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PROJECT TOPIC: AN INTERNATIONAL LAW DISCOURSE ON GLOBALIZATION: ANALYSIS OF STATE SOVEREIGNTY IN RELATION TO CURRENT GLOBAL INFLUENCE.

ABSTRACT

State sovereignty, long regarded as the cornerstone of international law, encapsulates the dual concepts of rights and responsibilities vested in sovereign independent states. Originating from the Westphalian tradition of absolute sovereignty, this principle has undergone profound evolution to address the demands of an interconnected international system. This research study critically explores the dynamic relationship between state sovereignty and international law, emphasizing the evolving responsibilities that accompany existing rights of sovereign states in the modern era of global connectedness. The research study investigates the tension between state sovereignty and globalization, particularly in instances where certain conducts of sovereign states are subjected to the dictates and directives of the international legal order, with a view to keeping the peace of the international community, and fostering international relations through transnational development. It examines the role of international law and institutions, with special focus on the Rome Statute of the International Criminal Court (ICC), which seeks to uphold accountability for *international* crimes such as genocide, war crimes, and crimes against humanity. Furthermore, the research study analyzes key challenges to sovereignty, including the erosion of state immunity in cases of international crimes, the role of the United Nations in humanitarian interventions under the Responsibility to Protect (R2P) policy framework, and the influence of non-state actors in shaping policy outcomes. With an assessment of the implications of international norms and legal pluralism, the research study analyzes the evolving responsibilities of sovereign states within the

context of globalization and the birth of a “new sovereignty.” This research primarily adopts a socio-legal perspective to unravel the complexities surrounding state sovereignty, contributing to the ongoing discourse on balancing the rights of states with their responsibilities under international law. It ultimately underscores the relevance of sovereignty as both a legal and moral construct in an increasingly interconnected world.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background: Evolution of State Sovereignty

To start with, states are dominant personalities in international law, and, sovereignty which stems from independence, as well as recognition by the international community is an essential feature of statehood. Sovereignty simply connotes the power to take decisions without recourse, or rather, reference to another state entity, except for mutual agreement(s) through treaty(ies) as to the achievement of individual/collective state goals.

The evolution of state sovereignty has been a dynamic and nuanced process, constituted by various historical events, political theories and philosophical ideas. In ancient Greece, philosophers like Plato and Aristotle wrote about the ideal form of association, the “polis” or “city-state”, where the community’s needs were satisfied.¹ The Roman “res publica” or commonwealth, as described by Cicero, introduced the concept of a legal system securing citizens’ rights, and determining obligations and responsibilities.²

The modern concept of state sovereignty emerged in 16th-century France, with Jean Bodin’s idea of supreme power vested in the monarch as a sovereign.³ Thomas Hobbes, in reinforcing Bodin’s position of state supremacy argued that absolute authority is necessary for a unified state.⁴ John Locke and Jean-Jacques Rousseau, in furtherance of the concept, introduced a systematized module known as the *social contract* to enable a less encumbered rule of the human society. This

¹ B Jowett, *Plato’s The Republic*, (trans), Oxford, Oxford University Press, 2008, 427-445; B Jowett, *Aristotle’s Politics*, (trans), Oxford, Oxford University Press, 2008.

² FF Barham, *Cicero: On the Commonwealth*, (trans), Edmund Spettigue, 1841, 42.

³ Jean Bodin, *Les six livres de la Republique*, Librairie generale francaise, Paris (1993)

⁴ J Schneewind, *Thomas Hobbes’ Leviathan*, (ed), Cambridge, Cambridge University Press, 1996.

module describes the systemic and consensual submission of power or simply put, the absolute entrustment of power by the people in a given human society to a representative government for common protection and management of affairs.⁵

State sovereignty is often thought to be synonymous with Westphalia sovereignty as the latter describes the absolute control of states over all conduct that occurs within their territories.⁶ This conception of sovereignty may not always have prevailed, even among states themselves. It has been argued that sovereignty in its meaning of absolute, unlimited, and indivisible authority is incompatible with international law, perhaps with any law. Though, within a defined territorial jurisdiction, a state's sovereignty is exclusive and absolute and limitation or rather, non-recognition only arises from international law or with the consent of the sovereign.⁷ As Katzenstein et al has pointed out, nations have long been willing to discard certain elements of sovereignty when it suited their purposes.⁸

Interestingly, as the contemporary time will have it, globalization in forms of emerging international institutions and non-state actors appear to have eroded the idea of absolute sovereignty of independent states. Many scholars have argued in this respect that globalization may be more certain than dreaming Westphalia sovereignty. Daniele Archibugi argued that

⁵ Peter Laslett, *John Locke's Two Treatises of Government*, (ed), Cambridge, Cambridge University Press, 1988; Franklin Philip, *Jean-Jacques Rousseau's The Social Contract*, (ed), Oxford, Oxford University Press, 2008.

⁶ The Montevideo Convention of 1933 signed by the USA and South American States enlisted the main attributes of a state as: having a permanent population; having a defined territory; a government and; a capacity to enter into relations with other states.

⁷ Norman D Palmer and Howard C Perkins, *International Relations: The World Community in Transition*, 3rd ed, A.I.T.B.S. Publishers and Distributors, 2004.

⁸ P Katzenstein, R Keohane, and S Krasner, *Exploration and Contestation in the Study of World Politics*, 1st ed, Cambridge, MIT Press, 1999.

globalization requires a shift from the traditional Westphalia sovereignty model to a cosmopolitan democracy, where decision-making power is distributed among various levels of governance.⁹ David Held and Anthony McGrew have also explored the tension between globalization and Westphalia sovereignty. The former argues that globalization has led to a “deterritorialization” of political power, making it imperative to rethink traditional notions of sovereignty.¹⁰ The latter, McGrew, contends that globalization has created new challenges for national sovereignty, and thus requiring a more nuanced understanding of the concept of global governance.¹¹

But what makes the contemporary styling and conception of sovereignty different from the Westphalia model of absolutism is the tendency of states to enter into relationships, majorly for mutual political and economic benefits. The sovereign states have shared relations with each other, especially for the purpose of their territorial wellbeing and security, thus limiting the absolute nature of sovereignty. These international situations, i.e. territorial wellbeing, security,¹² and a number of others, whether political or economic in nature, make states to often enter into bilateral or multilateral commitments. These notions of interdependence and comity brought about globalization¹³ which have significantly influenced the conceptualization of state sovereignty.

⁹ Daniel Archibugi, “Cosmopolitan Democracy and its Critics: A Review,” (2004) 10 (4) *European Journal of International Relations*, 437.

¹⁰ David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge, Polity Press, 1995.

¹¹ Anthony McGrew, A, *Globalization and Global Politics*, Cambridge, Polity Press, 2017.

¹² Pearl Matibe, “How US-Gabon Partnership may Impact Nigeria, other African Countries.” Available at <https://www.premiumtimesng.com/news/top-news/759961-how-us-gabon-partnership-may-impact-nigeria-other-african-countries.html> accessed 8 December 2024.

¹³ Consequently, it must be understood that the idea of globalization emanated from the seemingly necessary international relationships between and among sovereign states.

Owing to the effect of international relationships, significant norms arose as a framework to maintain the international legal order. There are two of these significant norms which have, for the purpose of protecting the peace of the international community at large, attributed several responsibilities to sovereign states. They are namely;

1. *The Jus Cogens Norms and*¹⁴
2. *Obligations Erga Omnes*¹⁵

Thus, the subordination of a sovereign state to the customary rules of international law and to the treaty obligations is not a detraction from sovereignty, rather, it is an attribute of the latter.

Attempts have been made in the past to formulate the rights and duties of states.¹⁶ The rights often enumerated are the right to independence which is coterminous with the concept of sovereignty, equality, exclusive domestic jurisdiction, and the right to self-preservation – all these constituting what sovereignty simply is.

On the other hand, the duties/responsibilities frequently reiterated are the refrainment from the use of force as a national policy, non-intervention in the domestic affairs of other states, observance of the principle of *pacta sunt servanda*, and respect for the *jus cogens and erga omnes* rules of international law.¹⁷

¹⁴ “... a norm accepted and recognized by the international community of States as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” United Nations, Treaty Series, vol 1155, p 331.

¹⁵ “... obligations of a State towards the international community as a whole.” *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, 33.

¹⁶ It must be understood that the words “duties” and “responsibilities” are synonymous. Hence, their interchanging usage in the course of this research. However, more of responsibilities will be seen, with respect to usage.

¹⁷ These duties/responsibilities are given international legal backings respectively in Article 2(4) of the United Nations Charter, 1945; Article 26 of the Vienna Convention on the Law of Treaties, 1969 and; Art 38(1) of the International Court of Justice Statute, 1945.

Furthermore, one necessity of globalization to the very extent of ensuing international relations is the concept of international accountability. International accountability is to the effect of making states own up to their responsibilities as parties in a course for the collective good. International accountability simply refers to the mechanisms¹⁸ and processes that hold individuals, states, and international organizations responsible for their conducts and compliance with international law.

The questions of international accountability arise where an actor exercises particular prerogatives as it is with a sovereign state. These questions can be political, administrative, fiscal, or legal in nature. A wide range of questions of accountability is now being raised in the international legal arena, including in the present volume of states' enjoyment of sovereignty. Regardless of its tenacious invocation by international lawyers, the concept of international accountability has not acquired a clearly defined legal meaning. It is however, safe to say that the concept of international legal responsibility denotes a particular form of international accountability, focused upon legal consequences of breaches of *erga omnes obligations*, as well as *jus cogens norms* that are attributable to sovereign states, by virtue of agreements and comity.

1.2 Research problem: Tension between state sovereignty and international law/relations vis-à-vis attendant rights and responsibilities.

The foremost issue to be determined in the course of this research work is the tension between state sovereignty and international relationships vis-à-vis the attendant rights and responsibilities of sovereign states with which the research work examines the evolving concept of state sovereignty in the context of globalization, humanitarian intervention, and international law.

¹⁸ There are several mechanisms for international accountability and they include the instrumentality of the international courts (both the ICJ and the ICC), International Human Rights Bodies, and Sanction models which may be economic, diplomatic, or in other measures imposed on non-compliant states.

In determining this issue of tension, significant questions are asked and answered, upon a critical evaluation, to constitute a sufficiently detailed scope of this research work.

1.2.1 Specific Research Questions

For what it is worth, the concept of state sovereignty has been a cornerstone of international relations since the 1648 Treaty of Westphalia.

However, the emergence of the notion of globalization has raised significant questions about the relevance and effectiveness of traditional conception of state sovereignty.

These research questions are as follows:

- ◆ To what extent is sovereignty exclusively enjoyed by states in the 21st century, given the notion of globalization?
- ◆ What roles do international law and institutions play in addressing state abuse of sovereignty?
- ◆ What are the attendant rights and responsibilities of a sovereign state and what implications are they on state sovereignty vis-à-vis the notion of globalization?
- ◆ How do global governance frameworks and non-state actors influence state sovereignty?

1.3 Research Aims/Objectives

The aims and/or objectives of this research is to:

- ◆ Analyse the historical development of state sovereignty and its evolving concept in the context of globalization.
- ◆ Identify traditional models and subsequent practice of sovereignty that responds to globalization.

- ◆ Examine core attendant rights (Territorial Integrity and Self-determination, with Immunity in view) and responsibilities (especially by virtue of *Obligations Erga Omnes* and the *Jus Cogens Norms*).
- ◆ Investigate international law's role in shaping state sovereignty.
- ◆ Evaluate case studies illustrating the challenge(s) of sovereignty in contemporary international relations.

1.4 Contribution to Knowledge

This research work aims to contribute to the ongoing discourse on state sovereignty and its future prospects in the era of globalization, informing policy debates, scholarly discussions, and educational programmes on the nuanced relationships between sovereignty, globalization, and global governance, more so, the existing rights and evolving responsibilities that states undertake, in their bid to foster municipal growth and development.

1.5 Research Methodology

This research work employs a socio-legal approach, integrating insights from international law, political science, sociology, and philosophy. The methodology combines qualitative and quantitative methods with key features of interdisciplinary research as earlier established, literature review and case studies, evolutionary and statistical analysis, as well as contemporary case studies. The research work, in complementarity of its socio-legal approach, involves the utility of primary internal evidence offered by international treaties and agreements, UN documents and resolutions, ICJ and ICC decisions, scholarly articles and books, Government reports and policy documents, likewise other materials sourced from and processed via the internet.

CHAPTER TWO

CONCEPTUAL THEORETICAL FRAMEWORKS AND LITERATURE REVIEW

2.1 Introduction

This chapter of the research essay aims to capture the essential aspects of the evolution of the concept of sovereignty, from the classical socio-political mechanism through which it was formed to the contemporary meaning it has today, trying to predict the way in which it is foreshadowed that will be used in the future. Although it is a central concept of both international relations and domestic public policy, sovereignty adapts its meaning, like most fundamental notions, to the realities, context and expectations that society presupposes. I will begin by focusing on conceptual clarifications in order to capture the need and the way in which the concept of sovereignty was constructed, both historically and doctrinally. In order to present the modern way in which the concept of sovereignty is understood, I will expose the original meaning conferred by Westphalian sovereignty and arrive at the inevitable erosion of the concept of sovereignty occasioned by the revolutionary concepts of globalization and integration of international communities.

2.2 Conceptual Clarifications: Definitions and Characteristics of Sovereignty

The idea of absolute sovereignty is in many respects an antiquated concept in modern international law and there are various factors contributing to its erosion. As a result of especially the phenomenon of globalization, there is a growing trend of interdependence and co-operation between states. Although state sovereignty is a fundamental principle of international law,¹ the

¹ Frank Perrez, *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law*, (2000) 13 explains the importance of sovereignty in international law as follows: “It is argued that international law is based on the principle of sovereignty...that sovereignty in sum is the ‘cornerstone of international law’ and the ‘controlling principle of world order’.”

precise meaning of the term sovereignty is not so clearly defined.² The following possible definitions of sovereignty have however been offered:

Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein³

Krasner⁴ identifies the following four ways in which the term sovereignty is commonly used:

1. Domestic sovereignty, which refers to the organisation of political authority within a state and the level of control enjoyed by a state.
2. Interdependence sovereignty, which is concerned with the question of control, for example, the ability of a state to control movements across its own borders.
3. International legal sovereignty, which is concerned with establishing the status of a political entity in the international system. The state is treated at the international level similarly to the individual at the national level.
4. Westphalian sovereignty, which is understood as an institutional arrangement for organising political life and is based on two principles, namely territoriality and the exclusion of external factors from domestic structures of authority. Westphalian sovereignty is violated when external factors influence or determine the domestic authority

² AD McNair, *Oppenheim International Law: A Treatise* Vol 1, (ed), 1928, 137 notes that “there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an undisputable fact that this conception, from the moment when it was introduced into political science until the present day, had never had a meaning which was universally agreed upon.”

³ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, 1999, 127 provides the following explanation of the term “sovereignty” by distinguishing between legal and political sovereignty.

⁴ Krasner, “Sovereignty: Organized hypocrisy” in Steiner & Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (2000) 575-577.

structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state voluntarily subjects internal authority structures to external constraints.⁵

Ideas and views about sovereignty may vary from time to time, as changing times necessitate different approaches.⁶ Fassbender notes that the concept of sovereignty has proven to be highly adaptable.⁷ According to him, sovereignty is a collective or umbrella term that indicates the rights and duties that a state is accorded by international law at a given period of time. These sovereign rights and duties culminate in state sovereignty.⁸ Sovereignty is thus the legal status of a state as defined, and not only protected, by international law. Because of a process that has increasingly placed constraints on the freedom of action of states, the substance of the notion of sovereignty has changed and will further change in future.⁹

Although it is not possible to formulate an all-inclusive definition of sovereignty, two major points of view with regard to the concept of sovereignty can continuously be identified. The first view is that sovereignty means absolute power above the law and that absolute sovereignty constitutes one of the most powerful and inviolable principles in international law.¹⁰ The second view is that it is

⁵ Ibid, 567-577

⁶ S Makinda, "Recasting global governance" in Thakur & Newman (eds), *New Millennium, New Perspectives: The United Nations, Security, and Governance* (2000) 168.

⁷ B Fassbender, "Sovereignty and constitutionalism in international law" in Walker (ed) *Sovereignty in Transition*, 2003, 115.

⁸ According to A Cassese, *International Law*, 2005, 49-52 sovereignty includes the following sweeping powers and rights: (1) Exercise of authority over all the people living in a particular territory. (2) Territorial discretion (3) Territorial independence. (4) Immunity right. (5) The right to respect for the state's nationals and its officials abroad.

⁹ Ibid, 129.

¹⁰ D Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, 1970, 2: Since the early stage of its growth, certain elements remained the attributes of sovereignty in the subsequent stages of its development such as the notion that 1. sovereignty is an essential attribute of state power, and, 2. the essence of

of utmost significance that states – as the most important subjects of international law – do not claim that they are above the law or that international law does not bind them.¹¹

2.2.1 Internal and external sovereignty

Bodley refers to the following definition of sovereign states:¹²

States whose subjects or citizens are in the habit of obedience to them, and which are not in themselves subject to any other (or paramount) State in any respect ... In the intercourse of nations, certain States have a position of entire independence of others ... This power of independent action in external and internal relations constitutes complete sovereignty.¹³

It is, therefore, necessary to distinguish between the internal and the external sovereignty of a state. Internal sovereignty may be described as the competence and authority to exercise the function of a state within national borders and to regulate internal affairs freely. Internal sovereignty thus comprises of the whole body of rights and attributes that a state possesses in its territory. External sovereignty is traditionally understood as legal independence from all foreign powers, and as impermeability, thus protecting the state's territory against all outside interference.¹⁴ According to Perrez external sovereignty broadly includes international independence, the right to international self-help and the authority to participate in international society.¹⁵ The idea of external sovereignty

sovereignty is constituted by the independence of state power from any other power. We may also, however, observe a tendency to free the state from any form of limitation, both legal and moral, as well as an inclination to identify sovereignty with force (i.e. with material force or the physical possibility of realizing sovereignty), in which we find the main ingredients of the so-called theory of absolute sovereignty.

¹¹ A Bodley, “Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia” *New York University Journal of International Law and Politics* 1993, 429.

¹² Ibid.

¹³ Ibid., refers to the definition of the concept “sovereign states” in Black, H.C, *Black’s Law Dictionary*, 6th ed, West, 1993, 1396.

¹⁴ B Fassbender, “Article 2(1)” in Simma, (ed), *The Charter of the United Nations: A Commentary*, UN Publication, 2002, 70.

¹⁵ Ibid.

eventually led to the development of modern international law. In the external relations of states, sovereignty was regarded as legal independence from all foreign powers, in particular that of the Pope and the Emperor of the Holy Roman Empire, and as impermeability, which protect the particular territory against all outside interference.¹⁶ The principle of external sovereignty to a large extent determined the overall structure and the entire substance of the international law of co-existence.¹⁷

The classical definition of external sovereignty is given by Max Huber in the *Island of Palmas Case*:¹⁸

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.¹⁹

According to MacCormick, the distinction between internal and external sovereignty makes it possible to contemplate the division and limitation of state sovereignty.²⁰

2.3 Historical Evolution of State Sovereignty and its Theoretical Foundation

The Thirty Years War in Europe was ended in 1648 with the Peace of Westphalia. It was concluded in two different treaties, namely the Treaty of Münster and the Treaty of Osnabrück. The Peace of Westphalia marked a shift of paradigms by establishing the basis for transforming person-orientated law into territory-orientated law.²¹ The new world society that was established after the

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Island of Palmas Case* [1928] 2 RIAA 829.

¹⁹ Ibid, 838.

²⁰ MacCormick (n 3).

²¹ Perrez (n 1) 22.

Peace of Westphalia was premised on the absolute sovereignty of its constituent members.²² The Peace of Westphalia recognised the equality of states as a principle of modern international law. The equality of states was recognised irrespective of their religious faith and of their monarchical or republican form of government. Both the Treaty of Münster and the Treaty of Osnabrück formally ended the medieval conception of a society of states that is organised hierarchically and thus on the basis of inequality.²³

The nation state was seen as an instrument of effective power, and international law was regarded as a law between the free and independent states which were primarily concerned with the promotion of their individual interests.²⁴ The Peace of Westphalia, however, obliged states to defend and protect the peace and thereby combined the principle of sovereignty with a duty to cooperate.²⁵

2.3.1 The Classical Understanding of State Sovereignty

The Peace of Westphalia laid the foundation for an international order based on independent sovereign states.²⁶ After the conclusion of the Peace of Westphalia, the several reigning princes of the German empire became more or less independent. In the eighteenth century a distinction was made between absolute, perfect or full sovereignty on the one hand, and relative, imperfect or half sovereignty on the other. Absolute sovereignty was ascribed to monarchs who had an unqualified independence within and outside their states. Relative sovereignty was attributed to those

²² S Murphy, "The Grotian vision of world order," (1982) *American Journal of International Law*, 497.

²³ B Fassbender, "Sovereignty and constitutionalism in international law" in Walker, (ed), *Sovereignty in Transition* (2003) 115; Fassbender (n 14) 74; Murphy (n 22) 478.

²⁴ Perrez, (n 1) 22.

²⁵ Ibid.

²⁶ According to Bodley (n 11) 421, absolute sovereignty has never existed in practical terms, but as a doctrine it forms the basis of modern relations theory.

monarchs who were to some extent dependent on other monarchs in the different aspects of the internal or foreign affairs of the state. Owing to the distinction between absolute and relative sovereignty, the divisibility of sovereignty was recognised, although not universally, during this century.²⁷

It is, however, generally accepted that the classical theory of unlimited sovereignty originated with the Peace of Westphalia.²⁸ During the eighteenth and nineteenth centuries, Bodin's definition of sovereignty as the absolute and perpetual power of a state, was extended into an absolute concept of unlimited freedom and independence.²⁹ For this classical notion of sovereignty, international law has no binding force and a state therefore has the power to define freely its own competencies.³⁰ The revolutionary changes in the late eighteenth and early nineteenth century gave rise to a new concept of sovereignty which now included the concept of the equality of states as one of its essential elements.³¹

The concept of sovereignty also contained the important but negative principle of non-intervention in the internal affairs of other states. It was generally accepted that sovereignty is a critical element of state power and that it signifies supremacy of the state concerning its internal affairs and independence in its external relations.³² In 1945, this principle found its way into the United Nations Charter in the form of Article 2(7) that provides as follows:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require

²⁷ H Lauterpacht, *Oppenheim's International Law*, (ed), Vol 1, 1947, 117-118.

²⁸ Perrez (n 1) 39.

²⁹ Ibid.

³⁰ Perrez (n 1) 44 refers, in this regard, to the principle of *Kompetenz-Kompetenz* which is generally defined as a state's competence to decide freely what the sphere of its competence shall be.

³¹ Ninčić (n 10) 4.

³² Ibid, 5.

the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.³³ The doctrine of sovereignty which prevailed in the nineteenth and part of the twentieth century was based on the idea that states are only bound by those rules of law to which they agree, either by the conclusion of treaties or customarily.³⁴ According to these voluntarist and positivist doctrines, sovereignty is not merely supreme authority (*summa potestas*), but the full and more or less unlimited power of a state (*plenitudo potestas*).³⁵ During the nineteenth century, the nation-state and imperialism joined and led to what was later known as the “anarchy of sovereignty”. The concept of sovereignty was interpreted as justifying the use of absolute power or symbolising the possession of it.³⁶ The sovereignty of a state was not seen as a power to be used towards the common good of the international community, but as a subjective right to be exercised in the own interest of a state.³⁷

The internal order of the individual state was not only shielded from intervention by other states, but also from any intrusion by international law.³⁸ International law was seen as a set of voluntary rules found in treaties or which derived from custom.³⁹ It was essentially bilateral and was not

³³ Chapter VII of the United Nations Charter deals with action with respect to threats to peace, breaches of the peace and acts of aggression.

³⁴ Fassbender (n 14) 72.

³⁵ Ninčić (n 10) 6-7.

³⁶ Fassbender (n 14) 73.

³⁷ *Ibid.*

³⁸ *Ibid.*, 72.

³⁹ P Tangney, “The new internationalism: The cession of sovereign competences to supranational organizations and constitutional change in the United States and Germany,” (1996), *The Yale Journal of International Law*, 401.

considered to extend beyond the correlative rights and obligations of its subjects.⁴⁰ In the Lotus Case the Permanent Court of International Justice held:⁴¹

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law ...⁴²

Bardo Fassbender is consequently of the opinion that there existed a presumption of unfettered sovereignty. This idea was also confirmed by the Permanent Court of International Justice when it declared, in the Lotus Case,⁴³ that restrictions upon the independence of states cannot be presumed.

According to the classical notion of sovereignty, the right to engage in war is seen as one of the key elements of sovereignty and no binding legal rules obliging states to keep the peace are accepted.⁴⁴

2.3.2 A Contemporary Understanding of Sovereignty

Since the beginning of the twentieth century, it has become increasingly apparent that the classical approach to sovereignty as absolute and unlimited authority constitutes a threat to international peace and to the existence of independent nation states.⁴⁵ The core question that was asked was whether a sovereign state, with no authority above it, can be bound by international law. With reference to *Die rechtliche Natur der Staatenverträge (1890)*, Jellinek tried to explain the binding force of international law by using the legally meaningless hypothesis that a sovereign state, when

⁴⁰ Fassbender (n 23) 119.

⁴¹ *The Lotus Case* [1927] PCIJ Reports, Series A, at 10.

⁴² *Ibid*, 18.

⁴³ *Lotus* (n 41) 16.

⁴⁴ Perrez (n 1) 45; Fassbender (n 14) 72.

⁴⁵ Perrez (n 1) 46.

entering into a legal relationship with another state, subjects itself to international law by an act of self-limitation, from which the state may disengage itself at any time without violating any law.

The state is thus only subjected to its own will.⁴⁶

Reference was as well made to Triepel's *Völkerrecht und Landesrecht* (1899) in which a distinction is made between international and municipal laws by referring to their fundamentals.

Triepel contends that international law regulates the relationship between states, while municipal law is concerned with the relations between individuals or between individuals and the state.

Therefore, municipal law is derived from the particular law of the state, while international law finds its source in the common will of sovereign states. In order to give an international rule effect in municipal law, it must be transformed into a rule of municipal law by an act of national legislation. This is called the dualist doctrine of international law.⁴⁷

However, as a result of the horrors of war, anti-sovereign doctrines emerged that tended to replace the dualist doctrine which placed emphasis on the will of states, with a monistic approach that sought to establish a common source for both national and international and law. Some of the most important authors of the monistic school of thought include Hugo Krabbe, Leon Duguit and Hans Kelsen.⁴⁸

According to Krabbe, international law comes into existence when people from different states, as a result of external events, broaden their consciousness of right in order to include international relations. Thus, the source of the resulting rules of international law is not the will of states, but the consciousness of law felt by individuals whose interests are affected by the rule or who have a

⁴⁶ A Nussbaum, *A Concise History of the Law of Nations*, New York, New York Press, 1947, 281.

⁴⁷ Ibid.

⁴⁸ Ibid, 282-283.

constitutional duty to take care of these interests. Therefore, national and international law have essentially the same quality and are above state rule. However, because international law is the law of the larger community, it takes precedence over national law. Krabbe emphasises the role of the universal community in determining the formation and demise of states and the parameters within which they may exercise their authority.⁴⁹ He envisages the eventual establishment of a so-called world state which is founded upon popular representation and is able to enforce a world-wide sense of right.⁵⁰ The development of such an absolutist world state may finally result in the disappearance of individual states or the degrading of these states to mere executors of the aims of the universal community.⁵¹

Leon Duguit is of the opinion that the state is no longer a sovereign power issuing its commands. He argues that the idea of public service replaces the idea of sovereignty. To him, the concept of sovereignty is in the process of disintegration, insofar as the idea of public service increasingly forms the foundation of modern state theory.⁵² He describes public service as those activities that the government is bound to perform. These activities display an internal, as well as an external (international) character as the result of the interdependence between states.⁵³ The recognition of individual rights simultaneously determines both the direction and the limit of public activity. It thus constitutes the source of all rules regulating the relationship between individuals and the state.⁵⁴

⁴⁹ Hugo Krabbe, *Die Lehre der Rechtssouveränität*, 1906, 224-227, 241.

⁵⁰ Nussbaum (n 46) 284.

⁵¹ Krabbe (n 49) 243-244.

⁵² Leon Duguit, *Law in the Modern State*, (trans) by Frida & Harold Laski, 1921, xlv, 89.

⁵³ *Ibid*, 45-46.

⁵⁴ *Ibid*, xxxix.

Although Kelsen also disputes the sovereignty of the state, he follows a different argument from those of Krabbe and Duguit. Kelsen identifies a certain hierarchy of norms, at the top of which the norms of international law can be found.⁵⁵ According to him, there are two possible *Grundnorm* in the international sphere, namely the supremacy of the municipal system or the supremacy of international law.⁵⁶ With the application of a monistic view to the relationship between international law and municipal law, he declares that the Grundnorm of the international system assumes the primacy of international law. Because in practice, nations recognise the equality of each other's legal orders, i.e., the doctrine of equality must mean that they recognise a ground norm higher than the Groundnormen of their own legal orders. The equal force of their national systems is only possible if the existence of a higher authority is assumed, which bestows equality. Kelsen attributes the binding force of international law to international custom, for example the principle of *pacta sunt servanda*. The binding force of international custom forms the ground norm which is inherent in every legal system.⁵⁷ With emphasis on the supremacy of international law, Kelsen foresees the removal of the demarcation between international and national law, the creation of a universal legal community and the eventual emergence of a world state.⁵⁸ In so far as national legal orders are nevertheless referred to as sovereign, it simply means that these legal orders are subject only to the international legal order.⁵⁹

During the early twentieth century, Kelsen's contemporary, Hersch Lauterpacht, specifically criticised the voluntarist positivism that extolled the virtues of statehood and sovereignty and,

⁵⁵ Hans Kelsen, *Pure Theory of Law*, (trans) by Max Knight, 1970, 200-201.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

because of its alliance with aggressive nationalism, had been responsible for the First World War.⁶⁰ Lauterpacht describes sovereignty as “an artificial personification of the metaphysical state”. As such, sovereignty has no real essence and is only a bundle of rights and powers accorded to the state by the legal order. Therefore, sovereignty can also be divided and limited.⁶¹

In an authoritative exposition of the viewpoints of Lauterpacht, Koskenniemi⁶² points out that it is Lauterpacht’s traditionalism and moral rationalism that sets him apart from Kelsen. Lauterpacht regards the idea of international law as derived from the will of states as insufficient. In typical Grotian tradition, he insists that there is a need for judging the adequacy of law in the light of ethics and reason.⁶³ Lauterpacht therefore differs greatly from Kelsen with regard to the place of natural law in legal construction.⁶⁴ While Kelsen rejects a natural law basis for his system, Lauterpacht is of the opinion that morality enters the law through its application and interpretation.⁶⁵ Although Kelsen does not deny the place of values in law, he insists on the need for openness in value choices, for example the choice between dualism and monism.⁶⁶

The principle of absolute sovereignty is thus replaced by a concept of relative sovereignty, where the freedom of each state is limited by the freedom of other states and the independence of a state is subjected to international law.⁶⁷ Apart from the Vienna or normativist school founded by Kelsen and Verdross, which stems from a monistic vision of the legal system, Djura Ninčić also discusses

⁶⁰ M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 2002, 355-364.

⁶¹ H Lauterpacht, *Private Law Sources and Analogies of International Law*, Cambridge, Polity Press, 1927, 299.

⁶² Koskenniemi (n 60) 409.

⁶³ H Lauterpacht, *International Law: Being the Collective Papers of Hersch Lauterpacht*, (ed), 1975, 2 at 330.

⁶⁴ Koskenniemi (n 60) 356.

⁶⁵ Lauterpacht (n 63) 424-429.

⁶⁶ Koskenniemi (n 60) 409.

⁶⁷ Perrez (n 1) 16.

other theories of relative sovereignty that spanned and dominated the period between the First and the Second World Wars.⁶⁸ During this period, *autonomy, independence and equality* were regarded as the three basic elements of sovereignty.⁶⁹

The first theory of relative sovereignty identified by Ninčić calls for a rejection of the classical idea that states are the only subjects of international law and claims that individuals are also subjects of international law. The result of this theory is that if the state is deprived of its status as a subject of international law, it can also no longer have sovereignty.⁷⁰ The second, and probably the most prominent theory of relative sovereignty, contends that the theory of sovereignty is no longer in accordance with the development of positive international law and must therefore either be totally discarded or modified to new international realities through a process of “relativisation”.⁷¹ Thirdly, the theories of the common interest and the common good entail that states are required to sacrifice their individual interests as well as certain aspects of their sovereignty in favour of the common interest and the common good. A common feature of this theory is the striving to adjust the sovereignty of states in various ways and to varying degrees to the norms of international law. Sovereignty may to a certain extent be subordinated to international law. The sovereignty of one state, however, cannot be subordinate to that of another state because sovereignties are, by their very essence, equal. A consequence of this is that the concept of sovereignty tends to merge increasingly with the concept of independence. However, the

⁶⁸ Ninčić (n 10) 9-15.

⁶⁹ Ibid, 13.

⁷⁰ Ibid, 11.

⁷¹ Ibid.

independence of a state is not absolute. It is limited by the equal freedom and independence of other states as well as by international conventions and specific agreements entered into by states.⁷²

2.4 Literature Review: An Encompassing Analysis of the Postulates of Jean Bodin (1530-1596), The Spanish Philosophers (Francisco de Vitoria, 1486-1492; Francisco Suarez, 1548-1617; and Alberico Gentili, 1552-1608) and Hugo Grotius.

The traditional understanding of sovereignty as independence and supreme authority may be attributed to Jean Bodin's sixteenth-century definition of sovereignty in his work, *Les Six Livres de République* as the absolute and perpetual power of a state. According to Bodin, the concept of sovereignty primarily entails the absolute and sole competence of law making within the territorial boundaries of a state and that the state would not tolerate any other law-creating agent above it. He maintains that sovereignty, as the supreme power within a state, cannot be restricted except by the laws of God and by natural law. No constitution can limit sovereignty and therefore a sovereign is regarded to be above positive law.⁷³

According to Bodin's theory of sovereignty, the sovereign power is bound by international law, which results either from treaties or from divine or natural law.⁷⁴

Although Bodin's conception of sovereignty as introduced in the sixteenth century was accepted by writers on politics, the majority of these writers held the opinion that sovereignty may be restricted by a constitution and by positive law. However, in the seventeenth century Hobbes (1588-1679) went even further than Bodin by stating that a sovereign was not bound by anything

⁷² Ibid, 11-12.

⁷³ Jean Bodin, *Four Chapters from the Six Books of the Commonwealth*, (trans) by Julian Franklin, 1992, 1-45.

⁷⁴ Ibid, 45.

and had a right over everything, including religion.⁷⁵ In contrast, Pufendorf (1632- 1694) denied that sovereignty involves omnipotence.⁷⁶ According to him sovereignty is the supreme power of a state, but not the absolute power. Sovereignty may therefore be constitutionally restricted.

The conception of sovereignty by the Spanish philosophers⁷⁷ is based on the existence of a presupposed world community with an undisputed legal character and the interdependent relationship between states. Like Bodin, they subject sovereignty to the existence of a higher or supreme law. They all refer to the role of the *ius gentium* that governs the relationship between the states comprising this world community, but differ in certain respects on its meaning and relation to international law. In his work, *De Indis et de iure Belli Relectionis*, Francisco de Vitoria, one of the founding fathers of modern international law, proposes that the *ius gentium* is the result of man's rational nature and natural law and therefore common to all mankind. A state cannot refuse to be subjected to international law as international law has been established by the whole world.⁷⁸ According to him the aims of the state are embedded in the common good of the world community. Hence, the interest of the community directs the aims of the state and also imposes certain limitations on the state. Sovereign independence is thus not absolute as the sovereignty of a state finds its limits in the common good of the world community to which all states are subject.⁷⁹

Also, Francisco Suarez, in his *De Legibus ac Deo Legislatore*, regards the freedom of states as limited by both international and natural law. Although the communications and association between states are to a large extent regulated by natural reason, certain special rules could be

⁷⁵ Thomas Hobbes, *De Cive: Dominion*, Available at <http://www.thomas-hobbes.com/works/dominion.html> accessed December 8 2024.

⁷⁶ EH Carr, *The Political Writings of Samuel Pufendorf*, (trans), Michael J Seidler, 1994, 230-235.

⁷⁷ De Vitoria (1486-1492), Suarez (1548- 1617) and Gentili (1552-1608).

⁷⁸ F Vitoria, *De Indis et de iure Belli Relectionis*, (trans), John Pawley Bate, 1917, 151.

⁷⁹ JB Scott, *Francisco de Vitoria and his Law of Nations*, 1934, lxxxix.

established by the customs of different nations.⁸⁰ He therefore makes a distinction between natural law and the *ius gentium*. The *ius gentium* or positive international law has a dual meaning: First, it refers to the law that has to be respected in the relations between states and, secondly, it refers to the law that all states commonly accept and respect internally.⁸¹ Because the *ius gentium* is established by common usage it creates a general obligation. Furthermore, international law includes certain fundamental principles of natural law that are unchangeable and binding on states, such as the principle of *pacta sunt servanda*.⁸²

Alberico Gentili regards the *ius gentium*, as closely connected to, but not the same as international law.⁸³ It therefore appears that his idea of *ius gentium* is that of universal law, rather than a law between states.⁸⁴

With regard to a state's sovereign right to engage in war, Perrez suggests that both Suarez and Gentili recognise the right of states to intervene with armed force when international law is violated. They, therefore, seem to accept that the freedom of states is limited and that state sovereignty is subjected to the norms of international law.⁸⁵

The concept of sovereignty cannot be discussed in totality without reference to the ideas of the father of international law, Hugo Grotius. In certain respects, the Spanish philosophers had a significant influence on his thinking. Grotius distinguishes between the *ius gentium*, which is the customary law of nations or voluntary law (*ius voluntarium*), and the *ius naturae*, which concerns

⁸⁰ F Suarez, *Ausgewählte Texte zum Völkerrecht*, (trans), Josef de Vries, 1965, 67.

⁸¹ Ibid.

⁸² Ibid.

⁸³ A Gentili, A, *De Jure Belli Libri Tres*, John C Rolfe (trans), 1933, 67-68.

⁸⁴ Nussbaum (n 46) 81.

⁸⁵ Perrez (n 1) 33.

the international relations between states.⁸⁶ According to Grotius, the universal and binding natural law is the primary source of international law. Natural law is supplemented by the secondary corpus of international law associated with the consent of states.⁸⁷ Although international law is partly independent of the will of states, Grotius nevertheless sees it as binding on sovereign states.⁸⁸

Grotius, who was a devout Christian and theologian, took the decisive step of secularising the law of nature and of emancipating it from theology.⁸⁹ According to him the law of nature is discerned by human reason⁹⁰ and urges man to seek a peaceful and organised society.⁹¹

Similar to the Spanish philosophers, Grotius accepts the existence of a legal world community. However, contrary to these philosophers, he does not describe this community as instituted by God in Creation, but as a community that has its binding element in reason, common to all humankind. Because God created man with human reason and the living community was a living reality to Grotius, he used this community as basis for his theories, reason being the binding element.⁹²

Dugard submits that by depending on the “dictate of right reason”, for example in the *ius gentium* and writings of scholars, Grotius aimed to construct a just international legal order whose principal aim was the restraint of war.⁹³ Grotius makes a distinction between just and unjust wars and denies the absolute right of rulers to engage in war. He accepts that states may use armed force to defend

⁸⁶ H Grotius, *De Jure Belli ac Pacis*, (trans), Campbell, 1814.

⁸⁷ *Ibid*, 13-14.

⁸⁸ Perrez (n 1) 34-35.

⁸⁹ Lauterpacht (n 27) 88.

⁹⁰ Grotius (n 86).

⁹¹ J Dugard, *International Law – A South African Perspective*, 2005, 12.

⁹² Grotius (n 87) par 6&9.

⁹³ Dugard (n 91) 12.

their own rights and to correct the violation of the norms of international law.⁹⁴ If a war is undertaken by a lawful authority and for proper reasons, warfare enforces law and right. When a war is conducted according to moral commands, it will lead to peace as its ultimate goal.⁹⁵ Wars may thus be waged for a just cause, as the redress of wrongs is a principle of natural law.⁹⁶ However, wars undertaken for expediency as well as anticipatory self-defence are regarded as unjust and therefore forbidden.⁹⁷ Although Grotius condones the use of force in certain instances, his work reflects a deep aversion to war.⁹⁸

2.4.1 Friedmann's Distinctive Analysis of the Classical Traditional System of Co-existence and the Modern System of Co-operation.

Wolfgang Friedmann makes a distinction between the classical system of international law of co-existence and a new international law of co-operation.⁹⁹ He identifies the beginning of this new international law as the period between the First and the Second World Wars. The shift of the international society, from an essentially negative code of rules of abstention¹⁰⁰ to positive rules

⁹⁴ Grotius (n 87) par 25.

⁹⁵ See, in general, *De Jure Belli ac Pacis* Book 1 Ch 2-4; Book 2 Ch 1. Also see Murphy (n 22) 481.

⁹⁶ Grotius accepts "defence, recovery of property and punishment" as just causes for war. See *De Jure Belli ac Pacis* Book 2 Ch 1 par 2.

⁹⁷ Murphy (n 22) 481.

⁹⁸ Ibid.

⁹⁹ W Friedmann, *The Changing Structure of International Law*, 1964, 62.

¹⁰⁰ Fassbender (n 23) 118 identifies the principle of non-intervention in the internal affairs of other states, the rule that in the territory of a foreign state, sovereign power may not be exercised and the concept of state (or sovereign) immunity as primary examples of Friedmann's rules of abstention. According to him the definition of sovereignty as independence by Max Huber in the *Island of Palmas Case* (n 18) is a good example of the negative or exclusive quality of sovereignty in the period of co-existence.

of co-operation, is a development of immense significance for the principles and structure of international law.¹⁰¹

Even though the traditional understanding of sovereignty still primarily focuses on independence, the definition of sovereignty as an absolute concept of unlimited freedom and authority is questioned. States have come to realise that there exists a need for co-operation in order to achieve the advancement of community goals and that all members of the international community must take into account the valid interests of the other members when exercising their sovereignty.¹⁰²

States can no longer act completely independently of each other, as there remain increasingly few aspects of life which are not dependent on, or do not respond to, activities outside the state's boundaries. This tendency directly challenges the traditional understanding of sovereignty as supreme authority and independence.¹⁰³

Although the majority of scholars of international law are still of the opinion that international law is founded on the will of states, they contend that it must be submitted to some restraint.¹⁰⁴ This restraint may be found in the conception of international society. The individual state cannot exist in isolation and therefore the relationship between states is one of independence.¹⁰⁵

¹⁰¹ Fassbender (n 14) 89 notes that some authors are in agreement that contemporary international law has already surpassed Friedmann's law of co-operation. In this regard, he refers to Christian Tomuschat who is of the opinion that the international legal order is in the third stage of its development. According to Tomuschat, the law of co-existence and the law of co-operation are followed by a period where international law is a comprehensive blueprint for social life.

¹⁰² M Martinez, *National Sovereignty and International Organizations*, 1996, 63-64.

¹⁰³ Perrez (n 1) 114.

¹⁰⁴ P Kooijmans, *The Doctrine of the Legal Equality of States*, 1964, 59.

¹⁰⁵ Ibid, 140. Kooijmans explains as follows: "With respect to the significance of this international society, however, conception of the notion of sovereignty is of the utmost importance. ... Authors agree upon one characteristic of sovereignty, namely, that the state is free from any other foreign will; that there is no higher authority to restrain the

The growing idea of co-operation and interdependence between states necessitates the existence of an international community of states.¹⁰⁶ In the advisory opinion of the International Court of Justice concerning the Legality of the Threat or Use of Nuclear Weapons (1996)¹⁰⁷ President Bedjaoui declares as follows:

Despite the still modest breakthrough of "supranationalism", the progress made in terms of the institutionalisation, not to say integration and "globalization", of international society is undeniable. Witness the proliferation of international organisations, the gradual substitution of an international law of co-operation for the traditional law of co-existence, the emergence of the concept of "international community" and its sometimes-successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as *obligations erga omnes*, *rules of jus cogens* or *the common heritage of mankind*. The resolutely positivist, voluntarist approach of international law still current at the beginning of the twentieth (20th) century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective judicial conscience and respond to the social necessities of states organised as a community.¹⁰⁸

will of the states; that this will is, therefore, utterly free; That, in spite of this, not all of the state's wishes can be called law.

¹⁰⁶ D Kritsiotis, "Imagining the international community," 2002, *European Journal of International Law*, 970 ...notes that though state-based, the international community is also organized in international institutions such as the African Union, the European Union, the World Trade Organisation and the North Atlantic Treaty Organisation. Kritsiotis is sceptical about the need to invoke the idea of an international community within international law literature. The reason for this being that international law has identified each of the actors of the international system for who they are, whether they be states, international institutions, individuals or corporations. Therefore, the need to concoct more terminology is questioned. He is of the opinion that the term "international community" is often loosely applied. This makes the term open to manipulation. He nevertheless reaches the conclusion that investigations on how history is moving from the idea of state sovereignty to the idea of an international community, are in radical contrast to established traditions of legal thinking "which have cast international relations as 'formalist and legalistic, entranced by a fantasy billiard ball world of states'".

¹⁰⁷ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996 ICJ Reports 226.

¹⁰⁸ *Ibid*, 270-271.

For Anne Bodley, the emerging interdependence between states is not an entirely new phenomenon. She is of the opinion that the principle of absolute sovereignty is a mere fiction that came to be recognised as the foundation of modern relations theory. While she submits that practical sovereignty has always been limited by the realities of power and that states have never enjoyed entire independence from each other, she nevertheless accepts that “if sovereignty ever existed in its absolutist sense (which it probably did not), both doctrinally and practically, it is, in fact, waning in the twentieth century”.¹⁰⁹

2.5 Conclusion

Traditionally, sovereignty has been denoted as the independence and supreme authority of a state. Therefore, sovereignty is often conceived as an absolute concept which implies that states are totally independent with regard to all other states and are above the rules of international law. However, it is evident that the early authors of international law did not regard state sovereignty as absolute and unlimited, but subject to higher norms.

Although the concept of state sovereignty is still far from portraying its full essence, the understanding of the controversial meanings it has generated prepares us for a dynamic construction of the idea of state and international cooperation. However, this concept must either be rethought and accepted in the newest of form, or other notions that wholly respect the current dynamics must be found.

¹⁰⁹ Bodley (n 11) 419-422. In page 422-425, Bodley identifies the three reasons for the weakening of state sovereignty, namely the establishment of international tribunals, the marked growth of interest in concluding multilateral treaties and the establishment of two international organisations i.e., the League of Nations in 1919 and the United Nations in 1945.

CHAPTER THREE

ANALYSIS OF THE RIGHTS AND RESPONSIBILITIES OF SOVEREIGN STATES THROUGH THE LENS OF THE 1933 MONTEVIDEO CONVENTION

3.1 Introduction

States have rights they are entitled to and responsibilities they are saddled with. In fact, the idea of sovereignty is an intersection of both scopes in the global context and these scopes are exercised by states in conformity with their obligations under international law. These obligations are established in good faith, by states, to maintain peaceful relation and global order. As for rights, sovereign states can regulate migration, grant citizenship, make or enter treaties, have domestic autonomy and territorial independence. Responsibility on the other hand is to the effect that sovereign states are accountable for conducts disposed of by them or on their behalf, especially through their officials and/or authorized agencies. These responsibilities include: respect for, and protection of human rights of all people on their territory or under their jurisdiction; adherence to international law; liability for breaches of their obligations, including direct violations of international law; demonstration of accountability and responsibility to both domestic and external constituencies.

3.2 Sovereign Rights under International Law

Sovereign rights refer to the political entitlements of nations to regulate foreign investments within their borders and to supervise the activities of transnational entities operating within their jurisdiction.¹ Before a state can enjoy certain political entitlements in international law, it must have been recognized as an international person, by already recognized states,² having adhered to

¹ *Encyclopedia of Applied Ethics*, 2nd ed, 2012.

² For Oppenheim, recognition is mainly a matter of intention and states are not bound to recognize new claimants of statehood, thus making it a positive duty to recognize a state i.e., this duty can be derogated.

the four (4) main qualifications outlined in the Montevideo Convention:³ a permanent population; a definite territory; a legitimate government; and lastly, the capacity to enter into relationships with other states.

Sovereign rights are related to one aspect of the state so defined, namely, to its independence. In a broad sense, *right of independence* includes all those rights that are related to the maintenance and development of the existence of the state as such. But in a narrow sense which denotes enjoyment of a certain legal status, it comprises only those rights which a state possesses in a more limited facet as an entity exercising its will with direct reference either to other states or to persons and things within the sphere of its legitimate control. It is this facet that comprises a group of rights which go by the name, sovereign rights.⁴ From here, it is but a short step to specification of privileges that are usually regarded as the principal elements of sovereign rights such as equality with other states, principles of non-intervention and territorial integrity. Thus, the sum of these statements logically amounts to the proposition that certain empirical facts give rise to a specific legal status, one consequence of which is enjoyment of sovereign rights.

A certain connection between empirical attributes of statehood and possession of sovereign rights is discernible even in the writings of an international lawyer who otherwise was skeptical about the usage of the word 'sovereignty'. Thus, James L. Brierly, in his introduction to international law, suggests that the word 'sovereignty' in a specific sense refers to 'the nature of rights over territory' and that '...in the absence of any better word, it is a convenient way of contrasting the fullest rights over territory known to the law with the minor territorial rights...'.⁵ Brierly did not

³ The Montevideo Convention on Rights and Duties of States, 1933.

⁴ EW Hall, *A Treatise on International Law*, 8th ed, (ed. A. Pearce Higgins), Oxford, Clarendon, 1924, 55.

⁵ JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed, (ed. Sir Humphrey Waldock), Oxford, Clarendon, 1963, 162.

probe specifically into the question of whether states hold such *fullest rights* as a result of their possession of a certain subject status under international law. But he does assert that the idea of a world divided into states, each exercising jurisdiction over a definite territory to the exclusion of others is an underlying assumption of international law and that international law basically—though not exclusively—monitors the relations between and among independent states.⁶ On the other hand, if the *fullest rights*—or *sovereignty*—are possessed by states, then the states are defined in terms of empirical qualities. In the context of a discussion of the coming into existence of new states, Brierly specifies the essential features of a state—in a phraseology, heralding the wording of the Montevideo Convention—as ‘...an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations’.

3.2.1 Immunity as an Attendant Right of Sovereign States

The idea of immunity flows from the intrinsic value of independence that a sovereign state is deemed to have, courtesy of the 1933 Montevideo Convention. When the courts of one sovereign state assume jurisdiction over another sovereign state or its representatives, the authority of the forum state to adjudicate the dispute conflicts with the principle of state equality, often expressed by the maxim “*par in parem non habet imperium*.”⁷ Over time, a number of customary rules barring domestic courts from adjudicating disputes involving another state have emerged under international law. These rules are commonly justified by the need to avoid interference with the exercise of sovereign prerogatives of one state by foreign state and to allow its representatives to perform their official duties without undue impairment. The International Law Commission (ILC)

⁶ Ibid.

⁷ “An equal has no power over an equal.” Doctrinal contributions on foreign sovereign immunity are abundant. For a recent analysis, see H Fox, *The Law of State Immunity*, 2nd ed, Oxford University Press, 2008.

explained that customary international law on state immunity has grown “principally and essentially out of the judicial practice of States on the matter, although in actual practice other branches of the government, namely, the executive and the legislature, have had their share in the progressive evolution of rules of international law.”⁸

Identifying the international rules governing state immunity proves to be a difficult task for several reasons. First, as noted by the International Law Commission (ILC), “the sources of international law on the subject of State immunities appear to be more widely scattered than normally expected in the search for rules of international law on any other topic.”⁹ Moreover, the practice of states on the matter is not uniform. As of today, it seems generally accepted that the immunity of states is no longer absolute: a foreign state will be accorded immunity only for claims arising out of sovereign acts (*acta jure imperii*), as opposed to the claims arising out of its commercial transactions or “private law” activities (*acta jure gestionis*). However, the exact scope of this so-called “restrictive” doctrine of state immunity remains unclear. If, over time, most countries have similarly extended their courts’ jurisdictional reach to foreign states’ activities, then international consensus on the matter “exists only at a rather significant level of abstraction,” and the details of the international law of state immunity are not always certain.¹⁰ The opacity of practice of states is also due to the sensitivity of the questions at stake: often, legal decisions regarding state immunity yield to considerations of foreign relations and policy, so as to maintain friendly relations with the foreign sovereign.¹¹

⁸ Special Rapporteur, “Preliminary Report on Jurisdictional Immunities of States and Their Property,” 23, U.N. Doc. A/CN.4/323, reprinted in 2 YB, *International Law Commission*, 1979, 231.

⁹ Ibid.

¹⁰ JW Dellapenna, “Foreign State Immunity in Europe,” 5 NY, *International Law Review*, 1992, 51-61.

¹¹ This is the research essayist’s reflections based on several readings, rather than a single source.

Against this backdrop, the adoption, in 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property (JISP Convention) appeared as a major step towards enhanced legal certainty in this area of law. Designed to achieve “the codification and development of international law and the harmonization of practice in this area,” the JISP Convention embraces the restrictive approach to state immunity. While it has not yet entered into force, it seems likely that the 30 ratifications necessary to bring it into effect will soon be achieved.¹² The support already demonstrated for this instrument by states which traditionally favored absolute immunity in the past, such as Russia and China, indicates how custom has evolved in this area and demonstrates that the JISP Convention can be expected to establish a universal standard for the treatment of state immunity by individual national legal systems.

With respect to individual officials, under international law, “a distinction is usually drawn between two types of immunity: immunity *ratione personae* and immunity *ratione materiae*.”¹³ The former, also known as personal immunity, is enjoyed solely by foreign officials occupying senior or high-level government posts, such as heads of state.¹⁴ This type of immunity attaches to the status of the individual official, thus covering both official and private conduct, irrespective of whether the action was carried out before or during time of agency. Personal immunity, whose purpose is to ensure that high ranking officials may “act freely on the inter-State level without

¹² See the Preamble of the United Nations Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004) UN Doc A/RES/59/38, opened for signature, Jan. 17, 2005, reprinted in 44 ILM 803 (2005) [hereinafter JISP Convention]. As of now, 28 states have signed it and 22 have ratified it.

¹³ Special Rapporteur, “Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction,” 78, UN Doc. A/CN.4/601, reprinted in 2 YB, *International Law Commission*, 2008, 37.

¹⁴ International law further confers extensive immunities to members of diplomatic missions and consular posts. Regulated by a distinct legal regime, the so-called diplomatic and consular immunities are outside of the scope of this convention.

unwarranted interference” ends when they complete their service.¹⁵ Subsequently, they are entitled to immunity *ratione materiae*, also called “functional immunity,” which is the same type of immunity as the one enjoyed by all foreign officials regardless of rank. This type of immunity does not extend to the acts performed in a private capacity, but covers solely the acts performed in an official capacity. However, functional immunity does not cease when the official leaves government service. Former state officials continue to enjoy immunity *ratione materiae* for the acts performed while serving in an official capacity.

The distinction between immunity *ratione personae* and immunity *ratione materiae* is expressly mentioned in the JISP Convention: under Article 3.2, it is specified that the personal immunity enjoyed by heads of state is excluded from the scope of that instrument.¹⁶ However, the provisions of the JISP Convention are relevant in determining the scope of the functional immunity of all state officials, since these are assimilated to the state when “acting in that capacity” (that is, when they act in their official capacity).¹⁷

3.2.1.1 Limitation/Waiver of Immunity as an Attendant Right vis-à-vis the Violation of Jus Cogens Notion

Under international law, a norm having the *jus cogens* character is a norm from which states are not allowed to depart under any circumstances. Unlike other international legal norms, states

¹⁵ Arrest Warrant of 11 April 2000, *Democratic Republic of the Congo v. Belgium*, 2002 I.C.J. 3, 74-75, Joint Sep. Op. of Judges Higgins, Kooijmans and Burgenthal)

¹⁶ Although the usefulness of the analytical distinction between functional and personal immunity is widely recognized, it must be noted that the ICJ did not refer to the categorization of immunity “*ratione personae*” and “*ratione materiae*” in ruling on the scope of immunity accruing to state officials. The ICJ considered whether the acts of state representatives had been performed in an official capacity or in a private capacity, while in service or out of office, without using this specific denomination. See, e.g., *Arrest Warrant Case* (n 15).

¹⁷ JISP Convention (n 12). See art. 2.1 (b) (iv).

cannot choose to reverse these norms by either treaty or practice. This notion was codified in the Vienna Convention on the Law of Treaties, which defines a peremptory norm of international law as “an accepted norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁸

Jurists have argued that breaches of peremptory norms imply that foreign states or foreign officials must be denied immunity in proceedings arising out of such violations, because of the special status of *jus cogens*. Various lines of reasoning have been followed in support of this claim: the *Normative Hierarchy Argument* posits that a *jus cogens* rule overrides any other rule which does not have its status;¹⁹ the *Complicity Argument* posits that the recognition of immunity for an act contrary to peremptory norms would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order;²⁰ the *Qualification Argument* posits that acts of the state in breach of peremptory norms cannot qualify as sovereign acts of state;²¹ the *Implied Waiver Argument* posits that when a state is in breach of the peremptory norms, it cannot lawfully expect to be granted the right of immunity, consequently, it is deemed to have tacitly waived such right;²² and as for the *Universal Jurisdiction Argument*, it posits that once extra-territorial jurisdiction is established, it makes no sense to exclude from it, acts done in an official capacity.²³

¹⁸ See Vienna Convention on the Law of Treaties. Art. 53.

¹⁹ *Al-Adsani v UK*, 2001-XI Eur, Ct, HR 79, 111-112 (Rozakis & Caflisch, J.J., dissenting, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić).

²⁰ M Gavouneli, “War Reparation Claims and State Immunity,” 1997, 50 *RHDI*, 595-599.

²¹ *Prefecture of Voiotia v Federal Republic of Germany*, No. 137/1997 (Ct. 1st Inst. Levidia, Oct. 30, 1997).

²² *Ibid.*

²³ *R., ex parte Pinochet Ugarte (Amnesty International Intervening)* (No. 3) [2000] AC 924 (Lord Phillips of Worth Matravers).

In a number of cases, jus cogens seems to provide courts with a basis for arguing against immunity for serious abuses committed by foreign states or their officials. The decision of the *Italian Court of Cassation in Ferrini* illustrates that approach. In that case, the Court appears to have relied on jus cogens not as a conflict rule, but rather as a means of highlighting the seriousness of the acts committed by the foreign state, so as to justify the denial of immunity.²⁴

So far, the international rules on foreign sovereign immunity do not entail an exception for the violation of peremptory norms. But legal evolution in this area has not been foreclosed. Jus cogens may play a role in this evolution by buttressing the view that such an exception is necessary because it is in line with the values incorporated by the international community in a higher legal category. Using jus cogens to support the contention that immunity is not warranted for international crimes like genocide is a permissible use of that notion. It seems more appropriate than the implied waiver construction, which relies on a legal fiction that is more clever than principled, and which comes close to a straining of the truth. 13 It must also be distinguished from the use of jus cogens as a conflict norm, which, as explained above, is currently not triggered in the context of immunity.

Finally, it is also different from the claim that violations of peremptory norms are not sovereign acts: as discussed above, that argument is untenable because such violations are, by definition, committed in the exercise of sovereign authority.

3.3 Responsibilities of Sovereign States

Flowing from the analysis of immunity as an attendant right of sovereignty, plus the limitation(s) hitherto, the rights accorded to states under international law heavily imply duties or

²⁴ P De Sena and F De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case," (2005) 16 *European Journal of International Law*, 89&100.

responsibilities.²⁵ States are liable for breaches of their obligations, provided that the breach is attributable to the state itself. A state is responsible for the direct violations of international law e.g. the breach of a treaty, or the violation of another state's territory.²⁶ A state is also liable for breaches committed by its designated institutions, however, they are defined by its municipal laws; by entities and persons acting under the direction or control of the state. These responsibilities exist even if the organ or entity exceeded its authority. Furthermore, the state is internationally responsible for the private activities of persons to the extent that they are subsequently adopted by the state. In 1979, for example, the Iranian government officially supported the seizure of the US Embassy by militants and subsequent holding of diplomats and other embassy staff as hostages. Interestingly, a state is not internationally responsible in this respect if its conduct: was validated or required by a peremptory norm of general international law; was taken in conformity with the right to self-defense under the UN charter; constituted a legitimate measure to pressure another state to comply with its international obligations; as a result of a force majeure i.e. beyond the state's control; could not reasonably be avoided in order to save a life or lives; constituted the only means of safeguarding an essential interest of the state against a grave and imminent peril, where no essential interest of the states toward which the obligation exists was impaired.

3.4 Tension between State Sovereignty and International Accountability: An Analysis of the Responsibility to Protect (R2P) Policy

The Responsibility to Protect (R2P) is an emerging international norm which provides that states are primarily responsible for the protection of their populations from genocide, war crimes, crimes

²⁵ An attestation of Hohfeld's Jurisprudential analysis of jural correlatives. See WN Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-14) 23 *Yale Law Journal*, 16.

²⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. See the Crime of Aggression as stipulated in art. 2.1 (b) (iv).

against humanity and ethnic cleansing. When the state fails in its primary responsibility to protect its citizens, this responsibility falls to the international community.

R2P is not synonymous of forcible intervention, but it consists of a continuum of actions, i.e. prevention, reaction and rebuilding. The concept was firstly put forward in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).²⁷ Four years later, key elements of R2P were endorsed by the international community in the 2005 UN World Summit Outcome Document.²⁸ Further advancements in the discussion of R2P came after the election of Mr. Ban Ki-moon to the post of Secretary-General of the United Nations in 2007, and even more so after the appointment of Edward Luck to Special Adviser to the Secretary-General on R2P in 2008.

But R2P did not suddenly surface without attributable antecedents. In a certain sense, it can be said that it is not at all a new idea, as the concept of sovereignty as responsibility was somehow anticipated by Hugo Grotius, whose concept of law was based on the principle that rules governing the behavior of states exist for the benefit of the populace.

Elaborating on the concept of sovereignty as a responsibility, the ICISS held that the international community has a responsibility to intervene and protect the citizens of another state where that other state has failed in its obligation to protect its own citizens. The preparation of the report was preceded by a series of consultations held around the globe. Among the recurring themes of these consultations were how to improve prevention²⁹ and information sharing, as well as how to

²⁷ The Canadian government proposed in 2000 to establish the International Commission on Intervention and State Sovereignty (ICISS). The main purpose of the ICISS was to approach the whole issue of intervention for humanitarian purposes from a perspective different from that adopted in the 1990s.

²⁸ 2005 World Summit Outcome, *United Nations General Assembly* doc. A/RES/60/1. Available at <https://documents.un.org/> accessed 28 December 2024.

²⁹ AJ Bellamy, *Responsibility to Protect the Global Effort to End Mass Atrocities*, Polity Press, 2009, page 53.

generate the political will to act on the predictions. The report also highlighted the importance of regional actors.³⁰

In 2001, the ICISS presented its report to the United Nations. In the report, the Commission stressed that the concept of state sovereignty had evolved and that sovereignty now implies responsibility as well as rights. States are first to be responsible for the protection of their population; however, when the state fails in that responsibility, a responsibility to protect falls to the international community acting through the United Nations.

The responsibility to protect involves three (3) stages: to prevent, to react and to rebuild, the most important being prevention. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied. Military Intervention should be considered the last resort. If, nevertheless, an intervention is to be envisaged, the commission proposed a set of decision-making criteria to be followed. These can be summarized as follows:

- (a) Right authority: According to the ICISS the Security Council is the right authority. Only if the Security Council fails to act, the General Assembly may intervene on the basis of the “Uniting for Peace” Resolution.³¹ A further possibility would be for collective intervention to be pursued by the relevant regional or sub-regional organization.

³⁰ ICISS Report, page 22.

³¹ UN General Assembly Resolution 377 A (V) of 3 November 1950. The adoption of the resolution came in response to the strategy of the then USSR to block any decisions by the Security Council on measures to be taken to protect the Republic of Korea against the aggression launched against it by military forces from North Korea. The most important part of resolution is section A which states that where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly shall consider the matter immediately and may issue any recommendations it deems necessary to restore international peace and security. Text available at <https://documents.un.org/> accessed 28 December 2024.

- (b) Just Cause: In the Commission’s view, forcible intervention for humanitarian protection purposes is justified to halt or prevent: large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape. These conditions also “include overwhelming natural and environmental catastrophes where the states concerned is either unwilling or incapable to cope or call for assistance, and significant loss of life occurs or is threatened.”³²
- (c) Last Resort: Every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored before a resort to the use of force.
- (d) Right Intention: The primary purpose of the intervention must be to halt or avert human suffering.
- (e) Proportional means: The scale, duration and intensity of the intervention should be the least necessary;
- (f) There should be reasonable prospects of halting the sufferings without worsening the situation.

The Commission further proposed that the five permanent members of the Security Council, in matters where their vital state interests were not involved, should agree not to apply their veto power to obstruct the approval of resolutions authorizing military intervention for humanitarian purposes, for which there may be majority support. The report also stressed that, in case the

³² ICISS report (n 30) para. 4.20

Security Council fail to discharge its responsibility to protect in grave situations, concerned states might consider adopting other means to meet the gravity and urgency of the situation.

The report of the ICISS was received with great interest but was also criticized for not having sufficiently elaborated on the principle of R2P and having left many questions unanswered. As Jennifer Welsh pointed out, for example, the appeal to the international community in the ICISS report is a very general one “leaving us with an unallocated duty to protect”.³³ For Thomas Weiss the report was too cautious as the commissioners set the bar for intervention very high or at least higher than many would have hoped for: “Thus, he concluded, the ICISS report is neither a forerunner nor a pacesetter. It usefully staked out a helpful middle ground”.³⁴ Yet the report had the merit of having reframed the debate, provided guidelines for action and anticipated issues presently under discussion, such as, inter alia, the role of the Security Council and that of the regional organizations.

By signing the UN Charter, member states oblige themselves to protect human rights for their populations, and to cooperate with the UN to promote human rights more generally.³⁵ Despite this, violations occur daily. When confronted, governments react differently. Some deny the accusations or remain silent. Others may express intentions for improvement,³⁶ genuinely, or

³³ JM Welsh, “The Responsibility to Protect and Humanitarian Intervention,” Chapter 13, in J Hoffmann and A Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice*, 190.

³⁴ TG Weiss, “The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era,” in J Hoffmann and A Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice*, 139.

³⁵ United Nations Charter, Ch. I (1-2); Preamble of the Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A, 10 December 1948.

³⁶ On 29th December, 2023, South Africa filed an application at the ICJ to begin proceedings against Israel as a signatory to the ‘Genocide Convention’ on grounds of committing genocide against the Palestinian people. In an 84-paged court document, South Africa has stated that Israel’s “acts... in the wake of the attacks on 7th October, 2023... are genocidal in character.”

perhaps just as lip service. However, no state leader officially rejects responsibilities for their subjects. It would of course be unacceptable for the subjects, but neither would the international community accept that as a legitimate position. Mervin Frost has couched the point elegantly, saying that politicians frequently use ethical terms to explain their states' behavior to an international audience, but the ethical aspects need not be their main concern. It might simply be an expectation, a prerequisite for legitimate participation.³⁷

The framework of R2P is said to be activated when mass atrocities unfold or where there is a lurking danger that this will take place except if adequate measures come in due time.³⁸ The first of R2P's pillars is prevention. To prevent a conflict from escalating to a manmade catastrophe is always the less costly and the less controversial choice when it exists. To protect populations against mass atrocities is primarily a national responsibility.³⁹ Apart from some critical academic voices who oppose the whole idea of sovereignty connected to responsibility, this is not controversial. However, sovereign states may need help. R2P's second pillar expresses in paragraph 138 of the 2005 World Summit Outcome Document that "the international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capacity."⁴⁰ To help states building their own

³⁷ M Frost, *Global Ethics; Anarchy; Freedom and International Relations*, 2009, 19.

³⁸ This is fundamental for all the United Nation's Secretary-General's yearly reports on R2P to the U.N. General Assembly from 2009 to 2023.

³⁹ Ban Ki-Moon, *The role of regional and subregional arrangements in implementing R2P*. Report of the UN Secretary-General to the UN General Assembly, A/65/877S/2011/393,7-8 (28 June 2011).

⁴⁰ The United Nations World Summit Outcome Document, U.N. General Assembly Resolution A/RES/60/1, 30 (16 September 2005).

protection capacities, and to assist states that are under stress, is also accentuated in paragraph 139.⁴¹

Voluntarily asking for help, and offering help, is not controversial and does not undermine sovereignty. Rather, it is sovereign acts. However, pillar 2 stretches into the border zone where controversies visualize, because it can be difficult to draw a line of distinction between what is voluntary and what is not. This challenge may arise both between sovereign states or between a sovereign state and the UN.⁴² An example illustrates this point. In 2017 and 2018 more than 750,000 Rohingya Muslims escaped from Myanmar to neighboring Bangladesh. According to human rights organizations, Myanmar security forces had deliberately targeted civilians and carried out mass atrocities. Myanmar authorities denied UN investigators access. China refused to negotiate on a potential Security Council resolution that aimed to oblige Myanmar to cooperate with the UN.⁴³ This was too controversial, but China supported a so-called presidential statement⁴⁴ expressing concern and reminding the Myanmar government of its primary responsibility to

⁴¹ Ibid.

⁴² T Dahl-Eriksen, "Sovereignty as Responsibility with References to the Framework of R2P," (2024) 12 *Pennsylvania State Journal of Law and International Affairs*. Available at: <https://elibrary.law.psu.edu/jlia/vol12/iss1/4>

⁴³ J Kirby, *New UN report documents the evidence of mass atrocities against Rohingya*. VOX (18 September 2018), <https://www.vox.com/world/2018/9/18/17873638/rohingya-united-nations-myanmar-war-crimes>. Accessed 28 December 2024.

⁴⁴ S/PRST/2017/22 (6 November 2017).

protect, but with weak direct criticism.⁴⁵ Obviously, moving into the international sphere soon implies confronting controversial aspects connected to sovereignty understood as responsibility.⁴⁶ The third R2P pillar transfers responsibilities to the UN Security Council. Since R2P represents a broad approach to humanitarian crisis with military means being the last option, the Council, if choosing to act, will normally first try peaceful means; from diplomatic dialogue and criticism to different positive incentives and non-violent resistance, arms embargoes, and comprehensive economic sanctions.⁴⁷ How controversial these measures are, vary, with diplomatic initiatives and invitation to dialogue less controversial than comprehensive sanctions. The latter is particularly controversial if the state in question has close connections to one of the Council's vetopowers. Yet, peaceful means are not always sufficient to halt mass atrocities.

R2P's third pillar is embedded in paragraph 139 of the Outcome Document:

Should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, the international community shall, through the UN Security Council, 'be prepared to take collective action' in a timely and decisive manner, in accordance with the UN Charter, on a case-by-case basis, and in cooperation with relevant regional organizations.⁴⁸

⁴⁵ K Yhome, *Understanding China's response to ethnic conflicts in Myanmar*, 188 ORF Occasional Paper (10 April 2018).

⁴⁶ The UN Security Council adopted Resolution 2669 on 21 December 2022, its first resolution directly criticizing the Myanmar government. Without addressing the Rohingya population explicitly, the resolution expresses deep concern about the ongoing state of emergency imposed by the Myanmar military and its grave impact on the people.

⁴⁷ J Pattison, *The Alternatives to War – From Sanctions to Nonviolence*, 2018, 1.

⁴⁸ The U.N. World Summit Outcome Document, U.N. General Assembly Resolution A/RES/60/1, 30 (16 September 2005).

This text was weaker than what was originally suggested by ICISS.⁴⁹ It recognized the existence of both national and international responsibilities, but to be prepared is not an obligation. It is a right without a duty. ICISS was open to alternative procedures when the Security Council is unable to cooperate. Yet, the discussions around an acceptable text demonstrated that R2P had to be embedded inside existing international law. Alex Bellamy catches the point:

Consensus on R2P was possible precisely because it did not change, or even seek to change, the basic rules governing the use of force.⁵⁰

The Outcome Document clearly stated that a Security Council mandate must be operative before member states and regional organizations can act on behalf of the international community.⁵¹

3.5 Evaluation of the Rights and Duties/Responsibilities of States in International Law vis-à-vis the 1933 Montevideo Convention

The 1933 Montevideo Convention on the Rights and Duties of States is a cornerstone of international law, providing a foundational framework for the definition, recognition, rights, and responsibilities of statehood. Signed during the Seventh International Conference of American States in Montevideo, Uruguay, this treaty codifies key principles such as state sovereignty, equality, and non-intervention. Its provisions remain relevant today, informing debates about state recognition, international responsibilities, and the balance between rights and duties in an interconnected global order. The section of this chapter evaluates the rights and responsibilities of

⁴⁹ M Schack, *The Threat to Punish and the Promise to Intervene*, PhD Thesis University of Copenhagen, Denmark (2016).

⁵⁰ Bellamy (n 29) 14.

⁵¹ This is stated in para. 139 on page 30 of the U.N. World Summit Outcome Document. But ICISS took a more flexible attitude, as described on the pages 53-55 in the ICISS report.

states under international law with specific reference to the Montevideo Convention, highlighting its enduring significance and contemporary application.

3.5.1 Key Substantive Provisions of the Montevideo Convention

The Montevideo Convention outlines four essential criteria for statehood under Article 1: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. These criteria have since become integral to international legal discourse, forming the basis for determining the existence of a state.

- (a) **Permanent Population:** The existence of a stable community is essential for statehood. This criterion emphasizes the importance of a population bound by a collective identity and social structure.⁵²
- (b) **Defined Territory:** While territorial disputes exist, a state must possess a defined geographical area over which it exercises sovereignty. This principle does not require fixed borders, as seen in cases like Palestine, but it necessitates a discernible territorial base.⁵³
- (c) **Government:** A functioning government is critical for exercising internal authority and fulfilling international obligations. The Montevideo Convention's emphasis on governance underscores the need for effective control and administrative capacity.⁵⁴
- (d) **Capacity to Enter Relations with Other States:** This criterion reflects the necessity of legal independence and the ability to engage in diplomatic and international affairs. It

⁵² MN Shaw, *International Law*, 8th ed, Cambridge, Cambridge University Press, 2017, 33.

⁵³ J Crawford, *The Creation of States in International Law*, 2nd ed, Oxford, Oxford University Press, 2006.

⁵⁴ J Dugard, *International Law: A South African Perspective*, 4th ed, Cape Town, Juta, 2011.

underscores the principle of sovereign equality, enabling states to interact on a global stage without external interference.⁵⁵

3.5.2 Rights of States under the Montevideo Convention

The Montevideo Convention grants states several rights rooted in sovereignty and equality, which continue to underpin modern international relations:

- (a) Right to Independence: Article 3 asserts that the political existence of a state is independent of recognition by other states. This provision safeguards the autonomy of states, emphasizing that recognition is declaratory rather than constitutive.⁵⁶
- (b) Right to Equality: Article 4 establishes the equality of states, regardless of size, power, or development. This principle is integral to the United Nations Charter and ensures parity in international decision-making.⁵⁷
- (c) Non-Intervention: Article 8 prohibits intervention in the internal or external affairs of other states. This reflects the broader international norm against the use of force or coercion, reaffirmed in subsequent treaties like the Charter of the Organization of American States.⁵⁸

3.5.3 Duties/Responsibilities of States under the Montevideo Convention

The Montevideo Convention also emphasizes the responsibilities of states, balancing their rights with duties to the international community:

⁵⁵ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

⁵⁶ I Brownlie, *Principles of Public International Law*, 7th ed, Oxford, Oxford University Press, 2008, 72.

⁵⁷ United Nations, *Charter of the United Nations*, 1945.

⁵⁸ A Cassese, *International Law*, 2nd ed. Oxford, Oxford University Press, 2005, 125.

- (a) Duty to Respect International Law: Article 10 obliges states to conduct their international affairs in accordance with established norms of international law. This reinforces principles such as *pacta sunt servanda* (agreements must be kept) and the prohibition of aggression.⁵⁹
- (b) Duty to Avoid Threats to Peace: Article 11 prohibits states from using war as an instrument of national policy. This provision reflects broader efforts to promote collective security and peaceful dispute resolution.⁶⁰
- (c) Protection of Human Rights: Although not explicitly detailed in the Montevideo Convention, the responsibility to uphold human rights has become a critical duty in modern international law. This evolution is reflected in instruments like the Universal Declaration of Human Rights and the Responsibility to Protect (R2P) doctrine.⁶¹

3.5.4 Contemporary Application and Relevance

The principles of the Montevideo Convention continue to influence debates about state recognition and sovereignty. Contemporary issues such as the status of Taiwan, Kosovo, and Palestine illustrate the enduring importance of the Convention's criteria for statehood. Furthermore, the balance between state rights and responsibilities has gained prominence in addressing transnational challenges like climate change, global health crises, and terrorism.

While the Montevideo Convention affirms state sovereignty, evolving international norms highlight the increasing interdependence of states. For instance, the principle of non-intervention is being reinterpreted in light of humanitarian interventions and global accountability mechanisms. Similarly, the capacity to engage in international relations now encompasses participation in multilateral institutions and adherence to international legal frameworks.

⁵⁹ MN Shaw, *International Law*, 8th ed. Cambridge, Cambridge University Press, 2017, 34-35.

⁶⁰ See the Montevideo Convention (n 3) art. 11.

⁶¹ J Dugard (n 54) 85.

3.6 Conclusion

The Montevideo Convention provides an enduring framework for understanding statehood and sovereignty, appraising both the rights and responsibilities of states. It introduced a legal conception of statehood rooted in independence, equality, and territorial integrity while imposing duties that are aligned with international law and peaceful coexistence and cooperation. However, the landscape of international law has evolved, with trends such as interdependence and human rights accountability, shaping contemporary international relations. To the very effect of these trends, sovereign rights are increasingly balanced by evolving responsibilities that go beyond territorial markings i.e. states now align to tackle global challenges like climate change, pandemics, and collective security for the keeping of the international peace.

CHAPTER FOUR

AN ANALYSIS OF STATE SOVEREIGNTY IN RELATION TO CURRENT GLOBAL INFLUENCE

4.1 Introduction

The concept of state sovereignty has historically been foundational to the modern international system, signifying the ultimate authority of a state over its territory and domestic affairs without external interference.¹ However, globalization has introduced complex and more nuanced dynamics that have both challenged and reshaped traditional notions of sovereignty. This chapter of the research essay examines the debate on sovereignty and globalization, with a view to analytically investigate how globalization challenges traditional notions of sovereignty, bringing about the conception of “new sovereignty.” It also discusses current trends in state sovereignty through the lens of globalization, focusing on the erosion of traditional sovereignty, the rise of regionalism, the influence of non-state actors, and technological sovereignty.

Furthermore, the chapter also examines the conflicts and convergences between sovereignty and globalization as well as highlights the tensions arising from international law obligations that subject state sovereignty to certain limitations, using the Rome Statute of the ICC as a point of reference in advancing international accountability.

It lastly examines three (3) case studies: Brexit, the South China Sea dispute, and the Ukraine crisis which underpin the challenges in contemporary international relations, assessing the implications of these challenges on global sovereignty norms.

¹ An overview of the Westphalian System as discussed in previous chapters of this research essay.

4.2 The Debate between Sovereignty and Globalization: The Emergence of “New Sovereignty”

From previous chapters of this research essay, I have established a somewhat comprehensive analysis as to what the concept of sovereignty entails and as a recap in the context of this debate, sovereignty is usually defined as the most essential attribute of the state in the form of its complete self-sufficiency in the frames of a certain territory i.e., its supremacy in the domestic policy and independence in the foreign one.

However, the notion of sovereignty is one of the most difficult and ambiguous and its content has constantly changed and continues changing in connection with the transformations of international relations and characteristics of the states themselves, even in connection with complexity of definition of the notion of state. In other words, the notion of sovereignty is not univocal and indisputable but provokes numerous debates and, thus, demands a considerable elaboration, including various approaches to the classification of the states themselves possessing sovereignty. One gradually becomes aware of the necessity of re-interpretation and re-evaluation of the notion of ‘sovereignty’ in connection with the emergence of the international political community, defining boundaries of private sovereignty, principles of their combination with each other and building their hierarchy, and also taking into consideration actions of other different subjects: numerous non-governmental organizations, multinational structures and arrangements, also considering the development of various global ideologies, for example, the Global Civil Society.

If there is a single phenomenon most relevant for the several developmental trends and relevant for sovereignty of the state and its future, it is globalization. Globalization is not a new term as it long depicts the reality that we live in a time when the walls of sovereignty are no longer protection

against the movements of capital, labour, information and ideas, nor can they provide effective protection against harm and damage.²

The above declaration made by Judge Rosalyn Higgins, the former President of the International Court of Justice, represents the conventional wisdom about the future of global governance. Many view globalization as a reality that will erode or even eliminate the sovereignty of nation-states.

The typical account points to at least three ways that globalization has affected sovereignty. First, the rise of international trade and capital markets has interfered with the ability of nation-states to control their domestic economies.³ Second, nation-states have responded by delegating authority to international organizations.⁴ Third, a "new" international law, nominally referred to as "world law" generated in part by these organizations, has placed limitations on the independent conduct of domestic policies.⁵

These developments have placed sovereignty under serious pressure. But the decline of national sovereignty is neither inevitable nor obviously desirable.

In my view, globalization describes the various processes that occasion economic, social, cultural, and political integration across the defined territories of states. Globalization has a profound effect

² Rosalyn Higgins, "International Law in a Changing International System," (1999) 58 *Cambridge Law Journal*, 78-82.

³ See D Held, *Global Transformations: Politics, Economics, And Culture*, 1999, 187... "Today, not only tariffs and quota restrictions, but also policies supporting domestic industry and even domestic laws with respect to business competition and safety standards are subject to growing international scrutiny and regulation."

⁴ Julian Ku, "The Delegation of Federal Power to International Organizations: New Problems with Solutions," (2000) 85 *Minnesota Law Review*, 71, 88-113.

⁵ P Tangney, "The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany," (1996) 21 *Yale Journal of International Law*, 395, 399-404 (1996).

on the concept of physical territory as an organizing principle for social, cultural, economic, or political relations.⁶

This integration did not happen naturally but with intent of states to primarily cause internal development and since had been propelled along by expansive academic theories. Leading international legal scholars, like Abram and Antonia Chayes, celebrate the arrival of the "new sovereignty" which found its emergence on the concept of globalization.⁷ The international order is governed, not by autonomous nation-states that control all affairs within their borders, but by a "tightly woven fabric of international agreements, organizations, and institutions that shape their relations with one another and penetrate deeply into their internal economics and politics."⁸ Chayes and Chayes argue that if sovereignty refers to a nation's ability to govern activity within its borders, then it must move upward to international organizations, because globalization means that no individual state can fully control the people and activity on their territory.⁹

One way that the "new sovereignty" operates, according to Anne-Marie Slaughter, is through transnational networks of government officials.¹⁰ Finance ministers meet through organizations like the G-8 and the G-20 to coordinate solutions to international debt crises. Officials of the United States, Canada, and Mexico meet through NAFTA bodies to create a transnational environmental enforcement network. Judges on some national courts increasingly, Slaughter argues, cite precedents from other countries and international tribunals, stitching together, in countries that

⁶ Held (n 3) 2-3.

⁷ A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1997, 123.

⁸ Ibid.

⁹ Ibid.

¹⁰ See generally, Anne-Marie Slaughter, *A New World Order*, 2004.

respect international law, something like a transnational body of law in discrete areas.¹¹ These networks share information, build trust between nations, and spread best practices, the combination of which allows them to harmonize and enforce a common set of policies and laws. According to Slaughter, transnational networks will eventually "disaggregate sovereignty" because individual agencies will exercise authority in a nation as part of an international network, rather than as part of a nation-state's government.¹²

In this vision, international institutions and international law reverse the traditional understanding of sovereignty. Sovereignty originally meant that a nation-state was free from any other form of governance in its control of activity within its borders.¹³ A nation-state would not be subject to the political claims of a supranational entity, such as the Holy Roman Empire, or a higher authority, such as the Catholic Church. Whether it chose to cooperate with other nations was a matter of its own consent, usually expressed through the form of treaties and long customary practice.¹⁴ According to the theories promulgated by academics and advocates, however, sovereignty is defined not by independence, but by a state's ability to fulfill international obligations.¹⁵

4.3 Erosion of Traditional Sovereignty

¹¹ Ibid.

¹² Ibid.

¹³ *The Schooner Exchange v McFaddon*, (1812) 11 U.S. 116 (Cranch)... "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

¹⁴ Ibid.

¹⁵ A Chayes & AH Chayes (n 7) 26.

Globalization has significantly eroded the traditional sovereignty of states in several domains discussed below, thus birthing a new narrative of sovereignty:

- (a) **Economic Policy:** States have ceded control over certain economic decisions to international financial institutions such as the International Monetary Fund (IMF) and the World Bank. These institutions often impose structural adjustment programs, limiting states' autonomy over fiscal and monetary policies.¹⁶
- (b) **Trade Agreements:** Multilateral trade frameworks, such as those established by the World Trade Organization (WTO), constrain states by requiring adherence to globally negotiated trade rules that often prioritize liberalization over protectionist measures.¹⁷
- (c) **Digital Sovereignty:** The internet's global nature has weakened state control over information and cybersecurity. For instance, cross-border data flows managed by multinational tech corporations pose challenges to national regulation.¹⁸

4.3.1 Rise of Regionalism

Furthermore, in the context of erosion of traditional sovereignty, and in parallel with globalization, regionalism has gained momentum, reflecting a significant effort at balancing global interdependence with regional integration. Regional organizations like the African Union (AU), European Union (EU), the Association of Southeast Asian Nations (ASEAN), etc., exemplify this trend. Member states of these organizations willingly share sovereignty in areas such as trade, environment, and regional security to enhance collective decision-making and global influence.

¹⁶ JE Stiglitz, *Globalization and its discontents*, W. W. Norton & Company, 2002.

¹⁷ D Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy can't coexist*, Oxford, Oxford University Press, 2011.

¹⁸ A Chander and UP Le, "Data nationalism," (2015) 64 (3) *Emory Law Journal*, 677–739.

Regional trade agreements have facilitated economic collaboration, but they also require member states to conform to collective policies, thereby limiting individual autonomy.¹⁹

4.3.2 The Growing Influence of Non-State Actors

The world formed by over 190 States now co-exist with a larger number of powerful non-state actors, ranging from corporations to non-government organizations (NGOs), from terrorist groups to drug cartels, from regional and global institutions to banks and private equity funds. The sovereign state is influenced by them (for better and for worse) as much as it is able to influence them. The near monopoly of power once enjoyed by sovereign entities is being eroded. Globalization has thus elevated the role of non-state actors, thus challenging traditional state authority. Multinational Corporations like Goldman Sachs, Amazon, Google, and Facebook operate transnationally, often wielding more economic influence than many states. Their actions, such as data management and tax avoidance, challenge state regulations.²⁰ Moreso, International NGOs like Amnesty International influence domestic policies on human rights and environmental issues, sometimes bypassing state-centric mechanisms.²¹

4.3.3 Technological Sovereignty

As technology drives globalization, states are focusing on maintaining control over critical digital assets and technological infrastructure. With respect to AI mainstreaming and regulation, states are developing frameworks to govern artificial intelligence, balancing innovation with sovereignty

¹⁹ TA Børzel, “Governance between integration and sovereignty: The European Union and its Neighbours,” (2012) 50 (6) *Journal of Common Market Studies*, 1–20.

²⁰ D Fuchs, “Transnational Corporations and Global Governance,” in *Corporate Power in Global Agrifood Governance*, Massachusetts, MIT Press, 2017, 33-48.

²¹ M Keck and K Sikkink, *Activists beyond borders: Advocacy networks in international politics*, Cornell University Press, 1998.

concerns.²² There are as well debates surrounding 5G technological mainstreaming; Huawei's 5G technology in fact highlights critical concerns over technological dependence and national security.²³

On the critical concern(s) over national security is the US-Tiktok saga. US lawmakers have voiced apprehension over the platform's data handling practices, fearing that sensitive user information could be accessed and exploited by foreign entities, particularly the Chinese Government. The lawmakers also point to China's national security law, which give the Chinese government the power to demand data from private companies like ByteDance²⁴ for the purpose of gathering intelligence.

This critical concern over national security have beclouded the fact that Tiktok has become both a catalyst and a metaphor for the tech rivalry between the United States and China. US lawmakers are thus calling for a forced divestiture of Tiktok from ByteDance.²⁵ There is no doubt that this move as to assertion of technological sovereignty by the US has attendant consequences that are so grave and could plummet US' present economic structure.²⁶

4.4 The Conflicts and Convergences between State Sovereignty and Globalization

²² C Cath, S Wachter, B Mittelstadt, M Taddeo and L Floridi, "Artificial intelligence and the 'good society': The US, EU, and UK approach," (2018) 24 (5) *Science and Engineering Ethics*, 1-19.

²³ M Lim, "5G Geopolitics: Huawei's Market Influence and The Battle for Technological Sovereignty," (2020) 5 (1) *Journal of Cyber Policy*, 1-10.

²⁴ ByteDance is the parent company of Tiktok.

²⁵ W Sun and MY Zhang, "Tiktok Tensions are a new front in US-China tech wars," *East Asia Forum*, 29 June 2024. Available at <https://eastasiaforum.org/2024/06/29/tiktok-tensions-are-a-new-front-in-us-china-tech-wars/> accessed 28 December 2024

²⁶ Ibid... This reason is because such event is largely impactful and could lead to significant job losses of the US population. Many have argued that the proposed ban is nothing but hypocrisy, given the extensive data collection practices of US tech companies.

Significant changes in terms of industrial evolution over the years have increased the flow of people, goods, capital, and ideas. Monetary policy is an area where state control has contracted. With the exception of Great Britain, the major European states have established a single monetary authority. Along with the erosion of national currencies, we now see the erosion of national citizenship – the notion that an individual should be a citizen of one and only one country, and that the state has exclusive claims to that person’s loyalty. For many states, there is no longer a sharp distinction between citizens and non-citizens. Permanent residents, guest workers, refugees, and undocumented immigrants are entitled to some bundle of rights even if they cannot vote.²⁷ The ease of travel and the desire of many countries to attract either capital or skilled workers have increased incentives to make citizenship more flexible.

Treaty is one of the sources of international obligation. There is a basic norm of law that one cannot derive rights and liabilities from a treaty to which he is not party. However, contemporary international law now envisages situations where rights and liabilities are created for states without their being party to such transaction. There are treaties that are assimilable to international executive acts and treaties assimilable to international legislative acts, such as treaties that create objective legal situations like neutralization, demilitarization, internationalization of human rights and conventions codifying existing norms of customary international law.²⁸

Membership to an international organization has monumental impact on the sovereignty of states. This can be appreciated from four sides. The activities of international organizations can have

²⁷ RB Karky, “Globalization and Less Developed Countries,” in C.C Nweze (ed) *Contemporary Issues on Public International and Comparative Law: Essays in honor of Professor Christian Nwachukwu Okeke*. USA, Vandephas, 2009.

²⁸ TR Kudrle, “Three Types of Globalization: Communication, Market and Direct,” in R. Vayrynen (ed) *Globalization and Global Governance*, Lanham, Rowman& Littlefield, 1999.

quasi- legislative, administrative and supervisory, as well as jurisdictional effects. This hinders the freedom of member states to act as they please. The UN Charter, Article 2 (6), states that the organization shall ensure that states that are not members of the UN shall act in accordance with the UN Charter.

Transnational Non-Governmental Organizations (NGOs) have much influence over state activities. Throughout the 19th century, there were transnational movements to abolish slavery, promote the rights of women, and improve conditions for workers. The number of transnational NGOs, however, has grown tremendously today. The availability of inexpensive and very fast communications technology has made it easier for such groups to organize and make an impact on public policy and international law. Such groups prompt questions about sovereignty because they appear to threaten the integrity of domestic decision-making. Activists who lose on their home territory can pressure foreign governments, which may in turn influence decision makers in the activists' own nation.

Belonging to international institutions like the African Union (AU), the European Union (EU) or the Organization of American States (OAS) is inconsistent with conventional sovereignty rules. Member states have created supranational institutions that can make decisions opposed by some member states. For instance, the ruling of The European Court of Justice has direct effect and supremacy within national judicial systems, even though these doctrines were never explicitly endorsed in any treaty. The European Monetary Union created a central bank that now controls monetary affairs for three of the union's four largest states. The Single European Act and the

Maastricht Treaty provide for majority or qualified majority, but not unanimous voting in some issue areas²⁹.

In a sense, globalization is a product of state sovereignty (a phenomenon borne out of the desire of sovereign states to act for the purpose of their all-round development) because they were created through voluntary agreements among its member states. But, in another sense, it fundamentally contradicts conventional understandings of sovereignty because these same agreements have undermined the juridical autonomy of its individual members. Thus, the question that must be addressed is; which is superior: sovereignty or political and economic integration? Which should be subject to the other?³⁰ Human rights have made a significant impact on international law. It has particularly affected the sovereignty of states and the assumption that international law is solely a state-based system and that states are free to treat their nationals the way they please. In Article 56 of the United Nations Charter, all members “pledge themselves to take a joint and separate actions in cooperation with the organization for the achievement of these and related ends”. The notion of human rights is not only individualistic in nature but also protects certain group rights. The idea of peoples’ rights is based on the premise that there are certain rights, which are enjoyed commonly by all.

In the economic sphere, there have been allegations that underlying the economic sovereignty debate is a hidden power struggle on the world stage, contested by a number of prominent countries who use the language of globalization in the pursuit of very national agendas. Karky warns any country opening their economy to the outside world that it is by no means a free lunch. The policy

²⁹ A Giddens, *The Consequences of Modernity*, Stanford, Stanford University Press, 1990.

³⁰ D Woodley, *Globalization and Capitalist Geopolitics Sovereignty and State Power in a Multi-Polar World*, London, Routledge, 2015.

will inevitably come at a cost. The cost can be perceived to be a weakening of the nation's "economic sovereignty", namely the erosion of permanent and exclusive privileges over its economic activities, wealth, and natural resources.³¹ A review of the world's history will find that it is common that the economic sovereignty of an individual member is from time to time influenced by global economic trends. The increase in the number of international organizations and the expansion of their functions has undeniably restricted an individual country's sovereignty to certain extent.

As national barriers to cross-border economic activity have fallen, nation-states have become more prone to global market forces. As international trade expands and becomes a more important part of domestic economic output, nation-states that impose significant tariffs or provide large domestic subsidies face the danger of painful retaliation.³² Anti- globalists suggest that international capital markets prevent nation states from pursuing independent macroeconomic policies. Nation-states, for example, cannot fully control the value of their currencies. Private traders have forced the United Kingdom to allow movement in the pound, though more authoritarian nations like China have maintained a tighter grip.³³ Currency fluctuation, in turn, has waned nation-states in pursuing macroeconomic policies that fuel growth by expanding the money supply. International markets may impose similar constraints on fiscal policy. Because national governments issue bonds on the international capital markets, they find their ability to set domestic policy constrained by the value of their securities.³⁴

³¹ Karky (n 27).

³² CC Dunn, "Globalization: A World Systems Perspective," (1999) 2 *Journal of World-systems Research*, 187–215. Available at <http://jwsr.ucr.edu>. Last accessed 28 December 2024.

³³ Ibid.

³⁴ Ibid.

The COVID-19 pandemic was contained and plummeted as a result of global collaboration aimed at preventing a widespread. China could not have tackled and contained the spread of the deadly virus alone. WHO led the international community in developing the health strategies and approaches required to control and end this COVID outbreak, same with the Ebola crisis. WHO is still engaged on the front line, implementing many of the major health interventions.

4.4.1 The Tension of Responsibility

To better talk about the conflicts and convergences of state sovereignty and globalization is to critically assess the tensions arising from international law obligations that subject state sovereignty to certain limitations. One of which is the tension of responsibility.

To fill sovereignty not only with rights, but also with obligations or responsibilities, is obviously attractive. As Amitai Etzioni explains: “A concept of sovereignty as responsibility that includes both the duty to protect and the duty to prevent has broad appeal across the political spectrum.”³⁵

The imagination of sovereignty connected to responsibility means to understand responsibility as an inseparable aspect of state sovereignty. This imagination is also broadly embraced within academia, but not in unison, at least not without reservations. Etzioni himself has expressed critical remarks, arguing that formulating sovereignty as responsibility renders the concept conditional. Even at the national level, the content of responsibilities is not a matter of concern for sovereigns and subjects alone, because in the real world, sovereigns are expected to adhere to evolving norms the international community considers legitimate.³⁶ For Etzioni this represents a fundamental shift in the international community’s role related to states’ internal affairs, challenging the Westphalian notion of independence.

³⁵ A Etzioni, “Sovereignty as Responsibility,” (2006) 76 (50) *ORBIS* 71-85.

³⁶ *Ibid.*

4.4.2 The Tension of Accountability: Overview and Classical Experiences

Another tension to be discussed is that of accountability. The word “accountability” is understood in the broadest sense to involve the justification of an actor’s performance vis-à-vis others, the assessment or judgement of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to such standards as applicable.³⁷ The questions of accountability arise where an actor exercises particular functions, powers, or authority. They can be political, administrative, financial, or legal in nature.³⁸ A wide range of accountability questions/issues is now being asked/raised in the international legal arena.³⁹ Notwithstanding, its increasingly frequent use by international lawyers, the concept of accountability has not acquired a clearly defined legal meaning.⁴⁰ It is thus safe to say, however, that the concept of responsibility, or rather contextually put, international legal responsibility, as discussed as a tension above denotes a particular form of legal accountability, focused upon the legal consequences of breaches of international law that are attributable to international actors.⁴¹

³⁷ RW Grant and RO Keohane, “Accountability and Abuses of Power in World Politics,” (2005) 99 *American Political Science Review*, 29-30.

³⁸ International Law Association, “Accountability of International Organizations”, *Report of the Seventy-First Conference*, Berlin 2004 (London, ILA 2004), 164-168.

³⁹ B Stephens, “Accountability for International Crimes: The Synergy between the International Criminal Court and Alternative Remedies,” (2003) 21 *Wisconsin International Law Journal*, 527.

⁴⁰ Indeed, in several languages, including French, German, Spanish, and Russian, even the term ‘accountability’ finds no direct equivalent. See G Hafner, ‘Accountability of International Organizations’, in American Society of International Law (ASIL), *Proceedings of the 97th Annual Meeting*, 2003, 236.

⁴¹ A Nollkaemper, “Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives,” in G Winter, (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology, and Law*, Cambridge, Cambridge University Press, 2006, 179 at 181-182 (on the different usages of the term ‘responsibility’ in International Law).

It is interesting how the longest ruling monarch in the history of Europe, Louis XIV, legitimized his rule.⁴² Famous for the words *L'Etat, c'est moi*, many consider him the absolute sovereign per se. He acknowledged that the only acceptable use of sovereign power was for the subject's advantage and happiness. The sovereign was responsible for the people, but he was not accountable to them.⁴³ The sovereign stood above the law, accountable only to God.⁴⁴

During the 18th Century, acceptance for sovereignty broadly located increased.⁴⁵ Protection of individual human rights were central for the American and the French revolutions. Liberty and equality of individuals justified popular sovereignty. However, inspired by the French philosopher Jean Jacques Rousseau's idea of the 'general will', a sort of unity of collective interests, sovereigns were invited to prioritize the nation before its individual members.⁴⁶ This idea ended dynastic rule all over Europe, but it also paved way for a variety of struggles for self-determination, violent nationalism included.⁴⁷

4.4.2.1 Accountability and International Relations: Contemporary Experiences and Insights from International Stakeholders⁴⁸

By virtue of contemporary experience, accountability for serious violations of international law is crucial to the effective function of the United Nations justice system — and the Security Council must uphold its special responsibility to that principle and ensure decisions, resolutions and Court

⁴² L Glanville, "The Antecedents of 'Sovereignty as a Responsibility,'" (2011) 242 (17) *European Journal of International Relations*, 233-235.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ United Nations General Assembly Meeting, 2019.

orders are abided by. Briefers, high-ranking Government officials and representatives stressed the urgency of accountability mechanisms and processes in fighting impunity, as conflicts rage and tensions simmer in multiple regions worldwide.

During the 74th session of the UN General Assembly held on 25th September, 2019, Joan E. Donoghue, then President of the International Court of Justice, spoke via videoconference from The Hague, noting that the desire for accountability is a key motivation for applicants bringing a case before the Court.⁴⁹ The Court has had an opportunity to pronounce on aspects of the principle's legal framework, including the relationship between international human rights law and international humanitarian law in times of armed conflict.⁵⁰

Accountability for atrocities is enhanced when the governing law is clear and agreed among States, she stressed — and where a mechanism is in place to adjudicate any ensuing inter-State disputes. However, the Court can only promote accountability to the extent that Member States accord it the jurisdiction to do so. Adopting a convention on crimes against humanity would promote accountability for violations of fundamental obligations found in international law, she said.⁵¹

Sounding a note of concern, however, Dapo Akande, Professor of Public International Law, University of Oxford, said that despite important strides in addressing serious violations of international law, the commitment to holding individuals to account has wavered in recent

⁴⁹ The court referred to here is the International Court of Justice (ICJ).

⁵⁰ In recent armed conflict cases like the Israeli-Palestinian conflict where South Africa brought an action against Israel in the court, on the basis of committing international crimes against the Palestinian population.

⁵¹ United Nations General Assembly Meeting (n 48).

years. He emphasized the need to develop the rules to underpin the prevention, investigation and punishment of those crimes.

Regarding ways to strengthen norms upon which accountability is based, he spotlighted the International Law Commission's draft articles on the matter, which would express the obligation of States not only to commit crimes against humanity but also create a framework in which States can punish and repress those crimes.

Michelle Bachelet, United Nations High Commissioner for Human Rights, as of 2019, said that the Organization's intergovernmental organs have taken significant steps to advance accountability. The Council's creation of the United Nations Investigative Team for Accountability of Da'esh/ISIL (UNITAD) has enhanced criminal accountability for that armed group's crimes. She also highlighted actions by the General Assembly and the Human Rights Council and the establishing of independent investigative mechanisms in the cases of Syria and Myanmar.

In addition, the Human Rights Council has stepped up its response to serious human rights violations that may also amount to international crimes, she said. The Council's support for independent and impartial investigation, justice and accountability efforts is essential, emphasizing the importance of placing victims at the centre of accountability strategies.

In the ensuing debate, more than sixty-five (65) heads of State, ministers and representatives from around the world underscored the importance of upholding international law, with many of them taking the Council and the international community to task for perceived inaction and others citing the use of the veto in the Security Council as a major obstacle to international peace and security.

The representative of Kenya stressed that the world will never believe the multilateral system offers real hope for accountability without the Security Council reform. States that invoke the veto should respect General Assembly resolution 76/262 — also known as the Veto Initiative — to explain that their action is justified and not opposed to peace. However, with Africans not holding vetoes, there will never be accountability in the United Nations.

Still, Gabon's delegate underlined how all the tools at the UN's disposal demonstrate the international community's determination to reject impunity. Warning that the international criminal justice system can be a weak deterrent to perpetrators, she called on the Security Council to be a cornerstone in support of that system and activate all the instruments at its disposal.

Mexico's delegate said it is important to avoid interpretations of the fundamental norms of international law that are not supported by the jurisprudence of the International Court of Justice. The use of the veto in the Council is a major obstacle to maintaining international peace and security and should not occur in cases of mass atrocities.

The representative of China warned that asserting the will of a minority of countries as a universally applicable rule for other countries to follow will not bring about genuine and lasting justice. States have the primary responsibility for punishing serious crimes. Further, not all accountability mechanisms authorized by the Council have achieved their intended objectives within the prescribed timeframe.

Brazil's delegate emphasized that the world cannot rely solely on international bodies to counter violations of human rights. "The choices we make nationally and as Member States, particularly when we have a seat on the Security Council, are decisive in the search for more accountability in the international sphere," he stressed.

Many speakers pointed to both old and new conflicts that illustrated the lack of accountability by perpetrators and aggressors, as what was currently being witnessed in Ukraine.

Uzra Zeya, Under-Secretary of State for Civilian Security, Democracy and Human Rights of the United States, citing the urgency of the conflict in Ukraine in the context of the debate, said the Council was created to prevent unprovoked attacks on sovereignty against nations. The international community must be united in bringing perpetrators to justice and must also not lose sight of the atrocities still ongoing in other countries around the world.

However, the Russian Federation's representative said Western countries are suddenly recalling the existence of international law regarding his country's special military operation — but during attacks by the North Atlantic Treaty Organization (NATO) countries on the former Yugoslavia, Iraq, Afghanistan, Libya and Syria, international law was an annoying obstacle. "Suddenly, the fight against impunity becomes not so important," he said.

Nonetheless, Edi Rama, Prime Minister of Albania and President of the Security Council for June, speaking in his national capacity stressed: "We need to say now more than ever, never again," adding that accountability breeds responsibility, leading to justice, which leads to peace. "We must make impunity history," he stated.

4.4.2.2 International Accountability and Its Instrumentality: The Rome Statute in View

A major landmark in the development to provide for international accountability is the Rome Statute of the International Criminal Court (ICC).⁵² The Statute in its Preamble affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished

⁵² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.” By creating the ICC, the signatory states were “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”

Impunity for serious human rights violations is a worldwide phenomenon. It has many faces, from singular incidents to systematic grants of impunity. The last decades have witnessed a wide range of amnesties all over the world.⁵³ The reasons for granting amnesties are manifold: authoritarian regimes provide for self-amnesties in order to escape future punishment. In such instances, amnesty is proclaimed for offences committed by political opponents to neutralize opposition.⁵⁴ In other cases, amnesties are seen as a valuable means for the transition from civil war to democracy. The renunciation of criminal prosecution is therefore occasionally used as a bargaining chip for the purpose of peace and security.⁵⁵ The UN brokered peace agreement with Haiti by providing an amnesty in order to end the Cedras regime.⁵⁶ There are also conditional forms of amnesty, like the South African Truth and Reconciliation Commission process where individualized amnesty is granted for a complete disclosure of the crime(s) committed.⁵⁷ The

⁵³ For a detailed analysis of different amnesty regimes, see N Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, 1995, 73.

⁵⁴ L Joinet, *Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights*, Doc. E/CN.4/Sub.2/1985/16, paras. 33-37. Available at <https://digitallibrary.un.org/record/604651?ln=en&v=pdf> accessed 28 December 2024. He gives a careful analysis of the various rationales for providing an amnesty.

⁵⁵ For this issue, see Anonymous, “Human Rights in Peace Negotiations,” (1996) 18 *Human Rights Quarterly*, 249.

⁵⁶ Governors Island Agreement. See the Report of the UN Secretary General on Haiti reproducing the agreement, Doc. A/47/975-S/26063.

⁵⁷ The crimes must be proportional to the ends sought and deemed to be political acts. Promotion of National Unity and Reconciliation Act 34 of 1995; K Asmal, “Truth, Reconciliation, and Justice: The South African Experience in Perspective,” (2000) 63 *Modern Law Review*, 1.

purpose of such mechanisms is to enable a society which was torn apart during a prolonged period of civil unrest to come to terms with their past and to make the transition to peace and democracy. Investigation and disclosure of past abuses are sought as an alternative to prosecution to satisfy the victim's interests and the quest for some form of accountability while at the same time providing for reconciliation by the decision not to prosecute.

It is not difficult to predict that such forms of amnesty will be put into question once an international tribunal exercises jurisdiction. A state's intent to keep certain offenders from criminal punishment may be jeopardized by international prosecution. The need to allow for reconciliation is likely to conflict with the aim of the Rome Statute to fight impunity. One of the several reasons brought forward by the United States for its decision of 6 May 2002 to notify the UN Secretary General of its intent not to become a party to the treaty despite its earlier signature was that the Rome Statute did not take due account of the need for accepting amnesties under certain conditions.⁵⁸ It was argued that a democratic decision between prosecution and national reconciliation should be respected and not made by the ICC.⁵⁹ But the Rome Statute, according to the US threatened the transition from oppression to democracy.⁶⁰ This reading of the Statute has not been unchallenged. There are a whole lot of distinct views on how the Rome Statute should be read. Some commentators argue that the ICC does not have the right to review amnesty

⁵⁸ A Seibert-Fohr, "The Fight against Impunity under the International Covenant on Civil and Political Rights," (2002) 6 *Max Planck UNYB*, 301-303.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

legislation⁶¹ while others hold that the high contracting parties to the statute are even prevented from granting an amnesty in the first place.⁶²

Now that the court has been established, it can be expected that these questions will come up in a case where charges are brought for crimes which are covered by a domestic amnesty law. Whereas, it is unlikely that a state which has proclaimed an amnesty will galvanize or support prosecution by the ICC, the prosecutor may take up the matter *proprio motu*; the UN Security Council may refer it to the Court;⁶³ or a state, which did not proclaim the amnesty but whose national the accused offender is, may initiate proceedings. In such a case, the Court will need to explore how amnesties is to be dealt with under the Rome Statute.

To the very effect of international accountability of states, most especially state parties, The Rome Statute in its article 17 paragraph 2 gives guidance for the evaluation whether a state is unwilling to prosecute, which in fact, contravenes its tenet and special purpose of accountability in terms of international crimes. Such unwillingness results in the admissibility of a case, despite the conduct of an investigation or prosecution. Article 17 paragraph 2 thus provides:⁶⁴

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

⁶¹ MH Arsanjani, “The International Criminal Court and National Amnesty Laws: Proceedings of the 93rd Annual Meeting,” (1999) 93 *ASILPROC* 65, 67.

⁶² P Benvenuti, “Complementarity of the International Criminal Court to National Criminal Jurisdiction,” in F Lattanzi and AS William (eds), *Essays on the Rome Statute of the International Criminal Court*, 1999, 1, 21-22.

⁶³ This is very unlikely because of political considerations and biases. The same is with referrals by states. See Andrew O’Shea, *Amnesty for Crimes in International Law and Practice*, 2002, 123-124.

⁶⁴ Rome Statute of the ICC (n 52). See art. (17)(2) (a, b, & c).

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

4.5 Challenges of Sovereignty in Contemporary International Relations (Part 1): Analysis of the Trifecta

Although many see threats to state sovereignty from a wide variety of sources, many of these can be grouped in three broad areas: the rise of human rights, economic globalization, and the growth of supranational institutions; the latter being partially driven by economic integration and the cause of human rights.

The emergence of human rights as a subject of concern in international law affects sovereignty because these “agreed upon” principles place clear limits on the authority of governments to act even within their borders. The growth of multinational corporations and the free flow of capital have placed constraints on states’ ability to direct economic development and fashion social and economic policy. Finally, both to facilitate and to limit the more troubling effects of these developments, along with a range of other purposes, supranational organizations have emerged as a significant source of authority that, at least to some degree, place limits on state sovereignty.

4.5.1 The Protection of Human Rights

The United Nations Charter contains a contradiction that has become ever more troublesome, particularly after the end of the Cold War. On the one hand, the Charter contains clear defense of the territorial integrity of states, which was a reaction to Nazi aggression during the Second World War. At the same time, it also contains commitments to individual human rights and the rights of groups to self-determination which in fact brews territorial conflicts. Conventions on genocide, torture, and the like restricted state behavior within its own borders. Regional organizations were articulating human rights principles as well.⁶⁵ The growth of human rights law limits sovereignty by providing individuals rights vis-à-vis the state. However, in the context of the Cold War, US-Soviet rivalry paralyzed the Security Council and it rarely acted in defense of these principles.

At the same time, non-governmental organizations (NGOs) emerged in the 1960s-70s fighting for the cause of human rights. Groups such as Amnesty International and Human Rights Watch serve as watchdogs to publicize the human rights record of governments limiting state action in some ways.⁶⁶ The publicity is sometimes enough to alter state behavior. At other times, the information serves to prompt other states to apply diplomatic pressure, economic sanctions, and increasingly common, to contemplate humanitarian intervention.

In the 1990s, the Security Council began to reinterpret the UN Charter to largely favour human rights over the protection of state sovereignty. Through a series of resolutions, the United Nations has justified intervention in the internal affairs of states without their acquiescence.⁶⁷ In cases such

⁶⁵ The European Commission on Human Rights (ECHR) and the African Commission on Human and People's Rights (ACHPR).

⁶⁶ K Sikkink, "Human-Rights, Principled Issue-Networks, and Sovereignty in Latin-America," (1993) 47 (3) International Organization, 411-441. <<http://www.jstor.org/stable/2706982>>.

⁶⁷ NJ Wheeler, *Saving Strangers*, New York, Oxford University Press, 2000. Available at <<http://books.google.com/books?id=XBBBwis6VtwC>>.

as Somalia, Bosnia, and Kosovo, the Security Council has gradually expanded the definition of international threats to peace and security to justify intervention in circumstances that would have been inconceivable in the past. At the same time, as these cases and Rwanda show, states are often only willing to risk their troops when there is some national interest at stake. There is also great reluctance to interpret any of these instances as precedent-setting as states fear they may be the target of intervention in the future.

4.5.2 Economic Globalization

For many, economic globalization places significant limits on the behavior of nation-states at present. For those who see the retreat of the nation-state, the growing power of unaccountable market forces and international organizations provokes calls for change.⁶⁸ As will be further elaborated below, the growth of multilateral institutions to manage the global economy constrains state action.⁶⁹ The increasing mobility of capital has led states to pursue increasingly similar policies along the neo-liberal model.⁷⁰ Given the intensification of global competition, government

⁶⁸ M Khor, *Rethinking Globalization: Critical Issues and Policy Choices*, 2nd ed, New York, Zed Books, 2001. <<http://books.google.com/books?id=7rFqmTp5koEC&dq=khor>> ; D Korten, *When Corporations Rule the World*, 3rd ed, Bloomfield CT, Kumarian Press, 2001. <<http://books.google.com/books?id=G738BK-Ur-kC>>.

⁶⁹ K Ohmae, (2005). *The Next Global Stage: Challenges and Opportunities in Our Borderless World*, Wharton School Publishing, 2005. <<http://books.google.com/books?id=n4u2AAAAIAAJ>>; R Reich, *The Work of Nations*, New York, Random House Digital Inc, 2010; JN Rosenau, *Along the Domestic-Foreign Frontier*, Cambridge, Cambridge University Press, 1997. <<http://books.google.com/books?id=eTKi5qzuLIYC>>; S Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996.

⁷⁰ S Amin, *Capitalism in the Age of Globalization*, London, Zed Press, 1997.; S Gill, "Globalization, Market Civilization and Disciplinary Neoliberalism," 1995 24(3) *Millennium*; W Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism*, New York, Simon and Schuster, 1997.; A Hoogvelt, *Globalization and the Postcolonial World: The New Political Economy of Development*, London, Macmillan, 2001.; E Luttwak, *Turbo-Capitalism*, New York, Basic Books, 2000 <<http://books.google.com/books?id=EgroHAAACAAJ>>; JA Scholte, "Global Capitalism and the State," (1997) 73(3) *International Affairs*, 427-452.; S Strange, *The Retreat of the State*,

spending and revenue-generation are increasingly constrained.⁷¹ While some do not go so far as to declare the end of the welfare state, many see a worldwide convergence toward a more limited welfare state.⁷² Others find that, while the tasks of the state may be changing, the state very much remains the key driver of globalization processes.⁷³ That is not to say that all states have equal influence in the process. Nor can the outcomes be reduced to strictly positive or negative because the multitude of processes involved impact different states in different ways.⁷⁴

4.5.3 Supranational Organizations

Given the emergence of a whole range of transborder issues from economic globalization to the environment to terrorism, one of the key discussions surrounds whether the nation-state is obsolete as the best form of political organization to deal with these problems. Economic and social processes increasingly fail to conform to nation-state borders, making it increasingly difficult for states to control their territory, a central component of sovereignty. This raises important questions

Cambridge, Cambridge University Press, 1996.; D Yergin and J Stanislaw, *The Commanding Heights*, New York: Simon and Schuster, 2002. <<http://books.google.com/books?id=uNYzPUhXhJYC>>.

⁷¹ R Cox, "Economic Globalization and the Limits to Liberal Democracy," in A McGrew, (ed), *The Transformation of Democracy? Globalization and Territorial Democracy*, Cambridge, Polity Press, 1997.

<<http://books.google.com/books?id=NCOIb4mn9J8C>>; J Frieden, "Invested Interests: The Politics of National Economic Policies in a World of Global Finance," (1991) 45 (4) *International Organization*.; G Garrett and P Lange, (1991). "Political Responses to Interdependence: What's 'Left' for the Left?" (1991) 45 (4) *International Organization*.; P Gourevitch, *Politics in Hard Times*, New York, Cornell University Press, 1986.; J Gray, *False Dawn: The Delusions of Global Capitalism*, New York, The New York Press, 1998. Updated edition (2010) <http://books.google.com/books?id=ISV4wyZtXNgC&source>.

⁷² U Pieper and L Taylor, "The Revival of the Liberal Creed: The IMF, the World Bank and Inequality in a Globalized Economy," in D Baker, G Epstein and R Pollin, (eds), *Globalization and Progressive Economic Policy*. Cambridge: Cambridge University Press, 1998. <<https://doi.org/10.107/CBO9780511599095.002>>.

⁷³ G Garrett, "Global Markets and National Politics: Collision Course or Virtuous Circle," (1998) 52 (4) *International Organization*, 787-824.

⁷⁴ M Mann, "Has Globalization Ended the Rise of the Nation-State?" (1997) 4 (3) *Review of International Political Economy*, 472-496.

about the proper site of political authority. As governance structures are established at the global level to deal with the growing number of global problems, debate has ensued as to how to make these arrangements accountable and democratic.

Many organizations are state-based, such as the United Nations, the World Trade Organization, or the European Union. Therefore, in principle, states are firmly in control and any ceding of sovereign authority is in their interest to do so. However, bureaucracies, once established, often seek to carve out additional authority for themselves. States also may find functional benefit in ceding authority to supranational organizations.⁷⁵

Private organizations have emerged to infringe on sovereign authority as well. In addition to human rights NGOs discussed above, global civil society organizations have emerged around numerous issues. Civil society groups have had a growing, yet uneven, effect on nation-states and international organizations.⁷⁶ In addition, as economic interdependence grows, private governance arrangements, such as the Bank for International Settlements, are also becoming more prevalent.⁷⁷

⁷⁵ EB Haas, "International Integration: The European and the Universal Process." (1961) 15 (3) *International Organization*, 366-392.; D Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization*. London, The Royal Institute of International Affairs, 1943. Available at <http://books.google.com/books/?id=yIEcAAAAMAAJ> Accessed 28 December 2024.

⁷⁶ JW Meyer, J Boli, GM Thomas, and FO Ramirez, "World Society and the Nation-State," (1997) 103 (1) *American Journal of Sociology*, 144-181.

⁷⁷ S Picciotto, (1997). "The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks," in W Bratton et al, (eds), *International Regulatory Competition and Coordination*. Oxford: Clarendon, 1997, 89-123. Available at <http://www.amazon.com/International-Regulatory-Competition-Coordination-Perspectives/dp/0198260350>; W Reinicke, *Global Public Policy: Governing Without Government*, Washington, DC, Bookings, 1998.

Private security organizations even conduct war on behalf of states, whether as mercenaries in western African civil wars or as contractors to the US military around the world.⁷⁸

Together all of this suggests that the concept of sovereignty is under considerable pressure. Some aspects of sovereignty still exist and are honored in most circumstances, but many inroads are being made into state authority by many actors in many different circumstances. Where this will lead has yet to be determined.

4.6 Challenges of Sovereignty in Contemporary International Relations (Part 2): The Case Studies of Brexit, the South China Sea Dispute, and the Russia-Ukraine Crisis

Recent events from the international community have starkly illustrated the challenges of state sovereignty in contemporary relations. The United Kingdom's decision to leave the European Union (Brexit) has raised fundamental questions about the limits of national sovereignty in an increasingly interconnected world. The ongoing South China Sea dispute has highlighted the tensions between China's assertion of sovereignty over disputed territories and the rights of other nations to freedom of navigation. Meanwhile, the Russia-Ukraine crisis has underscored the difficulties of maintaining sovereignty in the face of internal divisions and external pressure.

4.6.1 Brexit

During the Brexit negotiations, sovereignty was central to the UK narrative on its withdrawal from the Union and its future relationship with its neighbours in Europe. Brexit initiated a heated and unresolved political battle about the meaning of sovereignty because taking back control collided with the asymmetry of power between the UK and the EU, on the one hand, and the practice of

⁷⁸ PW Singer, "Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security," (2001/2002) 26 (3) *Journal of International Security*, 186-220.

sovereignty in a highly interdependent world of shared regulations, common policies and connected supply chains, on the other.

Following a brief exploration of sovereignty and integration, the argument develops as follows. Firstly, throughout its 46 years membership of the EU, the UK was never that comfortable with the practice of sovereignty as an EU member state for reasons that pre-date membership. Secondly, successive UK Governments adopted a range of strategies to defend sovereignty and minimize the encroachment of the EU. Thirdly, sovereignty discourse was prominent in the referendum and central to the Leave campaign. It was particularly potent when linked to migration. Fourthly, in the post referendum period, sovereignty was key to UK redlines and greatly influenced, even dominated, UK negotiating strategy. Fifthly, Prime Minister Theresa May tried to reconcile her sovereignty demands with the needs of the UK economy whereas the Boris Johnson's Government pursued a sovereignty-first relationship with the EU. The outcome of the Brexit process offers an interesting social science puzzle given the explanatory power of a certain idea of sovereignty over producer interests and the UK economy.⁷⁹

The supranational gene, a core feature of the EU, would not have been planted if the UK was part of the Union from the beginning. During the later accession negotiations but particularly during the ratification debates in 1971 on the Treaty of Accession, parliamentary sovereignty was a recurrent issue in the discussion. The idea of parliamentary sovereignty was a key feature of the UK's constitutional and political order and appeared to carry emotional resonance for many UK parliamentarians. The orthodox version of parliamentary sovereignty implied that parliament was supreme and no parliament could be bound by the laws of the past. Accession to the EU and

⁷⁹ L Brigid, *Sovereignty and Brexit: From Theory to Practice, Working Paper*, No. 5 – 2021. Available at <https://ssrn.com/abstract=3788141> accessed 28 December 2024.

especially the supremacy principle in Union's legal order was at odds with the idea of an unfettered member state parliament. Although the UK constitution adapted and adjusted to membership, the impact on parliamentary sovereignty was experienced as a loss and a price that was paid for accession.

Sovereignty dominated the discourse of the Leave campaign and its leadership. Michael Gove, a member of the UK parliament and secretary of state for justice on the EU referendum, when justifying his total commitment to the Leave movement argued thus:

‘My starting point is simple. I believe that the decisions which govern all our lives, the laws we must all obey and the taxes we must all pay should be decided by people we choose and who we can throw out if we want change’.⁸⁰

He went on to say that EU membership implied no control over swathes of laws that were decided by politicians from other countries.⁸¹ For Gove, Brexit was about independence and the exit date from the Union would constitute Independence Day, a restoration and recapturing of independence and sovereignty. He spoke of the untapped potential which independence would unleash ‘if the UK became unshackled’ from its EU past.⁸² In the battle for hearts and minds, the sovereignty argument including controlling migration by regaining control over borders was very powerful and according to Niblett, the idea of restoring sovereignty appeals to British sensibilities’.⁸³ The

⁸⁰ M Gove, *Statement on the EU Referendum*, 20 February 2016. Available at http://www.voteleavetakecontrol.org/statement_from_michael_gove_mp_secretary_of_state_for_justice_on_the_eu_referendum.html accessed 28 December 2024.

⁸¹ Ibid.

⁸² Ibid.

⁸³ R Niblett, *Britain, the EU and the Sovereignty Myth*, London, Chatham House, 2016. Available at <https://www.chathamhouse.org/2016/05/britain-eu-and-sovereignty-myth> accessed 28 December 2024.

sovereignty claims in the referendum won the day but did not determine the form Brexit would take. The fact that the UK ended up with a 'sovereignty-first' Brexit has to be analyzed and understood, however that will be an area for further research with the view to maintaining a traditionalist approach as to the concept of sovereignty. The eventual Brexit outcome was one that implied an absolutist definition of sovereignty in an era of deep interdependence, a definition that privileged formal sovereignty over effective sovereignty.

4.6.2 The South China Sea Dispute

A verdict issued on 12 July 2016 by a Tribunal set up under the United Nations Convention on the Law of the Seas (UNCLOS) has ruled that there was no evidence that China had exercised exclusive control over the waters and resources of the South China Sea (SCS), and therefore had no legal basis to claim historic rights to sea areas within the so-called 'Nine-Dash Line'. The verdict also noted that while small groups of fishermen had used the rocky outcrops of the sea, collectively called the Spratly Islands, none of them were capable of sustaining a stable community and thus could not claim an Exclusive Economic Zone (EEZ). Going further, the verdict stated that some of the areas were in fact within the Philippines EEZ and China had violated their rights by interfering with Filipino fishermen and oil exploration teams. The concluding statement of the verdict established that Beijing's artificial island programme had violated UNCLOS obligations on protecting the environment.⁸⁴

Given China's emphatic rejection of the arbitration process initiated by the Philippines in 2013, it was not surprising that Beijing trashed the Tribunal verdict as "null and void". The Chinese foreign ministry statement noted that "China neither accepts nor recognizes it." Rejecting all third-party

⁸⁴ See Permanent Court of Arbitration, Press Release on The South China Sea Arbitration (*The Republic of the Philippines v The People's Republic of China*) The Hague, 12 July 2016. Available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN20160712-Press-Release-No-11-English.pdf> accessed 28 December 2024.

dispute settlement procedures, it called for processes which respected “historical facts” and upheld state sovereignty.⁸⁵ A government statement reaffirmed China’s official maritime claims to the Nanhai Zhudao (South China Sea Islands) on the basis of history, Chinese law, as well as UNCLOS. It said it was willing to discuss all disputes “peacefully through negotiations,” pending which it could undertake joint development.⁸⁶

It is important to know at the outset what the arbitral award is about and what it is not.⁸⁷ Most significantly, the award has not addressed the underlying issue—the competing claims to sovereignty of the islands. Likewise, though it has said that entitlements under the United Nations Convention on the Law of the Seas (UNCLOS) extinguish the claims of the Nine-Dash Line, it has not declared the line invalid, nor questioned China’s claims to the islands within that line. However, in deciding that none of the Spratly Islands were true islands under Article 121 of UNCLOS, with an EEZ and continental shelf, the verdict has sharply limited the maritime entitlements of those who control the islands anyway. What the Tribunal did say was that China’s artificial island programme violated its obligations to protect the marine environment by altering the natural conditions of the features that were disputed. It did not, however, question the principle

⁸⁵ Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the request of the Republic of the Philippines 2016/07/12. Available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1379492.shtml accessed 28 December 2024.

⁸⁶ Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in South China Sea, 12 July 2016. Available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1379493.shtml accessed 28 December 2024.

⁸⁷ R Beckman, “Tribunal ruling a game changer,” *The Straits Times*, 14 July 2016, <http://www.straitstimes.com/opinion/tribunal-ruling-a-game-changer-south-china-sea> accessed 28 December 2024.

of the construction activities, nor the building of military installations, except in the case of the Mischief Reef, which it held was part of the Philippines EEZ.⁸⁸

While the Tribunal has no means to enforce its judgement, its impact will be seen hereafter in the behaviour of the countries of the region. No one expects China to abandon the artificial islands that it has created, and the verdict, too, has not called for any roll-back on that score. What remains to be seen is whether China steps up its island building programme and aggressive fishing, or it backs off, although discretely.

4.6.3 The Russia-Ukraine Crisis

The most obvious place to start in making sense of what has happened concerning sovereignty tussle between Russia and Ukraine is with Russia itself, though even this might be viewed as controversial, given that a number of critics have laid most of the responsibility for the war on the United States and NATO for previously having failed to take account of Russian security needs.⁸⁹ Still, at the end of the day, it was the decisions made in the Kremlin that occasioned the ongoing conflict; so understanding what the rationale was in launching the ‘war’ would hardly seem unreasonable.⁹⁰

⁸⁸ Ibid.

⁸⁹ J Mearsheimer, “Why the Ukraine crisis is the West’s fault: The liberal delusions that provoked Putin,” (2013) 93 (5) *Foreign Affairs*, 77–89. Available at <http://www.jstor.org/stable/24483306> accessed 28 December 2024.

⁹⁰ There is now a fast-rising literature on why the Kremlin under the leadership of President Vladimir Putin launched the war against Ukraine. For a sample of the most recent studies, see O Matthews, *Overreach: The inside story of Putin’s war against Ukraine*, London, Mudlark, 2022; L Harding, *Invasion*, London, Guardian Faber Publishing, 2022; S Plochy, *The Russo-Ukrainian War*, London, Allen Lane, 2023; J McGlynn, *Memory Makers: The Politics of the Past in Putin’s Russia*, London, Bloomsbury Academic, 2023. Available at DOI: <https://doi.org/10.5040/9781350280793> accessed 28 December 2024; S Ramani, *Putin’s war on Ukraine*, London, Hurst Publishers, 2023; A Etkind, *Russia Against Modernity*, Cambridge, UK, Polity Press, 2023; C Miller, *The war came to us: Life and death in Ukraine*, London, Bloomsbury, 2023.

Three connected essays attempt to deal with this issue. The first, by Tomila Lankina, seeks to explain what may seem difficult to explain to outside observers: why the majority of Russians continue to support President Vladimir Putin and have proved vulnerable to his official propaganda in the Kremlin. To understand this, Lankina posited that we have to move beyond the upper layers of Russian society and look at the broader swathes of Russian society from the rural communities and small towns. As she points out, people in Russia have remained remarkably susceptible to his message, even as he ‘wages’ what Lankina terms his ‘brutal and genocidal war against Ukraine’.⁹¹

In the second essay, Björn Alexander Düben focuses on Putin’s own strongly held belief that far from constituting a sovereign country with its own history and culture, Ukraine in effect does not exist (and never has) as a nation separate from Russia. Düben admits that Putin’s ‘calculus for launching the invasion combined a variety of motives, including geopolitical concerns about systemic threats to Russia’s national security and domestic considerations of shielding his own authoritarian regime against potential pro-democratic “spill-over” from across the border’. But as he goes on to argue, ‘there is much to suggest that Putin’s personal readings of Ukrainian and Russian history, combined with deeply held ethno-nationalist and irredentist beliefs, have been one of the core factors motivating his decision to unleash a full-scale military assault against Kyiv’.⁹²

Eleanor Knott, in the last of the three essays, further examines Putin’s ideas, making the important point that while ‘the stakes of Russia’s war against and invasion of Ukraine are ethnic, imperial,

⁹¹ M Cox, *Ukraine: Russia’s War and the Future of the Global Order*, new ed, London, LSE Press, 2023. Available at DOI: <https://doi.org/10.31389/lsepress.ukr> License: CC-BY, accessed 28 December 2024.

⁹² Ibid.

and civilizational’, they are also ‘existential’. This suggests that the decision to invade and continue with the war is as much, if not more, about Russian identity as it is about power. Knott also goes on to argue that there will be no easy exit from this conflict, not only because Ukraine as a ‘victim’ must be allowed to set the terms on which the war ends, but also because the war has come to define Russia as a nation while legitimizing the repressive character of President Putin’s rule at home.⁹³

4.7 Conclusion

Globalization has profoundly redefined and redesigned the concept of state sovereignty, presenting both challenges and opportunities. The fundamental policy of globalization that undermines the sovereignty of states is the promotion of universal standard for everything, which, in turn, alters the scope of the state authority. To this end, economic, cultural and information which are the purview of a sovereign state have been eroded. While traditional notions of absolute sovereignty have been eroded, states are finding ways to adapt, either through regional cooperation, assertion of national control, or embracing technological innovations. The future of sovereignty will likely hinge on states’ ability to navigate these dynamics while maintaining relevance in an interconnected world.

⁹³ Ibid.

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS, AND GENERAL CONCLUSION

5.1 Summary of Findings

This research essay has examined in great detail, the redesigning and adaptation of the concept of sovereignty in the 21st century, owing to the influence of international relations, underpinned by the phenomenon called globalization, which have made it possible for such redesigning and adaptation to occur. After a thorough analysis of relevant pieces of international laws and norms, policy papers, scholarly write-ups by jurists and political scientists alike, case laws, as well as case studies on the subject matter of this research, the following findings emerged from the work:

1. The Classical conception of sovereignty is established on the manifestation of power and authority vested in an individual regarded as the sovereign ruler. Simply put, classical sovereignty is deposited in an individual. Classical philosophers gave credence in this regard: Plato, in his book, “The Republic” emphasized the position of a philosopher king; Cicero also laid claims to the effectiveness of ‘one man rule’ in terms of protecting the commonwealth. There was as well the common saying then that “a king can do no wrong.”
2. Contemporary issues and concerns have called for a shift in terms of the generally accepted understanding of sovereignty i.e. the Westphalia model. The popular sovereignty exercised by states has undergone some significant modifications due to the increasing need for states to interact with one another, and with supranational forces and factors at play, an interdependence is caused in this respect of international relations. Daniele Archibugi referred to this interdependence as “cosmopolitan democracy.”¹

¹ D Archibugi, “Cosmopolitan Democracy and its Critics: A Review,” (2004) 10(4) *European Journal of International Relations*, 437.

3. Regarding the analysis of state sovereignty with its attendant rights and responsibilities in view, the making of a state cannot but be given credence to, as such forms the basis upon which every conception as to sovereignty and its changing dynamics is built. Extrapolating from chapter three of the research essay, the 1933 Montevideo Convention provides an enduring framework for understanding statehood and sovereignty, appraising both the rights and responsibilities of states. It introduced a legal conception of statehood rooted in independence, equality, and territorial integrity while imposing duties that are aligned with international law and peaceful coexistence and cooperation.
4. The exercise of sovereignty by states have been widely discussed and described by jurisprudence, sociology and political scholars as a consolidation of both rights and responsibilities with the latter having a preponderance, as a result of the changing dynamics of international relations. In other words, sovereignty is dichotomous and the “responsibility aspect” of it is seeing significant upgrade as a result of states’ continued participation in the international community. Within the scope of international legal responsibility are: the responsibility of states to protect, which is further divided into two parts -internal and external responsibility, legitimized by the R2P policy framework; responsibility in the form of international obligations vis-à-vis the adherence to treaties, encapsulated in the principle of *pacta sunt servanda*; and lastly, responsibility in the form of accountability for breach of public international law, with the International Criminal Court as a subsisting instrumentality.
5. One significant controversy concerning the making of the Rome Statute which established the ICC and the exact reason as to why it has not yet been adopted by the United States even after being signatory is the statute’s insufficient appraisal of the issue surrounding the

granting of Amnesty. It was argued that a democratic decision between prosecution and national reconciliation should be respected and not made by the ICC. But the Rome Statute, according to the US threatened the transition from oppression to democracy.

6. The phenomenon of globalization is discussed in this research essay to have emerged as a term used to simply describe the integration or alliance of sovereign states for the purpose of advancing a common cause. Hence, globalization has brought about both comforting and conflicting developments to the international community. These developments find their root in three (3) key scopes regarded as the '*trifecta*' namely: the widened frontiers of human rights; economic security (with respect to trade import and export, as well as currency dominance) which birthed the facet of economic globalization; and lastly, the establishment of supranational organizations, including terrorist organizations which are a grave threat to the peace and security of the international community.

5.2 Recommendations

Based on the foregoing discourse of this research essay, the following are recommendations underscoring the conflicts and convergences between sovereignty and globalization:

1. Reservations makes it possible for states to constructively assert their sovereignty with respect to entering lateral agreements with one another under Treaty Law. However, this exemption mechanism should be utilized in line with stipulated international rules.
2. Supranational frameworks for global governance should recognize that the phenomenon of globalization, upon which they are established, is to the effect of tackling a common challenge or a surpassing internal/domestic challenge that bedevils the international community and thus, the exercise of sovereignty by states is somewhat limited in this

respect. Anything outside of this context should be handled by states with credence given to their internal/domestic governance.

3. The International Law Commission should work on reforming the Rome Statute concerning the issues surrounding the grant of amnesty by sovereign states. The niceties of amnesty must be appreciated, so that the ICC as a supranational institution, is not seen to be violating the judicial sovereignty of a state by non-recognition of its grant of amnesty. It must be emphasized that this is the significant reason why the US have not adopted it.
4. Although the debate as to the equality of states or otherwise in international law has been settled by *pragmatic jurisprudence*,² seemingly ‘powerful’ states should be considerate in the exercise and assertion of their power and authority to achieve a balance in the international legal order.

5.3 Conclusion

Traditionally, sovereignty has been denoted as the independence and supreme authority of a state. Therefore, sovereignty is often conceived as an absolute concept which implies that states are totally independent with regard to all other states and are above the rules of international law. However, it is evident that the early authors of international law did not regard state sovereignty as absolute and unlimited, but subject to higher norms.

Although the concept of state sovereignty is still far from portraying its full essence, the understanding of the controversial meanings it has generated prepares us for a dynamic construction of the idea of coexistence and cooperation of states. However, this concept must either be rethought and accepted in the newest of form, or other notions that wholly respect the current

² *Pragmatic jurisprudence* is a nomenclative conception drawn from the research essayist’s legal knowledge, with meaning, based on what works suitably and practically well, according to legal philosophies in situations tending to define the word ‘equality.’

dynamics must be found. The problem remains open, but solutions will be found sooner or later. This research essay tried to capture precisely these expectations. Specifically, I presented the classic meanings of the concept of sovereignty that have been functional for centuries. I refer here, above all, to the Westphalian model, the strictest and most rigid meaning of this concept. Although it meant a great gain in its emergence, the kind of sovereignty which presupposes independence in the strictest sense, today it can no longer accurately describe reality. Because, as we have seen, in the case of the Member States of international organizations like the UN, EU, AU, ECOWAS, NATO, BRICS+, ASEAN etc., we have given credence to the idea of a new form of sovereignty (shared sovereignty) which has consequently resulted in certain limitations of the exercise of sovereign power. However, we must understand that this complex adaptation, as Bardo Fassbender described it, does not detract from the essence of the concept, so long as it is the states themselves that consciously, voluntarily and legitimately delegate powers, by virtue of comity, to a shared structure for the purpose of advancing security and prosperity.

What we must however keep in mind is that the concept of sovereignty receives new connotations and conceptual additions over time, in response to changing socio-political requirements. Emphatically, the concept should not be completely removed, but only adapted, because it still remains fundamental and meets some still current requirements.³ The changes are only nuanced, but the conceptual core will continue to be used efficiently. It is difficult to imagine a paradoxical viewpoint in which states will give up this term in totality. And we cannot expect that exhaustively, all the elements of the multitude of the states of the world will be understood to give up this concept

³ Sovereign states like the UK have hinged on the assertion of its sovereignty by exiting the EU, through Brexit. US tech war with Tiktok, a subsidiary of ByteDance is also about the assertion of sovereignty vis-à-vis US national security.

simultaneously. Excusing this hypothesis, all we have to do is adapt and readjust this permissive and malleable concept.

The research essay also appraises of the Montevideo experience which underscores the delicate nexus between independence and interdependence, as well as co-existence and cooperation, highlighting the necessity for states to adapt their sovereignty to address shared global responsibilities effectively.

On the analysis of state sovereignty in relation to current global influence, the phenomenon called globalization has profoundly redefined state sovereignty. The fundamental policy of globalization that undermines the sovereignty of states is the promotion of universal standard for everything, which, in turn, alters the scope of the state authority. To this end, economic, cultural and information which are the purview of a sovereign state have been eroded. While traditional notions of absolute sovereignty have been eroded, states are finding ways to adapt, either through regional cooperation, subtle assertion of national control, or embracing technological innovations. The future of sovereignty will likely hinge on states' ability to navigate these dynamics while maintaining relevance in an interconnected world.

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