Limitations for Domestic Jurisdiction of States in the Post-UN International Legal Order: An ICL Perspective

Mazhar Ali Khan

ABSTRACT

Domestic jurisdiction or state sovereignty are the notions closely associated with the political and legal existence of state. In legal sense, domestic jurisdiction is referred to the state internal authority to legislate, adjudicate and execute the laws. On the contrary, sovereignty is used in a broader context covering both internal as well as external affairs of the state. Some scholar argues that the shift in the paradigm of public international law such as the contemporary regime on human rights law and international criminal law carries restrictive implications for domestic jurisdiction of states. In this context, this work evaluates the abstract notions of domestic jurisdiction and state sovereignty under the contemporary international law. It briefly analyzes the legal basis of sovereignty in historical context. What are limits of domestic jurisdiction under the post-UN international legal order is the question which this work tends to examine. The article mainly focuses on evaluation of the notion of domestic jurisdiction from the perspective of international criminal law especially the jurisdictional overlap between international organs and national courts. Lastly, it is concluded that the concept of domestic jurisdiction is not without limitations in the post-UN international legal order.

Keywords: (Domestic Jurisdiction, sovereignty, criminal jurisdiction, international criminal law, immunity)

1. Introduction

One of the underpinning elements behind opposing the universality and extra-territoriality of international judicial organs by some states is the doctrine of domestic jurisdiction or in other words the state sovereignty. They rest their claim on the premise that it is the state alone which has right to exercise criminal jurisdiction instead of international judicial organs. On the contrary, the shift in the paradigm of public international law and progressions made in the area of International Human Rights Law (IHRL) and International Criminal Law (ICL) suggests that jurisdiction of international judicial organs such as International Criminal Law (ICC) becomes compulsory when the states are not willing to prosecute the accused persons for commission of

international crimes and that the notion of state sovereignty no more exists in absolute form. Similarly, that in the post-UN cosmopolitan world there are various limitations for domestic jurisdiction of states.

In this article, the questions that what are the limitations for domestic or national jurisdiction of states and in what way the notion of absolute state sovereignty has changed in the context of post-UN international legal order will be answered. The political term usually used for national or domestic jurisdiction is sovereignty therefore, in order to evaluate the limitations on the domestic jurisdiction it is imperative to understand that what is state sovereignty and whether the term sovereignty used in the United Nations (UN) Charter encompasses the elements of domestic jurisdiction. Finally, the chapter will evaluate the legal developments took place in the area of ICL that have put an end to the traditional concept of official immunity. Thus, it will be argued that how these progressions restrict the absoluteness and exclusiveness of domestic jurisdiction of states.

2. Domestic Jurisdiction or Sovereignty? Understanding the Limits

In legal sense, the state prerogative to prescribe, enforce and adjudicate upon law is called the national or domestic jurisdiction. Under contemporary international law, the term domestic jurisdiction was for the first time employed in article 2(7)) of the UN Charter. Though, the language of article 2(7) is not exclusive because certain exceptions have been created to it. Verily, the limitations placed on domestic jurisdiction are not in legislative matters rather it is related to the enforcement matters falling under chapter VII of the UN Charter. On the other hand, article 2(1) of the Charter contains the phrase ‘sovereign equality of all its members’. This sovereign equality is further elaborated in article 2(4), wherein the phrases ‘territorial integrity’

and 'political independence' are used. Apparently, it seems that the phrases referred to sovereign character of a state is broader in scope than the phrase 'domestic jurisdiction'. For this purpose, it will be appropriate to examine the sovereignty that what does it implies in legal sense.

The concept of sovereignty is closely connected with state and society.[1] Primitive stateless societies were short of political institutions and centralized authority. Quite the opposite, modern state system is based on uniform and unequivocal flowing of authority from sovereign entities.[2] In primitive societies, the rules and authority were subject to the notion of 'might is right' and the ultimate outcome was anarchy in the absence of institutions and prescribed rules. The abstract concept of sovereignty came into existence with the emergence of state. On the other hand, domestic jurisdiction is only referred to the states' internal executive, legislative and adjudicative authority. In this sense, it may be held that the contents of sovereignty encompasses the doctrine of domestic jurisdiction.

Legal and political scholars treat sovereignty as an essential and indispensable element for statehood alongside territory, population and government. In this context, for the existence as well as recognition of state all of the four elements must co-exist.[3] The elements of statehood under international law are prescribed in a different manner according to "Montevideo Convention on Rights and Duties of States, 1933" which refer to the phrase "capacity to enter

[1] *See on the concept of state and society in historical context* Matthew Innes, *State And Society In The Early Middle Ages: The Middle Rhine Valley, 400–1000* (UK: Cambridge University Press, 2000); Joel S. Migdal, *State in Society: Studying How States And Societies Transform And Constitute One Another* (UK: Cambridge University Press, 2001); *see also* James W. McAuley, *An Introduction to Politics, State and Society* (London: SAGE Publications Ltd, 2003);Christopher Pierson, *The Modern State*, 2nd ed., (New York: Routledge, 1996).

[2] *See on the concept of authority in the modern state system* Harold J. Laski, *Authority in the Modern State* (USA: Yale University Press, 1919); *see also on the development of modern state* Graeme Gill, *The Nature and Development of the Modern State* (New York: Palgrave Macmillan, 2003).

[3] *See generally* Kevin R. Cox, *Political Geography: Territory, State, and Society* (Oxford: Blackwell Publishers Ltd, 2002); Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (New York: Oxford University Press, 2010).

into relations with other states" instead of sovereignty.[4] For legal and political thinkers, society, after a consistent political process gave birth to state- a political organization of a society. The famous theories of 'Social Contract'[5] presented by Thomas Hobbes, John Locke and J.J.Rousseau are conceived by contemporary scholars as theoretical and conceptual basis for the establishment of state.[6] Though, the contents of social contracts theories differs from each other, however, all the three theorists are in general agreement with respect of centralized and uniform authority of state over people.

The theory of social contract gave birth to a new domain of positive era with the exclusion of the state of nature ruled by natural law. Moreover, the seventeenth century Westphalian concept of modern nation states was also based on the complex notion of sovereignty.[7] Meaning thereby that the concept of sovereignty has always been crucial to the *de jure* and *de facto* existence of state. In 20th century, the formation of League of Nations and that of UN restricted the concept of absolute sovereignty in a systematic manner through a chain of international obligations under treaty law,whereas non-compliance with treaty obligations carries

[4] Article 1 of the 1933, Montevideo Convention on Rights and Duties of States provides as; "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."

[5] See Jean-Jacques Rousseau, *The Social Contract*, trans. G. D. H. Cole (New York: Cosimo, Inc., 2008); Carl Schmitt, *The Leviathan In The State Theory Of Thomas Hobbes*, trans. George Schwab and Ema Hilfstein (USA: Greenwood Press, 1996); John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Shapiro Ian (New Haven; London: Yale University Press, 2003), http://www.jstor.org/stable/j.ctt1npw0d.

[6] *See* Brian R. Nelson, *The Making of the Modern State: A Theoretical Evolution* (New York: Palgrave Macmillan, 2006); *see also* Dmitry Shlapentokh, *Societal Breakdown and the Rise of the Early Modern State in Europe* (New York: Palgrave Macmillan, 2008).

[7] It refers to a series of treaties, signed between May and October 1648 in the Westphalain cities of Osnabruck and Munster, ending the thirty years destructive war in Europe. The peace of Munster took place between the Dutch Republic and the Kingdom of Spain on 30th January, 1648, ratified on 15 May, 1648 in Munster. Similarly, Two complementary treaties were also signed on 24th October, 1648: first, the Treaty of Munster (*Instrumentum Pacis Monasteriensis*) between the Holy Roman Empire, France and their allies; second, the Treaty of Osnabruck (*Instrumentum Pacis Osnabrugensis)* between the Holy Roman Empire, Sweden and their allies. The treaty was a landmark achievement regarded by legal and political scholars as it gave independence to Switzerland and the Netherlands of Austria and Spain respectively. The German principalities also secured their autonomy. Sweden and France gained territories. Significantly, under the treaty the Roman Catholic Church lost it control over the Europe which it was enjoying for more than thousands of years.

unpleasant consequences. Before discussing the complex and all times disputed concept of 'state sovereignty', it is necessary to analyze the legal basis of sovereignty.

The notion of sovereignty is closely linked with the concept of state which represents an organized political community.[8] Sovereignty being an abstract term is not a fact, rather it is a quality attributed and applied by humans to a particular circumstances in relation to legal and political power exercised by them.[9] The term sovereignty originally expresses the idea that an absolute and final authority exists in a political community.[10] On the other hand, the idea that an absolute authority exists in a political community- the state, is irrelevant in stateless societies.[11] It denotes that the 'concept of sovereignty' cannot be construed in concrete term. Rather, the instrument of political power to which the sovereignty is attributed exists in a phenomenal world, therefore, both of the concepts are indispensable for each other at same time.[12]

---

[8] *See* Harold J. Laski, *Studies In The Problem Of Sovereignty* (New Haven: Yale University Press, 1917); *see also* Raia Prokhovnik, *Sovereignties: Contemporary Theory and Practice* (New York: Palgrave Macmillan, 2007); Jens Bartelson, "The Concept of Sovereignty Revisited", *European Journal of International Law 17, no. 2* (April 2006): 463–474, https://doi.org/10.1093/ejil/chl006; *see also* Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered," *Columbia Law Review* 48, no. 3 (1948): 341-365; *See for detail discussion on the historical evolution of the concept of sovereignty and its relevancy in contemporary political affairs* Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995).

[9] *See* Warren L. McFerran, *Political Sovereignty: The Supreme Authority in the United States* (Florida: Southern Liberty Press, 2005); *See generally* John H. Jackson, "Sovereignty - Modern: A New Approach to an Outdated Concept", *The American Journal of International Law* (2003): 782-802, http://scholarship.law.georgetown.edu/facpub/110/; *see also* Dieter Grimm, *Sovereignty: The Origin and Future of a Political Concept*, Belinda Cooper, trans. (New York: Columbia University Press, 2015); *see on the indivisibility of the concept of sovereignty* Jens Bartelson, "On the Indivisibility of Sovereignty." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 2 (June 1, 2011): 85-94, http://rofl.stanford.edu/node/91.

[10] F.H.Hinsley, *Sovereignty*, 2nd ed. (UK: Cambridge University Press, 1986), 1.

[11] Ibid, 17.

[12] *See for the historical account of sovereignty with reference to natural law* Ian Hunter and David Saunders, eds., *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought* (New York: Palgrave Macmillan, 2002); *see generally on the issues pertaining to sovereignty and its dimensions in different legal and political system of the world* Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001).

2.1 The Legal Basis of Sovereignty in Greeks, Romans, Muslims and Christians Religious Thoughts

Historically, sovereignty has been perceived as an absolutism of authority vested in some person or body of persons.[13] In the ancient Greek city states- *polis*, the ruler was a sovereign enjoying the legal as well as political authority over the subjects, known as emperor-worship. Similarly, it has roots in the Hellenistic theory of rule- the exercise of authorities over specific territories by the famous ancient Hellenistic Monarchies.[14] In the writings of Aristotle, it was the *polis*-body politics in which the legal power and authority vested.[15]

Sovereignty, as regarded by Romans, was different than that of Greeks. The highest body treated as sovereign in the ancient Rome was '*imperium populi Romani*'- Roman People's Empire, the notion elaborated during 2nd Century B.C., which in fact was the resemblance of Greek city states-the *polis*.[16] It was the *populus Romanus* in whose name the authority was to be exercised and the law to be enforced, however, the law for the rulers was not the will of Roman people, rather it was a some kind of higher morality. Similarly, the *imperium* was not a political and territorial community but it was a power to rule conferred by the Roman people over the rulers.[17] Conversely, the Islamic "concept of sovereignty" stands on different footings from that

---

[13] *See generally* Daniel Engster, "Jean Bodin, Scepticism and Absolute Sovereignty," *History of Political Thought* 17, no. 4 (1996): 469–499; *See also* J. H. M. Salmon, "The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?" *History of Political Thought* 17, no. 4 (1996): 500–522.

[14] Hellenistic monarchies refer to those monarchies arose out of fifty years warfare between the Generals of Alexander the Great-the Kingdom of Ptolemaic in Egypt, that of Seleucids in Syria and Mesopotamia and that which was formed out of mainland Greece. See Hinsley, *Sovereignty*, 32.

[15] See Fred Mille, "Aristotle's Political Theory", *TheStanford Encyclopedia of Philosophy,* ed. Edward N. Zalta (USA: Metaphysics Research Lab, Stanford University, 2017), https://plato.stanford.edu/archives/win2017/entries/aristotle-politics/.

[16] Matthew S.Weinert, *Democratic Sovereignty: Authority, legitimacy, and state in a globalizing age* (USA: University College London Press, 2007), 24-25.

[17] Hinsley, *Sovreignty*, 37; *see also* MP Ferreira-Snyman, "The Evolution of State Sovereignty: A Historical Overview", *Fundamina: A Journal of Legal History* 12, no.2, (2006): 1-28, http://uir.unisa.ac.za/bitstream/handle/10500/3689/Fundamina%20Snyman.finaal.pdf.

of Greek and Romans. In Islam there is a divine concept of sovereignty. It belongs to and vests in *Allah Almighty* and has no territorial and geographical limitations. In Quran it is stated as follow:

> "Say, "O Allah, Owner of Sovereignty, You give sovereignty to whom You will and You take sovereignty away from whom You will. You honor whom You will and You humble whom You will. In Your hand is [all] good. Indeed, You are over all things competent."—3: Al–Imran: 26

Unlike, the popular concept of sovereignty, Islamic notion of sovereignty provides a divine conception of authority delegated to the rulers as sacred trust.[18] Muslim rulers are duty bound to exercise authority as sacred trust and not to misuse it. As oppose to positive legal doctrine, the Islamic concept of sovereignty obliges the ruler- *khalifah* or *Imam* to remain within the limits prescribed by God as a religious duty.[19]

After the fall of Rome, Western Europe experienced that it could not sustain its political unitary society. Learning from Islamic political unity, Europe adopted the single theocracy on the lines of Islam for preservation of its political unity. Following the Islamic pattern, a tendency for the unification of Europe under one government and one law developed in order to establish a Christian community as a universal Church or common wealth.[20] Resultantly, the Church through Pope inherited from St. Peter-who himself was once appointed by the Emperor became

---

[18] Islamic concept of sovereignty differs from the concepts of popular and parliamentary sovereignty in various aspects. In parliamentary sovereignty, the legislative body is the ultimate source of powers and can make, change or repeal any law without judicial review or any check thereupon. This kind of sovereignty exists in U.K, New Zealand and Finland. In popular sovereignty, people are the ultimate source of powers, and are associated with Republic form of government. It exists in U.S.A and is noticeable in the constitution of U.S.A which is read as: "*We the People of the United States*". Under the concept of Islamic sovereignty, the Islamic Republic is based on the will of the Almighty, wherein the God Almighty is ultimate source of powers and authority. *See generally* Busṭāmī Muḥammad S'aīd Muḥammad Khīr, "The Islamic Concept of Sovereignty" (PhD Diss., University of Edinburg, 1990), https://www.era.lib.ed.ac.uk/handle/1842/19012.

[19] *See for comparative analysis of Islamic and Westphalian concepts of sovereignty* Amin Saikal, "Westphalian and Islamic Concepts of Sovereignty in the Middle East" in *Re-Envisioning Sovereignty*, ed. Trudy Jacobsen, Charles Sampford and Ramesh Thakur (England: Ashgate Publishing Limited, 2008); *see also* Abdalhadi Alijla and Gahad Hamed, "Addressing the Islamic Notion of Sovereign state", *Journal of Islamic Studies and Culture* 3, no. 2 (December, 2015): 133-142, http://dx.doi.org/10.15640/jisc.v3n2a13; *see also on the Islamic concept of nation state and sovereignty* Gerrit Steunebrink, "Sovereignty, the nation state, and Islam", *Ethical Perspectives: Journal of the European Ethics Network* 15, no. 1 (2008): 7-47, http://www.ethical-perspectives.be/viewpic.php?TABLE=EP&ID=1087.

[20] *See for detail discussion on the transformation from the divine conception of sovereignty to that of positivistic one* Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (USA: The University of Chicago Press, 2005), 36-52.

the center of legal and political authority whereas the Emperor was to rule the Europe through delegation from Pope.[21] The logical outcome was establishment of the sovereignty of Pope instead of Emperor as was in the '*imperium populi Romani*'.[22]

2.2 The Legal Basis of Sovereignty in Early Modern and Modern Political Thoughts: From Bodin to Foucault

Throughout the history of Europe, the legal aspect of sovereignty has been perceived not different than its political one. Because at domestic level the term sovereignty had been used in reference to the internal authority of states which is nowadays known as domestic jurisdiction. It was until the beginning of seventeenth century, that Bodin for the first time introduced the theory behind the word sovereignty on contemporary footings.[23] Bodin's theory of sovereignty was formulated on the pattern to strengthen the legal as well as political authority in center.[24] The critics of Bodin treat his theory as a strengthening element of the divine rights of the King or

[21] *See generally for detail analysis of the medieval Christian notion of sovereignty* Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (The Netherlands: Eburon Academic Publishers, 2007), 128-129; *see also* Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphs and the Publicists* (New York: Cambridge University Press, 1963); *see for detailarguments on the assumption that sovereignty is a secular truth as opposed to religious faith* Constantin Fasolt, "Sovereignty and Heresy," in *Infinite Boundaries: Order, Disorder, and Reorder in Early Modern German Culture* 40 (Kirksville, Sixteenth Century Journal Publishers, 1998).

[22] Hinsley, *Sovereignty*, 53-55; *See for detail discussion on imperium populi Romani* Andrew Lintott, "What was the 'Imperium Romanum'?" *Greece & Rome* 28, no. 1 (1981): 53-67, http://www.jstor.org/stable/642483.

[23] Jean Bodin, *Bodin: On Sovereignty*, ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992); *see also* Andrew, Edward, "Jean Bodin on Sovereignty." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 2 (June 1, 2011): 75-84, http://rofl.stanford.edu/node/90 ; J. U. Lewis, "Jean Bodin's 'Logic of Sovereignty" *Political Studies*, 16 (1968): 206-222, doi:10.1111/j.1467-9248.1968.tb00424.x.

[24] *See for Bodin's conception of political authority, sovereignty and state* Jean Bodin, *Six Books of the Commonwealth*, abridged and trans. M. J. Tooley (Oxford: Blackwell, 1955); *see also for Bodin's theory of sovereignty* Winston P. Nagan and Aitza M. Haddad, "Sovereignty in Theory and Practice" *San Diego Int'l L.J.* 13 (2012): 429-519, http://www.worldacademy.org/files/Dubrovnik_Conference/Soverignity_in_Theory_and_Practice_W.Nagan.pdf.

center. In other words, Bodin's views accentuate on localization of legal authority within a particular dominion.

As oppose to the Bodin's theory of sovereignty formulated in the interest of authority in center, Althusius, the German Calvinistpolitical philosopher and Bodin's contemporary took a different and entirely opposite view on sovereignty by rendering it as an exclusive authority of the people.[25] Thereafter, Althusius views formed the basis of the famous theory of popular sovereignty.[26]This popular sovereignty theory is short of legal flavor such as who to legislate and execute the law.

Legal elements in the contents of the theories of sovereignty formulated by Bodin and Althusius differs from each other in terms of deductive and inductive flow of authority. For instance, Bodin advocated that the absolute authority must belong exclusively to the ruler and should flow from the ruler towards the subject. On the contrary, Althusius viewpoint is based on the premise of popular flavor and it say that the power and authority must be vested in the people.[27] Unlike Bodin and Althusius, Suarez- a Spanish politico-legal philosopher propounded the theory of partial or limited sovereignty.[28] The limited sovereignty thesis contemplates the

---

[25] Calvinism refers to reformed Christianity or reformed faith, and is a major branch of Protestantism that follows the Christian theological traditions of John Calvin and other reformative era theologians separated from Roman Catholic Church in 16th century. *See* T. H. L. Parker, *John Calvin: A Biography* (Philadelphia: Westminster Press, 1975).

[26] See Johannes Althusius, *Politica*, An Abridged Translation of Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples, ed. and Trans. Frederick S. Carney (Indianapolis: Liberty Fund, 1995), http://oll.libertyfund.org/titles/692; *see generally* H.E.S Woldring, "The Constitutional State in the Political Philosophy of Johannes Althusius."*European Journal of Law and Economics* 5,(1998)*:* 123-132; *see also* Alain de Benoist, "The First Federalist: Johannes Althusius." *Telos* 118, (2000): 25-59, https://s3-eu-west-1.amazonaws.com/alaindebenoist/pdf/the_first_federalist_althusius.pdf; *see generally* M. R. R. Ossewaarde, "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *The Monist* 90, no. 1 (2007): 106-25, http://www.jstor.org/stable/27904017.

[27] Hinsley, *Sovereignty*, 132-133; *see generally for comparative analysis of Bodin's and Althusius theories of sovereignty* Alain de Benoist, "What is Sovereignty?" *Telos* 116, (2000): 99- 118.

[28] *See* Christopher Shields and Daniel Schwartz, "Francisco Suárez", *The Stanford Encyclopedia of Philosophy*, ed.Edward N. Zalta (USA: Metaphysics Research Lab, Stanford University, 2016), https://plato.stanford.edu/archives/win2016/entries/suarez/; *see generally* John P. Doyle, "Francisco Suarez: On Preaching the Gospel to ´ People Like the American Indians," *Fordham International Law Journal* 15, no. 4 (1991): 879-951, https://pdfs.semanticscholar.org/336b/2e94984582bdc7c4109a4ee25e1ca560a601.pdf.

division of authority among the people and the Ruler.[29] According to limited sovereignty, certain legal boundaries has to be fixed between the people and the ruler.

In his *De Jure Belli ac Pacis* (1625), Hugo Grotius, attempted to give an account of the theory of sovereignty on entirely new lines and it says that political society contains a twofold subject of supreme authority- the whole community or body politic on one hand and the Ruler on the other.[30] He was of the view that the fully developed political societies are represented by the Ruler, therefore, sovereignty of the people is visible in the Ruler alone which is transferred by the people that ruler.[31]In addition to, Grotius formulated the idea of sovereignty on territorial lines cementing it with natural law.[32] According to Grotius, universal sovereignty became redundant as the Church had failed to maintain its universal moral authority over the people. Similarly, popular sovereignty also proved problematic because it could not accommodate those sovereigns who do not believe on the popular will.[33]

---

[29] Francisco Suarez took a different line of arguments than that of Bodin and Althusius. His limited sovereignty thesis gives an idea that the Ruler held his authority from the community by a transfer of the sovereignty of the people. He was of the view that the people have permanently alienated this sovereignty to the Ruler, but limited by positive law (rules) and the permanent natural rights of the people. *See* Hinsley, *Sovereignty*, 135-136. It is pertinent to mention that the idea of limited sovereignty as propounded by Suarez is totally different from that of twentieth century socialist theory of 'limited sovereignty' both in its content and form. According to socialist theory of 'limited sovereignty' the countries of the 'socialist community' have no right to formulate and determine their foreign policies in a sovereign way without having prior approval of the Soviet Union, which has been regarded as denial of sovereignty by the legal and political critics. *See on limited sovereignty theory* L. Erven, "Limited Sovereignty," *Review of International Affairs* (November 1968): 66-68, https://doi.org/10.1080/00396336908440956.

[30] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, Vol. 2 of *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1925); *see generally* Susumu Yamauchi, "The Ambivalence of Hugo Grotius: State Sovereignty and Common Interests of Mankind," *Hitotsubashi Journal of Law and Politics* 22 (1993): 1-17, http://doi.org/10.15057/8195; *see also* Benjamin Straumann, "Early Modern Sovereignty and Its Limits," *Theoretical Inquiries in Law* 16, no. 2 (2015): 423-446, http://www7.tau.ac.il/ojs/index.php/til/article/view/1344/1389.

[31] Sovereignty defined by Hugo Grotius is as follow "That power [potestas] is called sovereign [summa potestas] whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will." The translation is taken from Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey trans., 1925).

[32]*See for the Grotius theory of territorial sovereignty as opposed to popular and universal theories of sovereignty and importantly his discourse on the nation states* Ali Khan, "The Extinction of Nation-States," *American University International Law Review* 7, no. 2 (1992): 197-234, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1523&context=auilr.

[33] Ibid, 205.

After a long scholastic and intellectual battle, it was Thomas Hobbes who in his famous book *Leviathan,* provided the first clear formulation of the theory of sovereignty in the history of English legal and political thoughts which is generally conceived as problem solving thesis.[34] His famous Social Contract theory provided basis for the absolute authority of the ruler over subjects.[35] Unlike Bodin, Hobbes rationale behind the sovereign's authority was not the divinity of King's rights but the Social Contract- the contract between individual and individual and between the people and the ruler.[36] Hobbes' sovereign took no part in the contract, whereas in Althusius's views the contract took place between the people. In this way, no contract can bind Hobbes' sovereign.[37]

Hobbes also departed from the dualist conception of sovereignty propounded by Grotius and the limited concept of sovereignty theorized by Suarez. It is for this reason that sovereignty is absolute and uniform, therefore, cannot be subjected to division or restrictions. The political community, according to Hobbes is transformed to a corporate entity -the state- through a

[34] Schmitt, *The Leviathan;see generally* Arihiro Fukuda, "Thomas Hobbes's Theory of Sovereignty, 1640–1647: Private Judgement, Fear, Covenant," in *Sovereignty and the Sword: Harrington, Hobbes, and Mixed Government in the English Civil Wars* (Oxford: Calrendon Press, 1997); *see also* James R. Hurtgen, "Hobbes's Theory of Sovereignty in Leviathan," *Reason Papers* No. 5, (Winter 1979): 55-67, https://reasonpapers.com/pdf/05/rp_5_5.pdf; *see for example* Quentin Skinner, "Hobbes on Sovereignty: An Unknown Discussion," *Political Studies* 13, no. 2 (June, 1965): 213-218, https://doi.org/10.1111/j.1467-9248.1965.tb00365.x.

[35]*See generally* Jean Hampton, *Hobbes and the Social Contract Theory* (Cambridge University Press, 1988); *see for example* David Gauthier, "Hobbes"s Social Contract" in *Perspectives on Thomas Hobbes* eds. G A J Rogers and Alan Ryan (Oxford University Press, 1988).

[36]*See for example on comparison of Hobbes' and Bodin's ideas of sovereignty* Howell A. Lloyd, "Sovereignty: Bodin, Hobbes, Rousseau," *Revue Internationale De Philosophie* 45, no. 179 (4) (1991): 353-79, http://www.jstor.org/stable/23949578; *see also* Kinch Hoekstra, "Early Modern Absolutism and Constitutionalism," *Cardozo Law Review* 34 (2013): 1079-1098, http://scholarship.law.berkeley.edu/facpubs; *see also* David Schraub, "Finding the Sovereign in Sovereign Immunity: Lessons from Bodin, Hobbes, and Rousseau," *Critical Review* 29, no. 3 (2017): 388 – 403, http://works.bepress.com/david_schraub/16/.

[37] Johannes Althusius has been generally regarded as the founder of popular sovereignty. In his political thoughts, it was the community which entered into a social contract and thus all the authorities exclusively belong to the people. Althusius social contract differs from Hobbes in several aspects: that there exists mainly two contracts, the first contract establishes organized social life among the individual as an equal partners; while the second contract took place between the people and the rules, therefore, determining the limits of mandated government. In this context, according to Althusius, the first contract constitutes as basis for the second one. On the other hand, in Hobbes views sovereign is absolute and thus cannot be entered into contract, nor can any contract bind the sovereign. *See* Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Canada: Wilfrid Laurier University Press, 1999), 3-4.

covenant, wherein the absolute authority belongs to the ruler which he called sovereign.[38] It was Hobbes' Social Contract theory, which later on became the philosophical basis for the state (corporate body politic) as well as the determination of absolute authority within the state or domestic jurisdiction.[39] After a long time, Hobbes' intellectual contributions made it possible to consolidate the abstract notion of sovereignty with the state and thus laid down tangible foundations for the state domestic jurisdiction to be exercised on the authority of sovereign.

In 17th century, the notion sovereignty was further clarified by John Locke an English naturalist philosopher. However, this time the terms state and sovereignty were outcome of the social contract between the people and the ruler (institution).[40] Locke asserted that there are certain inalienable rights such as of life, liberty and property, and it is the duty of the ruler to protect these rights.[41] Unlike Hobbes, for Locke the authority of the rulers came into existence in consequence of the social contract. Under the contract, people conditionally surrendered the

---

[38] Morton A. Kaplan, "How Sovereign Is Hobbes' Sovereign?," *The Western Political Quarterly* 9, no. 2 (1956): 389-405, http://www.jstor.org/stable/444613.

[39] *See generally* Bertrand Russell, "Hobbes's Leviathan," in *The History of Western Philosophy* (New York: Simon & Schuster, 1972), 546-557; *see also* Glen Newey, *Routledge Philosophy GuideBook to Hobbes and Leviathan* (USA: Routledge, 2008).

[40] *See* Locke, *Two Treatises of Government*; *see generally* Julian H. Franklin, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge: Cambridge University Press, 1978); *see also* Raghuveer Singh,"John Locke and the Idea of Sovereignty," *The Indian Journal of Political Science* 20, no. 4 (1959): 320-334,http://www.jstor.org/stable/42743527 .

[41] *See for Locke conception of natural rights* Gary B. Herbert, "John Locke: Natural Rights and Natural Duties," *Jahrbuch Für Recht Und Ethik / Annual Review of Law and Ethics* 4 (1996): 591-613, http://www.jstor.org/stable/43593573; *see generally* Mark Francis Hurtubise, "Philosophy of Natural Rights According to John Locke" (Master's Thesis, Paper 1057, Loyola University Chicago, USA, 1952), http://ecommons.luc.edu/luc_theses/1057 ; *see generally for detail discussion on natural law and natural rights* John Finnis, *Natural Law And Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011); *see also* Ginna M. Pennance-Acevedo, "St. Thomas Aquinas And John Locke On Natural Law," *Studia Gilsoniana* 6, no. 2 (2017): 221-248, http://www.gilsonsociety.com/files/Pennance-Acevedo.pdf; *see also for general discussion on the origin of natural rights* Brian Tierney, The Idea of Natural Rights-Origins and Persistence, *Northwestern Law Journal of International Human Rights* 2, no.1(2004), https://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/2; *see generally on the evolution of natural rights since 12th century C.E.* Virpi Mäkinen, "The Evolution of Natural Rights, 1100–1500," in *Universalism in International Law and Political Philosophy* 4, eds., Petter Korkman & Virpi Mäkinen (Helsinki: Helsinki Collegium for Advanced Studies, 2008), 105-119, https://helda.helsinki.fi/bitstream/handle/10138/25778/06_makinen_2008_4.pdf?sequence=1 .

authority whereas the government is mere bearer of executive powers entrusted by community.[42] Locke's theory influenced the constitution of U.S.A.[43] Historically, Locke theory has been regarded as substantial basis of the modern states and domestic jurisdiction.

At the other end of spectrum, Jean Jacques Rousseau, in his *Contract social* (1756) dismissed the authoritarian thesis of sovereignty propounded by Hobbes.[44] Sovereignty according to him, vests in the people or community instead of ruler. In Rousseau view, only community is sovereign while the state performs the role of political organization and exercise its powers and functions in pursuance of the authority entrusted to it by the community.[45] It is the Rousseau's community as a sovereign which actually replaced the earlier form of popular sovereignty.[46]

---

[42] *See generally* Thomas Mouritz, "Comparing the Social Contracts of Hobbes and Locke," *The Western Australian Jurist* 1 (2010): 123-127, https://www.murdoch.edu.au/School-of-Law/_document/WA-jurist-documents/WAJ_Vol1_2010_Tom-Mouritz---Hobbes-%26-Locke.pdf; *see also* Deborah Baumgold, "Hobbes's and Locke's Contract Theories: Political not Metaphysical," *Critical Review of International Social and Political Philosophy* 8, no. 3 (2005): 289-308,https://doi.org/10.1080/13698230500187169. Locke theoretical basis of the social contract was entirely differs with that of Hobbes. Unlike Hobbes, Locke propounded the conditional surrender of authority by the people to the ruler. The Lockian concept of sovereignty implies a sort of check and balances over the ruler class, wherein, it was the duty of the ruler to protect the three fundamental and inalienable rights of the people: right to life, liberty and property. On the other hand, the Hobbes' sovereign was absolute and could not be subjected to any check or condition.

[43] *See* Anita L. Allen, "Social Contract Theory in American Case Law," *Florida Law Review* 51, no. 1 (1999), http://scholarship.law.upenn.edu/faculty_scholarship.

[44] *See generally* Ethan Putterman, *Rousseau, Law and the Sovereignty of the People* (New York: Cambridge University Press, 2010); *see also* John B. Noone, "The Social Contract and the Idea of Sovereignty in Rousseau," *The Journal of Politics* 32, no. 3 (1970): 696-708, http://www.jstor.org/stable/2128837; *see generally* Christopher W. Morris, "The Very Idea of Popular Sovereignty: "We The People" Reconsidered," Social Philosophy & Policy Foundation (2000), https://pdfs.semanticscholar.org/8bac/214ff1ad4adc24e2a2a85cc172a370ed5465.pdf.

[45] Rousseau, *The Social Contract.*

[46] John Neville Figgis,"Political Thought in the Sixteenth Century," in *the Cambridge Modern History*, eds., Stanley Mordaunt Leathes, Sir Adolphus William Ward and G. W. Prothero(Cambridge: Cambridge University Press 1904), 767.Rousseau is generally regarded as the pioneer of modern day concept of popular sovereignty. According to him sovereignty belong to the community and it is the community at large in which behalf the ruler exercise the authority within a state. Rousseau conception of sovereignty is not that much different from Althusius, however, the difference lies in the form of the social contract theory of state given by Rousseau, which is missing in the political philosophy of Althusius. It is generally conceived that the Rousseau popular sovereignty theory is the modern version of the Althusius classical theory of sovereignty. Some scholars argue that Rousseau was influenced by the writings of Althusius and borrowed the contents of the theory from the works of Althusius, however, it needs a strong piece of evidence.

The modern trend in constitutional paradigm was advanced by Immanuel Kant in 1780s. He accepted the Rousseau's popular sovereignty in its entirety. This fact was also accepted by Kant that state is in principle mere an agent and representative of sovereign's general will.[47] In Kant's view, all the popular rights are absorbed in Hobbes' sovereign- the state being an agent of the sovereign.[48] In a constitutional state where the divisions of power is in conflict with the freedom of executive powers, the question before Kant was that where the actual sovereignty can be found? To prove this he argued that theoretical sovereignty is vested in people while the actual sovereignty in executive state.[49] Thus, Kant devised a rational and permanent solution to this fundamental problem in constitutional states in the context of power and authority.

The most suitable theory of sovereignty was presented by twentieth century thinker Michel Foucault, who while encountering all the previously established theories of sovereignty accentuate on the contents of sovereignty. In Foucault's viewpoint sovereignty either popular or absolute is not weighable in terms of facts. To this he answered that sovereignty is not a fact or a state of affairs in which a political authority could find itself.[50] Rather sovereignty is a claim by authorities. It is not the fact of political powers rather it is a discourse of performing authority which must be obeyed. He further emphasized that sovereignty is a flexible thing instead of

---

[47] Jacob Weinrib, "Sovereignty as a Right and as a Duty: Kant's Theory of the State" (2017): 4-6, https://ssrn.com/abstract=2976485; *see also* Frederick Rauscher, "Kant's Social and Political Philosophy", *TheStanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (USA: Metaphysics Research Lab, Stanford University, 2017), https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/.

[48] *See generally on Kant idea of sovereignty* C. E. Merriam, Jr., *History of the Theory of Sovereignty since Rousseau* (Canada: Batoche Books Kitchener 2001), 21-27; Antonio Franceschet, "Sovereignty And Freedom: Immanuel Kant's Liberal Internationalist 'Legacy'," *Review of International Studies* 27, no. 2 (2001): 209–228, doi:10.1017/S0260210500002096 ; *see also* Peter Nicholson, "Kant on the Duty Never to Resist the Sovereign," *Ethics* 86, no.3 (1976): 214-230, http://www.journals.uchicago.edu/doi/abs/10.1086/291995.

[49] Hinsley, *Sovereignty*, 156.

[50] Eli. B. Lichtenstein, "Foucault's Analytics of Sovereignty," *A Journal of Philosophy and Social Theory* 22, no. 3 (2021), 300 in 287-305.

being static. In nutshell, Foucault believe that absolutist and popular forms of sovereignty are altogether irrelevant to the modern means of technology.[51]

In sequel to the above, the doctrine of domestic jurisdiction is embodied in the political concept of sovereignty. In classical and early modern era, sovereignty stood the underlying principle behind legal authority of states. The concept of sovereignty involves the belief that there exists an absolute political authority within the community and such authority is thus uniform and indivisible. In modern context, it is the state being a juristic person enjoying all the executive, legislative and adjudicative powers under the umbrella of domestic jurisdiction.

Though, the term sovereignty is fluently used in political debates but legally it originally refers to domestic jurisdiction of states. The detail analysis of sovereignty tells us that it is not only limited to the internal affairs of states but it also accomplish external objectives of its exclusiveness. Contrary to this, domestic jurisdiction is limited to internal affairs of a state. Apparently, it seems that rules of domestic jurisdiction are substantially derived from sovereignty. It is due to this reason that domestic jurisdiction of states is only recognized under the UN Charter to the extent of internal affairs. On the other side, sovereignty of members of the UN refer to both external and internal affairs.

3. Limitations on Domestic Jurisdiction

In the post-UN legal cosmopolitan world, the states being sovereign entities are the subject of PIL. Its rules and principles are exclusively applicable to states.[52] Treaties, Conventions,

[51] *See e.g. on Foucault views on sovereignty* Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

[52] *See generally* Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Rev. ed., (USA New York: Routledge Publishers, 1997); Malcom N. Shaw, *International Law*, 6th ed., (USA New York: Cambridge University Press, 2008); Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed, Vol 1, (U.K: Longman Group Limited, 1992); Hans Kelson, *Principles of International Law*, 2nd ed. (New York: Holt, Rinehart and Winston, 1967); Fernando R. Teson, *A Philosophy of International Law* (USA:

international customs and decisions of international judicial organs (not most of the time) lays down a chain of binding obligations for states. For instance, IHRL requires the states to take measures for the protection and promotion of individuals' rights.[53] Likewise, International Humanitarian Law (IHL) regulate the conduct of conflicting parties in order to protect civilians, civilian property, prisoners of war and wounded and sick people during the armed conflicts.[54] Any possible violations of IHL or IHRL norms by the state authorities or even by non-state actors give rise to international crimes, which then falls within the jurisdictional ambit of ICL.[55] Obviously, ICL only fixes individual criminal responsibility instead of states.[56]At the end, these

---

Westview Press, 1998); Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2005); David J. Bederman, *The Spirit of International Law* (Athens: The University of Georgia Press, 2002).

[53] *See for example* Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (New York: Cambridge University Press, 2010); Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming human* (London: Routledge, 2001); Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (UK: Oxford University Press, 2013); Shiv R S Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (USA: Hart Publishing, 2007); Benjamin Gregg, *Human Rights as Social Construction* (New York: Cambridge University Press, 2012).

[54] *See* Yaël Ronen, "International humanitarian law,"in *International legal positivism in a post-modern world*, eds., Jean d'Aspremont and Jörg Kammerhofer (Cambridge : Cambridge University Press, 2014), 475-497, https://library.ext.icrc.org/library/docs/ArticlesPDF/40096.pdf; *See also* Robert Kolb, *Advanced introduction to international humanitarian law* (Cheltenham: Edward Elgar Publishing limited, 2014); Howard M. Hensel, "International humanitarian law," in *The Ashgate Research Companion to Military* Ethics, James Turner Johnson and Eric D. Patterson, eds, (Farnham; Burlington: Ashgate, 2015), 153-167.

[55] Rene Provost, *International Human Rights and Humanitarian Law* (UK: Cambridge University Press, 2002). IHRL and IHL follow each other in a series of events. The rationale behind the whole scheme of IHL is the minimization of the effects of war over human lives, which falls under the broader category of the right to life, property and dignity. It is to say that IHL did not come into existence only for the regulation of warfare or it is not the rules of game, but the purpose behind its scheme is the extension of maximum protection to human lives during warfare. Unlike IHL, the scope of human rights law is vast applicable both in war and peace times, thus, the whole scheme of IHL is purposely designed to lessen the impacts of war over human lives, or in other words the aiming the maximum protection of human rights from grave violations during armed conflicts. *See for example* Alain-Guy Tachou-Sipowo,"Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the Rome Statute," *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 51 (2014): 289–318, http://ssrn.com/abstract=2550438.

[56] See Article 25 of the ICC Statute. The said article contains provisions in respect of individual criminal responsibility. It has been regarded by the legal scholarship throughout the world as a tremendous shift in the paradigm of public international law from state (juristic person) to an individual (natural person). Being a pragmatist, one can truly imagine that the corporate veil behind the abstract entity of state has been pierced with the emergence of modern ICL. Before the modern ICL, the rulers (Heads of State or Government) would put forward the narrative that the state are the key actors that should be held responsible, although, determining the responsibility of state being a corporate entity in concrete terms was impossible. Re-considering the above narrative of state self-contained responsibility, the international community when drafting the ICC statute in the Rome Conference, introduced the substantive provisions of individual criminal responsibility by putting the states in secondary list. The individual criminal responsibility rule is incomplete unless it is read with Article 27 of the

progressions in PIL leave serious repercussions for the domestic jurisdiction of states because balancing its obligations under the international treaties as well as customary law with that of internal authority pragmatically seems difficult.[57]

The phrase domestic jurisdiction for the first time appeared in article 15 of the Covenant of the League of Nations, 1919.[58] According to the language of article 15, the Council's powers of interference was altogether ousted when the matter would fall within the domestic jurisdiction of states. Later on, the phrase domestic jurisdiction was re-introduced in article 2(7) of the UN Charter but with few exceptions. Due to the mass internationalization of various issues such as human rights, environmental protection, international and non-international conflicts and international prosecutions, it is now difficult to ascertain that which and what affairs falls within the domestic jurisdiction of states. Conversely, few scholars argue that domestic jurisdiction clause is still intact and the interference is only warranted in enforcement measures by the UN Security Council and not otherwise.[59]

The prohibition of the use of force in Article 2(4) of the UN Charter and the obligations of peaceful international cooperation have a great influence on the nature and contents of domestic jurisdiction as well as state sovereignty. Article 2(7) restricts the domestic jurisdiction of states in case, whenever a humanitarian intervention is required, article 2(7) states as:

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

---

statute which provides for the irrelevancy of official capacity. Article 27 for the first time ended the historic and so-called holy rule of head of state immunity, which has been regarded as a great achievement. *See for detail discussion on individual's criminal responsibility* Ciara Damgaard, *Individual Criminal Responsibility for Core International Crime* (Heidelberg: Springer Science+Business Media B.V., 2008).

[57] *See generally* Zhu Wenqi, "On co-operation by states not party to the International Criminal Court," *International Review of the Red Cross* 88, no. 861 (2006): 87-110.

[58] Article 15(8) of the Covenant of League of Nations, 1919: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

[59] Kawser Ahmed, "The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View," *Singapore Year Book of International Law and Contributors* 10 (2006), 196 in 175-197.

> submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[60]

The language of article 2(7) reduces the scope of domestic jurisdiction when interference is required on the yardstick of peace and security or humanitarian grounds. Quite the opposite, the scope of 'peace and security' and 'humanitarian grounds' is far wider because any matter could easily become the concern of international community when it threatens international peace and security or warranted on humanitarian grounds. Since the language used in article 2(7) is so open for interpretation that even any action rightly exercised by the national authorities in pursuance of its domestic jurisdictional powers could itself become the subject of humanitarian intervention.[61]

In ICL perspective, under the complementarity rule domestic jurisdiction has been given upper hand over the jurisdiction of ICC but in matters of universal jurisdiction exercised by national courts oust the jurisdiction of the state of nationality of offender. Besides, it is also argued that implications of articles 12(2) and 13(b) of the Rome Statute for domestic jurisdiction of states are universal because in both cases the jurisdiction of Court supersede the national jurisdiction.[62]Similarly, the irrelevancy of official's immunity clause in the Rome Statute has overriding legal impacts over claim of primacy of jurisdiction by domestic authorities because

---

[60] *See for details on the state sovereignty and UN intervention* Samuel M. Makinda, "The United Nations and State Sovereignty: Mechanism for Managing International Security," *Australian Journal of Political Sciences* 33, no. 1 (1998): 101-115; M. Ayoob, "Humanitarian Intervention and State Sovereignty," *The International Journal of Human Rights* 6, no. 1 (2002): 81-102.

[61] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law* 1, no. 1 (1990): 72-73, http://www.ejil.org/article.php?article=1146&issue=71. Graefrath argued that, "For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation."

[62] *See for example* Cenap Cakmak, "The International Criminal Court In World Politics," *International Journal on World Peace* 23, no. 1 (MARCH 2006): 3-40, http://www.jstor.org/stable/20753516 ; *see also* Matthew H. Charity, "Criminalized State: The International Criminal Court, The Responsibility to Protect, and Darfur, Republic of Sudan," *Ohio Northern University Law Review* 37 (2011): 67-110.

under most of the states' national legislations, officials are mostly immune from prosecution for the acts done in official capacity.[63]Consequently, this new rule of ICL remove the impression of being immune from criminal prosecution in heinous crimes.[64]

4. Legal Limits of State Sovereignty in post-UN International Legal Order

Historically, the concept of sovereignty has been conceived by legal and political thinkers as an absolute authority within a political community.[65] The formulation of sovereignty on legal

[63] Article 27 of the ICC Statute: Irrelevance of official capacity, "(1). This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". *See for example Prosecutor v Omar Hassan Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) ('*Prosecutor v Al-Bashir'*). It is notable that Sudan's President *Omar Hassan Ahmed Bashir* was charged in the warrants for war crimes and crimes against humanity in Darfur. The ICC issued arrest warrants against the incumbent President *Omar Bashir* in pursuance of the situation referred to it by the United Nations Security Council under Article 13 (b). *Al-Bashir* was also accused of Genocide but due to lack of express provisions regarding head of state immunity, such charges could not be framed in the warrants. Dapo Akande has suggested that the test applied with regard to the 'reasonable grounds to believe' was totally restrictive and erroneous; the obligations contained in the Genocide Convention might would have served the purpose of removing the immunity of *Al-Bashir*. Furthermore, the International Court of Justice while in Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro, 2007) Case held that "the Genocide Convention implicitly contains an obligation to cooperate with competent international courts, including an obligation to arrest persons suspected of genocide". *See* Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on *Al-Bashir's* Immunities'" *Journal of International Criminal Justice* 7 (2009) 333-352, http://councilandcourt.org/files/2012/11/Akande-Referrals-Immunities.pdf; *See also* M. Milanovic, "The ICC Issues Arrest Warrant for Bashir but Rejects the Genocide Charge'", *EJIL: Talk!* (2009), http://www.ejiltalk.org/icc-issues-arrest-warrant-forbashir-but-rejects-the-genocide-charge/; K. Heller, "The Majority's Complete Misunderstanding of Reasonable Grounds'" *EJIL: Talk!* (2009), http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonablegrounds/

[64] *See* Paola Gaeta, 'Official Capacity and Immunities,' in *The Rome Statute of the International Criminal Court: A Commentary*, vol I, eds, Antonio Cassese et al (UK: Oxford University Press, 2002); Phillip Wardle, "The Survival of Head of State Immunity at the International Criminal Court," *Australian International Law Journal* 9 (2011): 181-205, http://www5.austlii.edu.au/au/journals/AUIntLawJl/2011/9.pdf.

[65]*See generally* Dieter Grimm and Belinda Cooper, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (New York: Columbia University Press,2015); Robert Jackson, *Sovereignty: The Evolution of An Idea* (Cambridge: Polity Press, 2007); Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments: The Past, Present, and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2014); Carmen Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority*, (Oxford: Oxford University Press, 2014); Corinne Comstock Weston and Janelle Renfrow Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge: Cambridge University Press, 1981).

theoretical basis took place with the emergence of state- the political organization of a society.[66] Legal and political scholars generally trace the origin of modern nation states from the Treaty of Westphalia, 1648.[67] It was the Westphalian model that originally paved the way for the nowadays so-called sovereign territorial states either monarchy, principality or republic.[68] Moreover, for the purpose of identifying the existence of state sovereignty, the Westphalian peace established in 1648 legitimized the rights of monarchs (states) to rule their people free from interference by extrinsic legal and political forces.[69] In this context, the state sovereignty may be understood as the "absolute territorial organization of political authority".

For all practical purposes, Krasner classified the state sovereignty into four classes as:

> "The term sovereignty has been used in four different ways—international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial

---

[66] *See for example* Joel S. Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge: Cambridge University Press, 2001). It has been generally argued that it was the establishment of state which compelled the legal and political thinkers to present the idea of sovereignty. Moreover, it was the peculiar circumstances of Western Europe that the separation of state (political authority) from the church was highly needed, and for that purpose the theories of sovereignty provided ideological strength to the establishment of state and as well played the role of catalyst in repealing the authority of Church.

[67] *See generally* Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55, no. 2 (2001): 251–287; Andreas Osiander, *The States System of Europe, 1640-1994*, (Oxford: Clarendon Press, 1994); Daniel H Nexon, *The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires, and International Change*, (Princeton: Princeton University Press, 2009).

[68] Joseph R. Strayer, *On the Medieval Origins of the Modern State* (New Jersey: Princeton University Press, 1970), 107-108. Political thinkers generally divide the existence of political authority within the European societies into two eras: one the pre-Westphalian era, and second the post-Westphalian era. In pre-Westphalian era there was a general tendency among the masses as well as the ruling elite, that there is one man-the ruler designated by God through the authority of Church, had the right to rule a particular territory, and all the people must obey him without questioning. This tendency, however, was resisted in the thirty years war, in consequence to which the Treat of Westphalia was concluded in 1648. On the other hand, there was an idea that no divine rights of the monarchs exist at all, and that a sort of political organization-state is necessary for the welfare of human beings and to exercise all the legitimate authorities (sovereignty) over the subjects.

[69] Douglas Howland and Luise White, eds, "Introduction: Sovereignty and the Study of States," in *The State of Sovereignty: Territories, Laws, Populations* (USA: Indiana University Press, 2009), 3; *see also* Anne L. Clunan, "Redefining Sovereignty: Humanitarianism's Challenge to Sovereign Immunity," in *Negotiating Sovereignty and Human Rights Actors and Issues in Contemporary Human Rights Politics*, eds, Noha Shawki and Michaelene Cox (England: Ashgate Publishing Limited, 2009), 7. Generally the state sovereignty has two necessary components: internal and external sovereignty. In classical sense, internally the state has an exclusive authority to regulate all affairs over a particular territory. In furtherance of the objects contained in the Treaty of Westphalia 1648, the states for the next three hundred years recognized each other's rights to determine their own internal political, economic or social affairs. Afterwards, such rights were also recognized in the UN Charter under Article 2(4). Externally, the states got freedom to regulate their affairs on inter-states level, e.g. to conclude treaties and agreements with other states.

> entities that have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state."[70]

International legal sovereignty and Westphalian sovereignty for Krasner entails the issues of authority and legitimacy, not control.[71] He stated the rule for international legal sovereignty as the extension of recognition to territorial entities that have formal juridical independence.[72] Similarly, the Westphalian sovereignty provides for a rule of exclusion of external actors from the territory of a state.[73] The rule for Domestic sovereignty is the exercising of effective and legitimate authority and control within a defined territorial limits.[74] Interdependence sovereignty in Krasner view is concerned with control-the capacity of state to regulate across the border movements.[75]

The aforesaid different classes of state sovereignty cannot be logically coupled simultaneously because all of the classes provide diversified justifications of sovereign authority.[76] International legal sovereignty has its relevancy when it comes to the status of states in their international relations- the modern concept of statehood under international law.[77] On the

---

[70] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey: Princeton University Press, 1999), 3-4.

[71] Ibid, 5-6. *See also* John Agnew, "Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics," *Annals of the Association of American Geographers* 95, no. 2(2005): 437–461, doi:10.1111/j.1467-8306.2005.00468.x.

[72] *See* Stephen D Krasner,"Sovereignty," *Foreign Policy*, no. 122 (2001): 20-29,http://www.jstor.org/stable/3183223; *see also* Janice E. Thomson, "State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research," *International Studies Quarterly* 39, no. 2, (1995): 213–233.

[73] *See for example* Jason Farr, "Point: The Westphalia Legacy and the Modern Nation-State," *International Social Science Review* 80, No. 3&4 (2005): 156-159, http://www.jstor.org/stable/41887235; *see also* Peter M. R. Stirk,"The Westphalian Model and Sovereign Equality," *Review of International Studies* 38, no. 3 (2012): 641-60, http://www.jstor.org/stable/41681482.

[74] Krasner, *Sovereignty*, 11.

[75] Ibid, 12.

[76] Ibid, 9.

[77] *See generally* Stéphane Beaulac, "International Law: Challenging the Myth," *Australian Journal of Legal History* 8, no. 2 (2004), http://classic.austlii.edu.au/au/journals/AJLH/2004/9.html. In international law the Treaty of Westphalia being a peace establishing agreement is historically treated as the foundation stone of modern

other hand, the Westphalian sovereignty provides for the exclusion of foreign interference within the territorial limits of a state- such as Article 2 (4) of the UN Charter put general obligations on members states "to refrain from threat or use of force against the territorial integrity or political independence of any state".[78]Resultantly, article 2(4) safeguards the states from foreign interference within the domestic affairs of states which is the essence of Wetsphalian sovereignty.[79]

Theoretically, the history of sovereignty is closely linked with the concept of domestic jurisdiction.[80] The rule for domestic jurisdiction as discussed earlier is the exercising of control and authority within a polity.[81] It is mainly concerned with the affairs of authority as well as

---

state system. The modern sovereign states derived their legitimacy and absolute authority both internally and externally from the Westphalian agreements. International lawyers pay a great attention to the Westphalian peace when it comes to the recognition of states in international law. *See also* Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (1999): 569-591, http://www.jstor.org/stable/40109077; *See for example* A.C. Culter, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis in Legitimac," *Review of International Studies* 27 (2001): 133-150; D. Hassan, "The Rise of the Territorial State and the Treaty of Westphalia," *Yearbook of New Zealand Jurisprudence* 9, (2006), http://epress.lib.uts.edu.au/research/bitstream/handle/10453/3289/2006006060.pdf?sequence=1.

[78] *See for the principle of sovereign equality under the UN Charter* Behrooz Moslemi and Ali Babaeimehr, "Principle of Sovereign Equality of States in the Light of the Doctrine of Responsibility to Protect," *International Journal Of Humanities And Cultural Studies* (2015): 687-697. Alex Ansong, "The Concept of Sovereign Equality of States in International Law," *GIMPA Law Review* 2, no. 1 (2016): 14-36, https://works.bepress.com/alex_ansong/2/. Article 2(1) of the UN Charter lay down the general principles of the equality of states as obvious from its text, "The Organization is based on the principle of the sovereign equality of all its Members". Moreover, in order to safeguard the sovereign equality of all states, the UN charter further put an express bar on the use of force in Article 2(4) which states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

[79] *See for example* Müge Kinacioğlu, "The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate," *Perceptions* 10(Summer 2005): 15-39, http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf; Leta Jaleta Negeri, "The Tension Between State Sovereignty And Humanitarian Intervention In International Law" (Master Thesis, University of Oslo, Norway, 2011), https://www.duo.uio.no/bitstream/handle/10852/19668/ThesisxFinal.pdf?sequence=2.

[80] *See generally* G. Nolte, "Article 2(7)" in *The Charter of the United Nations: A Commentary*, 2nd ed., ed, B. Simma, (New York: Oxford University Press, 2002).

[81] *See* Kawser Ahmed, "The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View," *Singapore Year Book of International Law and Contributors* 10 (2006): 175-197, http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2006/10.pdf. Domestic sovereignty in modern context generally refers to the domestic jurisdiction of states: the jurisdiction to legislate, enforce and adjudicate. However, the same has been restricted in one way or other through the application of article 2(7) of the UN Charter. The principle of domestic jurisdiction was laid down by article 15 (8) of the Covenant of the League of Nations, the text of article 15(8) appeared as: "If the dispute between the parties is claimed by one of them, and is found by the

control within a defined territory. Authority and control are hereby used in both legal and political senses.[82] In broader sense the authority refers to absolutism of powers within prescribed framework i.e. legislative, executive and adjudicative powers of state.[83] On the other hand, interdependence sovereignty merely deals with control and not authority.

Besides, the concept of interdependence sovereignty is closely associated with the era of new post-UN international legal order.[84] Emergence of new issues especially after 1950s and followed by technological advancements created serious concerns for states that whether they would be able to sustain the interdependence sovereignty- the ability to regulate or control movements across the border.[85] Additionally, the emergence of new transnational issues such as atmospheric pollution, drugs trade, terrorism, currency crises, cybercrimes etc. are the outcome of interdependence or technology. In the foregoing scenario, states are not able to provide

---

Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." Similarly, the phrase "domestic jurisdiction" used in article 2(7) lays down a general rule for the exercise and enjoyment of domestic jurisdiction as prerogative of the member states. In other words, article 2(7) embodies the principle of non-intervention as well, meaning thereby, that states are free to exercise its own executive, legislative and judicial jurisdiction independently.

[82] Exercising exclusive authority and control within a particular territory is the essential ingredients of domestic sovereignty. A state cannot claim its sovereign status without effective authority and control over its subjects and territory. Some scholar argues that emergence of global issues and technological advancement in twentieth and twenty first centuries adversely undermined the classical concept of state domestic sovereignty. As Krasner argues that it is possible at one time that a state may not be able to exercise effective authority and control but still it would have international recognition (*de jure*). *See* Krasner, *Sovereignty*, 8.

[83] Hinsley defined the sovereignty in the following terms, "the idea that an absolute and final authority exists in a political community". The definition given by Hinsley suggests the absoluteness of authority and powers within a political community- the powers to legislate, enforce and adjudicate. Absoluteness of authority carries a broader range of meaning with the exclusion of any restrictions associated to it. *See* Hinsley, *Sovereignty*, 1-2.

[84] *See generally* John Agnew, *Globalization and Sovereignty* (USA: Rowman & Littlefield Publishers, Inc., 2009). The assumption under the Westphalian model that states have exclusive absolute territorial sovereignty is undermined/ transformed by globalization. *See also* D. Held, ''Democracy, the nation-state, and the global system,'' in *Political Theory Today* ed., D. Held (Cambridge: Polity Press, 1991), 22. David Held argues that globalization is posing the question as to whether global networks are displacing ''notions of sovereignty as an illimitable, indivisible, and exclusive form of public power'' such that ''sovereignty itself has to be conceived today as already divided among a number of agencies—national, regional, and international—and limited by the very nature of this plurality."

[85] *See* S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

solution for how to deal with these issues, therefore, the emerging transnational issues restrict the so-called state sovereignty both in form and substance.[86]

In Krasner's terms 'globalization' has almost perished the classical concept of sovereignty as well as domestic jurisdiction.[87] He argues that "the inability to regulate the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries has been described as a loss of sovereignty".[88]Likewise, Richard Cooper holds "that in a world of large open capital markets smaller states would not be able to control their own monetary policy because they could not control the trans-border movements of capital".[89] The growing economic interdependence, free market economy and the foreign direct investments are the factors that played a key role in transforming the concept of states' domestic jurisdiction.[90]

Additionally, the formation of a global capital market represents a monopoly of power being capable of influencing the national economic policies of states in one way or the

[86] Krasner articulated the interdependence sovereignty as, "While a loss of interdependence sovereignty does not necessarily imply anything about domestic sovereignty understood as the organization of authoritative decision making, it does undermine domestic sovereignty comprehended simply as control. If a state cannot regulate what passes across its borders, it will not be able to control what happens within them." Krasner, *Sovereignty*, 13.

[87] It has been argued by the advocates of globalization that it undermines the concept of state sovereignty through different means such as global finance flow, multinational corporations, global media empires and the internet. The physical borders of the states are turned into soft borders which are out of the control of states. Political science regards the sovereignty as essential element of the state accompanied with the concept of complete supremacy in domestic policies and independence in foreign affairs. However, technology and the flow of capital have brought considerable changes in the notion of state sovereignty. Globalization catalyzed the transformation process and resultantly, the scope of national sovereignty has changed from the classical to the modern one. *See for detail discussion* Leonid E. Grinin, "State Sovereignty in the Age of Globalization: Will it Survive?," in *Globalistics And Globalization Studies*, eds., Leonid E. Grinin, Ilya V. Ilyin, and Andrey V. Korotayev (Volgograd: 'Uchitel' Publishing House, 2012); *see also* Dukagjin Leka, "Challenges of State Sovereignty in the Age of Globalization," *AUDJ* 13, no. 2 (2017): 61-72, http://journals.univ-danubius.ro/index.php/juridica/article/viewFile/4051/4125; Leonid E. Grinin, "Transformation of Sovereignty and Globalization," in *Hierarchy And Power In The History Of Civilizations: Political Aspects of Modernity* eds., Leonid E. Grinin, Dmitri D. Beliaev and Andrey V. Korotayev (Moscow: KD "LIBROCOM", 2009).

[88] Krasner, *Sovereignty*, 12.

[89] *See* Richard Cooper, *The Economics of Interdependence* (New York: McGraw- Hill, 1968); *see also* Richard N. Cooper, "Economic Interdependence and Foreign Policy in the Seventies," *World Politics* 24, no. 2 (1972): 159-81, http://www.jstor.org/stable/2009735.

[90] In Richard Cooper terms the speedy flow of goods, persons, funds, information and ideas across the borders are the reasons that is causing difficulties for states. In modern world, the economic interdependence is followed by psychological interdependence due to rapid technological advancements such as electronic and information technology. *See* Cooper, "Economic Interdependence", 162-163.

other.[91]The increasing role of multinational corporations in the global capital market has decreased the role of states to an enormous level especially in regulation of the economic affairs on inter-state level.[92] Similarly, the economic interdependence has crucial implications for the foreign policies of states because states are economically dependent on the inter-state organizations like "World Bank and International Monetary Fund (IMF)".[93]

Institutions like World Bank and IMF provide loans to the states which are subject to various stipulations where under the states are bound to formulate their economic policies. In nutshell, the economic, social and cultural aspects of growing internationalized issues are beyond the control of states.[94] All these suggests that post-UN international legal order has curtailed the scope of state sovereignty as well as domestic jurisdiction which is no more a valid ground for immunity from the jurisdiction of international judicial organs.

5. Domestic Jurisdiction and ICL: From Impunity to Accountability

Since the Westphalian model of statehood, state have always claimed immunity from certain criminal jurisdictions.[95] This rule is known as the rule of sovereign immunity in PIL.[96]

---

[91] Ibid, 172.

[92] Ibid, 173.

[93] Valerie Sperling, *Altered States: The Globalization of Accountability* (New York: Cambridge University Press, 2009), 35-36. The World Bank and IMF also known as Bretton Woods's institutions were established in the aftermaths of Second World War. Both the institutions are since then regarded as global institutions for the regulation of economic affairs. The political critics of the World Bank and IMF often allege that these intuitions have a direct influence over the economic policies of states, and in consequence to, the states have compromised their national sovereignty, especially, when it comes to the loans borrowed by the states accompanied with various conditions. *See also* Martin Wolf, "Globalization and Global Economic Governance," *Oxford Review of Economic Policy* 20, no. 1 (2004): 72-84, http://people.ds.cam.ac.uk/mb65/documents/wolf-2004.pdf.

[94] David J. Bederman, *Globalization and International Law* (New York: Palgrave Macmillan, 2008), 147-148. "The emergence of a 'borderless world' can certainly give credit to the notion that the concept of bounded territory, which is necessary for State sovereignty, is no longer a meaningful concept for describing political and social change. Under this theory, the nation-State has lost its dominant role in international governance (in both the political and economic senses of that concept) and is being supplanted by transnational networks of authority and non-State actors. Taken to its extreme, this theory of globalization—called by some as 'hyperglobalization'—will inevitably involve the decreasing relevance and ultimate withering away of the nation-State."

[95] State immunity is a concept of international law, which has its origin in the "principle *par in parem non habet imperium* that one sovereign power cannot exercise jurisdiction over another sovereign power". It is the

Historically, heads of states were granted absolute immunity due to being the personification of state.[97] It means that under international law the head of state can act with impunity without any fear from prosecution. The rule of sovereign immunity is embodied both in customary law as well as treaty law.[98] Immunities granted to the diplomats and counselors of foreign states from the jurisdiction of the forum states are also based on the 'principle of sovereign immunity'.[99]

The first step towards eliminating the impunity clause (head of state immunity) was taken in shape of IMT or Nuremberg Tribunal and the Tokyo Tribunal.[100] It was a paramount decision

---

basis of the act of state doctrine and sovereign immunity. *See generally* Yoram Dinstein, "Par in Parem Non Habet Imperium," *Israel Law Review* 1, no. 3 (1966): 407–420, doi:10.1017/S0021223700013893.

[96] Historically the head of foreign states has enjoyed complete immunity, even in the acts done in their private capacity. Under customary international law the doctrine of state immunity applies to all activities of the state with very narrow exceptions. The prevailing trend in many countries is that they have adopted the doctrine of qualified immunity instead of the absolute immunity- that is, they grant immunity to foreign states only in respect of their governmental acts (acts iure imperii), not in respect of their commercial acts (acts iure gestionis). Nowadays most of the states follow the doctrine of qualified immunity except some South American states that still follow the absolute immunity rule. *See the* Inter-American Draft Convention on Jurisdictional Immunity of States, approved by the Inter- American Juridical Committee on 21 January 1983.

[97] LIU Daqun, "Has Non-Immunity for Heads of State Become a Rule of Customary International Law?" in *State Sovereignty and International Criminal Law* eds., Morten Bergsmo and LING Yan (Beijing: Torkel Opsahl Academic EPublisher, 2012), 55. The immunity rule has been reaffirmed by the International Court of Justice in *Arrest Warrant* case. Three judges in their joint separate opinion holds that "immunities are granted […] to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system" The ICJ verdict reflects the idea that "an equal has no power over an equal". *See* International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), February 14, 2002, para. 75, http://www.legaltools.org/doc/23d1ec/. The Court further holds at para. 54 that, "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability".

[98] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004. It is expressed in the preamble of the convention that the jurisdictional immunity of states are "generally accepted as a principle of customary international law". Moreover, the phrase in the preamble "Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property" reflects the state practices at national level in respect of jurisdictional immunities of states. *See also* European Convention on State Immunity and its Additional Protocol, 1972.

[99] *See* Vienna Convention on Diplomatic Relations, 1961; the Vienna Convention on Consular Relations, 1963.

[100] *See* Paul G. Lauren, "From impunity to accountability: Forces of transformation and the changing international human rights context," in *From sovereign impunity to international accountability: The search for justice in a world* eds., Ramesh Thakur and Peter Malcontent (Tokyo: United Nations University Press, 2004); M. Cherif Bassiouni, "Combating Impunity for International Crimes [comments]," *University of Colorado Law Review* 71, no. 2 (Spring 2000): 409-422.

with respect of divorcing the inviolability of head of state as an individual from the inviolability of state itself.[101] Article 7 of the IMT Charter states that:

> "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[102]

The Nuremberg Tribunal marked stamp over the principle of irrelevancy of head of state immunity in its judgment of 1 October, 1946 by stating that: "The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot take shelter behind their official position in order to be exempted from punishment in appropriate proceedings."[103]

It is evident from the IMT Charter and the judgments of Nuremberg Tribunal that the notion of immunity has stood excluded from the sphere of special defenses in criminal prosecution.[104]Likewise, article 4 of the 1948 Genocide Convention, article 3 of the Apartheid Convention 1973, and the 1984 Torture Convention in articles 4 and 12 also provides for the "removal of the head of State and other public officials immunity from criminal prosecution".[105]

---

[101] Daqun, "Has Non-Immunity for Heads of State", 57.

[102] Article 7, Charter of the International Military Tribunal, 1945.

[103] The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22 August 1946 – 1 October 1946), para. 447.

[104] M. Cheriff Bassiouni, *Introduction to International Criminal Law: Second Revised Edition,* (The Netherland: Martinus Nijhoff Publishers, 2012), 75.

[105]*See* Andrea Bianchi, "Immunity versus Human rights: The Pinochet case," *European Journal of International Law* 10, no. 2 (1999): 237-277, http://www.ejil.org/pdfs/10/2/581.pdf. "The famous Pinochet case, in which the UK House of Lords allowed an extradition application by Spain in respect of the former Chilean president to proceed, remains the leading case on such an exception. The House of Lords in 3:2 majority decision held that Pinochet being a head of state of Chile is not entitled to immunity from criminal proceedings and therefore, be extradited to the Spanish government. Pinochet was accused of torturing the Spanish citizens in Chile, while he was on his visit to England, on the following day the Spanish Metropolitan magistrate issued a provisional arrest warrant accusing him for the murder of Spanish citizens between 1973 and 1983 in Chile. The principle laid down by the House of Lord in its decision of 24th March, 1999 was that Pinochet does not enjoy immunity in respect of acts of torture committed after the entry into force of the 1984 Convention against Torture. Moreover, Chile, Spain and the United Kingdom are all parties to the Torture Convention, therefore, contractually bounds to give effect to its provisions pertaining to irrelevancy of the head of state immunity." http://www.internationalcrimesdatabase.org/Case/855/Pinochet/.

In the same manner, article 7(2) of the ICTY and article 6(2) of the ICTR provides for the removal of the head of state immunity in criminal prosecutions. Generally, ICL removes both substantial and temporal immunity for all public officials for international crimes. The ICC's Statute in article 27 also provides for the removal of immunity in criminal prosecution.[106] Quite the opposite, the ICJ in Congo v. Belgium (2002) recognized the temporal immunity of the incumbent officials.[107]

One of the notable example of ICC regarding irrelevancy of immunity to criminal prosecution is the issuance of arrest warrant of Sudanese President Omar Hassan Ahmed Bashir.[108] Bashir was charged in the warrants for the "crimes against humanity and war crimes" for events in Darfur. Similarly, in 2011 the Court issued the arrest warrant for Libyan leader Muammar Gadhafi, his son Saif Al-Islam Gadhafi and Abdullah Al-Senussi for the "crimes against humanity".[109] These practices of the Court were in line with the essence of article 27 of the Statute. Article 27 is exhaustive for all purposes, however, article 98 of the Statute places certain limitations over the exercise of these powers of Court.[110]

---

[106] Article 27: "Irrelevance of official capacity, (1). This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

[107] *Democratic Republic of Congo v. Belgium*, ICJ, 2002.

[108] Warrant of Arrest for Omar Hassan Ahmad Al Bashir issued by the Pre-Trial Chamber on 04th March, 2009 in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-1.

[109] Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi issued by the Pre-Trial Chamber on 27th June, 2011in *The Prosecutor v. Saif Al-Islam Gaddafi*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-2.

[110] Article 98: "Cooperation with respect to waiver of immunity and consent to surrender, (1). The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. (2). The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the

Thus, it can be held that the principle of sovereign immunities is no more absolute rather the removal of official's immunity clauses in various international treaties have created strong exceptions to this principle. The claim regarding absolute sovereignty as well as domestic jurisdiction is restricted due to operation of international rules and principles which are binding in nature.[111] Likewise, the traditional concept of immunity from criminal prosecution which was in fact an impunity is no more relevant in criminal prosecution.[112]This aspect of ICL has devastating impacts for the domestic jurisdiction of states where under the official immunities were granted to certain officials. Besides ICL, other branches of PIL such as IHRL, International Environmental Law, International Investment Law and Arbitrations, International Economic and Commercial Law too carries overriding impacts for the domestic jurisdiction of states.[113]

6. Conclusion

The legitimate claim of states regarding exercising jurisdiction is based on the principle of domestic jurisdiction as oppose to universal jurisdiction. The factual aspect of domestic jurisdiction on the other side is rooted in the theory of state sovereignty. Sovereignty in legal sense, is in fact the ability of state to exercise control and authority both internally as well as

---

consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

[111] *See* Robert Cryer "International Criminal Law vs State Sovereignty: Another Round?," *European Journal of International Law* 16, no. 5 (2005): 979-1000.

[112] Benjamin N. Schiff, "Universalism Meets Sovereignty at the International Criminal Court," in *Negotiating Sovereignty and Human Rights Actors and Issues in Contemporary Human Rights Politics*, eds, Noha Shawki and Michaelene Cox (England: Ashgate Publishing Limited, 2009), 60. The International Criminal Court that came into force in 2002 expresses the member states commitment to hold individuals accountable for committing the most serious international crimes- "war crimes, genocide, crimes against humanity and possibly the crime of aggression". The Rome Statute of 1998 challenges the Westphalian model of state sovereignty by regarding the individuals apart from the states either acting on their own or as state official, inside their own states' territories or on the territory of other states. Further, it constrains the sovereignty of states by creating obligations: the obligation to implement the Court statute in their domestic law, and the obligation to cooperate with the Court.

[113] *See generally* M. Cherif Bassiouni, "The Future of Human Rights in the Age of Globalization," *Denver Journal of International Law and Policy* 40, no. 1 - 3 (2011-2012): 22-43; M. Cherif Bassiouni, *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Cambridge – Antwerp – Portland: Intersentia, 2015).

externally. Different legal and political thinkers associate the idea of sovereignty with the absolute politico-legal authority of state or ruler. However, in the post-UN international legal order there are certain limitations for both sovereignty and domestic jurisdiction. For instance, article 2(7) of the UN Charter explicitly stipulates that in matters of international peace and security and humanitarian matters, the domestic jurisdiction clause would not oust the intervention of UN. Thus, the scope of domestic jurisdiction has been reduced in many ways.

Similarly, in the post-UN international legal order the state sovereignty has also lost its absoluteness which was once rendered a strong ground to oust all the external elements to interfere within the state's internal affairs. In fact, it is the modern technological advancements and cross border flow of goods, money and even human population that are beyond the sovereign control of states. Likewise, the traditional principle of sovereign immunities upon which certain states' officials were granted immunity from criminal prosecution both before the national courts as well as foreign and international courts has lost its validity, since at different occasions the official's immunity has been declared altogether irrelevant. This progression in ICL has restricted the scope of the domestic jurisdiction where under such immunities were granted. In nutshell, in the post-UN legal order especially under the ICL universal jurisdiction has got primacy over domestic jurisdiction of states in certain matters.