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Redefining State Sovereignty: International Tribunals and Human Rights

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## ABSTRACT

### Redefining State Sovereignty: International Tribunals and Human Rights

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In the current nation-state system state sovereignty is often seen as a way for state officials to escape accountability. International tribunals in the 20th century have helped deliver accountability in certain regions: but how is state sovereignty affected by the formation of these tribunals? While new concepts such as the Responsibility to Protect have created the idea of a “contingent sovereignty” within the human rights regime, do tribunals replicate this line of thinking? What aspects of sovereignty have changed over time and which ones have been retained within the regime? To what extent do criminal tribunals represent a limitation on state sovereignty? My thesis evaluates and answers the question of how the jurisdiction of these tribunals is established, and how these tribunals have effected state sovereignty in the human rights regime.

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## **Introduction**

The growth of the human rights regime and the formation of international criminal tribunals have challenged traditional aspects of state sovereignty. Using Schmitt's definition of sovereignty as a reference, the inquiry at hand will evaluate to what extent criminal tribunals represent a limitation on state sovereignty on some countries and not others, and examine which aspects of state sovereignty have been maintained in these tribunals and which have not. Thus the paper will assess whether or not a new conceptualization of sovereignty is evolving within the human rights regime with the formation of international tribunals.

The inquiry of this paper will be limited in scope to three tribunals, the International Military Tribunal, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. I choose to include the International Military Tribunal since it represents a basis for the further creation of such tribunals and because it was an important step for the human rights movement in creating accountability for major crimes, although the term genocide had yet to be coined at the time of the trials. The ICTY and ICTR were important to include because they were established by the UN to prosecute crimes that were prosecuted at Nuremberg. Due to the fact that they were established by the UN and are not treaty-based they are important to analyze because they would have greater implications on state sovereignty than courts that are treaty-based. It is for this reason that I chose not to include the International Criminal Court and International Court of Justice in my research.

In order to analyze how these tribunals (re)define sovereignty it is necessary to investigate the ways in which sovereignty has been defined, and the ways in which it has changed so as to be used in current governments and nation-states. The Treaty of Westphalia was written in 1648 to end religious conflict in Europe and established areas with “single overriding

authorities”.<sup>1</sup> These authorities were the ruling powers in states<sup>2</sup>, and the treaty developed a “hands-off” conception of sovereignty, that author Jackson Nyamuya Maogoto refers to as an “iron curtain-like” version of state sovereignty.<sup>3</sup> This version of sovereignty prevented interference from other state powers over areas that each authority was acknowledged to have control and power over. This version of non-interference meant that accountability was not enforced by outside sources from other areas or territories. This meant, that unlike modern day conceptions of sovereignty authority figures were only accountable to those within their territory and not to other rulers or persons outside of their own territories (at least in theory). Notably, Maogoto claimed that “the post–World War II international trials pierced the Westphalian veil of sovereignty by directly challenging and trumping the dictates of national law”.<sup>4</sup> The inquiry of this paper will be to evaluate whether or not this claim is true for all three tribunals and the way in which they were established and whether or not it was merely the Westphalian version of sovereignty that was impacted by the human rights regime.

William Rasch calls Hobbes “the most interesting and influential early-modern philosopher of sovereignty”.<sup>5</sup> Hobbes’ state of nature is one in which man is inherently in a state

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<sup>1</sup> Maogoto, Jackson Nyamuya. "Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept." *Re-envisioning Sovereignty: The End of Westphalia?* Ed. Trudy Jacobsen, Charles Sampford, and Ramesh Thakur. Aldershot, England: Ashgate, 2008. 211. *ProQuest Ebrary*. Web. <<http://site.ebrary.com.ezproxy.cul.columbia.edu/lib/columbia/reader.action?docID=10218502>>. (Henceforth Maogoto, Jackson Nyamuya. "Westphalian Sovereignty in the Shadow of International Justice?")

<sup>2</sup> "Treaty of Westphalia." *The Avalon Project*. Yale Law School, Web. <[http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp)>.

<sup>3</sup> Maogoto, Jackson Nyamuya. "Westphalian Sovereignty in the Shadow of International Justice?." 211.

<sup>4</sup> Maogoto, Jackson Nyamuya. "Westphalian Sovereignty in the Shadow of International Justice?." 216.

<sup>5</sup> Rasch, William. "From Sovereign Ban to Banning Sovereignty." *Giorgio Agamben: Sovereignty and Life*. Stanford, CA: Stanford UP, 2007. 101. Print. (Henceforth Rasch, William. "From Sovereign Ban to Banning Sovereignty.")

of war and conflict with one another.<sup>6</sup> Individuals can enter into what Hobbes calls a “common-wealth”, in order to overcome or supercede the state of nature, “to live peaceably amongst themselves, and be protected against other men”.<sup>7</sup> Hobbes’ sovereignty seems, at a glance, to be in discord with conflict then, as entering into a common-wealth is intended to eradicate conflict between individuals. However, Hobbes still gives the sovereign power the right to enter into war “with other Nations”<sup>8</sup>. Of course, this right was intended to be used when it was for the good of the common-wealth or “publique good”.<sup>9</sup> Indeed, it seems apparent that Rasch was correct when identifying Hobbes’ sovereignty as the most influential of early-modern philosophers, as this conception of a sovereign power is not much different from traditional views of modern sovereignty, in which governments (defined by their territory) could engage in war with other nation-states under the claim that it was to protect their own citizens. Indeed, we have seen that the relatively new concept of conflict outside of the traditional nation-state has meant an expansion of international law, such as the Geneva Conventions, so as to recognize non-state actors that may be engaged in conflict with recognized nation-states. This highlights the need for a re-defining moment for sovereignty and is one of the reasons I will choose a different working definition of sovereignty when analyzing the foundational documents that formulate international tribunals.

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<sup>6</sup> Rasch, William. "From Sovereign Ban to Banning Sovereignty." 101.

<sup>7</sup> Hobbes, Thomas. *Leviathan*. Vol. 2: *The English and Latin Texts*. Ed. Noel Malcolm. The Clarendon Edition of the Works of Thomas Hobbes, Vol. 4. Oxford: Oxford UP, 2012. 264. *Oxford Scholarly Editions Online*, 26 Sep. 2013. Web. (Henceforth Hobbes, Thomas. *Leviathan*.)

<sup>8</sup> Hobbes, Thomas. *Leviathan*. 274.

<sup>9</sup> Hobbes, Thomas. *Leviathan*. 274.

Carl Schmitt's working definition of sovereignty is well-known, "he who decides on the exception"<sup>10</sup> is the person who is sovereign according to Schmitt. This definition has several important ramifications. One of the most important is that treating the sovereign as such means that this person or group has the authority to declare a state of exception when "normal" laws, rules, and codes of conduct are, for the time being anyway, not applicable under whatever circumstances it has been deemed fit to declare a state of exception. This definition is perhaps the most practical one, as it does not worry itself with defining boundaries or specified territories, or even nationalities for that matter. It hits at the heart of what it means to be a sovereign power: those who have the power to determine the guiding principles of those they have power over and decide when to change the state of affairs. Schmitt's definition is the most useful when observing tribunals, as he explains that "the rule proves nothing; the exception proves everything".<sup>11</sup> The tribunals this paper will discuss certainly represent cases of exception and extraordinary circumstances, both by the crimes committed and by the legal proceedings following. I find Schmitt's definition particularly useful in the current nation-state system because the "power", governmental organization, or nation-state that decides what merits an exception is not always specifically codified in legal code. Particularly in the case at hand, when new tribunals and precedents are being established political pull seems to be an important and relevant aspect at play. Thus, utilizing this definition will provide a clearer basis for the inquiry at hand.

Schmitt's definition, at first glance, will not seem particularly different from that of a monarch in the time of Westphalia and is incompatible with the modern constitutionalist state.

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<sup>10</sup> Schmitt, Carl. *Political Theology Four Chapters on the Concept of Sovereignty*. Trans. George Schwab. Intro. George Schwab. Foreword Tracy B. Strong. Chicago and London: U of Chicago, 2005.5. Print. (Henceforth Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*.)

<sup>11</sup> Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. 15.



However, Schmitt “rescues” his definition of sovereignty by clarifying that the constitution of a state can “indicate who can act in such a case”<sup>12</sup>, speaking to a state of emergency in which a state of exception can be declared. Schmitt acknowledges that many philosophers posited the sovereign power with having received authority from a higher power, “everything in the nineteenth century was increasingly governed by conceptions of immanence”.<sup>13</sup> By the time of Schmitt’s writing he claims that “most educated people” will no longer believe in a source of divine transcendence to instill power in the sovereign. He thus claims that most people will find a “positivist indifference toward any metaphysics” or a “more or less clear immanence-pantheism”<sup>14</sup> in their analysis of sovereign power. Indeed it seems that abandoning metaphysical considerations of sovereignty may be the most practical route, especially for scholars of human rights, who are more concerned with what a sovereign power can do than where the power of a given sovereign comes from.

Schmitt’s definition thus serves us two purposes in our current inquiry- it allows us to analyze sovereignty in a way that is not outdated with the current political state, and also that it rids us from a number of metaphysical and logical considerations that other foundations of sovereignty would present us with. To discuss the sovereign as one who can decide on the exception, especially in regard to international tribunals and international law it seems pertinent and necessary to analyze the sovereign and the rule of law. Schmitt, and indeed a number of other philosophers such as Rasch, who uses Russell’s law of the excluded middle to explain “sovereign self-exemption”,<sup>15</sup> recognize that the sovereign is both within and out of the law or

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<sup>12</sup> Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. 7.

<sup>13</sup> Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. 49.

<sup>14</sup> Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. 50.

<sup>15</sup> Rasch, William. "From Sovereign Ban to Banning Sovereignty." 93.

legal order.<sup>16</sup> This presents a logical problem, but yet again, Schmitt's claim that the sovereign can decide on the exception means that the sovereign is "bound to the normally valid legal order but also transcended it".<sup>17</sup> This ability to transcend above the law is precisely what makes a sovereign power sovereign. It does not entirely solve the logical problem, but when the sovereign exercise the power of exception, the "normally valid legal order" is no longer relevant as the sovereign can change and suspend the rules of the legal order so that the apparent contradiction is solved as the sovereign will thus be within the newly created legal order and outside of the previous legal order. The seeming contradiction is not truly an issue however, as it is the new legal order to which the sovereign is bound because the state of exception has suspended the old, precisely because of the ability for the sovereign to declare a state in which it is necessary to be outside the former legal order. As soon as a state of exception is declared the sovereign is within a new working rule of law. This creates a state of sovereignty that legal positivists will balk at, but it provides the best working definition to analyze tribunals as international criminal law has also strayed from legal positivism when trying crimes ex-post facto as well as establishing the jurisdiction to do so.

## **IMT**

The International Military Tribunal was established to prosecute a number of crimes committed in the course of World War II. While genocide was not yet the name for such international crimes, the atrocities witnessed during the Holocaust at the hands of German guards and officials were prosecuted as crimes against humanity. The tribunal was established by the

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<sup>16</sup> Rasch, William. "From Sovereign Ban to Banning Sovereignty." 93-94.

<sup>17</sup> Schwab, George, and Carl Schmitt. "Introduction." *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago and London: Chicago UP, 2005. Xliii-xliv. Print.

United States, Great Britain, France, and the Soviet Union.<sup>18</sup> Notably, these countries had fought against Germany in WW II, which has led some people to cite the trials as “victor’s justice”. Nevertheless, the point of this inquiry will be to evaluate how the tribunal was established and how we can interpret the legal justification and reasoning keeping Schmitt’s sovereignty in mind.

Robert Fine identifies the main arguments made by defendants at Nuremberg, one of which was that the charges brought up for crimes against humanity were not valid, as they were not clearly outlined as law.<sup>19</sup> He also points out that the fact that crimes that could be tried as crimes against humanity “had to be committed against civilian populations, have some connection with war, and be carried out as part of a systematic governmental policy”<sup>20</sup> acted as a “limiting factor”.<sup>21</sup> The Charter of the IMT outlines the jurisdiction for crimes against humanity in Article 6, where the crime is also defined: “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>22</sup>

This is the crime that is the most equivalent to compare to the crime of genocide that will be prosecuted decades later in the ICTY and ICTR. Article 6 both outlined crimes against

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<sup>18</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*. Yale Law School, Web. <<http://avalon.law.yale.edu/imt/imtconst.asp>>. (Henceforth "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.)

<sup>19</sup> Fine, Robert. "Crimes Against Humanity: Hannah Arendt and the Nuremberg Debates." *European Journal of Social Theory* 3.3 (2000): 300. *SAGE Journals*. Web. (Henceforth Fine, Robert. "Crimes Against Humanity...")

<sup>20</sup> Fine, Robert. "Crimes Against Humanity..." 294.

<sup>21</sup> Fine, Robert. "Crimes Against Humanity..." 294.

<sup>22</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.

humanity, and established jurisdiction for the crime. The reference as to what allowed for this jurisdiction was the agreement referred to in the Charter in Article one (the London Agreement), between the Allied powers.<sup>23</sup> The London Agreement, and therefore the jurisdiction receives its power from the four countries who established this Charter. All of these were clearly in a position to hold authority over the Allied Axis countries, who had just lost the war. The article to establish jurisdiction then, gets its authority by referencing the same document, which has clear implications for the regard for the sovereign state at the time the Charter was being written. The Westphalian model of sovereignty failed after WW II, as a system of nation-states that were, at face value, taken to be equivalent, was dependant upon political backing by the nation state. After the war Germany did not have the political power that the Allied countries did, which allowed them to establish the trials.

Philosopher Karl Jaspers claimed that the trials at Nuremberg (which included the IMT) “undercut”<sup>24</sup> national sovereignty because it allowed for state officials and head of governments to be prosecuted, this was allowed for in Article 7 of the Charter. While this may have been a step towards eradicating impunity for gross violence on the part of government officials, it also meant that Germany had its sovereignty “undercut”, but that the Allied countries, who also committed war crimes, were able to maintain their sovereignty after the war.

This sovereignty was further impeded upon in Article 8, which maintained that the claim that a defendant was following orders did “not free him from responsibility”<sup>25</sup> of crimes outlined

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<sup>23</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.

<sup>24</sup> Fine, Robert. “Crimes Against Humanity..” 294.  
Fine draws this analysis from Jasper’s book, *The Question of German Guilt*:  
Jaspers, Karl. *The Question of German Guilt*. New York: Capricorn, 1961. Print.

<sup>25</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.

in the Charter. This yet again displayed that Germany's political power and claim to equal sovereignty was null in the tribunal. The Allied countries declared the commands of the German government to no longer have weight, essentially making Germany a lesser sovereign or arguably implying that it no longer had sovereignty at all.

The Nuremberg Military Trials, run strictly by the US after the IMT,<sup>26</sup> also prosecuted Germans for crimes committed during the war. In a memorandum to Telford Taylor, the chief prosecutor for the Nuremberg Trials, Robert Kempner sent the notes of Mr. Fried on April 3, 1947. Notably, Fried began by stating that "The entire recent development of International Law is in the direction of limiting the concept of sovereignty"<sup>27</sup>. He continues to note that Germany, however, is not a sovereign state, "as a result of the unconditional surrender and the complete collapse and disintegration of the German State machinery"<sup>28</sup>. So he first states that sovereignty is becoming limited in international law, and then proceeds to nullify the need for this claim by noting that Germany is not a sovereign state anyway.

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<sup>26</sup> "International Military Tribunal at Nuremberg." *United States Holocaust Memorial Museum*. United States Holocaust Memorial Council, 29 Jan. 2016. Web.  
<<https://www.ushmm.org/wlc/en/article.php?ModuleId=10007069>>.

<sup>27</sup> Fried's Notes:

Fried, John. "Question: Does This Tribunal Possess Jurisdiction to Try, and If Found Guilty to Convict German Citizens or Citizens of Any Other Country, for Crimes against German Citizens?" 1.

These notes come from a letter from Robert Kempner to Taylor:

Kempner, Robert M.W. "Jurisdiction in Cases of "Germans against Germans"" Letter to Telford Taylor. 3 Apr. 1947.

(These documents can be found in archived documents in the Rare Book and Manuscript Library at Columbia University, found in the files of Telford Taylor, this specific document can be in box 26 of the Telford Taylor papers, in the folder labeled "NMT-Correspondence and Reports-Crimes Against Humanity (1947)", which is in series 5, subseries 1, box number 1, folder 2)

(Henceforth Fried, John. "Question: Does This Tribunal Possess Jurisdiction...")

<sup>28</sup> Fried, John. "Question: Does This Tribunal Possess Jurisdiction..." 1.

Freid claims that “the occupying powers exercise sovereignty in Germany”.<sup>29</sup> While this comment was made in the context of defending the jurisdiction of the Nuremberg Military Trials to prosecute German citizens for crimes against other German citizens, it certainly is applicable to the IMT as well. What this supports is that the formation of the IMT also represented a limitation or complete nullification of Germany’s sovereignty, because the Allies controlled the proceedings.

As already pointed out, the establishment of crimes against humanity was met with contention, but the IMT also included war crimes and crimes against peace.<sup>30</sup> The Charter explicated in Article 6 that crimes against peace included “waging of a war of aggression, or a war in violation of international treaties”.<sup>31</sup> In the course of the Nuremberg Military Tribunals the concept of aggressive warfare that was established by the Charter of the IMT was challenged. In a letter from Frederick J. Libby to Senator Clyde R. Hoey, Libby cited Taylor’s Information Bulletin, from the magazine of US Military Government in Germany, the Bulletin noted that “the concept of the crime of aggressive warfare” was “challenged as legally invalid under the principle *nullum crimen nulla poena sine lege*. (No crime and no penalty without law.)”<sup>32</sup>

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<sup>29</sup> Fried, John. "Question: Does This Tribunal Possess Jurisdiction..."<sup>1</sup>.

<sup>30</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.

<sup>31</sup> "Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal." *The Avalon Project*.

<sup>32</sup> Libby, Fredrick J. "Smoke of Controversy Marks Judicial Fire." Letter to Clyde R. Hoey. 5 July 1949. MS. Washington, D.C. 1.

The quote referenced in the letter came from the source below:

Taylor, Telford. "Information Bulletin, Magazine of US Military Government in Germany." May 31, 1949.

(The letter containing this quote can be found in archived documents in the Rare Book and Manuscript Library at Columbia University, found in the files of Telford Taylor, this specific document can be in box 26 of the Telford Taylor papers, in the folder labeled “NMT-Correspondence (1947-1949)”, which is in series 5, subseries 1, box number 1, folder 1)

The Judgement of the Law of the Charter, however, did confront this. Noting that, “the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice”.<sup>33</sup> The Judgement identifies the relevant international treaties that established general principles of warfare. Before exploring these however, it seems important to un-pack the statement that what was occurring was not a “limitation” of sovereignty but a “general principle of justice”. This claim, seems largely to be a way to establish a new perception of sovereignty, and set a precedence for future tribunals. I make this claim because upholding principles of justice is something that is inherently related to sovereign power. Hobbes’ common-wealth raises man out of the state of nature, by ensuring that certain rules of society are kept amongst the individuals in society,<sup>34</sup> in the state of nature man is constantly in conflict<sup>35</sup>. The establishment of rules, law, and society then are inherently tied to sovereignty. Of course, my claim here could be argued. As Hobbes’ wrote hundreds of years ago, and perhaps his beliefs about the “state of nature” could be considered irrelevant to the current structure of societies and nation-states, especially in light of the large numbers of stateless persons that do not engage in conflict with one another. However, even so, the enforcement of “justice” is usually maintained by the government and/or police force of a sovereign state, and what makes these enforcements and rules hold any meaningful power is that they are established and enforced by the backing of the state. To differentiate between sovereignty and enforcing justice is creating a false dichotomy for all intents and purposes. What is considered just, and what rules need to be enforced, what justice needs to be upheld, is usually decided by the sovereign. In light of this it appears the only

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<sup>33</sup> "Judgment : The Law of the Charter." *The Avalon Project*. Yale Law School, Web. <<http://avalon.law.yale.edu/imt/judlawch.asp>>. (Henceforth "Judgment : The Law of the Charter." *The Avalon Project*.)

<sup>34</sup> Hobbes, Thomas. *Leviathan*. 264.

<sup>35</sup> Rasch, William. "From Sovereign Ban to Banning Sovereignty." 101.

way to rescue the claim that it was not a “limitation” on sovereignty is to view the occupying powers who established the IMT to be the sovereign power at the time of establishment.

In concession, “general principle of justice” is likely more a claim to a universal sentiment of justice and morality than the enforcement of justice as legal systems domestically. The Judgement explicates, “To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”<sup>36</sup>

At the time of WW II countries and territories were more inter-connected, so this general principle could be a reference to sentiment amongst most countries at the time. If so, then the statement can only mean that there was a limitation of sovereignty occurring, one in which acts of a nation-state did not align with general sentiment and thus other nations used political power, in line with this general sentiment, to directly hold accountable the outlier.

In order to assert that justice was being enforced the Judgement references the several treaties that it relies upon to establish international law, and respond to the argument that the crimes being prosecuted were legally invalid. The Judgment notes that Germany violated the Kellogg-Briand Pact by waging war, and that this violation was essentially an international crime. However, “the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars.”<sup>37</sup> The Tribunal then proceeded to say that since violations of the Hague Convention of 1907 have been tried by military tribunals, “those who wage aggressive war are doing that which is equally illegal”<sup>38</sup> and can thus be tried in tribunals. The Judgement

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<sup>36</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>37</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>38</sup> "Judgment : The Law of the Charter." *The Avalon Project*.



again references principles of justice: “The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.”<sup>39</sup>

The Judgement points out that a draft Treaty of Mutual Assistance as well as the 1924 Protocol for the Pacific Settlement of International Disputes made it clear that leading countries agreed that aggressive war was considered an international crime. “Although the Protocol was never ratified, it was signed by leading statesmen of the world”.<sup>40</sup> At the time however, while Italy and Japan were members of the League, Germany was not.<sup>41</sup> In 1927 all members, which included Germany by this point, adopted a declaration that stated “a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime...”.<sup>42</sup> In addition, the Judgement identified that “(t)he unanimous resolution of the 18th February, 1928, of twenty-one American Republics of the Sixth (Havana) Pan-American Conference” posited war of aggression as an international crime.<sup>43</sup>

While these declarations, treaties, and agreements may all be essential to making the claim that an international crime had been committed, the structure for legal recourse remained unanswered. To this the Judgement answered with the Treaty of Versailles as evidence that the Tribunal was a valid way to prosecute both the crimes that it had clearly outlined and

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<sup>39</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>40</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>41</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>42</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

The quote itself comes from a declaration at a meeting of the Assembly of the League of Nations on September 24th, 1927, a direct citation to the record of the meeting was not available at the above source.

<sup>43</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

international crimes. The Treaty of Versailles in 1919, clearly stated that Germany submitted to Allied powers the right to “bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.”<sup>44</sup>

The Judgment then proceeded to establish that “individuals can be punished for violations of international law”<sup>45</sup>, and that international law was relevant to individuals and not just sovereign states.<sup>46</sup> Without delving too much into this statement, it seems this claim is quite obvious not only because of past cases, but also because sovereign states function and derive power from individuals. It is a constant paradox of sovereign power that the sovereign receives power from individuals yet individuals are restrained by those who are considered sovereign. Thus if a sovereign state can be considered to have broken a law then certainly so can individuals. The Tribunal however felt it necessary to establish that following orders was not an excuse for international violations, while it could be a factor taken into consideration (this is spelled out in Article 8 of the Charter). The Tribunal explicated that “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”<sup>47</sup>

To this point I would have to contend that the Charter was here setting an important precedent in claiming that individuals had obligations to their countries, as well as the international community. There is not much of an argument other than answering to commands that holds up to the claim that individuals can be tried for international crimes. Military tribunals

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<sup>44</sup> "The Versailles Treaty June 28, 1919: Part VII." *The Avalon Project*. Yale Law School, n.d. Web. <<http://avalon.law.yale.edu/imt/partvii.asp#art228>>.

<sup>45</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>46</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>47</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

are, and were, not new. However, military tribunals were done not internationally but held domestically.<sup>48</sup> That wars of aggression were international crimes was clearly established by the Judgement of the Charter: but could the Treaty of Versailles extend to all future wars to assume that Germany would always concede to being tried by the Allied powers? Especially in view of the fact that Germany withdrew from the League of Nations, the Covenant of which served as Part I of the Treaty of Versailles<sup>49</sup> in 1933.<sup>50</sup> In addition, after WW I, the tribunals agreed to in the Treaty were held domestically.<sup>51</sup> The Judgement notes that “the law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition,”.<sup>52</sup> This may be true yet up to this point in history there was nothing “customary” in the holdings of military tribunals that were not held domestically.

In a telegram/memorandum to General Taylor in 1947 from the WDSCA, on April 15th 1947 references James G McDonald, the High Commissioner for Refugees from Germany :

“Apart from the Upper Silesia Convention of May 1922, Germany does not appear to be expressly bound by a treaty obligation providing for equal citizenship of racial, religious, or linguistic minorities. But the principle of respect for the rights of minorities has been during the last three centuries hardening into an obligation of the public law of Europe. That principle as recognized in some of the most important international instruments of the nineteenth century. I may refer to the provisions of the Congress of Vienna, the Treaty of Guarantee following upon the union of Belgium and Holland, the collective recognition of the

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<sup>48</sup> Lewis, Mark. "Judicial Resistance? War Crime Trials after World War I." *OUPblog*. Oxford University Press, 30 Jan. 2015. Web. <<http://blog.oup.com/2015/01/world-war-one-war-crimes-trials/>>. (Henceforth Lewis, Mark. "Judicial Resistance? War Crime Trials after World War I.")

<sup>49</sup> "The League of Nations, 1920, Milestones: 1914-1920." *Office of the Historian*. Bureau of Public Affairs, U.S. Department of State, n.d. Web. <<https://history.state.gov/milestones/1914-1920/league>>.

<sup>50</sup> "Withdrawal of Germany from the League of Nations. Letter from Konstantin Von Neurath." *Word Digital Library*. U.S. Library of Congress, Oct. 19th 1933. Web. <<https://www.wdl.org/en/item/11598/>>.

<sup>51</sup> Lewis, Mark. "Judicial Resistance? War Crime Trials after World War I."

<sup>52</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

independence of Greece, the creation of the autonomous principalities of Moldavia and Wallachia.”<sup>53</sup>

This correspondence occurred in the context of the Nuremberg Military Trials, yet it seems important to consider the discussed “principle” in light of the establishment and codification of crimes against humanity in the Charter of the IMT. The argument that the actions outlined in the Charter as crimes against humanity were within the jurisdiction of the IMT is probably best represented by a basic appeal to customary law. Here I find it necessary to again note that Germany withdrew from the League of Nations. Although of course none of the mentioned treaties clearly outlined crimes against humanity, they do support McDonald’s claim that a respectable treatment towards minorities was becoming customary, yet the actual codification of crimes against humanity and subsequent prosecution still represent something new in international law and as such can definitely be seen to re-cast sovereignty within the human rights regime, serving as a statement about accountability.

Of course, fear that justice would not truly be carried out if military tribunals were held domestically was a legitimate one, as after WW I the trials in Germany were of “limited scope”.<sup>54</sup> To prevent this from occurring once again, especially in light of the numbers of lives lost because of policies implemented by the Nazi party, the International Military Tribunal may better have served justice. Past history suggests that a domestic tribunal would not have been as far-reaching as the IMT. However, it important to remember that the Allied powers also

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<sup>53</sup> WDSCA WC. Letter to Telford Taylor. 15 Apr. 1947. 2.

The quote itself is from a statement from McDonald to the Secretary General of League of Nations on 27 December, 1935.

(This was also found in the Rare Book and Manuscript Library at Columbia University. This specific document can be in box 26 of the Telford Taylor papers, in the folder labeled “NMT-Correspondence and Reports-Crimes Against Humanity (1947)”, which is in series 5, subseries 1, box number 1, folder 2)

<sup>54</sup> Lewis, Mark. "Judicial Resistance? War Crime Trials after World War I."

committed war crimes in the course of WW II, yet it was the Axis powers who would be tried under the IMT. This perhaps hits at the biggest tension in the sovereignty debate. While the Judgement of the Charter claims that the Charter did not limit sovereignty, the “general principle of justice”<sup>55</sup> seemed to be only applicable to Axis powers, while individuals who committed war crimes on the Allied side would not be tried in international tribunals, if at all. Those with the most political power retained their sovereignty while others did not.

So what can be taken away from the sovereignty debate over the IMT? The IMT tried crimes that were not clearly outlined in international law, but were supposedly established by custom, paving the way to a new precedent for international law. It is clear that by this point the German government, after surrendering, was under control of the occupying powers. Here it is necessary to consider what territorial control implies for sovereignty. Notably, Andreas Osiander wrote that “the prevalence of the Westphalian myth in IR is the result of nineteenth- and twentieth-century historians adopting a certain standard account of 1648”.<sup>56</sup> It seems that if the concept of a Westphalian sovereignty was created by 19th and 20th century historians then it was also still disregarded in politics amongst the international community. Fried’s point that with the defeat of Germany the occupying powers represented the sovereign in the nation-state territory is in line with Schmitt’s view. A sovereign power has the ability to decide what constitutes the state of exception, and the occupying powers did just that. In choosing which crimes (and in fact writing the first official texts of some crimes) they both created law and then chose when and to whom it would be applied, notably that Allied individuals were not under this umbrella. As a law making body, and also in deciding when these laws could be put on “hold” so to speak for a state

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<sup>55</sup> "Judgment : The Law of the Charter." *The Avalon Project*.

<sup>56</sup> Osiander, Andreas. “Sovereignty, International Relations, and the Westphalian Myth”. *International Organization* 55.2 (2001): 268. Web.

of exception, the actions of the Occupying powers certainly fall within what is allowed for by the sovereign.

If we accept the argument that Germany was no longer a sovereign state (Fried makes this claim in the context of the NMT<sup>57</sup>), then the formation of the IMT represents a transition of sovereignty to the occupying powers, not to the nation-state and the current recognition of territory that was the German government. Thus, the trial did limit sovereignty yet was in line with the Westphalian conception that territorial control was necessary for establishing a sovereign power. If so, the power came not from the people of Germany granting the Allies sovereign power, but more so from the international community as well as the political power gained from the triumph of the Allies. Yet, the Tribunal did represent a shift in the conception of sovereignty by establishing the jurisdiction to prosecute heads of state, as previously the “hands-off” policy of Westphalian or traditional sovereignty meant that rulers and governments were free to act within their nation-state without being held accountable. The concept of Westphalian sovereignty was only partially maintained in the creation of the Charter, because while the territory was now under the control of a different government, the prior government could now be held responsible for actions in their own nation-state of which they, at one point, had sovereign power in. The aspect of territorial control as an element of sovereignty remained intact in the regime, with the transfer of control to the Allied Powers, but sovereign immunity, and non-interference did not. In establishing the Tribunal and the right to prosecute all levels of state officials the Allies were declaring a state of exception to the norm. Schmitt’s definition is more fitting for this situation and allows us to see the impact that the human rights regime, in the creation of tribunals to hold individuals accountable, had on the way sovereignty is treated in the international community.

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<sup>57</sup> Fried, John. "Question: Does This Tribunal Possess Jurisdiction..."<sup>1</sup>.

What this means for the human rights regime may not be clear, as the United Nations was just getting under way, but it seems that if the IMT represented justice and accountability for gross violations of human rights, to do so meant that the German government could no longer be the sovereign power in its own country. It's certain that if sovereignty was no longer being regarded in international law as a valid concept for remaining above accountability, the cases in which sovereignty were made invalid were chosen selectively. The argument may of course be made that this is because the Holocaust in Germany far exceeded the brutality of war, yet remember that this was the first international military tribunal, and there was not one after the Armenian genocide. Does the concept of a "contingent sovereignty" really hold for international tribunals or is sovereignty disregarded after a "weak" state commits violations but not when a "strong" one, such as the states of the Allies, commit violations? In order to assess if this is truly how the regime ensures accountability it is necessary to look at responses by the international community and the UN in other similar situations. In order to do so academic and human rights activists would have to wait almost fifty years.

## **ICTY**

The International Criminal Tribunal for the Former Yugoslavia was established by the Security Council of the United Nations in 1993.<sup>58</sup> The tribunal, similar to the IMT prosecuted individuals for crimes against humanity, and, in addition the crime of genocide was prosecuted<sup>59</sup> (a term that since WW II had been codified into international law). The Tribunal made a firm

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<sup>58</sup> "About the ICTY." *The United Nations International Criminal Tribunal for the Former Yugoslavia*. The United Nations International Criminal Tribunal for the Former Yugoslavia, n.d. Web. <<http://www.icty.org/en/about>>. (Henceforth "About the ICTY." *The United Nations International Criminal Tribunal for the Former Yugoslavia*.)

<sup>59</sup> "About the ICTY." *The United Nations International Criminal Tribunal for the Former Yugoslavia*.

statement about accountability in charging state officials<sup>60</sup> and even in the choice to create a tribunal through the Security Council. The creation of the ICTY was different than the IMT in several important ways: it was established by the UN, but those countries who created the IMT had been involved in the war leading up to Allied control, whereas the countries on the Security Council were not all directly affected by conflict in Yugoslavia. This may quell any thoughts of the ICTY being considered “victor’s justice” but the question to consider then is whether or not state sovereignty was respected differently in the ICTY than the IMT.

Resolution 827 declared that the conflict in the territory that was at one point Yugoslavia represented an international threat.<sup>61</sup> The Resolution also declared that the establishment of the tribunal was a power granted to the Security Council in the Charter of the United Nations, namely chapter seven.<sup>62</sup> Chapter VII does not expressly outline the capability to establish a tribunal,<sup>63</sup> but it does allow, in Article 39, that the Security Council “shall decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.<sup>64</sup> It is important to note that Article 40 says that the Security Council “may ....call upon the parties concerned to comply with such provisional measures as it deems necessary or

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<sup>60</sup> About the ICTY." *The United Nations International Criminal Tribunal for the Former Yugoslavia*.

<sup>61</sup> United Nations Security Council Resolution 827 (25 May 1993), UN Doc S/RES/827. 1. <[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf)>. (Henceforth UNSC Res. 827)

<sup>62</sup> UNSC Res. 827. 2.

<sup>63</sup> Bodley notes and further discusses this in her article *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*." See: Bodley, Anne. "Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia." *New York University Journal of Law and Politics* 31.2 (1 Jan. 1999): 428. *HeinOnline*. Web. (Henceforth Bodley, Anne. "Weakening the Principle of Sovereignty in International Law...")

<sup>64</sup> "Charter of the United Nations." *United Nations*. 24 October 1945. Web. <<http://www.un.org/en/sections/un-charter/chapter-vii/index.html>>. (Henceforth "Charter of the United Nations." *United Nations*.)



desirable”.<sup>65</sup> The Charter then does give the Security Council quite a wide range of actions to pursue, and while it explicitly lists certain actions, it does not outline the process of establishing a tribunal. This certainly puts those on the Council in a position of power, and with the power of the Permanent Five to veto the question becomes: can any of these countries ever be similarly checked by the international community?

There are two issues to consider in light of the Security Council Resolution. The first being that Yugoslavia was not existent at the time of the proceedings, and the second being whether or not the Security Council was acting in accord with the desires of the nation-states in establishing the Tribunal, and whether or not the council had consulted with these nation-states about prosecuting the crimes domestically.

The Socialist Federal Republic of Yugoslavia fell apart in 1991, as Croatia, one of the six republics of which made up Yugoslavia declared independence.<sup>66</sup> Yugoslavia signed and ratified the UN Charter in 1945,<sup>67</sup> however the countries that declared independence would not become members of the UN until 1992 and on (Montenegro did not become a member of the UN until 2006).<sup>68</sup> Notably, Bosnia and Herzegovina, Croatia, Slovenia, and the former Yugoslav Republic of Macedonia all became members of the UN prior to the establishment of the tribunal. In the

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<sup>65</sup> "Charter of the United Nations." *United Nations*.

<sup>66</sup> "The Conflicts." *United Nations International Criminal Tribunal for the Former Yugoslavia*. UN-ICTY, n.d. Web. <<http://www.icty.org/en/about/what-former-yugoslavia/conflicts>>. (Henceforth "The Conflicts." *United Nations International Criminal Tribunal for the Former Yugoslavia*.)

<sup>67</sup> "Chapter I Charter of the United Nations and Statute of the International Court of Justice-Declarations of Acceptance of the Obligations Contained in the Charter of the United Nations - Admission of States to Membership in the United Nations in Accordance with Article 4 of the Charter." *United Nations Treaty Collection*. United Nations, original date 24 October 1945 (status continually updated). Web. <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-2&chapter=1&lang=en#25](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-2&chapter=1&lang=en#25)>. (Henceforth "Chapter I Charter of the United Nations and Statute of the International Court of Justice-Declarations of Acceptance .." *United Nations Treaty Collection*.)

<sup>68</sup> Chapter I Charter of the United Nations and Statute of the International Court of Justice-Declarations of Acceptance .." *United Nations Treaty Collection*.

record of the Resolution 827 that established the ICTY, representatives from Bosnia and Herzegovina as well as Croatia were present at the Security Council meeting, and were allowed to participate in discussion, but were not granted a vote.<sup>69</sup> It is important to bear in mind that the genocide that occurred at Srebrenica was in the territory of Bosnia and Herzegovina, but this had not occurred at the time the tribunal was established. Croatia was also involved in the conflict in Bosnia, as Bosnian Croats declared independence with support from Croatia.<sup>70</sup> The genocide at Srebrenica, which was a UN safe area happened in 1995, and was “lead by the Bosnian Serb commander Ratko Mladić”.<sup>71</sup> Due to the fact that this is directly related to the crime of genocide, of particular interest to the inquiry at hand, and because the acts relevant happened after the establishment of the tribunal, there is no room for a claim that the tribunal and the crimes in its jurisdiction had not yet been established and were thus ex-post facto.

At the Security Council meeting in May 1993 comments relating to the establishment of the tribunal had to do with acts committed in Bosnia and Herzegovina, which was a member of the UN at the time, although the whole territory of the former Yugoslavia was considered to fall under the tribunal.<sup>72</sup> This is markedly different from the IMT as it is clearly obvious that the German government was not a part of the agreement by the Allied powers to establish the IMT. In this way, the sovereignty of Bosnia and Herzegovina was at least in play, so to speak, as a member, but they were not granted a vote at the Security Council meeting. Notably, multiple

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<sup>69</sup> This can be found on the second page of the provisional record of the meeting see: UN Security Council Provisional Verbatim Record of the three thousand two hundred and seventeenth meeting (25 May 1993), UN Doc S/PV.3217. 2. *UN-ICTY*. Web. <<http://www.icty.org/x/file/Legal%20Library/Statute/930525-unsc-verbatim-record.pdf>>. (Henceforth UNSC Provisional Verbatim Record of the 3217th Meeting.)

<sup>70</sup> "The Conflicts." *United Nations International Criminal Tribunal for the Former Yugoslavia*.

<sup>71</sup> "The Conflicts." *United Nations International Criminal Tribunal for the Former Yugoslavia*.

<sup>72</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 38,42.

representatives referred to Bosnia and Herzegovina's sovereignty during the meeting.<sup>73</sup> China, while voting in favor of the resolution called for a treaty to establish the tribunal and expressed “reservations”, stating that giving “the Tribunal both preferential and exclusive jurisdiction is not in compliance with the principle of State judicial sovereignty”.<sup>74</sup> Brazil noted a desire for the General Assembly to vote on the establishment of the tribunal,<sup>75</sup> so as to include more members in the voting and consideration of the Tribunal. This note is also important to evaluate as the Security Council President at the time claimed that “the entire international community that, through the Tribunal, will be passing sentence”<sup>76</sup> responding to the events in the Former Yugoslavia, and it raises the important question: who is the international community? The Security Council, with only five permanent members can surely not be considered the international community. Of course, these broad claims may be based on general sentiment, but then how is it decided who does the speaking for this community? I advocate that it is those with the most political power, not those that are necessarily representative of general sentiment amongst members of the UN. Brazil also noted disagreement that the Tribunal should be established by Security Council only, and instead suggested a Convention, but ultimately did vote favorably for Resolution 827 which established the Statute of the Tribunal.<sup>77</sup>

While some countries did note apprehension about the way that the Tribunal was established, the Tribunal was not setting precedent the way the IMT was. In the same meeting

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<sup>73</sup> UNSC Provisional Verbatim Record of the 3217th Meeting.

Cape Verde, Morocco, and Pakistan all referred to the sovereignty of Bosnia and Herzegovina, primarily in the context of the need to fully establish the sovereignty of Bosnia and Herzegovina.

<sup>74</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 33.

<sup>75</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 36.

<sup>76</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 44.

<sup>77</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 36.

Venezuela notes that the Tribunal does not have “the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law.”<sup>78</sup> The crimes that fell under the jurisdiction of the tribunal were pre-existing in the codification of international law. Japan also had reservations about the legal validity of the tribunal: “Perhaps more extensive legal studies could have been undertaken on various aspects of the Statute, such as the question of the principle of *nullum crimen sine lege* and on measures to establish a bridge with domestic legal systems”.<sup>79</sup>

The principle of “no punishment without a crime” was a concern as well during the IMT. The crimes covered by the Tribunal are international laws, and may not be written into domestic law or have clear prosecution guidelines codified, but all of the crimes covered do represent violations that should be covered by the UN Charter. Even if the laws have not been codified and implemented into domestic laws in nation-state territories at least some of the countries involved in the Tribunal had already become members of the UN by this point. In addition, all of the nation-states that represented the former Republic of Yugoslavia had become members of the UN before the Tribunal had ceased hearing trials. So while the resolutions that established the Tribunal were not a part of the Charter that the nation states agreed to uphold upon becoming members, certainly the principles in it were. While the Security Council created the Tribunal under Chapter VII, it does not mention tribunals explicitly. So creating an international tribunal to hold individuals accountable outside of the domestic remedies certainly represents a symbolic interjection into state sovereignty, if nothing else because it removes the need for domestic jurisdiction and justice systems, and creates a kind of international accountability that the nation-

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<sup>78</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 7.

<sup>79</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 24-25.

state in question may not subscribe to, yet is one that directly affects its citizens. Notably, after a time of conflict and civil war the legal remedies and justice system may not have had the appropriate resources to hear cases. The representatives of Croatia and Bosnia and Herzegovina did not make comments at the meeting to propose the statute of the Tribunal itself. Yet nor were they given a vote. The issue raised by Japan is relevant to consider in light of this as well. The fact that these nation-states did not get a vote, yet the nation-states on the Security Council did, certainly aligns with the critique by Japan that the establishment of the Tribunal was done so in a way that was not fully aligned with or recognized each nation-state as a sovereign power.

The Tribunal, international in nature, presents some tension with state sovereignty not merely because the countries involved were not granted a vote, but also because of the limitation that it places on domestic and national courts. Albright, the United States representative, noted that “every Government, including each one in the former Yugoslavia, will be obligated to hand over those indicted by the Tribunal.”<sup>80</sup> Placing an obligation on other nation-states, including those outside of the Security Council begs the question of whose sovereignty is nullified, if anyone’s by one group of countries demanding action from others. The President, while explaining that the Tribunal was not meant to “abolish nor replace national justice organs”<sup>81</sup>, also states that domestic courts were to “give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court”.<sup>82</sup> Multiple representatives noted that the international tribunal, according to articles 9 and 10 had primacy over domestic courts in the given territory, the former Yugoslavia. The representative of the UK

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<sup>80</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 13.

<sup>81</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 46.

<sup>82</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 46.

noted that the primacy of the international tribunal is not relevant in other nation-states unless “exceptional circumstances outlined in Article 10, paragraph 2” are relevant.<sup>83</sup> Turning directly to Articles 9 and 10 of the Statute, Article 9 establishes primacy but Article 10 goes somewhat further by declaring that, if a person had already been tried in a domestic court, the International Tribunal may try the same individual “only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.”<sup>84</sup>

The comments make it clear that the international tribunal held weight that national courts didn’t, and Article 10 presents another conundrum. If an individual was tried by the ICTY after being tried domestically then it is a direct judgement on the national courts who originally prosecuted the case. It is a direct limitation on sovereignty and the choice of what is and isn’t a legitimate trial is left to other nation-states. The representative from Morocco claimed that the Tribunal was a part of the process that was required to “restore the territorial integrity, unity and sovereignty of Bosnia and Herzegovina.”<sup>85</sup> This suggests that at least one country present who voted for the Tribunal felt that Bosnia and Herzegovina were not fully sovereign states. Does the establishment of an international tribunal help aid in this, or are those on the Security Council seen as white knights to aid in restoring sovereignty? The articles place limits on national sovereignty, so can it be that the tribunal was helping to restore it after conflict? The articles also

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<sup>83</sup> UNSC Provisional Verbatim Record of the 3217th Meeting. 19.

<sup>84</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*. United Nations, Sept. 2009. 7. Web. <[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)>. (Henceforth "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*.)

<sup>85</sup> UNSC Provisional Verbatim Record of 3217th Meeting. 27.

imply that the conception of all sovereign states being equal is not valid in the human rights regime, as certain states were given the power to decide whether or not domestic courts were valid or legitimate in trials related to crimes covered by the Statute. This removes the need for domestic courts to be directly involved in the prosecution, and in allowing and even encouraging domestic courts to give the international tribunal primacy over domestic courts, the domestic courts and national processes do not help establish and maintain accountability for human rights violations during the conflict. While this might be the most prudent and even the best decision in many cases it also puts a limitation on the judicial process at the national level.

In evaluating the statute itself, Article 13 outlines the judges who are to serve on the Tribunal. Permanent judges are to be elected by the General Assembly, but the list from which they are to be elected is one that is compiled by the Security Council.<sup>86</sup> *Ad litem* judges are selected in the same way. The nominations for judges can be submitted from member states of the UN as well as those that are not members but have permanent missions with the UN. During any term at the request of whoever is the president of the tribunal the Secretary-General can appoint an *ad litem* judge “for one or more trials, for a cumulative period of up to, but not including, three years”.<sup>87</sup> None of the permanent judges selected have been from nation-states in the former Republic of Yugoslavia.<sup>88</sup> While the General Assembly makes the final decision about judges, the Security Council creates the initial pool to select from. The Security Council

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<sup>86</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*. 8.

<sup>87</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*. 8-9.

<sup>88</sup> a list of former judges can be found here: "Former Judges." *UN-ICTY*. UN-ICTY, n.d. Web. <<http://www.icty.org/en/sid/10572>>. current judges: "The Judges." *UN-ICTY*. UN-ICTY, n.d. Web. <<http://www.icty.org/en/about/chambers/judges>>.

then creates the tribunal and then establishes who can sit as judge, giving the Security Council members more control in steering the direction of the Tribunal.

Article 27 of the statute is as follows:

“Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.”<sup>89</sup>

Article 29 deals specifically with cooperation of nation-states.

“1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.”<sup>90</sup>

What these two articles taken together show is the superiority of the capabilities of the Security Council over other nation-states. Article 29 demands cooperation from other nation-states,<sup>91</sup> essentially nullifying and deeming any domestic efforts for accountability of those nation-states who are then asked to turn over individuals to the tribunal. Anne Bodley, in a note she wrote while at NYU Law School, says that the demand in Article 29 “goes beyond the Member States of the United Nations. More specifically, in this instance it reaches the States of the former Yugoslavia as yet without membership in the United Nations and whose support

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<sup>89</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*.13.

<sup>90</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*.13.

<sup>91</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*.13.



could not be counted on under the Charter.”<sup>92</sup> In addition, as outlined in Article 27 the fact that imprisonment in nation-states was subject to the approval and recommendation of the Security Council<sup>93</sup> also means that state sovereignty of these nation-states is, at least to some extent, controlled by the Security Council. Bodley makes the claim that the ICTY “meant that the institution of state sovereignty was weakened a little for most of the world’s states- but it was probably strengthened for five.”<sup>94</sup> Bodley bases this argument, in part, on the power and “reach” of the Security Council and the ICTY to mandate nation-states to act in accordance with demands or requests from the Tribunal.<sup>95</sup> However, for those nation-states who were obliged to cooperate with the ICTY, it is not so simple as some states having sovereignty weakened. Instead the state sovereignty of some nation-states was completely overlooked, not merely weakened, essentially becoming an extension of the sovereignty of the Security Council. Certainly, the Security Council did not move into other nation-states, as if colonizing the territory, but had authority over the domestic judicial systems of these nation-states as if they were colonial powers, at least in relation to crimes covered by the Tribunal.

Karadzic, a “political chief”<sup>96</sup> mentioned in the comments by the Security Council at the establishment of the Statute, was prosecuted in the Tribunal. I refer to his case, because of his mention in these comments, and also because the Trial Chambers issued a statement rebuking the Former Republic of Yugoslavia and Republika Srpska for not arresting both Karadzic and

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<sup>92</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law..." 466.

<sup>93</sup> "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." *UN-ICTY*.13.

<sup>94</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law..."471.

<sup>95</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law..."

<sup>96</sup> UNSC Provisional Verbatim Record of 3217th Meeting. 42.

Mladic.<sup>97</sup> The issued press release stated that in line with the Dayton Peace Accords, this failure represented “a breach of the obligations made on its behalf by the FRY during the Dayton Peace Agreement.”<sup>98</sup> In response to this failure, the press release also issued a statement that, “The international warrants will be sent to all States and, if necessary, to the Implementation Force (IFOR). All States will henceforth be legally obliged to arrest the accused if they come within their jurisdiction.”<sup>99</sup>

This press release presents a conundrum when considering state sovereignty. By issuing a statement that nation-states were legally obligated to arrest “accused” there is an impetus put on all nation-states, while the Dayton Peace Accords were not signed by all nation-states. In addition, the use of the term “legally obliged” presents another consideration. If nation-states have domestic legal systems, domestic, then where is the source of legal obligation coming from? Binding agreements may be made, treaties represent hard law, but the problem arises of which legal force, domestic or hard law in the form of treaties has superiority. Hypothetically, the consideration would never be needed, as countries can be expected to abide by obligations outlined in treaties. Yet again, not all nation-states signed the Dayton Accords, so to legally “obligate” every nation-state to arrest indicted individuals implies a superiority over domestic legal systems. Certainly many countries agreed to cooperate with the requests of the ICTY, so where does obligation come from if these nation-states were not part of a treaty or other binding

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<sup>97</sup> UN-ICTY. *Trial Chamber issues international arrest warrants against Karadzic and Mladic and rebukes Federal Republic of Yugoslavia and Republika Srpska for failing to arrest them.* UN-ICTY, 11 July 1996. Web. <<http://www.icty.org/sid/7327>>.

(Henceforth UN-ICTY. *Trial Chamber issues international arrest warrants against Karadzic and Mladic...*) In addition, Bodley notes, in regard to state cooperation the unwillingness of the Republika Srpska in regards to Mladic and Karadzic:

Bodley, Anne. "Weakening the Principle of Sovereignty in International Law..." 450

<sup>98</sup> UN-ICTY. *Trial Chamber issues international arrest warrants against Karadzic and Mladic...*

<sup>99</sup> UN-ICTY. *Trial Chamber issues international arrest warrants against Karadzic and Mladic...*

law? The obligation comes from the demand of the Trial Chambers, a branch of the Tribunal established by the Security Council. The impetus then comes from the power and political force that allows the Security Council to establish a Tribunal that can make such statements and demands to the international community. The impetus to be in line with the Tribunal could be out of a desire to be in line with morality, and a sense of justice that nation-states want to uphold, but as was seen with the FRY and Republika Srpska that idea of morality may not be shared. Many countries probably abide with obligation just to be in line with the Security Council, in order to not violate emerging norms and also to not cut any political ties with important and politically powerful nation-states, such as the P5. Karadzic was eventually arrested in Serbia,<sup>100</sup> so eventually the international community came to align with the demands of the tribunal, which also underscores how big of a role the tribunal came to play as opposed to domestic courts.

Bodley points out that in the course of the Blasikic case the “Tribunal also has the power to demand a sovereign state produce evidence (here, documents) for the purpose of proving charges against an indictee, although it may not compel a particular state official to comply with the order”.<sup>101</sup> To demand a sovereign state to comply with the Tribunal means that the sovereign state is answering to a power that is in authority over them, essentially nullifying full sovereignty and giving whatever authority it is the power of exception. To say then that the Security Council could establish the exception is no stretch, especially in light of the fact that the political power of the P5 means that few countries will not comply. As an extension of this, as Bodley points out, “with permanent seats on the Security Council and the ever-present ability to veto any action the Security Council has under consideration, there are at least five states against

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<sup>100</sup> UN-ICTY. *Radovan Karadžić in Tribunal’s Custody*. UN-ICTY. UN-ICTY, 30 July 2008. Web. <<http://www.icty.org/sid/9869>>.

<sup>101</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law.." 468.

whom it is unlikely a tribunal would ever be convened”.<sup>102</sup>

The Secretary-General issued a report, which discussed the legal basis for the formation of the Tribunal. The report makes reference to concerns that the Security Council comments already referred to echoed, namely that the Tribunal was not treaty or conference based and that the General Assembly was not more involved. In response the report claims that putting together such a treaty would be more time consuming and that involving the General Assembly would also “not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993)”.<sup>103</sup> Another anecdotal, yet important, support offered for the establishment of the Tribunal by the Security Council was that “there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective”.<sup>104</sup> In addition, the report references the creation of “subsidiary organs”<sup>105</sup> in the past by the Security Council, noting Resolution 687 (1991) pertaining to Kuwait and Iraq. It seems that this reference was intended to establish a sort of precedent as the report goes on to say, “In this particular case, the “Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature”.<sup>106</sup>

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<sup>102</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law.." 470.

<sup>103</sup> UN Security Council “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808” (3 May 1993), UN Doc S/25704. 7.  
<[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_re808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf)>.  
(Henceforth UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.”)

<sup>104</sup> UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.” 7.

<sup>105</sup> UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.” 8.

<sup>106</sup> UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.” 8.

The report outlines the expectation that “This organ would, of course, have to perform its functions independently of political considerations”.<sup>107</sup>

In light of this report, it seems important to consider how the need for a speedy solution to the conflict in Yugoslavia meant that a treaty was bypassed, and the General Assembly was left out of the process of establishing the Tribunal. In doing so, the Security Council, finding the conflict demanded a quick response, created something akin to the state of exception. Granted, there was no move to be “outside” of a constitution and put those rights on hold, but the interpretation of the Charter, and the subsidiary organs that were allowed to be established through powers granted in the Charter was extended. In addition, the point that some nation-states would not ratify a treaty, supporting the move to establish a Tribunal without one, is a direct disregard for full sovereign power of a nation-state. This seems to be in line with the idea of a “contingent sovereignty” amongst the human rights regime. Similar to the Responsibility to Protect, it seems that a group of powerful nation-states can intervene in another nation-state if actions inside are deemed to constitute gross human rights violations. Yet, as Bodley noted, there is little chance all states will be held accountable to the same extent. Meanwhile, those nation-states on the Security Council, supported by the Secretary General, were able to establish a Tribunal without needing the assent of relevant nation-states. While the view that sovereignty is “contingent” upon a number of things may be strong within the human rights field, this may ultimately mean that politically strong nation-states retain sovereignty while others do not, as those that are on the P5 can establish when it is necessary to nullify the sovereignty of another nation-state in order to intervene.

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<sup>107</sup> UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.” 8.

This shifted the way sovereignty was being regarded in that the power came from an international body of nation-states, instead of necessarily from the citizens of a given nation-state. In addition, the territorial control that was present for the Allies of WW II was not an aspect of the ICTY, as the establishing powers did not occupy the Former Yugoslavia in the same way as the Allies occupied Germany. Certainly the ability to collect evidence or extradite a witness represents some type of control, but not in the same complete sense as the Allies at the end of WW II.

## ICTR

The ICTR was created after conflict broke out in Rwanda in which Hutu extremists were responsible for the killing of “Between eight-hundred thousand and one million men, women and children”.<sup>108</sup> There had been long-term conflict in the area between Tutsis and Hutus, but it was in 1994 that genocidal killings occurred when “exiles of the Rwandan Patriotic Front (mainly Tutsis)” were returning to a “Hutu-dominated government”.<sup>109</sup> The International Criminal Tribunal for Rwanda was created in 1994, with the passing of Resolution 955. This resolution, like that which created the ICTY, was a Security Council Resolution. Notably the ICTY served as a type of precedence for the creation of the ICTR, which perhaps is why comments from the Security Council meeting are not included on the ICTR site. Author Helena Cobban refers to the

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<sup>108</sup> "The Genocide." *United Nations International Criminal Tribunal for Rwanda*. United Nations, Web. <<http://unictr.unmict.org/en/genocide>>.

<sup>109</sup> Cobban, Helena. "Transitional Justice and Conflict Termination: Mozambique, Rwanda and South Africa Assessed." *Atrocities and International Accountability: Beyond Transitional Justice*. Ed. Edel Hughes, William Schabas, and Ramesh Chandra Thakur. New York: United Nations University Press, 2007. 43. *Proquest ebrary*. Web. (Henceforth Cobban, Helena. "Transitional Justice and Conflict Termination: Mozambique, Rwanda and South Africa Assessed.")

ICTR as a “sister-court”<sup>110</sup> of the ICTY, as does the official ICTR site.<sup>111</sup> In light of this the question to explore then is whether or not the ICTR and ICTY regarded sovereignty within the human rights regime the same way.

In the statute of the ICTR the Security Council “Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel”.<sup>112</sup> While “urging” is certainly different than mandating or requiring action, the fact that the Security Council can offer this type of recommendation in a statute suggests it has a force in establishing international law and even expects organizations and states to comply with the requests of the Council. In a nation-state system in which all states are supposed to have equal sovereignty, to demand that states help create an independent tribunal certainly creates a contradiction in the nation-state system- if sovereign power is not the highest power, then it is not truly sovereign- the Council would be. Of course, this request falls short of a demand, but to encourage even NGO’s and IGO’s to comply with, and help support the tribunal suggests the Council is playing the role of a government, pressuring organizations within the relevant nation-state. In addition, the Security Council declared “that all States shall cooperate fully with the International Tribunal”.<sup>113</sup> This statement is not just a call for action, but a mandate about what states must do, essentially nullifying the

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<sup>110</sup> Cobban, Helena. "Transitional Justice and Conflict Termination: Mozambique, Rwanda and South Africa Assessed.". 47.

<sup>111</sup> "The ICTR in Brief." *United Nations International Criminal Tribunal for Rwanda*. United Nations, Web. <<http://unictr.unmict.org/en/tribunal>>. (Henceforth "The ICTR in Brief." *United Nations International Criminal Tribunal for Rwanda*.)

<sup>112</sup> This is found in point four on page two of the Resolution. See: UN Security Council Resolution 955 (8 November 1994), UN Doc S/RES/955. 2. Web. <[http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108\\_res955\\_en.pdf](http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf)>. (Henceforth UNSC Res. 955.)

<sup>113</sup> This is found in point two, on the second page of the resolution: UNSC Res. 955. 2.

concept of state sovereignty and replacing it with a “more sovereign” power that essentially receives its power from the political pull of the countries who vote on the Security Council.

Author Peter R. Baehr notes that the tribunals are backed by political power, saying:

“It was mainly for political reasons that the cases of the former Yugoslavia and Rwanda were singled out for judgement. There is certainly no legal reason why human rights in these countries should be dealt with and similar events in countries such as Burundi, Cambodia, Somalia, Liberia or Zaire/Congo (to name only a few of the more notorious ones) not.”<sup>114</sup>

Article 28 furthers the obligation of nation-states. It begins by re-stating that states shall “cooperate” with the Tribunal, but further defines the obligations by stating that states “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber”.<sup>115</sup> The article then defines the actions that may be requested including locating persons of interest, “taking of testimony”, “service of documents”, “the arrest or detention of persons”, and “The surrender or the transfer of the accused to the International Tribunal for Rwanda”.<sup>116</sup> What is striking about all of these obligations is that they mandate action and use of resources from nation-states, not just requesting non-interference in the Tribunal.

To request direct action implies that nation-states answer to the Security Council. Not only does this imply that countries are subservient to the Security Council, thereby creating an incongruous definition of nation-state power, but it also assumes that all countries can even provide the resources to meet these demands. Judges, in the manner of the ICTY, were chosen by

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<sup>114</sup> Baehr, Peter R. "How to Come to Terms with the Past." *Atrocities and International Accountability: Beyond Transitional Justice*. Ed. Edel Hughes, William Schabas, and Ramesh Chandra Thakur. New York: United Nations UP, 2007. 13. *Proquest ebrary*. Web. (Henceforth Baehr, Peter R. "How to Come to Terms with the Past.")

<sup>115</sup> Article 28 can be found on page 14. See: UNSC Res. 955. 14.

<sup>116</sup> UNSC Res. 955. 14.



the General Assembly from a list that was compiled by the Security Council, after nominations are taken from United Nation member states “and non-member States maintaining permanent observer missions at United Nations Headquarters”<sup>117</sup>. While this may seem to act as a kind of check on the power of the Security Council, diffusing some of the responsibility to other members in the General Assembly, it still ensures that the Security Council gets a large part of deciding who gets their foot in the door, so to speak, by controlling which nominations will be on the final ballot that the General Assembly will see. Of course, this means that while the General Assembly can vote not to elect some nominations that perhaps the P5 wanted on the Tribunal, the P5 can ensure nominations they are adverse to do not even make it to the ballot, thereby giving them more control over the outcome by ensuring that all those that can be considered are not strongly opposed to.

In Article 8, the statute for the ICTR, like the ICTY, establishes the primacy of the Tribunal: “The International Tribunal for Rwanda shall have primacy over the national courts of all States.”<sup>118</sup> In a nation-state system in which all nation-states have equal sovereignty, what does it mean for all nation-states to answer to an independent body? In theory, if all of the nation-states had equal part in the establishment of and commitment to the independent body, it would represent and reinforce the sovereign power of nation-states. However, the tension that arises with international tribunals, formed by the Security Council, stems from the fact that they are not created with input and agreement from all nation-states equally. Thus, it may be difficult to categorize the Tribunal as truly independent. Instead nation-states are expected to answer to a

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<sup>117</sup> The complete manner of how judges are chosen can be found in Article 12, which can be found on page eight of the Resolution. See: UNSC Res. 955. 8.

<sup>118</sup> This is found in Article 8 of the Resolution(found on page 6 of printed Resolution). UNSC Res. 955. 6.

tribunal established by other countries. Thus the theory that all nation-states are equal does not fit, and even the idea of a contingent sovereignty is not upheld, as the demands are put on nation-states in which no conflict or extreme government mistreatment is occurring, and certainly not arresting a criminal does not amount to a gross violation severe enough to nullify a country's sovereignty. Thus what is truly evolving within the human rights regime are imperialist demands that are handed down, not ironically, from those countries whose international reach most resembles empires today.

The fact that the ICTR was modeled after the ICTY means that some type of precedence had already been set. However, there were ways in which the ICTR furthered the interpretation of international law. Before discussing these rulings however, it seems pertinent to evaluate whether or not the nation-state was receptive to the creation of the Tribunal. Schabas points out that Rwanda asked for help from the Security Council in creating an international court.<sup>119</sup> If nation-states request help in establishing an international platform to try cases, then perhaps the Tribunal does not even need to be seen as an independent body established by outside countries, although the judges that sit on the Trial Chambers do not represent Rwandan citizens.<sup>120</sup> The tension comes when certain nation-states place obligations and create new laws without the consent of relevant parties. While the ICTR was modeled after the ICTY, and can be seen as customary in its prosecution of genocide, which was codified in 1948: it did extend applicable law.

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<sup>119</sup>Schabas, William. *Genocide in International Law: The Crimes of Crimes*. Cambridge, U.K.: Cambridge U.P., 2000. 345. ProQuest Ebrary. Web.  
(Henceforth Schabas, William A. *Genocide in International Law: The Crimes of Crimes*.)

<sup>120</sup> "Chambers." *United Nations International Criminal Tribunal for Rwanda*. United Nations, Web.  
<<http://unictr.unmict.org/en/tribunal/chambers>>.

The ICTR is credited with being “the first international tribunal to hold members of the media responsible for broadcasts intended to inflame the public to commit acts of genocide”<sup>121</sup>, as well as extending the definition of the crime of genocide to include rape.<sup>122</sup> The Genocide Convention includes “incitement to commit genocide” as a criminal act<sup>123</sup>, but while this was codified at the time of the ICTR, there was also a similar case in the International Military Tribunal which the judges cited in their judgment. Schabas explains that Julius Streicher was found guilty of crimes against humanity<sup>124</sup> for “direct incitement”<sup>125</sup> even though he was not a member of the military<sup>126</sup>. Van der Merwe posits that the case of Streicher “represented de facto the first conviction for incitement to genocide at the international level”<sup>127</sup> but that the ICTR further defined incitement and its applicability.<sup>128</sup>

In addition, while the crime of genocide had yet to be written into law when the Charter of the IMT was established, the Trial Chamber of the ICTR, in the case of the Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze (called the “Media Case”<sup>129</sup>)

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<sup>121</sup> "The ICTR in Brief." *United Nations International Criminal Tribunal for Rwanda*.

<sup>122</sup> "The ICTR in Brief." *United Nations International Criminal Tribunal for Rwanda*.

<sup>123</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277. Web.  
<<https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>>.

<sup>124</sup> Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. 121.

<sup>125</sup> Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. 278,279.

<sup>126</sup> Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. 41.

<sup>127</sup> Van der Merwe, HJ. "The Prosecution of Incitement to Genocide in South Africa." *Potchefstroom Electric Law Journal* 16.5 (2013): 331. *HeinOnline*. Web.  
(Henceforth Van der Merwe, HJ. "The Prosecution of Incitement to Genocide in South Africa.")

<sup>128</sup> Van der Merwe, HJ. "The Prosecution of Incitement to Genocide in South Africa." 340-346.

<sup>129</sup> "The ICTR in Brief." *United Nations International Criminal Tribunal for Rwanda*.  
In addition to specific names found on:

notes that Julius Streicher “was convicted of crimes against humanity for his incitement to murder and extermination of Jews. which was found to have constituted the crime of "persecution" as defined by the Charter of the International Military Tribunal.”<sup>130</sup> Thus the Tribunal was not making any great extensions of international law, at least not anymore so than had been done previously at Tribunals. Especially in light of the fact that Rwanda requested help handling the cases, and that no new law was created for the Tribunal, the sovereignty of Rwanda was not clearly lessened by the creation of the Tribunal, and none of the laws at the Tribunal were created strictly for the prosecution of Rwandan citizens. Thus, while Baehr claims Rwanda was “singled out”<sup>131</sup>, the laws were already relevant at the time of the Tribunal. Certainly, many elements of the Tribunal were not controlled by Rwandans or local structures but the fact that Rwanda requested assistance, yet voted against the Resolution that established the Tribunal, makes this more complex than a clear limitation on state sovereignty.

The Tribunal did however, extend the definition of genocide to include rape. “In September 1998, the Rwandan Tribunal rendered an historic judgment in Prosecutor v. Jean-Paul Akayesu, becoming the first international criminal tribunal to define rape as an act of genocide.”<sup>132</sup> The judgement explains that the inclusion of rape as a means of genocide was pertinent as the acts of rape and sexual violence against Tutsi women amounted to “infliction of

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Kagan, Sophia. "The "Media Case" before the Rwanda Tribunal: The Nahimana Et Al. Appeal Judgement." (2008): n. pag. *The Hague Justice Portal*. Hague Academic Coalition, 24 Apr. 2008. Web. <<http://www.haguejusticeportal.net/index.php?id=9166>>.

<sup>130</sup> The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Trial Judgement), Case No. ICTR-99-51-T. 326 (para. 981). International Criminal Tribunal for Rwanda. 3 Dec. 2003. *United Nations International Criminal Tribunal for Rwanda*. United Nations, Web. <<http://unict.unmict.org/sites/unict.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf>>.

<sup>131</sup> Baehr, Peter R. "How to Come to Terms with the Past." 13.

<sup>132</sup> Russell-Brown, Sherrie L. "Rape as an Act of Genocide." *Berkeley Journal of International Law* 21.2 (2003): 351. *HeinOnline*. Web.

serious bodily and mental harm on members of said group.”<sup>133</sup> Rape is not explicitly spelled out as a means of genocide in the Genocide Convention, but the way that it is written leaves room for interpretation in what can be considered as harm against a group with intent to destroy. While rape is explicitly outlined as a crime against humanity<sup>134</sup> the Tribunal was furthering the application and interpretation of international law by also using rape as evidence of genocidal intent. What this means for the power of the Tribunal, and by extension the Security Council is that the Tribunal has relative autonomy, similar to a domestic court over citizens, in interpreting and applying the law. Notably, it is the creation of the Tribunal that is in the Security Council’s hands, not the judgements handed down, yet the judges are nominated from a list that the Security Council creates. It seems though, that as the judges and Trial Chambers can still act with relative autonomy the countries that sit on the Security Council have limited power over sentencing.

In comments about the establishment of the Tribunal from members of the Security Council, the representative from Argentina noted that “a standing international tribunal, in order to be established as legitimate and effective, should be the result of a treaty agreed among sovereign States”.<sup>135</sup> Argentina also noted that the Tribunal was not to create new international

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<sup>133</sup> The Prosecutor Versus Jean-Paul Akayesu (Trial Judgement), Case No. ICTR-96-4-T. Found on page 172 of pdf (para. 705). International Criminal Tribunal for Rwanda. 2 Sept. 1998. *United Nations International Criminal Tribunal for Rwanda*. United Nations, Web. <<http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>>.

<sup>134</sup> "What Are Crimes against Humanity?" *International Criminal Court ("Site")*. International Criminal Court, n.d. Web. <[https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx)>

<sup>135</sup> UN Security Council Provisional Verbatim Record of the three thousand four hundred and fifty-third meeting (8 November 1994), UN Doc S/PV.3453. 8. Web. <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.3453](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.3453)>. (Henceforth UNSC Provisional Verbatim Record of the 3453rd Meeting.)

law but “apply existing international law”.<sup>136</sup> In addition, the same representative claimed that the tribunal was being created in response to “a specific request made by the Rwandese Government for rapid and effective action in this direction to contribute to reconciliation and reconstruction and to the maintenance of peace in Rwanda.”<sup>137</sup> It is interesting to note then that at the time, Rwanda was a rotating member of the Security Council, and voted against Resolution 955. China, while not voting against the resolution abstained from voting. This is interesting to consider in light of the reservations that China expressed with the the establishment of the ICTY. The representative explained that China was “not in favour of invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution.”<sup>138</sup> In addition, it was noted that the cooperation of Rwanda was necessary for the tribunal to deliver true justice, and that the concerns of Rwanda should be taken into “consideration”.<sup>139</sup>

Rwanda outlined a list of concerns and amongst these were a desire for the dates of crimes to be considered for trial to be extended. In addition, Rwanda felt it was important for the tribunal to have a separate Appeals Chamber and Prosecutor, but the Resolution had the ICTR sharing these with the ICTY. Rwanda also felt that the “seat” of the tribunal should be located in Rwanda- but the location was still undecided at the time of the meeting during which Resolution 955 was voted on. Rwanda also noted that the Tribunal departed from domestic legal code

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<sup>136</sup> UNSC Provisional Verbatim Record of the 3453rd Meeting. 8.

<sup>137</sup> UNSC Provisional Verbatim Record of the 3453rd Meeting. 8.

<sup>138</sup> UNSC Provisional Verbatim Record of the 3453rd Meeting. 11.

<sup>139</sup> UNSC Provisional Verbatim Record of the 3453rd Meeting. 11.

because of its exclusion of the death penalty.<sup>140</sup> What is interesting about this claim is that it expresses a concern over what is usually concerned a power of national government. The move to keep the death penalty out of the tribunal and the Security Council's ability to limit the date range for consideration at the tribunal, and relative independence in establishing the location of the tribunal limit the capabilities of Rwanda that are usually associated with a sovereign nation-state.

## **Conclusion**

Sovereignty has thus evolved over the course of the 20th century, from one in which territory was regarded as sufficient to ensure sovereignty, to one in which territorial sovereignty is no longer relevant. State boundaries serve as more convenient demarcators for issues such as jurisdiction and trade, but they can be disregarded in order to achieve a common goal in the international community. The question to ask ourselves then is what type of sovereignty remains and is a new conceptualization of sovereignty needed for how we view sovereignty out of and within the human rights regime?

By evaluating all three of these tribunals, it is possible to see how sovereignty within the human rights regime has evolved. Each tribunal has provided an opportunity to re-cast sovereignty, in both the way the Tribunals are established, and the lasting normative effect the tribunal may or may not have on the way sovereignty is regarded within the international community. What is evident is that some aspects of sovereignty have been maintained over the 20th century while others have not. While the IMT set the stage for a new kind of international tribunal, and was created at the outset of the human rights movement of the 20th century and the

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<sup>140</sup> The full list of concerns, and further discussion of these concerns can be found in the comments from the representative for Rwanda at the meeting on pages 14-16 of the provisional record: UNSC Provisional Verbatim Record of the 3453rd Meeting. 14-16.

creation of the U.N., it maintained certain aspects of sovereignty that the ICTY and ICTR did not. Concern during the establishment of the IMT still centered on territory. As displayed by Fried's notes received by Telford Taylor after the IMT, Germany had abdicated territorial control in defeat to the Allies, who then occupied Germany. What this supports is that the somewhat "old-school" aspect of Westphalian sovereignty was maintained, in that territorial control was implied in the sovereign power. What was not maintained in the IMT was sovereign immunity or protection from trial. On the other hand, in the ICTY and ICTR the Security Council did not have territorial control of the areas in question. This set a precedent in how sovereignty was defined: control of the tribunal was done by countries outside of the territory, who were not directly involved in the conflict, and who did not "win" control of the area. If there was any notion left of a Westphalian sovereignty, any remaining fragment of that "iron curtain"<sup>141</sup> was clearly brought down by the Security Council. In the same vein as the IMT, both tribunals did not acknowledge sovereign immunity, so this reformation has been maintained throughout the regime. This study has shown that while certain elements of sovereignty have been reformed within the human rights regime, not all of these reformations can be traced back to the IMT, as the element of territorial control for sovereign power was still regarded.

It is clear that the idea of a "contingent sovereignty" is consistent with the defense for establishing the tribunals formed by the UN. However, concerns over traditional sovereignty are still evident in the comments by some countries, and Rwanda's concern about the seat of the Tribunal show that some aspect of territorial claim is still an important consideration for some countries. Indeed, for some of the "weaker" countries this may be a concept that is important to hold onto, because of the ability of "stronger" countries to intervene. The demands placed on other countries in the statutes of the ICTY and ICTR, which was not something that was

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<sup>141</sup> Maogoto, Jackson Nyamuya. "Westphalian Sovereignty in the Shadow of International Justice?" 211.



necessary for the Allies to do in the case of the IMT, highlight another aspect of sovereignty that has not been retained in the regime: namely, that of an isolationist policy in regards to state sovereignty. In the current incarnation of the regime, state sovereignty is retained when a nation-state cooperates and abides with the norms established by other similar political powers. The previous ability for a state to isolate itself from other nation-states would now put that state at risk of losing its “full” sovereignty. The sovereign power receives that authority not just from the people of the nation-state, but also from the international community and through cooperation with international norms. Hobbes’ “common-wealth” has expanded to include a more interconnected nation-state system.

In putting articles in the statute of the tribunals that demanded cooperation and active involvement in the collection of evidence and persons relevant to the ICTR and ICTY the Security Council did not just establish a greater sovereign power over the countries relevant to the tribunals, but also to other countries in the UN. Hence Bodley’s claim that “establishing the International Criminal Tribunal for the Former Yugoslavia meant that the institution of state sovereignty was weakened a little for most of the world’s states-but it was probably strengthened for five”.<sup>142</sup> What this means is that sovereignty is no longer a legitimate concept to invoke an isolationist policy, and that sovereignty has become a much more interconnected concept.

Interestingly, while the IMT established new codified international law, thereby representing the Allies as the sovereign power, the ICTY and ICTR was expressly intended *not* to establish new laws. In this way the IMT moved away from traditional sovereignty, while the ICTR and ICTY made sure to protect it and ensure accountability was only enforced for crimes that were already established. This suggests that while sovereignty was limited within the regime

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<sup>142</sup> Bodley, Anne. "Weakening the Principle of Sovereignty in International Law..". 470-471.

to deliver accountability, once the establishing countries were a wider group than those that were directly involved in the conflict preceding the Tribunal, there was still concern amongst the international community to preserve basic aspects of sovereignty. This could be due in part to the fact that the power of the Allies was highly concentrated as opposed to those countries in the UN, who might also be concerned that a future Tribunal would affect their own citizens. So sovereignty has returned, at least in one respect to a more traditional conceptualization.

This is further supported by the unique way that Rwanda was positioned during the establishment of the ICTR. Rwanda asked for the establishment of a court, in order to hold trials to have some type of reconciliation begin,<sup>143</sup> yet they were also rotating members of the Security Council when the resolution that established the ICTR was put to vote. This created a unique situation in that Rwanda voted against the Tribunal, apparently because it would actually deliver less in terms of accountability and prosecution than what was hoped for. This is interesting because while part of the reason the ICTY was not treaty based according to the Secretary-General was to ensure that nation-states could not avoid ratification,<sup>144</sup> in the case of the ICTR, the proceedings preferred by Rwanda would likely have been much more severe. The fact that Rwanda desired the death penalty to be an option for the Tribunal to hand down, like the domestic courts in Rwanda, further highlights that the ability of a nation-state to isolate itself, citing sovereign power, is no longer a defense in the international community. This further suggests that the isolationist policy of sovereignty has been outlawed in the interconnected

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<sup>143</sup> See: UNSC Provisional Verbatim Record of the 3453rd Meeting. 8.  
In which the representative from Argentina notes the request from the Rwandese Government  
In addition, to the mention from: Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. 345.

<sup>144</sup> UNSC “Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808.” 7.

community that represents nation-states within the normative framework of the human rights regime. Abiding with these norms is necessary to maintain sovereignty with the acceptance of nation-states. Perhaps, this is best seen in the statement of Resolution 955, that the creation of the ICTR was to “strengthen the courts and judicial system of Rwanda”<sup>145</sup> and the claim by the representative from Nigeria (Gambari) in comments at the establishment of the ICTR, that it was “designed not to replace, but to complement, the sovereignty of Rwanda”.<sup>146</sup> Getting “up to scruff” on the norms and implementing them should help a nation-state become fully sovereign in the eyes of the international community, although this certainly represents a shift in the way sovereignty is regarded, as the very nature of being sovereign used to mean the right to choose to act or not act in parallel with other nation-states.

In spite of these reformations, the way sovereignty is regarded is dynamic, and may not even be standard for all players in the international community. I return to Schmitt’s definition of sovereignty because it accurately represents that the sovereign power is established through not just legal power, but also the political. I make this claim, because as observed, the “exception” may not always be codified (in fact it runs contrary to the idea of “exception”) and in this case political power may be the deciding factor for how complete sovereign power really is. It is this nexus from which the theoretical problems of sovereignty within the human rights regime arise.

By having the ability to extend the UN Charter to allow for establishment of the Tribunals the P5 is in a position to decide the state of exception. Even disregarding the definition of sovereignty as a state of exception, sovereignty within the regime is left with a theoretical problem: not all aspects of sovereignty are maintained for all nation-states. It’s no news to

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<sup>145</sup> This can be found on page two of Resolution 955: UNSC Res .955. 2.

<sup>146</sup> UNSC Provisional Verbatim Record of the 3453rd Meeting. 13.

human rights activists and academics alike that countries such as the United States or Russia have a greater insulation against outside forces that may undermine sovereignty than countries like Rwanda (notice that while Rwanda's desire to implement the death penalty in the Tribunal was turned down, the US still has the death penalty). Stronger countries not only maintain their territorial sovereignty but can also have political sway over other countries. What has emerged then in the human rights regime is a system in which some nation-states have "more" sovereignty than others, which seems counterintuitive to the very notion of sovereignty. If we regard the ability to establish an exception outside of what has been legally codified as a power reserved for whatever loci is the sovereign, whether this be a government, or ruler, etc. then only the P5 have maintained full sovereignty. Regardless, it is evident that within the regime some states have "lesser" sovereignty while others have "more" or are the only states who are sovereign. The problem with this is that those that have maintained the traditional aspects can still evade accountability because of the political power that allows them to retain full sovereignty.

Sovereignty will continue to be re-defined with the growth and evolution of the human rights regime, and as nation-states become more connected. Moving forward I predict sovereignty will continue to become more centralized within the regime to a small group of countries, that while not controlling greater amounts of territory will have the political power to retain sovereignty and validate strong actions by citing international norms, such as those that have been created with the establishment of discussed tribunals. It is important to note that the arguments being used in the establishment of the ICTY and ICTR place a much heavier emphasis on human rights and the need to prevent further violations, while the emphasis in the IMT focused on war crimes and crimes against humanity, although genocide was not yet

codified in the IMT. It is especially evident that the emphasis was more in line with the human rights regime in the move to keep the death penalty out of the ICTR. Countries like China have expressed concern over the establishment of international tribunals, and will likely continue to do so unless the tribunals are met with agreement from the relevant countries or the General Assembly. Protection of international peace is likely to be used as justification, much the way it was in Rwanda and Yugoslavia. While this means that they have not fully consented to the changing norms within the regime, it also suggests that the formation of tribunals might be left at the discretion of a wider body of nation-states, such as the General Assembly, if enough countries protest the capabilities of the Security Council. Although not speaking to the role of the Tribunals, Mexico noted in a General Assembly meeting that national sovereignty should be protected and considered even when international justice is being pursued: “This community of nations now wishes to internationalize certain issues which in earlier times fell exclusively within the internal jurisdiction of States. Mexico, as a country aware of its international responsibilities, is acting within the requirements of the new consensuses. But we must repeat time and again that we reject the idea of international action developing to the detriment of national sovereignty.”<sup>147</sup>

In a somewhat unexpected turn of events, we see that while some aspects of sovereignty have been declared outdated and even irrelevant or unimportant in the face of human rights violations, other aspects of sovereignty that were torn down by the IMT are making a comeback, and individual nation-states in the UN are beginning to push back and speak out for a need for greater regard for sovereignty. While the IMT was able to create new law, the ICTR and ICTY were confined within already codified law, and while territorial control was something present at

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<sup>147</sup> This quote can be found on page 18 of the General Assembly Official Records for the 9th Plenary Meeting: UNGA (48th Session) 9th Plenary Meeting (29 September 1993), UN Doc A/48/PV. 9. p.18. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/866/35/PDF/N9386635.pdf?OpenElement>>.

the IMT, particularly that the Allies had control of the territory, this is no longer as large of a concern in the human rights regime when it comes to establishing tribunals. In a similar vein, all of the Tribunals undermined isolationist principles of sovereignty, as well as the argument of sovereign immunity, while the ICTY and ICTR furthered the weakening of this principle more significantly than the IMT.

The fact that international courts such as the ICC and ICJ are treaty based, unlike the tribunals of the 20th century, exemplify the way that sovereignty is being uniquely regarded and changed by the formation of these tribunals within the regime. They provide a catalyst for further refining and reforming state sovereignty, both within and outside of the legal order. The formation of these tribunals has created a new type of sovereignty within the human rights regime in which not all states are sovereign, and territorial control is no longer synonymous with sovereignty. In a speech by Louis Henkin at Fordham Law School, he claims that “The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty”.<sup>148</sup> While in some ways the traditional concept of sovereignty has changed, evidence also suggests that a new type of sovereignty is emerging, and that nation-states in the UN may regard the principle of sovereignty with a higher regard in the future, yet this need not be antithetical to human rights. Indeed, as was seen in comments by Rwanda, strengthening sovereignty might even lead to a more extensive form of accountability in a nation-state, although on the flip side, there is always the risk that state sovereignty can be used to evade accountability. What the inquiry at hand has revealed though is that it may not be as simple to say that the concept of state sovereignty is being broken down or becoming a kind of

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<sup>148</sup> Henkin, Louis. That "S" word: Sovereignty, and Globalization, and Human Rights, et cetera. *Fordham Law Review* 68.1 (1999): 4. *Fordham University School of Law. HeinOnline*. Web. <<http://heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.journals/flr68&collection=journals&page=1>>.

contingent sovereignty but rather that the human rights regime has fostered a reformation of sovereignty at the abstract and practical level.

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