

A PEOPLE BETRAYED-THE DARFUR CRISIS AND INTERNATIONAL LAW: RETHINKING WESTPHALIAN SOVEREIGNTY IN THE 21ST CENTURY

Jackson Nyamuya Maogoto* & Kithure Kindiki**

1. Introduction

Roughly ten years after the Rwandan genocide and despite years of soul-searching, the response of the international community to the events in the Darfur region of Western Sudan starting 2003 at best point at history repeating itself. Since then, the world has watched with both shock and apathy as Sudan's Arab-dominated government ethnically cleanses the vast Darfur region by giving military support to mainly Arab militias (*the Janjaweed*) who kill, maim, rape and rob black Africans. The situation and implication of the goings on in Darfur has been aptly summed as follows:

The Darfur crisis combines the worst of everything: armed conflict, extreme violence, sexual assault, great tides of desperate refugees ... Evidence from numerous sources – governmental, intergovernmental and non-governmental – suggests a tragedy that, in nature and scale, follows the example of the Holocaust.¹

Using the crisis in the Darfur region of Western Sudan as the reference for analysis, this article argues for a re-conceptualized notion of State sovereignty—one that views sovereignty not as control but as responsibility—as the starting point for designing appropriate legal and policy responses to the Darfur situation that has so far defied easy solution. The article proceeds from the assumption that while sovereign States have the primary responsibility for the protection of their people from avoidable catastrophe, this responsibility should shift to the international society whenever the State in question manifests an inability or

*LL.B (Hons) (Moi), LL.M (Hons) (Cantab), PhD (Melb), Senior Lecturer, School of Law, University of Newcastle.

**LL.B (Hons) (Moi), LL.M (Pretoria), PhD (Pretoria), Senior Lecturer & Associate Dean, University of Nairobi.

unwillingness to protect its citizenry. Seen as such, sovereignty should not be a barrier to holding the perpetrators of heinous crimes in Darfur accountable, or to possible models of international intervention including the lawful use of armed force.

Rather than eliminating sovereignty as a political ideology, a more productive enterprise would be to refocus the discourse away from the traditional structural understanding of the term, which only serves to accentuate the level of discrepancy between the theological and the political definitions of the term and which ultimately leaves the false impression that absolute sovereignty is somehow realizable in the international political sphere.² This refocus would constitute a shift toward a functional conception of sovereignty, wherein the purpose that State sovereignty would serve in any given situation would itself determine its limits.³ This discursive shift in emphasis toward a functional understanding of sovereignty would facilitate recognition of sovereignty's "neglected counter-side: sovereignty is not only a claim of freedom from external interference, it is also the liberty to permit some kinds of external interference."⁴ No longer is State conduct immune from international scrutiny, or even from sanction. Mechanisms are being created through which "sovereign" conduct is held accountable to international norms—without the ability simply to claim lack of continuing consent to those norms. This demonstrates that the nineteenth century notion of a second-tier social contract is no longer appropriate to the conduct of international relations.⁵

¹ Nsongurua Udombana 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan', (2005) 27 *Human Rights Quarterly* 1149, 1150.

² See Ivan Simonovic, 'State Sovereignty and Globalization: Are Some States More Equal?', (2000) 28 *Georgia Journal of International & Comparative Law* 381, 402 (arguing that because the history of the term "sovereignty" illustrates its elasticity and imperviousness to categorical definition, it should be able to adapt to the changes ushered in by globalization as well).

³ See generally, Post-lecture discussion between John H. Robinson and Jean Bethke Elshtain on Sovereign God, Sovereign State, Sovereign Self, (2 March 1991) in Jean Bethke Elshtain, 'Sovereign God, Sovereign State, Sovereign Self', (1991) 66 *Notre Dame Law Review* 1355, 1379-84.

⁴ See Brian F Havel, 'The Constitution in an Era of Supranational Adjudication', (2000) 78 *North Carolina Law Review* 257, 327.

⁵ In terms of a Lockean, second-tier social contract, sovereignty treats the relationship among States in forming the international order as parallel to the relationship among citizens in forming the order that is the State. The

2. The Darfur Crisis and the Betrayal

Darfur is Sudan's largest region, situated on its western border with Libya, Chad and the Central African Republic. It comprises an area of approximately 250 000 kilometres with a population of approximately 6 million people. Sedentary African farmers, such as the Fur, Marsalis and Agawam tribes dominate Darfur. The rest of the population consists of nomadic Arab tribes.

Unrest and periodic violence in Darfur is not new. On the contrary numerous reports identify a timeline of tension and violence in the region dating back a decade or more. Two main issues have driven the violence. Firstly is an ethnic division between the Government of Sudan (GoS) and the non-Arab African communities in Darfur, which has led the latter to support the "Arab" groups in the region. Secondly is an age-old economic competition between the nomadic Arabized herdsmen and the sedentary farmers of the African tribes over land use and water.

The distrust between the government favoured Arabs and the African communities in Darfur exacerbated when the Sadiq El Mahdi government (1986-89) adopted a policy of arming the Arab Bagara militias known as the *muraheleen* and using them as a counterinsurgency force against the southern-based rebels. Both the El Mahdi government and its military successors have employed these militias for almost twenty years. After taking power in a coup in 1989 the National Islamic Front (NIF), renamed the National Congress, incorporated many of the

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

muraheleen into the Popular Defence Forces and paramilitaries, who have been involved in attacks against African communities in Darfur.

What is relatively new is the sharp escalation of the violence in the past decade, and its explosion in 2003. During this period, the GoS has backed the *Janjaweed* militias and related predecessors who have and continue to engage in steadily more vicious attacks on local villages. These attacks have spurred local militants to organize their own armed rebel groups, notably the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM).

The clash entered a new phase when the rebel groups attacked a police station in 2002 and burned government garrisons in early 2003. The SLA and the JEM accused the GoS of decades of neglect and oppression of black Africans in favour of Arabs. They also demanded that the GoS address perceived political marginalization, socio-economic neglect, and discrimination towards African Darfurians. Because the GoS apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, it allegedly sponsored the *Janjaweed* to respond to the rebellion. With active government support the militia have attacked villages, systematically targeting civilian communities that share the same ethnicity with the rebel groups; killing, looting, displacing and polluting water supplies.⁶

The culpability of the GoS arises from the overwhelming evidence that it is responsible for recruiting, arming and participating in joint attacks with militia forces that have become the

contract structure by bringing first-tier social contract subjects directly into second-tier relationships and thus effectively placing the individual within the international legal framework.

⁶ Udombana, above note 1 at 1154. See also the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18th September 2004., 25 January 2005, para 50 (hereinafter the Darfur Commission Report).

main instrument for attacks on and the displacement of the civilian population. It is hard to know the total mortality during the two years of ethnic cleansing in Darfur. The current estimates of the number of deaths range from 200,000 to 500,000.⁷ To date, prospects for an imminent end to the atrocities in Darfur remain bleak. The GoS has neither improved protection for civilians nor sought to end impunity for crimes against humanity committed by or done with the complicity of its officials and allied militia leaders. The international response so far has failed to stop the killings, protect civilians or ensure accountability. Despite a ceasefire agreement and other agreements brokered and monitored by the African Union (AU) between the GoS and the rebel groups, the GoS-backed militia continues in their offensive bombing civilians and rebel targets especially in South Darfur. The rebels have also increasingly violated the ceasefire. AU-sponsored peace talks between the parties have made little progress.

After lengthy negotiations, the GoS tacitly consented to the deployment of 1200 AU troops in Darfur in 2004 with a mandate that encompassed among other things enforcing a negotiated ceasefire, reporting on human rights violations, and protect civilians whom they encounter under imminent threat within their resources and capability, it being understood that the protection of civilians remained the responsibility of the GoS. Although the number of AU troops has risen to 7000 over time, logistical details have hindered their capacity and ability to implement their mandate, despite significant funding from the United States and the European Union. Overwhelming evidence shows that the GoS is unable or unwilling to protect its own citizens. This is compounded further by the GoS vehement rejection of any intervention by the United Nations (UN) on the basis of State sovereignty; and continuously warnings issued by the regime that any intervention without its consent violates the norm of

⁷ See, for instance, Darfur Commission Report; and Smith, Russel *How Many have died in Darfur?* BBC News

sovereignty and its corollary doctrines of non-use of force and non-intervention in internal affairs of States. This requires rethinking of State sovereignty within the changing paradigms of international law.

3. Situating Sovereignty along a New Paradigm

In his speech to mark the opening of the 54th UN General Assembly in 1999, then UN Secretary-General Kofi Annan presented the representatives of the community of nations with the following dilemma, which aptly fits the Darfur question

To those for whom the greatest threat to the future of the international order is the use of force in the absence of a SC mandate, one might ask, not in the context of Kosovo, but in the context of Rwanda: if in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt [Security] Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one may ask, is there not a danger of such interventions undermining the imperfect yet resilient security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?⁸

The dilemma captured by the Secretary-General in his speech can be broadly summed up as that of competing normative values in international law. The basic question is: What deserves priority, the emphasis on preventing the use of force between States and maintaining stable relations between them or 'humanity' - the protection of citizen's fundamental rights? The relationship between these two interests, that is, of sovereignty versus humanity, is complicated and fraught with contradictions that defy easy solutions.

Online, available at <www.news.bb.co.uk> (accessed 30 April 2007).

The one view considers forcible intervention in sovereign States—especially in light of Article 2(4) of the UN Charter) *jus ad bellum* framework—as a fundamental violation of international norms that would result in grave and negative implications for international peace and security. These consequences would arise, for instance, if intervention without a Security Council mandate results in the permanent members of the Council distancing themselves from the intervention giving rise to dangerous tension and insecurity.⁹

The second view considers emphasizes the need to uphold the ‘principles of humanity’. Here, universal respect for human rights is also seen as a precondition for a stable international order, as an aspect of the ‘constitution of the international community’. According to this line of reasoning, international failure to take action against large-scale violations of human rights is not only wrongful - because, for example, it violates the Genocide Convention - but also encourages repressive regimes to use or continue to use, harsh methods in order to maintain their own positions of power.¹⁰ According to this view, any international order that tolerates genocide or other flagrant violations of human rights is by definition unstable, as national and international order are closely connected, and both largely derive their legitimacy and stability from their ability to protect individuals or groups against violence and arbitrary treatment.¹¹

In international law, this dilemma has been addressed by placing a premium on the principles that protect human rights and general welfare or development of the international society in the broadest sense. Ultimately, this approach has had the effect of eroding the principle of

⁸ For full text see Kofi Annan ‘Secretary-General’s Speech to the 54th Session of the General Assembly, 20 September 1999, SG/SM/7136 GA/9596.

⁹ See Advisory Council on International Affairs & Advisory Committee on Issues of Public International law (2000) 8.

¹⁰ Ibid.

¹¹ Ibid.

State sovereignty in a fundamental way. The following section offers a brief re-look at the road that sovereignty has travelled, and shows a changing face of the doctrine, from a sacrosanct notion to a more loose doctrine that today allows international intervention especially that which is designed to deal with Darfur-like situations which are clearly situations of breach of international criminal, humanitarian and human rights law.

3.1. The World after Nuremberg & Tokyo: No Easy Steps

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

The significance of the post-World War II trials is captured by Justice Robert H Jackson, Chief Prosecutor at Nuremberg. Writing in 1949, he described the Nuremberg international trials as the twentieth century’s most “definite challenge” to the “anarchic concepts of the law of nations.”¹² He argued that Nuremberg was the first step towards limiting the unfettered

¹² Robert H Jackson, ‘Nuremberg in Retrospect: Legal Answer to International Lawlessness’, (1949) 35 *American Bar Association Journal* 813.

discretion of sovereign States to resort to armed force.¹³ Government officials could no longer credibly claim legal immunity based upon the act of State and superior orders defences.¹⁴ Jackson noted that international institutions were so undeveloped and moribund that, absent the Nuremberg trial, it is unlikely that these “catastrophic doctrines” would have been challenged and modified.¹⁵

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

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid 813-814.

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

By establishing individual accountability for violations of international law, the Nuremberg and Tokyo judgments explicitly rejected the argument that State sovereignty was an acceptable defence for unconscionable violations of international criminal law. The previously conflicting demands of sovereignty and global order that crippled the post-World War I attempts at international penal process were overcome by the viability of individual accountability. Henceforth, citizens were firmly a concern of international regulation instead of internal State prerogatives, and the State's law-making competence in certain aspects was to be limited by the requirements of international law.

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

principle is the explicit recognition that a nation's sovereignty is limited by the demands of international law.¹⁶

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

If we view the operational state of international law as constitutionally allocated to sovereign States by custom, practice and treaty law, then the post-World War II international trials were an important constitutional allocation of competence to the international community and away from the sovereign Nation-State. This is the accurate juridical position which Nuremberg (and Tokyo) occupy in the global constitutive process. The Nuremberg tribunal confronted the dualism between sovereign versus personal responsibility directly: “[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.”¹⁷

The post-World War II international trials constituted an unprecedented inroad into the great barrier of sovereignty—exclusive territorial and national jurisdiction—and set a lasting precedent in relation to the extension of international criminal jurisdiction beyond national frontiers. This was previously impossibility in view of the iron curtain cast by the

Westphalian notion of sovereignty. The mantle of legal protection against the worst forms of violent abuse was to be a central feature in the drive to clip State sovereignty, by subjecting the State to external restraints and controls.

3.2. The Cold War Era: Internationalisation of the Human Being

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

Even as international human rights and humanitarian law instruments marked the important steps by the international law to limit sovereignty, the Cold War was to tie the issue of sovereignty to ideological and revolutionary agendas. The world experienced the third struggle for hegemonic domination of the twentieth century hot on the heels of the conclusion of the second. The USSR increasingly saw the notion of “restriction of sovereignty” and the conceptions of “common interest” and “common good” as nothing more than a diplomatic

¹⁷ See Katherine B Fite, *The Nurnberg Judgment, A Summary* (1947) 110-11.

screen hiding the avaricious and predatory aims of Western imperialist Powers.¹⁸ Coupled with this stance by one of the world's only two superpowers was the outcome of the decolonization and self-determination process which saw a radical increase in internationally recognised claims to national State sovereignty.

Vast numbers of newly independent sovereign States were weak in terms of national integration and foreign relations. This led to widespread reification of sovereignty in the vast numbers of newly independent States, justified under the internal affairs domestic jurisdiction clause of the UN Charter.¹⁹ These States sought to claim widespread immunity from international duties and obligations (especially in the human rights sphere) and expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony. The net effect of these factors was to strengthen sovereignty considerations as the UN became a ground for cultivating the agenda of nationalism brought to the fore with the appearance of the "Third World" as a force in the years after World War II.

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

¹⁸ See, e.g., I E Korovin, 'Respect for Sovereignty: An Unchanging Principle of Soviet Foreign Policy' (1956) *International Affairs* (Moscow) 11, 32, 37-9.

¹⁹ *UN Charter*, art 2(7).

divided world, was a feature of the Cold War that threatened to expand and strengthen State sovereignty, which had undergone a major battering at Nuremberg and Tokyo.

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

3.3. The Major Shift from Sovereignty as Control to Sovereignty as Responsibility

Through the years, the doctrinal contours of State sovereignty have shifted, resulting to a substantial erosion of the doctrine in the post-Cold War era. At least five developments call for a doctrinal review of sovereignty as a legal doctrine. First, sovereignty in the classical sense has suffered from the increasing internationalisation of human rights. The tremendous increase in the *corpus* of human rights law in the last few decades has resulted in the removal

of the question of human rights from the domain of individual sovereign States, and the fundamental rights and freedoms of the individual are now the concern of the international community as a collectivity. Second, Westphalian notions of sovereignty are today nuanced by the exponential increase, over the last few decades, of global interdependence and interconnection. Transformations on the world scene have greatly eroded the boundaries between national economies and the world economies, which have never been as closely integrated in as many ways as it is today.²⁰

Third, State sovereignty as a legal concept ought to be interpreted in the context of revolutionary developments in telecommunications and technology, which are also linked to the issue of human rights. These revolutions have eliminated the controls that governments exercised over the availability and dissemination of information. Kwakwa captures the role of media technology in exposing information contained in a State, including abuse of human rights, in the following terms:

Television and satellites have created an unprecedented capacity for people all over the world to watch what is happening in other countries. For example, satellite television contributed to the end of apartheid and precipitated the [US]-led intervention in Somalia... Human rights monitors and TV networks such as the CNN use video recorders to document and communicate vivid images of human rights abuses wherever they occur. The net effect of this has been to make a state's exercise of traditional sovereign functions more transparent and therefore more subject to review by the international community.²¹

Fourth, classical sovereignty has been eroded by increased participation by individuals, international organizations, non-governmental organizations and other non-State actors in the international arena. As a result, respect for sovereignty and jurisdictional boundaries have gradually shifted from an absolute sovereignty theory to a 'sovereignty is not that crucial'

²⁰ Edward Kwakwa 'Internal Conflicts in Africa: Is There a Right of Humanitarian Action?' (1994) 2 *African Yearbook of International Law* 9.

²¹ *Ibid* at, 20.

attitude.²² There are numerous treaties, declarations of principles and other human rights instruments²³ that define the role of the individual on the international plane. Further, the increasing role of the individual in international law is manifest in the provisions relating to the optional individual complaints mechanisms of international human rights instruments.

Fifth, the changing patterns of armed conflict have had the net effect of eroding the traditional notions of State sovereignty on several fronts. The involvement of the international community in violent conflicts and humanitarian crises has substantially increased since the end of the Cold War.²⁴ At the same time the world security system has changed. Whereas the Cold War was marked by global rivalry between the superpowers, many countries are now discovering that they are no longer of sufficient strategic importance to the erstwhile foes to qualify for international assistance.²⁵

The result of this State of affairs where direct superpower involvement in conflict is declining is exacerbation of armed conflicts to an extent whereby some States have disintegrated or are in the verge of doing so.²⁶ Consequently, governments of various countries have resorted to harsh repressive measures in an attempt to maintain national unity.²⁷ Armed conflicts have also, since the end of the Cold War, lost the traditional distinction between 'intra-state' and

²² Ibid at 21.

²³ For a compilation of these, see for instance, United Nations (1994a), United Nations (1994b) and United Nations (1994c).

²⁴ This is reflected in the number of UN Security Council resolutions on humanitarian crises and the increase in the number of UN peacekeeping troops and military coalitions deployed around the globe since 1990.

²⁵ Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) *Humanitarian Intervention* A Report Submitted to the Government of the Netherlands Pursuant to the Request of the Minister for Foreign Affairs (copy with the author) 10.

²⁶ See G.Helman, & S. Ratner, 'Saving Failed States' (1992-1993) 89 *Foreign Policy* 3, 5 (where a distinction is made between 'failed states' such as Somalia and Liberia, 'whose governmental structures have been overwhelmed by circumstances', and 'failing states' like Zaire (now DRC), 'where collapse is not imminent but could occur within several years').

²⁷ Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 10.

‘inter-state’ conflicts. Conflicts within States often lead to conflicts between them and *vice versa*.²⁸

Additionally, many national frontiers do not coincide with ethnic, religious or cultural boundaries, and this leads to a ‘spill-over’ of conflict.²⁹ Additionally, refugee flows across borders have the impact of internationalization of a hitherto intra-state armed conflict. These new patterns of conflict mean that the traditional diplomatic means of intervention may not apply where whole populations are threatened with extermination by their own governments. Economic sanctions, too, have a limited effect, as their impact only becomes apparent in the long term, whereas the prevention of genocide or mass slaughter of civilians calls for rapid, decisive action.³⁰ What this means is that military intervention is often the only way left to contain a catastrophe,³¹ and this has substantially eroded the principle of State sovereignty as traditionally conceived.

The effect of the erosion of the doctrine of State sovereignty is to make the interpretation of the doctrine in the context of the changes that have taken place since the norms on sovereignty were first crafted. As a result of these changes, State sovereignty today is increasingly viewed from the point of view of responsibility.³² The State is treated as sovereign, on the implied condition that it will act responsibly and safeguard the safety, lives and welfare of its citizens.³³ Should the State fail in this primary duty to protect its citizens,

²⁸ Ibid.

²⁹ For a discussion on the ‘spill-over’ effects of national armed conflicts, see Parsons, A (1995) *From Cold War to Hot Peace* London: Penguin especially chaps 14, 16, 17, 18 and 19.

³⁰ Advisory Council on International Affairs above note 27 at 10-11.

³¹ Ibid.

³² F. M. Deng ‘Reconciling Sovereignty with Responsibility: A Basis for Humanitarian Action in Africa’ in Harbeson, J & Rothchild, D (eds) (1995) *Africa and World Politics: Post Cold War Challenges* Boulder: Westview, 208.

³³ See ICISS (2001) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* Ottawa: IDRC, 13.

this responsibility is transferred to the international community, who may use all means to achieve the protection of basic rights on behalf of humanity.³⁴ The ‘transfer’ of responsibility is premised on the ground that a State that cannot protect the basic rights of its population has forfeited its sovereignty, and the international community has a duty to re-establish it.³⁵

Although there have been other attempts to redefine the concept of sovereignty and the place of forcible intervention in a country where gross and systematic human rights violations are taking place, it is the 2001 *Responsibility to Protect* Report of the International Commission Intervention and State Sovereignty (ICISS) that broke new normative ground on this matter. Although the notion of sovereignty as responsibility did not arrive with the ICISS Report, the Report is arguably the most progressive attempt to reconcile the conflicting paradigms of State sovereignty and forcible intervention to protect civilians. *The Responsibility to Protect* highlights two basic principles. (1) State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies in the State itself. (2) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure, and the State in question is unable or unwilling to halt or avert it, the principles of State sovereignty and non-intervention yield to the international community’s responsibility to protect.³⁶

The first of these principles echoes (without formally acknowledging) arguments put forth by Mr. Francis M. Deng, the UN Secretary-General’s Representative on Internally Displaced Persons, namely that a sovereign State’s responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and

³⁴ Ibid.

³⁵ Deng, above note 32 at 208-209.

³⁶ ICISS, above note 33 at xi.

international order. At the very least that means providing for the basic needs of its people. When States fail to discharge this responsibility and refuse to call for help even under those circumstances, the international community can be expected to step in to provide remedies.³⁷ The second principle is bold and definitive. Although the Report acknowledges that the primary responsibility to protect lies with the State concerned, it recognizes the duty of the international community to protect people when the State is unable to do so, is unwilling to do so, or is the main vehicle of oppression.

4. The 21st Century: Darfur and Sovereignty as a Transitional Crucible

Sovereignty has several basic difficulties—some of a conceptual and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous.³⁸ All too often though, the sovereignty doctrine is an impenetrably rigid juridical artefact as States incant the ritual of brooking no interference with their internal affairs.³⁹ The constitutional position of the extant *ad hoc* international criminal tribunals as well as the international criminal court is instructive. The common interest of sovereign entities is better protected when exclusive parochial interests of reified sovereignty are bypassed in the interests of mankind. The basis for this is through mapping and locating sovereignty more precisely within the context of global power and constitutive processes.

Professor Nagan postulates that:

To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates. We need more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield, a clearer

³⁷ Ibid.

³⁸ Operational constitutions often exhibit the characteristics of being reified and porous at the same time.

³⁹ Winston P Nagan, 'Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia', (1995) 6 *Duke Journal of Comparative & International Law* 127,.

perception of the common and special interest it sometimes seeks to promote, protect or compromise, and a clearer delineation of its precise role in the constitutional order and promise of the UN Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes.⁴⁰

Since the end of the Cold War, international law has come to recognise the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human rights norms as a basis for intervention. Current consensus indicates that a State's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, "international law today recognises, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorised by the Security Council for the purpose of remedying serious human rights violations."⁴¹

State sovereignty, which for centuries was conceptualised as "the absolute power of the State to rule,"⁴² has become delimited by recognition that the State may be responsible for its breach of certain international obligations. Among these obligations, a State must provide for the general safety of the human person and may not permit widespread human rights violations against its citizens, such as the commission of genocide, crimes against humanity, slavery, and apartheid.⁴³ Though State responsibility and individual criminal responsibility are separate concepts under international law,⁴⁴ a State that undertakes the prosecution of a foreign citizen for crimes committed in a foreign State assumes that State's domestic jurisdiction. In this regard, the author concurs with Anthony Sammons postulation that:

⁴⁰ Ibid 146.

⁴¹ Fernando R Tesón, 'Changing Perceptions of Domestic Jurisdiction and Intervention' in Tom Farer ed, *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (1996) 29.

⁴² Kriangsak Kittichaisaree, *International Criminal Law* (2001) 5.

⁴³ Ibid 7 (citing art 19, §3(c) of the Draft Articles on State Responsibility).

⁴⁴ Ibid 9.

...the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the State of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.⁴⁵

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

From an operational perspective, the practical question generally has been how far a State may go in establishing the external reach of its criminal jurisdiction under international law. The phrase "under international law" suggests some accommodating prudential limit of the reach of a state's competence from the perspective of other States whose interest may be compromised when a State allocates for itself the right to try the nationals of other States under its own criminal justice standards.⁴⁶

The destructive impact of massive and systematic human rights violations impinges directly on important world order values which no State has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, then effective policing is required from local to global levels in the name of the world community as a whole.⁴⁷ A complete denial of the principles of human rights and humanitarian law, especially when grave breaches of that law are involved represents a rejection of fundamental human rights precepts. This may point to an alternative normative order that essentially disparages the precept of human dignity.

⁴⁵ Anthony Sammons, 'The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', (2003) 21 *Berkeley Journal of International Law* 111, 115.

⁴⁶ Nagan, 'Strengthening Humanitarian Law', above note 39 at 137.

⁴⁷ *Ibid* 145-46.

Professor Harold Laski notes that, “[s]overeignty, in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing.”⁴⁸ The “oneness” of humanity was to be found through the pervasive unity of God (*jus divinum*) in the *Respublica Christiana*.⁴⁹ Like Hobbes’ later focus on the delegation of individual authority to the State, medieval notions of sovereign power included limitations—based on abstract moral rights.⁵⁰ Thus, there were bounds beyond which the sovereign could not pass in its relations with the individual, and individual rights which were not alienable to the sovereign. The replacement of the *Respublica Christiana* by the State meant that the significance of nationality became paramount. The protection and welfare of the citizenry was entrusted to the State.⁵¹ With the dawn of international human rights, the State’s treatment of its citizenry was specifically constrained through international law.

Though sovereignty in the external or international context continues to be strong, it is not as absolute as its definition suggests.⁵² No State, however powerful, has been able to shield its affairs completely from external influence.⁵³ “Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations.”⁵⁴ These limitations often result from the

⁴⁸ Harold J Laski, *The Foundations of Sovereignty and Other Essays* (1921) 1.

⁴⁹ Ibid 2; see Helmut Steinberger, ‘Sovereignty’, 10 *Encyclopedia of Public International Law* 397, 398 - 400 (1987) (discussing *Universitas Christiana*).

⁵⁰ See Thomas Hobbes, *Leviathan* (E Curley ed, 1994) xiii [3]-[4].

⁵¹ Laski, *The Foundations of Sovereignty*, above note 48 at 15. The evolution of sovereignty replaced concepts of a “universal ethical right,” with the idea that the state makes, interprets and applies its own laws. Jean Bodin’s *De la Republique* reflected this evolution, with its sanction of absolute sovereignty resting in the State. “*Jus est quod jussum est*” became the “essence of the State.”

⁵² See Sandra L Jamison, ‘A Permanent International Criminal Court: A Proposal that Overcomes Past Objections’, (1995) 23 *Denver Journal of International Law* 419, 432 (asserting that notion of absolute sovereignty is “no longer tenable”); see also W. Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’, (1990) 84 *American Journal of International Law* 866, 866-69.

⁵³ See J L Brierly, *The Law of Nations* (4th ed, 1949) 48-50 (finding problems with implication that sovereignty exempts states from being subject to international law).

⁵⁴ See Ronald A Brand, *External Sovereignty and International Law*, (1995) 18 *Fordham International Law Journal* 1685, 1695.

need to balance the recognised rights of sovereign nations against the greater need for international justice.⁵⁵

Since one of the main roles of a sovereign State is to provide security and protection for its own people,⁵⁶ the author argues that a State forfeits its sovereignty when its actions are universally condemned.⁵⁷ From a legal perspective, each instance of enforcement serves to legitimise norms of international criminal law. These norms reflect a collective judgment by all countries that certain acts are by their very nature criminal. The enforcement of criminal law is innately tied to a nation's sovereignty and it can be argued that by enforcing international criminal law governments are not ceding sovereignty but instead are exercising sovereignty.

... if the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so.⁵⁸

When governments exercise their sovereignty by recognising and enforcing international criminal law they reinforce and bolster a universal standard of international criminal law. This may prove a difficult adjustment for political processes still entrenched in dual social contract relationships of yester centuries but developments of the twentieth century properly recognised emerging new trends in an understanding and location of sovereignty. This understanding of sovereignty rejects approaching relations between sovereigns in terms of a

⁵⁵ Patricia A McKeon, 'An International Criminal Court: Balancing The Principle Of Sovereignty Against The Demands For International Justice', (1997) 12 *Saint John's Journal of Legal Commentary* 535, 541.

⁵⁶ See Brand, 'External Sovereignty and International Law', above note 54 at 1696 (describing sovereign state's obligation to protect and provide security for its citizens).

⁵⁷ See generally Michael Ross Fowler & Julie Marie Bunch, *Law Power, and the Sovereign State* (1995).41-45 (explaining that sovereign state's failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

⁵⁸ Brand, 'External Sovereignty and International Law', above note 54 at 1696.

Lockean, second-tier social contract.⁵⁹ This two-tiered notion of sovereignty treats the relationship among States in forming the international order as parallel to the relationship among citizens in forming the order that is the State. In this way, it obscures important aspects of the relationship between the citizen and the State, and obstructs the proper functioning of that relationship on the international plane.

The internationalisation of the individual in the aftermath of World War II and his/her elevation from the subordinate status of an object of international law to a subject means that international law fractured the second-tier social contract structure by bringing first-tier social contract subjects directly into second-tier relationships and thus effectively placing the individual within the international legal framework.⁶⁰ If international law is to be contemporary in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the State for purposes of defining sovereignty in both national (internal) and international (external) relations. In place of a social contract of States, this redefinition of sovereignty recognises that international law has developed direct links between the individual and international law. Consequently, an active role on the part of the international community in promoting human rights and humanitarian norms is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty.⁶¹ Patricia A. McKeon notes that:

⁵⁹ See, e.g., Richard B Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, (1994) 20 *Canada-United States Law Journal* 9 (1994); Richard Falk, 'Evasions of Sovereignty' in R B J Walker & S H Mendlovitz eds, *Contending Sovereignties: Redefining Political Community* (1990); Louis Henkin, 'The Mythology of Sovereignty', reprinted in *Notes from the President*, ASIL Newsletter, March-May 1993 at 1.

⁶⁰ Brand, 'External Sovereignty and International Law', above note 54 at 1693.

⁶¹ See Magdalena M. Martin Martinez, *National Sovereignty and International Organizations* (1996) 66; see also Nancy Arniston, 'International Law and Non- Intervention: When Do Humanitarian Concerns Supersede Sovereignty?', (1993) 17 *Fletcher Forum for World Affairs* 199, 207 (1993); Ravi Mahalingam, 'The Compatibility of the Principles of Non-Intervention with the Right of Humanitarian Intervention', 1 *UCLA*

Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself with the aid of the international community only enhances this objective.⁶²

McKeon's observation is echoed and amplified by the Report of the Secretary General's High-level Panel on Threats, Challenges and Change. The Report firstly endorses the emerging norm of a *responsibility to protect* civilians from large-scale violence—a responsibility that is held, first and foremost, by national authorities.⁶³ It however, goes on to note that:

When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure—and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.⁶⁴

Support for the Report is found in the reality that the UN Charter is part of a world constitutional instrument and hence the formal basis of an international rule of law. One of the Charter's primary purposes is to constrain sovereign behaviours inconsistent with its key precepts. Professor Nagan notes that: "The term 'sovereignty' in the UN Charter is most visible in the context of sovereign equality."⁶⁵ However he goes on to observe that: "Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2(7) uses the term 'domestic jurisdiction' as a precept that seems intentionally less inclusive than the term 'sovereign' suggests."⁶⁶ This particular interpretation provides the basis for the author to contend that it seeks to demonstrate de-linkage of the external nature of sovereignty from its

Journal of International & Foreign Affairs 221, 253 (1996) (pointing out consistency between sovereignty and international protection of human rights).

⁶² McKeon, 'An International Criminal Court', above note 55 at 542-43. See Benjamin B Ferencz, 'An International Criminal Code & Court: Where They Stand and Where They're Going', (1992) 30 *Columbia Journal of International Law* 375, 391-92.

⁶³ *Report of the Secretary General's High-level Panel on Threats, Challenges and Change*, Executive Summary accessible at <http://www.un.org/secureworld/>.

⁶⁴ *Ibid.*

⁶⁵ Nagan, 'Strengthening Humanitarian Law', above note 39 at 146.

⁶⁶ *Ibid.*

internal contours and thus shed the all-encompassing conception that is frequently and regularly attributed to Westphalian sovereignty. “Commentaries that disregard State sovereignty as an eradicable hindrance to denationalization fail to recognise the possible benefits to be gained by simply redrawing the balance between sovereignty’s empowering and limiting aspects.”⁶⁷

Recent international legal theory supports the view of sovereignty as an “allocation of decision-making authority between national and international legal regimes.”⁶⁸ A State’s total “bundle” of sovereign rights remains extensive, as sovereignty remains the pre-emptive international norm. However, the international legal regime obligates all States to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a State must meet continuously in order to maintain legitimacy under the international system. Elaborating on this new sovereignty reconceptualisation, Kurt Mills asserts that:

[A State’s] rights and obligations come into play when a State, or at least certain actions of a State, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a State violates human rights or cannot meet its obligations vis-à-vis its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the State in favour [sic] of the sovereignty of individuals and groups.⁶⁹

The import of the assertion above is that when a State instigates or acquiesces in the commission of serious violations of international human rights and humanitarian norms, it exceeds its allocation of authority as a matter of law. This position recognises that a State’s sovereign rights with regard to the internal treatment of its population are not absolute and, by

⁶⁷ John R Worth, ‘Globalization and the Myth of Absolute National Sovereignty: Reconsidering the “Un-Signing” Of the Rome Statute and the Legacy of Senator Bricker’, (2004) 79 *Indiana Law Journal* 245, 261.

⁶⁸ Gregory H Fox, ‘New Approaches to International Human Rights’ in Sohail H Hashmi, *State Sovereignty: Change and Persistence in International Relations* (1997) 107.

⁶⁹ Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (1998) 163-64.

implication, States are subject to international oversight. International law places conditions on a State's sovereign right to non-interference to the extent the State must meet its human rights obligations or face intervention or trial of its nationals by foreign tribunals.⁷⁰

The recognition of sovereignty as a bounded legal norm leads to the further conclusion that sovereignty is not static within a nation, but is transferable. Sovereignty is dynamic and fluid, flowing at times from one country to another by some event of political restructuring within the international community of States. If sovereignty can pass from one State to another, it conceivably can flow from a State to the international community, or vice versa. When a State exceeds its authority through commission of human rights violations, the State cedes its sovereign right to non-interference.⁷¹ It cannot exclude other States acting collectively on behalf of the international community.⁷² The future development of international law, which includes an international criminal court hinges upon the continuing evolution of this rationale.⁷³ Whatever sovereign rights are forfeited by submitting to the jurisdiction of international penal process is regained by the protection it provides.⁷⁴ Thus, the evolution of sovereignty and the increasing need for international justice have now converged.

⁷⁰ Anthony Sammons, 'The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', (2003) 21 *Berkeley Journal of International Law* 111, 121-122; Steven R Ratner & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 176 (2nd ed, 2001)

⁷¹ Sammons, above note 70 at 122.

⁷² See Friedrich Kratochwil, 'Sovereignty as Dominion: Is There a Right of Humanitarian Intervention?' in Gene M Lyons & Michael Mastanduno eds, *Beyond Westphalia? State Sovereignty and International Intervention* (1995) 40 (discussing the requirement that intervention into a State's domestic affairs be preceded by "collective legitimisation").

⁷³ See Anthony P Maingot, 'Sovereign Consent Versus State-Centric Sovereignty' in Tom Farer ed, *Beyond Sovereignty* 190 (1996) (calling gradual dilution of state sovereignty not merely historic phenomenon but also "moral imperative"); see Brand, 'External Sovereignty and International Law', above note 54 at 1686 (asserting twenty-first century international law will be determined by continuing evolution of perception of sovereignty).

⁷⁴ See also Jules Deschenes, 'Toward International Criminal Justice', (1994) 5 *Criminal Law Forum* 249, 252 (intimating that resistance to International Criminal Court is largely result of some heads of state concerned about being prosecuted for their actions which threaten citizen's security). See generally Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law* 554

5. Conclusion

The debilitating effects of abuse of power by political leadership and authority have been particularly felt in Africa, as a result of poor accountability of a significant number of governments on the continent. Despite the significance of setting up regional normative and institutional frameworks of collective governance and accountability at the global (UN) and regional (AU) level, decisive action to protect civilians from atrocities perpetrated or condoned by their own governments remain a mirage. As a result, Khartoum continues to wave the card of Westphalian sovereignty at an extraordinary time in history when many ideas, relationships and institutions, which hitherto seemed solid, continue to dissolve rapidly.⁷⁵

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

(observing that internal atrocities have far greater impact on international human rights laws because it occurs with greater frequency than with international conflicts).

⁷⁵ T. J. Farer 'An Inquiry into the Legitimacy of Humanitarian Intervention' in Damrosch, LF & Scheffer, DJ (eds) (1991) *Law and Force in the New International Order* (Boulder: Westview) 185.