From Sovereignty to Responsibility: The Changing Nature of Nation-State System

Kardan Journal of Law
1 (1) 131–143

Kardan Publications
Kabul, Afghanistan
https://kardan.edu.af/Research/kardan_journal_of_law.aspx

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Abstract

Nation-state system originated in the seventeenth century in Europe in a particular politico-religious environment. In that particular context, sovereignty primarily meant political independence from the central authority of the Holy Roman Empire. However, with the passage of time it was taken to mean absolute authority of the state over its territory and subjects. In the second half of the twentieth century, developments in various branches of international law, most particularly in human rights law, have transformed sovereignty into 'responsibility to protect', thereby changing the very nature of the modern nation-state system.

Keywords: *Nation-State System, Sovereignty, Responsibility to Protect, Self-Determination*

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Introduction

International law or "the law of nations", as it was earlier called,[1] is a product of the nation-state system. Hence, this paper first briefly discusses the origins of the nation-state system and, then, focuses on the characteristic features of this system insofar as they are related to the notion of sovereignty. After this, it shows how the nation-state system was 'transplanted' in the twentieth century in the non-European world, which resulted in recognizing some new rights, which were previously not acceptable to the nation-state system. The most important of these rights is that of self-determination. It concludes that the developments in human rights law have changed not only the traditional concept of sovereignty but also the very nature of the nation-state system.

2. From the Holy Roman Empire to the Nation-states

During the so-called medieval period or "the middle ages"[2], Europeans were loosely united – both religiously and politically – by the Holy Roman Empire.[3] It was this Empire, which in the eleventh century launched the series of wars called "crusades" against Muslims for "liberating" the Holy Land.[4] The crusades brought Muslims and European Christians into

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1 Jeremy Bentham is accredited with coining the term "international law". Before him, the phrase "the law of nations" was in vogue which, in turn, was based on the notion of *jus gentium* used in Roman law. See for details about the history of the modern nation-state system and international law: Peter Malanczuk, *Akehurt's Modern Introduction to International Law* (New York: Routledge, 2002), 9-35; Malclom N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 13-42.

2 The period between the division of the Roman Empire in the fifth century and the conquest of Constantinople by Muslims in 1453 CE is termed as the "middle ages" as it lies in the middle of the two risings of Europe.

3 The Roman Empire got divided into Eastern and Western parts in 476 CE. After this, the Eastern/Byzantine Empire continued to flourish. It was this Empire which had encounters with Muslims in their early history. Thus, Muslims succeeded in taking Jerusalem and other parts of the 'Holy Land' from the Byzantine Empire during the reign of 'Umar (God be pleased with him). The Western Empire fell into the darkness of ignorance. After a long period, the church and the political authority succeeded in making an alliance when Pope Leo III designated Charlemagne, who was the contemporary of Haroon al-Rashid (d. 193 AH/809 CE), as the Emperor of the Holy Roman Empire on December 25, 800 CE.

4 The series of wars initiated when Pope Urban II issued a verdict to this effect in 1095 CE. In 1099, the Crusaders succeeded in capturing Jerusalem and other parts of the Holy Land. In 1148, Salah al-Din al-Ayyubi re-conquered Jerusalem. The next five waves of Crusades proved complete failures and by 1291 the last

direct contact and resultantly Muslim sciences and knowledge reached Europe.[5] Muslim works on Greek philosophy also greatly helped several intelligent Europeans in questioning many of their assumptions and beliefs. This, in turn, resulted in the movement for "reformation" of religion.[6] The "reformed" or "protestant" churches not only weakened the authority of the Pope but also shook the foundations of the Holy Roman Empire.

As religion no longer remained a uniting force, the Europeans had to seek some new bases for binding people together and the result was in the form of *nationalism*.[7] People belonging to a distinct ethnic origin, speaking a distinct language, believing in a distinct religious dogma and living on a specific piece of land emerged as a "nation" distinct from other nations.[8] These nations not only fought with each other on various – religious and non-religious – grounds but also tried to get independence from the Holy Roman Empire. The seventeenth century Europe saw the bloody Thirty-Year War and finally peace was brought through concluding the Treaty of Westphalia in 1648 CE.[9] The most important consequence of this treaty was the demise of the Empire and the emergence of several independent 'nation-states'. Thus, the Peace

fortress of Crusaders fell to the Muslims. See for details: Thomas Asbridge, *The First Crusade: A New History: The Roots of Conflict between Christianity and Islam* (New York: Oxford University Press, 2004).

5 This influenced European thought in many different ways and one of the most obvious effects was on the laws of war and peace.

6 For details about the movement of reformation of religion, see: R. Po-chia Hsia (ed.), *The Cambridge History of Christianity: Reform and Expansion 1500-1660* (Cambridge: Cambridge University Press, 2007); Alister E. McGrath, *The Intellectual Fathers of the European Reformation* (Oxford: Blackwell Publishing, 2004). See also: S.L. Greenslade (ed.), *Cambridge History of the Bible from Reformation to the Present Day* (Cambridge: Cambridge University Press, 2008).

7 See for details: Charles Tilly (ed.), *The Formation of the National State in Europe* (Princeton: Princeton University Press, 1975); Michael Mann (ed.), *The Rise and Decline of the Nation State* (Oxford: Basil Blackwell, 1990); Sverker Gustavsson and Leif Lewin, *The Future of the Nation State: Essays on Cultural Pluralism and Political Integration* (New York: Routledge, 2004).

8 Nationalism cause many serious problems for Muslim intelligentsia. See, for instance: Abu 'l-A'la Mawdudi, *Mas'ala-i-Qawmiyyat* (Lahore: Islamic Publications, 1990).

9 See for details: Geoffrey Treasure, *The Making of Modern Europe 1648–1780* (New York: Routledge, 2003).

of Westphalia is considered as the starting point of the modern nation-state system in Europe.

For the next two centuries, this system – and the resultant 'law of nations' – remained confined to European Christian states and non-European world was essentially considered *terra nullius*, a territory that had no owner and could be annexed by occupation.[10] Thus, the colonial era began, lasting for the next three centuries.[11]

3. Colonial and Post-Colonial World

After the end of World War I in 1918, most of the colonies were placed under the so-called 'mandate' system.[12] This system was based on the principle of 'tutelage', which meant that these territories were given under the guardianship of the victors because people of these territories were not competent for self-rule and the mandatory powers were to civilize them and hand over power to them after making them capable of self-rule.[13] Thus, the age-old colonialism was given a legal cover, with

[10] "There is also no doubt that the concepts of international law prevailing at this time served to facilitate the process of colonization. Sovereignty could be acquired over *terrae nullius,* territory allegedly belonging to nobody, a notion applied to areas throughout the world lacking a strong central power able to resist conquest. If resistance happened to occur, either treaties with local rulers were available as legal instruments, or war could be used." Malanczuk, 19.

[11] It was only in 1856 CE that Turkey, a Muslim but semi-European, state was acknowledged some rights as it was admitted to the concert of Europe. In 1905, Japan was also acknowledged some right and, thus, for the first time the operation of international law was extended to a non-European and non-Christian state.

[12] For details of the relationship between the Mandate System, colonialism and the international legal order, see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 115-194. After a detailed analysis, Anghie concludes: "Colonialism was central to the constitution of international law and sovereignty doctrine… The rhetoric of the 'civilizing mission'… was such an indispensable part of the imperial project. This mission furthered itself by postulating an essential difference -- what might be termed 'a cultural difference' -- between the Europeans and non-Europeans, the Spanish and the Indians, the civilized and the uncivilized." *Ibid., 310.*

See also: Malanczuk, 327-332. See also: Martin Dixon, *Textbook on International Law* (London: Blackstone, 2000), 24-27; D. J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 1998), 125-26. For a landmark judgment on the legal issues arising out of this system, see: *International Status of the South West Africa Case*, ICJ 1950 Rep 128.

[13] The distorted concept of "the white man's burden"!

the difference that now mandate territories were not considered part of the territory of the mandatory power.[14]

There were three types of mandate territories:

- Territories termed as 'A' Mandates were to be given the choice of selecting their guardian or mandatory power. The role of the mandatory power was "rendering of administrative advice and assistance… until such time as they are able to stand alone." Arab territories of the former Ottoman Empire were placed under this category but they were never given the choice of selecting their colonial master.[15] The Mandate for Syria was given to France and for Iraq, Palestine and Trans-Jordan to UK. The Mandate for Palestine was conditioned by an undertaking given to the Jews by the British government in 1917 to establish in Palestine "a national home for the Jewish people."[16]
- Greater part of Germany's African possessions was given the status of 'B' mandates. These territories were considered unfit for administrative autonomy. The mandatory power was to prohibit slave trade and arms trafficking in these territories. Moreover, B mandates were declared open to all League members for trade purposes.[17]

[14] Thus, although India had become 'British India' in 1857, Palestine did not become part of the British Empire even when it was given in British mandate.

[15] When Emir Al-Feisal of Iraq went to Paris to express his views he was not even heard.

[16] The infamous 'Balfour Declaration'. The British Foreign Secretary Arthur James Balfour was among the staunch supporters of Zionism, although he was not a Jew. In 1920, he presented to the League of Nations the draft Palestine Mandate, which contained the commitment of the Balfour Declaration. In 1922, he was made a peer, and in that capacity he always defended the pro-Zionist policy of the British government in public statements as well as speeches in the House of Lords. In justifying the mandate before the House of Lords, he mentioned the atrocities committed by the Christians against the Jews and stressed upon the need 'to wash out an ancient stain upon our own civilization'. In 1925, he visited Palestine to lay foundation stone of the Hebrew University on Mount Scopus. His niece Mrs. Blanche, who also wrote his biography, worked closely with Dr. Weizmann and the Zionist Executive in London. The Israeli government has named several towns and streets after him in recognition of his efforts. (John Comay, *Who's Who in Jewish History after the Period of Old Testament* (New York: Routledge, 1995), 36-37).

[17] The whole of Tanganyika was given to UK, except for two western provinces, which adjoining the Belgian Congo, were given to Belgium, and the southern

– Under 'C' mandates, Germany's possessions of South West Africa and Germany's Pacific islands were placed. The mandate for the African territories was given to the Union of South Africa and for the Pacific islands to Australia, New Zealand and Japan. They were under the sole control of the mandatory power. Other League members had no rights of trade in these territories.[18]

The Covenant established a Permanent Mandates Commission (PMC), which was given supervisory authority.[19] The PMC consisted of 9 members, majority of which were nationals of non-mandatory powers.[20] The PMC was to receive its information from the annual reports submitted to it by the mandatory powers, from questioning their representatives and from petitions submitted by the inhabitants of the mandate territories. However, such petitions could only be submitted through the mandatory power.[21]

At the time of the formation of the United Nations, there were seventy-four 'non-self-governing territories' in the world wherein almost a third of the world's population lived under colonial regimes. Regarding these people, the Charter established the principles that "the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories."[22] The Charter also established the International Trusteeship System[23] and the Trusteeship Council,[24] to monitor certain territories, known as "Trust Territories".[25]

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port of Kionga, which was given to Portugal. The Cameroons and Togoland were divided between France and UK.

18 Importantly, people of B and C Mandates could not be enrolled in the army of the Mandatory Power.

19 Covenant of the League, Article 22.

20 In 1929, however, a German national was also added raising the number to 10.

21 Reports by the mandatory powers were not submitted regularly. The PMC also could get information from other League bodies but it never visited the Mandate Territories nor dispatched investigation commissions to them. It practically became an agent of the League Council.

22 UN Charter, Article 73.

23 *Ibid.,* Chapter XII (Articles 75-85)

24 *Ibid.,* Chapter XIII (Articles 86-91)

25 A total of eleven territories were placed under this system which were formally administered under Mandates from the League of Nations, or were separated from countries defeated in the Second World War, or were voluntarily placed

In the aftermath of World War II, most of these mandate territories gradually got independence and obtained the status of "sovereign states."[26] Thus, the nation-state system was artificially transplanted in Asia, Africa and other parts of the world. As many of these new states got independence from colonial regime because of armed liberation struggle, the right to "self-determination" became the central theme of rebellions and civil wars. Those fighting against colonial, racist or alien domination were hailed in the colonies as heroes and torchbearers of commendable human values, while the same people were termed criminals, bandits and miscreants by the colonial masters. Hence, the famous adage: "One man's terrorist is another's freedom fighter!"[27]

International law about rebellion, thus, has two parallel principles, which sometimes clash with each other: the right of all people to live in accordance with their own beliefs, values and aspirations – the so-called right to self-determination – and the need of a stable international legal order for smooth functioning of the system. The former may instigate secession and anarchy, while the latter may lead to worst form of tyranny and persecution. Legal and political philosophers have been trying to strike a balance between these apparently conflicting legal principles. This will be explained in the next sections of the chapter.

4. Hobbes or Locke: Stability or Freedom?

Thomas Hobbes (d. 1679), the famous English philosopher of the seventeenth century who believed that state came into existence as a result of a 'social contract', had seen the evil effects of disorder, anarchy and disintegration[28] and, thus, strongly advocated a strong state – which he calls 'leviathan', or a monster – that could ensure peace, stability and order so that the lives of all its citizens are saved.[29] John Locke (d. 1704),

under the system by States responsible for their administration. For details, see: Harris, 125-26.

[26] Egypt, Iraq, Syria and Algiers are just a few examples.

[27] Bhagat Singh, the famous Indian is a glaring example who is hailed as a great freedom-fighter by Indians but who was punished as a serious criminal by the British government in India.

[28] Hobbes witnessed the rule of the dictator Oliver Cromwell (d. 1658) and the violence before and after that. These events influenced his thought and he wanted to establish peace at any cost.

[29] Thomas Hobbes, *Leviathan or the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996). See for a detailed exposition of the views of Hobbes, see: Carl Schmitt,

another Englishman who expounded a different version of the social contract theory, instead tried to restrict the unbridled powers of the state by emphasizing on individual's freedom and liberty.[30] It is these two apparently opposing considerations which affect the whole discourse in international law on rebellion or liberation movements. While both Hobbes and Locke shared some basic presumptions, they reached quite different conclusions.

Hobbes believed in the existence of a "state of nature" where no superior-subordinate relationship existed at the political level and, thus, everyone was free. This absolute freedom and the lack of a superior authority, in the opinion of Hobbes, led to a war of all against all till everyone was tired of it and, resultantly, all agreed to surrender their freedom to the "state" which alone should have coercive powers. As everyone submitted to this leviathan, nobody could rise up against the state, argued Hobbes. Moreover, in the opinion of Hobbes, the state was not a party to the "social contract" and was, thus, under no contractual obligations towards the other party – the individuals who had surrendered their freedom to the state for securing their lives.

As opposed to this, Locke believed that the state of nature provided happiness and joy to all people as they could enjoy natural freedom and natural rights given to them by the law of nature.[31] It was only after some people started abusing their natural freedom that problems arose, asserted Locke. Moreover, when finally, people decided to enter into a social contract and constitute a political setup, expounded Locke, they did not surrender all of their freedom. Rather, in the opinion of Locke, people surrendered some of their rights to the state on the condition that the state – which was a party to the contract – must protect the rest of their rights. Thus, Locke's social contract put certain obligations on the state, which if not fulfilled allowed individuals to rise up against it and

The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol (London: Greenwood Press, 1996).

30 Locke's *Second Treatise* is particularly important in this regard. See John Locke, *Second Treaties of Government*, ed. C.B. Macpherson (Cambridge: Hackett Publishing Co., 1980). See also: Paul Kelly, *Locke's Second Treatise of Government: A Reader's Guide* (New York: Continuum, 2007).

31 Locke says: "The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." *Second Treatise*, 9.

change the system or replace it with another – more just – order. Locke, thus, created room for recognizing a "limited right to rebellion."[32]

The ideas of Locke greatly influenced the American political and legal philosophy and his ideas were embodied in the American Declaration of Independence as well as in the Constitution of the USA. Thomas Jefferson wrote in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness – that to secure these rights, government are instituted among men, deriving their powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness.[33]

These ideas are also reflected in several documents and declarations regarding human rights, particularly the right to self-determination and, as shown below, they form the basis for legitimizing armed liberation struggle against tyrannical and oppressive regimes.

5. The Changing Notions of Sovereignty

The system that came into existence as a result of the Treaty of Westphalia stood on the notion of "sovereignty."[34] Although political and legal philosophers much before this debated the concept of sovereignty, the Treaty of Westphalia recognized this concept for the various entities in a peculiar way – the so-called "Westphalian

[32] See for details: Donald L. Doernberg, "We the People: John Lock, Collective Constitutional Rights and Standing to Challenge Government Action," *California Law Review* 73 (1985): 52-118.

[33] American Declaration of Independence, para 1. The US Supreme Court in *Saving and Loan Association v Topeka* declared: "There are…. rights in every free government beyond the control of the state. A government, which recognized no such rights, which held the lives, the liberty, and the property of its citizen's subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism…."

[34] For a detailed discussion on the evolution of the concept of sovereignty with special focus on issues relating to rebellion and insurgency, see: Anghie, *op. cit*. See also: M.P. Ferreira-Snyman, "The Evolution of State Sovereignty: A Historical Perspective," *Fundamina* 12 (Apr 2006), 1-28; also available at: <https://journals.co.za/content/funda/12/2/AJA1021545X_80> (Last accessed: 20.12.2019).

sovereignty". This notion of sovereignty essentially included two ideas: "territoriality and the exclusion of external factors from domestic structures of authority." The present section briefly discusses some of the important approaches toward sovereignty in international law and the way it changed the concept of rebellion for the legal fraternity.

The first systematic exposition of the notion of sovereignty is ascribed to the famous French philosopher of the sixteenth century Jean Bodin (d. 1596) who gave a detailed analysis of this notion in his famous treatise *Les Six Livres de République* (Six Books of the Commonwealth).[35] For Bodin, sovereignty essentially meant absolute and sole power of law making within a particular territory, which did not tolerate any otherlaw-creating agent above the sovereign. This supremepower could not be restricted, in the opinion of Bodin, even by a 'constitution' and his sovereign was above positive law. He, however, accepted the supremacy of the laws of God and natural law.[36]

Some of the Spanish philosophers who preceded Hugo Grotius, the so-called 'Father of international law', examined the relationship of *jus gentium* (law of nations) with the concept of sovereignty. For instance, Francisco de Vitoria (d. 1492) asserted that *jus gentium* was the product of the man's rational nature and was thus common to all humankind. He, thus, argued for subjecting the power of the state to the common good of the world community.[37] Alberico Gentili (d. 1608), another influential Spanish jurist-cum-philosopher, thought that *jus gentium* was not just a 'law between states'; rather, he considered it a 'universal law' and Resultantly he recognized the right of other states to intervene with armedforce when this law was violated. In other words, Gentili subjected

[35] Jean Bodin, *Six Books of the Commonwealth*, tr. M.J. Tooley (Oxford: Basil Blackwell, 1955).

[36] Ferreira-Snyman, 5. As noted above, Hobbes' 'leviathan' was all powerful and thus he went even farther than Bodin by stating that a sovereign was not bound by anything and had a right over everything, including religion. See for details: Hobbes, *De Cive: Philosophical Rudiments Concerning Government and Society*, ed. Howard Warrender (Oxford: Oxford University Press, 1983). As opposed to this, Samuel Pufendorf (d. 1694), another classical authority, denied omnipotence to sovereign and asserted that sovereignty did not mean absolute power. Thus, for Pufendorf sovereignty could be constitutionally restricted. Ferreira-Snyman, 6.

[37] See for details about how the views of Vitoria influenced the development of the international legal order: Anghie, 13-30.

the state's sovereignty to the norms of international law.[38] This, indeed, was an important contribution.

These ideas of the Spanish philosophers greatly influenced the thought of Grotius (d. 1645) who like them subjected the states' sovereignty to the norms of the law of nations. He believed that *jus gentium* was based partly on *jus voluntarium* (voluntary law) and partly on *jus naturae* (law of nature).[39] Thus, for Grotius, it was not only the consent of states that brought into existence the norms of international law but also over above the consent of the states there was the law of nature that bound all states. Significantly, Grotius – though himself a devout Christian theologian – separated the law of nature from theology and based it solely on reason.[40]

It was in this background that the Treaty of Westphalia, which ended the Thirty-Year War, recognized sovereignty for various entities. Thus, it acknowledged equality for states irrespective of their Catholic or Protestant beliefs as well as their monarchical or republican form of government. Simultaneously, it made it obligatory on states to protect the peace reached through this Treaty, thus, also recognizing the 'duty to cooperate'.[41]

The rise of legal positivism in the eighteenth and nineteenth centuries further strengthened the notion of sovereignty as absolute power as legal positivism regarded state as the source of all laws and rejected the idea of a superior law of nature. Thus, the famous English philosopher of the nineteenth century Jeremy Bentham (d. 1832) who is also credited for coining the term "international law" believed that international law was not 'law-proper". The same was the view of his famous disciple John Austin (d. 1859).

In the twentieth century, however, the trend changed as the notion of absolute sovereignty was deemed a threat to international peace. Resultantly, the 'dualist' approach toward international law advocated by Austin and others was attacked by the theory of 'monism' expounded

[38] Ferreira-Snyman, 7-8.

[39] See for details: Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005).

[40] See for an analysis of the views and influence of Grotius: Richard Tuck, *Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999).

[41] Ferreira-Snyman, 10.

by some renowned legal philosophers, such as Hans Kelsen (d. 1973). Kelsen expounded the supremacy of the norms of international law by envisaging a hierarchy of norms in which the norms of international law were placed on the top of the hierarchy. He argued that as states believe in equality of each other's legal orders; this necessitates recognition of a *grundnorm,* which was higher than the respective *groundnormen* of the individual states because equality of national systems was possible only by assuming a higher authority that bestowed equality on states.

Sir Hersch Lauterpacht (d. 1960), a contemporary of Kelsen, also criticized the consent-based model of international law expounded by legal positivists. For Lauterpacht, sovereignty was "an artificial personification of the metaphysical state" and, hence, it had no real essence and was just "a bundle of rights andpowers accorded to the state by the legal order." Thus, he also believed that sovereignty was divisible and could be restricted.

Three significant trends in the twentieth century further eroded the notion of absolute sovereignty. Among these notable trends, the primary inclination was the growing emphasis on human rights law and the emergence of individuals as subjects of international law. Second trend is the development of international criminal justice system, which helped in piercing the corporate veil of state and holding individuals, even serving heads of states, criminally responsible before international criminal tribunals. Finally, the emphasis on "common good" and "common interests" which require states to submit to the norms of international law and sacrifice part of their sovereignty.

These developments have greatly influenced the law regarding the use of force, particularly the use of force by a state against its own population. Until the first half of the twentieth century, this could be termed as an 'internal affair' of a sovereign state in which other states could not interfere. However, the second half of the twentieth century saw many instances of the so-called "humanitarian intervention" and in the twenty-first century, sovereignty is generally deemed as "responsibility to protect".

Conclusion

Legal positivism converted sovereignty from political independence to absolute authority for legal, judicial and executive purposes. Naturalism and other theories put dents in this absolute concept, and developments in human rights law transformed sovereignty into 'responsibility to

protect'. It is hoped that, as technological developments bring human beings close to each other, states will pay more respect to the rights of the people and the world will become a safer – and happier – place.