

TRANSFORMING WESTPHALIAN SOVEREIGNTY: HUMAN RIGHTS & INTERNATIONAL JUSTICE AS A TRANSITIONAL CRUCIBLE

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I. INTRODUCTION

Sovereign excesses in the twentieth century resulted in the murder of approximately 170,000,000 persons by their sovereign.¹ This statistic, a potent testimony of sovereign excesses through gross and systematic human rights violations firmly places human rights and humanitarian problems on the international plane. This reality (identified and articulated in the Report of the Secretary General's High-level Panel on Threats, Challenges and Change)² firmly places human rights problems on the international plane and mandates a fundamental rethinking about the basis of sovereignty's political and associational organization in the new millennium.

Since the end of World War II, a body of international rights law has emerged that considers a government's treatment of its own citizens as a concern of international regulation instead of internal State prerogatives.³ "It is therefore inevitable that States would regard egregious violations of human rights as subject to individual criminal responsibility instead of only State liability."⁴ Lynn S. Bickley extrapolates and substantiates this point thus:

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¹ R J Rummel, *Death by Government* (1994) 9.

² *Report of the Secretary General's High-level Panel on Threats, Challenges and Change*, Executive Summary accessible at <http://www.un.org/secureworld/> (visited 20 December 2004).

³ See generally Myres S McDougal et al, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 313-32; Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms', (1995-1996) 25 *Georgia Journal of International & Comparative Law* 47, 75-80.

⁴ Lynn Sellers Bickley, 'U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?', (2000) 14 *Emory International Law Review* 213, 265.

Consistent with a sovereign responsibility to protect its citizens, the increasingly active role of the international community in human rights protection enhances rather than diminishes the notion of sovereignty. Although a nation sacrifices some sovereignty when it becomes a party to an international agreement, it also gains certain protections that broaden and enhance its sovereignty. The interdependence of the international community assists and fortifies sovereignty as the power of a nation to protect its citizens.⁵

Distinguished international law publicists recognise what they regard as the “inescapability of the concept of sovereignty as a quality of the State under present-day international law.”⁶

They also recognise it as a “fundamental principle of the law of nations.”⁷ However, even the strongest proponents of this positivist view of international law conditioned by sovereign States assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law.⁸

It follows then that rather than eliminating sovereignty as a political ideology, a more productive enterprise would be to refocus the discourse away from the traditional structural understanding of the term, which only serves to accentuate the level of discrepancy between the theological and the political definitions of the term and which ultimately leaves the false impression that absolute sovereignty is somehow realizable in the international political sphere.⁹ This refocus would constitute a shift toward a functional conception of sovereignty, wherein the purpose that State sovereignty would serve in any given situation would itself determine its limits.¹⁰ This discursive shift in emphasis toward a functional understanding of

⁵ Ibid 261.

⁶ Marek Stanislaw Korowicz, *Some Present Aspects of Sovereignty in International Law* (1961) 16-17; cf. Arthur Larson et al., *Sovereignty within the Law* (1965).

⁷ Ibid.

⁸ Surveys of the writings of diverse authors such as Korowicz, Larsen and Jenks indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny. Arthur Larson et al., *Sovereignty within the Law* (1965).

⁹ See Ivan Simonovic, ‘State Sovereignty and Globalization: Are Some States More Equal?’, (2000) 28 *Georgia Journal of International & Comparative Law* 381, 402 (arguing that because the history of the term “sovereignty” illustrates its elasticity and imperviousness to categorical definition, it should be able to adapt to the changes ushered in by globalization as well).

¹⁰ See generally, Post-lecture discussion between John H. Robinson and Jean Bethke Elshtain on Sovereign God, Sovereign State, Sovereign Self, (2 March 1991) in Jean Bethke Elshtain, ‘Sovereign God, Sovereign State, Sovereign Self’, (1991) 66 *Notre Dame Law Review* 1355, 1379-84.

sovereignty would facilitate recognition of sovereignty's "neglected counter-side: sovereignty is not only a claim of freedom from external interference, it is also the liberty to permit some kinds of external interference."¹¹ Sammons reinforces this position with his observation that:

Since global interdependence creates a functional necessity for transnational cooperation, this reformulation of sovereignty would suggest that in areas of law where the traditional Nation-State is deemed ill-equipped to regulate, deference to global governance would paradoxically bolster that state's sovereignty. This reformulation would replace the misguided structural balance between the empowering and limiting aspects of sovereignty, which posited international cooperation as a tolerable concession, with a functional understanding of sovereignty strengthened by cooperation.¹²

Brian F. Havel further argues that sovereignty now "expresses a reanimated sense of autonomy, it does so in the guise of a perfectly rational paradox: its existence also is defined by its capacity to be given away."¹³ He argues further that truly transnational concerns would no longer simply be tolerated derogations of sovereignty; rather, they would become emanations of that sovereignty."¹⁴ In sum, "under this reformulation, sovereignty would no longer exist in diametrical opposition to global denationalization."¹⁵

No longer is State conduct immune from international scrutiny, or even from sanction. Mechanisms are being created through which "sovereign" conduct is held accountable to international norms—without the ability simply to claim lack of continuing consent to those norms. This demonstrates that the nineteenth century notion of a second-tier social contract is no longer appropriate to the conduct of international relations.¹⁶ International criminal law runs directly to the individual.

¹¹ See Brian F Havel, 'The Constitution in an Era of Supranational Adjudication', (2000) 78 *North Carolina Law Review* 257, 327.

¹² John R Worth, 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-Signing" Of the Rome Statute and the Legacy of Senator Bricker', (2004) 79 *Indiana Law Journal* 245, 262.

¹³ See Havel, 'The Constitution in an Era of Supranational Adjudication', above note 11 at 328.

¹⁴ *Ibid* 330.

¹⁵ John R Worth, 'Globalization and the Myth of Absolute National Sovereignty', above note 12 at 262.

¹⁶ In terms of a Lockean, second-tier social contract, sovereignty treats the relationship among States in forming the international order as parallel to the relationship among citizens in forming the order that is the State. The

This Article has as its modest aim an examination and analysis of the role of the development of human rights and humanitarian norms in reshaping the content and contour of Westphalian sovereignty. In particular it seeks to espouse paradigms based on the impact of human rights and humanitarian norms through which sovereignty should be viewed and understood in contemporary times.

II. THE WORLD WARS: CHALLENGING WESTPHALIAN SOVEREIGNTY

World War I was a watershed conflagration. Apart from inaugurating total war, the end of the war saw an unsuccessful attempt to prise open the iron curtain of Westphalian sovereignty by individualising criminal responsibility for violations of the emerging law of war. The punishment provisions of the peace treaties of Versailles and Sevres sought to limit the scope of the principle of sovereign immunity by punishing military and civilian officials, while at the same time extending universal jurisdiction to cover war crimes and crimes against humanity.

In a dramatic break with the past, and in a bid to build a normative foundation of human dignity, the chaos and destruction of World War I gave rise to a yearning for peace and a popular backlash against impunity for atrocity. “The war provoked criticism by many of both the outrageous behaviour by a government towards its own citizens (Turkey) and aggression against other nations (Germany). Both types of atrocity evoked demands for increased respect for humanity and the maintenance of peace.”¹⁷ The devastation of the war provided a catalyst

internationalisation of the individual in the aftermath of World War II and his/her elevation from the subordinate status of an object of international law to a subject means that international law fractured the second-tier social contract structure by bringing first-tier social contract subjects directly into second-tier relationships and thus effectively placing the individual within the international legal framework.

¹⁷ Jackson N Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome* (2003) 33.

for the first serious attempt to crack the Westphalian notion of sovereignty. This dramatic new attitude was encapsulated in the enthusiasm for extending criminal jurisdiction over sovereign States (Germany and Turkey) with the aim of apprehension, trial and punishment of individuals guilty of committing atrocities through supranational trials.¹⁸

However the emerging commitment to human dignity was to be first derailed and then swept aside by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics. The “iron curtain” of Westphalian sovereignty was the primary objection advanced by both Germany and Turkey, against Allied calls for the establishment of supranational tribunals to try the officials and personnel of these countries implicated in wartime atrocities. Both nations in the light of these international efforts strongly advocated against such a move arguing that sovereignty over territory and authority over nationals, a sacrosanct principle of international law, was threatened if the proposed supranational tribunals proceeded.

The anticipated international penal process yielded to the demands of national sovereignty leading to sham national trials in Germany and Turkey after a major revision and scaling down of the defendant list in both countries. While the envisaged international efforts to secure international criminal liability failed to materialise, important principles were established. Firstly, the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties articulated crimes against humanity, and attempted to limit the previously solid conception of sovereign immunity that shielded Heads of State as well as officials from the reach of international law. Secondly, for the first time, the idea that the State did not hold exclusive criminal jurisdiction was challenged. Lastly, the recognition of

¹⁸ The peace treaties of Versailles and Sevres envisaged liability for individuals even if their crimes were

the need of international penal institutions to repress violations of international criminal law in the face of State recalcitrance questioned the State's exclusive right to legal competence over management of its affairs.

Subsequently, the German and Turkish regimes that gained power in the post-war era successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the domestic trials held in lieu of anticipated supranational trials. It was to take another round of State orchestrated carnage about two decades later to spur States into giving international criminal law life and vitality. The resultant economic and political chaos of World War II, reinforced by increasing moral disquiet over the idea that States had a right to go to war whenever they wanted to provided the basis for focusing on international accountability through penal process.

It was at Nuremberg (and later at Tokyo) that the iron curtain of sovereignty was dramatically drawn back. The post-World War II trials were designed to change the anarchic context in which nations and peoples of the world related to one another. The rejection of "obedience to superior orders", "acts of State" and "sovereign immunity" for the first time exposed the State to inquiry into its freedom of action and law-making competence.

The Nuremberg and Tokyo Trials are the visible symbol of the transition from the classical Westphalian system of State sovereignty to an international system based on the credo of "common interest" that took place in the middle of the last century. In a sense these trials represent the foundation of modern thinking about international law, with an emphasis on the maintenance of peace and the responsibility of the State and its officials to international

committed in the name of their States.

standards. The Nuremberg and Tokyo Trials of major war criminals were a landmark event in the development of international law. Besides infusing international law with fundamental moral principles in a manner not seen for centuries and giving birth to the modern international law of human rights, the trials also gave clear notice to the nations of the world that, henceforth, claims of absolute sovereignty must yield to the international community's claim on peace and justice.

Nuremberg and Tokyo marked a paradigmatic shift from the externalisation of domestic norms under the statist Westphalian system of sovereignty to an international system determined to increasingly internalise international norms within the national sphere. It was at these post-World War II trials that unabashed claims of national sovereignty, stimulated by the Nation-State system recognised at Westphalia, were subjected to the test of international standards and universalist claims for peace and the sanctity of human rights. At Nuremberg and later Tokyo, for the first time in history, individuals who had abused power in violation of international law were held to answer in international courts of law for crimes committed during war in the name of their State. The Nuremberg Judgment (echoed subsequently by the Tokyo judgment) clearly brought crimes against humanity from the realm of vague exhortation into the domain of positive international law spawning the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual State.

The World after Nuremberg & Tokyo: Common Values, Common Interests

The decision by the Allies at the end of World War II to try major war criminals for violations of international law was a turning point in modern history concerning the relationship

between individuals and international law.¹⁹ The lesson of Nuremberg, echoed at Tokyo, was that never again would atrocities in war or peace be carried out with impunity and that the world was determined to bring to accountability individuals who carried out massive and heinous atrocities against other warring parties and civilians. The Nuremberg tribunal was not merely to establish plainly and forcefully that the rules of public international law should and do apply to individuals; it was also intended to demonstrate that the protection of human rights was too important a matter to be left entirely to States, a proposition that was earlier enshrined in the Preamble and Article 55 of the UN Charter.²⁰

The post-World War II trials were a pivotal event in international law. In some ways they marked a return to venerable doctrines of natural justice that had fallen into disuse and disfavour with the rise of legal positivism starting in the eighteenth century. Naturalistic doctrines were resurrected and infused into the new thought and philosophy that was behind the decision to hold the trials. The belief in natural law helped to ensure that the tribunals would apply international law in the interests of fundamental moral values. This reversed the nineteenth century trend—the heyday of legal positivism—during which natural law lost much ground as positivism gained sway and infused international law with the agenda of maximising State sovereignty and cutting back concerns with following any fundamental precepts of morality.

The significance of the post-World War II trials is captured by Justice Robert H Jackson, Chief Prosecutor at Nuremberg. Writing in 1949, he described the Nuremberg international

¹⁹ M W Janis, *An Introduction to International Law* (1993) 246.

²⁰ The *UN Charter* was signed on 26 June 1945 (and entered into force on 24 October 1945). Shortly after the San Francisco Conference which gave birth to the UN, representatives of the four Major Allied Powers (Great Britain, France, the USSR and the US) met in London on 26 June 1945 to negotiate on the law and procedures according to which the Nazi leaders ought to be prosecuted, tried and punished resulting in the adoption of the *Nuremberg Charter* on 8 August 1945.

trials as the twentieth century's most "definite challenge" to the "anarchic concepts of the law of nations."²¹ He argued that Nuremberg was the first step towards limiting the unfettered discretion of sovereign States to resort to armed force.²² Government officials could no longer credibly claim legal immunity based upon the act of State and superior orders defences.²³ Jackson noted that international institutions were so undeveloped and moribund that, absent the Nuremberg trial, it is unlikely that these "catastrophic doctrines" would have been challenged and modified.²⁴

Internationalisation of the Individual

The concept that international law should take into account the rights and duties of individuals was not a position generally accepted as a part of international law immediately prior to the post-World War II international trials. At that time, international law dealt with the rights and duties of States and applied only to interactions and conflicts among States.²⁵ There is, however, evidence that individual rights were a concern of international law in the eighteenth century,²⁶ but this interest faded in the nineteenth and twentieth centuries as the statist concept of international law driven by positivist doctrines gained popularity.

The post-World War II international trials revived the commitment to protect individual rights infusing international law with naturalistic doctrines that had earlier been eclipsed. It was primarily normative concerns that reintroduced and reinforced naturalistic doctrines into

²¹ Robert H Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness', (1949) 35 *American Bar Association Journal* 813.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid* 813-814.

²⁵ American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States* (1986) Part III at 144-45 (Introductory Note).

²⁶ See generally Louis B Sohn, 'The New International Law: Protection of the Rights of the Individual Rather Than States', (1982) 32 *American University Law Review* 12 (tracing the concerns of international law with the rights of the individual from Nuremberg through 1982).

international law. Individuals suffered horribly at the hands of the Axis war machine, and the Allies resolved to include serious violations of human dignity as crimes in the Tribunals' jurisdiction. The international trials cast in stone the important principle that if individuals are directly subject to international legal obligations, they are also directly entitled to international legal rights. This principle was implied in the post-World War II international trials in two ways. First, the victim had rights that international law could protect collectively through criminal law. Second, in the same manner that the rights of individuals would henceforth be a concern of international law, the conduct of individuals under the colour of official State action would no longer be immune from the reach of international law. In holding that individuals have obligations under international law which are over and above the obligations to the sovereign States of Germany and Japan, the post-World War II international trials pierced the Westphalian veil of sovereignty by directly challenging and trumping the dictates of national law.

The message was clear; those who authorised and committed crimes against peace, war crimes and other humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct. To hold the perpetrators of these proscribed forms of conduct accountable signifies that terrible things cannot be done to people without a resulting meaningful international sense of responsibility. This infusion of morals and concern for individual rights into international law launched the modern doctrine of international human rights law.

By establishing individual accountability for violations of international law, the Nuremberg and Tokyo judgments explicitly rejected the argument that State sovereignty was an acceptable defence for unconscionable violations of international criminal law. The

previously conflicting demands of sovereignty and global order that crippled the post-World War I attempts at international penal process were overcome by the viability of individual accountability. Henceforth, citizens were firmly a concern of international regulation instead of internal State prerogatives, and the State's law-making competence in certain aspects was to be limited by the requirements of international law.

Externalising the State and its Sovereignty

The post-World War II international trials impacted the State in two ways. Firstly, the right of the State to act was challenged through the "crimes against humanity" and the "crimes against peace" counts, alluding to a limitation in the law-making competence of the State. The crimes against humanity count reached behind the iron curtain of Westphalian sovereignty and held that individuals have international human rights which State action cannot jeopardise and that State authorisation provides no cover for individuals who violate the human rights of others. The violations committed by these individuals are punishable under international law. This principle is the explicit recognition that a nation's sovereignty is limited by the demands of international law.

Secondly Nuremberg and Tokyo represented practical manifestations of the authority of the international community under international law to question, assess and pass judgment on the internal activities and laws of the State. In holding that the local municipal law of the sovereign States of Germany and Japan provided no cover for individuals who had violated international rules governing the conduct of warfare, the post-World War II international trials upheld the notion that a State was bound by international law even when its government had chosen not to be so bound.

If we view the operational state of international criminal law as constitutionally allocated to sovereign States by custom, practice and treaty law, then the post-World War II international trials were an important constitutional allocation of competence to the international community and away from the sovereign Nation-State. This is the accurate juridical position which Nuremberg (and Tokyo) occupy in the global constitutive process. The Nuremberg tribunal confronted the dualism between sovereign versus personal responsibility directly: “[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.”²⁷

Supranational Jurisdiction for International Law Violations

Universal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with, either the crime, the alleged offender, or the victim. This doctrine limits the reach of national sovereignty while extending the reach of international law. Courts developed this doctrine centuries ago to address piracy and later extended it to cover slave trading.²⁸ The pirate and slave trader were deemed *hostis generis humanis*—the enemy of all people. “Until the 1920s the practice of States, both with respect to the power to prescribe and the power to enforce, preserved the connection between State sovereignty in its territorial context and the judicial exercise of national criminal jurisdiction.”²⁹ The progressive trends in certain judicial opinions as well as legal writings in the interwar period buoyed by post-World War I efforts at international criminal accountability contributed in paving the way for the Nuremberg and Tokyo tribunals to

²⁷ See Katherine B Fite, *The Nurnberg Judgment, A Summary* (1947) 110-11.

²⁸ For a concise, detailed discussion of the history of universal jurisdiction and its contemporary practice, see M Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *Virginia Journal of International Law* 81.

²⁹ *Ibid* 92.

extend universal jurisdiction to cover several offences other than piracy and slave trading. The doctrine was expanded to include crimes against peace, war crimes and crimes against humanity.

Until Nuremberg and Tokyo, it was only national courts that would prosecute criminals for crimes committed in a particular country provided that there existed either a territorial or nationality nexus. This concept was first by-passed at Nuremberg when it obliterated traditional aspects of national sovereignty in its approach towards crimes against peace and war crimes when it articulated for the first time the concept of crimes against humanity.

Universal jurisdiction together with the post-World War II international trials' multilateral recognition of international human rights extending beyond the borders of individual countries pointed to the need for supranational judicial process to implement international law particularly where leaders with immense military and political power are involved in international law violations. Enforcement of international criminal law at the post-World War II international trials was the first modern international adjudication of crimes extending beyond the reach of a national sovereign in modern times.

The post-World War II international trials constituted an unprecedented inroad into the great barrier of sovereignty—exclusive territorial and national jurisdiction—and set a lasting precedent in relation to the extension of international criminal jurisdiction beyond national frontiers. This was previously an impossibility in view of the iron curtain cast by the Westphalian notion of sovereignty. The mantle of legal protection against the worst forms of violent abuse was to be a central feature in the drive to clip State sovereignty, by subjecting the State to external restraints and controls.

III. THE COLD WAR: CHECKING THE ADVANCES IN CURTAILING WESTPHALIAN SOVEREIGNTY?

The “*internationalisation*” of the legal status of the human being became one of the most prominent features of the post-World War II period after the Nazi and fascist violations of elementary human rights.³⁰ From an international law perspective, the idea that individuals could be directly responsible under international law subverted a cardinal tenet of the positivist conception of international law—that it is a law of sovereign States for sovereign States. The law of both the Nuremberg and Tokyo Charters and the manner in which the judges applied it was in opposition to the general nationalistic, statist, and positivist philosophies generally ascendant in the nineteenth to early twentieth century period. This stance however had the positive effect of reinvigorating international law with revolutionary principles—principles such as individual criminal responsibility and limitation of the sovereign State’s law-making competence. These fundamental principles were a signal for the future course of sovereignty vis-à-vis international law.

The post-World War II era was a period in which the freedom and independence of the State in law-making was subjected to limitations by international law in respect of certain international interests. What had been unthinkable before World War II became commonplace. The dozens of human rights and humanitarian instruments adopted after the post-World War II trials are based on the premise that sovereign States are not free to abuse their own citizens with impunity. The instruments are designed to secure adherence to the international human rights recognised at the post World War II international trials. Besides demonstrating that legal values arising from international law impose obligations directly on

³⁰ See Professor Bedjaoui’s general introduction in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 13.

the State, these instruments are a sign that the citizen is not subject only to the dictates of the national sovereign but a subject of the dictates of international law as well.

Even as international human rights and humanitarian law instruments marked the important steps by the international law to limit sovereignty, the Cold War was to tie the issue of sovereignty to ideological and revolutionary agendas. The world experienced the third struggle for hegemonic domination of the twentieth century hot on the heels of the conclusion of the second. The USSR increasingly saw the notion of “restriction of sovereignty” and the conceptions of “common interest” and “common good” as nothing more than a diplomatic screen hiding the avaricious and predatory aims of Western imperialist Powers.³¹ Coupled with this stance by one of the world’s only two superpowers was the outcome of the decolonization and self-determination process which saw a radical increase in internationally recognised claims to national State sovereignty. Vast numbers of newly independent sovereign States were weak in terms of national integration and foreign relations. This led to widespread reification of sovereignty in the vast numbers of newly independent States, justified under the internal affairs domestic jurisdiction clause of the UN Charter.³² These States sought to claim widespread immunity from international duties and obligations (especially in the human rights sphere) and expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony. The net effect of these factors was to strengthen sovereignty considerations as the UN became a ground for cultivating the agenda of nationalism brought to the fore with the appearance of the “Third World” as a force in the years after World War II.

³¹ See, e.g., I E Korovin, ‘Respect for Sovereignty: An Unchanging Principle of Soviet Foreign Policy’ (1956) *International Affairs* (Moscow) 11, 32, 37-9.

³² *UN Charter*, art 2(7).

With sovereignty viewed as a vital element of global international society, the power politics of the Cold War era served to curtail the expected benefits from the limitation of sovereignty articulated at the post-World War II trials. Consequently, an increasingly evident contradiction in the Cold War appeared. International law continued to pursue its original, and still topical, ambition which is to regulate the relations between States in their international dimensions while at the same time tending more and more to defer to the municipal dimension of States and their domestic affairs. The interpenetration between international dimensions and national aspects in inter-State relations, against a background of rivalries in a divided world, was a feature of the Cold War that threatened to expand and strengthen State sovereignty, which had undergone a major battering at Nuremberg and Tokyo.

The Cold War largely put an end to the spurt of international judicial activity inaugurated at Nuremberg and Tokyo and contributed to the preservation of a statist international order. Many States were reluctant to enthusiastically embrace any form of international penal process and displayed a great deal of ambivalence in the normal conduct of their foreign affairs. Though a series of conflicts in the Cold War era set the arena for violations of international criminal law, the lack of a systematic international enforcement regime contributed to the lack of respect for the legitimacy of the international justice and even to a degree of cynicism about it. With lack of State cooperation, the blood-soaked Cold War era was characterised by impunity. The ad hoc international criminal tribunals in the 1990s represented an international effort to put in place an international enforcement regime, the lack of which had helped ensure impunity during the Cold War era. The war crimes and crimes against humanity counts at Nuremberg were the forerunners at the heart of the United Nations Security resolutions of the 1990s which created the two ad hoc international criminal tribunals.

IV. POST-COLD WAR: OLD SOVEREIGNTY, NEW SOVEREIGNTY-INTERNATIONAL JUSTICE AS A TRANSITIONAL CRUCIBLE

The creation of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda raised questions concerning the appropriate relationship between these international ad hoc penal institutions and national courts. This is in view of the fact that traditionally sovereignty over territory and authority over nationals are two of the most basic aspects of statehood, and therefore the territorial and nationality principles are more fundamental than other competing principles of jurisdiction. While the statutes of the ad hoc international criminal tribunals recognise that national courts have concurrent jurisdiction, they clearly assert the primacy of the international tribunals, an extraordinary jurisdictional development. Though States, by definition, have international independence, “combined with the right and power of regulating [their] internal affairs without foreign dictation,”³³ the weakening of its denotation of full and unchallengeable power over territory and all the persons therein, is illustrated by the establishment of the two ad hoc international criminal tribunals. It was not lost on the international community that concessions to the ideals of international justice were necessary to create effective international mechanisms necessitating trumping the wishes of many States insisting upon preserving the totality of their sovereign prerogatives.

The new balance achieved between the jurisdiction of national courts and that of the ad hoc international criminal tribunals marks the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign State. Though the Security Council created each of the two existing international criminal tribunals ad hoc as an extraordinary response to a specific and narrowly defined threat to international peace and security, to enable them to address these threats, it granted them unprecedented primacy over

³³ *Black's Law Dictionary* (abridged 6th ed, 1993) 971.

the jurisdiction of all national courts. The practice and application of primacy, both in the ICTFY and the ICTR, foreshadowed the political and legal disputes over the creation of a permanent International Criminal Court (ICC) and the possible contours of its jurisdiction during the Rome Diplomatic Conference.

The dilemma of building agreement among State Parties without diluting core principles essential to an effective international penal regime coloured the Rome conference.³⁴ The process of making the Rome Statute was a battleground for supra-national and inter-national regimes. The challenge was the need for a trade-off between achieving consistency and building consensus. This was arguably more pronounced in part because the State was being called upon to reconfigure certain key aspects of its domestic jurisdiction as well as state-crafted inter-national regimes in favour of a functioning international regime.³⁵ Consultations, consensus and compromise were at the heart of the Statute making process.³⁶

The Rome Statute embodies a carefully crafted compromise between a State-centred idea of jurisdiction, and a more inclusive international vision. The State-centred idea, in its extreme manifestation, would uphold a State's exclusive jurisdiction to prosecute and try its own

³⁴ Chimene Keitner, 'Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)', (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 215, 271.

³⁵ Ibid 215.

³⁶ In the articulate encapsulation of this triad, Professor M Plachta states:

Triple 'C' was a dominant tone at the Conference. Consultations-Consensus-Compromise describes both the organisational framework and the tools that were adopted at the Conference. While the first element is procedure-oriented, the last two are result-oriented, with one important distinction between them. The second component sets the threshold, whereas the third determines the contents of the final result. The first two elements out of this triad facilitate and encourage achieving the last one. That compromise will be a matter of 'life and death' became apparent at the very beginning of the Conference, when the delegates started presenting their positions specified in instructions from their capitals.

Michael Plachta, 'Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law' (1999) 5 *UC Davis Journal of International Law and Policy* 181, 186-187.

citizens for war crimes, genocide, and crimes against humanity, and to prosecute and try citizens of other States who commit such acts on the territory of the forum State. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any State acting on behalf of humanity as a whole. The ICC follows a middle path. The Rome Statute assigns primary jurisdiction to the ICC's Member States. However, in ratifying the Rome Statute and becoming members of the ICC, States agree that, if they are unwilling or unable to carry out their obligation to investigate and prosecute these crimes, the ICC has "complementary" jurisdiction to do so in their stead.

The ICC will provide an indispensable backup to national jurisdictions in deterring, investigating, and prosecuting serious international crimes. The momentum behind the ICC testifies to the increasing realization by countries that international norms may require international enforcement mechanisms, especially where individual perpetrators beyond the reach of their own domestic courts are concerned. The frequent observation that an individual who commits one murder may face life imprisonment, but another who murders thousands may enjoy impunity, has driven efforts to rectify this incongruity, especially insofar as it constitutes a by-product of an international system of sovereign States.³⁷ The ICC will provide important incentives and support for domestic efforts in future cases, and it will eliminate the need to create additional ad hoc international tribunals when domestic legal systems lack the will or ability to investigate and prosecute these crimes themselves.

³⁷ Signing, ratifying, and implementing the ICC provides States with an opportunity to review their existing criminal procedures, and to ensure that these comport with international standards such as those relating to due process, the protection of victims and witnesses, and jurisdiction over internationally recognised crimes.

In sum, some see the Court as a monster arguing that: “If allowed to stand—and to thrive and grow, as its champions intend—this Court will sound the death knell for national sovereignty, and for the freedoms associated with limited, constitutional government.”³⁸ But there are those on the extreme end who feel that sovereignty is an outmoded concept and should be discarded, dismissing the whole notion of sovereignty as a false idea and suggesting that for legal purposes, we might do well to relegate the term to the shelf of history as a relic from an earlier era.³⁹

Overall, the author contends that the continued relevance of sovereignty should be balanced against reality. Though State sovereignty is still a cornerstone of international law it should not be seen as the bulwark from which State prerogatives are defended from foreign infringement, even when this “infringement” aims to secure the rights of individuals and entities within the domestic sphere.⁴⁰ World War II exposed the hazards inherent in an international system founded upon absolute sovereignty.⁴¹ The lessons derived from limiting sovereignty as seen in the UN response to human rights violations in the former Yugoslavia and Rwanda provided the impetus for the international community to establish the ICC to prevent recurrence of such atrocities. Those sovereign rights forfeited through submission to the jurisdiction of the ICC are regained by the protection it provides.⁴²

³⁸ William F Jasper, ‘Courting Global Tyranny’, 14 *The New American* No 189 (August 1998) 10.

³⁹ J L Brierly, *The Law of Nations* (6th ed, Waldock 1963) 54-5; Louis Henkin et al, *International Law: Cases and Materials* (3rd ed, 1993) 16.

⁴⁰ The United Nations itself is based “on the principle of the sovereign equality of all its Members.” *UN Charter*, art 2(1). One of the fundamental purposes of the UN is to protect the territorial integrity and political independence of Member States. See *UN Charter*, art 2(4) (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”).

⁴¹ See Winston P Nagan, ‘Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia’, (1995) 6 *Duke Journal of Comparative & International Law* 127, 149 (noting that the notions of absolute sovereignty were overruled by Nuremberg).

⁴² Rupa Bhattacharyya, ‘Establishing a Rule-of-Law International Criminal Justice System’, (1996) 31 *Texas Journal of International Law* 57, 75 (suggesting the International Criminal Court would function as a deterrent against actions that most likely would threaten national security); Jules Deschenes, ‘Toward International Criminal Justice’, (1994) 5 *Criminal Law Forum* 249, 253 (arguing that opposition to the International Criminal

V. AN AGEING IDEOLOGY FACING A NEW, YOUTHFUL REALITY

Sovereignty has several basic difficulties—some of a conceptual and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous.⁴³ All too often though, the sovereignty doctrine is an “impenetrably rigid juridical artefact as States incant the ritual of brooking no interference with their internal affairs.”⁴⁴ The constitutional position of the extant ad hoc international criminal tribunals as well as the international criminal court is instructive. The common interest of sovereign entities is better protected when exclusive parochial interests of reified sovereignty are bypassed in the interests of mankind. The basis for this is through mapping and locating sovereignty more precisely within the context of global power and constitutive processes.

Professor Nagan postulates that:

To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates. We need more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield, a clearer perception of the common and special interest it sometimes seeks to promote, protect or compromise, and a clearer delineation of its precise role in the constitutional order and promise of the UN Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes.⁴⁵

Since the end of the Cold War, international law has come to recognise the permissibility of intervention in circumstances other than in response to a nation’s external acts of aggression. This growth has focused primarily on the violation of basic human rights norms as a basis for intervention. Current consensus indicates that a State’s violation of its citizens’ most basic rights may permit intervention into its affairs. Indeed, “international law today recognises, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of

Court is mainly the result of some officials’ concerns about being prosecuted for their actions that threaten their subject’s security).

⁴³ Operational constitutions often exhibit the characteristics of being reified and porous at the same time.

military measures authorised by the Security Council for the purpose of remedying serious human rights violations.”⁴⁶

State sovereignty, which for centuries was conceptualised as “the absolute power of the State to rule,”⁴⁷ has become delimited by recognition that the State may be responsible for its breach of certain international obligations. Among these obligations, a State must provide for the general safety of the human person and may not permit widespread human rights violations against its citizens, such as the commission of genocide, crimes against humanity, slavery, and apartheid.⁴⁸ Though State responsibility and individual criminal responsibility are separate concepts under international law,⁴⁹ a State that undertakes the prosecution of a foreign citizen for crimes committed in a foreign State assumes that State’s domestic jurisdiction. In this regard, the author concurs with Anthony Sammons postulation that:

...the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the State of the perpetrator’s nationality, or of the crime’s commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.⁵⁰

Sammons postulation is especially relevant in view of the fact that classical Westphalian sovereignty hinders the development of a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviour that requires effective international community intervention. Further elaboration of Sammon’s view is encapsulated in Professor Nagan’s concise observation that:

⁴⁴ Nagan, ‘Strengthening Humanitarian Law’, above note 41 at 137.

⁴⁵ Ibid 146.

⁴⁶ Fernando R Tesón, ‘Changing Perceptions of Domestic Jurisdiction and Intervention’ in Tom Farer ed, *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (1996) 29.

⁴⁷ Kriangsak Kittichaisaree, *International Criminal Law* (2001) 5.

⁴⁸ Ibid 7 (citing art 19, §3(c) of the Draft Articles on State Responsibility).

⁴⁹ Ibid 9.

⁵⁰ Anthony Sammons, ‘The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts’, (2003) 21 *Berkeley Journal of International Law* 111, 115.

From an operational perspective, the practical question generally has been how far a State may go in establishing the external reach of its criminal jurisdiction under international law. The phrase “under international law” suggests some accommodating prudential limit of the reach of a state’s competence from the perspective of other States whose interest may be compromised when a State allocates for itself the right to try the nationals of other States under its own criminal justice standards.⁵¹

The destructive impact of massive and systematic human rights violations impinges directly on important world order values which no State has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, then effective policing is required from local to global levels in the name of the world community as a whole.⁵² A complete denial of the principles of human rights and humanitarian law, especially when grave breaches of that law are involved represents a rejection of fundamental human rights precepts and may point to an alternative normative order that essentially disparages the precept of human dignity.

Professor Harold Laski notes that, “[s]overeignty, in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing.”⁵³ The “oneness” of humanity was to be found through the pervasive unity of God (*jus divinum*) in the *Respublica Christiana*.⁵⁴ Like Hobbes’ later focus on the delegation of individual authority to the State, medieval notions of sovereign power included limitations—based on abstract moral rights.⁵⁵ Thus, there were bounds beyond which the sovereign could not pass in its relations with the individual, and individual rights which were not alienable to the sovereign. The replacement of the *Respublica Christiana* by the State meant that the significance of nationality became

⁵¹ Nagan, ‘Strengthening Humanitarian Law’, above note 41 at 137.

⁵² *Ibid* 145-46.

⁵³ Harold J Laski, *The Foundations of Sovereignty and Other Essays* (1921) 1.

⁵⁴ *Ibid* 2; see Helmut Steinberger, ‘Sovereignty’, 10 *Encyclopedia of Public International Law* 397, 398 - 400 (1987) (discussing *Universitas Christiana*).

⁵⁵ See Thomas Hobbes, *Leviathan* (E Curley ed, 1994) xiii [3]-[4].

paramount. The protection and welfare of the citizenry was entrusted to the State.⁵⁶ With the dawn of international human rights, the State's treatment of its citizenry was specifically constrained through international law.

Though sovereignty in the external or international context continues to be strong, it is not as absolute as its definition suggests.⁵⁷ No State, however powerful, has been able to shield its affairs completely from external influence.⁵⁸ "Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations."⁵⁹ These limitations often result from the need to balance the recognised rights of sovereign nations against the greater need for international justice.⁶⁰

Since one of the main roles of a sovereign State is to provide security and protection for its own people,⁶¹ the author argues that a State forfeits its sovereignty when its actions are universally condemned.⁶² From a legal perspective, each instance of enforcement serves to legitimise norms of international criminal law. These norms reflect a collective judgment by all countries that certain acts are by their very nature criminal. The enforcement of criminal

⁵⁶ Laski, *The Foundations of Sovereignty*, above note 53 at 15. The evolution of sovereignty replaced concepts of a "universal ethical right," with the idea that the state makes, interprets and applies its own laws. Jean Bodin's *De la Republique* reflected this evolution, with its sanction of absolute sovereignty resting in the State. "Jus est quod jussum est" became the "essence of the State."

⁵⁷ See Sandra L Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections', (1995) 23 *Denver Journal of International Law* 419, 432 (asserting that notion of absolute sovereignty is "no longer tenable"); see also W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', (1990) 84 *American Journal of International Law* 866, 866-69.

⁵⁸ See J L Brierly, *The Law of Nations* (4th ed, 1949) 48-50 (finding problems with implication that sovereignty exempts states from being subject to international law).

⁵⁹ See Ronald A Brand, *External Sovereignty and International Law*, (1995) 18 *Fordham International Law Journal* 1685, 1695.

⁶⁰ Patricia A McKeon, 'An International Criminal Court: Balancing The Principle Of Sovereignty Against The Demands For International Justice', (1997) 12 *Saint John's Journal of Legal Commentary* 535, 541.

⁶¹ See Brand, 'External Sovereignty and International Law', above note 59 at 1696 (describing sovereign state's obligation to protect and provide security for its citizens).

law is innately tied to a nation's sovereignty and it can be argued that by enforcing international criminal law governments are not ceding sovereignty but instead are exercising sovereignty.

... if the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so.⁶³

When governments exercise their sovereignty by recognising and enforcing international criminal law they reinforce and bolster a universal standard of international criminal law. This may prove a difficult adjustment for political processes still entrenched in dual social contract relationships of yester centuries but developments of the twentieth century properly recognised emerging new trends in an understanding and location of sovereignty. This understanding of sovereignty rejects approaching relations between sovereigns in terms of a Lockean, second-tier social contract.⁶⁴ This two-tiered notion of sovereignty treats the relationship among States in forming the international order as parallel to the relationship among citizens in forming the order that is the State. In this way, it obscures important aspects of the relationship between the citizen and the State, and obstructs the proper functioning of that relationship on the international plane.

The internationalisation of the individual in the aftermath of World War II and his/her elevation from the subordinate status of an object of international law to a subject means that

⁶² See generally Michael Ross Fowler & Julie Marie Bunck, *Law Power, and the Sovereign State* (1995).41-45 (explaining that sovereign state's failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

⁶³ Brand, 'External Sovereignty and International Law', above note 59 at 1696.

⁶⁴ See, e.g., Richard B Bilder, Perspectives on Sovereignty in the Current Context: An American Viewpoint, (1994) 20 *Canada-United States Law Journal* 9 (1994); Richard Falk, 'Evasions of Sovereignty' in R B J Walker & S H Mendlovitz eds, *Contending Sovereignties: Redefining Political Community* (1990); Louis

international law fractured the second-tier social contract structure by bringing first-tier social contract subjects directly into second-tier relationships and thus effectively placing the individual within the international legal framework.⁶⁵ If international law is to be contemporary in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the State for purposes of defining sovereignty in both national (internal) and international (external) relations. In place of a social contract of States, this redefinition of sovereignty recognises that international law has developed direct links between the individual and international law. Consequently, an active role on the part of the international community in promoting human rights and humanitarian norms is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty.⁶⁶ Patricia A. McKeon notes that:

Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself with the aid of the international community only enhances this objective.⁶⁷

McKeon's observation is echoed and amplified by the Report of the Secretary General's High-level Panel on Threats, Challenges and Change. The Report firstly endorses the emerging norm of a *responsibility to protect* civilians from large-scale violence—a

Henkin, 'The Mythology of Sovereignty', reprinted in Notes from the President, ASIL Newsletter, March-May 1993 at 1.

⁶⁵ Brand, 'External Sovereignty and International Law', above note 59 at 1693.

⁶⁶ See Magdalena M. Martin Martinez, *National Sovereignty and International Organizations* (1996) 66; see also Nancy Arniston, 'International Law and Non- Intervention: When Do Humanitarian Concerns Supersede Sovereignty?', (1993) 17 *Fletcher Forum for World Affairs* 199, 207 (1993); Ravi Mahalingam, 'The Compatibility of the Principles of Non-Intervention with the Right of Humanitarian Intervention', 1 *UCLA Journal of International & Foreign Affairs* 221, 253 (1996) (pointing out consistency between sovereignty and international protection of human rights).

⁶⁷ McKeon, 'An International Criminal Court', above note 60 at 542-43. See Benjamin B Ferencz, 'An International Criminal Code & Court: Where They Stand and Where They're Going', (1992) 30 *Columbia Journal of International Law* 375, 391-92.

responsibility that is held, first and foremost, by national authorities.⁶⁸ It however, goes on to note that:

When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure—and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.⁶⁹

Support for the Report is found in the reality that the UN Charter is part of a world constitutional instrument and hence the formal basis of an international rule of law. One of the Charter's primary purposes is to constrain sovereign behaviours inconsistent with its key precepts. Professor Nagan notes that: "The term 'sovereignty' in the UN Charter is most visible in the context of sovereign equality."⁷⁰ However he goes on to observe that: "Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2(7) uses the term 'domestic jurisdiction' as a precept that seems intentionally less inclusive than the term 'sovereign' suggests."⁷¹ This particular interpretation provides the basis for the author to contend that it seeks to demonstrate de-linkage of the external nature of sovereignty from its internal contours and thus shed the all-encompassing conception that is frequently and regularly attributed to Westphalian sovereignty. "Commentaries that disregard State sovereignty as an eradicable hindrance to denationalization fail to recognise the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects."⁷²

⁶⁸ *Report of the Secretary General's High-level Panel on Threats, Challenges and Change*, Executive Summary accessible at <http://www.un.org/secureworld/>.

⁶⁹ *Ibid.*

⁷⁰ Nagan, 'Strengthening Humanitarian Law', above note 41 at 146.

⁷¹ *Ibid.*

⁷² Worth, 'Globalization and The Myth of Absolute National Sovereignty', above note 12 at 261.

Recent international legal theory supports the view of sovereignty as an “allocation of decision-making authority between national and international legal regimes.”⁷³ A State’s total “bundle” of sovereign rights remains extensive, as sovereignty remains the pre-emptive international norm. However, the international legal regime obligates all States to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a State must meet continuously in order to maintain legitimacy under the international system. Elaborating on this new sovereignty reconceptualisation, Kurt Mills asserts that:

[A State’s] rights and obligations come into play when a State, or at least certain actions of a State, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a State violates human rights or cannot meet its obligations vis-à-vis its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the State in favour [sic] of the sovereignty of individuals and groups.⁷⁴

The import of the assertion above is that when a State instigates or acquiesces in the commission of serious violations of international human rights and humanitarian norms, it exceeds its allocation of authority as a matter of law. This position recognises that a State’s sovereign rights with regard to the internal treatment of its population are not absolute and, by implication, States are subject to international oversight. International law places conditions on a State’s sovereign right to non-interference to the extent the State must meet its human rights obligations or face intervention or trial of its nationals by foreign tribunals.⁷⁵

The recognition of sovereignty as a bounded legal norm leads to the further conclusion that sovereignty is not static within a nation, but is transferable. Sovereignty is dynamic and fluid,

⁷³ Gregory H Fox, ‘New Approaches to International Human Rights’ in Sohail H Hashmi, *State Sovereignty: Change and Persistence in International Relations* (1997) 107.

⁷⁴ Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (1998) 163-64.

flowing at times from one country to another by some event of political restructuring within the international community of States. If sovereignty can pass from one State to another, it conceivably can flow from a State to the international community, or vice versa. When a State exceeds its authority through commission of human rights violations, the State cedes its sovereign right to non-interference.⁷⁶ It cannot exclude other States acting collectively on behalf of the international community.⁷⁷ The future development of international law, which includes an international criminal court hinges upon the continuing evolution of this rationale.⁷⁸ Whatever sovereign rights are forfeited by submitting to the jurisdiction of international penal process are regained by the protection it provides.⁷⁹ Thus, the evolution of sovereignty and the increasing need for international justice have now converged.

VI. CONCLUSION

It is incontrovertible that the traditional Westphalian notions of the independent State and sovereignty have changed irrevocably particularly in the course of the twentieth century. The traditional notion of national sovereignty has been eroded to a large extent through the development of the concept of international penal process. The international community throughout the twentieth century has grappled with the problem that national sovereignty

⁷⁵ Sammons, 'The "Under-Theorization" of Universal Jurisdiction', above note 50 at 121-122; Steven R Ratner & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 176 (2nd ed, 2001)

⁷⁶ Sammons, *ibid* 122.

⁷⁷ See Friedrich Kratochwil, 'Sovereignty as Dominion: Is There a Right of Humanitarian Intervention?' in Gene M Lyons & Michael Mastanduno eds, *Beyond Westphalia? State Sovereignty and International Intervention* (1995) 40 (discussing the requirement that intervention into a State's domestic affairs be preceded by "collective legitimisation").

⁷⁸ See Anthony P Maingot, 'Sovereign Consent Versus State-Centric Sovereignty' in Tom Farer ed, *Beyond Sovereignty* 190 (1996) (calling gradual dilution of state sovereignty not merely historic phenomenon but also "moral imperative"); see Brand, 'External Sovereignty and International Law', above note 59 at 1686 (asserting twenty-first century international law will be determined by continuing evolution of perception of sovereignty).

⁷⁹ See also Jules Deschenes, 'Towards International Criminal Justice', above note 42 at 252 (intimating that resistance to International Criminal Court is largely result of some heads of state concerned about being prosecuted for their actions which threaten citizen's security). See generally Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law* 554 (observing that internal atrocities have far greater impact on international human rights laws because it occurs with greater frequency than with international conflicts).

poses for mankind in the quest for a better world in which peace and the respect for human rights reigns. Unabashed claims of national sovereignty, stimulated by the Nation-State system recognised at Westphalia, have gradually been modified by universalist claims for peace and respect for human rights through limitations on the State's use of its power and law-making competence.

Although hardcore realists still cling to the notion that States are supreme, reality points to the fact that international law norms have developed rules whose aim is to modulate the behaviour of States. This implies violation of, or intrusion upon State authority. International penal process has already significantly contributed to a diminution of the overall concept of sovereignty. The significance of international penal process and its accompanying tenet of international justice reflects an evolution in the perception of sovereignty heralding a qualitative shift from State supremacy to an ethical vision in which human values ultimately prevail over State rights where the two are in conflict.

Although the State has expanded its capabilities for control and involvement in some areas, overall the trend in international criminal law has been toward the 'diminution of State authority' with authority being relocated both upward to international penal institutions and downward as individuals and groups assert themselves as subjects of international law. The international penal process represents a shift in authority from States to the international community. Sovereignty has been chipped away, both from the outside and from within, as the concept of an international penal process has been increasingly recognised as trumping the right of States to hold sole rights in the exercise of certain prerogatives. We can conceive of any reconceptualisation of sovereignty as moving both downward (inward) from the State incorporating both human and 'peoples' rights and upward (outward) from the State as we

look for ways to respond to the need to protect these rights within a global framework as well as respond to the increasing permeability of borders. International criminal law norms have been thoroughly internationalised. But the internationalisation of norms does not necessarily entail the internationalisation of implementation procedures.

Although the international obligations of States are normatively strong, implementation and observance has been extremely weak necessitating the need for a permanent international penal institution. An international penal process in opposition to the State is the enemy of State power. The notion of international justice now points towards a sphere that, though controlled by States, is ineffaceably external to power. The far-reaching transformation of the social and political landscape in the last century has been accompanied by a correlative transformation of the concept and practice of sovereignty through the development of an international penal process.

State sovereignty cannot be written off simply by a documentation of the gains of international penal process. Though it remains very much alive, much satisfaction is derived from the fact that its content has changed and continues to change. Much dissatisfaction, however, persists in the fact that few States ascribe fully and enthusiastically to the gains of international justice. Much work still remains in convincing States that the necessary concessions needed in order to have an efficient system of international justice are the only way in which the gains spawned by international penal process can be both safeguarded and utilised. Whether or not the power structure of Nation-States ever accurately reflected textbook characteristics, sovereignty is subject to a greater range of qualifications. The exclusivity and inviolability of State sovereignty are mocked by increasing percolation of international norms and processes into the domestic sphere. Eliminating sovereignty from the

lexicon of international relations in the foreseeable future is unlikely; State-centric structures will not agree easily to part with the basis for their status quo. But it seems likely that the trend to greater qualifications on the scope of sovereign authority is irreversible.