THE EVOLVING NATURE OF SOVEREIGNTY IN PRACTICE

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Sovereignty is a concept which for centuries has been a defining principle which regulates the relationship of states. It has provided the fundamental framework for order and has greatly influenced the development of international law. There exists an enormous amount of literature on the concept of sovereignty with varying views regarding its origin and evolution, its scope and nature. Significantly, it is recognised that within the past 50 years, the concept of (absolute) sovereignty has been challenged by factors such as globalization, human rights regional integration, etc. Discussions on limitations on sovereignty are usually approached by directly examining these factors. This paper however adopts a historical perspective to understanding the concept of sovereignty. It examines the historical development of the concept of sovereignty with emphasis on the nature of sovereignty before and after World War II. These eras reflect the different attitudes regarding the nature of sovereignty.

Also the paper considers that the most significant limitations on sovereignty are those arising from the recognition of international human rights norms which have significantly modified absolute sovereignty to include sovereignty as responsibility.

Keywords: sovereignty, evolution, limitations, historical

Introduction

The international society is based on a set of normative structures, which were derived from factual situations with sovereignty being the foremost among them.[1] It is regarded as the "primary constitutive rule" of

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1 Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty," 6 International Journal of Human Rights, 82 (2002).

international law, which regulates the relationship of States.[2] It has for the last several hundred years been a defining principle of interstate relations and a foundation of world order.[3] It is ascribed to a State in terms of territory and population over which institutional authorities exercise absolute control free from all external interference.[4]

The concept of sovereignty has many functions in interstate relations and lays the foundation for other traditional concepts of international law such as territorial integrity and sovereign equality.[5] It is deeply rooted in customary international law and is supported by other corollary principles and rules of public international law such as the prohibition of the use of force and non-intervention in domestic affairs.[6]

Traditional notions of sovereignty (which reflect positivist ideas) imply absoluteness, permanence and indivisibility. In the context of international law, it is understood to be an attribute of the State as a member of the international community.[7] Since the international community is full of overwhelming variations of power, sovereignty is for many (weak) States their only source of protection against powerful States.[8] Consequently, sovereignty is regarded as more than just a functional principle of

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2 Thomas J. Biersteker and Cynthia Weber "The Social Construction of State Sovereignty" in Thomas J Biersteker and Cynthia Weber ed. *State Sovereignty as a Social Construct,* 1 (Cambridge: Cambridge University Press, 1996)

3 ICISS, *The Responsibility to Protect: Research, Bibliography, Background - Supplementary Volume to the Report of The International Commission on Intervention and State Sovereignty* (Canada, International Development Research Centre, 2001), 7.

4 Samuel .J Barkin and Bruce Cronin "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations," 48(1) International Organisation 111 (1994)

5 John H Jackson "Sovereignty-Modern: A New Approach to an Outdated Concept," 97(4) American Journal of International Law, 782 (2003).

6 See Charter of the United Nations 1945; Article 2 (4) and (7).

7 Yoram Dinstein "Sovereignty, the Security Council and the Use of Force" in Bothe et al *ed. Redefining Sovereignty: The Use of Force after the Cold War*, 111 (USA: Transnational Publishers, 2005)

8 ICISS, *Supplementary Report*, (n.3), p. 7.

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international relations as some States perceive it as recognition of their equal worth and dignity.[9]

However, because of the tendency of several States to participate or acquiesce in human rights violations within their territories, there have been attempts by "norm entrepreneurs" to change the balance from an emphasis on absolute sovereignty to limited sovereignty, which entails responsibility.[10] This paper thus examines the historical development of the concept of sovereignty with emphasis on the nature of sovereignty before and after World War II. These eras are watersheds in the sense that they reflect the attitude of States to the nature of sovereignty. The pre-World War II era, which comprises the period from the inception of the concept in 1648 to the period after World War I, represents the traditional notions of sovereignty, which emphasises its absolute nature. The post- World War II era represents a period where there are conscious attempts to place limitations on sovereignty through the development of other norms.

Internal and External Sovereignty

The concept of sovereignty is generally defined with the idea of internal and external sovereignty in mind. Constructivists are of the view that sovereignty in both its internal and external faces is a social concept produced through the practices of States.[11] Internal sovereignty is predicated on the principle that each State is free to pursue its internal affairs free from outside interference. It essentially means that the government of any State has

[9] *Ibid.*

[10] Bruce Cronin "The Tension between Sovereignty and Intervention in the Prevention of Genocide," Human Rights Review 297, (2007).

[11] David A. Lake "The New Sovereignty in international Relations," 5(3) International Studies Review 306 (2003).

supremacy over the people, resources and all other authorities within its control and is usually described as empirical sovereignty.[12]

On the other hand, external sovereignty envisages recognition by other states and implies a relationship of formal equality.[13] It implies that each state is independent with no authority above it. It is based on the notion that the territorial integrity of every State is inviolate and is described as juridical sovereignty.[14] An illustration of the extent of external sovereignty is found in a statement by Judge Huber to the effect that sovereignty in relations between States signifies independence to a portion of the globe and the right to exercise therein, to the exclusion of any other State, the functions of a State.[15]

These dimensions of internal and external sovereignty represent the traditional and absolutist nature of sovereignty retained in international practice during the late 1970s.[16] However, Sikkink has observed that "neither the doctrine nor practice of internal sovereignty has ever been absolute."[17] She cites as examples the Treaty of Augsburg and the Peace of Westphalia, which limited the discretion of the monarch in controlling the practice and religion of its subjects and the campaign for the abolition of slavery in the 19th century, which made it clear that certain extreme practices would be the basis for international concern and action.[18]

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12 Samuel Makinda "Sovereignty and International Security: Challenges for the United Nations," 2 Global Governance, 150 (1996).
13 Lake, (n.11), p. 305.
14 Makinda, (n.12), p. 150.
15 *Island of Palmas Case* (1928) 2 RIAA 829.
16 Lake, (n.11), p. 306.
17 Kathryn Sikkink "Human Rights, Principled Issue-Networks," 47(3) International Organization, 413 (1993).
18 *Ibid.*

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However, until the Second World War, in the widest range of issues, the treatment of its population remained within the discretion of a State and no important legal doctrine challenged the State's supreme authority within its borders.[19]

In the light of this, internal sovereignty as it is traditionally understood (absolute control) is being challenged by the growing human rights norms in the sense that it seeks to redefine what is essentially within the domestic jurisdiction of States. Thus, issues which were within the exclusive domestic jurisdiction of a State have now become an issue of international concern.

The Nature of Sovereignty

Sovereignty is a social/legal construct and as such the roots of its legitimacy tends to differ according to time and place.[20] As a social construct, the understandings of sovereignty are usually transformed and this affects the way in which States give effect to the concept in their relationships with each other.[21] The understanding of sovereignty tends to be redefined during and following the conclusion of major wars or in the aftermath of widespread political upheavals.[22] Such understandings are a reflection of the norms and principles that underlay the legitimacy of a state following a particular era.[23] Thus it is suggested that sovereignty is not "exogenous" to the system but produced through the practice of States and is thus influenced by other

[19] *Ibid.*
[20] Biersteker &Weber, (n.2), p. 1.
[21] Lake, (n.11), p. 306.
[22]Barkin & Cronin, (n.4), p. 114.
[23] *Ibid.*

social norms (such as human rights, self-determination, environmental factors, regional integration and globalization to mention a few).[24]

The generality of the concept of sovereignty together with the differences in its meaning and understanding over time makes sovereignty one of the most controversial concepts in international law. Sovereignty which was once relatively uncontested has become a major cause of disagreement within international law particularly with respect to the scope of its application.[25] The central argument is that the principle of sovereignty despite the significant support it still enjoys is in steady decline. Former UN Secretary General Boutros-Ghali reflected this change in ideology in a statement to the effect that:

> The time of absolute and exclusive sovereignty has passed; its theory was never matched by reality. It is the task of leaders of states today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent World.[26]

In the light of recent developments in international law and practice the paramount question is whether sovereignty remains absolute in the traditional Westphalian sense or has it been limite d by the recognition of other normative concepts particularly human rights norms, humanitarian

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[24] Nico P. Swartz "State Sovereignty and Environmental Law," *European Journal of Business and Social Science* 3 (8) (November 2014): 35-37, URL: http://www.ejbss.com/recent.aspx-/ ISSN: 2235 -767X; Koesrianti "International Cooperation among State in the Globalised the Era: The Decline of State Sovereignty," *Indonesia Law Review* 3 (September – December 2013): 272, do: http://ilrev.ui.ac.id/index.php/home/article/view/41; Leonid E. Grinin "State Sovereignty in the Age of Globalization: Will it Survive?" *Globalistics and Globalization Studies*, (2012): 217-218, Accessed March 18, 2016 http://www.sociostudies.org/books/files/globalistics_and_globalization_studies/211-237.pdf.

[25] Jens Bartelson "The Concept of Sovereignty Revisited," 17(2) European Journal of International Law, 463 (2006).

[26] 'An 'Agenda for Peace; Preventive diplomacy, peacemaking and peacekeeping' *Report of the Secretary General pursuant to the statement adopted by the Summit meeting of the Security Council on 31 January, 1992, forty-seventh session, A/47/277;* Para. 17, Accessed March 19, 2016 http://www.un-documents.net/a47-277.htm.

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intervention and the doctrine of the responsibility to protect? Answering these questions requires an overview of how the notion of state sovereignty has developed and transformed over time.

Historical Development

The concept of sovereignty is not a modern one and the doctrine was not produced by the modern State, as there were no States in this sense until the 19th century.[27] Throughout the course of history, the meaning of sovereignty has undergone important change and transformation from the location of the source of its legitimacy (in God, in the Monarch or in the people) to the scope of activities claimed under its protection.[28] This history can be told as one of two broad movements – the first, a century's long evolution towards a Europe Continent, then a globe of sovereign States; and the second a circumscription of absolute sovereign prerogative in the second half of the 20th Century.[29]

Sovereignty pre-World War II

The concept of sovereignty dates back to the time when there were relations among disparate territorial entities such as those making up the Holy Roman Empire.[30] It also shows an emergence of increasingly autonomous cities in Northern Italy and in Flanders, which gave rise to an understanding among numerically small urban elites that certain places could be immune

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[27] F.H Hinsley 'Sovereignty' cited in Wayne Hudson, "Fables of Sovereignty" in Trudy Jacobsen et al *Re-envisioning Sovereignty: The End of Westphalia?* 24 (Ashgate Publishing Limited, 2008).
[28] Biersteker & Weber, (n.2), 1.
[29] 'Sovereignty' *Stanford Encyclopaedia of Philosophy* p 4, available at http://plato.stanford.edu/entries/sovereignty, accessed 3/3 2009.
[30] ICISS, *Supplementary Report*, (n.3), p. 6.

from the authority structures that dominated elsewhere.[31] Since the late middle ages, the term sovereignty became a political slogan used by territorial princes in their quest to emancipate themselves from or resist the claims to universal temporal jurisdiction made by the pope or emperor.[32] It replaced the medieval mixture of overlapping personal jurisdiction with an exclusive territorial jurisdiction and eliminated rivalling powers of nobility and estates.[33] It established a relationship of immediate obedience between the ruler and individual subjects.[34]

However, the present foundations of international law regarding sovereignty date back to the 1648 Peace of Westphalia, which established what was considered a new legal order for European States.[35] The Westphalian international legal regime is best remembered for codifying State sovereignty and making the territorial State the foundation of the modern international system.[36] The emergence of a society of states first in Europe and later across the globe went hand in hand with a new conception of international law which can be referred to as the classic regime of sovereignty (from 1648 to the early 20th Century).[37]

Under the Westphalian system, sovereignty was perceived to reside with political leaders and government and not with the civil society.[38] This represents the traditional notions of sovereignty whereby the state is

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31 Helmut Steinberger "Sovereignty," *Encyclopedia of Public International Law* 4 (2000): 503.
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 Makinda, (n.12), p. 150.
36 *Ibid.*
37 David Held "The Changing Structure of International Law: Sovereignty Transformed?" p 162, Accessed February 2, 2009 http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf.
38 Makinda, (n.12), p. 150.

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supreme and not subject to any force or authority from within or outside its borders. This notion has occasionally served as a defence and excuse for the imposition of dictatorial rule particularly in developing countries as a means of avoiding international scrutiny of their domestic human rights situations.[39]

The history and State practice of the concept of sovereignty was also evidenced and influenced by the works of scholars writing at the time. These scholars contributed to the literature concerning the scope and extent of sovereignty and the holders of sovereignty. These have influenced the differing views of sovereignty existing in today's world. For example, when Jean Bodin and Thomas Hobbes first elaborated the notion of sovereignty in the 16th and 17th Centuries, they were concerned with establishing the legitimacy of a single hierarchy of domestic authority.[40]

These writers popularised the idea of sovereignty that originated from the Peace Treaties of Westphalia. They envisioned sovereignty as absolute, extending to all matters within the territory unconditionally.[41] To Bodin, the only limit to the sovereign's absolute power was that the leader was subject to God and natural law.[42] The term absolute meant the totality of legislative power and the lack of a higher earthly authority and this had a considerable impact on the rise of the State system in early modern Europe.[43] For Hobbes, the concept of sovereignty envisaged a situation where the people established

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[39] *Ibid*, 151.

[40] See Lorenzo Zucca "A Genealogy of State Sovereignty," *Theoretical Inquiries in Law* 16 (2) (2015) Accessed *March* 22, 2016, http://www7.tau.ac.il/ojs/index.php/til/article/viewFile/1343/1388.

[41] Jean Bodin *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* 1 (Julian H Franklyn (ed), Cambridge: Cambridge University Press, 1992).

[42] *Ibid,* 4.

[43] Ruth Lapidoth "Sovereignty in Transition" Journal of International Affairs, 326 (2001).

sovereign authority through a covenant in which they transferred all of their rights to the "*Leviathan*", who represented the abstract notion of the State.[44] The will of the *Leviathan* reigned supreme and represented the will of those who had alienated their rights to it.[45]

The writings of Machiavelli also influenced the development of the concept of sovereignty. In his renaissance discourse, the government, territory and population remained the property of the prince.[46] The prince was not bound by natural law, canon law or any other norm or authorities that obligated members of Christendom.[47] He was supreme within the state's territory and responsible for the well-being of this singular, unitary body.[48] To these writers, the form of sovereign that exercised sovereign powers could legitimately vary between monarchy and aristocracy but what was important was that sovereignty was absolute and never resided in the people.[49]

However, these absolutist notions of sovereignty were criticised and modified later by writers in the 18th Century. These writers include John Locke and Rousseau. John Locke redefined sovereignty as popular sovereignty and was in line with the principles of liberal democracy and respect for human rights.[50] This concept of popular sovereignty was reasserted in the work of Rousseau, who based sovereignty of the people on

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44 Thomas Hobbes *Leviathan* (Ed) Richard Tuck (Cambridge, Cambridge University Press, 121 (1991).
45 *Ibid*, 130.
46 Niccolo Machiavelli *The Prince and Discourses (1950)* cited in Wayne Hudson, "Fables of Sovereignty", in Trudy Jacobsen , Charles Sampford, and Ramesh Thaku ed. Re-Envisioning Sovereignty 26 (Routledge, 2008).
47 *Ibid.*
48 *Ibid.*
49 Stanford Encyclopaedia, 8.
50 Makinda, (n.12), p. 151.

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natural rights.[51] According to him, the exercise of sovereignty must be linked to the will of the people, which means that political leaders must seek legitimacy through democratic processes.[52]

The proponents of popular sovereignty envisage that sovereignty ultimately originates from the people and it is a power to be exercised by, for and on behalf of the people of a State.[53] This then means that sovereignty would be respected only if the people of a state have the opportunities to exercise their political, economic and cultural rights.[54]

This idea of popular sovereignty has laid the foundation for other norms such as self-determination, democracy, humanitarian intervention and the responsibility to protect thus reflecting the growing limitations of the traditional conceptions of absolute sovereignty. According to Makinda, if sovereignty were universally reinterpreted as popular sovereignty, the international community would then have a reason to intervene in states where human rights were violated by a military regime or an unelected government.[55]

However, for many years following the treaty of Westphalia, the traditional notions of sovereignty remained absolute in international practice. States resisted any attempts to limit or even question the absolutism of their sovereign power.[56] This was evident in the 1919 Treaty

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[51]Hinsley, (n.27), p. 29.
[52] Jean-Jacques Rousseau *The Social Contract* in Nigel Warburton *Philosophy: The Classics* 100 (London: Routledge, 1998).
[53] *Our Global Neighbourhood*, The Report of the Commission on Global Governance cited in Makinda "Sovereignty in International Security, 151.
[54] *Ibid*
[55] *Ibid*, p. 175.
[56] Vesselin Popovski "Essay: Sovereignty as Duty to Protect Human Right", Accessed March 31, 2009 http://www.un.org/pubs/chronicle/2004/issue4/0404p16.html.

of Versailles, which established a commission to investigate and identify persons, including the Kaiser of Germany, Wilhelm II, as liable for war crimes, recommending the creation of an international Tribunal.[57] The victorious States opposed such an option regarding the trial of a Head of State as unprecedented in international and national law and contrary to the basic concept of national sovereignty.[58] This was the first notable attempt to crack the Westphalian notion of sovereignty.[59]

Sovereignty post-World War II

This era shows a growing number of factors, ranging from globalization to trade, security and environmental factors which place certain limitations on the concept of State sovereignty.[60] These factors and the growth of non-state actors in international relations have placed limitations on the scope of sovereignty. Also, as States subscribed and participated more in external relations through treaties, these imposed limitations on their will to be totally independent.[61] This era also gave birth to the growth of certain principles such as genocide, international criminal law and self-determination, which influenced the way in which sovereignty, came to be constructed by States. This era is also instructive as it also gave birth to fundamental principles of sovereignty buttressed in the United Nations Charter by article 2(4) and (7) concerning the prohibition on the use of force and non-intervention in the domestic affairs of states respectively. Practice

[57] *Ibid.*
[58] *Ibid.*
[59] Jackson N Maogoto "Westphalian Sovereignty in the Shadow of international Justice? A Fresh Coat of paint for a tainted Concept" in Trudy Jacobsen et al (eds) *Re-envisioning Sovereignty: The End of Westphalia?* 213 (Ashgate Publishing Limited, 2008).
[60] Grinin, (n.24), p. 217-218.
[61] Cronin, (n.10), p. 294.

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however reveals certain limitations placed on the absolute adherence to these principles by human rights norms.

The Principle of Non-Intervention

Before 1648, the principle of non-intervention,[62] which is a central element of modern sovereignty, had not been given recognition as a principle of international law.[63] Interventions for the protection of religious minorities were considered justified in the medieval age but from the time of the Peace of Westphalia, the admissibility of religious interventions were terminated.[64] The principle of non-intervention implies that States are precluded from interfering in the domestic affairs of other sovereign States and this is an established principle of customary international law.[65] It has been suggested that "states jealously treasure the principle of non-intervention, and it is the chief envy of aspiring States because it is the legal insurance of their sovereign existence."[66]

The principle of non-intervention is reflected in article 2(7) of the UN Charter, which provides, *inter alia,* that "nothing contained in the present Charter shall authorise the United Nations to intervene in the matters which are essentially within the domestic jurisdiction of any state…." The principle of non-intervention is also reflected in numerous General Assembly declarations[67] and decisions of the International Court of Justice (ICJ).[68]

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[62] ICISS, *Supplementary Report*, (n.3), p. 15. Intervention can be defined as the 'various forms of non-consensual action that are often thought to directly challenge the principle of state sovereignty.
[63] Steinberger, "Sovereignty,"504.
[64] *Ibid,* 505.
[65] ICISS, *Supplementary Report*, (n.3), p. 15.
[66] Dino Kritsiotis "Reappraising Policy Objections to Humanitarian Intervention," 19 Michigan Journal of International Law, 1009 (1997-1998).
[67] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965) G.A Resolution 2131 (XX) 21 December 1965.

During the past years however, the concept of intervention has been given qualitative and new meanings.[69] Interventions have increasingly been defined in terms of the purposes or goals that are radically different from the traditional objectives that intervention was expected to achieve.[70] It became projected as being undertaken by, or on behalf of the international community undertaken to achieve humanitarian objectives "which are intrinsically far too valuable to be held hostage to the traditional notions of sovereignty".[71]

The Prohibition of the use of Force by States

The threat or use of force against the territorial integrity or political independence of a state is prohibited by article 2(4)[72] of the UN Charter as well as a corresponding general rule of customary international law.[73] The law prohibiting the use of force by States in their international affairs is one of the fundamental obligations of States in international law, a breach of which would incur state responsibility.[74] Since the end of World War II, international law has prohibited States from threatening or using force against another State except in self-defence or pursuant to Security Council authorisation thereby reducing the use of force to the barest minimum.[75]

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[68] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14.
[69] Ayoob, (n.1), p. 83.
[70] *Ibid*.
[71] *Ibid*, 84.
[72] All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.
[73] Steinberger, (n.31), p. 513-14.
[74] Martin Dixon *Textbook on International Law* 310 (6th ed., Oxford, Oxford University Press, 2007)
[75] Ryan Goodman "Humanitarian Intervention and Pretext for War" 100 American Journal of International Law, 111 (2006).

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The provision of article 2(4) is widely regarded as one of the central building blocks of the UN and it stipulates a general prohibition of the unilateral use of force. The provision of article 2(4) of the Charter is recognised as customary international law and has obtained the status of *jus cogens*, which applies to all States.[76] Article 2(4) prevents acts of aggression, defined as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter."[77] Notwithstanding the express prohibition on the use of force however, the Charter permits States to use force in enforcement measures authorised by the Security Council in the maintenance of international peace and security.[78] These are usually justified in the face of gross violations of human rights by states.

Sovereignty and Self-Determination

The concept of self-determination, which became recognised after World War II as a right of peoples in international law, is another normative factor that has contributed to challenging the once absolute notion of sovereignty particularly with respect to territorial integrity.[79] Self-determination, which has its roots in popular sovereignty, stresses the link between sovereign authority and a defined population.[80] The right of peoples to self-determination is recognised in the Charter, by Article 1(3) and subsequently

[76] It has also found affirmation in several General Assembly resolutions. These include Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States 1965, Declaration on Principles of International Law 1970 and the Definition of Aggression 1974.
[77] Article 1 Resolution on the Definition of Aggression.
[78] See Chapter VII of the United Nations Charter.
[79] Held, (n. 37), p. 162.
[80] Barkin & Cronin, (n.4), p. 112.

supported by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 1966.

The right to self-determination has both an internal and external aspect. The external aspect gives a right to peoples to establish a State or to choose the State to which they wish to belong and internally the free choice of government namely democracy.[81] The right to self-determination as a principle of international law relating to sovereignty although not consistently practiced and respected in individual cases was supported by the policies of decolonisation.[82] During the colonial times, self-determination affected traditional notions of sovereignty in the sense that peoples were entitled to secede from colonial territories even without the consent of the original State.[83] This led to the creation of a number of sovereign States in Africa and Asia.[84] According to Deng:

> …this re conceptualisation of sovereignty has necessitated the reassertion of the self-determination doctrine which, in effect, calls for the respect of people's sovereign rights. While the doctrine of self-determination is as old as the French Revolution and the American Revolution in the 18th century, the application of this doctrine became more pronounced in the fight against colonialism by the marginalised and colonised peoples of the world.[85]

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[81] Lapidoth, (n. 43), p. 336.
[82] Steinberger, (n.31), 516.
[83] Martin Griffiths "Self Determination, International Society and World Order," 3 Macquarie Law Journal, 29 (2003).
[84] *Ibid*.
[85] Biong K. Deng "The Evolving Concept and Institution of Sovereignty Challenges and Opportunities", *Policy Brief*, Briefing No 28, June 2010, p 4, Accessed March 20, 2016 http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-28.-The-Evolving-Concept-and-Institution-of-Sovereignty.pdf.

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On the other hand, in postcolonial times, the right to self-determination did not authorise the dismemberment of the territorial integrity of an existing State, if that State possessed a government representing the whole people without discrimination and respected the fundamental human rights of its people.[86] However, the exercise of the right to self-determination during this period witnessed the breakdown of sovereign States such as the Soviet Union, Yugoslavia and Ethiopia.[87]

For many years, the provisions of self-determination as enshrined in the Charter was interpreted as asserting the right of existing States to determine their internal affairs free from outside intervention.[88] However, given the changing understanding of sovereignty, it could now be interpreted to assert the right of a people to have control over its own future thus enhancing the idea of popular sovereignty.[89]

It was therefore the role of the State to act in the interest of itself and its population, rather than to act towards some long-term internationalist ideal in a manner that might rebound to the detriment of the immediate national interest.[90] Thus, as a result, where the State as represented by the government suppressed the peoples, they could arguably seek outside assistance in order to achieve self-determination. This is implied in the General Assembly Resolution on Aggression.[91] However, this view is

[86] Steinberger, (n.31), p. 516.
[87] ICISS, *Supplementary Report*, (n.3), p. 9.
[88] Makinda, (n.12), p. 160.
[89] *Ibid*.
[90] Barkin & Cronin, (n.4), p. 123.
[91] See Article 7 of the Resolution on the Definition of Aggression (1974) G.A Resolution 3314 (XXIX) 14 December 1974.

unsettled since States refrain from doing so because it is contrary to the provisions of article 2(4) and 2(7) of the Charter.

As mentioned earlier, the Charter by Article 2(1) inherited and reflected the traditional conceptions of sovereign equality. This was because at the time the Charter entered into force, international law centred primarily on State sovereignty and the independence of states especially with respect to matters of domestic concern was of most significance.[92] This era marked a decolonisation era and the newly independent States sought to guard their sovereignty and equality jealously.[93] For these States, the institution of sovereignty provided the basis for a political and legal restraint on the imposition of values and policies by more powerful States.[94]

Sovereignty and Human Rights Norms

The experience of the Second World War and above all the holocaust is considered the beginning of a new era concerning the perception of absolute sovereignty which had dominated political theory and practice since the peace of Westphalia in 1648.[95] The horrors of the Nazi genocide and the lessons from the Nuremberg and Tokyo trials led states to create a series of agreements to protect the human rights of their citizens.[96] These trials to a large extent succeeded in merging international law with certain basic moral principles and gave a clear notice to the nations of the world that

[92] J.I. Charney "Anticipatory Humanitarian Intervention in Kosovo," 32 Vanderbilt Journal of Transnational Law 1240 (1999).
[93] ICISS, *Supplementary Report*, (n.3), p. 6.
[94] Cronin, (n.10), p. 294.
[95] J. Traub "Absolute Fiction: The Perversion of Sovereignty," *World Affairs* (2009): 74.
[96]Eric Brahm "Sovereignty," (2004), available at http://www.beyondintractability.org/essay/sovereignty, accessed 19/03/2016.

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henceforth, "claims of absolute sovereignty must yield to the international community's claim on peace and justice."[97]

The end of World War II also gave birth to the United Nations and the United Nations Charter became the governing legal and institutional framework for States under international law.[98] The Charter on one hand incorporated the concept of human rights in its preamble and on the other hand incorporated the traditional concept of sovereignty.[99] The inclusion of human rights in the Charter inspired the adoption of numerous human rights treaties which created binding obligations on State parties to respect the human rights of citizens within their territory.[100]

The recognition and development of human rights norms in particular placed certain limitations on what used to be within the exclusive domestic jurisdiction of a State.[101]As parts of its obligations, a State was required to provide security for its populations and ensure that situations within its borders do not threaten international peace and security.[102] Consequently, the line between domestic policies and international concerns became vague and the autonomy of a State in law making was subjected to limitations by international law in respect of certain international interests.[103]

The most notable human rights treaty in this regard is the 1948 United Nations Convention on the Prevention and Punishment of Genocide which created a legal framework for states to override the rights of

[97] Maogoto, (n.59), p. 215.
[98] Barkin & Cronin, (n.4), p 123.
[99] Maogoto, (n.59), p. 218.
[100] ICISS, *Supplementary Report*, (n.3), p. 8.
[101] Cronin, (n.10), p. 294.
[102] *Ibid*.
[103] Maogoto, (n.59), p. 218.

sovereignty whenever genocide was committed.[104] By Article 1 of the Convention, State parties recognised that genocide is "a crime under international law which they undertake to prevent and punish". Thus, they are not merely entitled to prevent genocide but also obliged to do so.[105] However, in practice, the ability of the international community to oppose genocide is hampered by the principle of sovereignty and non-intervention, as governments of weaker states are very hesitant to allow great powers the authority to intervene in another state's internal affairs.[106]

This has however to a large extent been addressed by the Security Council which has on occasions created international criminal tribunals (ICTY, ICTR and Special Court for Sierra Leone) to prosecute those accused of perpetrating acts of genocide and other crimes against humanity.[107] These tribunals represent the most direct challenge of state sovereignty by rejecting the claims of states when relying on the defences of sovereign immunity and the act of state doctrine.[108]

Changing Perceptions of Sovereignty

Although the era following World War II marked the rise of international human rights' treaties which purportedly limited the absolute nature of sovereignty, "the idea of limited or conditional sovereignty was just that-an idea."[109] Anything contained within a state's border including the most heinous violations of human rights was understood to fall into the realm of

[104] Cronin, (n.10), p. 295.
[105] *Ibid.*
[106] *Ibid*, p. 293.
[107] *Ibid*, p. 298.
[108] *Ibid,* p. 299.
[109] Traub, (n.95), p. 74.

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domestic jurisdiction.[110] This allowed for gross abuses by governments of their populations, including in extreme instances a state committing ethnic genocide without a substantive response from the international community.[111]

However, with the end of the Cold War, the Security Council began to interpret the Charter more frequently to favour human rights over the protection of state sovereignty. The recognition of human rights in this era redefined the traditional conceptions of sovereignty in the sense that it gradually inspired and shaped the decisions of the Security Council in its definitions of threat to the peace and adoption of enforcement measures.[112] The Security Council qualified situations involving systemic human rights violations as threats to the peace, thus opening legal prospects for interventions (although subject to controversies).[113]

Thus, the norm of non-intervention in the sovereign affairs of states became undermined by agents outside the State with a potential stake in the outcome of internal affairs.[114] For example, in 1990, the Western countries acting under a Security Council Resolution intervened in Northern Iraq to protect the Kurds from dictatorial rule.[115] These resolutions by the Security Council were the beginning of humanitarian interventions under the auspices of the United Nations. The rationale behind these interventions was to favour a redefinition of sovereignty from absolute to limited and as

[110] *Ibid.*
[111] Barkin & Cronin, (n. 4), p. 126.
[112] Vesselin Popovski "Essay: Sovereignty as Duty to Protect Human Rights", available at http://www.un.org/pubs/chronicle/2004/issue4/0404p16.html, accessed 31/03/2009.
[113] *Ibid.*
[114] Biersteker &Weber, (n.2), p. 10.
[115] Makinda, (n.12), p. 157.

such, a State could not claim absolute sovereignty without demonstrating a duty to protect people's rights as it is from their right that it derives its own.[116]

In each case, the rights of citizens were understood to take precedence over the rights of states.[117] This gradually weakened the legitimacy of sovereignty understood as the inviolability of states.[118] Thus, they are constantly relied on as proof of the limited nature of sovereignty.

Sovereignty as Responsibility to Protect

The humanitarian interventions of the 1990s though not recognised as a right under international law[119] generated much controversy regarding its implication on the concept of sovereignty.[120] Consequently, in 2000, the Canadian government financed the establishment of the International Commission on Intervention and State Sovereignty (hereinafter referred to as the ICISS).[121] The task of the ICISS was 'to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty.'[122] It considered "when if ever it is appropriate for states to take

[116]Popovski. (n.56),
[117] Traub, (n.4), p. 76.
[118] Barkin & Cronin, (n.4), p. 126.
[119] This is primarily as a result of absence of *opinio juris* and consistent state practice it was not recognised as customary international law and the right was not recognised under treaty law in the absence of an international agreement on humanitarian intervention.
[120] Ian Williams 'Righting the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty' *International Journal of Human Rights* 6(3) (2002):103. See also Penelope C Simons 'Humanitarian Intervention: A Review of Literature', Ploughshares Working Paper 01-2 p 2 Accessed January 22, 2009 http://www.ploughshares.ca/content/working%papers/wpo12.
[121] ICISS *The Responsibility to Protect:* Report of the International Commission on Intervention and State Sovereignty (Canada, International Development Research Centre, 2001) p 2 at para 1.7.
[122] Ibid.

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coercive military actions against another state, how it should be exercised and under whose authority."[123]

The membership of the ICISS was intended to reflect as much as possible the perspectives of both developed and developing countries in attaining consensus regarding the debate on humanitarian intervention.[124] In its report, the ICISS proposed a redefinition of sovereignty by perceiving it as responsibility rather than control.[125] That is sovereignty as the responsibility to protect (R2P). Sovereignty as responsibility entails that states are only entitled to full sovereignty as long as they abide by the norms established by the international community.[126] In explaining the concept, the ICCIS noted that the R2P reflects the idea that:

> Sovereign states have the responsibility to protect their own citizens from avoidable catastrophe, from mass murder, rape and starvation-but when they are unable or unwilling to do so, the responsibility must be borne by the broader community of states.[127]

Consequently, where a State fails in its responsibility to protect its citizens, the international community must then assume this responsibility on its behalf.[128] Thus, sovereignty becomes an internationally shared

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123 Gareth Evans "From Humanitarian Intervention to the Responsibility to Protect" 24 Wisconsin International Law Journal 703 (2006/2007).
124 ICISS Report, (n.121), p. para 1.7.
125 *Ibid.*
126 Amitai Etzoni 'Sovereignty as Responsibility' (2005) Accessed March 31, 2009 http://www.sciencedirect.com
127 ICISS Report (n.3), p viii.
128 Ivan Simonovic "Relative Sovereignty of the Twenty First Century" 25 Hastings International and Comparative Law Review 373 (2001/2002).

responsibility and national sovereignty becomes a "privilege" dependent on the fulfilment of responsibilities.[129]

The ICISS argued that on signing the Charter, it grants membership of the UN to the State and accepts it as a responsible member of the international community and alternatively, the signatory State accepts the responsibilities of membership flowing from that signature.[130] Although the ICISS makes a convincing proposition, in practice States have ignored these responsibilities because they are in fact not a prerequisite for state sovereignty.[131] Although the R2P doctrine is not yet legally binding on States, it has been argued that it serves as an international endorsement of existing international legal obligations.[132]

According to the ICISS, the legal foundation of the R2P is found in fundamental natural law principles, the human rights provisions inherent in the UN Charter, the Universal Declaration on Human Rights and particularly the Genocide Convention of 1948.[133] The Genocide convention remains one of the relatively few instances prior to the adoption of the R2P doctrine, which reflects an attempt by the international community to place certain limits on state sovereignty.[134]

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[129] Etzoni (n.126)
[130] *Ibid*.
[131] Edward Newman "Humanitarian intervention, Legality and Legitimacy" 16 International Journal of Human Rights 118 (2002).
[132] Adele Brown 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?' *Research Paper 08/55 17 June 2008* Accessed January 22, 2009 http://www.wiscnetwork.org/papers/WISC_2008-436.doc

[133] ICISS Report, (n.121), p 16 at para 2.26.
[134]Brown, (n.132)

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Conclusion

As indicated earlier, the proceedings of the Nuremberg Tribunal introduced a significant departure on absolute claims to sovereignty and its treatment of its citizens within its territory.[135] In the last few decades, widespread and gross human rights violations such as genocide, war crimes and crimes against humanity have arguably come to be understood as falling outside the purview of a State's sovereign authority.[136] Consequently, it is argued that human rights norms occupy a special position in international law exempt from the "bedrock" of State sovereignty which presupposes that a state's actions within its own national borders are exempt from international legal scrutiny.[137] This is generally expressed in the attainment and recognition of certain human rights norms as jus cogens[138] which are superior to any claims of sovereignty coloured with abuse of such power.

From 1945 to the end of the Cold War, the attitude of the Security Council (and the United Nations as a whole) was to regard human rights as being subordinate to State sovereignty within the framework of the Charter.[139] However, with the end of the Cold War, proponents of a qualified sovereignty suggest a change in the attitude of the Security Council, by

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[135] Thomas W. Mcshane "International Law and the New Order: Redefining Sovereignty," p 39, Accessed March 19, 2016 http://www.au.af.mil/au/awc/awcgate/army-usawc/strategy2004/04mcshane.pdf.

[136] This can be inferred from the provisions of paragraphs 138 and 139 of the *World Summit Outcome Document* (2005), Accessed January 29, 2009 http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement. See also Patrick Macklem "Humanitarian Intervention and the Distribution of Sovereignty in International Law" *Ethics and International Affairs* (2008) 372, Accessed March 19, 2016 http://www.law.nyu.edu/sites/default/files/upload_documents/gffmacklempaper.pdf.

[137] John Hilla "The Literary Effect of Sovereignty in International Law," *Widener Law Review* 14, no.77 (2008): 78, Accessed March 20, 2016 http://widenerlawreview.org/files/2008/10/03-hilla-final.pdf.

[138] *Ibid.*

[139] Michael Ignatieff "Intervention and State Failure," Accessed June 26, 2009 http://dissentmagazine.org/article/?article=641.

contending that human rights seem to have attained the same or more significance than the claim of States.[140] This change in attitude is attributed to the tendency and readiness of the Security Council to consider serious violations of human rights in the wake of internal armed conflicts, at least those that produce cross border effects as situations falling under article 39 of the Charter.[141]

This has increasingly changed the perceptions of absolute sovereignty to include sovereignty as responsibility. This requires that a State in its exercise of sovereignty must refrain from abuse of human rights or face likely intervention from other sovereigns. According to Deng et al, "when nations fail to conduct their internal affairs in ways that meet up with internationally recognised standards, other nations not only have a right but also a duty to intervene."[142] There continues to be the resistance in the practice of states to completely dispose of absolute sovereignty as it best suits their status as equals however from time to time they are willing to modify their attitude to accommodate changes that are inevitable within international law.

[140]ICISS, *Supplementary Repor*t, (n.3), p. 48.

[141] Ulrich Beyerlin "Humanitarian Intervention," in *Encyclopedia of Public International Law* (Max 932 Planck Institute for Comparative Public Law and International Law, 1995).

[142] Francis Deng et al *Sovereignty as Responsibility: Conflict Management in Africa* cited in Amitai Etzoni "Sovereignty as Responsibility" (2005) Accessed March 31, 2009 http://www.sciencedirect.com.

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