rationalize the participation of the German Princes in international life, but by *the same legal move* established their *responsibility* to conform to the justice-based rules of the law of nations’.<sup>14</sup> Contrary to the chronicles that equate sovereignty (at least prior to the globalisation age) with autonomy,<sup>15</sup> from its very inception in modern international law sovereignty thus meant having a certain identity, which came with rights *and* duties and responsibilities. This was reconfirmed in one of the landmark rulings on sovereignty in the twentieth century: the *Island of Palmas* case. In this case, arbiter Huber made the relation between sovereignty and responsibility the core of his argument, claiming that territorial sovereignty not only gives states the right to exercise jurisdiction over their territories, but also puts them under an obligation to respect the rights of other states.<sup>16</sup>

The nexus between sovereignty and responsibility further materialised in the post 1945 international society as well as in the international legal order. As the International Law Commission argued, ‘If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations.’<sup>17</sup> The link between sovereignty and responsibility became even more important in light of the growing importance of so called ‘community interests’, that is, interests that ‘go far beyond the interests held by States as such; rather, they correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind’.<sup>18</sup> Community interests can be found, *inter alia*, in the sphere of international environmental law, human rights, as well as international peace and security.<sup>19</sup> Whereas community interests previously connoted

<sup>14</sup> Janne Nijman, *The Concept of International Legal Personality. An Inquiry into the History and Theory of International Law* (The Hague: T. C. M. Asser, 2004), p. 499, emphasis added.

<sup>15</sup> Beck’s argument relies on a similar reading of sovereignty as autonomy, see Beck, ‘The Terrorist Threat’.

<sup>16</sup> As the Huber put it: ‘Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory’ (*Island of Palmas case* (Netherlands vs. US), RIAA II 829, 1928). See also the award in the *Spanish Zones of Morocco claims case* (Britain vs. Spain), 2 RIAA 615, 1925, p. 641 ([R]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility’); and the separate opinion of Judge Sefériadès in the *Lighthouses in Crete and Samos case* (France vs. Greece), PCIJ Series A/B no. 62, 1937, p. 45.

<sup>17</sup> Yearbook of the International Law Commission, 1973, II, p. 177.

<sup>18</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, *Recueil des Cours*, 250 (1994), pp. 217–384, at pp. 233, 244. See also Cassese’s characterisation of ‘community obligations’ as obligations possessing the following features: ‘(i) they are obligations protecting fundamental values ...; (ii) they are obligations *erga omnes* ...; (iii) they are attended by a correlative right that belongs to any State (or to any other contracting State, in case of obligations provided for in multilateral treaties); (iv) this right may be exercised by any other (contracting) State, whether or not it has been materially or morally injured by the violation; (v) the right is exercised *on behalf of the whole international community* (or the community of contracting States) to *safeguard fundamental values of this community*’ (Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), p. 16, emphasis in original).

<sup>19</sup> By now, there is a rich body of literature on ‘community interests’ in international law. For an overview see, *inter alia*, Jost Delbrück (ed.), *New Trends in International Lawmaking. International ‘Legislation’ In The Public Interest* (Berlin: Duncker and Humblot, 1997).

foremost issues of so-called soft politics, the attacks on the Twin Towers have broadened its agenda to security issues and high politics. In Beck's cosmopolitan visionary: 'People have often asked: "What could unite the world?" And the answer sometimes given is: "An attack from Mars." In a sense, that was just what happened on September 11th: an attack from our "inner Mars". It worked as predicted. For some time, at least, the warring camps and nations of the world united against the common foe of global terrorism.'<sup>20</sup> And an important lesson to be drawn, in his view, is that it has turned security into a transnational issue that moves beyond national sovereignty, in other words: a community interest.

At first sight, it seems as if community interests challenge the traditional idea of state sovereignty as they transcend the interests and autonomy of individual states.<sup>21</sup> However, given the absence of a centralised body that creates and enforces rules, sovereign states still play a pivotal role in the articulation and realisation of community interests. A good example can be found in the sphere of environmental law, which defines certain issues as problems of 'common concern' or as 'concern to humankind'.<sup>22</sup> The concept of 'common concern' assigns special responsibilities to sovereign states:

[It] leaves existing jurisdictional regimes intact, be it sovereignty over territory and the territorial sea, sovereign rights in the exclusive economic zone, or flag state or state of registry jurisdiction in the global commons. It requires that states within their territory and over activities subject to their jurisdiction adopt measures to curtail environmental degradation and that states assist each other in addressing such degradation.<sup>23</sup>

In similar fashion, community interests such as the protection of human rights require rather than undermine responsible, sovereign states, as was confirmed in redefinition of sovereignty in the Responsibility to Protect paradigm.<sup>24</sup>

<sup>20</sup> Beck, 'The Terrorist Threat', p. 26.

<sup>21</sup> Indeed, Beck calls for releasing the link between sovereignty and autonomy: 'In this context, then, a new central distinction emerges between sovereignty and autonomy. The nation-state is built on equating the two. So from the nation-state perspective, economic interdependence, cultural diversification and military, judicial and technological cooperation all lead to a loss of autonomy and thus sovereignty. But if sovereignty is measured in terms of political clout – that is, by the extent to which a country is capable of having an impact on the world stage, and of furthering the security and wellbeing of its people by bringing its judgements to bear – then it is possible to conceive the same situation very differently. In the latter framework, increasing interdependence and cooperation, that is, a *decrease* in autonomy, can lead to an increase in sovereignty. Thus, sharing sovereignty does not reduce it; on the contrary, sharing actually enhances it. This is what cosmopolitan sovereignty means in the era of world risk society.' (Beck, 'The Terrorist Threat', pp. 48–9). This line of argument seems to resonate in familiar discussions on the possibility of cooperation, integration and pooling of sovereignty between sovereign states within neoliberal institutionalist approaches. See *inter alia* Robert O. Keohane, 'Ironies of Sovereignty: The EU and the US', *Journal of Common Market Studies*, 40 (2002), pp. 743–65.

<sup>22</sup> Examples can be found in the preambles of the 1992 Convention on Biological Diversity, or the 1992 UN Framework Convention on Climate Change.

<sup>23</sup> Ellen Hey, 'Global Environmental Law and Global Institutions, A System Lacking "Good Process"', in Roland Pierik and Wouter Werner (eds), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2009) (in print). Text on file with authors.

<sup>24</sup> Whereas we argue that the link between sovereignty and responsibility is not a late-twentieth century invention (as the controversy surrounding the Responsibility to Protect paradigm suggests), there has been a shift in what this sovereign responsibility entails: from respecting the rights of fellow-sovereigns (*Island of Palmas*) to protecting human rights of one's citizens (Responsibility to Protect) to community interests at large. See also Tanja E. Aalberts and Wouter G. Werner, 'Sovereignty Beyond Borders: Sovereignty, Self-Defense and the Disciplining of States', in Rebecca Adler-Nissen

The protection of community interests, like the attempts to create order and stability through the recognition of responsible sovereigns in the 17th century, thus still heavily depends on the functioning of disciplined, sovereign states that can be held accountable for the way in which they use their freedom. Sovereignty, hence, is not a given identity of states, ontologically prior to the development of the international community and autonomous from the legal order. Rather, it connotes in post-structuralist terms ‘subjectivity’ (subject-hood). Here a parallel can be drawn with the notion of international legal personality.<sup>25</sup> Just as subjects in international law, including sovereign states, are defined by the institutional framework and the rights and duties that are attached to their status as international legal persons at a given moment of time, so does the notion of subjectivity (subject-hood) refer to the construction of the subject within the discourse or social order, as opposed to the assumption of the subject as given and complete (sovereign) identity by itself. Parallel to the legal link between international personality and (sovereign) status on the one hand, and rights and duties that provide its substance on the other,<sup>26</sup> ‘subjectivity’ refers to the relation between rights and identity, both in terms of empowerment, agency and freedom (establishing a sovereign status), and in terms of substantiating this by the imposition of a norm of ‘being’ (and/or sovereign rights and duties). In Foucaultian terms: subjectivity entails an ‘ambiguous position as an object of knowledge and as a subject that knows’.<sup>27</sup> In other words, in addition to the traditional conception of states as bearers of power and authority in the international realm, one should address how they themselves are subject to international protocols and regimes of knowledge that empower them as subjects.<sup>28</sup>

Conceiving sovereignty as subjectivity, and more specifically as a way to organise international responsibility, a continuity transpires between attempts in the 17th century to create stability and order through the recognition of responsible sovereigns and recent attempts to transform sovereign states into guardians of common interests that affect mankind as a whole. The shift in world risk society in terms of relinquishing the alleged traditional bond of sovereignty and autonomy is then less revolutionary than Beck would have us believe.<sup>29</sup> However, as we will set out in the next section, the rise of community interests, increasingly defined in terms of new types of threat and radical uncertainty, also signified an important discontinuity: it has affected the specific institutional ways in which states are called to account, and hence the manifestation of sovereign subjectivity.

and Thomas Gammeltoft-Hansen (eds), *Sovereignty Games. Instrumentalising State Sovereignty in Europe and Beyond* (Houndmills: Palgrave, 2008), pp. 129–50.

<sup>25</sup> Tanja E. Aalberts, *Constructing Sovereignty Between Politics and Law* (London: Routledge, 2012).

<sup>26</sup> As Koskenniemi puts it: from the status of sovereign statehood itself no ‘given, determinate, normative implications’ follow Martti Koskenniemi, ‘The Future of Statehood’, *Harvard International Law Journal*, 32 (1991), pp. 397–410, 408.

<sup>27</sup> Michael Foucault, *The Order of Things* (Harvester Press, 1989), p. 312, quoted by Michael Dillon, ‘Sovereignty and Governmentality: From the Problematics of The “New World Order” To the Ethical Problematic of the World Order’, *Alternatives*, 20 (1995), pp. 323–68, 324.

<sup>28</sup> See also Dillon, ‘Sovereignty and Governmentality: From the Problematics of The “New World Order” To the Ethical Problematic of the World Order’; Beck, ‘The Terrorist Threat’.

<sup>29</sup> Nevertheless, his concern seems to be quite similar to 17th century scholars and lawyers, namely ‘if the world is to survive this century, it must find a way to civilize world risk society. A new big idea is wanted. I suggest the idea of the *cosmopolitan state*, founded upon the recognition of the otherness of the other’ (Beck, ‘The Terrorist Threat’, p. 50).



**The changing ways in which states are called to account***State responsibility*

The traditional way in which states are called to account for wrongful behaviour is through the invocation of their formal responsibility. In August 2001 the International Law Commission laid down the most important rules on state responsibility in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>30</sup> Most of the articles adopted by the Commission reflect provisions of customary international law.<sup>31</sup> The articles set out how and under what conditions a state is to be held responsible for a breach of international law and determine what consequences follow from such a breach.<sup>32</sup> For the purposes of this article, two features of the articles on state responsibility deserve special attention.

In the first place, the articles link past, present, and future in a particular way. The rules on state responsibility are only applicable when it is possible to define existing undesired events as injuries of a state that are the result of past wrongful behaviour of another state. In this sense, the articles are backward-looking: they link existing injuries to preceding illegalities. At the same time, the articles contain obligations that aim to guide future (and present) conduct of the wrongdoing state. The latter is under an obligation to cease the wrongful act to give, if necessary, assurances, and guarantees of non-repetition<sup>33</sup> and to 'repair' the injuries of another state. The articles on State responsibility thus place the occurrence of undesired events in a bigger narrative of normalcy, disruption, and restoration. Its aim is to put things back in order; to restore the integrity of the norm, of normalcy. As Brownlie puts it: 'The question of responsibility is, in practical terms, a matter of insistence on performance or restoration of normal standards of international conduct.'<sup>34</sup>

In the second place, the articles on state responsibility are, by their very nature, state-centric. The rules of state responsibility only apply when wrongful behaviour can be attributed to a state (because it conducted, controlled, or adopted such behaviour)<sup>35</sup> or when a state failed to take appropriate measures to prevent illegal conduct by others.<sup>36</sup> In addition, the responsibility of a wrongdoing state needs to

<sup>30</sup> Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp No 10, p. 43, UN Doc A/56/10 (2001). See also Resolution 56/83 (12 December 2001) through which the UN General Assembly 'commended [the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.

<sup>31</sup> For an overview see James Crawford, *The International Law Commission's Articles on State Responsibility-Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

<sup>32</sup> Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53d session (2001), p. 59. Available at: {www.un.org/law} accessed on 7 August 2009.

<sup>33</sup> For an expression of this obligation see, *inter alia*, *La Grand* (Germany vs. US of America), *Merits*, Judgement of 27 June 2001.

<sup>34</sup> Ian Brownlie, *System of the Law of Nations, State Responsibility (Part I)* (Oxford: Clarendon Press, 1983), p. 22.

<sup>35</sup> See chapter II of the ILC articles, *supra* note 32.

<sup>36</sup> The classical case regarding the so called 'due diligence' or 'due care' obligations of a state is the *US Diplomatic and Consular Staff in Teheran* (US of America vs. Iran), 24 May 1980, ICJ Reports, 1980.

be invoked by an injured state. In this context, the term ‘invocation’ is reserved for relatively formal measures such as the presentation of a formal claim against the wrongdoing state or the commencement of judicial proceedings.

Both the backward-looking and the state-centric nature of state responsibility are difficult to square with the way in which some security issues have been framed in the post-9/11 era. As was set out in the introduction, security issues have increasingly been defined in terms of uncertain, potentially catastrophic threats against community interests – very much like dangers to the global environment have been presented since the late 1980s. While states remain pivotal in tackling such threats, the institutional framework of effectuating the responsibility of states has proven to be far from perfect. In areas such as the protection of the global environment it has proven to be difficult to govern behaviour in terms of the formal invocation of the responsibility of a wrongdoing state. The legal regime of state responsibility often fails for (a combination of) different reasons: it is not always possible to attribute harmful conduct to a state; it is sometimes difficult to establish a causal relation between wrongful behaviour and damage; the formal invocation of responsibility might be problematic for diplomatic reasons; and the rules of state responsibility do not take sufficient account of the capabilities of states to live up to their international obligations.<sup>37</sup> Not surprisingly, therefore, states have been rather reluctant to rely exclusively on the formal rules of state responsibility in international environmental practice as well as international terrorism.<sup>38</sup> The shortcomings of state responsibility have led to several alternative, or supplementary, ways of holding states accountable under international law. One such alternative is the creation of institutional mechanisms that try to actively engage states in a common effort to forestall potentially catastrophic threats: the so-called non-compliance procedures. The development of non-compliance procedures is an example of the so called ‘managerial turn’ in (international) law and policy. Increasingly, formal rules and traditional forms of responsibility are supplemented or replaced by more informal, managerial forms of accountability.<sup>39</sup> While these mechanisms leave more room for flexibility, they also raise concerns about the defomalisation of international law and the increased possibilities to use international law as a mere policy instrument. In the next section we will spell out in more detail how this managerial turn has taken place in the area of counter-terrorism and how this has affected our understanding of the nature and function of state sovereignty.

### *Non-compliance procedures and sovereign responsibility*

The shift towards more active forms of responsibility has materialised most significantly in non-compliance procedures. In this alternative form to organise

<sup>37</sup> See Jutta Brunnée, ‘International Legal Accountability through the Lens of the Law of State Responsibility’, *Netherlands Yearbook of International Law*, 36 (2005), pp. 3–38.

<sup>38</sup> This does not mean that the traditional doctrine of state responsibility has become completely obsolete. It has played a key role, for instance, in the legitimisation of the war in Afghanistan. See Aalberts and Werner, ‘Sovereignty Beyond Borders’.

<sup>39</sup> See also Kessler’s distinction between law as a ‘system of norms’ versus law as ‘manager of uncertainty’, this special section.

state responsibility, states are called to account for their behaviour with regard to particular issues of community interest in a procedure constituted by international law. They have been aptly described as the ‘middle way between diplomacy and law’.<sup>40</sup> These procedures are legal in the sense that they are established and regulated by international treaties. They are diplomatic in the sense that they leave much more room for negotiation, adjustment and cooperation than the traditional rules of state responsibility that are formulated in a law enforcement mode.

The ‘compliance shift’ originates from the environmental regime.<sup>41</sup> In response to the relative ineffectiveness of the rules of state responsibility several environmental treaties developed specific procedures to ensure compliance with its substantive obligations. Since the 1990s international environmental law has thus witnessed a proliferation of treaty-specific monitoring bodies entrusted with the tasks of preventing non-compliance, assisting states to comply with their international obligations, responding to non-compliance and facilitating further decision-making relating to non-compliance.<sup>42</sup>

Whereas they both aim to regulate responsibility and accountability amongst sovereign members, non-compliance procedures differ significantly from the invocation of State responsibility as discussed in the previous section. The traditional rules on state responsibility are essentially confrontational as they require an injured state to formally invoke the responsibility of another, supposedly wrongdoing state. As described above, non-compliance procedures are much more ‘managerial’ or administrative: their aim is to enhance international cooperation for what is perceived to be the common good. Thus, rather than invoking juridical procedures, judgements of responsibility are transferred to the administrative sphere. State parties are generally required to file reports on their compliance to an independent committee. When a state party fails to meet its obligations under the treaty, the result is not a formal invocation of their responsibility, but rather the start of a dialogue on the possible causes, the proposal of possible improvements and maybe even the offering of technical assistance, thus assuming a lack of capacity as cause for the non-compliance, rather than intentional fault or lack of will. Only if a state persists in non-compliance with

<sup>40</sup> Maas Goote, ‘Non-Compliance Procedures in International Environmental Law: The Middle Way between Diplomacy and Law’, *International Law Forum*, 1 (1999), pp. 82–9, 82.

<sup>41</sup> For an extensive discussion of non-compliance procedures in international environmental law see Martti Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’, *Yearbook of International Environmental Law*, 3 (1992), pp. 123–62; Jacob Werksman, ‘Compliance and the Kyoto Protocol: Building a Backbone into a “Flexible” Regime’, *Yearbook of International Environmental Law*, 9 (1998), pp. 48–105; Malgosia Fitzmaurice and Catherine Redgwell, ‘Environmental Non-Compliance Procedures and International Law’, *Netherlands Yearbook of International Law*, 31 (2000), pp. 35–65; Robin R. Churchill and Geir Ulfstein ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’, *The American Journal of International Law*, 49 (2000), pp. 623–59.

<sup>42</sup> Examples can be found in the Montreal protocol on Substances that Deplete the Ozone Layer, the Convention on Long-Range Transboundary Air Pollution, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the UN Framework on Climate Change. See also Goote, ‘Non-Compliance Procedures’, p. 85. A relatively recent example of such a mechanism is the Compliance Committee that was established under the Aarhus Convention. Aarhus Convention on Access to Information, Publics Participation in Decision-Making and Access to Justice in Environmental Matters, available at: {<http://www.uncece.org/env/pp/documents/cep43e.pdf>} accessed on 18 August 2009.

treaty obligations will the committee use confrontational methods such as naming, shaming, and suspension of rights.

Within the post-9/11 context it is not surprising that this shift to managerial forms of accountability is extended from environmental issues to terrorism. As policy areas, environmental issues and global terrorism share a number of characteristics.<sup>43</sup> Both can be characterised as ‘global’ problems *par excellence*. They do not respect territorial boundaries and hence do not fit the current system of sovereign states and the demarcation of domestic from international affairs very well. Irrespective of the particular territory or jurisdiction in which an undesired event takes place, with the environment and global terrorism there is no real demarcation of ‘inside’ and ‘outside’ and the distinction between domestic and foreign affairs dissolves. As common problems they do not fit ‘sovereign solutions’ in the Westphalian sense of *cuius regio, eius religio*; rather as a community interest they require combined efforts by the international community at large. Moreover, both environmental issues and global terrorism are perceived as uncertain risks, having potentially catastrophic consequences. Whereas for the environment these are still considered to be longer term problems for future generations, 9/11 has been perceived as an example of an instant catastrophic event. The political imaginary of uncertain yet undeniable catastrophe has informed the shift to a precautionary logic as an alternative way to master the risk of terror.<sup>44</sup> Responsible behaviour is now informed by proactivity and taking precautions for the preservation of international order and common good.

This imagery also informed the adoption of Security Council adopted Resolution 1373 (2001), a resolution which was characterised as the ‘cornerstone of the United Nation’s counter terrorism effort’<sup>45</sup> as well as the ‘centre of global efforts to fight against terrorism’.<sup>46</sup> Resolution 1373 puts states under far-reaching obligations to effectively combat terrorism within their respective sovereign jurisdictions.<sup>47</sup> States are required to ensure that their domestic legal systems are capable of preventing the commission and financing of terrorist activities and to

<sup>43</sup> For a discussion of the differences between environmental, financial and terrorist risks, see Beck, ‘The Terrorist Threat’.

<sup>44</sup> Aradau and Van Munster, ‘Taming the Future’; Claudia Aradau and Rens van Munster, *Politics of Catastrophe. Genealogies of the Unknown* (London, Routledge, 2011), in print. The precautionary principle was officially adopted by the 1992 UN Conference on Environment and Development. Principle 15 of the Rio Declaration reads: ‘In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ Since then, it has been established in a variety of treaties and declarations. For an overview see, *inter alia* Arie Trouwborst, *Precautionary Rights and Duties of States* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

<sup>45</sup> Eric Rosand, ‘Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism’, *American Journal of International Law*, 97 (2003), pp. 333–41, 333.

<sup>46</sup> Secretary General Kofi Annan’s statement in the ministerial meeting of the Security Council, Doc.S/PV.4688, 20 January 2003, p. 2.

<sup>47</sup> Resolution 1373 has been characterised as ‘first-ever legislative act’ of the Security Council, on the basis of its discretionary powers according to article 25 en Chapter VII of the Charter: a decision that is legally binding and enforceable upon all member-states indefinitely, and that is broad in its scope. See Paul Szasz, ‘The Security Council Starts Legislating’, *American Journal of International Law*, 96 (2002), pp. 901–5; José E. Alvarez, ‘Hegemonic International Law Revisited’, *American Journal of International Law*, 97 (2002), pp. 873–88; Stefan Talmon, ‘The Security Council as World Legislature’, *American Journal of International Law*, 99 (2005), pp. 175–93; Kendall W. Stiles, ‘The Power of Procedures and the Procedures of the Powerful: Anti-Terror Law in the UN’, *Journal of Peace Research*, 43 (2006), pp. 37–54, 46.

ensure that those responsible for terrorist activities are brought to justice. Moreover, Resolution 1373 obliges states to facilitate international cooperation and calls upon states to exchange information, become party to anti-terrorist conventions, scrutinise their asylum policies and implement their international obligations. Resolution 1373, in short, aims at disciplining the legislative and executive machinery of the states worldwide. In that sense, it is a prime example of the blurring of the internal-international divide discussed by Beck.

The formulation of the Resolution shows a clear shift towards the prevention of terrorism and towards the cooperation and exchange of information (early warning) between member-states in their combat against transnational terrorism. This is a palpable move away from (post-)Cold War anti-terror strategies that the Security Council adopted up until the 9/11 attacks. Not only had it treated terrorism as foremost internal or interstate conflicts, its anti-terror strategy was characterised by a mandatory sanctions regime against state-sponsored terrorism, such as for instance implemented against Libya, Sudan and the Taliban.<sup>48</sup> Now, rather than having merely a 'duty to refrain',<sup>49</sup> member-states are made responsible for taking precautions so that their country is free from any possible future terrorist activity.

In order to monitor the implementation of the obligations contained in Resolution 1373, it also created a specialised committee, the so called Counter-Terrorism Committee.<sup>50</sup> When the CTC was established, US governmental officials regarded it as an instrument to globalise the US counterterrorism legislation, especially the Patriot Act.<sup>51</sup> Resolution 1373 was indeed drafted by the US government, which also highly supported its implementation. While formally the CTC was backed by strong legal and political powers, in practice, however, the CTC has taken great pains to distance itself from any adversarial or confrontational attitude towards member states. Time and again, the CTC emphasised that it is *not* a sanction committee and has no intention whatsoever to condemn or pressure states.<sup>52</sup> Starting from the principle of sovereignty equality, it takes into account that states have different levels of capacity to effectively fight terrorism and have sought to assist rather than criticise states that lagged behind in the

<sup>48</sup> Respectively UNSC Resolution 748 (1992), Resolution 1054 (1996), and Resolutions 1267 (1999), 1333 (2000) and 1363 (2001).

<sup>49</sup> UNSC Resolution 1189 (13 August 1998).

<sup>50</sup> By now, the CTC consists of three layers: the Plenary, the Bureau and the CTED. The *Plenary* consists of representatives of the fifteen member States of the Security Council. It has the primary responsibility for setting priorities in promoting and monitoring the implementation of Resolution 1373, communicating problems to the Security Council and facilitating contacts between the CTC and other UN bodies as well as other international organisations, considering initiatives for technical assistance and approving of the CTED work programme. The *Bureau* consists of the chair and the three vice chairs and is responsible for dealing promptly with issues that could be reported to the Plenary for confirmation as well as for harmonising the work of the subcommittees that deal with State reports on implementation. The *CTED* consists of experts who play a pivotal role in, *inter alia*, overseeing the implementation of Resolution 1373, setting up dialogues with states, facilitating capacity building and cooperating and communicating with UN bodies and other international organisations. For a detailed overview of the tasks and responsibilities of the different branches of the CTC see: {<http://www.un.org/sc/ctc/>} accessed 15 October 2008.

<sup>51</sup> Serge Schmemmann, 'UN to Get a US Antiterror Guide', *New York Times* (19 December 2001). See also the US report on Resolution 1373 to the Security Council, available at: {<http://www.state.gov/p/io/rls/rpt/2001/6917.htm>}.

<sup>52</sup> See, for example, the comments of chairman Greenstock at the 57th Security Council session (4/8 October 2002), S/PV.4618, p. 5.

implementation of Resolution 1373.<sup>53</sup> The CTC seeks to create an image based on concepts such as transparency, dialogue, and consensus instead of sanctions, coercion, and confrontation. Its main activities consist of reviewing country reports, facilitating technical assistance, fostering international cooperation, encouraging states to sign up to international conventions, and dissemination of best practices. The shift to compliance procedures illustrates this reliance on precaution, yet also reveals the precaution paradox: Whereas one of the defining elements of precaution is that we need to act in the face of radical uncertainty and impossibility of reliable knowledge, it is accompanied by a wish to collect as much information as possible.<sup>54</sup> In its urge for data, the language used by the CTC is far more administrative, technical, and bureaucratic, more managerial than political. It is about committees and subcommittees, accountability mechanisms, terms of review, and numerous abbreviations. However, as we will argue below, this administrative endeavour should not distract from the fact that the CTC project is in fact highly political, not in the least through the very mechanisms that are applied. In fact, the more managerial approach advocated by the CTC makes it easier to use international law as an instrument to govern the international society of states.

### Sovereignty, and governmentality

Non-compliance procedures thus give renewed meaning to the intrinsic relation between sovereignty, freedom, and responsibility that has always existed under international law. They can be considered as an attempt to institutionally embed the focus on the future and the community interest. In that sense they seem to fit the shift from 'government' to 'governance' in the IR globalisation literature. As opposed to notions of unilateral power, centralised authority, command, and coercion that characterise the workings of 'government', governance 'refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance'.<sup>55</sup> The emphasis hence is on the linkages between formally equal members of the international society (networks of interdependence), who cooperate to deal with shared problems, without relying on centralised, hierarchical, and coercive authority structures to create international order. Thus the non-confrontational workings of compliance committees, based on sovereignty equality and cooperation in combination with managerial

<sup>53</sup> The CTC distinguishes between three phases. In stage A the focus is on the appropriate legislation that should be in place. Stage B focuses on the existence of an effective executive machinery, coordination, and mechanisms for counterterrorist activity and cooperation at the bilateral, regional, and global level. Stage C deals with bringing terrorists and their supporters to justice via the legislation and the executive machinery established in the earlier stages.

<sup>54</sup> Marjolein van Asselt and Ellen Vos, 'The Precautionary Principle and the Uncertainty Paradox', *Journal of Risk Research*, 9 (2006), pp. 313–36.

<sup>55</sup> James N. Rosenau, 'Governance, Order, and Change in World Politics', in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), pp. 1–29, at p. 4.

compliance strategies, seems to fit the governance agenda quite well.<sup>56</sup> Apart from the unprecedented rule-setting measures by the Security Council, the implementation of the UN counterterrorist strategy then represents an equalising move away from hierarchical modes of government, and an attempt at taming power relations by cooperating in the pursuit of a shared interest regarding a transnational problem. In this light, governance is conceived as rescuing the international community from 'sovereignty's worst instincts'.<sup>57</sup> At the same time, to the extent that governance pertains to a voluntary act of sovereign states to cooperate in common regimes to address transnational problems, it can be conceived as a reconfirmation of their sovereign status.<sup>58</sup> This indeed seems to come close to Beck's democratising and cosmopolitan vision of world risk society.

However, the preceding discussion of the changing nature of state responsibility within legal discourse suggests that something else is at stake, which pertains to the intricate relationship between politics and law, and the workings of sovereign equality as liberal foundation of the international society. In this regard non-compliance procedures supplement the age-old attempts of international law to create free, yet disciplined and responsible sovereigns. Proactive responsibility and compliance procedures then entail more than an increasing legalisation of international society in a liberal governance mode. Rather, the 'thickening' of the international realm involves a transformation of the logic of politics and the functioning of power itself in relation to member-states as subjects of international society.<sup>59</sup> Crucially, this functioning of power is not separate from the legal realm but part and parcel of the manifestation of sovereign subjectivity as it is embedded in international protocols and regimes of knowledge that empower states as actors in the international realm. This is the result of what Foucault identifies as productive power. In juxtaposition to the traditional conception of power as 'excluding', 'repressive', and 'censoring', Foucault emphasises its constitutive side: '[P]ower produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.'<sup>60</sup>

Crucially, productive power does not rely on a hierarchical and coercive domination of a ruler over its subjects, but derives from heterogeneous practices of

<sup>56</sup> Monika Heupel, 'Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism', *Security Dialogue*, 38 (2007), pp. 477–99; Monika Heupel, 'Combining Hierarchical and Soft Modes of Governance, The Un Security Council's Approach to Terrorism and Weapons of Mass Destruction Proliferation after 9/11', *Cooperation and Conflict*, 53 (2008), pp. 7–29.

<sup>57</sup> Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge: Cambridge University Press, 2005), p. 1.

<sup>58</sup> This was explicitly stated in the *Wimbledon Case* (1923), which dealt with the restriction of sovereign freedom due to treaty making. This, however, is not a forsaking of (the status of) sovereignty but rather part of its exercise, as the Permanent Court famously stated: 'No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign right of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty' (S. S. Wimbledon Case, PCIJ Series A, No.1, 1923, p. 25).

<sup>59</sup> Iver B. Neumann and Ole Jacob Sending, 'The International as Governmentality', *Millennium*, 35 (2007), pp. 677–701.

<sup>60</sup> Michel Foucault, *Discipline and Punish: The Birth of a Prison* (London: Allen Lane, 1977), p. 194; cf. Michel Foucault, 'Truth and Power', in Colin Gordon (ed.), *Power/Knowledge. Selected Interviews and Other Writings 1972–1977* (Brighton: Harvester Press, 1980), pp. 109–33, 119.

power within society. Thus productive power is characterised not by mechanisms of coercion or punishment, but typically works through self-government, rating, and ranking of performances, surveillance and control within a system of formal equality and autonomy. In the case of the CTC this pertains to assessment of performances of individual member-states in the execution of the UN anti-terror strategy within their jurisdiction in order to establish a community of responsible sovereigns. This is what Foucault refers to as governmentality, defined as the 'conduct of conduct', or 'the art of government': 'a form of activity aiming to shape, guide or affect the conduct of some person[s]' with the aim of the promotion of the common good.<sup>61</sup> Translated to the international society, it does not only consist of subjects with individual wishes and inspirations, but sovereign statehood concurrently is an object of government that needs to be ordered for the pursuit of common concerns. Also described as 'the right disposition of things ... to a convenient end'<sup>62</sup> governmentality at once entails a rationalisation of governance that can be conceived as a 'managerial activity': 'arranging things wisely in order to maximize outputs in specific fields of application'.<sup>63</sup>

With the *modus operandi* of governmentality being knowledge, examination, and control of subjects (rather than coercive power and punishment), law performs a different function within this regime of power. Whereas traditionally law is conceived in terms of rules of constraint within a formal juridical structure, a governmental perspective draws attention to its productive function.<sup>64</sup> Relating this double function of law to the institution of sovereignty it pinpoints beyond a traditional conception in terms of sovereign rights (of non-intervention, self-defence and non-intervention) *per se*, to the (productive) power of the Norm. This hence leads to an alternative reading of the notion of 'rights' and sovereignty as autonomy and freedom of manoeuvre. From a governmentality perspective the focus thus shifts from the agency, authority, and legitimacy that rights create, to mechanisms of subjectivation that are generated by a particular rights regime. Consequently, such a perspective discloses the interconnection between legal status and rights beyond the legal perspective of rights as a package deal or attribute to personality, to the impact of rights in constituting the very personality. Accordingly, it qualifies the common notion of sovereign individuality *qua* freedom and autonomy by addressing the production of legitimate forms of being (subjectivity) and responsibility instead.

Two issues follow from this. For one thing, distinguishing between the juridical system of the law, and the operation of law as a Norm beyond established judicial institutions,<sup>65</sup> law thus can be conceptualised as a tactic or technology of government, as a way of ordering things and people.<sup>66</sup> This functioning of law

<sup>61</sup> Colin Gordon, 'Governmental Rationality: An Introduction', in Graham Burchell et al., (eds), *The Foucault Effect. Studies in Governmentality* (University of Chicago Press, 1991), pp. 1–52, 2.

<sup>62</sup> Michel Foucault, 'Governmentality', in Graham Burchell et al., (eds), *The Foucault Effect. Studies in Governmentality* (University of Chicago Press, 1991), pp. 87–105, 94.

<sup>63</sup> Laura Zanotti, 'Governmentalizing the Post-Cold War International Regime: The Un Debate on Democratization and Good Governance', *Alternatives*, 30 (2005), pp. 461–87, 463.

<sup>64</sup> François Ewald, 'Norms, Discipline, and the Law', *Representations*, 30 (1990), pp. 138–61; Aalberts, *Constructing Sovereignty Between Politics and Law*.

<sup>65</sup> Michel Foucault, *The History of Sexuality. Volume I: An Introduction* (New York, 1979); Ewald, 'Norms, Discipline, and the Law'.

<sup>66</sup> Foucault, 'Governmentality', p. 95.



transpires clearly in the shift towards proactive forms of state responsibility and the compliance regime as discussed in the previous section. This relates to a second point: whereas subjectivity qualifies the liberal notion of absolute autonomy and freedom as the natural condition of individual beings, freedom, and agency are indeed a crucial condition for the working of governmentality. To put it differently, as a non-coercive form of power, productive power operates through the modality of freedom and agency, which is both an end and a means for governing: ‘Governing is performed *through* autonomous subjects, not *on* passive objects.’<sup>67</sup> Liberal governance can then be conceptualised as a particular governmental logic that operates by shaping and fostering autonomous and responsible individuals (states) for the protection of the (international) community through a collection of ‘governmental techniques’, including setting standards for appropriate, effective, and legitimate behaviour for individual subjects and examining their performances accordingly.

Thus, governmentality works towards the improvement of respective populations, as well as structuring their possible field of action’ in order to produce visible, responsible and predictable actors.<sup>68</sup> In terms of the preceding discussion on the legal link between sovereignty and responsibility, in governmental terms this hence pertains to the exercise of sovereign freedom in a responsible and disciplined fashion – ‘in order to act freely, the subject must first be shaped, guided and moulded into one capable of responsibly exercising that freedom’.<sup>69</sup> This shaping, guiding, and moulding is increasingly practiced through compliance regimes that reinforce the exercise of a sovereign status of autonomy and liberty through rational normalised conduct. Crucially, this entails a shift from State responsibility in terms of *ex post facto* attribution and reparation for wrongful behaviour, towards responsible behaving of individual subjects by taking precautions against possible future threats within world risk society. As executive body of the UN counterterror strategy the CTC has thus set clear standards what responsible exercise of sovereignty entails in this regard, and closely monitors member-states’ performances accordingly.

Moreover, from a governmental perspective this responsabilisation of sovereign subjectivity on the one hand constitutes states as capable actors that bear responsibility for their policy choices (for example, countering terrorist activities within their respective territories) and on the other hand projects them as objects of examination and regulation (for example, ranking their performances in terms of the UN anti-terror strategy) on the basis of their very identity as sovereign members of the international society. This is further exemplified in terms of the particular measures taken in case of under-performance. As opposed to traditional legal notions of state responsibility, within its compliance regime the CTC acknowledges differences in state capabilities. Rather than insisting on ‘reparations’ in case a state fails to live up to its obligations, the committee provides advice and technical assistance in order to enable states to better themselves and improving

<sup>67</sup> Ole Jacob Sending and Iver B. Neumann, ‘Governance to Governmentality: Analyzing NGOs, States, and Power’, *International Studies Quarterly*, 50 (2006), pp. 651–72, at 696. See also Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999).

<sup>68</sup> Neumann and Sending, ‘International as Governmentality’; and Zanotti, ‘Governmentalizing the Post-Cold War International Regime’, p. 471.

<sup>69</sup> Dean *Governmentality*, p. 165.

state capabilities. Thus the particular regime of government displayed by the CTC, focusing on sovereign equality of member-states, reinforces the responsabilisation of sovereignty. States are constituted as ethical actors responsible and deemed capable not only for safeguarding sovereign rights of fellow-states (as is key to the *Island of Palmas* ruling), and protecting their own citizens (as reflected in the Responsibility to Protect paradigm), but also for taking precautions against transnational terrorism within their jurisdiction. As part of a governmental project this responsabilisation of sovereignty hence enables the UN and the CTC in particular to direct individual states on the basis of their sovereign membership of the international society.

## Conclusion

How does the threat of global terrorism affect the nature and identity of sovereign states? According to some, global terrorism has turned the sovereign state into a 'zombie category' as it forces states to cooperate internationally and to give up their autonomy. Others have argued the opposite: global terrorism has reinforced state sovereignty as it has legitimised the adoption of exceptional policies such as preventative detention, anticipatory self-defence, or profiling of individuals. However, as this article has demonstrated, neither position is able to do justice to the nuanced relation between sovereignty, law, and international politics. Both positions assume that the relation between sovereignty and law – as well as the relation between sovereignty and international cooperation – is to be regarded as a zero-sum game: the more international cooperation and the more legal regulation, the less room for state sovereignty and *vice versa*.

This article has developed an alternative approach to state sovereignty. It took as its starting point the nexus between state sovereignty and international legal responsibility. Historically, the idea of state sovereignty has always been connected with the necessity to create disciplined subjects that know the relation between autonomy and the responsibility to respect the rights of others. In that sense, there is a strong continuity between 17th century attempts to contain warfare and 21st century attempts to protect human rights via the 'responsibility to protect'. Both build on the idea that sovereignty and autonomy comes with responsibilities.

Having said that, the article shows that the rise of global threats such as terrorism did have an impact on the way in which states are called to account in international society. While traditional rules of state responsibility were essentially backward-looking and confrontational, newer forms of accountability aim at international cooperation for the protection of common interests. A prime example is the CTC which aims at disciplining the legislative and executive machinery of the states worldwide via mechanisms such as reporting, monitoring, providing assistance, etc.

The CTC shapes the identities and behaviours of states via a particular governmental project of responsabilisation of sovereignty. In this regard the shift towards compliance regimes is illustrative of how law works as a governmental technology; the accountability of state now not only refers to reparation of wrongful behaviour in the past, but increasingly to taking precautions against an

uncertain future. Governance then works as a global system of indirect, productive power that operates to ‘guide, shape and foster’ specific types of states by setting up standards of behaviour for good membership of the international community (that is, as a republican project) with the ultimate aim the production of visible, responsible, and predictable agents. Responsibilisation of sovereignty and the shift to a legal compliance system thus fit within a global governance programme of international scrutiny that is aimed at rendering states visible and predictable actors of a normalised international arena, that exercise ‘their’ sovereignty in a responsible and disciplined manner. Within the era of global terrorism and other transnational risks, this responsibility is increasingly informed by taking precautions in order to protect the common good of international society.<sup>70</sup>

<sup>70</sup> Apart from specific threats (such as environmental, terrorist or financial risks), within liberal governance ‘common good’ increasingly also includes more abstract notions of the protection of the liberal world order and ‘our way of living’. See for instance Rita Abrahamsen, ‘Blair’s Africa: The Politics of Securitization and Fear’, *Alternatives*, 30 (2005), pp. 55–80; and Oded Löwenheim, ‘Examining the State: A Foucauldian Perspective on International “Governance Indicators”’, *Third World Quarterly*, 29 (2008), pp. 255–74.