

**SELF-DETERMINATION, SOVEREIGNTY AND THE RIGHT OF EXTERNAL INTERVENTION IN INTERNATIONAL LAW\*****Abstract**

*Self-determination is the process by which an entity determines its own statehood and forms its own government. In its context, the right of self-determination evinces freedom from imposition, oppression, tyranny, totalitarian governments and other forms of subjugation. As such the right is a crucial aspect of international law and remains significant for the freedom of all people. Consequently this paper aims to enable the implementation of the right. To achieve this aim, the work employed the doctrinal research method using the analytical tools with primary and secondary sources. The work finds that full attainment of the right of self-determination is fraught by the concept of sovereignty which precludes such international intervention in the domestic affairs of a state. Yet the nature of the exercise of the right of self-determination is one that essentially requires external actors to help foster. A people oppressed often seek external intervention to implement their right to self-determination. The analysis of the concepts will help shape a recommendation for a new model of the concept of sovereignty that will aid external interventions on humanitarian grounds.*

**Keywords:** Self-Determination; Sovereignty; External Intervention; International Law

**1. Introduction**

Self-determination is the process by which an entity determines its own statehood and forms its own government. The main focus of a discourse on sovereignty is for the purpose of rationalizing on the right of the international community to interfere with the domestic affairs of a state in exceptional situations, such as matters pertaining to the self-determination of peoples. There is no doubt that the principle of non-intervention remains a well established part of international law. The prohibition of intervention is a corollary of every state's right to sovereignty, territorial integrity and political independence. The Friendly Relations Declaration<sup>1</sup> includes a whole section on the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the UN Charter. There is the tendency to categorize all domestic matters which includes the right of self-determination as one which the international community has no right to preside over. Thus article 2.7 of the UN Charter provides that 'nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.'<sup>2</sup> Consequently the UN Charter gives premium to the concept of sovereignty in a manner that suggests that it is absolute and contradicts the prescription of the right of self-determination expressed in the Charter. Yet the concept may have been merely overstretched and has become obstructive to the principle of self-determination which proclaims an inalienable right of a people. The implementation of the right of sovereignty has always been fraught with difficulties as local populations lack both the political and economic dispositions to enforce their right of self-determination.

**2. Conceptual Analysis**

The concept of self-determination can be traced back to the beginning of government. The right has always been appreciated by all peoples as it is protective in principle. As such its contextual appreciation is based on the fact that peoples who are dominated employ the concept to exercise their will of attaining independence or self-government. The concept of self-determination did not, however, assume the definitive status of a political and constitutional principle until the American and French revolutions. However the principle of equal rights and self-determination of peoples took shape and was incorporated in a number of places in the final version of the United Nations Charter; explicitly, in Articles 1(2) and 55 and implicitly in articles 73 and 76(b) dealing with colonies and trust territories. Self-determination as an international principle was now considerably strengthened. In light of the provisions of the Charter it was assumed that the principle of self-determination was subordinate to the principle of state sovereignty, and it was also argued that the right of self-determination could never be exercised at the expense of any disruption, partial or total, of a national unity or sovereignty as well as the territorial integrity of a sovereign state.<sup>3</sup>

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<sup>1</sup> UNGA res. 2625 (XXV) 1970.

<sup>2</sup> See article 2 of the United Nations Charter 1945.

<sup>3</sup> Bring Ove, Kurdistan and the Principle of Self-determination, German Yearbook of International Law, Volume 35, 1992 (GYIL 35, 1992), p. 158.

### **Sovereignty**

Sovereignty<sup>4</sup> may be defined as the power of the state to make law and enforce the law with all coercive power it cares to employ. It is ‘*that characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself.*’<sup>5</sup> In jurisprudence, sovereignty is the full right and power of a governing body over itself, without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity or nation state. In international law, the concept of sovereignty refers to the exercise of power by a state. Sovereignty as a concept emerged as an attribute of the state at a particular stage of historical development and consequently, in the course of its evolution, has been accorded different connotations in the context of its substance, scope and principles. The preceding paragraph attempts an analytical construct of the concept of sovereignty by considering certain kinds of sovereignty; the general elements of sovereignty and the effect of globalization on sovereignty and rationalizations for external intervention in state practice.

### **Absolute Sovereignty**

The late nineteenth century was characterized by the emergence and development of an absolute kind of sovereignty<sup>6</sup> in Germany in particular and later in England.<sup>7</sup> The proponents of absolute sovereignty hold the view that sovereignty is not merely the overall authority that subsumes all other authorities. In their postulation, sovereignty is an authority that imbibes an unlimited scope of power without any subjugation. In accordance with the fundamental principle of the National Socialist Jurisprudence, ‘Law is what is advantageous to the national community’, the German Reich is justified in disregarding any legal obligation which is incompatible with the real or alleged advantage of the German nation.<sup>8</sup> Thus, the virtual independence from international law can be proclaimed whenever it serves the purpose of the National Socialists. As such the domestic legal order is paramount, and domestic law prevails whenever a conflict between these two legal spheres arises.<sup>9</sup>

### **Relative Sovereignty**

The need to adopt a relativist approach to sovereignty became pronounced during the two world wars and contextually the aim was to *de-absolutize* sovereignty in an increasingly independent international community.<sup>10</sup> The dogma of sovereignty has been severally addressed with the aim of neutralizing its assumptive character.<sup>11</sup> It has also been severally proposed to assume sovereignty as relative rather than absolute.<sup>12</sup> The supposed relative manifestation of sovereignty implies that sovereignty can be subordinated to international law which extricates absolutism of the concept in reality. However in the main, relative sovereignty reflects the view that a state cannot be subordinated to another state since in principle all states are on equal pedestal. As such the

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<sup>4</sup> The word ‘sovereignty’ is derived from the latin word *superanus* and means ‘supremacy’.

<sup>5</sup> *Lehre von den Staatenverbindungen*, p. 34; cited by J. w. Garner in his *Introduction to Political Science*, p. 239.

<sup>6</sup> See Djura Nincic, ‘Problem of Sovereignty in the Charter and in the Practice of the United Nations (Martinus Nijhoff, The Hague, 1970) at p.6.

<sup>7</sup> See G.W. Hegel, *Grundlinien der philosophie des Rechts*, 3<sup>rd</sup> ed., 1880 g. Cited in Nincic, n.68 at p.6. Accordingly Ihering argued that a state may be limited by its own will alone. See R. Von Ihering, *Der Zweck im Recht*, Berlin, 1880 and *Der Geist des Romischen Rechts*, t. IV. Cited in Nincic, *Ibid*.

<sup>8</sup> See Gott, *The National Socialist Doctrine of International Law* (1938) 32 AM. J. INT L, 708, 709.

<sup>9</sup> See SCHECHER, *DEUTSCHES AUSSENSTAATSRECHT* (1933) 9, 12, 17.

<sup>10</sup> One of the prominent theory in this view was that of the Vienna or the Normativist School founded by Kelsen and Verdross. It builds on the monistic vision of the legal system and considers that the original norm of the entire legal system should be sought in international law. The system as enunciated by these proponents pontificates on sovereignty as merely signifying the delimitation of a state’s sphere of competence. Thus the confines of a state’s jurisdiction are drawn by international law. See Kelsen, *Das Problem der Souveranitat und die Theorie des volkerrechts*, Tubigen, 1920. Cited in Nincic, *Ibid* n. 68 at p. 10.

<sup>11</sup> For instance, KELSEN, *DAS PROBLEM DER SOUVERANITAT UND DIE THEORIE DES VOLKER-RECHTS* (1920); LANSING, *Notes on World Sovereignty* (1921) 15 AM. J. INT. L. 13; *limitations de la souverainete*’ (1925) 6 *RECUEIL DES COURS* (Hague Academy of Int. Law) 5; Garner, *Limitations on National Sovereignty in International Relations* (1925) 19 AM. PoL. SCI. Rev. 1; BRIERLY, *THE LAW OF NATIONS* (1942) 36 AM. J. INT. L. 229, 234.

<sup>12</sup> More emphasis has been on relativity of sovereignty. In GARNER, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW*(1925) 812. ‘The task of reconstructing and increasing the effectiveness of international law raises the question of how far certain changes of this character are desirable...The theories of absolute sovereignty and equality of states which have heretofore been recognized as basic principles should be definitely eliminated so that law will conform more nearly to the facts.’ See also EAGLETON, *INTERNATIONAL GOVERNMENT* (1932) 29. ‘Sovereignty is not a unit, which a state either has or does not have; it is a relative term.’ Cf. 1 OPPENHEIM, *INTERNATIONAL LAW* (5<sup>th</sup> ed. By Lauterpacht, 1935) 117. ‘The very notion of international law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation implies implies the idea of their subjection to international law and makes it impossible to accept their claim to absolute sovereignty in the international sphere.’ On absolute sovereignty see SUKIEN-NICKI, *LA SOUVERAINETE DES ETATS EN DROIT INTERNATIONAL MODERNE* (1927) 59. See also, SOTWELL, *THE GREAT DECISION* (1944) 202. ‘Absolute, unqualified and unchecked sovereignty is a conception of anarchy.’

doctrine establishes the overriding effect and supremacy of international law over state sovereignty.<sup>13</sup> One shares the view that it is certainly justifiable to assume that a national legal order is the highest order so long as attention is focused on the sphere of exclusive jurisdiction conferred on a state by international law.<sup>14</sup> As such the assumption that international law is of a higher level than domestic law supposes that the sovereignty of the domestic law is not absolute. This is on the premise that international law binds individual states. Domestic norms are superior only in regard to subordinate norms, but in principle, inferior in relation to the superior international norm. The superiority of international law over and above domestic/constitutional law has been reaffirmed by the Permanent Court of International Justice in its Advisory Opinion No. 23. ‘...a state cannot adduce as against another state its constitution with a view to evading obligations incumbent upon it under international law or treaties in force.’<sup>15</sup> In this case and in matters correlated to same, the implied or express doctrine of the sovereignty of international law connotes a certain scope of superiority of the international norm over the domestic norm.<sup>16</sup>

It is instructive to note certain salient implications of relative sovereignty. First, it has as a consequence the subservience of the state to international law. Again it connotes identification with external independence of a state from any other sovereign authority, but not from the established norms which govern the sovereign states in international law. The independence, sovereignty assures thus entails legal equality of states in their mutual relations and autonomy in their internal connections but with submission to international laws. This creates a forum for co-existence of states within the international community with the apparent subjection of the state to the norms of international law. Consequently the subjection of the sovereignties of states to international norms appears to wither the acclaimed independence and autonomy of states. This in effect appears to erode the claim of absolute sovereignty of states in actual sense.<sup>17</sup> The term independence is equally susceptible to another construction, whereby independence would mean only independence from any superior personal unit, but not independence from law. In this regard, history pontificates on a significant event of the feudal period which was characterized by a struggle for the highest rank within the feudal hierarchy of persons.<sup>18</sup> The fight for political power aimed at the elimination of superior personal units but did not in essence imply the denial of a superior law. It has been submitted that even Bodin’s doctrine of sovereignty has been frequently misconstrued, for it has been overlooked that Bodin’s struggle against the papacy did not lead to the assertion of the absolute sovereignty of the prince; on the contrary, the subjection of the state to law was still maintained.<sup>19</sup>

### 3. Globalization and its Effect on Sovereignty

Globalization is the process of interaction and integration among people, companies and governments worldwide. It has been defined as a relatively recent process of worldwide integration, cooperation and conscious building whereby an increase in the flows and trade of ideas, people, goods and services between national state borders is prevalent.<sup>20</sup> The International Labor Organization defines globalization as a process of growing interdependence between all people of this planet.<sup>21</sup> Throughout human history, the globe has gone through a series of material epochs that have also brought with it a series of epochs concerning human political organization which stems from the emergence of the modern state. The era in which the modern state emerged can be traced back to the Westphalian Peace Treaty where the idea of state sovereignty arose and set the foundations to the normative structure for international relations. As the sovereign state arose because of a particular conjunction of social and political interests in Europe, so too have interests dictated that sovereign states be drawn into union in the post-modern era.<sup>22</sup> Interestingly the most defining interests of the post-modern

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<sup>13</sup> Op cit, n. 68 at p. 10.

<sup>14</sup> See P.C.I.J., Ser. B, No. 4, p. 23 (1923). ‘From one point of view it might well be said that the jurisdiction of the state is exclusive within the limits fixed by international law- using this expression in its wider sense, embracing both customary law as well as particular treaty law.’

<sup>15</sup> Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory, P.C.I.J., A/B, No. 44.

<sup>16</sup> See The international Law of the Future: Postulates, Principles and Proposals (Supp. 1944) 38 AM. J. INT. L. 41, 73. See also Kunz, The International Law of the Future (1944) 38 AM. POL. SCI. REV. 354, 358.

<sup>17</sup> According to Nincic this is the basic weakness of the theory of absolute sovereignty. Nincic op cit, 68 p. 15.

<sup>18</sup> For the historical development of this doctrine, see SERENI, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW (1928) 3.

<sup>19</sup> Cf. Bodin, LES SIX LIVRES DE LA REPUBLIQUE (1577) 133. ‘La puissance absolue des Princes et seigneuries, ne s’estend aucunement aux loix de Dieu, et de nature.’ See also Gardot, Jean Bodin: Sa Place parmi les Fondateurs du Droit International (1934) 50 RECUEIL DES COURS 549; SABINE, A HISTORY OF POLITICAL THEORY (1937) 408.

<sup>20</sup> Globalization and its Effect on Sovereignty, ‘Essay in politics’ Available at <https://www.ukessays.com/essays/politics/understanding-globalisation-and-its-effect-on-sovereignty-politics-essay.php>. accessed 23/2/2020.

<sup>21</sup> <https://www.ilo.org/global/topics/economic-and-social-development/globalization/lang-en/index.htm> accessed 23/2/2020.

<sup>22</sup> See McGrew A. and Held, D. ‘Governing Globalization: Power, Authority and Global Governance’, Cambridge, UK, Polity Press.

era that have drawn sovereign states into union have centered on political, economic and security-related safekeeping. International political relations in the 20<sup>th</sup> century have drastically transformed the way in which nation-states relate and co-operate at various dimensions. Substantial political integration has become so predominant that some political theorists believe that the idea of Westphalian sovereignty no longer pertains.<sup>23</sup> Factually the political interconnectedness through the international and regional organizations such as the United Nations, the European Union as well as the African Union connotes that nation-states are increasingly coalescing and consequently sacrificing their recognition as sovereign. Nevertheless sovereignty continues to play a role in defining the status and rights of nation-states in international law. Sovereignty implies a right against interference or intervention by any foreign or international structure and power. A fact derived from the assumed superiority of nation states over and above any other source of governance. Incidentally the logical connection between the sovereignty conceptions and the foundations and sources of international law becomes clearer. If sovereignty implies that there is no higher authority or power than the nation-state, then it is argued that no international law norm is valid unless the state has in some sense consented to it.<sup>24</sup> Of course, treaties almost always imply, in a broader sense, the legitimate consent of the nation-states that accepted them. However pertinent questions arise in connection with many treaty details, such as when a treaty-based international institution sees its practice and jurisprudence evolve over time and purports to obligate its members even though they opposed that evolution.<sup>25</sup> The effect of globalization on the insulation of nation states from external forces continues to increase owing to the sharply reduced costs and time required for the transport of goods and requirements for communication as well as global governing policies. Thus the older concepts of sovereignty are rendered fictional. These developments often demand action that no single nation-state can satisfactorily carry out, and thus require some type of institutional cooperation mechanism. In some of these circumstances, therefore, a powerful tension is generated between traditional core 'sovereignty,' on the one hand, and the international institution, on the other hand. From a related dimension, it was the expression of preferred local predominance of power that developed into the notion of the absolute right of the sovereign. Richard Hass in defining the concept of sovereignty espoused on its problems and contemporary dimensions when he stated thus:

...these components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components-internal authority, border control, policy autonomy, and non-intervention- is being challenged in unprecedented ways.<sup>26</sup>

The above reflects the majority view on the notion of sovereignty as a concept that must not be expressed in absolutism. Even if sovereignty was absolute, the contemporary claim seems to be that its absolute effect has been eroded. Most literatures are critical of the idea of sovereignty as it has generally been known. One eminent scholar has described the sovereignty concept as 'organized hypocrisy.'<sup>27</sup> Fowler refers to sovereignty as being 'of more value for purposes of oratory and persuasion than of science and law.'<sup>28</sup> The approach today seems to be that no particular characteristic is stable in the concept of sovereignty, but that its nature depends very much on the customs and practices of nation-states and international systems,<sup>29</sup> which practices imbibe the tendency of change over time. On this point, Henry Schermers made a far reaching point when he stated:

Sovereignty has many different aspects and none of these aspects is stable. The content of the notion of sovereignty is continuously changing, especially in recent years. From the above we may conclude that under international law the sovereignty of states must be reduced. International co-operation requires that all States be bound by some minimum requirements of

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<sup>23</sup>Globalization and its Effect on Sovereignty, 'Essay in politics' Available at <https://www.ukessays.com/essays/politics/understanding-globalisation-and-its-effect-on-sovereignty-politics-essay.php>. Accessed 23/2/2020.

<sup>24</sup> See John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) Georgetown University Law Center, 97 Am. J. Int'L. 782-802.

<sup>25</sup>An example of an evolutionary approach can be seen in some of Professor Thomas Frank's writings, particularly, THOMAS M. FRANCK, REOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 8 (2002) (noting the evolution of practice regarding the veto power under the UN Charter). See also United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 130 (adopted Nov. 6, 1998).

<sup>26</sup> Richard N. Haass, former ambassador and director of Policy Planning Staff, U.S Department of State, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2 (Jan. 14, 2003).

<sup>27</sup> Stehen D. Krasner, Sovereignty: organized hypocrisy (1999).

<sup>28</sup> Michael Ross Fowler & Julie Marie Bunck, 'Law, Power, and the Sovereign State (1995).

<sup>29</sup> Cynthia Weber & Thomas J. Biersteker, Reconstructing the Analysis of Sovereignty: Concluding reflections and Directions for Future Research. Weber eds., 1996 at 278.

international law without being entitled to claim that their sovereignty allows them to reject basic international regulations. Thirdly, we may conclude that the world community takes over sovereignty of territories where national governments completely fail and that therefore national sovereignty has disappeared in those territories. The world community by now has sufficient means to step in with the help of existing States and has therefore the obligation to rule those territories where the governments fail.<sup>30</sup>

Again the concern for the actual scope and effect of sovereignty has prompted world leaders and diplomats to submit their critical appraisals of the long established and older sovereignty ideas. Although they recognize the overall importance of some of the attributes of sovereignty, they nevertheless appear to be divergent in the area of absolute sovereignty. For instance, in 1992 the then United Nations Secretary-General Boutros Boutros-Ghali said in his report to the Security Council, 'Respect for the State's fundamental sovereignty and integrity is crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.'<sup>31</sup>

One could see the antiquated kind of sovereignty that should be relegated. The position that sovereignty implies absolute power of a nation-state over its subjects and territory, unfettered by any higher law or rule unless the nation-state consents in an individual and meaningful way has been grounded. A multitude of treaties and customary international law norms impose international legal constraints that circumscribe extreme forms of arbitrary actions even against a sovereign's own citizens. Nevertheless the possibility of likelihood of abuse of power may also subsist where power is allocated to international institutions. Consequently, many, if not most, of the critics of the older sovereignty notions recognize, with varying degrees of support, some of the important and continuing contributions that the sovereignty concepts have made toward international discourse, stability, and peace. For instance, Ambassador Richard Haass, formerly director of policy planning at the United States Department of State, noted same in his speech in January 2003 at a security summit.<sup>32</sup>

The complexity surrounding the effect of sovereignty in international relations essentially triggers the issue of where power should properly reside. Allocation of power therefore must be done with consideration of the fact of the potential misuse of power that could occur in international institutions. The often inferior effectiveness of the constraints on international institutions to those on national institutions may be the core of the argument against placing power at the higher level. Similarly, power can equally be misused at lower levels of government. Many reasons could be given for a preferred placement of power at international levels.<sup>33</sup> In this situation, if governments solely and individually act in their respective interest without any coordination, the result will be damaging to everyone; whereas matters would improve if states assumed certain, presumably minimal, constraints so as to avoid the dangers of separate action. There is also the worry that competition between nation-states could lead to a degradation of socially important economic regulation.<sup>34</sup>

The question then is: what are some essential theories or principles that could reach beyond the traditional sovereignty parameters but equally offer some principled constraints to avoid the risk of abuse of power at higher levels? One possibility would be to follow a popular line of reasoning that calls for redefinition of sovereignty concepts. A constricted definition of sovereignty where emphasis is placed on sovereignty of a people rather than government is suggested. Thus, sovereignty of a people will invariably transmit power to a people and not a select authority that exercises power. The acclaimed absolute power to govern a territory without external interference may be diluted if it is up to a people to decide whether such external force is necessary. This approach has the ability to guarantee better and more stable policies at international levels with

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<sup>30</sup> Henry Schermes, *Different aspects of Sovereignty*, in State, Sovereignty, and International Governance, (Gerald Kreijen et al. eds., 2002).

<sup>31</sup> AN AGENDA FOR PEACE-PREVENTIVE DIPLOMACY, PEACEMAKING, AND PEACE-KEEPING, REPORT OF THE SECRETARY-GENERAL, UN Doc. A/47/277-S/24111, para. 17 (1992), UN Sales No. E.95.1.15 91995).

<sup>32</sup> According to Richard Haas 'Sovereignty has been a source of stability for more than two centuries. It has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law. It has also provided a stable framework within which representative government and market economies could emerge in many nations. At the beginning of the twenty-first century, sovereignty remains an essential foundation for peace, democracy, and prosperity.'

<sup>33</sup> See Cary Coglianese, 'Globalization and the Design of International Institutions', in GOVERNANCE IN A GLOBALIZING WORLD, 45 (Joseph S. Nye Jr. & John D. Donoghue ed., 2000).

<sup>34</sup> Juhn H. Jackson, International Economic Law in Times That Are Interesting, 3 J. INT'L ECON. L. 3 (2000). See also REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Geradin eds., 2001); and articles in 3 J. INT'L ECON. L. 215-383 (2000).

wider acceptance by states. It has the potential to embellish<sup>35</sup> the more traditional concepts of the *volgeist*<sup>35</sup> in international agreements or *opinion juris*. The approach in this work is to establish the fading concepts of sovereignty due to globalization. Yet it is also narrowly aimed to respond to the many extensive challenges and criticisms of the concept of 'sovereignty' by urging a pause for reflection about the consequences of discarding that concept in broad measure. Since sovereignty is a concept fundamental to the logical foundations of traditional international law, discarding it risks undermining international law and certain other principles of the international relations system. It is observed that a holistic abandon of sovereignty could challenge the legitimacy and moral force of international law. It seems clear that the international relations system (including, but not limited to, the international legal system) is being forced to reconsider certain sovereignty concepts. But this must be done carefully, because to bury these concepts without adequate replacements could lead to a situation in which pure power prevails; that, in turn, could foster chaos, misunderstanding, and conflict.<sup>36</sup> The risk of a higher level of abuse of power which may distort the order in states may be more enhanced with an extermination of the sovereignty concepts. Thus it is considered necessary to disaggregate and analyze the complex array of sovereignty concepts and examine particular aspects in detail which may necessitate the need for a supervisory superior power domiciled in international institutions. Perhaps it is in the area of human rights which closely connects with self-determination that international attention should be drawn. This is not to play down on other areas that may crop up concern, such as: unfair trade relations between states; a breach of the expected reciprocal attitude between states as well as breaches of public international policies. Nevertheless it is quickly understandable how humanitarian concerns come to the fore in matters relating to whether there should be external intervention in affairs of a state. It is thus recommended that the comity of nations adopt a new model of sovereignty that allows external intervention on humanitarian grounds. This can be settled by way of a treaty which will require assent of states and help to cope with the challenges posed by agitations for self-determination based on human right abuses. The new development suggested here embraces the thought that the concept of sovereignty must not be relegated but must allow external intervention on humanitarian grounds.

#### 4. Sovereignty in the 21<sup>st</sup> Century and the Right of External Interference

It is submitted that the relative nature of sovereignty must be acknowledged in order to permit external intervention in the affairs of other states particularly when it is deemed necessary to do so on humanitarian grounds. Some of the instances where international interference with matters of a state should be permitted are drawn from historic instances. The NATO<sup>37</sup> intervention in Kosovo sets an example of where intervention becomes imminent on humanitarian grounds. Although NATO intervention spurred criticisms as a violation of *jus cogens* principles of state sovereignty, non-intervention, and non-use of force, it nonetheless provokes the thought that there is no longer an absolute state sovereignty. Incidentally other multinational interventions that aimed to protect civilians against intolerable persecution, such as in Iraq, Haiti, Rwanda, Bosnia and Herzegovina and East Timor, have provoked similar opposition from critics of such actions by multinational forces. Nevertheless the principle of non-interference in the internal affairs of a state is being challenged by the international community's position in its responsibility to protect when it is required to do so.<sup>38</sup> Such interventions must be seen from a humanitarian perspective which becomes necessary in cases of grave injustice and oppression of a people or where a state has failed in the protection of its citizens or has begun meting out injustice on a section of the community. Human rights must be seen from a global view and it is necessary to accord every person the right and responsibility to protect lives and rights. Thus the posited justification for external interferences on humanitarian grounds is that people matter most, and that states, as well as the rest of international community, have some obligation to protect them. Consequently where a state fails to perform the inherent obligation to protect, it is the duty of other actors – no matter whether they are external actors- to help the victims.<sup>39</sup> As such, the principle of sovereignty can no longer be employed in the 21<sup>st</sup> century to shield against the actual suppression of a relative and popular sovereignty that allows interferences.<sup>40</sup> Accordingly a third party intervention to restore the rights of a people in a state where the political order has failed to achieve

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<sup>35</sup> Otherwise referred to as the spirit of the people as Von Savigny postulates in his Historical theory of law.

<sup>36</sup> THOMAS HOBBS, LEVITHAN 100 (Michael Oakeshott ed., Collier Books 1962) (1651) ('In a state of nature there are no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.').

<sup>37</sup> North Atlantic Treaty Organization.

<sup>38</sup> See INTERNATIONAL DEVELOPMENT RESEARCH CENTRE, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

<sup>39</sup> See Shunji Kobayashi, 'State Sovereignty in the 21<sup>st</sup> Century: Political and Strategic Implications', 'State Sovereignty in the 21<sup>st</sup> Century, Concept, Relevance and Limits, PROC. OF AN INT'L SEMINAR (July 23-24, 2001), available at <http://www.stratmag.com/issue2Aug-15.htm>(last accessed Feb 12 2020).

<sup>40</sup> See Michael Reisman, Comment, Sovereignty and Human rights in Contemporary International Law, 84 AM. J. INT'L L. 866, 871-72 (1990).

same must be considered legitimate. It is submitted that the opposing view<sup>41</sup> of such external interference which cites same as a colonial attitude is rather obtuse. It should be noted that the prevalence of bad governance in many states of the world today often leaves a population no alternative other than a resort to international rescue. As the effect of bad governance can often lead to extreme cases of human rights abuse, it is pertinent to have external interferences without the consent of the state. Such intervention which results to interferences should be considered legitimate as human rights have steadily evolved from the internal affairs of individual states to a globally guaranteed functionality which is protected through various mechanisms.<sup>42</sup> This may help eliminate the radical exercise of power by a government which may have become an affliction to its people where its policies amount to an abuse of human rights. The problems of bad governance can be solved by neutralizing the effect of sovereignty as it is apparent that states are reluctant to transfer their prerogatives to the international structure. The reason for such reluctance may be that some states resist any limitation of sovereignty in order to continue domestic human rights abuses, while others fear foreign domination. But whatever may be the persuasion for resistance of external interferences, it is important to note that sectionalism, breach of the social contract, weapons of mass destruction, genocide, failed states and rogue states which often lead to a clamor for secession all pose extreme conceptual problems for doctrines of sovereignty and self-determination. It should indeed be considered a dilemma when international institutions do not have capacity or the will to act to prevent or redress such extreme dangers to world peace and security or to particular regions and populations. It was for this that Professor Henkin wrote that 'for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.'<sup>43</sup>

### **5. Conclusion and Recommendations**

It is evident that the notion of state sovereignty seems to be a conceptual veil that shields the state from external interferences. Yet the nature of the exercise of the right of self-determination is one that essentially requires external actors to help foster. Secessionist movements are internal threats to a nation's sovereignty that inevitably require the international community's involvement due to the potential impact it could cause to the state's political structure. A people oppressed often seek external intervention to implement their right to self-determination. The outside world is a relevant audience because no seceding nation exists in a vacuum. The breakaway entity must depend on at least some foreign nations and ideally the entire international community, including the United Nations and other International Organizations. While it is conceded that sovereignty has the crucible value of protecting states from foreign domination, it should be necessary to lift the veil of sovereignty in cases of gross human rights abuses. It is suggested to consider lifting the veil of sovereignty to allow external intervention as an exception to the principle of non-intervention within the scope of international law. The proper approach should be to consider the reasons for external interferences and interventions in cases of self-determination and it is suggested that the veil of sovereignty be lifted whenever the reason centers on violation of human rights.

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<sup>41</sup> Some views label the tendency toward international interventionism as a remnant of colonial attitude and an attempt to create a world order based on values and interests particular to the most powerful states. See Oscar Schachter, 'The Legality of Pro-Democratic Invasion' 78 AM. J. INT'L L. 645 (1984).

<sup>42</sup> See Johan van der Vyver, 'Sovereignty and Human Rights in Constitutional and International Law' 5 EMORY INT'L L. REV. 321 (1991). See also Antony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 25 GA. J. INT'L & COMP. L. 47, 75-80 (1995-1996).

<sup>43</sup> See Louis Henkin, 'International Law: Politics and Values' (1995) quoted in Jackson, *The GATT and the WHO: Insights on Treaty Law and Economic Relations* (2000).