View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Indiana University Bloomington Maurer School of Law

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 79 | Issue 1

Article 5

Winter 2004

Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker

John R. Worth
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the International Law Commons

Recommended Citation

Worth, John R. (2004) "Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker," *Indiana Law Journal*: Vol. 79: Iss. 1, Article 5.
Available at: http://www.repository.law.indiana.edu/ilj/vol79/iss1/5

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker

JOHN R. WORTH*

TABLE OF CONTENTS

INTRODUCTION 245
I. U.S. VALIDATION OF TEMPORARY INTERNATIONAL CRIMINAL TRIBUNALS 247
A. The International Military Tribunals at Nürnberg and Tokyo 248
B. The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda 251
II. U.S. REJECTION OF A PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL 252
A. Senator Bricker and the Precedent of American Exceptionalism 253
B. American Exceptionalism and the Rejection of the ICC 255
C. Reconsidering the U.S.'s Position on Supranational Criminal Courts 257
III. RECONSIDERING UNITED STATES SOVEREIGNTY 258
A. Sovereignty, Traditionally Understood 258
B. The Global Transcendence of Traditional Sovereignty 260
C. Global Sovereignty, the United States, and the International Criminal Court 263
CONCLUSION 265

INTRODUCTION

In May 2002, the Bush administration "un-signed" the Rome Statute, the multilateral treaty paving the way for a permanent International Criminal Court ("ICC"),[1] by declaring invalid President Clinton's signing of the same treaty during his final day in office. Subsequently, President Bush signed the American Servicemembers' Protection Act ("ASPA"),[2] a law designed to ensure that American and allied soldiers and government officials would not be subject to the jurisdiction of the ICC. By August 2003, the Bush administration had signed bilateral "impunity agreements" with more than thirty-five countries guaranteeing that United States troops would be immune from the prosecutorial reach of the ICC.[3] Likewise, the United Nations resolution authorizing the deployment of a

---

* Editor-in-Chief, INDIANA LAW JOURNAL, Vol. 79; J.D. Candidate, 2004, Indiana University School of Law—Bloomington; M.A., 2001, The University of Chicago Divinity School; B.A., 1997, Wabash College. This Note is for my grandfather, Dr. C.W. Worth, who, leading by example, has always encouraged a deep respect for critical inquiry. I would also like to thank my wife, Susan, for her constant encouragement and support.

1. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute], *reprinted in* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 167-247 (2001).

2. *See generally* American Servicemembers' Protection Act, 22 U.S.C.S. §§ 7401-33 (Law. Co-op. Supp. 2003).

3. *See* Emira Woods & William D. Hartung, *Bush's African Agenda*, THE NATION, Aug. 4, 2003, at 6 (noting the State Department's plans to "cut off military aid to nearly three dozen countries—including several on the President's [African visit] itinerary . . . [—]if they did not sign 'impunity agreements' indicating that they would never refer a U.S. citizen for prosecution to the newly operating International Criminal Court"). *See generally Around the*

multinational force to Liberia, which was sponsored by the United States and adopted by the Security Council on August 1, 2003, contained language guaranteeing any U.S. troops immunity from the International Criminal Court.[4]

Interestingly, the media debate surrounding the Bush administration's controversial rejection of the ICC highlights a sharp ideological schism regarding the role the United States should play in the creation and implementation of a permanent international criminal tribunal. While some commentators argue that the creation of a supranational criminal court is inevitable in the modern global context, and the United States should not shirk its responsibility to contribute to the legitimization and development of such a court,[5] others argue that the sovereignty of the United States would be invaded by a court wielding universal jurisdiction to try global crimes.[6]

This debate represents a contemporary moment in an ongoing philosophical discourse about the meaning of sovereignty as it applies to the nation-state—a discourse altered dramatically by global denationalization. While critical inquiry about the meaning of sovereignty in the context of the nation-state is voluminous, little attention has been paid to how that globally-altered discourse might help analyze U.S. resistance to a permanent international criminal court. Typically, the debate has been articulated within the framework of a dominant, theologically-derived, ideology of sovereignty and has not questioned the historical validity of the discourse. While opponents of the ICC insist that sovereignty, indispensable to state legitimacy, is necessarily inalienable without the consequent sacrifice of that legitimacy,[7] ICC proponents counter that the modern global world is irreconcilably at odds with the classical conception of state sovereignty.[8]

World: More Nations Won't Send U.S. Citizens to International Court, SEATTLE TIMES, July 30, 2003, at A10; *U.S. Signs Immunity Pacts with Five Nations*, L.A. TIMES, July 30, 2003, at A4.

4. *See* S.C. Res. 1497, U.N. SCOR, 4803d mtg., at 2, U.N. Doc. S/RES/1497 (2003). *See generally* Nicholas Kralev, *U.S. Submits U.N. Plan to Send Peacekeepers; Wants Americans Exempt from International Court*, WASH. TIMES, July 31, 2003, at A14.

5. *See, e.g.*, Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 4, 2002, § 1, at 18 (emphasizing that by retracting its signature from the ICC treaty, the United States will undermine international justice and find itself aligned with such questionable non-ratifying countries as Syria, Egypt, Iran, Pakistan, and China); Editorial, *Who is the Rogue?*, INTELLIGENCER JOURNAL (Lancaster, Pa.), May 8, 2002, at A14 (arguing that the signature retraction will not only emphasize the United States' alignment with questionable international players, but also will prevent the United States from contributing to the development of a global jurisprudence).

6. *See, e.g.*, Editorial, *A Global Special Prosecutor?*, WALL ST. J., May 7, 2002, at A26 (arguing that the ICC will be rendered impotent through a perceived lack of legitimacy stemming from its potential to become politicized and that global justice "is best achieved by U.S. leadership and military strength").

7. *See, e.g.*, Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 841-44 (2002) (arguing that ratification of the ICC would be antithetical to national sovereignty because it would undermine the principle that each sovereign nation-state has the exclusive jurisdictional authority over its own territory).

8. *See* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE, at xviii (New York Press 2000) (1999) (arguing that the United States' resistance to the ICC confirms that "[t]he movement for global justice has been a struggle against sovereignty—the doctrine of non-intervention in the internal affairs of nation states asserted by all governments which have refused to subject the treatment they mete out to their citizens to any independent external scrutiny"); Lynn Sellers Bickley, *U.S. Resistance*

This Note will examine untested presuppositions concerning the compatibility or irreconcilability of the concept of sovereignty with the establishment of a permanent international criminal court. Specifically, the Note will consider the United States' historical position regarding the implementation of such a court in light of the critical scholarly discourse on sovereignty. Part I will delineate the United States' historical laudation for the establishment of temporary, ad hoc criminal tribunals. Part II will investigate the United States' seemingly paradoxical rejection of proposals for the establishment of a permanent international criminal court. Finally, Part III will briefly investigate the origins of the conception of sovereignty underlying the United States' historical attitude toward the adjudication of international criminal law and will consider its continued practical and theoretical legitimacy. This Part will urge a reformulation of sovereignty that complements global denationalization and will conclude by considering the potential impact of this reformulation on the United States' position regarding the ICC.

I. U.S. VALIDATION OF TEMPORARY INTERNATIONAL CRIMINAL TRIBUNALS

Much of the impetus behind the establishment of the post-World War II International Military Tribunals ("IMT") at Nürnberg and Tokyo can be attributed to a pervasive sense of dissatisfaction with the largely unsuccessful attempt to establish a temporary criminal tribunal following World War I.[9] Article 227 of the Treaty of Versailles called for the establishment of a temporary international criminal tribunal to try the German Kaiser "for a supreme offence against international morality and the sanctity of treaties."[10] In addition, Articles 228 and 229 provided the authority to try lower officers and soldiers for "acts in violation of the laws and customs of war."[11] Though a few German officers were convicted of war crimes, the sentences were light.[12] The Netherlands, however, refused to extradite the German Kaiser, contending that the offense with which he was charged was not recognized in Dutch law.[13] Although the tribunal outlined in the Versailles treaty proved relatively ineffective in securing actual convictions, it promulgated a philosophical restructuring of the traditional notions of state

---

to the International Criminal Court: Is the Sword Mightier than the Law?, 14 EMORY INT'L L. REV. 213, 215-16 (2000) (arguing that "U.S. opposition [to the ICC] derives fundamentally from its adherence to the inflexible position that no international court has a right to override U.S. law," and that this "distorted view of . . . sovereignty" is "inconsistent and irreconcilable"); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 50, 64-65 (1996) (arguing that the "Sovereignty Paradigm," which protects the territorial integrity of the nation-state but permits "radical derogation[s] from the traditional sovereign prerogatives of states" in order to accommodate certain universal rights, such as human rights, "must be overthrown because it makes no sense").

9. Hans-Heinrich Jescheck, *Nuremberg Trials*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 747-48 (Rudolf Bernhardt ed., 1997).

10. Treaty of Versailles, June 28, 1919, art. 227, 225 Consol. T.S. 285, 285.

11. *Id.* at 285-86.

12. *See* Jescheck, *supra* note 9, at 747-48.

13. *See* SCHABAS, *supra* note 1, at 3; Bickley, *supra* note 8, at 225.

sovereignty and individual accountability for war crimes.[14]

A. The International Military Tribunals at Nürnberg and Tokyo

This restructuring was later memorialized in the London Agreement of August 8, 1945, which included the Charter of the IMT to be established at Nürnberg ("Nürnberg Charter").[15] The IMT was created both "to record the deplorable history" of Nazism and "to serve as a deterrent to future violations."[16] The IMT was monumental in the development of international criminal law,[17] its two most important contributions being the codification of crimes against humanity and the inclusion of the concept, simmering since Versailles, that individual responsibility would preclude defenses grounded in traditional notions of state sovereignty in the case of major war crimes.[18] Article 6(a)-(c) of the Nürnberg Charter specifically codified the three crimes subject to the jurisdiction of the Tribunal—namely, crimes against peace, war crimes, and crimes against humanity.[19] Articles (7)-(10) instituted the idea that state sovereignty would not serve as a defense to these crimes and that the Tribunal's jurisdictional reach would thereby extend to individuals accused of these crimes wherever found.[20] As the IMT noted in *United States v. von Leeb*:

> International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.[21]

Supreme Court Justice Robert H. Jackson, who served as Chief Prosecutor at the Nürnberg trials, opened the prosecution's case on November 21, 1945, by articulating the importance of individual responsibility in international law: "Th[e] principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace."[22] Jackson further explained,

---

14. *See* Bickley, *supra* note 8, at 224; Remigiusz Bierzanek, *The Prosecution of War Crimes*, *in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 559, 569-71 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

15. *See generally* London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544 [hereinafter London Agreement].

16. Bickley, *supra* note 8, at 228.

17. *See* Jescheck, *supra* note 9, at 747, 752.

18. *See* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9 (1995), Bickley, *supra* note 8, at 228-29.

19. London Agreement, *supra* note 15, at 1547. Interestingly, the Allies answered charges that the retroactive application of "crimes against humanity" would be unjust because the crime was unknown prior to the creation of the IMT by countering that "the prohibition of retroactive crimes was a principle of justice, and that it would fly in the face of justice to leave the Nazi crimes unpunished." SCHABAS, *supra* note 1, at 6.

20. London Agreement, *supra* note 15, at 1548.

21. United States v. von Leeb (1948), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 489 (1950).

22. 2 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, at 150 (1947).

"[T]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law." [23] Understanding that the Nürnberg tribunal would be susceptible to a loss of legitimacy if it were perceived by the international community that any established precedent would be self-contained, Jackson emphasized that the IMT was impartial and not simply victor's justice.[24]

To illustrate how the Nürnberg tribunal would render dispassionate and reasoned judgment, Jackson emphasized, "[The crimes enumerated in the Nürnberg Charter] are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."[25] He later summarized his point: "[L]et me make one thing clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment."[26]

Jackson's suggestion that the crimes with which the Nazi defendants were charged were theoretically universally applicable lent substantive legitimacy to the tribunal. Likewise, Jackson emphasized that the IMT was procedurally legitimate by noting that the common law principles of fundamental fairness would apply at Nürnberg. Jackson stated that "the law long has afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons."[27]

In fact, Justice Jackson's desire to make the IMT institutionally legitimate was not shared by many of his contemporaries. Just prior to the armistice concluding the Second World War, United States Treasury Secretary Henry Morganthau had sought to convince President Roosevelt to support his plan for the summary execution of the top Nazi leaders. Morganthau wrote that the Allies should "set up summary courts-martial. Then they should . . . place these [Nazi war] criminals on trial before them within twenty-four hours after they are caught, sentence them to death . . . and shoot them in the morning."[28] Morganthau's harsh, retributive sense of post-war justice was shared by General Eisenhower, who wanted to "'exterminate all of the [German] General Staff,' which he figured would be 3500 people, as well as the entire Gestapo and all Nazi Party members above the rank of mayor."[29] Most importantly, American public opinion polls conducted by Gallup in May 1945 overwhelmingly favored vengeance-driven retribution. A vast majority of Americans felt that summary execution was the appropriate sentence for German officials, and rarely did more than ten percent of the respondents favor the granting of trials.[30] Finally, the Soviet Union, like Morganthau and the American public, was strongly opposed to adopting the common law principles of procedural fairness at Nürnberg. I.T. Nikitchenko, the Soviet chief prosecutor at Nürnberg, insisted,

---

23. *Id.* at 154.

24. *See id.* at 101.

25 . REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 330 (1945) [hereinafter JACKSON REPORT].

26. ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 88 (1946).

27. *Id.* at 70.

28. GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 10 (2000).

29. *Id.* at 154.

30. *Id.* at 160.

"The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment—the sentences."[31] The Soviets wanted to make Nürnberg a show trial similar to those instrumental in Stalin's purges. From the Soviet perspective, a defendant's guilt was ascertained prior to trial through investigation and accusation. A Soviet trial was a mere procedural formality designed to calculate the degree of one's guilt.

Though influential members of the Roosevelt Administration, the majority of the American public, and at least one of the four Allied co-adjudicators were resolutely opposed to the importation of common law principles of procedural fairness to Nürnberg, President Truman's decision to appoint Justice Jackson as the United States' chief prosecutor signaled concern for the IMT's institutional legitimacy. Jackson, committed to the notion that judicial independence necessitated the transcendence of politics, lamented that

> [t]he Soviet views a court as one of the organs of government power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests. [They] find it difficult to accept or to understand the Anglo-American idea of a court as an independent agency responsible only before the law.[32]

Consequently, when Jackson was confronted with the public opinion polls confirming that most Americans deemed procedurally fair trials to be an unnecessary burden in the case of Nazi war criminals, he caustically replied, "I don't give a damn what the Gallup Poll says."[33]

Jackson's opening statement delivered on November 21, 1945—the first official articulation of the prosecution's case—began the rhetorical process of legitimizing the IMT procedurally and substantively. Jackson began, "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."[34] Jackson's suggestion that "Power" acts in the service of "Reason," rather than vice versa, lies at the heart of the theoretical question of institutional legitimacy. Legitimacy in international criminal law stems from a particular tribunal's ability to maintain an air of decorum—a certain collegiality and imperviousness to dispensing retributive justice. A judgment is not perceived as just if it is thought to simply represent victor's justice.

Despite Justice Jackson's reassurances that the IMT was a legitimate and impartial adjudicatory body impervious to enticements to render victor's justice, the IMT has always been subject to criticism.[35] Even Justice Jackson secretly revealed to President Truman that the Allied case was rife with hypocrisy.[36]

---

31. JACKSON REPORT, *supra* note 25, at 303.
32. *Id.* at vi (quotation omitted).
33. BASS, *supra* note 28, at 161.
34. JACKSON, *supra* note 26, at 3.
35. *See* MORRIS & SCHARF, *supra* note 18, at 9.
36. Interestingly, the Tokyo tribunal, modeled on the Nürnberg tribunal and set up to prosecute Japanese war criminals, was a procedural improvement on Nürnberg. For instance, defense attorneys were permitted to challenge the court's jurisdiction "on the grounds that it was 'victor's justice' imposing '*ex post facto* criminality.'" ROBERTSON, *supra* note 8, at 222-23. However, the legitimacy and effectiveness of the Tokyo tribunal was severely

Jackson wrote:

> [The Allies] have done or are doing some of the very things we are prosecuting Germans for . . . . We are prosecuting plunder and our Allies are practicing it. We say aggressive war is a crime and one of our Allies asserts sovereignty over the Baltic States based on no title except conquest.[37]

In addition, to insure that the indictments would be pinned exclusively on the Nazi defendants, the tribunal consistently overruled *tu quoque* ("I did it, but you did it too") objections as irrelevant, thereby "silencing any allegations about Allied war crimes."[38] Finally, the IMT never claimed universal jurisdiction, but instead "rest[ed] its authority . . . on the rights of the defeated German State."[39]

Once convened, the IMT articulated its own jurisdictional limits: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[40] In this sense, the IMT cannot be understood as a supranational judicial body but rather as an occupational court,[41] maintaining interim justice for a defeated state—"a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law."[42] Jackson's idealistic opening statement that the law "condemn[s] aggression by any other nations, including those which sit here now in judgment,"[43] must be considered in light of the Allies' privileged occupational status.

B. The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda

During the 1990s, the UN Security Council reasserted that the principle of individual criminal accountability, stated in the Versailles Treaty and codified by the IMT, is a principle of international law. In 1993, the Security Council created the International Tribunal for the Former Yugoslavia ("ICTY").[44] One year later, it created a second ad hoc tribunal, the International Tribunal for Rwanda ("ICTR"), modeled on the ICTY, to prosecute serious violations of humanitarian law in Rwanda.[45] Subject matter jurisdiction for the ad hoc tribunals included grave breaches of the Geneva Conventions, violations of the laws and customs of war,

---

undermined when the tribunal decided to exempt the Japanese Emperor from trial based on a politically-inspired decision on the part of the United States occupational government that a puppet regime headed by Hirohito would be preferable to the possibility of introducing "communism and chaos" into the region were the Emperor tried and convicted. *Id.* at 222, 224.

37. ROBERT E. CONOT, JUSTICE AT NUREMBERG 68 (1983).

38. ROBERTSON, *supra* note 8, at 214-15.

39. Casey, *supra* note 7, at 856.

40. *Id.* (citing The Nurnberg Trial, 6 F.R.D. 69, 107 (1946)).

41. *See* Jescheck, *supra* note 9, at 752.

42. MORRIS & SCHARF, *supra* note 18, at 9; *see also* Casey, *supra* note 7, at 866.

43. JACKSON, *supra* note 26, at 88.

44. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993).

45. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994).

crimes against humanity, and genocide.[46] Authority for creating the two ad hoc tribunals rested on an innovative interpretation of the UN Charter—in particular, a reformulation of the potential impact of Chapter VII on the Article 2(7) principle of non-intervention.[47] Article 2(7) both articulates the general principle of non-intervention and defines its limits by providing that "th[is] principle shall not prejudice the application of enforcement measures under Chapter VII."[48] Likewise, Chapter VII grants to the Security Council the authority to determine "the existence of any threat to the peace" and to "decide what measures shall be taken . . . to maintain or restore international peace and security."[49] By broadly construing Article 41, which authorized the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions,"[50] the Security Council determined that it was within its chartered powers to authorize the creation of the ad hoc tribunals as a means to "maintain or restore international peace and security."[51]

However, the Secretary General's Report, which delineated the legal and procedural bases for the ICTY, asserted that the authoritative reach of the tribunal was "circumscribed in scope and purpose."[52] Thus, "The decision d[id] not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature . . . ."[53] By definition, the lifespan of the ICTY "would be limited to the restoration of peace in former Yugoslavia."[54] Though this circumscription was broad enough to permit the prosecutor to investigate allegations about NATO war crimes during the bombing of Serbia,[55] it in fact placed a temporal and territorial limitation on the tribunal. As one commentator has noted, "ad hoc" is "a weasel Latin phrase used in UN resolutions as a coded diplomatic signal that the action will not be used as a precedent to threaten other members" and reflecting "the UN's systemic defect"—namely, "[o]beisance to member state sovereignty."[56]

II. U.S. REJECTION OF A PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

Despite Justice Jackson's reassurances that the humanitarian laws enumerated at Nürnberg were impervious to national territorial boundaries, the United States

---

46. *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, arts. 2-5, at 36-38, U.N. Doc. S/25704 (1993) [hereinafter *Secretary General's Report*].

47. *See* Jost Delbrück, *Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System*, 9 IND. J. GLOBAL LEGAL STUD. 401, 425-28 (2002) [hereinafter Delbrück, *Legal Developments*]; Jost Delbrück, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, 1 SWISS REV. INT'L & EUR. L. 1, 10-13 (2001) [hereinafter Delbrück, *Structural Changes*]. *See generally* Jost Delbrück, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United States*, 67 IND. L.J. 887 (1992).

48. U.N. CHARTER art. 2, para. 7.

49. *Id.* art. 39.

50. *Id.* art. 41.

51. *Id.* art. 39.

52. *Secretary General's Report*, *supra* note 46, ¶ 12.

53. *Id.*

54. ROBERTSON, *supra* note 8, at 290.

55. *See id.* at 292.

56. *Id.* at xix.

has historically been averse to perceived supranational limitations on its sovereignty—particularly with regard to international treaties and agreements. This aversion was evidenced by the debates surrounding the proposed Bricker Amendment in the 1950s. Similarly, a variant of the conservative Bricker argument has been articulated in defense of the United States' decision not to ratify the 1998 Rome Statute.

A. Senator Bricker and the Precedent of American Exceptionalism

During the 1950s, conservative members of Congress, led by Senator John Bricker of Ohio, became alarmed by a perceived threat to federalism posed by the federal government's right to enter into and enforce international treaties under Article VI, Paragraph 2 of the Constitution. The debate was initially sparked by *Missouri v. Holland*,[57] a Supreme Court decision in which Justice Oliver Wendell Holmes concluded that Congress possesses broader powers in the realm of foreign relations than it does with respect to domestic affairs.[58] The case involved Congress's authority to implement a treaty governing migratory birds that conflicted with Missouri's own view of the proper regulation.[59] Holmes noted that "the power to make treaties is delegated expressly" to the federal government.[60] Thus, while "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, . . . treaties are declared to be so when made under the authority of the United States."[61]

The implication of *Missouri v. Holland* was that a treaty could be used to grant the federal government authority over the states which otherwise would not have been constitutionally permitted. In fact, the specific catalyst for the Bricker debate in the 1950s was a California state court decision that invalidated a state law on the grounds that the law violated the UN Charter.[62] The court concluded that "[t]he position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the [UN] Charter according to its plain language and its unmistakable purpose and intent."[63] Since the United States was a UN signatory, the supremacy of the Charter under *Missouri v. Holland*'s interpretation of Article VI provided the federal government with an authority over the states not otherwise granted by the Constitution.[64] Consequently, even though *Sei Fujii* was eventually overturned, the implication was that "the UN treaty (and all treaties) could produce foreign interference in the exercise of American rights, including the rights of states."[65] In particular, the case implied that the human rights provisions of the UN Charter were self-executing and that they effectively proscribed racial discrimination.

The Bricker Amendment, initially proposed in 1951, would have amended the Supremacy Clause to assert that no treaty or executive agreement could be made "respecting the rights and freedoms of citizens of the United States recognized in

---

57. 252 U.S. 416 (1920).

58. *See id.* at 433.

59. *See id.* at 430-31.

60. *Id.* at 432.

61. *Id.* at 433.

62. Sei Fujii v. State, 217 P.2d 481, 488 (Cal. Dist. Ct. App. 1950).

63. *Id.* at 486.

64. *See* LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 87-89 (1984).

65. *Id.* at 89.

[the] Constitution [or] the character and form of government prescribed by the Constitution and laws of the United States."[66] The idea behind the Bricker proposal was 1) to deny the supremacy of international agreements or treaties over state and federal law, including the Constitution, and 2) to assert that a treaty would be non-self-executing.[67] During the first formal hearings, Senator Bricker emphasized that "[t]he primary purpose of [the Resolution] is to prohibit the use of the treaty as an instrument of domestic legislation for surrendering national sovereignty."[68] In truth, the conservative Bricker supporters were primarily concerned with the potential impact that the UN human rights conventions might have on racial segregation in the South.[69] Commentators have noted that "adoption of one treaty or another might [have] led to challenges to corporal punishment in schools, the death penalty, state . . . sodomy laws, or perhaps even any laws that discriminate on the basis of sexual orientation."[70]

Though the Senate in 1954 defeated the final Bricker proposal by one vote,[71] the political wrangling had forced the Eisenhower administration, as an appeasement to the Bricker supporters, to pledge not to become "a party to any such covenant [on human rights] or present it as a treaty for consideration by the Senate."[72] This policy proved to be a substantial setback to human rights protections that was not reversed until 1963.[73] Likewise, the Supreme Court issued a plurality opinion in a 1957 case that reaffirmed that the treaty power was subordinate to other constitutional provisions.[74] The plurality in *Reid v. Covert* stated, "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[75] The United States' contemporary policy, partially derived from the lasting legacy of the Bricker controversy and from the plurality holding in *Reid v. Covert*, of insisting on the attachment of reservations, understandings, and declarations ("RUDs") to its ratification of human rights conventions calls into question its commitment to human rights protection.[76] Professor Henkin writes: "The policy of declaring human rights conventions non-self-executing achieves what Senator Bricker sought to do by constitutional amendment. Senator Bricker sought to prevent Congress from adopting legislation to implement human rights

---

66. S.J. Res. 102, 82d Cong. (1951), *reprinted in* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP app. A, at 221 (1988).

67. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1464-65 (1994); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 703-04 (1998).

68. *Treaties and Executive Agreements: Hearing on S.J. Res. 130 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong. 1 (1952) (statement of Sen. John Bricker), *quoted in* JOHNSON, *supra* note 64, at 85.

69. Paul, *supra* note 67, at 703.

70. Friedman, *supra* note 67, at 1465 (citations omitted).

71. *See* 100 CONG. REC. 2374-75 (1954).

72. *Treaties and Executive Agreements: Hearing on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. 825 (1953) (testimony of Sen. John Bricker), *quoted in* Thomas Buergenthal, *The U.S. and International Human Rights*, 9 HUM. RTS. L.J. 141, 146 (1988).

73. *See generally* Buergenthal, *supra* note 72, at 142-47.

74. Reid v. Covert, 354 U.S. 1, 12-19 (1957) (Black, J., plurality).

75. *Id.* at 16 (Black, J., plurality).

76. *See generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

treaties; United States reservations have made congressional legislation largely unnecessary."[77]

B. American Exceptionalism and the Rejection of the ICC

The perceived threat posed to American sovereignty by the international treaties and agreements that led to the Bricker debate fifty years ago finds its contemporary corollary in the debate surrounding the establishment of the ICC. In the case of the ICC, a perceived threat to sovereignty triggered the Bush administration to retract President Clinton's signature from the Rome Statute. In August 2002, the Bush administration signed into law the American Servicemembers' Protection Act ("ASPA"),[78] a retaliatory measure specifically designed to ensure that American and allied soldiers and government officials would not be subject to the jurisdiction of the ICC by granting the President the power "to use all means necessary and appropriate to bring about the[ir] release" from the court.[79] As Senator Helms bluntly noted during the ASPA Senate hearings, the intent of the law is to "make certain that the United States does not acknowledge the legitimacy of the ICC's bogus claim of jurisdiction over American citizens."[80] While the Bricker supporters were concerned with interference of foreign treaties and agreements into areas of traditional state concern, ASPA supporters were concerned with the potential for a supranational judicial body to supercede Article III courts and U.S. military courts in trying American individuals and government officials for certain criminal offenses.[81]

The catalyst for the rejection of the ICC and the implementation of ASPA, as in the case of the Bricker debate fifty years ago, was a feared infringement on national sovereignty believed by the United States to be constitutionally and democratically inalienable. The United States' policy position regarding the ICC prior to the enactment of the ASPA was that the ICC's jurisdictional authority is incompatible with the U.S. Constitution.[82] Article 12(2)(a) of the Rome Statute states that the ICC will have territorial (*ratione loci*) jurisdiction over crimes committed on the territory of states that have become party to the ICC, regardless

77. *Id.* at 349.

78. *See generally* American Servicemembers' Protection Act, 22 U.S.C.S. §§ 7401-33 (Law Co-op. Supp. 2003).

79. *Id.* § 7427(a).

80. *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing Before the Senate Comm. on Foreign Relations*, 106th Cong. 2 (2000) [hereinafter *ASPA Hearings*] (statement of Sen. Jesse Helms).

81. At least one commentator has creatively suggested that a supranational judicial body vested with universal jurisdiction would not be constitutionally problematic. *See* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000) (employing Chomskyan linguistic theory to suggest that the Framers' "deep structure" understanding of judicial power, as reflected in the surface structure of the text of Article III, confirms that Article III judges were never intended to be the exclusive embodiment of that power).

82. *See* ROBERTSON, *supra* note 8, at 328 (noting that the "US delegation rejected the principle of universal jurisdiction over war crimes and crimes against humanity so vehemently that the US defense secretary William Cohen threatened Germany and South Korea with a US troop pull-out if they persisted in their support for its endorsement in the statute").

of the nationality of the offender.[83] Some commentators have even argued that the ICC's territorial jurisdiction might extend to crimes "committed outside the territory of a State but might be deemed to fall within the jurisdiction of the Court if its effects were felt on the territory."[84] Less controversially, Article 12(2)(b) states that the Court will have personal (*ratione personae*) jurisdiction over the citizens of states that have become party to the ICC.[85] Article 25 incorporates the idea of individual criminal responsibility,[86] and Articles 27 and 28 reject the notion of state immunity.[87] Broadly construed, the Rome Statute would empower the ICC to prosecute citizens of non-state signatories if their actions were deemed to constitute one of the enumerated crimes falling under the subject matter jurisdiction of the Court and if the effects of their actions were deemed to have impacted the territory of a state signatory.

As Senator Helms noted in defense of ASPA, "If other nations are going to insist on placing Americans under the ICC's jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure that our men and women in uniform are protected."[88] Implicit in Helms's argument is the belief that the lifeblood of national sovereignty is a state's exclusive right to adjudicate wrongs committed by citizens of that state. To validate a supranational judicial body possessing universal jurisdiction over all individuals for specific crimes deemed to have impacted the territory of a state signatory "would be to transfer the ultimate authority to judge the policies adopted and implemented by the elected officials of the United States—the core attribute of sovereignty and the *sine qua non* of democratic self-government—away from the American people and to the ICC's prosecutor and judicial branch."[89]

According to opponents of the ICC, this transition of power to a transnational judicial authority would implicate sovereignty in two ways. First, validation of the ICC would violate the notion of democratic self-government by vesting judicial authority in the hands of an unelected and unaccountable body.[90] It would disrupt what Madison called "[t]he genius of republican liberty"—the concept that "all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people . . . ."[91] Second, validation of the ICC would interfere with the traditional notion that sovereign statehood carries with it the responsibility for defining and maintaining the legal order within the territorial boundaries of the nation-state.[92] Since "[c]riminals are, by definition, prepared to defy the law,"[93] the ICC would necessarily imply a transfer of enforcement power from the national context to the supranational context. Similarly, since "the Court will not have police of its own to make arrests, [i]t will depend for its effectiveness

83. *See* Rome Statute, *supra* note 1, art. 12(2)(a), *reprinted* SCHABAS, *supra* note 1, at 176.

84. SCHABAS, *supra* note 1, at 63.

85. *See* Rome Statute, *supra* note 1, art. 12(2)(b), *reprinted* SCHABAS, *supra* note 1, at 176.

86. *See id.* art. 25, *reprinted* SCHABAS, *supra* note 1, at 183.

87. *See id.* arts. 27, 28, *reprinted* SCHABAS, *supra* note 1, at 184-85.

88. *ASPA Hearings*, *supra* note 80, at 2 (statement of Sen. Jesse Helms).

89. Casey, *supra* note 7, at 843-44 (emphasis in original).

90. *See id.* at 844.

91. THE FEDERALIST NO. 37, at 224 (James Madison) (Robert Scigliano ed., 2000).

92. *ASPA Hearings*, *supra* note 80, at 16-17 (statement of Dr. Jeremy Rabkin, Professor, Dep't of Gov't, Cornell Univ.).

93. *Id.*

on the cooperation of signatory states."[94] As Senator Rod Grams suggested during the ASPA hearings, however,

> the greatest force for peace on this Earth is not an international court; it is the United States military. Ironically, the very nations that have created a court . . . have repeatedly called on the United States to be the global enforcer. [A] treaty which hinders our military is . . . bad for the international community.[95]

C. Reconsidering the U.S.'s Position on Supranational Criminal Courts

Proponents of ASPA share an easily identifiable kinship with the earlier proponents of the Bricker Amendment—namely, both groups perceived the emerging universalization of human rights to be diametrically opposed to state sovereignty. In the case of the Bricker debate, this tension was articulated as a threat to federalism and an encroachment on state autonomy and diversity. In the case of the ASPA, the tension was articulated as a threat to democratic self-government and an affront to the constitutional principle that "[t]he judicial Power of the United States, shall be vested in one supreme Court"[96] and "shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ."[97] Kinship therefore stems from a common presupposition that denationalization and national sovereignty exist in a state of perpetual tension. For both the Bricker and ASPA supporters, to transfer authority from the national context to the supranational context necessarily corresponds to a sacrifice of sovereignty.

In addition, a kinship stemming from a common theoretical conception of national sovereignty shared by the Bricker and ASPA supporters and by the historical proponents of temporary international criminal tribunals is equally identifiable, if perhaps less explicit. Justice Jackson contributed to the legitimacy of the IMT by suggesting that the crimes enumerated in the Charter were universally applicable to all states; however, his correspondence with President Truman illustrated that he recognized that while laws may be theoretically universal, their applicability to victor and vanquished varies tremendously. The Nürnberg and Tokyo tribunals, as noted, were occupational courts. They existed as judicial surrogates for German and Japanese courts by providing legal order to the vanquished nations. Similarly, the ICTY and ICTR were designed to restore peace in a specific territory deemed by the UN to be too unstable to self-adjudicate. In this sense, all of the tribunals were limited in duration, subject matter, and territorial reach.

The historical precedent set by the temporary international criminal tribunals has been that the adjudication of international criminal law occurs in the context of state sovereignty and exists to reintroduce state sovereignty to a legally decimated territory. Traditionally, temporary international criminal tribunals have provided de facto validation to the sovereign notions of territorial integrity and political independence.[98] Supporters of ASPA similarly adhere to this traditional conception

---

94. *Id.* at 13. (response of Dr. Jeremy Rabkin, Professor, Dep't of Gov't, Cornell Univ. to additional questions for the record)

95. *Id.* at 3 (statement of Sen. Rod Grams).

96. U.S. CONST. art. III, § 1, cl. 1.

97. *Id.* § 2, cl. 1.

98. For an illuminating discussion of these interrelated concepts and their relationship to state sovereignty, see generally Christos L. Rozakis, *Territorial Integrity and Political*

of sovereignty. They embody the unstated assumptions in Justice Jackson's opening statement—namely, that humanitarian law may indeed be universal so long as it is victor's justice.

III. RECONSIDERING UNITED STATES SOVEREIGNTY

Political discourse on state sovereignty in the international context has contributed to a constantly evolving, but consistently controversial, notion of what it means for a state to be "sovereign."[99] This Part will briefly trace the development of the dominant, theologically-derived discourse on sovereignty and consider its continued validity in light of the emerging emphasis on global governance. In addition, this Part will suggest an alternative to the traditional sovereignty dialectic—one by which the national identity-building principles associated with state sovereignty are preserved while the protective territorialism likewise associated with the term is eliminated. Finally, this Part will urge a reformulation of sovereignty that complements global denationalization and will conclude by considering the potential impact of this reformulation on the United States' position regarding the ICC.

A. Sovereignty, Traditionally Understood

The development of the political notion of sovereignty has been characterized as a process of ideology-creation—the use of an abstract theological structure to describe the temporal political structure.[100] Professor Elshtain has suggested that "Bodin and Hobbes are each implicated in the birth of ideology" and "the peculiarly modern habit of justifying political acts by reference to abstract, metaphysical ideals."[101] Jean Bodin argued that "it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law."[102] Thomas Hobbes suggested that implicit in the process of granting consent to be governed to a single ruler or assembly—a characteristic of the social contract-based Leviathan state—is the creation of "that *Mortall God*, to which wee owe under the *Immortal God*, our peace and defence . . . And he that carryeth this Person, is called SOVERAIGNE, and said to have *Soveraigne Power*; and every one besides, his SUBJECT."[103] Residing at the heart of this ideological abstraction is the implicit concession that temporal political sovereignty, unlike theological sovereignty, cannot be absolute. In an international order where there is always another sovereign state next door, cooperation is unavoidable.

The emerging ideology of state sovereignty was consequently both empowering and humbling. It was empowering in the sense that through the

---

Independence, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 812-18 (Rudolf Bernhardt ed., 2000).

99. *See, e.g.*, Helmut Steinberger, *Sovereignty*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 500-01 (Rudolf Bernhardt ed., 2000).

100. *See* Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355 (1991).

101. *Id.* at 1363 (quotation omitted).

102. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 28 (M.J. Tooley trans., Barnes & Noble 1967) (1576).

103. THOMAS HOBBES, THE LEVIATHAN 227-28 (C.B. Macpherson ed., Penguin Books 1968) (1651) (emphases in original).

creation of the social contract, sovereignty was transferred from the king to the state, which "c[ould] no more alienate its sovereignty than a man c[ould] alienate his will and remain a man."[104] The social contract provided the theoretical precedent through which the body politic was deemed to itself constitute the sovereign.[105] Through this process, sovereignty became critical for state identity—the "essential qualification for full membership in international society, . . . the qualification which ma[de] a state eligible for full membership."[106] As Professor Elshtain noted: "The state is 'sovereign in the domestic context' and this sovereignty qualifies it for that agonistic arena, the international system."[107] "The international community has repeatedly recognized sovereignty as the most sacred and fundamental right that a nation can possess."[108] Sovereignty was also humbling in that a necessary step in the process of creating a theologically-derived conception of state sovereignty was the imposition of limits.[109] Because state sovereignty is not synonymous with the theological conception of sovereignty as absolute dominion and omnipotence, it is an imprecise mimesis of theological sovereignty. Professor Delbrück has noted that "sovereignty as a principle of international law has never been absolute, but relative in the sense that the sovereignty of one state found its legal limits in the sovereignty of the other states."[110] For one state to assert an unbridled and absolute sovereignty would by implication infringe on the sovereignty of another state.

The historical development of state sovereignty in the international context reflects an attempt to mediate the humbling and empowering aspects of sovereignty in a way that bolsters institutional legitimacy. Inherent in the discourse on sovereignty is the tension that arises when an area of international law, traditionally understood to fall within the exclusive dominion of the nation-state, begins to transcend that rigid framework. For instance, in the decades following the Treaty of Westphalia, nation-states were individualistic and thrived on self-sufficiency.[111] Arnold Brecht described this post-Westphalia, boundary-establishing period of state sovereignty: "Within a country's boundaries no law counts other than that issued by the sovereign . . . —no higher law, no imperial law, no divine law, no natural law. There is no appeal to any higher court, no arbiter, avenger or ultimate

---

104. CHARLES E. MERRIAM JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU: STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 33 (Garland Publishing 1972) (1900).

105. *Id.* at 33-35.

106. ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 7 (1986).

107. Elshtain, *supra* note 100, at 1369.

108. Joshua B. Bevitz, *Flawed Foreign Policy: Hypocritical U.S. Attitudes Toward International Criminal Forums*, 53 HASTINGS L.J. 931, 951 (2002).

109. Interestingly, the twentieth century French thinker Georges Bataille, influenced heavily by Nietzschean philosophy, proposed that sovereignty could in fact be lifted unscathed from theology and imposed without limits on the social order. In this case, "[S]overeignty is always linked to a denial of the sentiments that death controls. Sovereignty requires the strength to violate the prohibition against killing. . . ." 3 GEORGES BATAILLE, THE ACCURSED SHARE 220-23 (Robert Hurley trans., 1991). Obviously, this conception of sovereignty, while perhaps truer to the theological notion of the term, would prove quite problematic for fostering international cooperation.

110. Delbrück, *Legal Developments*, *supra* note 47, at 427.

111. Delbrück, *Structural Changes*, *supra* note 47, at 4-5.

guardian of peace and justice."[112] At this time, international law was governed by the principle of *liberum ius ad bellum*, the sovereign right to freely go to war to enforce state territorial interests.[113] Legitimacy was dependent on might and the continued sustainability of the individualistic nation-state. During the nineteenth century, however, industrialization and market expansion required the post-Westphalia nation-state to forego self-sufficiency and to cooperate internationally to maintain domestic sustainability.[114] In terms of the social contract, each state's public obligation to its people could not be realized without international cooperation.[115] The empowering social contract and identity-forming aspects of state sovereignty had to be rebalanced in light of sovereignty's new countervailing limitations.

The constant struggle to balance the empowering with the limiting aspects of sovereignty, exemplified by the gradual transition from "independence" to "interdependence," also occurred in the development of international criminal law. After World War II, the notion of peace and security was reconceptualized to transcend the responsibility of the territorial nation-state and to become an international legal concern.[116] This reconceptualization was institutionalized in Article 2(4) of the UN Charter which states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[117] By acknowledging the authority of the UN, state signatories thus voluntarily relinquished the *liberum ius ad bellum* and accepted the legitimacy of the UN to pursue their rights and interests—at least insofar as they related to international peace and security. Still, the countervailing notion, exemplified by Article 2(1), that the UN Charter is "a constitution of the community of states . . . still clearly committed to the respect and the protection of the 'sovereign equality' of all the members of the United Nations Organization,"[118] moderated this relinquishment. Legitimacy was dependent on effectively balancing the empowering aspects of sovereignty with the limitations imposed on the concept by the emerging international order. Indeed, the period of the emerging international order reflected ambivalence about the role that state sovereignty should continue to play in an increasingly interdependent world.[119]

B. The Global Transcendence of Traditional Sovereignty

The processes of globalization exacerbate the ambivalence that surrounded the continued viability of state sovereignty during the period of international cooperation. Globalization entails a less state-centered approach to solving supranational issues—a process of tackling "challenges [that] are inherently beyond the problem-solving capacity of the territorial nation-state and at the same

112. Arnold Brecht, *Sovereignty*, *in* WAR IN OUR TIME 58, 64 (Hans Speier & Alfred Kähler eds., 1939).

113. Delbrück, *Structural Changes*, *supra* note 47, at 4-5.

114. *See id.* at 6.

115. *See id.*

116. *See, e.g.*, *id.* at 10.

117. U.N. CHARTER art. 2, para. 4.

118. Delbrück, *Structural Changes*, *supra* note 47, at 12-13.

119. *Id.* at 13 (arguing that ambivalence occurs because international obligations necessarily restrict state sovereignty but that "respect and protection of state sovereignty [curiously] remains a major factor in international relations").

time affect humankind as a whole, regardless of borders and territorial jurisdictions."[120] Thus, "[a]s political, economic and social activities, in view of the inherently transnational character of the problems to be solved, 'are increasingly stretched across the globe, they become in a significant sense no longer primarily or solely organized according to a territorial principle.'"[121] Yet, the modern global legal order "is [still] a legal order predominately [among] coordinated, juxtaposed States as its typical subjects."[122] Even the Supreme Court has occasionally paid homage to the ever-presence of sovereignty: "Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense."[123] Thus, "[i]f a legal theory is seen as the attempt to explain the structures and implications of a given legal order, the theory of international law must take into account this attitude of States."[124] Commentaries that disregard state sovereignty as an eradicable hindrance to denationalization fail to recognize the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects.[125]

Rather than eliminating sovereignty as a political ideology, a more productive enterprise would be to refocus the discourse away from the traditional structural understanding of the term, which only serves to accentuate the level of discrepancy between the theological and the political definitions of the term and which ultimately leaves the false impression that absolute sovereignty is somehow realizable in the international political sphere.[126] This refocus would constitute a shift toward a functional conception of sovereignty, wherein the purpose that state sovereignty would serve in any given situation would itself determine its limits.[127] This discursive shift in emphasis toward a functional understanding of sovereignty would facilitate recognition of sovereignty's "neglected counter-side: sovereignty is not only a claim of freedom from external interference, it is also the liberty to *permit* some kinds of external interference."[128] Since global interdependence creates a functional necessity for transnational cooperation, this reformulation of

---

120. *Id.* at 15.

121. *Id.* at 16.

122. Steinberger, *supra* note 99, at 517.

123. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316-17 (1936).

124. Steinberger, *supra* note 99, at 517; *see also* Elshtain, *supra* note 100, at 1368 (arguing that "[t]he least interesting treatments of this theme are those that condemn sovereignty and go on to construct a fantasy world that would come into being were sovereignty dissolved altogether").

125. For instance, Louis Henkin has written that "as applied to states in the international system, 'sovereignty' is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology." Louis Henkin, *Sibley Lecture, March 1994: Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 31 (1996). Although Henkin proposes to "deconstruct" this myth of sovereignty, he ultimately leaves the myth in place while suggesting that human rights are "a radical derogation from the axiom of 'sovereignty.'" *Id.* at 38.

126. *See* Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 381, 402 (2000) (arguing that because the history of the term "sovereignty" illustrates its elasticity and imperviousness to categorical definition, it should be able to adapt to the changes ushered in by globalization as well).

127. *See generally*, Post-lecture discussion between John H. Robinson and Jean Bethke Elshtain on *Sovereign God, Sovereign State, Sovereign Self*, (March 2, 1991), *in* Elshtain, *supra* note 100, at 1379-84.

128. Havel, *supra* note 81, at 327 (emphasis in original).

sovereignty would suggest that in areas of law where the traditional nation-state is deemed ill-equipped to regulate, deference to global governance would paradoxically bolster that state's sovereignty. "In other words, if sovereignty now expresses a reanimated sense of autonomy, it does so in the guise of a perfectly rational paradox: its existence also is defined by its capacity to be given away."[129] This reformulation would replace the misguided structural balance between the empowering and limiting aspects of sovereignty, which posited international cooperation as a tolerable concession, with a functional understanding of sovereignty strengthened by cooperation. Truly transnational concerns would no longer simply be tolerated derogations of sovereignty; rather, "they [would become] emanations of that sovereignty." [130] Perhaps most importantly, under this reformulation, sovereignty would no longer exist in diametrical opposition to global denationalization.

This reformulation of sovereignty would also facilitate a reformulation of the social contract. Instead of individuals giving "up some of their powers and sovereign rights and transfer[ing] them to a state for the benefit of safeguarding their interests . . . [,] [i]t is the states, upon demand of their citizens and pressed by nongovernment organizations, that transfer some powers and rights to international organizations."[131] In other words, where rights were originally transferred from the individual to the state, now individuals—the true sovereigns—decide for themselves which governing body is best able to protect their fundamental interests. [132] Without using the term "sovereignty," Hannah Arendt posits a meaningful parallel distinction between illegitimate power—namely, territorial dominion—and legitimate power—namely, "a 'something' that comes into being when citizens come to know and to enact a good in common that they cannot know alone . . . ."[133] The reformulation of sovereignty not only eliminates the fallacy that in all circumstances relinquishment of authority through processes of denationalization is detrimental to state sovereignty but also serves to re-empower the individual by asserting that the key to legitimization resides within the civil society rather than with the state. If society deems a supranational entity better equipped to regulate a particular area of traditional state concern, then the relinquishment of the state's regulating power would not only reify the rational paradox of functional sovereignty, but also further the legitimacy of the supranational entity by granting it the symbolic backing of both the state and society.

Kofi Annan has suggested that the idea of "individual sovereignty"—the "consciousness of the right of every individual to control his or her destiny"[134]—has sparked a reformulation of the traditional notion of state sovereignty in the realm of humanitarian law. The declaration that some human rights constitute *erga*

---

129. *Id.* at 328.

130. *Id.* at 330.

131. Simonovic, *supra* note 126, at 392.

132. *See id.*

133. Jean Bethke Elshtain, *Will the Real Civil Society Advocates Please Stand Up?*, 75 CHI.-KENT L. REV. 583, 584 (2000). *See generally* HANNAH ARENDT, THE HUMAN CONDITION (1958).

134. Press Release, Kofi Annan, Annual Report to the General Assembly (Sept. 20, 1999), *available at* http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html (last visitied Jan. 27, 2004).

omnes norms,[135] which are norms applicable to all individuals regardless of citizenship status and enforceable by all states regardless of the existence of a territorial link between the crime and the enforcing state, reflects this changing conception of humanitarian law. Professor Delbrück has noted that "a very large majority of states . . . accept the notion of human rights based on the dignity of the human person, and view as indispensable international protection of human rights without or even against the will of individual states."[136] Still, some countries continue to rebuff the international concern for human rights to shield a traditional, boundary-driven sense of sovereignty.[137] This resistance illustrates that while some human rights may be universal *erga omnes* norms, nation-states that continue to operate within the framework of traditional sovereignty and that only begrudgingly accept the necessity for international cooperation fail to recognize the real source of global sovereignty.

C. Global Sovereignty, the United States, and the International Criminal Court

As illustrated, the United States has consistently resisted plans to implement a permanent international criminal tribunal while simultaneously heralding efforts to establish temporary criminal tribunals based on a territorial, boundary-driven notion of sovereignty.[138] Indeed, the United States has provided a consistent example of the traditional notion that state sovereignty is irreconcilable with global denationalization.[139] Commentators have suggested that "America's self-conception has from the beginning involved a sense of world historical uniqueness and ineluctable destiny."[140] While this national hubris is not obviously reconciled with a functional notion of sovereignty empowered by cooperation, two features of American government suggest otherwise—namely, the presence of a weak state coupled with a vibrant civil society and the "supremacy of public opinion in foreign relations."[141] For example, Alexis de Tocqueville's study characterized American democracy as "a lightly governed society with an engaged citizenry building their community through a myriad of 'voluntary associations' . . . ."[142] In addition to the strength of American civil society, James Bryce articulated the centrality of public opinion in American government: "Towering over presidents and state governors, over Congress and state legislatures, over conventions and the vast machinery of party, public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it."[143] The strength of American civil society coupled with the preeminence of public opinion in the

---

135. *See* ROBERTSON, *supra* note 8, at 239; Jost Delbrück, *The Role of the United Nations in Dealing with Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277, 289-90 (1997).

136. Delbrück, *Structural Changes*, *supra* note 47, at 22.

137. *See, e.g.*, Simonovic, *supra* note 126, at 389.

138. *See, e.g.*, Casey, *supra* note 7, at 855 (arguing within the traditional sovereignty paradigm that the ICC's claim of universal jurisdiction "would require the application of a universality principle that is inconsistent with, and superior to, the territorial principle").

139. *See* Bickley, *supra* note 8, at 216 (chronicling the history of United States exceptionalism in political policy making).

140. James Reed, *Why Is the USA Not a Like-Minded Country?*, *in* ENHANCING GLOBAL GOVERNANCE: TOWARDS A NEW DIPLOMACY? 55, 57 (Andrew F. Cooper et al. eds., 2002).

141. *Id.* at 57-58.

142. *Id.* at 58.

143. 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 923 (Liberty Fund 1995) (1888).

formation of American foreign policy suggests that the functional approach to sovereignty, which reconstructs the social contract to reflect the preeminence of the individual as the true sovereign, might in fact flourish in the United States.

Though this functional approach to sovereignty has yet to have gained ascendancy in the United States, it is possible to predict how this reformulation of sovereignty might affect United States' policy toward the development of international criminal law and, in particular, the establishment of the ICC. If it can be accepted that certain human rights have ascended to the status of *erga omnes* norms,[144] and that humanity, rather than territory, now serves as the jurisdictional link for these crimes,[145] then, under the functional approach to sovereignty, for the United States to resist the universal precedence of these *erga omnes* norms would constitute an illegitimate usurpation by the state of a sovereign power actually residing with the individual. In this sense, governmental resistance to international human rights treaties and agreements, exemplified historically by the Bricker controversy, would be untenable since the state would be attempting to rely on traditional, territorial sovereignty to deny to its citizens universal human rights. A functional reformulation of United States' sovereignty would expose some of the problems with traditional territorial sovereignty as it applies to *erga omnes* human rights because the state would be able to represent the wishes of its sovereign constituency without fearing that it might, in the process of delegating authority, be "losing" sovereignty.

On the other hand, for the ratification of the ICC to be legitimate from the functional understanding of sovereignty, it would have to appear that the court's limited subject matter should be adjudicated by a supranational forum and that the forum itself would be institutionally legitimate. Both requirements might be problematic. First, while it could be argued that three of the crimes falling under the ICC's jurisdiction are *erga omnes* norms (the crime of genocide, crimes against humanity, and war crimes), there is no comparable international precedent establishing that the fourth crime (aggression) is likewise universally recognized.[146] The Rome Statute explicitly indicates that jurisdiction over "aggression" will occur once the crime is defined,[147] suggesting not only that there is no universally recognized crime of aggression that transcends the nation-state but also that the crime would eventually be legislatively created by the UN pursuant to Article 121.[148] The ICC's subject matter jurisdiction over "aggression" would be problematic from the perspective of functional sovereignty in the sense that the crime is not an *erga omnes* norm and the provision calling for the crime to be legislatively defined would not contribute to its universalization.

Second, the institutional structure of the ICC as a fair adjudicatory body would need to be universally recognized for the transference of authority to be legitimate. Unlike *erga omnes* norms, "there are a number of competing (and often openly hostile) views on [law, justice, and procedural fairness]" that would hinder this universal acceptance.[149] One commentator noted that while the Rome Conference delegates attempted to incorporate procedural and judicial elements from both the Civil Law and Common Law traditions, "[t]he result [wa]s a jerry-rigged system,

144. *See* Delbrück, *supra* note 135, at 289-90.

145. *See* ROBERTSON, *supra* note 8, at 239.

146. Rome Statute, *supra* note 1, art. 5(1), *reprinted* SCHABAS, *supra* note 1, at 169.

147. *Id.* art. 5(2), *reprinted* SCHABAS, *supra* note 1, at 169.

148. *Id.* arts. 5(2), 121, *reprinted* SCHABAS, *supra* note 1, at 169.

149. Casey, *supra* note 7, at 842.

internally inconsistent, that lack[ed] the legitimizing force of the approval and acceptance that these separate systems have earned over the centuries."[150] In this sense, it would be difficult to argue, as in the case of *erga omnes* norms, that the ICC, itself a product of political compromise, somehow embodies a universal procedural right so central that it should supercede the jurisdiction of domestic courts in the adjudication of certain crimes.

CONCLUSION

Simply put, international crimes deemed to be *erga omnes* norms have attained a level of universality which the institutions designed to adjudicate them have not. This conclusion brings us to a point where Justice Jackson's statement that the crimes enumerated in the London Agreement are universally applicable is perhaps more understandable, if not less hypocritical. While Justice Jackson was willing to conclude that the Allies "are not prepared to lay down [at Nürnberg] a rule of criminal conduct against others which we would be unwilling to have invoked against us,"[151] he never suggested that the mere promulgation of universal principles of law would likewise mandate a universal means of enforcement. The process of legitimizing institutions designed to adjudicate *erga omnes* norms necessarily lags behind the declaration of those norms as universal simply because the institutional structure of the adjudicatory body itself demands independent acceptance. Thus, from the perspective of the functional reformulation of sovereignty, support for the Bricker Amendment and similar isolationist perspectives that deny the universality of *erga omnes* norms based on a traditional, territorial notion of sovereignty is untenable. Conversely, even the functional reformulation of sovereignty would not make it any more likely that the United States would ratify the ICC unless it could somehow be shown not only that aggression had attained *erga omnes* status but also that the court's institutional and procedural structure was itself universally recognized. For this to be accomplished, the individual members of society, as the true sovereigns, would have to recognize the common good to be gained by the transference of institutional authority from their own domestic courts to the supranational ICC—a task which assuredly was not fulfilled at the Rome Conference.

150. *Id.* at 843.
151. JACKSON REPORT, *supra* note 25, at 330.