International Criminal Court and the Question of Sovereignty

Atul Bharadwaj

Abstract

Appalled by the increasing brutality and emboldened by the collapse of ideological barriers, international law now intends to cross the rubicon and reach out for criminals hiding behind the veil of sovereignty. It aims to sensitize the world against gross human rights violations through the threat of legal action. The rapid entry of the Rome Statute on July 1, 2002 heralds a new era in international politics. It opens new avenues for the international community to monitor human rights violations within states and bring the delinquent individuals to trial.

One of the main reasons for the court to come into existence after the end of the Cold War is that many crimes committed against humanity have been ignored by states either due to 'military necessity' or under the national sovereignty and territorial integrity clause. The ICC does involve a certain sacrifice of sovereignty because it envisages asserting itself when a state refuses or fails to use its national criminal justice apparatus to deal with the perpetrator of crimes against humanity.

This paper argues that the ICC challenges the exclusivity of sovereign states. ICC imposes certain restrictions and limits on state authority and competes with the state in the exercise of authority.

-*-

Announcing the entry into force of the International Criminal Court (ICC), the UN Secretary-General Kofi Annan, said, "is a great victory for justice and for world order-a turn away from the rule of brute force, and towards the rule of law." He further added, "The process we are now witnessing marks a decisive break with the cynical worldview", according to which in Stalin's words, "a single death is a tragedy, a million deaths is a statistic".[1]

During the Cold War, violations of humanitarian law were generally brushed under the carpet due to political expediency. International law till the end of the Cold War had overcome many temptations to breach the territorial boundaries of the nation-state to discipline erring individuals. The principle of 'non-interference in the internal affairs' had often prevented the international

community from taking any action. Moreover, international society had lacked the coercive or deterrence power to prevent or punish the violations of human rights by individuals.

Appalled by the ever-increasing brutality and emboldened by the collapse of ideological barriers, the international community now intends to cross the rubicon and reach out for criminals hiding behind the veil of sovereignty. It aims to sensitize the world against gross human rights violations through the threat of legal action. The rapid entry into force of the Rome Statute on July 1, 2002 heralds a new era in international politics. It opens new avenues for the international community to monitor human rights violations within states and bring the delinquent individuals to trial.

This paper argues that the ICC challenges the exclusivity of sovereign states. The ICC imposes certain restrictions and limits on state authority and competes with the state in the exercise of authority. However, the onus of protecting and in fact, enhancing their sovereign status now rests more with states than ever before. By upholding the principles of international law within their territories, states can now prevent supranational interventions. This could lead states to value justice over narrow political considerations. James Gow has identified this shift in the state's primary source of sovereignty from the 'will of the people' to its obligations towards maintaining an international equilibrium as 'the revolution in the sovereignty principle.[2]

The paper is divided into two parts. The first part briefly touches upon the formation of the ICC and its basic structure. Part two deals with the impact of the ICC on sovereignty. Firstly, it looks at the metamorphosis of the individual from 'object' to 'subject' in the eyes of international law. Secondly, it examines the impact of ICC on the changing nature of the sovereignty discourse.

Background to ICC

In July 1998, the Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC concluded by adopting a statute for such a court.[3] The statute's principal inspiration came from the Nuremberg and Tokyo

Tribunals.[4] The process of the Rome Statute was further guided by the experience acquired from the operation of two ad-hoc International Criminal Tribunals (ICTY and ICTR) set up to deal with prosecution of individuals for violations of international criminal law in Yugoslavia and Rwanda.[5]

The seeds for an international criminal court were sown in the year 1864 by Gustave Monynier, one the founders of the International Commission for Red Cross (ICRC).[6] In 1947, Henri Donnedieli De Vabres, the French judge on the International Military Tribunal at Nuremberg made a proposal for a permanent court. The job of preparation for establishing an international criminal court had begun in 1947. The UN General Assembly (UNGA) entrusted the International Law Commission (ILC) with the task of drafting the statute of an international criminal court derived from Article VI of the Genocide Convention, along with the 'Nuremberg principles' and the 'Code of Crimes against the Peace and Security of Mankind'. In addition, the UNGA also constituted in 1952 a committee comprising representatives of 17 states, for drafting the Statute of the ICC. In 1954, the ILC submitted its proposal for the ICC. However, all further work on the ICC was suspended in the wake of Cold War imperatives.[7]

In 1989, Trinidad and Tobago initiated the process of establishing an international court to try individuals charged in connection with criminal offences, illicit trafficking in narcotic drugs across national frontiers and other transnational activities.[8] In 1993, the UNGA again requested the International Law Commission to prepare a draft statute for an ICC. The year 1994 saw the UN General Assembly constituting an ad-hoc committee to review the draft. The ad-hoc committee was followed by a preparatory committee, which met thrice from 1996 to 1998 to clear issues pertaining to the text of the statute. The ad-hoc committee was headed by Adriaan Bos, legal adviser to the Ministry of Foreign Affairs of the Netherlands, who was replaced just prior to the Rome conference by Philippe Kirsch, the legal adviser of the Ministry of Foreign Affairs of Canada.[9] The final product of the preparatory committee, which emerged in July 1998, had about 1400 brackets or points of disagreements on various issues contained in the text.[10]

The entire process of negotiating the disagreements over the various provisions of the statute was conducted in an organised manner. The 13 parts of the statute were divided among various working groups for detailed discussions. The working groups were provided adequate support through informal consultations and discussions conducted among various political and regional groups such as the Non-Aligned Movement, the European Union, the Arab Group, the Latin America Group and many NGOs. The three major groups of states which were formed during the conference were the 'like-minded group' (LMG), the P-5 Group and the NAM Group. The LMG Group consisted of 55 states, including many from Western Europe and Latin America. The LMG group was the strongest supporter of the ICC and was opposed to the moves of powerful nations to curtail the powers of the ICC. The LMG's strength was augmented when Britain broke ranks with the P-5 and joined it just prior to the commencement of the conference. The change in UK's stance had come about after the Labour Party victory in elections.[11] The focus of the P-5 Group during the negotiations rested primarily on a strong role for the Security Council vis-à-vis the court and the exclusion of use of nuclear weapons from the list of weapons considered illegal in the statute. The NAM Group comprised mainly India, Egypt and Mexico and argued against the chief concerns of the P-5 nations. The NAM Group also advocated a much less powerful ICC, which differed from the LMG position of a strong ICC.

Role of the State in ICC

The ICC is a permanent body, which has come into existence through a treaty among the member-states of the UN. It is binding only on the signatories of the treaty. The ICC has no jurisdiction over states or legal entities. Its purpose is to try individuals who are accused of committing crimes of international concern. Such crimes include:

- Genocide
- Crime against humanity
- War crimes and aggression[12]

The Rome Statute contains 13 parts, including 128 Articles. According to Mahnoush Arsanjani, the three principles around which the Rome Statute was built are:

- Complimentarity-upholding the primacy of national courts over ICC.
- Confining itself to dealing with more serious crimes against international community as a whole.
- Remaining within the realm of customary international law. That is, any provision in the Statute, which conflicts with or is inconsistent with general international law, shall be subordinate to it except in case of Article 53 of the Vienna Convention on the Laws of Treaties, 1969.

The most debated and controversial part of the Statute is Part 2, which deals with the Jurisdiction, Admissibility and Applicable Law. Articles 12-19 deal with the issues of jurisdiction of the court, the trigger mechanism and admissibility.

Member-states of the UN have acted as the primary agent for creating an international body like the ICC. Through the principle of complimentarity, the ICC primarily displays its trust and respect for the national judicial system. The court intends to deal only with the most serious crimes of concern to international community as a whole and leaving the so-called conventional crimes like terrorism and illicit drug trafficking to individual states' jurisdiction.[13] It is argued that terrorism has not been included in the Statute because of the absence of an internationally acceptable definition of terrorism. Moreover, the perception of many countries with regard to terrorism is that it is an individually driven project which is carried out by private individuals in an isolated and not widespread or systematic manner. Therefore, to proceed ahead with the formation of the ICC, controversial topics like terrorism, supported by India, were conveniently dropped.

The Court intends to deal only with those cases where the national procedures are unavailable or ineffective. In a statement before prepcom, on December 8, 1997, Louise Arbour, Prosecutor of ICTY said, "Recourse to an

international criminal forum will occur when horrendous crimes have been committed with the collusion or impotence of national authorities."[14]

One of the significant developments that could make states even more vigilant against serious violations of international crimes is the inclusion in the ICC Statute, of crimes perpetrated in civil wars, internal conflicts and non-international armed conflicts. The Statute also omits any nexus between crimes against humanity and armed conflict, thereby meaning that the crimes against humanity can be committed in times of peace as well.[15]

Only three powers are authorized to initiate the ICC 'trigger mechanism'. That is, the case can be referred to the ICC only by the UN Security Council, a party state or by the prosecutor acting on his or her own motion (proprio motou). A non-party state can also refer the case to the ICC. But, in case of a non-party state, Article 12 (3) of the Statute uses the term "the crime in question" instead of "a situation in which one or more crimes within the jurisdiction of the court appear to have been committed."[16] The prosecutor will have the power to reject the referrals made by the UN Security Council and the party states. During the negotiations the US had opposed the proprio motou powers of the prosecutor, which the LMG Group had promoted. Finally, the US was able to restrict the powers of the prosecutor by making him seek the advice of the pre-trial chamber prior to proceeding with a proprio motou investigation.[17]

Granting the UN Security Council the right to trigger the ICC primarily reinforces the argument that in the international order the concept of sovereignty has various gradations depending on the power and position of the state. The role of the Security Council in the ICC has been India's main objection. According to Dilip Lahiri, the head of the Indian delegation at the Rome Statute, "any pre-eminent role for the Security Council in triggering ICC jurisdiction constitutes a violation of sovereign equality, as well as equality before law, because it contains an assumption that the five veto-wielding states do not commit the crimes covered by the ICC Statute."[18] The counter-argument to India's position in Flavia Lattanzi's opinion is that the presence of

the complimentarity principle will act as an umbrella which will cover the powers of the Security Council under Chapter 7 in the initial phases at least.[19]

According to M. Cherif Bassiouni, "ICC is based on the principle of territorial criminal jurisdiction, and not on a theory of universality of criminal jurisdiction", because only 'referrals' by the Security Council are de-linked from "territoriality of any state, whether they are state parties or non-state parties."[20] This means that the other two trigger mechanisms are related to territorial criminal jurisdiction. However, in case of proprio motou, India's objection is that, "the distinction between the sovereign authority of the states on the one hand and the professional role of a prosecutor on the other should be maintained", because, the matters pertaining to states cannot be handed over to an individual prosecutor to initiate investigations suo motto and thus trigger the jurisdiction of the Court.[21] The United States too has been opposing the powers vested in the prosecutor, because it fears that the discretionary powers placed in the hands of a prosecutor are antithetical to its national sovereignty.[22] The US sees the ICC as an infringement of its sovereign rights as a Superpower to carry out humanitarian and international peace missions across the globe. The ICC will have the power to prosecute US citizens and soldiers, who are spread across the globe in pursuit of protecting US business and security interests.[23] In order to prevent such an eventuality, Washington tried its best to differentiate between internal conflicts and international armed conflicts. Initially, the US rejected the notion of automatic jurisdiction for crime except genocide and proposed an opt-out mechanism for war crimes and crimes against humanity. This proposal was meant to protect US citizens who are the most involved globally and whose actions could fall under the purview of war crimes and crimes against humanity. The US did not show much concern for genocide because it knows that such a crime is most likely to be applicable in case of internal conflicts between the majority and minority community in smaller states.[24] The US also tried in vain to put restrictions on the jurisdictional regime by proposing that the consent of the territorial state and the state of nationality of the perpetrator must be sought before trying the individual of a non-party state. For example, under Article 12 (2), if the US (non-party state) armed forces commander

attacks a marriage party in Afghanistan (party state) killing 100 children and women, being a non-party state, the US has immunity from the court. But if Afghanistan complains to ICC against the US commander for systematic attack on its citizens, then the US commander is liable to be tried. He would also not be able to seek immunity on the grounds that he was acting in an official capacity. It is mainly this threat that small states may combine against the US and browbeat it into accepting the diktats of the UN that is difficult for the Bush administration to swallow.

In accordance with the provisions of the Statute, state parties are obliged to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[25] While the Article, which deals with the surrender of persons to the Court, uses the term 'request' for seeking the cooperation of state parties in arrest and surrender of the concerned person, party states are under international obligation to comply with the request. Party states are duty bound to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part". Where a party state fails to comply with a request to cooperate with the Court, "the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council".

Even in the case of competing requests, the request for surrender by the Court would take precedence over a similar request for extradition of the same person by another state.[26] Here, it is important to note that the Court uses the term 'surrender' instead of extradition,[27] which is normally used when the transfer of criminals between two states based on a treaty is involved. The use of the term 'surrender' legitimizes the authority vested in the Court. 'Surrender' denotes authority and an order that needs to be complied with. 'Extradition' means request, which a state may or may not comply with. Moreover, the dictionary meaning of 'extradite' means handing over of a criminal to the foreign state, where the crime was committed. Since the ICC involves trying criminals who may have committed an offence not only in a

foreign land but anywhere in the world, even in their own country, hence the usage of the term 'surrender'.

In matters of national security, the 3Court does grant some concessions to state parties for protection of national security information. Article 72 of the Statute contains adequate safeguards to allow party states to protect sensitive national security information that might potentially be used as evidence at trial. Party states can refuse to divulge information that is prejudicial to their national security interests.

The two cornerstones of a sovereign state are independent foreign policy and national security. Here, one sees that while the Court shows respect for national security of the states, it does not accord the same status to its foreign policy. Irrespective of the foreign policy compulsions of the states involved, Article 90 grants priority to request for surrender by the Court over similar requests by other states for extradition of the same individual. The United States, which had played a significant role during the negotiations phase, finally decided to remain a non-signatory. But, what is more intriguing is that in the end the US was clubbed with the so-called 'evil states' (Iraq and Libya) who had voted against the treaty. India too opposed the treaty.

One of the main reasons cited by almost all those who opposed the treaty is that, the ICC goes against the concept of national sovereignty. But, each country has its own idea and definition of sovereignty based on its interests. Throughout the negotiations, the US' aim was to create greater scope for wielding power over, and through, the Court, by making the Security Council a powerful player in the scheme. India, on the other hand, opposed any role whatsoever for the Security Council. The difference between the Indian and the US opposition to the ICC, can be located in Hedley Bull's conception of sovereignty in international relations as antithesis of order and justice-"the clash between the preoccupation of the rich industrial states with order (or rather with a form of order that embodies their preferred values) and the preoccupation of poor and non-industrial world with just change."[28] It is interesting to note that the Israeli delegation's opposition to the Rome Statute was based on its demand for extra-territorial sovereignty. Therefore, it

protested against Article 8, Para 2 (b), and sub-para.viii, which included "the action of transferring population into occupied territory" in the list of most heinous and grievious war crimes.[29] While there may not be a consensus among these states on the definition of sovereignty, one thing that all of them seem to be experiencing is a challenge to their authority.

Why ICC?

The process of holding individuals accountable for human rights abuses had been on the agenda of international society since the end of the First World War. Since the First World War, five international investigative commissions and four ad-hoc international tribunals have been established to try individuals for crimes against humanity. [30] However, the common complaint against all these trials has been that they have been carried out at the behest of the victor.

It goes to the credit of the ICC that it has been brought out with the consent of a majority of nations to bring about a change in the international order and not any practice of the victor influencing the course of justice after the conflict. The Rome Statute was adopted by 121 votes in favour, seven against and 21 abstentions. The seven countries that cast a negative vote were the USA, China, Israel, Libya, Iraq, Qatar and Yemen. India abstained.[31] The representatives of 14 international organizations and 236 NGOs representing some 800 members of the International NGO Coalition for the ICC also attended the Rome conference.[32]

One of the main reasons for the Court to come into existence after the end of the Cold War is that many crimes committed against humanity have been ignored by states either due to 'military necessity' or under the national sovereignty and territorial integrity clause. The ICC does involve a sacrifice of sovereignty, because it envisages asserting itself when a state refuses or fails to use its national criminal justice apparatus to deal with the perpetrator of crime against humanity.

Under the Westphalian system, the sovereign power to make war and peace is restricted to the legitimate state alone. However, the proliferation of advanced technology and the ease with which individuals can appropriate these technologies to cause large-scale destruction challenges the state's monopoly over the means of waging war. A suicide bomber epitomizes the sovereign powers inherent in any individual to make war. The ICC's provisions are not directly related to controlling such atomized individuals who have broken their agreement of allegiance with civil society and with norms identified by the international society. However, by providing the irrational individuals viable media to seek justice, the ICC may help to prevent the slippage of a greater number of individuals into the Lockean 'state of nature'.[33]

The question that comes to mind is why should people hand over their rights to a supra-national body? The rapid growth of markets devoid of any soothing political effects has generated a fresh wave of fear in the minds of people. The growing inequalities and dwindling economic opportunities are a cause of insecurity in the world. This is one main reason for the growth of xenophobic, ultra-nationalist and ethnic movements across the world, which threaten minorities.

The movement towards supra-national legal structures spearheaded by the global civil society is perhaps a response to the human need to seek justice which is being denied within many states. Using the Lockean logic, one can argue that the sovereign individual cannot remain in a perpetual 'state of nature'. The rational individual, disillusioned with his own government's response to his needs of comprehensive security, is beginning to offload the baggage of his natural sovereign rights to a larger terrestrial body like the UN to ensure his 'peaceful sleep'. Through the ICC, the post-modern individual is exerting his inalienable right to appeal to a supra-national 'terrestrial body' which also possesses spatial powers to monitor the activities in various parts of the world rather than trying to seek justice from a supernatural power.[34] But, how credible and independent the Court will be of the political compulsions imposed by the stronger powers will have to be seen. The two

ad hoc tribunals, ICTY and ICTR, which are based on selective justice, do not enjoy very high international credibility ratings.[35]

Another reason for the formation of a permanent court is that the ad-hoc tribunals are time-consuming, relatively expensive and loaded with extensive logistic problems. The insights provided by Spain's request for the extradition of Augusto Pinochet from the UK for crimes committed against the Spanish people in Chile, also proved valuable in the ICC. The Pinochet event set alarm bells ringing in the international community, because such extradition could set a precedent. This, according to Antonio Perez, could "become a vehicle for bootstrapping the exercise of universal jurisdiction into a much more powerful tool of unilateral law enforcement, where each nation on its own or perhaps with a slight assist from the rendering state, could become [an] international policeman."[36]

Individual and Sovereignty

The judges of the International Military Tribunal at Nuremberg had reached a conclusion that "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." This was the first successful attempt to hold the individual responsible for acts detrimental to international society. During the inter-War years, attempts were made to contain national sovereignty and bring the legally invisible individual into the realm of international law. However, the predominance of state-centricity and positivist international law prevented any attempts to dilute state authority. The identification of states as the proper 'subjects' of international law was formalised with the introduction of bi-polarity at the end of the Second World War. The individual was ascribed the status of an 'object' in international law. "As objects, individuals have no rights or liabilities under international law. The only right or liability they possess are derivatives of states under the principle governing nationality".[37] It is the conception of the individual as a mere 'object' in international legal terms that is being contested by the ICC.

The process of conferring certain universal rights to individuals began at the end of the Second World War.[38] The Helsinki Act of 1975 reiterated the fact that the relationship between the national governments and their people was not solely the concern of the state.[39] According to Hideaki Shinoda, various international human rights conventions "have a great impact upon traditional anthropomorphisms, because the very notion of individual human rights goes beyond the simple analogy of natural and state persons." What this indicates is the decline of the nation as the organic subject of sovereignty and the state as the sole unit of analysis in international politics.[40]

The collapse of the Berlin Wall catapulted the human rights campaign to new heights through the use of media technology. The overarching presence of the media and the spread of NGOs in the 1990s led to greater scrutiny of the serious human rights violations record of states. The increased surveillance of the state's human development performance has led to the emergence of new concepts in the field of security. National security based on maintaining territorial integrity is being replaced by a much broader concept called 'human security', which "seeks to place the individual-or people collectively as the referent of security."[41]

It is an accepted norm in any society that rights and responsibilities go hand in hand. The ICC provisions aim to balance the rights conferred on individuals by international society with responsibilities and accountability to international law. Does this lead to a kind of 'supra-national citizenship', as in the case of the European Union, which is "understood not merely as an agreement among states but also as a 'social contract' among nationals of those states?"[42] Therefore, what we are witnessing is the international legal status of the individual undergoing a metamorphosis. The transformation of the individual from 'object' to 'subject' in international legal terms is resulting in a shift in power relations both within and between states. This means that the state's monopoly over its people is fast eroding and its political authority is being challenged. Since the Sovereign State is still considered to be the best available institution capable of dealing with human problems in world politics, we find that ICC's referent is both the state and the individual. However, there

is a problem in combining universality with individualism because the ethos of individual rights goes against the sense of communal responsibility. According to Michael Walzer, individualism fosters a "concept of self which is normatively undesirable".[43]

Although the ICC does not involve any official transfer of sovereignty, its provisions definitely enjoin upon states to share authority over its citizens. These provisions in the Statute could open the floodgates for intervention in the internal affairs of states. One senses in the ICC Statute a streak of Weberian logic according to which, under certain circumstances, "sovereignty and intervention cease to function as dichotomous terms. If sovereignty and intervention are everywhere, they are nowhere."[44] To understand Weber's logic let us consider the US intervention in Afghanistan. After the fall of the Taliban, the media carried pictures of liberated men and women, giving the impression that the US intervention was justified to free the Afghan population from the grip of the Taliban. It could be argued that it was the Taliban, which had initially pierced the sovereignty of the Afghan people and that the US had acted in self-defence and intervened only to protect human rights. Till this point the Weberian logic works. But, the problems start when US troops based in Afghanistan, during the course of their military operations, begin to attack the local population of Afghanistan and the government of Afghanistan is not able to unequivocally condemn US actions.[45] It is at this point that the need for restoring Afghan sovereignty arises once again and the dichotomy between sovereignty and intervention begins to resurface.

Towards Constitutional Sovereignty

The charisma of state's authority is under strain.[46] The staggering rise in intra-state conflicts in the post-Cold War world and the growing tentacles of transnational terrorism have raised questions about state legitimacy. States are no longer considered to be the most effective means of enforcing international norms and order among individuals.

The detailed scrutiny of the human rights records of certain countries by the international community is leading towards a new international order,

where the absolutes of state sovereignty are being challenged. In the new international setting stability and order take precedence over equality among states. The sovereign immunity enjoyed by states is being restricted and limited by the emergence of international constitutional structures, which exist beyond the boundaries of states.

The ongoing trends in the discourse on sovereignty suggest that a perceptible shift is occurring away from the theories of national sovereignty, which had dominated the post-Second World War world, towards constitutional notions of sovereignty that intend to limit sovereignty. At the end of the Second World War, Charles E. Merriam had argued, "sovereignty must make friends with constitutional values, scientific values, idealistic values, which are the heart of our new civilization."[47] The right to hold individuals responsible and accountable and the thrust towards international humanitarianism are a part of the same cosmopolitan ideology. The advanced technology available with the international community enables it to look into the happenings within state territories. The spatial reach of the international community is leading towards the construction of an international moral solidarity against infringement of individual rights.[48]

The fresh wave of cosmopolitanism is something akin to the medieval cosmopolitanism, which came via the church. However, one fundamental difference between the medieval and current cosmopolitanism is that while the former was based on the authority derived from God, the latter relies on scientific means of monitoring human activity for its legitimacy.

The growing interconnectivity and interdependence in the world is leading towards redefining sovereignty in terms of its obligation to international rules. According to the former UN Secretary-General, Javier Perez de Cuellar, "Sovereignty and international responsibility are different sides of the same coin...The nexus between sovereignty and humanitarianism introduces us to the notions of international rule of law... Sovereignty and international responsibility leads back to the international rule of law."[49]

International responsibilities of states are normally associated with their external sovereignty. The right to be an equal member in the comity of nations is an important aspect of external sovereignty. Alan James finds splitting of sovereignty into external and internal components to be too dangerous for the unitary character of sovereignty. Sovereignty, according to James is 'constitutional independence', which can neither be shared nor be divided.[50] However, George Sorensen, while acknowledging the impregnability inherent in 'constitutional independence', pierces the concept of sovereignty by dividing it into 'constitutive rules' and 'regulative rules'.[51] The core of 'constitutive rules' is composed of constitutional independence, which remains stable. But according to Sorensen, the 'regulative rules' remain in a state of flux. The difference between James' and Sorensen's 'constitutional independence' can be located in the age-old question: what came first, the egg or the chicken? While James holds the opinion that international law is the child of sovereignty, Sorensen believes that sovereignty is a passport for entry into an already constituted international community. The unitary character of James' 'constitutional independence' leaves no room for any external interference in the running of the state. However, Sorensen merely sees constitutional independence as a piece of paper to lure the states into an international society, where their sovereignty can be regulated through a different set of norms.

Applying the George Sorensen logic to the recently constituted ICC, one can safely argue that it does lead to a divided or truncated sovereignty for states. While the ICC acknowledges the constitutional validity of the states, it also undermines it by asking states to share their absolute authority, which they enjoy over their subjects, thus circumscribing their supremacy or 'constitutional independence'. It is claimed that the Court is not a supra-national body but a membership of international society. It only identifies certain core constitutional values, which are shared by all national societies. Therefore, there is no master-slave relationship between sovereign states and international institutions. However, one sees that states will always be subordinate to the ICC because, the latter possesses the treaty powers to force states to comply with its requirements. Transactions between states and

ICC are one-sided. It is only states that are required to give something (person or documents). ICC is not obliged to give anything in return to states. The ICC promises not to states but to its subjects, the protection of their rights.

Conclusion

Working within the realist paradigm, an Indian jurist Radhabinod Pal, in his landmark dissenting opinion at the Tokyo trials had come up with a verdict 'not guilty' in favour of the Japanese.[52] Justice Pal had offered the dissenting note in the year 1948 and had argued that, "so long as the international organization continues at the stage where trials and punishment for crime remain available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and preventive effect." Justice Pal's argument could still be used in 2002, because the hierarchies among nations have not vanished. In fact, the divide between rich and poor nations in terms of wealth and therefore the power they exert, is continuously widening. One could support the argument that sovereignty which is dissipating from weak nations, without getting destroyed, is finally getting accumulated with big powers. The power and authority enjoyed by the small nations during the Cold War is diminishing in the age of globalization. The rules of admission to an international club of nation-states are changing. New rules, once again dictated by the Western world, are being floated. In the medieval age, allegiance to Christianity was a prerequisite for entry into the club. The colonial era saw the demarcation of the world into civilized and non-civilized colonies. Now, once again, new demarcations based on pre-modernity, modernity and post-modernity are beginning to appear.[53] The world is gradually moving towards 'dual sovereignty' or truncated sovereignty, which, far from being absolute, only gives limited jurisdictional powers to the territorial state in certain specific spheres that are inconsequential to international society. In an interconnected and interdependent post-Cold War world, the choices are becoming limited, as states have become transmitters of global norms into the national mainstream. Under such circumstances, it may be better for small and weak nations to pool their sovereignties in

international organizations rather than letting their sovereign energies flowing towards a few or rather one powerful player in international politics, since the chances of receiving peace and justice within a larger international organization are much greater than relying on the sole Superpower to deliver justice only through war. Therefore, in deciding the future course of action on strengthening international organizations, rationality rather than realism should guide the policies of weak and small nations.

If the state is a notional person, then sovereignty is its spine. According to neo-realists, the strength of spine (economic, military) determines the domestic and international standing of the country. However, a constructivist would argue that since no person (state) can keep its spine ramrod straight for long times, therefore, it is the flexibility of the spine, which enables the state to perform and maintain a healthy balance between its domestic and 2international obligations. But the moot point is how much a state should bend to ensure that its back doesn't break. Joining international regimes like the ICC may not damage sovereignty to an extent to which it would get affected, if one were forced to enter the global structures created by a global hegemon.

References/End Notes

1. The text of UN Secretary-General Kofi Annan's speech, to the closing of the ninth session of the Preparatory Commission for the ICC, April 19, 2002.
2. Gow, James, A Revolution in International Affairs? Security Dialogue. September 2000, 31 (3) 297. According to Gow, "popular sovereignty has been ousted as the primary qualification for statehood by 'equilibriant' sovereignty". Also see Henrik Syse, Ethics, Sovereignty, and Self-Defence: A Rejoinder. Security Dialogue. December 2000, 31 (4) 437-442.
3. Kirsch, Philippe and John T. Holmes, Developments in International Criminal Law. Foreword in The American Journal of International Law. 1999, 93 (2) 1-12.
4. See Peggy E. Rancilio, From Nuremberg to Rome: Establishing Criminal Court and the Need for US Participation. University of Detroit Mercy Law Review. 2001, 78 (299) 299-339.
5. See Christian Tomuschat, International Criminal Prosecution: The Precedent of Nuremberg Confirmed. Criminal Law Forum. 1994, 5 (2-3) 237-247.
6. See R Venkata Rao, All Roads may not lead to Rome: A Critique of the New Millennium's International Criminal Court. International Law Conference on International Law in the New Millennium: Problems and Challenges Ahead. October 4-7 2001. The Indian Society of International Law, Souvenir and Conference Papers, 2. p. 647-650
7. See William A. Sachabas, An Introduction to the International Criminal Court. 2001. Cambridge University Press. pp. 8-10.
8. Arsanjani, Mahnoush H., The Rome Statute of the International Criminal Court. American Journal of International Law. 1999, 93 (2) 22-43
9. Ibid., p.23
10. Kirsch, Philippe, and John T. Holmes, no.3, p.3

11. Ibid., p.3 and Mahnoush H. Arsanjani, no.8, pp. 22-43

12. For details on various types of crimes see Michael N. Schmitt and Major Peter J. Richards, Into Uncharted Waters: The International Criminal Court. Naval War College Review. Winter 2000, 53 (1) 93-134. Also see Christopher Keith Hall, The Jurisdiction of the Permanent International Criminal Court Over Violations of Humanitarian Law. In Flavia Lattanzi, Ed. The International Court Comments on The Legal Draft Statute. Editoriale Scientifiica. 1998, pp.19-47 and David Donat Cattin, Crime Against Humanity. In Ibid., pp. 49-93.
13. Lattanzi, Flavia, The Complimentary Character of the Jurisdiction of the Court with Respect to National Jurisdiction. In Flavia Lattanzi, no. 12, p. 6-8. The states' preference for repression of the conventional crimes under the state jurisdiction influenced the contents of ILC draft code of crimes against peace and security of mankind. Eight categories of crimes, which were a part of the 1991 approved draft, have been omitted in the ILC draft approved in 1996. The crimes excluded are intervention in international affairs, colonial domination, international terrorism, international illicit drug traffic, mercenary soldiering.

14. Kirsch, Philippe, and John T. Holmes, no.3 p.10.

15. Ibid. p. 277.

16. See M Cherif Bassiouni, Explanatory Note on the ICC Statute. International Review of Penal Law. 71 fn. 21 p.7. It is to be noted that in case of all other trigger mechanism, the term 'situation' has been used, which is intended to exclude a possible selectivity of instances or individuals to be referred to the ICC on an exclusive basis.
17. See Jelena Pejic, The United States and the International Criminal Court: One Loophole too Many. University of Detroit Mercy Law Review. 2001, 78 (267) 283.
18. A statement by Dilip Lahiri, Additional Secretary, MEA, India, speaking on the adoption of Rome Statute of the international court, July 17 1998 at www.un.org/icc/speeches

19. Lattanzi, Flavia, no. 13, p. 10.

20. See M Cherif Bassiouni, no. 16, p. 8.

21. Ibid.

22. In an unprecedented step the US unsigned the Rome Treaty on May 6, 2002, which had earlier been signed by Bill Clinton in 2000. Never in the history of the UN had any country unsigned a treaty.
23. For details see Geoffrey S. Corn and Jan E. Aldykiewicz, New Options for Prosecuting War Criminals in Internal Armed Conflicts. Parameters. Spring 2002, 30-43.
24. Benison, Audrey I., International Criminal Tribunals: Is there a Substantive Limitation on Treaty Power? Stanford Journal of International Law. 2001, 37 (75) 85. The author says that "genocide is difficult crime to prosecute because of high definitional threshold'.
25. Part 9, Article 86-102 of the Rome Statute deals with international cooperation and judicial assistance. See Rome Statute at www,un.org/icc.

26. See Rome Statute Part 9 Article 90 at www.un.org/icc

27. Article 102 of the Rome Statute differentiates between surrender and extradition. (a) 'Surrender' means the delivering up of a person by a state to the Court, pursuant to this Statute. (b) 'extradition' means the delivering up of a person by one state to another as provided by treaty, convention or national legislation.
28. See Hideaki Shinoda, Re-Examining Sovereignty: From Classical Theory to the Global Age. 2000. Macmillan; London. p. 137.
29. See the statement by judge Eli Nathan, head of the delegation of Israel to Rome conference, July 17, 1998 at www.un.org/icc/speeches
30. The 1919 Treaty of Versailles had provided for the establishment of an international tribunal for the trial of German Emperor, Kaiser Wilhelm, for a supreme offence against international morality and sanctity of treaties. See M. Cherif Bassiouni, no. 16, p. 3, and Jules Deschenes, Towards International Criminal Justice. Criminal Law Forum. 1994, 5 (2-3) 252.

31. See Jelena Pejic, no. 17, pp. 267-297.

32. Ibid. p. 271.

33. Locke's state of nature deals with moral autonomy of the individual and is identified as the perfect state of freedom in which the individual has the natural power. An individual possesses the power to judge his actions. For detailed analysis of state of nature and state of war see John T. Scott, The Sovereignless State and Locke's Language of Obligation. American Political Science Review. September 2000, 94 (3) 547-560.
34. Ibid., p.552. According to Locke, if "the body the people, or any single man, is deprived of their right... and have no appeal on earth, there they have the liberty to appeal to heaven, whenever they judge the cause of sufficient movement". For 'material context in state of nature arguments' see Daniel H. Deudney, Regrounding Realism: Anarchy, Security and Changing Contexts. Security Studies. Autumn 2000, 10 (1) 1-42.
35. According to the Indian delegation at the Rome conference, the decisions to set up the International Criminal Tribunal for the Former Yugoslavia (ICTFY) and for Rwanda (ICTR) were dictated by the Security Council and are therefore of 'dubious legality' because the powers of the Security Council cannot be challenged. See Usha Ramanathan, For an International Criminal Court. Frontline. August 1-14, 1998, 15 (16).
36. For details on Pinochet case, see Antonio F. Perez, The Perils of Pinochet: Problems for Transnational Justice and Supranational Governance Solution, Denv. J. Int'l L. & Pol'y, 28 (2) 193.
37. Cutler, A. Claire, Critical Reflections on the Westphalian Assumption of International Law and Organization: A Crisis of legitimacy. Review of International Studies. 2001, 27 141.
38. In 1950, the UN General Assembly "recognized the right of peoples and nations to self-determination as a fundamental human right".
39. Gelber, Harry G., Sovereignty through Interdependence. 1997. Kulwer Law International; London. p. 76.

40. Shinoda, Hideaki, no. 28, p.148.

41. Newman, Edward, Human Security and Constructivism. International Studies Perspectives. 2001, 2 251.
42. Quoted by Robert Jackson, Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape. In Robert Jackson Ed. Sovereignty at the Millennium. 1999. Blackwell Publishers; The Political Studies Association; USA. p. 29.
43. As quoted in Thomas M. Frank, Are Human Rights Universal. Foreign Affairs. January/February 2001, 196.

44. Quoted in Hideaki Shinoda, no.28, p. 6.

45. See Marc W. Herold, The Massacre at Kakarak. Frontline. August 16, 2002, 66-72.
46. See John H. Schaar, Legitimacy in the Modern State. 2000.Transaction Publishers; New Brunswick, USA. Schaar has written some thought provoking essays on legitimacy and authority of the state in modern times. He is of the opinion that both in terms of providing security as well as material satisfaction the states, including the most powerful ones are falling far behind the expectations of their citizens.
47. British intellectuals like Carr, Leonard Woolf insisted on limiting sovereignty to uphold the rule of international law. Similarly, in America too people like Edward S. Crown, Charles E. Merriam stressed the need for amalgamation of sovereignties to enhance its power and reach. For details see Hideaki Shinoda, no.28, pp. 100-103.
48. For details on increased satellite surveillance capacity of the UN, see Paul Taylor. The United Nations in the 1990s: Proactive Cosmopolitanism. In Robert Jackson, no. 42, pp. 116-143.

49. See Hideaki Shinoda, no. 23, p. 160.

50. Sovereignty as 'Constitutional independence' stands for a unitary condition. That means the sovereign state is the one supreme authority deciding over internal as well as internal affairs. See Alan James, The Practice of Sovereign Statehood in Contemporary International Society. In A. Claire Cutler, no. 37, pp. 35-51.
51. For details see, George Sorensen, Sovereignty: Change and Continuity in a Fundamental Institution, Ibid. pp. 168-182. 'Regulative rules' for example are non-interference and reciprocity.
52. For detailed discussion on Radhabinod Pal's verdict on Tokyo trials see Latha Varadarajan, From Tokyo to Hague: A Reassessment of Radhabinod Pal's Dissenting Opinion at the Tokyo Trials on its Golden Jubilee.

53. Jackson, Robert, no. 42, p. 15.

Lt. Cdr. Atul Bharadwaj is Research Fellow at IDSA. An alumnus of the National Defence Academy, Pune, he was commissioned in the executive branch of the Indian Navy in 1987. He has served on board various ships and establishments. He has published articles on defence matters and is presently working on 'globalisation and national security'.