
THE EVOLUTION OF STATE SOVEREIGNTY: A HISTORICAL OVERVIEW*

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1 Introduction

1.1 Defining sovereignty

The idea of absolute sovereignty is in many respects an outdated concept in modern international law and there are various factors contributing to its erosion. As a result of especially globalization, there is a growing trend of interdependence and co-operation between states. The sovereignty of states, therefore, continues to be limited by, for example, the internationalization and universalization of human rights.

Although state sovereignty is a fundamental principle of international law,¹ the precise meaning of the term *sovereignty* is not clearly defined.² The following possible definitions of sovereignty have been offered:

Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein.³

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1 Perrez *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law* (2000) 13 explains the importance of sovereignty in international law as follows: "It is argued that international law is based on the principle of sovereignty, that sovereignty is the most important if not the only structural principle of international law that shapes the content of nearly all rules of international law, that the international legal order is merely an expression of the uniform principle of external sovereignty, that sovereignty is the criterion for membership in the international society, and that sovereignty in sum is the 'cornerstone of international law' and the 'controlling principle of world order'."

2 Oppenheim *International Law: A Treatise* Vol 1 (Arnold D McNair (ed) (1928)) 137 notes that "there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an undisputable fact that this conception, from the moment when it was introduced into political science until the present day, had never had a meaning which was universally agreed upon". Henkin *International Law: Politics and Values* (1995) at 8, also describes the concept of sovereignty as variable by maintaining that sovereignty "means many things, some essential, some insignificant; some agreed, some controversial; some are not warranted and should not be accepted". He is of the somewhat idealistic opinion that the concept of sovereignty should be entirely disposed of and submits that "for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic of an earlier era" (at 10).

3 Bodley "Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia" 1993 *New York University Journal of International Law and Politics* 419. McCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) 127 provides the following explanation of the term "sovereignty" by distinguishing between legal and political sovereignty: "[W]hereas a 'merely legal conception',

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

- *Domestic sovereignty*, which refers to the organisation of political authority within a state and the level of control enjoyed by a state.
- *Interdependence sovereignty*, which is concerned with the question of control, for example, the ability of a state to control movements across its own borders.
- *International legal sovereignty*, which is concerned with establishing the status of a political entity in the international system. The state is treated at the international level similarly to the individual at the national level.
- *Westphalian sovereignty*, which is understood as an institutional arrangement for organising political life and is based on two principles, namely territoriality and the exclusion of external factors from domestic structures of authority. Westphalian sovereignty is violated when external factors influence or determine the domestic authority structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state voluntarily subjects internal authority structures to external constraints.⁵

Ideas and views about sovereignty may vary from time to time, as changing times necessitate different approaches.⁶ Fassbender notes that the concept of

sovereignty is 'the power of law-making unrestricted by any legal limit', by contrast 'that body is 'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state'. Power without restriction is on this view the key idea. Power of one kind, normative power or 'authority', is conferred by law. This may be a power of law-making in a certain territory conferred by a certain constitutional order that is effectively observed in that territory. Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, as long as the constitution places no restrictions on the exercise of that power If the constitution then confers such a power but contains no limits upon the power (other than the discretion and judgment of those who exercise the power) we may say that sovereignty is vested in the holder of the law-making power. But what of political sovereignty? By parallel reasoning, one would be inclined to define it as political power unrestrained by higher political power Political power is interpersonal power over the conditions of life in a human community or society. It is the ability to take effective decisions on whatever concerns the common well-being of the members, and on whatever affects the distribution of the economic resources available to them." McCormick reaches the conclusion that sovereign power is territorial in nature and is not subject to limitation by higher or coordinate power.

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

5 *Idem* at 567-577. The rulings of the International Court of Justice, eg, have legitimacy in the judicial systems of the member states of the European Union. Human rights conventions can also cause unanticipated changes in the institutional arrangements of the signatory states.

6 Jennings "Sovereignty and international law" in Kreijen (ed) *State, Sovereignty and International Governance* (2002) 27. Makinda "Recasting global governance" in Thakur & Newman (eds) *New Millennium, New Perspectives: The United Nations, Security, and Governance* (2000) 168-172 distinguishes between three types of sovereignty. First, external

sovereignty has proven to be highly adaptable.⁷ According to him sovereignty is a collective or umbrella term that indicates the rights and duties that a state is accorded by international law at a given time. These sovereign rights and duties constitute state sovereignty.⁸ Sovereignty is thus the legal status of a state as defined, and not only protected, by international law. Therefore, sovereignty is neither “natural” nor static. Because of a process that has increasingly placed constraints on the freedom of action of states, the substance of the notion of sovereignty has changed and will further change in future.⁹

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

or juridical sovereignty, which is based on the notion that, theoretically, the state is under the exclusive authority of international law. Secondly, internal or empirical sovereignty, which is based on the idea that states have the right and the capacity to control the people, resources, and institutions within their territories. The third is individual or popular sovereignty, which is based on the claim that all people are entitled to fundamental freedoms and that states exercise control over them only with their consent. Empirical and juridical sovereignty accord states rights and responsibilities that other international actors do not possess. According to Makinda sovereignty has undergone various transformations in accordance with the prevailing norms of global governance. He explains, at 171, as follows: “Whenever serious crises undermine the legitimizing principles of sovereignty, new norms are negotiated, and these norms often reflect the preferences of hegemonic states. It is the processes of negotiating the rules of sovereignty which Biersteker and Weber had in mind when they argued that sovereignty was socially constructed. They posited that it is ‘the practices of states and non-state agents [that] produce, reform, and redefine sovereignty and its constitutive elements.’ In such social interactions, all participants help to shape, and are also shaped by, the structure of the system, in varying degrees. A global structure that is characterized by power politics and secret diplomacy is likely to favour the notion that sovereignty resides with governments. However, a global order which is committed to the promotion of democracy and human rights would favour popular sovereignty. Thus, it is the norms, values, and institutions which underpin global governance that determine the nature of sovereignty.”

7 Fassbender “Sovereignty and constitutionalism in international law” in Walker (ed) *Sovereignty in Transition* (2003) 115.

8 According to Cassese *International Law* (2005) 49-52 sovereignty includes the following sweeping powers and rights: (1) The power to exercise authority over all the people living in a particular territory. (2) The power to freely use and dispose of the territory under the state's jurisdiction and to perform all activities deemed necessary or to the benefit of the population living there. (3) The right that no state intrude in the state's territory. (4) The right to immunity from the jurisdiction from foreign courts for acts or actions performed by the state in its sovereign capacity and for execution measures taken against the use or planned use of public property or assets for the discharge of public functions. (5) The right to immunity for state representatives who act in their official capacity. (6) The right to respect for the state's nationals and its officials abroad.

9 *Idem* 129.

10 Ninčić *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (1970) 2 is of the opinion that since the early stage of its growth, certain elements remained the attributes of sovereignty in the subsequent stages of its development such as “the notion that 1. sovereignty is an essential attribute of state power, and, 2. that the essence of sovereignty is constituted by the independence of state power from any other power. We may also, however, observe a tendency to free the state from any form of limitation, both legal and moral, as well as an inclination to identify sovereignty with force (ie with material force or the physical possibility of realizing sovereignty), in which we find the main ingredients of the so-called theory of absolute sovereignty”.

international law – do not claim that they are above the law or that international law does not bind them.¹¹

In this contribution the theoretical foundation of state sovereignty will be discussed by giving a broad overview of the historical development of the notion of state sovereignty.

1 2 Internal and external sovereignty

Bodley refers to the following definition of sovereign states:¹²

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

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

The idea of external sovereignty eventually led to the development of modern international law. In the external relations of states, sovereignty was regarded as legal independence from all foreign powers, in particular that of the Pope and the Emperor of the Holy Roman Empire, and as impermeability, which

11 Bodley (n 3) 429.

12 *Idem* 419.

13 Bodley *ibid* refers to the definition of the concept "sovereign states" in *Black's Law Dictionary* (1993) 971.

14 Fassbender (n 7) 117; Fassbender "Article 2(1)" in Simma (ed) *The Charter of the United Nations: A Commentary* (2002) 70; Lee "A puzzle of sovereignty" 1997 *California Western International Law Journal* 253. McCormick (n 3) 129 notes that "a state whatever its internal distribution of legal or political power, is a 'sovereign state' in the sense that the totality of legal or political powers exercised within it is in fact subject to no higher power exercised from without. What we shall therefore call 'external sovereignty' characterizes a state which is not subject to superior political power or legal authority in respect of its territory".

15 (n 1) 16.

protect the particular territory against all outside interference.¹⁶ The principle of external sovereignty to a large extent determined the overall structure and the entire substance of the international law of co-existence.¹⁷

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

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

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

2 The traditional understanding of sovereignty

2.1 Jean Bodin (1530-1596)

The traditional understanding of sovereignty as independence and supreme authority may be attributed to Jean Bodin's sixteenth-century definition of sovereignty in his work *Les Six Livres de République* as the absolute and perpetual power of a state. According to Bodin, the concept of sovereignty primarily entails the absolute and sole competence of law making within the territorial boundaries of a state and that the state would not tolerate any other law-creating agent above it. He maintains that sovereignty, as the supreme power within a state, cannot be restricted except by the laws of God and by natural law. No constitution can limit sovereignty and therefore a sovereign is regarded to be above positive law.²¹

16 Fassbender (n 14) 71. Ninčić (n 10) 2 notes that the origin of the concept of sovereignty is usually linked to the disintegration of feudalism and the emergence of the modern nation state. In the struggle against both the feudal order and the Holy Roman Empire, the ruler strove to be freed from the limitations of the medieval order and to achieve an authority that did not depend on any other authority, thus an authority which is sovereign in the literal sense of the term.

17 Fassbender (n 14) 72. Also see 5.1 below.

18 *Island of Palmas Case* 2 RIAA 829 (1928).

19 At 838.

20 (n 3) 126.

21 See Bodin *Les Six Livres de République* (1577) Book I Ch 8. For an English translation see Jean Bodin *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (tr by Julian Franklin (1992)) 1-45. Also see Van der Vyver "The concept of political sovereignty" in Visser (ed) *Essays in Honour of Ellison Kahn* (1989) 290; Jennings (n 6) 28; Lauterpacht (ed) *Oppenheim's International Law* Vol 1 (1947) 116.

According to Bodin's theory of sovereignty, the sovereign power is bound by international law, which results either from treaties or from divine or natural law.²²

Although Bodin's conception of sovereignty as introduced in the sixteenth century was accepted by writers on politics, the majority of these writers held the opinion that sovereignty may be restricted by a constitution and by positive law. However, in the seventeenth century Hobbes (1588-1679) went even further than Bodin by stating that a sovereign was not bound by anything and had a right over everything, including religion.²³ In contrast, Pufendorf (1632-1694) denied that sovereignty involves omnipotence.²⁴ According to him sovereignty is the supreme power of a state, but not the absolute power. Sovereignty may therefore be constitutionally restricted.

2.2 The Spanish philosophers: De Vitoria (1486-1492), Suarez (1548-1617) and Gentili (1552-1608)

The Spanish philosophers' concept of sovereignty is based on the existence of a presupposed world community with an undisputed legal character and the interdependent relationship between states. Like Bodin, they subject sovereignty to the existence of a higher or supreme law. They all refer to the role of the *ius gentium* that governs the relationship between the states comprising this world community, but differ in certain respects on its meaning and relation to international law.

In his work *De Indis et de Iure Belli Relectionis*, Francisco de Vitoria, one of the fathers of modern international law, proposes that the *ius gentium* is the result of man's rational nature and natural law and therefore common to all mankind. A state cannot refuse to be subjected to international law as international law has been established by the whole world.²⁵ According to him the aims of the

22 Bodin (n 21) Book 1 Ch 8; Bodin (English translation) (n 21) 45. Also see Perrez (n 1) 27-28. Writers who followed after Bodin, such as Grotius, Pufendorf and Burlamaqui, tried to find the limitations of sovereignty in natural law, while others – such as Christian Wolf – held the opinion that these limitations could be found in an international organisation, called *civitas maxima*. See in this regard Ninčić (n 10) 3-4; Kelly *A Short History of Western Legal Theory* (1992) 299.

23 *De Cive* (1651) Ch 6 pars 12-15. For an English translation see Thomas Hobbes *De Cive: Dominion*: <http://www.thomas-hobbes.com/works/dominion.html> (16 October 2006). Also see Lauterpacht (n 21) 117.

24 *De Iure Naturae et Gentium Libri Octo* (1672) Book 7 Ch 6 pars 1-13. For an English translation see Carr (ed) *The Political Writings of Samuel Pufendorf* (1994) (tr by Michael J Seidler) 230-235. Also see Lauterpacht (n 21) 117.

25 *De Indis et de Iure Belli Relectionis* (1696) Sec 3 par 2. For an English translation see Franciscus de Victoria *De Indis et de Iure Belli Relectionis* (edited by Ernest Nys and translated by John Pawley Bate in 1917) 151. Perrez (n 1) 30-31 names the inviolability of ambassadors, the common ownership of the seas, the right to communication and the freedom of travel as examples of these binding rules of the *ius gentium*. Also see Kooijmans

state are embedded in the common good of the world community. Hence, the interest of the community directs the aims of the state and also imposes certain limitations on the state. Sovereign independence is thus not absolute as the sovereignty of a state finds its limits in the common good of the world community to which all states are subject.²⁶

Also Francisco Suarez, in his *De Legibus ac Deo Legislatore*, regards the freedom of states as limited by both international and natural law. Although the communications and association between states are to a large extent regulated by natural reason, certain special rules could be established by the customs of different nations.²⁷ He therefore makes a distinction between natural law and the *ius gentium*. The *ius gentium* or positive international law has a dual meaning: First, it refers to the law that has to be respected in the relations between states and, secondly, it refers to the law that all states commonly accept and respect internally.²⁸ Because the *ius gentium* is established by common usage it creates a general obligation. Furthermore, international law includes certain fundamental principles of natural law that are unchangeable and binding on states, such as the principle of *pacta sunt servanda*.²⁹

Alberico Gentili regards the *ius gentium*, as closely connected to, but not identical with international law.³⁰ It therefore appears that his idea of *ius gentium* is that of universal law, rather than a law between states.³¹

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

The Doctrine of the Legal Equality of States (1964) 59; Nussbaum *A Concise History of the Law of Nations* (1947) 60.

26 De Vitoria *De Potestate Civili* par 21. For an English translation see Scott *The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations* (1934) (translated by Gwladys L Williams) lxxxix. Also see Kooijmans (n 25) 60-61; Murphy "The Grotian vision of world order" 1982 *American Journal of International Law* 479. See further, in general, Tierney *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (1997) 290-301.

27 See Suarez *Tractatus de Legibus ac Deo Legislatore* (1612) Book 2 Ch 19 par 9. For a German translation see Francisco Suarez *Ausgewählte Texte zum Völkerrecht* (translated by Josef de Vries in 1965) 67. Also see Kooijmans (n 25) 63; Nussbaum (n 25) 67.

28 Suarez (n 27) Book 2 Ch 19 par 8; Suarez (German translation) (n 27) 65. Also see Kooijmans (n 25) 63-64; Nussbaum (n 25) 66.

29 Suarez (n 27) Book 2 Ch 19 pars 1-10; Suarez (German translation) (n 27) 69-79. Also see Murphy (n 26) 496; Perrez (n 1) 31-32. See further, in general, Tierney (n 26) 301-315.

30 See *De Iure Belli Libri Tres* Book 1 Ch 15 107-109. For an English translation see Alberico Gentili *De Iure Belli Libri Tres* (translated by John C Rolfe in 1933) 67-68. Also see Kooijmans (n 25) 65.

31 Nussbaum (n 25) 81.

the freedom of states is limited and that state sovereignty is subjected to the norms of international law.³²

2.3 Hugo Grotius (1583-1645)

No discussion of the concept of sovereignty is complete without reference to the ideas of the father of international law, Grotius. In certain respects the Spanish philosophers had a significant influence on his thinking. Grotius distinguishes between the *ius gentium*, which is the customary law of nations or voluntary law (*ius voluntarium*), and the *ius naturae*, which concerns the international relations between states.³³ According to Grotius, the universal and binding natural law is the primary source of international law. Natural law is supplemented by the secondary corpus of international law associated with the consent of states.³⁴ Although international law is partly independent of the will of states, Grotius nevertheless sees it as binding on sovereign states.³⁵

Grotius, who was a devout Christian and theologian, took the decisive step of secularising the law of nature and of emancipating it from theology.³⁶ According to him the law of nature is discerned by human reason³⁷ and urges man to seek a peaceful and organised society.³⁸

Similar to the Spanish philosophers, Grotius accepts the existence of a legal world community. However, contrary to these philosophers, he does not describe this community as instituted by God in Creation, but as a community that has its binding element in reason, common to all humankind. Because God created man with human reason and the living community was a living reality to Grotius, he used this community as basis for his theories, reason being the binding element.³⁹

Dugard submits that by depending on the “dictate of right reason”, for example in the *ius gentium* and writings of scholars, Grotius aimed to construct a just international legal order whose principal aim was the restraint of war.⁴⁰ Grotius

32 Perrez (n 1) 33. For their viewpoints on just war see, in general, Suarez *De Triplici Virtute Theologica, Fide, Spe et Charitate* (German translation) (n 27) 108-205; Gentili (n 30) Book I Ch 5-12.

33 *De Iure Belli ac Pacis* Book 1 Ch 1 par 10. For an English translation see Grotius *De Iure Belli ac Pacis* (translated by Campbell in 1814). Also see Lauterpacht (n 21) 89; Kooijmans (n 25) 67-68; Nussbaum (n 25) 104, Murphy (n 26) 480-481.

34 *De Iure Belli ac Pacis* Book 1 Ch 1 pars 13-14. Also see Nussbaum (n 25) 104; Kooijmans (n 25) 68; Perrez (n 1) 35.

35 Perrez (n 1) 34-35.

36 Lauterpacht (n 21) 88; Dugard *International Law – A South African Perspective* (2005) 12.

37 *De Iure Belli ac Pacis* Book 1 Ch 1 par 10 1.

38 *De Iure Belli ac Pacis Prolegomena* par 6. Also see Dugard (n 36) 12.

39 *De Iure Belli ac Pacis Prolegomena* par 6 and par 9. Cf Kooijmans (n 25) 67-68.

40 Dugard (n 36) 12.

makes a distinction between righteous and unrighteous wars and denies the absolute right of rulers to engage in war. He accepts that states may use armed force to defend their own rights and to correct the violation of the norms of international law.⁴¹ If a war is undertaken by a lawful authority and for proper reasons, warfare enforces law and right. When a war is conducted according to moral commands, it will lead to peace as its ultimate goal.⁴² Wars may thus be waged for a just cause, as the redress of wrongs is a principle of natural law.⁴³ However, wars undertaken for expediency as well as anticipatory self-defence are regarded as unjust and therefore forbidden.⁴⁴ Although Grotius condones the use of force in certain instances, his work reflects a deep aversion to war.⁴⁵

2.4 Conclusion

Traditionally sovereignty has been denoted as the independence and supreme authority of a state.⁴⁶ Therefore, sovereignty is often conceived as an absolute concept which implies that states are totally independent with regard to all other states and are above the rules of international law.⁴⁷ However, it is evident that the early authors of international law did not regard state sovereignty as absolute and unlimited, but subject to higher norms.⁴⁸

3 Westphalian sovereignty

The Thirty Years War in Europe was ended in 1648 with the Peace of Westphalia. It was concluded in two different treaties, namely the Treaty of Münster and the Treaty of Osnabrück. Perrez points out that the Peace of Westphalia marked a shift of paradigms by establishing the basis for transforming person-orientated law into territory-orientated law.⁴⁹ The new world society that was established after the Peace of Westphalia was premised on the absolute sovereignty of its constituent members.⁵⁰

The Peace of Westphalia recognised the equality of states as a principle of modern international law. The equality of states was recognised irrespective of

41 *De Jure Belli ac Pacis Prolegomena* par 25. Also see Murphy (n 26) 480-481; Perrez (n 1) 37.

42 See, in general, *De Jure Belli ac Pacis* Book 1 Ch 2-4; Book 2 Ch 1. Also see Murphy (n 26) 481.

43 Grotius accepts "defence, recovery of property and punishment" as just causes for war. See *De Jure Belli ac Pacis* Book 2 Ch 1 par 2. Also see Perrez (n 1) 36-37.

44 *De Jure Belli ac Pacis* Book 2 Ch 1 par 17. Also see Murphy (n 26) 481.

45 Murphy (n 26) 481.

46 According to Perrez (n 1) 16 the term "independence" may be described as "being free of external constraint or interference and being not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or, territorial jurisdiction of a foreign state or foreign law".

47 *Idem* 14.

48 *Idem* 37.

49 *Idem* 22.

50 Murphy (n 26) 497.

their Catholic or Protestant faith and of their monarchical or republican form of government. Both the Treaty of Münster and the Treaty of Osnabrück formally ended the medieval conception of a society of states that is organised hierarchically and thus on the basis of inequality.⁵¹

The nation state was seen as an instrument of effective power, and international law was regarded as a law between the free and independent states which were primarily concerned with the promotion of their individual interests.⁵² The Peace of Westphalia, however, obliged states to defend and protect the peace and thereby combined the principle of sovereignty with a duty to cooperate.⁵³

4 The classical understanding of sovereignty

The Peace of Westphalia laid the foundation for an international order based on independent sovereign states.⁵⁴ After the conclusion of the Peace of Westphalia the several reigning princes of the German empire became more or less independent. In the eighteenth century a distinction was made between absolute, perfect or full sovereignty on the one hand, and relative, imperfect or half sovereignty on the other. Absolute sovereignty was ascribed to monarchs who had an unqualified independence within and without their states. Relative sovereignty was attributed to those monarchs who were to some extent dependent on other monarchs in the different aspects of the internal or foreign affairs of the state. As a result of the distinction between absolute and relative sovereignty, the divisibility of sovereignty was recognised, although not universally, during this century.⁵⁵

It is, however, generally accepted that the classical theory of unlimited sovereignty originated with the Peace of Westphalia.⁵⁶ During the eighteenth and nineteenth centuries Bodin's definition of sovereignty as the absolute and perpetual power of a state, was extended into an absolute concept of unlimited freedom and independence.⁵⁷ According to this classical notion of sovereignty,

51 Fassbender (n 7) 121; Fassbender (n 14) 74. Also see Murphy (n 26) 478.

52 Perrez (n 1) 22.

53 *Ibid.*

54 *Idem* 39. According to Bodley (n 3) 421 fn 16 absolute sovereignty has never existed in practical terms, but as a doctrine it forms the basis of modern relations theory. Its beginnings have also been traced to the "new kind of state" which developed from the Reformation, although not all scholars are in agreement with this notion. Initially the concept of absolute sovereignty referred to an attribute of a ruler inside the state, but it later came to be regarded as an attribute of the state in its relations with other states.

55 Lauterpacht (n 21) 117-118.

56 Perrez (n 1) 39.

57 *Idem* 40. According to Ninčić (n 10) 6 the growth of the theory of absolute sovereignty may be traced most easily in the late nineteenth century in Germany. The reason for this being the specific conditions under which Germany entered the phase of industrial development and

international law has no binding force and a state therefore has the power to define freely its own competencies.⁵⁸ The revolutionary changes in the late eighteenth and early nineteenth century gave rise to a new concept of sovereignty which now included the concept of the equality of states as one of its essential elements.⁵⁹

The concept of sovereignty also contained the important, but negative, principle of non-intervention in the internal affairs of other states. It was generally accepted that sovereignty is an essential element of state power and that it signifies supremacy of the state in its internal and independence in its external relations.⁶⁰ In 1945 this principle found its way into the United Nations Charter in the form of Article 2(7) that provides as follows:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁶¹

The doctrine of sovereignty which prevailed in the nineteenth and part of the twentieth century was based on the idea that states are only bound by those rules of law to which they agree, either by the conclusion of treaties or customarily.⁶² According to these voluntarist and positivist doctrines, sovereignty is not merely supreme authority (*summa potestas*), but the full and more or less unlimited power of a state (*plenitudo potestas*).⁶³ During the nineteenth century the nation-state and imperialism joined and led to what was

achieved its national and political unity. Bismarck strove to translate this concept of sovereignty into political reality through both his struggles for the unity of the *Reich* and his *Kulturkampf* with the Roman Catholic Church.

58 Perrez (n 1) 44 refers, in this regard, to the principle of *Kompetenz-Kompetenz* which is generally defined as a state's competence to decide freely what the sphere of its competence shall be. The term *Kompetenz-Kompetenz* was introduced in the nineteenth century to stress the risk of giving a federal state the competence to determine for itself its competencies, because this could lead to an undue extension of its competencies. Perrez explains that eventually *Kompetenz-Kompetenz* became equated with sovereignty and it was argued that the competence of a state to determine the limits of its competencies is the central point of sovereignty. See also Ninčić (n 10) 7.

59 Ninčić (n 10) 4. He notes that the freedom and equality of the individual within the state was being paralleled by the independence and equality of states in the international sphere. Sovereignty was to constitute the legal expression of independence and equality that were appearing as two aspects of a single concept.

60 Ninčić (n 10) 5.

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

62 Fassbender (n 7) 117; Fassbender (n 14) 72.

63 Ninčić (n 10) 6-7.

later known as the “anarchy of sovereignty”. The concept of sovereignty was interpreted as justifying the use of absolute power or symbolising the possession of it.⁶⁴ The sovereignty of a state was not seen as a power to be used towards the common good of the international community, but as a subjective right to be exercised in the own interest of a state.⁶⁵

The internal order of the individual state was not only shielded from intervention by other states, but also from any intrusion by international law.⁶⁶ International law was seen as a set of voluntary rules found in treaties or which derived from custom.⁶⁷ It was essentially bilateral and was not considered to extend beyond the correlative rights and obligations of its subjects.⁶⁸ In the *Lotus Case* the Permanent Court of International Justice held:⁶⁹

[I]nternational 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 ...⁷⁰

Fassbender is consequently of the opinion that there existed a presumption of unrestrained sovereignty.⁷¹ This idea was also confirmed by the Permanent Court of International Justice when it declared, in the *Lotus Case*,⁷² that restrictions upon the independence of states cannot be presumed.⁷³

According to the classical notion of sovereignty the right to engage in war is seen as one of the key elements of sovereignty and no binding legal rules obliging states to keep the peace are accepted.⁷⁴

5 A new understanding of sovereignty

Since the beginning of the twentieth century it has become increasingly apparent that the classical approach to sovereignty as absolute and unlimited authority constitutes a threat to international peace and to the existence of

64 Fassbender (n 14) 73.

65 Fassbender (n 7) 119; Fassbender (n 14) 73.

66 Fassbender (n 14) 72.

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

68 Fassbender (n 7) 119; Fassbender (n 14) 73.

69 *Lotus Case* 1927 PCIJ Reports, Series A, No 10.

70 At 18.

71 Fassbender (n 7) 11; Fassbender (n 14) 72.

72 *Supra* (n 69).

73 18.

74 Perrez (n 1) 45. Also see Fassbender (n 14) 72.

independent nation states.⁷⁵ The cardinal question was asked whether a sovereign state, with no authority above it, can be bound by international law. With reference to Jellinek's *Die rechtliche Natur der Staatenverträge* (1890) Nussbaum points out that Jellinek tried to explain the binding force of international law by using the legally meaningless hypothesis that a sovereign state, when entering into a legal relationship with another state, subjects itself to international law by an act of self-limitation, from which the state may disengage itself at any time without violating any law. The state is thus only subjected to its own will.⁷⁶

Nussbaum also refers to Triepel's *Völkerrecht und Landesrecht* (1899) in which a distinction is made between international and municipal law by referring to their bases and sources. Triepel contends that international law regulates the relationship between states, while municipal law is concerned with the relations between individuals or between individuals and the state. With regard to their sources, municipal law is derived from the particular law of the state, while international law finds its source in the common will of the states. In order to give an international rule effect in municipal law, it must be transformed into a rule of municipal law by an act of national legislation. This is called the dualist doctrine of international law that was already earlier suggested by Austin.⁷⁷

However, as a result of the horrors of war, anti-sovereign doctrines emerged that tended to replace the dualist doctrine which placed emphasis on the will of states, with a monistic approach that sought to establish a common source for international and national law. Some of the most important authors of the monistic school of thought include Krabbe, Duguit and Kelsen.⁷⁸

According to Krabbe international law comes into existence when people from different states, as a result of external events, broaden their consciousness of right in order to include international relations. The source of the resulting rules of international law is not the will of states, but the consciousness of law felt by individuals whose interests are affected by the rule or who have a constitutional duty to take care of these interests. Therefore, national and international law have essentially the same quality and are above state rule. However, because international law is the law of the larger community, it takes precedence over

75 Perrez (n 1) 46.

76 Nussbaum (n 25) 281; Strydom "Enkele aspekte van die soewereiniteitsvraag in die volkereg" 1989 *Journal for Juridical Science* 33.

77 Nussbaum (n 25) 281.

78 *Idem* 282-283.

national law. Krabbe emphasises the role of the universal community in determining the formation and demise of states and the parameters within which they may exercise their authority.⁷⁹ He envisages the eventual establishment of a so-called world state which is founded upon popular representation and is able to enforce a world-wide sense of right.⁸⁰ The development of such an absolutist world state may finally result in the disappearance of individual states or the degrading of these states to mere executors of the aims of the universal community.⁸¹

Duguit is of the opinion that the state is no longer a sovereign power issuing its commands. He argues that the idea of public service replaces the idea of sovereignty. To him the concept of sovereignty is in the process of disintegration insofar as the idea of public service increasingly forms the foundation of modern state theory.⁸² He describes public service as those activities that the government is bound to perform. These activities display an internal as well as an external (international) character as the result of the interdependence between states.⁸³ The recognition of individual rights simultaneously determines both the direction and the limit of public activity. It thus constitutes the source of all rules regulating the relationship between individuals and the state.⁸⁴

Although Kelsen also disputes the sovereignty of the state, he follows a different argument from those of Krabbe and Duguit. Kelsen identifies a certain hierarchy of norms, at the top of which the norms of international law can be found.⁸⁵ According to him there are two possible *Grundnormen* in the international sphere, namely the supremacy of the municipal system or the supremacy of international law.⁸⁶ By applying a monistic view to the relationship between international law and municipal law, he declares that the *Grundnorm* of the international system assumes the primacy of international law. Because in practice nations recognise the equality of each other's legal orders, the doctrine of equality must mean that they recognise a *Grundnorm*

79 Krabbe *Die Lehre der Rechtssouveränität* (1906) 224-227 241.

80 Nussbaum (n 25) 284.

81 Krabbe (n 79) 243-244.

82 Duguit *Law in the Modern State* (1921) (tr by Frida & Harold Laski) xliv 89.

83 *Idem* 45-46.

84 *Idem* xxxix.

85 Kelsen *Reine Rechtslehre* (1960) 203-204. For an English translation see Kelsen *Pure Theory of Law* (tr by Max Knight in 1970) 200-201. Also see Nussbaum (n 25) 286; Strydom (n 76) 34.

86 Kelsen (n 85) 321-345. Cf Kelsen (English translation) (n 85) 320-347; Dias *Jurisprudence* (1970) 419; Strydom (n 76) 35; Van Eikema Hommes *Hoofdlijnen van de Geschiedenis der Rechtsfilosofie* (1972) 206-207.

higher than the *Grundnormen* of their own legal orders. The equal force of their national systems is only possible if the existence of a higher authority is assumed, which bestows equality. Kelsen attributes the binding force of international law to international custom, for example the principle of *pacta sunt servanda*. The binding force of international custom forms the *Grundnorm* which is inherent in every legal system.⁸⁷ By emphasising the supremacy of international law, Kelsen foresees the eradication of the border line between international and national law, the creation of a universal legal community and the eventual emergence of a world state.⁸⁸ In so far as national legal orders are nevertheless referred to as sovereign, it simply means that these legal orders are subject only to the international legal order.⁸⁹

During the early twentieth century Kelsen's contemporary, Hersch Lauterpacht, specifically criticised the voluntarist positivism that extolled the virtues of statehood and sovereignty and, because of its alliance with aggressive nationalism, had been responsible for the First World War.⁹⁰ Lauterpacht describes sovereignty as "an artificial personification of the metaphysical state". As such, sovereignty has no real essence and is only a bundle of rights and powers accorded to the state by the legal order. Therefore, sovereignty can also be divided and limited.⁹¹

In an authoritative exposition of the viewpoints of Lauterpacht, Koskenniemi⁹² points out that it is Lauterpacht's traditionalism and moral rationalism that sets him apart from Kelsen. Lauterpacht regards the idea of international law as derived from the will of states as insufficient. In typical Grotian tradition he insists that there is a need for judging the adequacy of law in the light of ethics and reason.⁹³ Lauterpacht therefore differs greatly from Kelsen with regard to the place of natural law in legal construction.⁹⁴ While Kelsen rejects a natural law basis for his system, Lauterpacht is of the opinion that morality enters the

87 Kelsen (n 85) 221-223. See Kelsen (English translation) (n 85) 214-217; Nussbaum (n 25) 286; Dias (n 86) 419-420.

88 Kelsen (n 85) 328. Also see Kelsen (English translation) (n 85) 328; Strydom (n 76) 35; Nussbaum (n 25) 286. Ninčić (n 10) 10 points out that some critical thinkers such as the Polish author, Korowicz, are of the opinion that the unity of the legal system that places international law above domestic law can only be achieved within the framework of a so-called super state or world state. According to him other authors, such as Pillet, Anzilotti and even Duguit remain true to the dualistic line of thinking, but endeavour to subordinate domestic law to international law and develop a system within which the sovereignty of states will either disappear or be limited to the proportions proposed by Kelsen.

89 Kelsen (n 85) 223. Also see Kelsen (English translation) (n 85) 217.

90 Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) 355-364.

91 Lauterpacht *Private Law Sources and Analogies of International Law* (1927) 299. Also see Koskenniemi (n 90) 365.

92 Koskenniemi *idem* 409.

93 Lauterpacht (ed) *International Law: Being the Collective Papers of Hersch Lauterpacht Vol 2* (1975) 330. Cf Koskenniemi (n 90) 408.

94 Koskenniemi (n 90) 356.

law through its application and interpretation.⁹⁵ Although Kelsen does not deny the place of values in law, he insists on the need for openness in value choices, for example the choice between dualism and monism.⁹⁶

The principle of absolute sovereignty is thus replaced by a concept of *relative sovereignty*, where the freedom of each state is limited by the freedom of other states and the independence of a state is subjected to international law.⁹⁷ Apart from the Vienna or normativist school founded by Kelsen and Verdross, which stems from a monistic vision of the legal system, Ninčić also discusses other theories of relative sovereignty that dominated the period between the First and the Second World Wars.⁹⁸ During this period autonomy, independence and equality were regarded as the three basic elements of sovereignty.⁹⁹

The first theory of relative sovereignty identified by Ninčić calls for a rejection of the classical idea that states are the only subjects of international law and claims that individuals are also subjects of international law. The result of this theory is that if the state is deprived of its status as a subject of international law, it can also no longer have sovereignty.¹⁰⁰ The second, and probably the most prominent theory of relative sovereignty, contends that the theory of sovereignty is no longer in accordance with the development of positive international law and must therefore either be totally discarded or modified to new international realities through a process of “relativisation”.¹⁰¹ Thirdly, the theories of the *common interest* and the *common good* entail that states are required to sacrifice their individual interests as well as certain aspects of their sovereignty in favour of the common interest and the common good. A common feature of this theory is the striving to adjust the sovereignty of states in various ways and to varying degrees to the norms of international law. Sovereignty may to a certain extent be subordinated to international law. The sovereignty of one state, however, cannot be subordinate to that of another state because sovereignties are, by their very essence, equal. A consequence of this is that the concept of sovereignty tends to merge increasingly with the concept of independence. However, the independence of a state is not

95 Lauterpacht (n 93) 424 428-429.

96 Kelsen *Das Problem der Souveränität und die Theorie des Völkerrechts* (1960) 257-267. See Koskenniemi (n 90) 409.

97 Perrez (n 1) 16 138.

98 Ninčić (n 10) 9-15.

99 *Idem* 13.

100 *Idem* 11.

101 *Ibid.*

absolute. It is limited by the equal freedom and independence of other states as well as by international conventions and specific agreements entered into by states.¹⁰²

5.1 Sovereignty as interdependence and co-operation

Friedmann makes a distinction between the classical system of international law of *co-existence* and a new international law of *co-operation*.¹⁰³ He identifies the beginning of this new international law as the period between the First and the Second World Wars of the twentieth century. The shift of the international society, from an essentially negative code of rules of abstention¹⁰⁴ to positive rules of co-operation, is a development of immense significance for the principles and structure of international law.¹⁰⁵

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

102 *Idem* 11-12.

103 Friedmann *The Changing Structure of International Law* (1964) 62.

104 Fassbender (n 7) 118 identifies the principle of non-intervention in the internal affairs of other states, the rule that in the territory of a foreign state sovereign power may not be exercised and the concept of state (or sovereign) immunity as primary examples of Friedmann's rules of abstention. According to him the definition of sovereignty as independence by Max Huber in the *Island of Palmas Case* (see 1.2 above) is a good example of the negative or exclusive quality of sovereignty in the period of co-existence. Jackson *Quasi-states: Sovereignty, International Relations, and the Third World* (1990) 27-29 explains the distinction between the notions of *negative sovereignty* and *positive sovereignty*. Negative sovereignty may be described as the freedom of a state from outside intervention. According to Jackson non-intervention and sovereignty in this meaning are basically two sides of the same coin. The idea of a sphere of exclusive legal jurisdiction of states is the central principle of the classical law of nations. Negative sovereignty is the legal foundation upon which a society of independent and equal states formally rests. Independence and non-intervention are therefore the distinctive and reciprocal rights and duties of an international social contract between states. Positive sovereignty presupposes capabilities which enable states to be their own masters. A positively sovereign state does not only enjoy the right of non-intervention and other international immunities, but is also able to provide political goods for its citizens. Such a state may also collaborate with other states in defense alliances and similar international arrangements and interact with other states in international commerce and finance. Positive sovereignty enables states to take advantage of their independence and this is usually indicated by the presence of responsible rulers and productive and allegiant citizens. Jackson points out that positive sovereignty is not a legal but rather a political attribute. In this sense the term *political* is understood to mean the sociological, economic, technological and psychological means to declare, implement and enforce public policy both domestically and internationally. Also see Kreijen "The transformation of sovereignty and African independence: No shortcuts to statehood" in Kreijen (ed) *State, Sovereignty, and International Governance* (2002) 47-54.

105 Fassbender (n 14) 89 notes that some authors are in agreement that contemporary international law has already surpassed Friedmann's law of co-operation. In this regard he refers to Tomuschat who is of the opinion that the international legal order is in the third stage of its development. According to Tomuschat the law of co-existence and the law of co-operation are followed by a period where international law is a comprehensive blueprint for social life. A characteristic of this period is the further intrusion of international law into matters which were previously shielded from outside intervention, for example obligations on states with regard to human rights. He, therefore, reaches the conclusion that there remains little of the traditional sovereignty of states.

take into account the valid interests of the other members when exercising their sovereignty.¹⁰⁶

States can no longer act completely independently of each other, as there remain increasingly few aspects of life which are not dependent on, or do not respond to, activities outside the state's boundaries. This tendency directly challenges the traditional understanding of sovereignty as supreme authority and independence.¹⁰⁷

Although the majority of scholars of international law are still of the opinion that international law is founded on the will of states, they contend that it must be submitted to some restraint.¹⁰⁸ This restraint may be found in the conception of international society. The individual state cannot exist in isolation and therefore the relationship between states is one of independence.¹⁰⁹

The growing idea of co-operation and interdependence between states necessitates the existence of an international community of states¹¹⁰ In the advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons* (1996)¹¹¹ President Bedjaoui declares as follows:

106 Fassbender (n 14) 73; Martin Martinez *National Sovereignty and International Organizations* (1996) 63-64.

107 Perrez (n 1) 114.

108 Kooijmans (n 25) 139-140.

109 *Idem* 140. Kooijmans explains as follows: "With respect to the significance of this international society, however, conception of the notion of sovereignty is of the utmost importance. ... [A]uthors agree upon one characteristic of sovereignty, namely, that the state is free from any other foreign will; that there is no higher authority to restrain the will of the states; that this will is, therefore, utterly free. That, in spite of this, not all of the state's wishes can be called law, finds its explanation in the idea of the *société internationale*. For there the will of the one state is confronted with that of the other... . [S]overeignty ... implies that there is no superior to the state, but that does not mean that the state can do what it wants. A sovereign state is sole master of its acts, but is not free to do everything." Also see Martin Martinez (n 106) 65; Jackson "Sovereignty-modern: A new approach to an outdated concept" 2003 *The American Journal of International Law* 801.

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

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

Despite the still modest breakthrough of "supranationalism", the progress made in terms of the institutionalisation, not to say integration and "globalisation", of international society is undeniable. Witness the proliferation of international organisations, the gradual substitution of an international law of co-operation for the traditional law of co-existence, the emergence of the concept of "international community" and its sometimes successful attempts at subjectivisation. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens* or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective judicial conscience and respond to the social necessities of states organised as a community.¹¹²

To Bodley the emerging interdependence between states is not an entirely new phenomenon. She is of the opinion that the principle of absolute sovereignty is a mere fiction that came to be recognised as the foundation of modern relations theory. While she submits that practical sovereignty has always been limited by the realities of power and that states have never enjoyed entire independence from each other, she nevertheless accepts that "if sovereignty ever existed in its absolutist sense (which it probably did not), both doctrinally and practically it is waning in the twentieth century".¹¹³

5 2 Sovereignty as the responsibility to protect

The shift away from the idea of unconditional sovereignty is evident in the emergence of the concept of responsible sovereignty. Falk is of the opinion that

[g]overnment legitimacy that validates the exercise of sovereignty involves adherence to minimum humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse conditions within a country.¹¹⁴

112 270-271.

113 Bodley (n 3) 419-422. On 422-425 Bodley identifies the three reasons for the weakening of state sovereignty, namely the establishment of international tribunals, the marked growth of interest in concluding multilateral treaties and the establishment of two international organisations in the twentieth century, the League of Nations in 1919 and the United Nations in 1945.

114 Falk "Sovereignty and human dignity: The search for reconciliation" in Steiner & Alston *International Human Rights in Context: Law, Politics, Morals* (2000) 582.

The Independent International Commission on Intervention and State Sovereignty was established in September 2000 by Canada. It was given the mandate to investigate the relation between intervention for human protection purposes and state sovereignty. The Commission suggests that sovereignty should be seen as the responsibility to protect. According to the Commission in their *Report on the Responsibility to Protect*¹¹⁵ this implies, first, that the state authorities are responsible for the functions of protecting the safety and the lives of citizens and the promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the United Nations. Thirdly, it means that the agents of the state are responsible for their actions and are thus accountable for their acts of commission and omission.

In view of its approach to sovereignty as the responsibility to protect, the Commission supports intervention for human protection purposes when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.¹¹⁶

5 3 The United Nations and sovereignty

5 3 1 Introduction

Since the United Nations Organisation was founded in 1945, the traditional idea of sovereignty has experienced a profound modification and limitation.¹¹⁷ In its preamble and in Article 1 the Charter of the United Nations sets out its aim to prevent wars, to maintain international peace and security and respect for human rights. It furthermore aims to promote justice and welfare and to enable the necessary collective measures and international co-operation.¹¹⁸

5 3 2 Sovereign equality

Article 2(1) of the Charter of the United Nations does not refer to the term *sovereignty* in isolation, but states that the United Nations is based on the principle of the *sovereign equality* of its members.¹¹⁹ The principle of equality in

115 The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (December 2001) 13: <http://www.iciss.ca/report2-en.asp> (4 March 2005).

116 *Idem* 16. Also see the discussion by Strydom "Peace and security under the African Union" 2003 *South African Yearbook of International Law* 74-76.

117 Fassbender (n 7) 124.

118 Also see Perrez (n 1) 52.

119 Cassese *International Law in a Divided World* (1986) 129 argues that the United Nations is not based on the full equality of its members, because Art 27(3) of the Charter grants the right of veto to the permanent members of the Security Council only. Therefore, the principle of equality laid down in Art 2(1) is to be interpreted merely as a general guideline, which is weakened by the exceptions specifically laid down in law. He nevertheless also points out on 129-130 that of all the fundamental principles that governs international relations, the

Article 2(1) is typical of the Westphalian model, as this principle legally sanctions the existing power relationships in the world community and formally acknowledges and confirms the claim that all states, irrespective of their stature, should be treated as equal.¹²⁰ However, the introduction of the phrase *sovereign equality* into international law by the Charter of the United Nations indicates a significant change in the history of the notion of state sovereignty.¹²¹ Fassbender explains the adoption of this new term as follows:¹²²

[T]he idea of equality of States in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun "equality". In this combination, sovereignty meant to exclude legal superiority of any State over another, but not to exclude a greater role of the international community played *vis-à-vis* all its members. The new term proved to be an accurate description of the development characterising the international legal order in the age of the League of Nations and, in particular, the UN: from the two elements, "sovereignty is in a process of progressive erosion, inasmuch as the international community

principle of equality in Art 2(1) is the only one on which there is unqualified agreement and support of all groups of states, irrespective of their ideologies, political leanings and circumstances. All states agree on both the importance of the principle and its basic contents. According to Cassese the conclusion is therefore warranted that "sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest". Also see Fincham *Domestic Jurisdiction* (1948) 181.

120 Cassese (n 119) 130. See 3 above.

121 Fassbender (n 7) 125. For a discussion of the drafting history of the notion of sovereign equality see Fassbender (n 14) 76-78. In a number of cases the International Court of Justice has referred to the concept of sovereign equality: In an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 226 Judge Shi notes that the structure of the international community is built on the principle of sovereign equality (278). Judge Fleischauer holds that the right of individual or collective self-defence is a right which every state possesses as a matter of sovereign equality and which is expressly preserved in Art 51 of the Charter (305-307). In the same case Judge Weeramantry is of the opinion that if the principle of equality in the right to self-defence is recognized, either all nations have right to self-defence with any particular weapon or, or none of them can have such a right. He concludes that the latter is the only option available (541). Judge Koroma points out that the principle of sovereign equality is of general application. He therefore holds that the use of nuclear weapons in a given conflict will always be in violation of the principle of sovereign equality, as this principle presupposes respect for the sovereignty and territorial integrity of all states, including the physical integrity of the civilian population (354). In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) 1950 ICJ Reports 65 Judge Zoričić explains in a separate opinion that sovereign equality is the corollary of independence (99-100). In the same case Judge Krylov is also of the opinion that the principle of sovereign equality confirms the principle of independence (109). According to Judge El-Kosheri in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* 1992 ICJ Reports 3 the principle of sovereign equality requires that an exercise of domestic jurisdiction by a state must be respected by other states and by the organs of the United Nations, unless the Court decides that such exercise is contrary to international law (211).

122 Fassbender (n 14) 83.

places even more constraints on the freedom of action of States". We witness a "development towards greater community discipline ... driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established".

The Friendly Relations Declaration of 1970¹²³ confirms that the principle of sovereign equality is understood as expressing the right of states to equality in law.¹²⁴ The Declaration explains the principle of sovereign equality as follows:

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. In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle is thus an umbrella concept that embraces the two distinct notions of sovereignty and legal equality.¹²⁵

123 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV) 1970).

124 Fassbender (n 7) 127. Fassbender (n 14) 80 notes that although the Declaration stresses the legal equality of states, its definition of equal sovereignty is not very specific. He explains as follows: "In the context of the Declaration, it is easy to see how much of it repeats other principles of international law in the age of the UN, such as the prohibition of the threat or use of force, and of intervention in matters within the domestic jurisdiction of other States, or the right to self-determination. The duty of states to fulfill in good faith their international obligations is equally proclaimed as an own principle in the Declaration. The 'territorial integrity' and 'political independence' of States to which the Declaration refers to interpret sovereign equality are no less in need of explanation than that concept itself. The difficulty of defining sovereign equality is manifested by the statement ... that this equality amounts to enjoying the 'rights inherent in full sovereignty'."

125 Cassese (n 119) 130 explains these two notions as follows: "Sovereignty, in addition to granting each State a set of powers relating to the territory under its jurisdiction, includes the following sweeping rights: first, that of claiming respect for the State's territorial integrity and

5.3.3 *Sovereignty and international law*

The Charter of the United Nations confirms that the sovereignty of states is limited, by subjecting sovereignty to international law.¹²⁶ In this regard Article 2(2) of the Charter reads as follows:

All Members, in order to ensure to all of them the right and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

In combining the principle of sovereignty with the principle that states have to respect international law, the Charter of the United Nations distinctly shows that there is not a contradiction, but rather a connection between state sovereignty and respect for international law. The Charter thus confirms the supreme nature of international law and describes sovereignty as sovereignty within and subject to international law, and thus as a limited concept.¹²⁷

political independence by other States; second, that of claiming sovereign immunity for State representatives acting in their official capacity ... third, that of claiming immunity from the jurisdiction of foreign courts for acts or actions performed by States in their sovereign capacity Legal equality implies that no member of the international community can be placed at a disadvantage: all must be treated on the same footing." Cassese furthermore notes at 131 that the principle of sovereign equality does not produce all the effects of *jus cogens* (see n 151 below). For example, it can be derogated from by treaty, which is demonstrated by the numerous conventions providing for restrictions on the sovereignty of a state and on the equality of states. These derogations are only permissible to the extent that they are freely accepted by the state on which the limitations are placed. However, two or more states are not allowed to enter into an agreement that provides for the impairment or restriction of the territorial integrity, political independence or legal equality of a third state. Such an agreement would be null and void.

126 Perrez (n 1) 60 is of the opinion that at present it is an open question whether a state's freedom and independence are not only limited by international law, but whether certain state activity even requires authorization by international law. In this regard he refers to the advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Reports 268. The Court does not address the issue whether the existing norms in international law have to be seen as prohibitions or authorisations for the threat or use of nuclear weapons. The Court argues that this question is not of significance for the particular case as all the states participating in the proceedings have accepted that their freedom of action is restricted by principles and rules of international law. Perrez points out that the Court thus indicates that while it is an open question whether certain state activities need legal permission, it is generally accepted that state sovereignty and freedom are limited by international law.

127 *Idem* 53. Since the beginning of the twentieth century, international courts and tribunals have increasingly indicated that state sovereignty is limited and subject to international law. In the *Corfu Channel Case* (Merits) 1949 ICJ Reports 4 it is confirmed that states are bound by international law. In a dissenting opinion Judge Alvarez acknowledges that sovereignty has evolved and that a new conception of sovereignty, which will be in harmony with the new conditions of social life, must be adopted. According to Judge Alvarez, state sovereignty can not be seen as an absolute right. States are bound by international law, including even those rules to which they have not consented (43). In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ Reports 15, the International Court of Justice again confirms that sovereignty is limited and subject to international law, by rejecting the argument that a state's sovereignty allows it to become a party to a multilateral convention subject to any reservation it wants to formulate. States are not free to frustrate the aims of a convention by adhering to it while making reservations with regard to its fundamental content. State sovereignty is thus not only subjected to international law in general, but also to its purposes (24).

5 3 4 *The use of force*

With regard to the use of force, Article 2(4) of the Charter of the United Nations stipulates that all Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. The Charter therefore recognises the right to resort to force only in two instances: First, under the authority of the Security Council and secondly, when states exercise the right of individual or collective self-defence in terms of Article 51.¹²⁸

By prohibiting the use of force the Charter qualifies the classical understanding of sovereignty as absolute authority, which included as a key element the right to engage in war.¹²⁹ According to Fassbender the ban on the use of force by the Charter is today understood not so much as a limitation of sovereignty, but as a necessary prerequisite for a *de facto* enjoyment of sovereign equality by states.¹³⁰ Therefore, a state's sovereign equality depends on a comprehensive prohibition of the use of force and an effective mechanism to implement and enforce this prohibition.¹³¹

5 3 5 *The Security Council*

The Charter of the United Nations provides the Security Council with the power to make binding decisions and to enforce these decisions.¹³² Article 39 of the Charter challenges the classical concept of state sovereignty by exempting the Security Council from the principle of non-intervention under certain circumstances. This provision gives the Security Council the discretion to determine the existence of any threat to the peace, or act of aggression and to make recommendations or to decide what measures must be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. In terms of Article 42 the Security Council is allowed to order

128 Art 51 provides as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right to self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Also see Dugard (n 36) 506-525 for a discussion of the arguments raised in support of the use of force without the authorization of the United Nations.

129 See 4 above.

130 Fassbender (n 7) 129-130.

131 *Idem* 130.

132 See Arts 24 and 25 and Chapter 7 of the Charter.

military intervention which is a clear example of the powers of the Security Council to limit the territorial integrity and sovereignty of states.¹³³

5 3 6 *International human rights*

The promotion of international human rights is a fundamental objective of the United Nations. The Charter therefore gives formal and authoritative expression to the protection of human rights.¹³⁴ In the Preamble of the Charter it is stated that the United Nations is determined to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. Especially with regard to the protection of human rights, the Charter not only limits the sovereignty of a state in respect of its relations with other states in the international community, but also with regard to its subjects within its own territory.¹³⁵ It is thus clear that the Charter of the United Nations accepts the primacy of international law over state sovereignty and confirms that sovereignty is no longer absolute, but should rather be understood as a relative and limited concept.¹³⁶

The Charter of the United Nations is supplemented by the Universal Declaration of Human Rights,¹³⁷ adopted by the General Assembly in 1948, and the International Covenant on Civil and Political Rights¹³⁸ and the International Covenant on Economic, Social and Cultural Rights¹³⁹ that were both adopted by the General Assembly in 1966. These instruments are often referred to as the International Bill of Rights.¹⁴⁰

After the Second World War, and especially since the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, a considerable number of multilateral treaties specifically aimed at the international protection of human rights have been concluded between states.¹⁴¹ This is a direct consequence of Article 55 of the Charter of the United

133 Bodley (n 3) 427-428.

134 Perrez (n 1) 49.

135 See, eg, Arts 1(3); 13(1)(b); 55(c) and 68 of the Charter.

136 Also see Perrez (n 1) 54-55.

137 GA Res 217 A(III) of 10 Dec 1948.

138 999 UNTS 171; 6 ILM 368 (1967).

139 993 UNTS 3 (1967); 6 ILM 360 (1967).

140 Weissbrodt, Fitzpatrick & Newman *International Human Rights* (2001) 9; Robbins "Powerful states, customary law and the erosion of human rights through regional enforcement" 2005 *California Western International Law Journal* 280; May & Wierda *International Criminal Evidence* (2002) 265.

141 The Universal Declaration of Human Rights is not a treaty, but rather a recommendatory resolution of the General Assembly. See in this regard Dugard (n 36) 314. Weissbrodt, Fitzpatrick & Newman (n 140) 20 state that the Universal Declaration of Human Rights "is the most prominent of ... human rights instruments, provides an authoritative, comprehensive, and nearly contemporaneous interpretation of the human rights obligations under the U.N. Charter, and also has provisions which have been recognized as reflective of customary international law".

Nations that links the international protection of human rights to the maintenance of international peace and security.¹⁴² The relevant provisions of Article 55 provide, *inter alia*, that, with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations between states and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This approach has placed the protection of human rights squarely in the international arena.¹⁴³ Since before 1945 state sovereignty was viewed as absolute, the regulation of the relationship between the state and its citizens was initially treated as an internal matter and therefore confined to municipal law. However, since 1945 almost all states elected to become involved in international regimes¹⁴⁴ that in some instances had a profound influence on the concept of state sovereignty as being absolute. The international arrangements concerning human rights constitute such a regime. Today very few states would probably seriously claim that the protection of human rights should be treated solely as a domestic affair.¹⁴⁵ In this regard Forsythe¹⁴⁶ argues that the idea of state sovereignty no longer provides an automatic and impenetrable shield against international action on issues once regarded as essentially domestic.¹⁴⁷

142 Forsythe *Human Rights in International Relations* (2000) 35.

143 A distinction must be made between the internationalisation and the universalisation of human rights. The first refers to the fact that human rights have become a subject of international law and politics, while the second relates to the fact that all human beings in all countries are the bearers of human rights. See Henkin, Neuman, Orentlicher & Leebron *Human Rights* (1999) 273.

144 The concept of "international regime" is explained as follows by Archer *International Organizations* (2001) 109 with reference to Krasner "Structural causes and regime consequences: Regimes as intervening variables" in Krasner (ed) *International Regimes* (1983) 1-21: "The system available for the management of a particular set of issues internationally is referred to as an *international regime*. A favoured definition of ... international regimes is that they are 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'"

145 This is borne out by figures supplied by Weissbrodt, Fitzpatrick & Newman (n 140) xxxv concerning the substantial increase in the acceptance of international human rights treaties by states. Also see Reisman "Sovereignty and human rights in contemporary international law" 1990 *American Journal of International Law* 867 who argues that no serious international law scholar still supports the contention that human rights are essentially within the domestic jurisdiction of any state and thus insulated from international law.

146 Forsythe (n 142) 24-25.

147 Forsythe *ibid* does not claim that state sovereignty has become totally irrelevant in the context of the international protection of human rights. On 218 he summarizes his viewpoint as follows: "International human rights are here to stay, but so is state sovereignty. The latter notion is being transformed by the actions, *inter alia*, of intergovernmental and transnational non-governmental organizations. But state consent still usually matters legally, and state policy and power still count for much in human affairs ... Our moral imagination has been expanded by the language of universal rights, but we live in a world in which nationalism and the nation-state and national interests are frequently powerful barriers to effective action in the name of international human rights." Also see Wessels *Derogation of Human Rights*:

Although international human rights are mostly contained in treaties, some of these human rights have already attained the status of customary international law and even *ius cogens*, in other words, principles from which derogation either by legislation or by treaty is prohibited.¹⁴⁸ Human rights principles can, therefore, be binding on states without specific consent on the part of the states.¹⁴⁹ The implication of this is that if states are bound by these principles, part of their sovereignty has been eroded.¹⁵⁰ There is also an increasing acceptance of human rights accorded the status of obligations *erga omnes* because of their extraordinary importance for the international community.¹⁵¹ The recognition of *erga omnes* norms in the realm of international human rights, for example the prohibition of torture and of discrimination based on race, sex, political beliefs and religion, indicates a far-reaching development in the process of universalising the meaning of human rights.¹⁵²

6 Conclusion

Traditionally sovereignty is seen as the independence and supreme authority of a state. Although sovereignty is, therefore, often conceived as absolute, it is clear that state sovereignty is in the process of evolving from an absolute concept of unlimited freedom and independence to a relative concept where

International Law Standards – Comparative Study (LLD thesis RAU 2001) 422-423 who echoes a similar sentiment.

148 The notion of *jus cogens* originated in Art 53 of the Vienna Convention on the Law of Treaties (1969) which provides as follows: "A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Dugard (n 36) 43 points out that there is little agreement as to which norms qualify for the status of *jus cogens*. He suggests that the prohibition on the aggressive use of force certainly does, while the prohibitions on slavery, genocide, racial discrimination (including apartheid) torture and the denial of self-determination enjoy widespread support to qualify for this status.

149 Schermers "Different aspects of sovereignty" in Kreijen (ed) *State, Sovereignty and International Law* (2002) 187 notes that "[i]n drafting the Vienna Convention on the Law of Treaties, the world community accepted that *jus cogens* exists, that there are rules of law universally binding even on States that did not expressly consent to them. Through the drafting of treaties, through discussion in the General Assembly of the UN, and through legal writings it became gradually accepted that the protection of the most fundamental human rights belongs to this *jus cogens*."

150 Mills "Reconstructing sovereignty: A human rights perspective" 1997 *Netherlands Quarterly of Human Rights* 277.

151 Delbrück "A more effective international law or a new 'world law'? – Some aspects of the development of international law in a changing international system" 1993 *Indiana Law Journal* 713. The concept of obligations *erga omnes* was formulated in 1970 in *Barcelona Traction, Light and Power Company Limited* 1970 ICJ Reports 3 when the International Court of Justice stated that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another state in the field of diplomatic protection. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (32).

152 Delbrück *idem* 713-714.

the freedom and independence of states are limited both by the freedom of other states and by international law. Because it is increasingly recognised that there are certain communal interests that cannot be addressed independently, a growing trend of co-operation and interdependence are developing between states. The present international legal order aims to regulate social life on all levels of governance. In this regard Fassbender notes as follows.¹⁵³

In this transformed environment, sovereignty of States stands out as a legal concept which exposes one of its flanks to politics and power. 'It has frequently had to serve as a juridical cover to mere politics'. In other cases, it provided, or rather channelled, legal arguments which, having found acceptance by other States, eventually led to a change in the law. What has made the concept especially convenient (or vulnerable) in that respect is a certain blurredness resulting from its long history and the many different uses made of it in the past. In particular, sovereignty's original meaning as 'supreme authority' has asserted an indistinct presence, notwithstanding the efforts – attempts as well as achievements - of legal science to domesticate the notion and define it as the legal autonomy of a State under international law. There is an untamed side of sovereignty – characteristic, one could say, of the international system as a political system *sui generis* – which to ignore in legal analysis would be a mistake.

It is clear that internationally there has been a significant movement away from the classical idea of sovereignty as an absolute and unlimited concept. However, this evolution is still an ongoing process, and its final outcome might even be the total demise of the nation-state as we know it today.

153 Fassbender (n 14) 91.