# SOVEREIGNTY IN TRANSITION: HUMAN RIGHTS AND INTERNATIONAL JUSTICE

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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 firmly mandates a fundamental rethinking about the basis of sovereignty's political and associational organization in the new millennium.[2]

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] 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.[4] International criminal law runs directly to the

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1 R. J. Rummel, *Death by Government* 9 (New Brunswick: Transactions Publishers 1994).

2 *See, e.g.,* United Nations, *Executive Summary, Report of the Secretary General's High-Level Panel on Threats, Challenges and Change* 1 (2004), *available at* http://www.un.org/secureworld/brochure.pdf, *accessed* December 20, 2004. The full report is available at http://www.un.org/secureworld/report3.pdf.

3 *See generally* Myres S. McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* 313–332 (New Haven: Yale University Press 1980); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 75–80 (1996)

4 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 internationalization 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. "It is therefore inevitable that states would regard egregious violations of human rights as subject to individual criminal responsibility instead of only state liability."[5] Lynn S. Bickley extrapolates and substantiates this point thus:

> 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.[6]

Distinguished international law publicists recognize what they regard as the "inescapability of the concept of sovereignty as a quality of the state under present-day international law."[7] They also recognize it as a "fundamental principle of the law of nations."[8] 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.[9] This article has as its modest aim a general overview of the role of the development of human rights and humanitarian norms in reshaping the content and contour of Westphalian sovereignty[10].

## II THE WORLD WARS: CHALLENGING SOVEREIGNTY

World War I was a watershed conflict. Apart from inaugurating total war, the end of the war saw an unsuccessful attempt to prise open the

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individual within the international legal framework.

5 Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?* 14 EMORY INT'L L. R. 213, 265 (2000).

6 Bickley, *supra* note 5, at 261.

7 Marek Stanislaw Korowicz, *Some Present Aspects of Sovereignty in International Law* (1961) 102 Recuil Des Cours 1-120; *but cf.* Arthur Larson et al., *Sovereignty within the Law* (Dobbs Ferry, New York: Oceana Publications 1965).

8 Korowicz and Larson et al., *supra* note 7.

9 Arthur Larson et al., Sovereignty within the Law (Dobbs Ferry, New York: Oceana Publications 1965). 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.

10 The modern indeoendent Nation-State is founded upon a reverence of sovereignty emanated from the Peace of Westphalia of 1648 which ended the ward of religion between the Protestant and Catholic States. Westphalian sovereignty enshrined the internal and external autonomy of the State. The accompanying soverign tenets of political independence and territorial supremacy enshrined the State's freedom of action and unlimited use of power internally, forbidding and exercise of jurisdiction by any State over issues and individuals within another State's territorial boundaries thus precluding external interference and unsolicited intervention. See Jackson Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome 1*

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.[11]

The devastation of the war provided a catalyst 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, such as Germany and Turkey, with the aim of apprehension, trial and punishment of individuals guilty of committing atrocities through supranational trials.[12]

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, which lead to sham national trials in Germany and Turkey after a major revision and scaling down of the defendant list in both countries. 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

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(New York: Transnational Publishers Inc. 2003)

11 Jackson Nyamuya Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome* 33 (Ardsley: Transnational Publishers 2003).

12 The peace treaties of Versailles and Sevres envisaged liability for individuals even if

intervene in the domestic trials held in lieu of anticipated supranational trials.

While the envisaged international efforts to secure international criminal liability failed to materialize, 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. Finally, the recognition of 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.

It took the Second World War, about two decades later, to spur states into giving international criminal law life and vitality. The surge of moral unrest over the unlimited right of states to go to war whenever they wanted to, coupled with political and economic chaos, provided the basis for focusing on international accountability through penal process. It was at the post-World War II trials 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 surfaced 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 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 claims of absolute sovereignty must hereafter 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 internalize

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 recognized at Westphalia, were subjected to the test of international standards and universalist claims for peace and the sanctity of human rights. For the first time in history, at Nuremberg and later Tokyo, 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. This generated 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 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.[13] 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 account, individuals who carried out massive and heinous atrocities against other warring parties and civilians. The Nuremberg tribunal was not merely to establish 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. This proposition was earlier enshrined in the Preamble and Article 55 of the United Nations ("U.N.") Charter.[14]

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

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their crimes were committed in the name of their states.

13 Mark W. Janis, *An Introduction to International Law* 246 (Boston: Little Brown 1993).

14 The *U.N. Charter* was signed on June 26, 1945 (and entered into force on October 24, 1945). Shortly after the San Francisco Conference which gave birth to the U.N., representatives of the four Major Allied Powers (Great Britain, France, the U.S.S.R. and the U.S.) met in London on 26 June 1945 to negotiate on the law and procedures

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 trials as the twentieth century's most "definite challenge" to the "anarchic concepts of the law of nations."[15] He argued that Nuremberg was the first step towards limiting the unfettered discretion of sovereign states to resort to armed force.[16] Government officials could no longer credibly claim legal immunity based upon the act of state and superior orders defenses.[17] Jackson noted that international institutions were so undeveloped and in decline that, absent the Nuremberg trial, it is unlikely that these "catastrophic doctrines" would have been challenged and modified.[18]

## III THE COLD WAR: A NOBLE CRUSADE IN STORMY WATERS?

The *"internationalization"* 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.[19] 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, recognized at the post World War II international trials. Besides demonstrating that legal values arising from international law impose obligations directly on 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

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according to which the Nazi leaders ought to be prosecuted, tried and punished resulting in the adoption of the *Nuremberg Charter* on August 8, 1945.

15 Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A J. 813 (1949).

16 *Id.*

17 *Id.*

18 *Id* at 813–814.

19 See Professor Bedjaoui's general introduction in Mohammed Bedjaoui (ed),

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 U.S.S.R. 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 predatory aims of western imperialist powers.[20] Coupled with this stance by one of the world's only two superpowers was the outcome of the decolonisation and self-determination process which saw a radical increase in internationally recognized 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 U.N. Charter.[21] 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 U.N. 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.

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 the Nuremberg and Tokyo trials.

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

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*International Law: Achievements and Prospects* 13 (Paris: UNESCO Publishing/ Martinus Nijhoff Publishers 1991).

20 *See, e.g.,* I. E. Korovin, *Respect for Sovereignty: An Unchanging Principle of Soviet*

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 characterized 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 Courts 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

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 recognize 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,"[22] 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 a necessity. This was in order 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. The Security Council created each of the two existing international criminal tribunals ad hoc

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*Foreign Policy* Int'l Affairs (Moscow) 11, 32, 37–9 (1956).

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 the jurisdiction of all national courts. The practice and application of primacy, in both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("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.[23] The process of making the Rome Statute was a battleground for supranational and international regimes. The challenge was the need for a trade-off between achieving consistency and building a consensus. This was arguably more pronounced because the state was being called upon to reconfigure certain key aspects of its domestic jurisdiction as well as state crafted international regimes in favour of a functioning international regime.[24] Consultations, consensus and compromise were at the heart of the Statute making process.[25]

The Rome Statute embodies a carefully created compromise between a state centred idea of jurisdiction, and a more inclusive international vision. In its extreme manifestation, the state centred idea would uphold a state's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, crimes against humanity, and to prosecute 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

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21 *U.N. Charter*, *supra* note 13, art. 2(7).

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

23 Chimene Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)* 6 UCLA J. Int'l L. & Foreign Aff. 215, 271 (2001).

24 *Id.*, at 215.

25 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.

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 realisation 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.[26] The ICC 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.

### A *An Ageing Ideology Facing a New Reality*

Sovereignty has several basic difficulties- some conceptual, and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous.[27] 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."[28] The constitutional position of the existing 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 Winston Nagan postulates that:

> To strengthen the conceptual and doctrinal basis of humanitarian law we

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Michael Plachta, *Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law* 5 U.C. Davis J. Int'l L. & Pol'y 181, 186–187 (1999) .

26 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.

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

> 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.[29]

Since the end of the Cold War, international law has come to recognize 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 recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying serious human rights violations."[30]

State sovereignty, which for centuries was conceptualized as "the absolute power of the state to rule,"[31] has opened up by recognition that the state may be responsible for a 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.[32] Though state responsibility and individual criminal responsibility are separate concepts under international law,[33] 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 conclusion 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.[34]

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28 Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia,* 6 Duke J. Comp. & Int'l L. 127, 137–143 (1995).

29 *Id.*, at 146.

30 Fernando R. Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention, in* Beyond Sovereignty: Collectively Defending Democracy in the Americas 29 (Tom Farer ed., Baltimore: The John Hopkins University Press 1996).

31 Kriangsak Kittichaisaree, International Criminal Law 5 (Oxford: Oxford University Press 2001).

32 *Id.*, at 7 (citing art 19, §3(c) of the Draft Articles on State Responsibility).

33 *Id.*, at 9.

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 Sammons's view is encapsulated in Professor Nagan's concise observation that:

> 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.[35]

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, effective policing is required from local to global levels in the name of the world community as a whole.[36] 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. This may point to an alternative normative order that essentially disparages the basic principle of human dignity.

Though sovereignty in the external or international context continues to be strong, it is not as absolute as its definition suggests.[37] No state, however powerful, has been able to shield its affairs completely from external influence.[38] "Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased

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34 Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts,* 21 Berkeley J. Int'l L. 111, 115 (2003).

35 Nagan, *supra* note 27, at 137.

36 *Id.*, at 145–146.

37 *See* Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 Denv. J. Int'l L. 419, 432 (1995) (asserting that notion of absolute sovereignty is 'no longer tenable'); *see also* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law,* 84 Am. J. Int'l L. 866, 866–869 (1990).

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

39 *See* Ronald A. Brand, *External Sovereignty and International Law*, 18 Fordham Int'l L. J. 1685, 1695 (1995).

limitations."[39] These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice.[40]

Since one of the main roles of a sovereign state is to provide security and protection for its own people.[41] The author concurs with McKeon's view that a state forfeits its sovereignty when its actions are universally condemned.[42] From a legal perspective, each instance of enforcement serves to legitimize 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 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.[43]

If international law is to be relevant 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 recognizes 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.[44] Patricia 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

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40 Patricia A. McKeon, *An International Criminal Court: Balancing The Principle Of Sovereignty Against The Demands For International Justice,* 12 St. John's J. Legal Comment. 535, 541 (1997).

41 *See* Brand, *supra* note 38, at 1696 (describing sovereign state's obligation to protect and provide security for its citizens).

42 *See generally* Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* 41–45 (University Park, P.A.: Pennsylvania State University Press 1995) (explaining that sovereign state's failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

43 Brand, *supra* note 38, at 1696.

44 See M. M. MARTIN Martinez, *National Sovereignty and International Organizations* 66 (The Hague: Kluwer Law International 1996); Nancy Arniston, *International Law*

> international community only enhances this objective.[45]

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 responsibility that is held, first and foremost, by national authorities.[46] 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.[47]

Support for the Report is found in the reality that the U.N. 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."[48] 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."[49] 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 Wesphalian sovereignty. "Commentaries that disregard state sovereignty as an eradicable hindrance to denationalization fail to recognize the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects."[50]

Recent international legal theory supports the view of sovereignty as an "allocation of decision-making authority between national and international legal regimes."[51] A state's total "bundle" of sovereign rights remains extensive, as sovereignty remains the pre-emptive international

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*and Non- Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 Fletcher Forum of World Affairs 199, 207 (1993).

45 McKeon, *supra* note 39, 542–43.

46 Report of the Secretary General's High-level Panel on Threats, Challenges and Change, *supra* note 2, at 4.

47 *Id.*, at 4.

48 Nagan, *supra* note 27, at 146.

49 *Id.*, at 146.

50 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*, 79 IND. L. J. 245, 261 (2004).

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 of the sovereignty of individuals and groups.[52]

The significance of the assertion above is captured in Sammons observation 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."[53] Sammons goes on to note that this position recognizes 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."[54] It would appear, that the evolution of sovereignty and the increasing need for international justice have now converged. This in turn means that the future development of international criminal law hinges upon the continuing evolution of this paradigm.

## 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 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 recognized at Westphalia, have

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51 Gregory H. Fox, *New Approaches to International Human Rights, in* State Sovereignty: Change and Persistence in International Relations 107 (Sohail H. Hashimi ed., University Park: Pennsylvania State University Press 1997).

52 Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (Great

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.

Though state sovereignty 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 utilized. 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; as 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.

Britain: MacMillan Press 1998) 163–164.

53 Sammons, *supra* note 33, at 121.

54 *Id.*, at 122.