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January, 2016

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Available at: https://works.bepress.com/alex_ansong/2/
Volume 2, 2016
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The GIMPA Law Review is published by:
The Faculty of Law
Ghana Institute of Management and Public Administration
Green hill
P.O.Box AH50
Achimota
Ghana

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GIMPA Law Review, Volume 2
THE CONCEPT OF SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW

Alex Ansong*

Abstract
The notion that the existence of a State must not be based on, inter alia, the military or economic power it wields to assure its existence and prevent interference from other states, has evolved over the centuries and has become a foundational provision in the United Nations Charter. States are deemed equal just by their status as states under international law. Sovereign equality is therefore juridical in nature in that, all states are equal under international law in spite of asymmetries of inequality in areas like military power, geographical and population size, levels of industrialisation and economic development. Transposing this principle into actual practice, especially in decision-making systems in international organisations, presents problems. If all states are equal, should it also mean equality of influence in law creation in international organisations? With treaties being one of the main sources of international law, if states do not have equal influence in treaty based international organisations this would mean that the will of the mighty would prevail over the weak. Juridical equality is therefore empty if it cannot translate into effective equality, at least at the level of law creation in international organisations. The above stated issues are considered in detail in this article. There are four main sections in this article. The first section takes a brief look at the definition of sovereign equality especially within the United Nations (UN) system and its concomitant application in international law. The second and third sections discuss the concepts of state sovereignty and equality of states in international law and present brief historical accounts of the development of these two concepts. The fourth section and the conclusion present an overview of the implications of the concept of sovereign equality of states in the decision-making systems of state constructed international organisations.

I. Defining the Principle of Sovereign Equality of States in International Law
The principle of sovereign equality is a fundamental norm that regulates the conduct of states in the international community. Its fundamental nature is evidenced by its enshrinement in the Charter of the United Nations. Article 2:1 of the UN Charter states that: “[T]he Organization is based on the principle of the sovereign equality of all its Members.”1 Though the principles of State sovereignty and equality of States in international law predate the UN Charter, its adoption as the basis of a ‘universal’ international law applicable to all states and

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1 Article 2:1 of the United Nations Charter.
not only European states was relatively novel. Thus during the Moscow Conference of 1943, a precursor to the UN, the universal application of the concept of sovereign equality of states was recognised in the Declaration of the Four Nations on General Security (Declaration on General Security). The meeting of the United States, United Kingdom, China and Russia in Moscow in 1943 was one of the foundational conferences that culminated in the formation of the UN and it preceded the Dumbarton Oaks Conference of 1944 and the San Francisco Conference of 1945. The Declaration on General Security recognised:

“... the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.”

The recognition of the sovereign equality of states at the Moscow Conference and also at the Dumbarton Oaks Conference therefore formed the basis of incorporation into the UN Charter. Thus, prior to the establishment of the United Nations, sovereign equality of states already formed the philosophical and normative foundation of the international law that was to be constructed in the post-World War II era.

Though the Declaration on General Security did not contain any definition or explanation of the concept of sovereign equality, the San Francisco Conference of 1945 provided a platform for a discussion on the concept of sovereign equality of States that was to be the foundational norm of the UN Charter. At the San Francisco Conference, Zeineddine of Syria summed up the consensus of the debates of Committee I/1 on the meaning of the concept of sovereign equality of States as including the following four principles:

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2 Wilhelm G. Grewe for instance argues that even though the congress of Vienna 1814-15 instituted the principle of state consent with regards to decisions affecting the European states in the Concert of Europe established after the Napoleonic Wars, the seeming equality that this brought did not take away the fact that the interests of the Great Powers – Britain, Austria, Russia and Prussia – held sway. Thus even in the European states, equality with regards to state consent was restricted in its application to the weaker European states in the sense that their consent was only needed on issues that directly concerned them whereas it was presupposed that the consent of the Great Powers was needed on all matters as their interests were pervasive. Wilhelm G. Grewe and Michael Byers, *The Epochs of International Law*, Berlin: Walter de Gruyter GmbH & Co. (2000) pp.429-431.


5 Para.4 of the Moscow Four-Nation Declaration on General Security, October 1943.

6 Bengt Broms, op. cit. fn.4.

7 Ibid, at 59.
(1) that States are juridically equal;
(2) that each State enjoys the right inherent in full sovereignty;
(3) that the personality of the State is respected, as well as its territorial integrity;
(4) that the State should, under international order, comply faithfully with its international duties and obligations.\(^8\)

The above summation of the principle of sovereign equality is again emphasised by the Declaration on Friendly Relations and Cooperation among States.\(^9\) The Declaration provides that:

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.\(^10\)

It further elaborates on the principle of sovereign equality of States as including the elements of juridical equality of States, the enjoyment by States of the rights inherent in full sovereignty, the duty of States to respect the personality of other States, the inviolability of the territorial integrity and political independence of the State, the freedom of each State to choose and develop its own political, social, economic and cultural systems, and the duty of States to comply fully and in good faith with their international obligations and to live in peace with other States.\(^11\) It is evident from the above that the explanation of the principle of sovereign equality of States provided by the Declaration on Friendly Relations and Cooperation Among States is drawn mostly from the summation of the concept given by Zeineddine of Syria at the San Francisco Conference.

Hans Kelsen argued in his 1944 book, *Peace Through Law*, that the principle of sovereign equality is a composition of two generally recognised features of the State in international law – the principle of State sovereignty and the principle of equality of States.\(^12\) Consequently:

> [T]o speak of sovereign equality is justified insofar as both qualities are usually considered to be connected with each other. The equality of States is frequently explained as a consequence of or as implied by their sovereignty.\(^13\)

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\(^8\)Ibid at 60.
\(^10\) Ibid.
\(^11\) paragraph 59 of Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970
\(^13\) Ibid.
Any analysis of the principle of sovereign equality would thus have to address the two composing concepts of sovereignty and equality of States and the proceeding discussions in the next two sections attempt to do that.

II. The Concept of State Sovereignty

The concept of sovereignty has a long history. The remit of this article does not extend to an in-depth historical analysis of the concept. The discussion here will focus mostly on current manifestations of the concept while noting its metamorphoses through time. As has been observed by the late Sir Robert Jennings:

…it the doctrines of sovereignty down the ages have differed from time to time for the very reason that they reflected the needs and problems of their own particular times and were designed to do so.

The main focus of the discourse on the current manifestation of the concept of sovereignty in this section is thus for the purpose of grasping its current relevance in international law. A historical perspective of the concept will however give a background picture of its metamorphoses through different epochs.

The rudiments of the concept of sovereignty as expressed in Jean Bodin’s *De Republica* (1576) deposited absolute power in the hands of a sovereign who had the power to make laws and was not bound by the law he made. Bodin’s preoccupation with defining sovereignty in terms of absolute power residing in a sovereign was a response to the political upheavals within the European States of his time. There was the perception that diffusion of power would result in competing interests for ascendancy by the various powers hence resulting in anarchy. The late Professor James Brierly thus observed that:

Bodin was convinced that a confusion of uncoordinated independent authorities must be fatal to a State, and that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty (…) he thought, is the power to make the laws (…) and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes …

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17 Ibid.

18 Ibid.

19 Ibid.
The concept of sovereignty espoused by Bodin was meant to instil order within the European States of his time and thus was useful for that purpose. Consequently, this early clearly articulated concept of sovereignty imbued in the sovereign, power and authority that is not to be challenged within his realm so that order within the State can be maintained.

The transformation of sovereignty from absolute power resident in a sovereign to power that emanates from the people who have concurred to form a State is often traced to Hugo Grotius’ *De Indis* (published in 1864 as *De Jure Praedae* (i.e. The Law of Prize and Booty)).\(^{20}\) To Grotius, the sovereign’s power emanates from the State, and the State is composed of voluntary individuals who have concurred to form the State.\(^{21}\) The power of the sovereign thus derives from the people who constitute the State. When this conception of unchallenged power is transposed from an individual sovereign into State sovereignty, it connotes the power and authority exercised by the institutions of State which occupy the prime position in the hierarchy of power. Other institutions not so imbued or vested with sovereign power and authority operate at a subservient level. Grotius thus stated in *De Jure Praedae* that:

\[
\text{Truly, there is no greater sovereign power set over the power of the state and superior to it, since the state is a self-sufficient aggregation. Nor was it possible for all of the nations not involved in a dispute to reach an agreement providing for an inquiry by them into the case of each disputant.}^{22}
\]

It must be noted, though, that in spite of the transformation of the concept of sovereignty that Grotius brought, his concept was also apologetic in nature, in the sense that it served to justify the right of the Dutch State to wage a just war.\(^{23}\) The capture of the Portuguese merchant ship, *Santa Catarina*, by the Dutchman Jacob van Heemskerck in the Strait of Singapore in 1603 is acknowledged as the basis for writing *De Jure Praedae*.\(^{24}\) Grotius reasoned that the capture of the *Santa Catarina* was justified because the Portuguese had waged a systematic campaign to oust Dutch merchants from the East Indies.\(^{25}\) From this premise it becomes evident in Grotius’ reasoning that Portuguese hostilities against Dutch trading interests in the East Indies was a violation of the ‘Eighth Law’ which he espouses in *De Jure Praedae*:

\[\text{\textit{\ldots}}\]

\(^{20}\) Ibid.

\(^{21}\) Ibid.

\(^{22}\) Hugo Grotius, *Commentary on the Law of Prize and Booty (1603)*, Indianapolis: Liberty Fund Inc. at 36.


\(^{24}\) Ibid.

\(^{25}\) Ibid.
Neither the state nor any citizen thereof shall seek to enforce his own right against another state or its citizen, save by judicial procedure. 26

The hostilities meted out by the Portuguese against Dutch merchants in the East Indies were therefore not just a campaign against Dutch citizens but also against the Dutch State – and by logical conclusion a campaign against the sovereignty of the Dutch State. The difference that Grotius brought to the concept of sovereignty by locating it within the State was thus for the purpose of serving the needs of his time in the same way Bodin also did to the concept in his time.

In fact, it has been observed that Grotius’ argument that sovereignty resides in the people who have voluntarily concurred to form a State should not be misconstrued to mean that he was a champion of the kind of democracy discernible in modern-day democratic States for:

… he strenuously denied that the Dutch war of independence (1568–1648) had originated in a popular revolt against Philip II of Spain and Portugal. Instead, he reserved the right of resistance for the traditional governing elite, the Dutch magistrates who were bearers of the “marks of sovereignty”. 27

Aside from the scholarly contributions to the development of the concept of sovereignty, a key event in international relations which is often cited in the history of the concept is the Peace of Westphalia 1648 which ended the Thirty Years’ War in Europe. 28 Though it is apparent that before 1648 the idea of sovereignty had already started evolving on conceptual and political levels, as evidenced by the works of scholars like Bodin and Grotius and the Dutch revolt against Philip II of Spain and Portugal, the Peace of Westphalia is often cited as a decisive political event with both national and ‘international’ consequences for the emergence of the modern State. 29 It marked the emergence of the horizontal system of the sovereign State which precluded external interference in the internal affairs of the State. Thus even in spite of the Dutch revolt against Spain and its assertion of independence, it was the Peace of Westphalia that brought about a formal recognition of the Netherlands as a sovereign state by Spain. 30 Prior to this horizontal system of relations among sovereign States, loose configurations of federal structures based on vertical relationships between sovereign overlords and vassal states were quite proliferate in Europe. 31 Also, the

26 Hugo Grotius, op cit, fn.22., at 36.
27 Martine Julia van Ittersum, op cit., fn.23, at 8.
29 Joshua Castellino for instance notes that it is problematic to accord the Peace of Westphalia the definitive origin of the concept of sovereignty though it was a significant event in the evolution of the modern state and its attachment to the concept of sovereignty. See Joshua Castellino, International Law and Self Determination, The Hague: Matinus Nijhoff Publishers (2000) at 75-76.
30 Wilhelm G. Grewe, op cit., fn.2, at 185
31 Joshua Castellino op. cit., fn.29.
assertion of statehood as an organising concept for polities began to take precedence over the religious affinities that had played an important role in the Thirty Years’ War. Thus:

The Thirty Years’ War was the last major international conflict in Europe in which two religious camps organized their forces as blocs. After 1648 such connections gave way to purely national interests; it is no surprise that the papacy denounced the peace vehemently. For this shift marked the decisive stage of a process that had been under way since the Late Middle Ages: the emergence of the state as the basic unit and object of loyalty in Western civilization. (…) Indeed, the reshaping of the relations among Europe’s states for centuries to come that was achieved at Westphalia is but one example of the multiple military and political consequences of this age of crisis.32

The Peace of Westphalia put an end to the Papacy’s claim of power over the polities that hitherto fell under its religious ‘authority’, hence making it possible to exclude external interference in the affairs of the state.33 The sovereign did not have to answer to any external authority and was supreme in his/her domain.34 The concept of territorial sovereignty (i.e. non-interference in matters falling within the territorial jurisdiction of the state) was an offshoot of the Westphalian conception of States. This account of sovereignty is, however, ‘euro-centric’ in nature as it did not create, at its inception, an international law applicable to all states.35 The benefits of non-interference in the internal affairs of the State that evolved from the Peace of Westphalia was to be the preserve of European States for centuries and its non-application to polities typically outside Europe was justified, inter alia, under the civilising mission and the extraterritoriality of action by the Great Powers.36

Consequently, even at the inception of the United Nations, the UN Charter made it expressly clear that the foundational principle of sovereign equality of its members did not apply to the colonies of the (mostly) European States which were under the trusteeship system – Article 78 provides that:

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.37

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33 Ibid.
36 Ibid.
37 Article 78 of the UN Charter.
Admittedly, though the principle of sovereign equality did not extend to the European colonies, the principle of self-determination championed by the UN Charter\textsuperscript{38} became an effective tool in the decolonisation of the colonies, transforming them into sovereign States in their own right.

It is worthy of note though that the Westphalian order did not institute an absolute and lasting system of non-interference even in Europe. Wilhelm Grewe for instance notes that the rationale for interference (or intervention) in Europe after the Peace of Westphalia shifted from religious to political pretensions. He argues further that:

The major, almost classical cases of intervention of the French Age – the interventions by Louis XIV in favour of the liberty of the German princes, the War of Spanish Succession, the divisions of Poland, the coalition wars against the French Republic and the wars conducted by the French revolutionary government – were now motivated on political rather than religious or confessional grounds.\textsuperscript{39}

In effect, it was the locus of intervention that shifted and not an actual adherence to any principle of non-interference. The very fact that the right to wage war still lay within the domain of the State after the Peace of Westphalia showed that a prohibition against interference without a proscription of the right to wage war was in itself a contradiction.\textsuperscript{40} Thus to deal with this contradiction, the two prominent precursors to the prohibition against war in the UN Charter – the Covenant of the League of Nations 1919 and the Kellog Briand Pact of 1928\textsuperscript{41} – both contained provisions that renounced the use of war as a medium of state policy. The Covenant of the League of Nations contained various provisions renouncing war, including an “acceptance of the obligations not to resort to war,”\textsuperscript{42} a requirement that signatory states do not stock-pile arms;\textsuperscript{43} a provision making war or the threat of war against a signatory state a matter of concern for the whole League;\textsuperscript{44} and an undertaking by signatory states not to resort to war until three months after an arbitral or judicial decision in a dispute.\textsuperscript{45} These renunciations of the resort to war, however, did not prevent the use of armed aggression by some signatories of the League, typical examples being the invasion of Manchuria in 1931 by Japan, the invasion of Ethiopia in 1935 by

\textsuperscript{38} Article 1:2 and Article 55 of the UN Charter.
\textsuperscript{39} Wilhelm G. Grewe, op cit. fn.2, at 332.
\textsuperscript{40} Ibid.
\textsuperscript{41} Article 1 of the Kellogg Briand Pact 1928 contains a renunciation of war by the signatory states and Article 2 provides that: “The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”
\textsuperscript{42} Paragraph 3 of the Preamble to the Covenant of the League of Nations.
\textsuperscript{43} Article 8 of the Covenant of the League of Nations.
\textsuperscript{44} Article 11 of the Covenant of the League of Nations.
\textsuperscript{45} Article 12 of the Covenant of the League of Nations.
Italy and the invasion of Poland in 1939 by Germany. The failure of the League of Nations to address these grave breaches of its Covenant played an important role in the outbreak of World War II.

It could be argued, from the above, that without an effective prohibition of the use or threat of use of violence by states in their international relations, as contained under the UN Charter, the non-intervention corollary of sovereignty would only be effective for States as long as they had the power to prevent interventions by other States. Sovereignty would have had to go with the power to assure its sustenance in the community of states. David Chandler thus argues that:

During the colonial era, the major powers either regulated their territorial acquisitions directly as in Africa and India – or, as in China, Japan and the Ottoman Empire, insisted that their own actions could not be fettered by local domestic legislation, claiming the right to extraterritoriality. Under the Westphalian system, then, superior force was the guarantor of effective sovereignty.

The claim to the right of extraterritoriality is perhaps best exemplified in the Opium Wars where Britain blatantly disregarded domestic regulation in China prohibiting the trade in opium so as to further her lucrative trade in narcotic drugs.

By proscribing the right of States to wage war, except in self-defence or by the authorisation of the UN Security Council, the UN Charter ushered the international community of States from the rule of might to the rule of law in their relations with one another. Aided by the principle of self-determination, newly independent States did not have to show the economic or military might to establish themselves or defend themselves from the imperial ambitions of other States. The establishment and continuous existence of the State was based on law – a juridical approach to State sovereignty became the accepted rule.

For instance, most of the colonies that achieved statehood after World War II did not have to resort to a war of independence in their bid to gain independence from their colonisers as the UN Trusteeship system recognised the right of...

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47 Ibid.
48 Article 2:4 of the UN Charter.
49 David Chandler op cit., fn.34.
51 Article 51 of the UN Charter.
52 Article 39 and Article 42 of the UN Charter.
peoples to self-determination and thus fostered a more orderly transition from colony to statehood\textsuperscript{53} instead of through a ‘full-blown’ war of independence as may have hitherto pertained. This can be contrasted with other former colonies like the United States and Haiti that had to fight a war of independence to oust their colonisers.\textsuperscript{54} By fighting and winning a war that ousted their colonisers, these former colonies were not only able to show that they had the military strength to be sovereign States, but also, importantly, that that same military strength will assure their continuous existence as States.

The juridical approach to State sovereignty is articulated by Hans Kelsen as follows:

The sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law. If sovereignty means “supreme” authority, the sovereignty of the States as subjects of international law cannot mean an absolutely, but only a relatively supreme authority; the State’s legal authority is “supreme” insofar as it is not subjected to the legal authority of any other State. The State is “sovereign” since it is subjected only to international law, not to the national law of any other State. The State’s sovereignty under international law is the State’s legal independence from other States.\textsuperscript{55}

Sir Robert Jennings expressed similar thoughts to Kelsen’s by arguing that absolute exercise of power expressed through the law making function of the State presents problems of co-existence with other sovereigns who are similarly imbued with such power and authority; i.e., how does a sovereign power relate to other sovereign powers within the community of sovereigns?\textsuperscript{56} Such relations can only exist without the use of coercion if sovereign power is regulated under a binding system of international law where rule supersedes might.

The above arguments, however, are not meant to paint a perfect picture of a post-World War II international system where the rule of law has always triumphed over the rule of might. During the Cold War, the two superpowers – the United States of America and the Soviet Union were noted for their interferences in the domestic politics of other states, especially those of geopolitical importance to them and also States in the developing world. Through its ideological stance of internationalisation of communism, for example, the Soviet Union perpetrated varying degrees of interventions in other States typically in Eastern Europe and


\textsuperscript{55} Hans Kelsen, op cit. fn.12, at 35.

\textsuperscript{56} Sir Robert Jennings, op cit. fn.15.
Asia.\textsuperscript{57} This ideological stance was epitomised in the 1968 and 1979 military interventions in Czechoslovakia and Afghanistan respectively.\textsuperscript{58} The Soviet Union also threatened military intervention during the Solidarity crisis of 1980-81 in Poland.\textsuperscript{59}

The record of the United States (US) regarding interferences in the domestic affairs of other States is no less troublesome. The US’ dealings with Latin America, for instance, are littered with numerous episodes of direct and proxy military and political interventions.\textsuperscript{60} Its military and political interventions in Nicaragua are clear examples as acknowledged in the \textit{Nicaragua Case}.\textsuperscript{61} As far back as 1854, the United States Navy launched an assault on the town of San Juan del Norte in Nicaragua in retaliation for an alleged insult to the wealthy US businessman, Cornelius Vanderbilt, and other US officials.\textsuperscript{62} The US was also instrumental in installing the Samoza dictatorship in Nicaragua during its military occupation in 1912-1933. In more recent times, the US backed the ‘Contra war’ against the Sandinista government of Nicaragua during the 1980s and its funding of the Violeta Chamorro-led opposition coalition that won the Nicaraguan elections in 1990\textsuperscript{63} epitomise its military and political interventions in Latin America. Thus in the 1986 Judgement of the International Court of Justice in the Nicaragua v. United States of America Case,\textsuperscript{64} the Court held that:

\begin{quote}
... the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.\textsuperscript{65}
\end{quote}

The above examples of blatant interferences in the domestic political and economic affairs of many States by the superpowers were evident breaches of the principle of non-interference espoused under the concept of sovereign equality of States in the UN Charter.

\textsuperscript{59} Ruud van Dijk, op. cit. fn.57.  
\textsuperscript{61} Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14.\textsuperscript{(Nicaragua Case)}.  
\textsuperscript{62} Noam Chomsky op cit. fn.60, at 129.  
\textsuperscript{63} Ruud van Dijk, op cit. fn.59.  
\textsuperscript{64} \textit{Nicaragua Case}, op cit. fn.61.  
\textsuperscript{65} Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14., para.3 of the Summaries of Judgments, Advisory Opinions and Orders of the ICJ.
The Soviet and US type of interference\textsuperscript{66} can be contrasted with international institutions like the World Trade Organisation (WTO) and the European Union where Member States put a restriction on their own sovereignty in order to achieve economic cooperation.\textsuperscript{67} A self-imposed restriction on one’s sovereignty would not amount to a diminution but rather an expression of sovereignty.\textsuperscript{68}

Sovereignty in its past and present manifestations has not been perfect in terms of the link between theory and practice. It is doubtful whether it is even desirable for states to apply a ‘pure’ concept of sovereignty as such a practice will stifle a legitimate expression of sovereignty even when expressed through a self-imposition of restrictions. However, not all restrictions to sovereignty may be desirable as evidenced by the Soviet and US type of forced interventions in the domestic affairs of other States. Consequently, what sovereignty is at the conceptual level is not always what it turns out to be at the practical level. Also, when the term ‘sovereignty’ is used, it does not refer to one homogeneous concept that describes the exercise of sovereign power by the State. The concept can be used to describe different facets of State practice at the domestic, inter-State and international levels.

Stephen Krasner for instance identifies four different ways in which the concept of sovereignty is used – international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.\textsuperscript{69}

Firstly, international legal sovereignty, to Krasner, denotes the mutual recognition that states having formal juridical independence accord to one another within the international community of states.\textsuperscript{70}

Secondly, the Westphalian account of sovereignty is that of non-interference of external entities in the political power structures of the state.\textsuperscript{71}

Thirdly, the emphasis of ‘domestic sovereignty’ is on “the ability of public authorities to exercise effective control within the borders of their own polity.”\textsuperscript{72} Here, there is a focus on the domestic system of political authority and how it is organised and used to achieve desired results within the territorial confines of a given polity. It is the State’s use of its sovereignty, within its domain, over its citizens. This manifestation of sovereignty is more akin to Bodin’s concept of absolute authority resident in a sovereign; the sovereign here being the institutions of State vested with the powers of the State.

\textsuperscript{66}i.e. interference by one state in the affairs of another state.


\textsuperscript{68} Ibid.


\textsuperscript{70} Ibid at 4.

\textsuperscript{71} Ibid.

\textsuperscript{72} Ibid.
Lastly, interdependence sovereignty denotes that ability of the state to control outflows from, and inflows into its territory.\(^{73}\)

The way the various manifestations of sovereignty work, or are supposed to work, are not the same. In effect, different rules apply to different manifestations of sovereignty.\(^{74}\) Krasner observes that international legal sovereignty and Westphalian sovereignty do not deal with issues of control but rather of authority and legitimacy; the rule for international legal sovereignty being the recognition accorded to polities possessing formal juridical independence and the rule for Westphalian sovereignty being the exclusion of external actors from interfering, whether \textit{de jure} or \textit{de facto}, in matters falling within the territory of the state.\(^{75}\) Domestic sovereignty and interdependence sovereignty require the effective exercise of power and control by the institutions of the state.

The different facets of sovereignty identified above do not operate independent of each other. They may be theoretically distinct but there cannot be a watertight distinction at the practical level. For example, the exercise of international legal sovereignty may empower a State to become a signatory to an international treaty organisation like the WTO. The requirements of the treaty commitments would, however, require an effective operation of domestic sovereignty in order to actualise the treaty commitments. The TRIPS Agreement\(^{76}\) under the WTO system, for instance, binds all member States to institute domestic legal and/or administrative systems in order to make the intellectual property protection requirements of the Agreement effective.\(^{77}\) Member States may use their international legal sovereignty to enter into this treaty commitment, but would definitely need their domestic sovereignty to implement and effectuate the requirements of the TRIPS Agreement.

To sum up, some common manifestations often bound up in the conceptualisation of state sovereignty include the existence of territory, population, hierarchy of power at the domestic level, independence, absence of external intervention, international recognition, and capacity to regulate trans-border flows.\(^{78}\) All these attributes do not have to be present at the same time in a State though the absence of one of the attributes may be a crucial factor in denying the rights of statehood to a polity. For example, though Taiwan has a stable democratic government and a well-managed economy, an indicator of domestic sovereignty, its lack of international legal sovereignty (i.e. international recognition) has been key in its inability to secure statehood in the international

\(^{73}\)Ibid.  
\(^{74}\)Ibid.  
\(^{75}\)Ibid.  
\(^{76}\)i.e. Agreement on Trade Related Aspects of Intellectual Property Rights.  
\(^{77}\)Articles 42-50 of the Agreement on Trade Related Aspects of Intellectual Property Rights.  
community of States.\textsuperscript{79} In spite of this lack of international recognition, it must be noted though that under the Montevideo Convention on the Rights and Duties of States 1933, international recognition per se is not a prerequisite for the acquisition of statehood. Article 3 of the Convention states that:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.\textsuperscript{80}

However, Article 1 of the same Convention provides that in addition to a permanent population, a defined territory, and government, the capacity to enter into relations with the other States constitutes one of the qualifications of the state as a person of international law.\textsuperscript{81} Thus though international recognition may not be a prerequisite to statehood, it would be reasonable to deduce that its attainment would make the capacity to enter into relations with other States efficacious.

In contrast to Taiwan, other States like Somalia, Liberia, Rwanda and Haiti which were described as ‘failed states’ due to domestic breakdown of government in their recent history,\textsuperscript{82} did not lack international legal sovereignty during their periods turmoil and breakdown of law and order.

As argued above, other restrictions to State sovereignty can be self-imposed. States, like individuals in municipal law, can enter into agreements that put a restriction on one or more of the manifestations of sovereignty. Hence, sovereignty is not a strait jacket that States must fit their practice in. It is rather a fluid concept that can be used in a versatile way to fit the contours of State practice. Krasner opines that:

Sovereign states are autonomous actors. They have the right and the ability to enter into contractual relationships. These contracts, even though they are promises that may limit freedom of action, are an indication of the sovereignty of the state, not a curtailment of it.\textsuperscript{83}

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\textsuperscript{80} Article 3 of the Montevideo Convention on the Rights and Duties of States 1933.

\textsuperscript{81} Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.


\textsuperscript{83} Stephen Krasner, op cit., fn.69, at 5.
\end{flushright}
III. The Concept of Equality of States

The second constituent concept of sovereign equality – the equality of States – emerged largely from the natural law school of thought. The principle of equality of States as a doctrine was greatly impacted by the works Hugo Grotius. Grotius’ concept of sovereignty, discussed above, had an inherent principle of equality. His assertion that “there is no greater sovereign power set over the power of the state and superior to it” was as much an argument in support of the equality of States as it was for State sovereignty. But perhaps the greatest elucidator of the doctrine of equality of States was Emerich de Vattel who likened the community of States to that of the human community. To Vattel, the notion that all humans are equal in the community, independent of size, wealth or social standing, applies equally to the community of States. Thus, as “[A] dwarf is just as much a man as a giant: a small republic is no less sovereign than the most powerful of kingdoms.”

This natural law notion of equality of humans as a natural right was therefore directly transposed into the conception of how States should relate to each other hence creating a consequential connection between equality of States and sovereignty of States, and by so doing smelted the two concepts as two indispensable sides of the same coin.

In international law, equality of states is juridical in nature. By their very existence as States, States are legally or juridically equal. Juridical equality here is not just a mere statement that all states are equal by their very existence as states; it translates into equal rights and duties. That states are juridically equal does not assure equality in other respects, like military or economic prowess. Legal personality and legal capacity are the constituents of juridical equality. Though the concept of equality of states advanced by earlier commentators like Vattel emanated from a natural law perspective, the increasing influence of legal positivism saw a demise of the natural law leanings for explaining the equality of states. The universality of the concept of equality of states could not be accepted on the basis that it is natural law but was rather viewed as emanating from the will of states expressed through their consent to the creation of international law.

Article 4 of the Montevideo Convention on Rights and Duties of States provides that:

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84 Hugo Grotius, op cit., fn.22, at 36.
86 Quoted in Djura Nincic, ibid., at 37.
88 Ibid.
89 Djura Nincic, op cit. fn.85.
States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.\(^{90}\)

Imbued in the concept of equality of states is the principle of self-determination. At the national level, to regard another as a person having equal rights under the law, is an affirmation of the fact that, unless prohibited by law, the individual has an inalienable right to pursue the aspirations that he or she deems fit. Equality before the law devoid of the right to choose one’s preferences in life due to subjugation to the will of another person is a contravention of the very basis of equality. It thus follows that at the international level, one cannot talk of equality of States without the fundamental principle of self-determination. In effect, self-determination is an incontrovertible logical consequence of equality of States under international law. The Declaration on Friendly Relations and Cooperation Among States affirms the link between equality of States and self-determination as follows:

… the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.\(^{91}\)

The notion of juridical equality of States emanated from the conception of States as being sovereign in their relations with one another hence juridical equality can only exist between sovereigns because “the sovereignty of States implies that they may not be subjected to one another, and this subjection is also precluded by their mutual equality”.\(^{92}\)

Equality of states is thus a logical extension of State sovereignty. John H. Jackson argues that:

The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its “sovereignty” negates the idea that there is a higher power, internationally or foreign (unless consented to by the nation state).\(^{93}\)

Thomas Heller and Abraham Sofaer also argue that the importance attached to the concept of sovereign equality of states by lawyers and diplomats is akin to the

\(^{90}\) Article 4 of the Montevideo Convention on Rights and Duties of States 1933.
\(^{91}\) Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970.
\(^{92}\) Djura Nincic, op cit. fn.85.
\(^{93}\) John H. Jackson, op cit., fn.67, at 58.
US Declaration of Independence - “all men are created equal”.

Equality here becomes a facilitating tool for international diplomacy in an international system premised on the horizontal relationship among states and not an ‘empire’ oriented vertical relationship. Without the conceptual foundation of sovereign equality of states, ‘the Great Power States’ would relate to weaker states as vassals and not ‘equals’ in the international community. Thus the concept of sovereign equality of States necessarily relies on international law and not State power. International law must be efficacious in limiting a State’s actions so as to protect the rights of other states. The proscription of the use or threat of use of war in the international relations of States under the UN Charter is an example. The fact that a State may have the military strength to conquer all other States would not justify the use of such strength because international law prohibits it. States must therefore sacrifice a bit of their sovereignty in order for sovereign equality to exist. In other words:

No state is absolutely sovereign, because it must exercise its powers without infringing upon the rights of other sovereign states.

IV. Sovereign Equality and Law Making in International Organisations

When the principle of sovereign equality is applied in State constructed international organisations it presents some fundamental conceptual problems. Where the principle of one-state one-vote pertains, as in the UN General Assembly and the WTO, there is an evident provision to protect the principle of sovereign equality of states. However, if voting requirements are not based on unanimity or consensus, the majority vote principle will pertain. The problem this presents is that it is very difficult to achieve unanimity in treaty based inter-state organisations hence the resort to majority voting processes. The tortuous process that plagued the ratification of the Lisbon Treaty amending the Treaty on European Union and the Treaty Establishing the European Community is a case in point. Due to the requirement of unanimity, all the 27 Member states of the European Union (EU) had to ratify the Treaty before it could come into force. From the Laeken Declaration of 2001 to the ratification of the Lisbon Treaty by the Czech Republic in November of 2009 and the coming into effect of the Treaty in December 2009, the process of ratifying a new treaty for the EU had been dogged with difficult hurdles like the rejection of the Treaty establishing a

95 Ibid.
96 Article 18:1 of the UN Charter.
97 Article IX of the WTO Agreement.
Constitution for Europe by France and the Netherlands in 2005.\(^100\) The rejection of the Treaty establishing a Constitution for Europe precipitated the drawing of the Lisbon Treaty. Two rulings of the Czech Constitutional Court was required to pave the way for ratification of the Lisbon Treaty by the Czech Republic,\(^101\) a ruling by the German Constitutional Court\(^102\) was also required and after a first rejection in a referendum in Ireland in June 2008, a second referendum was needed to pave the way for ratification in October 2009.\(^103\)

Where decisions are made based on majority voting, it presents some level of flexibility in the decision-making process than would have been the case under unanimity or consensus requirements. However, where the majority vote applies, this would mean States whose votes fell in the minority would be bound by the decisions of the majority. In principle, States whose vote fall within the minority will be bound by a decision that they expressly opposed. On the face value, this negates the principle that a sovereign State cannot be bound by an agreement that it has not consented to. The centrality of state consent in international law was highlighted by the Permanent Court of International Justice in the *Lotus Case*.\(^104\) The Court opined that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.\(^105\)

Consequently, Hans Kelsen for instance argued that the majority vote principle should not be applicable in international organisations like the UN because states whose votes fall in the minority would be bound by the decisions of the majority.\(^106\)

The majority vote system presents another problem with regards to its consistency with the principle of sovereign equality of States. There is the problem of States being bound by the decisions of other States on issues where in real terms the majority have a lesser stake in the outcome of the decision. In the WTO setting, the fact that industrialised nations form the minority is a typical example. Though industrialised nations form the minority, their output in international trade is by far greater than that of the majority developing

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100 Paul Berman, op cit. fn.98; Paul Craig, op cit. fn.98.
101 2008/11/26 - PL. ÚS 19/08: TREATY OF LISBON I.
103 Paul Berman, op cit. fn.98; Paul Craig, op cit. fn.98.
105 Ibid, at para.44.
106 Hans Kelsen op cit., fn.12.
countries.\textsuperscript{107} For instance, whereas the value of world merchandise trade for the United States in 2009 was 1,057 billion dollars, the combined value of that of all African states was 379 billion dollars.\textsuperscript{108} However, developing countries could use their numerical advantage to make decisions inimical to the trade interests of industrialised countries if the majority vote system applies.

But a more serious problem arises where the wishes of the minority hold sway due to the leverage they wield in influencing decision-making processes. Such a situation strikes at the very foundation of the concept of sovereign equality of States and the democratic legitimacy of decision-making processes in international treaty organisations. This problem is however a very real one as Malcolm Shaw notes:

\begin{quote}
… it would not be strictly accurate to talk in terms of the equality of states in creating law. The major states will always have an influence commensurate with their status, if only because their concerns are much wider, their interests much deeper and their power more effective.\textsuperscript{109}
\end{quote}

The permanent member status and the veto power given to the US, Russia, France, the UK and China in the UN Security Council\textsuperscript{110} are typical examples where there is a formal inequality among member states of the UN in spite of the fact that the UN Charter espouses the principle of sovereign equality of states.

On the other hand, it could be argued that states that accede to treaty-based organisations with majority voting systems do so knowing very well the implications of the voting regime. Thus by giving their assent to such a voting system through accession, they have agreed to a possible limitation of their sovereign equality and since this limitation is self-imposed, it is a legitimate expression of state sovereignty.

The just defended position on decision-making processes in treaty organisations does not completely alleviate some of the fundamental conceptual conflicts it raises regarding sovereign equality. It would be difficult to justify the argument that States that accede to the UN, for example, do so knowing very well that five Member States have been formally given special powers that are not accorded to other members. If the issue of permanent membership of the Security Council and the veto powers are anomalies, (judging on the basis of sovereign equality of states) acceding with full knowledge of this anomaly does not cure it nor does it justify the anomaly.

\textsuperscript{108} ibid.
\textsuperscript{109} Malcolm N. Shaw op cit, fn.87, at 193.
\textsuperscript{110} Article 27 of the UN Charter.
John H. Jackson also argues that fundamental issues regarding sovereignty arise:

… in connection with many treaty details, such as (for example) when a treaty-based international institution sees its practice and “jurisdiction” evolve over time and purports to obligate the nation members even when they opposed such evolution.\(^{111}\)

In such an instance, the issue relevant to the current discussion on sovereign equality would be the unequal influence that some members of the ‘treaty-based international institution’ brought to bear on the evolution of the institution’s jurisdiction over time. In effect, if the institution’s (to borrow Jackson’s words again) “… “jurisdiction” evolve over time and purports to obligate the nation members even when they opposed such evolution”,\(^{112}\) why were the opposing views of the members not reflected in the evolution of the institution’s jurisdiction and practice? Surely, since States are the main architects of treaty-based international law, it is the will of the States, expressed through the institution’s decision-making processes that hold sway.

If the international institution purports to develop “jurisdiction” which is unanimously contrary to the wishes of the member States, they, as the treaty legislators can counteract and stop such a prohibitive evolution. Thus even if the evolution of the institution’s jurisdiction was opposed, it is inconceivable that it would have been a unanimous opposition. Even if such opposition was widespread, the fact that the institution’s jurisdiction evolved in the face of opposition should mean that the evolution must have occurred in concert with some member States who had the leverage to influence changes in the institution.

This argument would, however, be truer in treaty-based institutions like the WTO where there are no supranational structures that operate outside the oversight of member States. Even decisions of dispute settlement Panels and the Appellate Body in the WTO system must be accepted by representatives of Member States in the General Council sitting as the Dispute Settlement Body.\(^{113}\) The WTO system could be described as solely member-driven. This is quite contrary to the EU, where though the EU as a treaty organisation is also member-driven, an organ like the European Court of Justice (ECJ) has supranational competencies and operates independently of the Member States.\(^{114}\) However, even in the EU system, if the ECJ gave a ruling that all Member States found objectionable, that ruling could be superseded by treaty amendments orchestrated by the member States. If a trend of ‘objectionable decisions’ are not counteracted with treaty amendments or legislation from the EU legislative organs, it would suggest that the member States have decided to live with the ECJ decisions, and by so doing

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\(^{111}\)John H. Jackson op cit., fn.67, at 58.

\(^{112}\)Ibid.

\(^{113}\)Article IV:3 of the Agreement Establishing the World Trade Organisation.

given a tacit acceptance, or that amendments would be, or have been, blocked by some States that are in favour of the trend of ECJ decisions.

Consequently, in a decision-making system like that of the WTO, despite the operation of the system of one-member-one-vote, disaffection with the decision-making process due to the informal leverages that developed countries bring to bear on decision-making has prompted calls, mostly from developing countries, for a reform of the decision-making process.\textsuperscript{115} Such calls for reform in favour of equality in decision-making, however, fail to balance the argument with the special and differential treatment of developing countries in the WTO. If all states are equal in terms of rights and duties, what justifies the special treatment of developing countries in the WTO? It could be argued that in the WTO decision-making system, the informal superior leverages and greater economic weights that developed countries bring to bear on the decision-making system is equilibrated by the special and differential treatment of developing countries. Consequently, the special and differential treatment of developing countries in the WTO setup does not amount to an aberration, with respect to the operation of the principle of sovereign equality of states. It rather becomes an equilibrating tool that effectuates the operation of sovereign equality in practice.\textsuperscript{116}

In a multilateral financial institution like the International Monetary Fund (IMF) the use of weighted votes based on Member States’ financial contributions\textsuperscript{117} means that the concept of sovereign equality is not reflected in its voting systems. Simply put, a one-member-one-vote policy is non-existent and as such, one cannot talk about the operation of the principle of sovereign equality in terms of equal influence in the decision making process. With the IMF therefore, the only aspect of the principle of sovereign equality that applies is the fact that members are sovereign states that have acceded to the Fund’s Articles of Agreement. The sovereignty of the members as States does not translate into equality in the decision-making process. Like the joint-stock company model, individuals who are equal under the law of the State are not equal with respect to their influence over the decisions of the company in which they own shares. Those with greater percentages of the shares have votes equivalent to the size of their shares. So also, in the IMF, sovereign equality can only be conceived of as equality of


\textsuperscript{116} An equilibrating tool in this regard may be the use of the concept of proportionality in reconciling the principles of special and differential treatment and sovereign equality of states. Thus in analysing these two principles, it does not have to be an ‘either or’ analysis but rather a proportionality analysis – i.e. where to place more emphasis on which principle without totally subjugating the other. See Andenas, M. and Zleptnig, S., ‘Proportionality: WTO Law in Comparative Perspective’, \textit{Texas International Law Journal}, (2007), Vol. 42:371. See also Pascal Lamy, ‘The Place of the WTO and its Law in the International Legal Order’ \textit{European Journal of International Law} (2007) 17:5, pp.969-984.

States under international law and not equality in terms of actual influence in the organisations that States join.

The above anomalies briefly discussed show that, like the concept of State sovereignty, the operation of equality of States in decision-making processes in treaty-based international organisations is not perfect. Such imperfections may not solely be the result of practice, but may reflect a problem with the concept of sovereign equality itself. Even from a natural law perspective where the concept of equality of states was prominently developed and advanced, the analogy between the equality of humans and the equality of States presents some conceptual problems. Vattel for instance argued that a giant and a dwarf are equal.\textsuperscript{118} Supposing there was rationing of food, should the giant receive the same proportion of ration as the dwarf, in spite of the fact that the giant’s requirements of nourishment would be far greater than the dwarf? An adult and a child are both human and thus equal by dint of their humanity. Should they receive the same ration or should their needs, dictated by their size, inform how much they should receive? Should China, with a population of 1.3 billion have an equal leverage in decision-making with Liechtenstein which has a population of 36,000.\textsuperscript{119} On a practical level one may ask the legitimate question ‘how can 1.3 billion people be equal to thirty-six thousand people just because they have congregated as states?’ The US’ contribution to international trade is greater than the combined output of all the 42 African State members of the WTO.\textsuperscript{120} However, on decisions relating to international trade in the WTO setup, the US has one vote just as each of the 42 African countries. A fundamental concern in the issues raised here is where to draw the line between sovereign equality – i.e. legal equality with regard to rights and duties – and equity – i.e. what is just and fair. A blind application of equality will evidently not always deliver what is just and fair for both the ‘giant’ and the ‘dwarf’. There is therefore the need for a principle of ‘equity-equality’ that gives due cognisance to the needs of both the giant and the dwarf.

V. Concluding Remarks
The kernel of the discussion on State sovereignty undertaken so far hinges on the fact that it relates to the supreme power or authority of the State and that the State is only subject to international law and not the national law of another sovereign State. Equality of States on the other hand is juridical in nature and relates to rights and responsibilities and not the actual power that States have at their disposal. As discussed above, both concepts, operating independently or together under the term – sovereign equality of states – present both practical and conceptual anomalies. Some of these anomalies are necessary and a legitimate and practical expression of state sovereignty, while others are aberrations.

\textsuperscript{118}Djura Nincic op cit, fn.85.at 37.
\textsuperscript{119} i.e. based on 2011 populations statistics and at which time the WTO had 153 Members
\textsuperscript{120} WTO Secretariat, op cit., fn.105.
But what if a powerful State (or a ‘cartel’ of powerful states) uses its leverage in international institutional systems to internationalise its national policy preferences? This presents a real problem especially due to the proliferation of treaty based international/multilateral organisations in the post-World War II era. The use of unequal leverages to promote policy preferences in multilateral organisations would result in a situation where treaties, one of the primary sources of international law, could become an extension of the national law of the powerful. The decision-making systems in international organisations become crucial in determining sovereign equality as the decisions of these organisations become the treaties and norms that primarily contribute to the formulation of international law.