



# Sovereignty transformed: a sociology of human rights<sup>1</sup>

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## **Abstract**

This paper examines how global interdependencies and the consolidation of a human rights discourse are transforming national sovereignty. Social researchers frequently address the supremacy of state sovereignty and the absoluteness of human rights as mutually exclusive categories. However, rather than presupposing that a universal rights discourse is necessarily leading to the demise of sovereignty, we suggest that an increasingly de-nationalized conception of legitimacy is contributing to a reconfiguration of sovereignty itself. Through the analytic prism of historical memories – which refers to shared understandings specific pasts carry for present concerns of a political community – we provide an explanatory factor for the salience of human rights norms as a globally available repertoire of legitimate claim making. While states retain most of their sovereign functions, their legitimacy is no longer exclusively conditioned by a contract with the nation, but also by their adherence to a set of nation-transcending human rights ideals. Legitimacy is mediated by how willing states are to engage with ‘judicial memories’ of human rights abuses and their articulation in cosmopolitan legal frames. Empirically, we focus on war crime trials and how legal inscriptions of memories of human rights abuses are recasting the jurisdiction of International Law. The readiness of states to engage with rights abuses is becoming politically and culturally consequential, as adherence to global human rights norms confers legitimacy.

**Keywords:** Collective memory; human rights; sovereignty; cosmopolitanism; international law; nation-state

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## **I. The transformation of sovereignty and the sociology of rights**

Different views on the nexus of rights and sovereignty have a long tradition in the annales of Western political thought. Following Hobbes and social contract theories, and in the aftermath of the French Revolution, the debate between Thomas Paine and Edmund Burke, remains an instructive example for

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sociological discourse. According to Paine (1985 [1791]), there is no contradiction between rights and sovereignty. Free individuals transfer sovereignty to an authority (i.e. government) for the protection of their rights. Paine's essay was an answer to Edmund Burke's criticism of the French Revolution and its notion of rights. For Burke, government can claim people's obedience because it exists as a community of memory beyond the lives of individuals. It is 'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born' (Burke 1999 [1790]: 96). Here historical memory, perceived in terms of continuity, provides legitimacy for sovereignty. Paine, subscribed to the opposite view: 'It is the living and not the dead who are to be accommodated (1985 [1791]: 64). Despite their differences, Paine and Burke share the notion that contractual obligations are focused on the relationship of a specific community and a particular state. It is the birth of modern nationalism and sociology, and the idea of the nation not as a collection of followers but as the institution which reconciled freedom and determinism (Beck and Sznaider 2006: 21). And shared historical memories have provided a crucial mechanism through which these nations were invented and imagined. In the framework of the Paine–Burke argument, only the sovereign people were considered the principle container of rights and the nation-state its guarantor.

At the beginning of the twenty first century, global processes have produced numerous challenges, both to the territorial premises of sovereignty as well as to the particularistic presuppositions that inform the dispensation of rights based on national belonging. The transformation of citizenship in many European countries is one indication for these changes. Migratory trends in the second half of the twentieth century have contributed to new patterns of claim making that transcend conventional appeals to nationality by invoking human rights conventions and demanding the recognition of minority group rights (Soysal 1994; Delanty 2000). 'With the erosion of national citizenship, Marshall's three forms of rights (legal, political and social) have been augmented by rights that are global, namely environmental, aboriginal and cultural rights' (Turner 2001: 189). This global component is echoed in Soysal's description of post-national trends, which are characterized by a decoupling of rights and identity. Here membership rights are no longer dispensed solely on the basis of particular national attributes, but increasingly derived from the universal status of personhood (Soysal 1994).

These nation-transcending features of human rights are not only changing the twentieth-century premises of citizenship, they are also affecting the coordinates of sovereignty. The supremacy of particular sovereignty and the indivisibility of universal human rights are often perceived as mutually exclusive categories (Sassen 1996; Strange 1996).<sup>2</sup> Such a perception is not surprising when we consider that 'human rights are instruments that seek to limit the scope of state sovereignty. They affirm that there are certain things that

independent states do not have the right to do. States may agree to enforce human rights; they may incorporate this or that human rights principle or charter into their own systems of law. But state national sovereignty is not the source of human rights' (Hirsh 2003: 3). However, rather than presupposing that globalization, or a universal rights discourse are necessarily leading to the demise of sovereignty, we suggest that an increasingly de-nationalized understanding of legitimacy is contributing to a reconfiguration of sovereignty itself.

This kind of de-nationalized understanding of legitimacy is mediated by the texture of historical memories providing renewed urgency to the Paine–Burke debate. During the last two decades there has been a pervasive trend of national introspection, leading numerous countries around the world to 'come to terms with their past' (Levy and Sznajder 2005). Nation-building practices based on violence and war-like conduct are being recast as illegitimate practices of human rights violations and ethnic cleansing (Minow 1998). Hence, one key interpretive issue involves the transition from heroic nation-states, to statehood that establishes its internal and external legitimacy through support for skeptical narratives. Those post-heroic manifestations of statehood are predicated on a critical engagement with human rights abuses, manifested, among other things, in the proliferation of historical commissions and the active role human rights organizations occupy in public debates about usable pasts (Barkan and Karn 2006).

Historical memories of past failures to prevent human rights abuses, we argue, have become a primary mechanism through which the institutionalization of human rights idioms and their legal inscription during the last two decades have transformed sovereignty. Historical memories refer to shared understandings about the significance specific pasts carry for present concerns of a community. The analytic prism of historical memories provides a crucial explanatory factor for both, the salience of human rights norms as a globally available repertoire of legitimate claim making, as well as the potential for differential recognition and particular appropriations of this universal script. A key factor in this process is a de-coupling of nationhood and the state. While states retain most of their sovereign functions, the basis for their legitimacy is no longer primarily conditioned by a contract with the nation, but also by their adherence to a set of nation-transcending human rights ideals. Legitimacy is mediated by how willing states are to engage with an emerging Human Rights regime. One manifestation of this willingness relates to whether 'judicial memories' of human rights abuses are articulated through cosmopolitan legal frames, and the extent to which they are inscribed into national law. 'Cosmopolitan criminal law is a new form of law . . . , because its authority does not originate in state sovereignty but in a set of supra-national principles, practices and institutions' (Hirsh 2003: XIII).<sup>3</sup>

Despite distinctive historical manifestations and varying definitions of modern sovereignty, there has long been a consensus in the sociological

literature that it encompasses the idea of a political system where authority is based on exclusive command over territory and a degree of autonomy (Giddens 1985; Mann 1997). This view is echoed in Max Weber's definition of the sovereign state as 'a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory' (Weber 1958 [1919]: 77–8). While this definition says nothing about what constitutes a political community, nationality and ethnicity have been the primary reference points for sociological approaches to sovereignty during the twentieth century. This nation-state centric view resonates with prevalent conceptions in the sociological field, where debates about the concept of sovereignty are largely absent. No doubt, this omission is also the result of the 'national caging' that coincided with the emergence of sociology during the late nineteenth century. Sociology understood particular memories of nationhood above all as means of integration into a new unity. The triumph of this perspective can be seen in the way the nation and state are frequently treated as interchangeable terms, concealing the historically conditioned character of political sovereignty.<sup>4</sup> This view is so dominant that the topic of sovereignty remains an 'essentially uncontested concept' in sociology.<sup>5</sup>

Since the history of state sovereignty varies according to perspectives that are themselves historically situated in discursive spaces defined by the principle of sovereignty (Walker 1988: 18ff), the de-coupling of nation and state must be examined against its contemporary manifestation. More specifically, our historical analysis focuses on the emergence of cosmopolitan memory tropes that challenge particular, that is nation-state centered memories. Cosmopolitan memories refer to practices that shift attention away from the territorialized nation-state framework, which is commonly associated with the notion of collective memory.<sup>6</sup> Rather than presuppose the congruity of nation, territory and polity, cosmopolitan memories are based on and contribute to nation-transcending idioms, spanning territorial and national borders. The conventional concept of collective memory is nationally bounded. We argue that this 'national container' is slowly being cracked. Particular national and ethnic memories are not erased but transformed. They continue to exist, but globalization processes shape the balance of universal (e.g. human rights oriented) and particular (e.g. nation-centric) memories, informing the parameters of sovereignty.

Notwithstanding, sovereignty and the nation-state continue to be perceived as a co-extensive pair rather than a malleable relationship. On this view, sovereignty involves the attempted abolition of temporality in favour of spatiality (Walker 1988). Accordingly, memory studies remain tied to the nation and their particular pasts, but have not been utilized for an institutional analysis of rights and sovereignty. The sociology of the diffusion of human rights as a global norm can be analysed in terms of what John Meyer and his collaborators have described as the formation of a world culture in a world polity

(Meyer et al. 1997; Boli and Thomas 1997). Operating with neo-institutionalist assumptions, the world society approach 'explicates how global standards and taken-for-granted models circumscribe national politics. The core argument is that models and norms that are institutionalized at the world level acquire taken-for-granted status over time, and influence policy makers at the national level. As many governments organize and restructure their national politics around global models and standards of appropriate behaviour, a growing number of states share isomorphic (or convergent) political and social structures harmonious with the international model' (Hafner-Burton and Tsutsui 2005: 1382). However, structural similarities do not necessarily determine the meanings attached to human rights norms in particular national contexts. Hence, neo-institutional assumptions of diffusion and convergence must be complemented with a process oriented approach. One in which claim making activities based on human rights idioms are addressed not as necessary but contingent categories, which are mediated by cosmopolitanized memories of human rights abuses and their legal persecution.

For neo-institutional approaches the nation-state template stands at the centre of the world polity model (Meyer et al. 1997). We suggest that the emergence of cosmopolitanized memories about past shortcomings to prevent human rights abuses operates as a variable that helps explain the reconfiguration of sovereignty, and thus the salience of the nation-centric model itself. By focusing on globally available historical memories, we elucidate under what conditions human rights norms become politically and culturally consequential. The transformative power of historical memories takes place in the context of growing global interdependencies and is evidenced in two processes that affect the reconfiguration of sovereignty: one, the political will of states to engage with rights abuses is becoming a prerequisite for their legitimate standing in the international community and increasingly also a domestic source of legitimacy; two, and related, legal inscriptions of memories of human rights abuses do recast the constitution of International Law itself and also constitute significant precedents for the cosmopolitanization of national jurisdiction.

In contrast to earlier proclamations of human rights which had little bearing on sovereignty related issues, the current degree of institutionalization and juridification of human rights is a crucial source for state legitimacy (Beetham 1995). Even powerful countries asserting classical notions of sovereignty and rejecting the political principles of this emerging Human Rights regime are facing domestic criticism and are confronted with an international legitimacy deficit.<sup>7</sup> Human rights norms are shaping a new global legalism that challenges conventional assumptions of nation-state sovereignty and confers legitimacy upon international and domestic politics (Hirsh 2003; Teitel 2003). Human rights violations are no longer merely a moral matter, but also reflect a legal breach. The two converge, thus allowing

for the suspension of certain parameters of sovereignty which were previously monopolized by the nation-state. The inauguration of the International Criminal Court in 2003 is but one example of this trend. The language of international legal principles is complementing the primacy of a nation-centric *raison d'état*.

This paper addresses law as a medium of collective memory. More specifically, we focus on trials because they are a particularly important site for the production of meaning, especially when considering the strong legal dimensions of contemporary global politics.<sup>8</sup> We treat this juridification not merely as a legal process, but as a socially embedded, meaning-producing act. Trials are transformative opportunities, where memories of grave injustices are addressed in rituals of restitution and renewal (Osiel 1997). There is thus a strong connection between trials, law and collective memory. What kind of memory is being mediated through law remains, of course, an empirical question. But conceptually speaking, the nexus of trials, law and memory points to a reciprocal relationship.

War crime trials do not only edify histories, but they also function as a remedy to amnesia (Douglas 2001). Trials do not only carry the potential to create legal precedents, but because of their often public dramaturgy, they also attract widespread media attention. Their dramatic enactment ensures that war crime trials are not only changing law from within, but that they enjoy ritualized attention thus serving broader educational and moral purposes. We can point to three didactic dimensions that characterize the relationship of law and memory as evidenced in war crime trials. One, relates to legitimacy in the sense that legality itself is being restored after their suspension through crimes against humanity. Two, is the moral pedagogy that underlies these trials. The third, through the category of crimes against humanity, questions of inclusion and exclusion as well as the legal limits of the nation-state, are being renegotiated (Pendas 2002). Together, justice itself becomes a form of remembrance.

However, the nexus of law and memory is not limited to the ritualistic dimension of war crime trials, but is also evidenced in a transformation of International Law itself. Since the 1990s, International Law has been recast as an alternative discourse

framed in the universalizing language of human rights. [ . . . ] The new paradigm weds traditional humanitarianism with the law of human rights, causing a shift away from states as the dominant subjects of International Law to include 'persons' and 'peoples' [ . . . ] The emerging legal regimes play a role in shaping current political policymaking, chiefly by reframing and restructuring the discourse in international affairs in a legalist direction. (Teitel 2003: 362–6)

The prominence of International Law itself is not new and enjoyed widespread support in the 'international' period during the nineteenth century.

However, what is new is the notion that law itself can define what constitutes peace and stability internationally, and further that it could somehow displace politics to resolve international conflict. (Teitel 2003: 385)

This juridification of political relations is a central feature in the institutionalization of the Human Rights regime and it is sustained by, among other things, self-conscious references to memories of past abuses.

## **II. Human rights and sovereignty**

There are few empirical attempts that stress the global importance of the Human Rights regime as an antidote to powerful organizations, and the emergence of NGOs and social movements which challenge the legitimacy of nation-states violating human rights (Sjoberg, Gill and Williams 2001). But by and large, sociologists have avoided the subject of human rights and 'not developed any general theory of social rights as institutions' (Turner 1993: 489). According to Turner,

the analysis of human rights presents a problem for sociology, in which cultural relativism and the fact-value distinction have largely destroyed the classical tradition of the natural-law basis for rights discourse. (Turner 1993: 489)

Recognizing the impact of globalization, Turner argues

that a sociology of rights is important, because there are obvious limitations to the idea of citizenship, which is based on membership of a nation state. Existing conceptualizations of citizenship require the supplement of rights theory. It is argued that sociology can ground the analysis of human rights in a concept of human frailty, especially the vulnerability of the body, in the idea of the precariousness of social institutions, and in a theory of moral sympathy. (Turner 1993: 489)

He goes on to argue that social rights of nation-states are being replaced or augmented by human rights (Turner 2001: 203ff) answering new global conditions undermining the cohesion of the nation-state like the environment and global identity questions. Here, our ontological security is – according to Turner – a major causal factor for the increasing dominance of human rights consciousness.

Turner's critique of social constructivism, was met by Malcolm Waters, who argued

that an adequate sociological theory of human rights must, indeed, take a social-constructionist point of view, that human rights is an institution that is specific to cultural and historical context just like any other, and that its very

universality is itself a human construction. The construction of human rights demonstrably transpires in the field of politics and its institutionalization is an emergent arrangement that reflects prevailing balances of political interests. (Waters 1996: 593)

This exchange directs our attention to a key omission of sociological analysis and their theoretical foray presents a formidable foundation to elaborate on the conceptual significance of human rights in general and its relationship with sovereignty, in particular. However, rather than treating these perspectives as mutually exclusive, our historical–sociological account is building on both propositions. We demonstrate how the institutionalization of a Human Rights regime and its transformative effects on sovereignty emerge in a particular historical configuration. What matters for our purpose, is less the ontological status of bodily frailty (nor the instrumental aspects of human rights for that matter). But the recognition of the body's universality as evidenced in the institutionalization of human rights and its political correlates (e.g. juridification). And, rather than assuming a somewhat abstract notion of political interests (grounded, for instance, in power or capital), we demonstrate how, once institutionalized, human rights idioms themselves constitute political interests shaping power balances and by extension the contours of sovereignty.

Sovereignty has proven to be an enduring institution, capable of mutating by way of adjusting to different political, cultural and economic circumstances. Just as absolutist states envisioned by Hobbes differed greatly from, say, the democratic parliamentary manifestations since the nineteenth century, globalization since the end of the twentieth century is reconfiguring the meaning of sovereignty once again. Global processes have eroded the boundaries of the sovereign nation-state by challenging many of the monopolies that the modern state had established between the mid-nineteenth and mid-twentieth century (Albrow 1996; Giddens 1985). These global developments are frequently interpreted as a sign of the demise of sovereignty (Sassen 1996; Strange 1996). Ironically, despite these developments (or perhaps precisely because of them) Carl Schmitt's dictum of 1922 in his *Political Theology* that the sovereign is 'the one who can proclaim a state of exception' (Carl Schmitt 1985 [1922]: 5), has recently regained attention. Mostly through the work of Giorgio Agamben (2005), who claims that matters of sovereignty are increasingly usurped by the executive power and as such do not allow for any interferences. When absolute conceptions of sovereignty and human rights are juxtaposed, the primacy of particular sovereignty and the indivisibility of universal human rights are locked into a zero-sum equation (Dunne and Wheeler 1999).

Consequently, much of the debate is framed around a dichotomy that stipulates either the persistence of bounded nation-state sovereignty or its erosion.



The spatial and cultural presupposition of sovereignty itself (i.e. the congruence of state, nation and legitimacy) remains, for the most part, uncontested. But sovereignty is not identical with the concept of the nation, which is usually predicated on a shared culture and not confined to territorial dimensions (Gellner 1983). The convergence, that is the coupling of nation and state, occurred at particular historical junctures starting with the French Revolution, greatly expanding toward the end of the nineteenth century and coming into full blossom during the twentieth century. Furthermore, the congruence of nation and state has never been as complete as most theories stipulated (Brubaker 1996). Neither has sovereignty been vested with the absolute qualities standard definitions have assigned to it (Krasner 1999). Prevalent conceptions of sovereignty are frequently the result of de-historicized and naturalized conceptualizations. The analysis presented here underscores, that the idea of fixed territorial boundaries and the notion that it functions ‘as the natural repository of political legitimacy’ (Gellner 1983: 55) is the product of a specific historical–political process. The transformation of humanitarian ideals into a regime of human rights can be considered as a Leviathan writ large. As we demonstrate in this paper, the transformative power of human rights is predicated on the recent uncoupling of nation and state, which is mediated by distinctive memories of past human rights abuses and their institutionalization in a cosmopolitan legal order. By treating state and nation synonymously, most scholars mistake the fact that the state remains a central entity, as an indicator for unchanged sovereignty. Globalization challenges the fit between nation-state and society (Beck 2002; Scholte 2000). Hence Gellner’s definition, that the modern nation-state and nationalism are ‘primarily a political principle, which holds that the political and the national unit should be congruent’ (Gellner 1983: 1), is subject to revision. As the next section shows, this reassessment of nationhood varies a great deal, is particularly salient in the European context and depends to a large extent on the political expediencies that are generated by certain historical junctures.

### **III. Legal memories of atrocities**

The Human Rights regime opens alternative trajectories for the articulation of international norms (Goldstein and Keohane 1993). While our main focus will be on the last two decades, previous periods – especially the decade following World War II – provide the mnemonic backdrop against which contemporary interpretations of International Law (IL), and by extension the relationship of human rights and sovereignty are articulated. One can conceive of this process in terms of what Finnemore and Sicking (1998) have referred to as the ‘life cycle of norms’. From this viewpoint, the emergence of international norms originates with the rhetorical work of norm entrepreneurs, which is based on

a particular way of framing an issue so that it resonates with public sensibilities. A necessary condition to sustain norms is their institutionalization in treaties, conventions and organizations. The second stage refers to a 'cascading of norms' that leads to their imitation by other states. The adoption of these norms can be the result of domestic pressures, but frequently also results from a desire to maintain international legitimacy.<sup>9</sup> According to Finnemore and Sicking the final stage occurs when these norms are internalized, that is when they acquire a taken for granted quality.

The conventional distinction between absolute power on internal territorial jurisdiction (i.e. power that is not subject to any external interference) and external sovereignty consisting of juridical independence and equality with other sovereign states (i.e. characterized by principles of noninterference) is increasingly blurred. One central reason for this blurring is derived from changes in IL. Prior to World War II, International Law was essentially the guarantor of nation-state sovereignty, articulating and sanctifying the ground rules for national self-determination. They were defined as a juridical interstate mechanism fortifying state sovereignty while trying to civilize warfare between states. International treaties at the turn of the century were cast in the spirit of nation-state formation and the legitimation of nationhood as a source of sovereignty. After the collapse of the Habsburg and Ottoman empires in Central and Southern Europe, ethnic minorities sought protection (Mazower 1998). However, the primacy of national sovereignty trumped the rights of minorities and the League of Nations had few instruments to protect them. In that post-Imperial context there was a pervasive sense that a nation-state could not protect members of its state who were of a different nationality. 'The nation had conquered the state' (Arendt 1958: 275). Memories of these failures to protect minorities and the excesses of nationalism form the backdrop for the recent mushrooming of international conventions and their cosmopolitan outlook.

### *The postwar period*

With memories of the atrocities of the Second World War and Nazi extermination camps omnipresent, the postwar period constitutes a crucial historical juncture for a renewed articulation of human rights principles and, at least in principle, a more conditional approach to sovereignty and a partial discreditation of nationalism in the European context. The aforementioned failure of the League of Nations to protect ethnic minorities, and the unprecedented genocidal scope of the Holocaust, played a crucial role in the articulation of new international regulatory measures during the 1940s. A comparison of Article 15 in the Covenant of the League of Nations and Article 2 in the Charter of the United Nations are a case in point. The Covenant reinforced the sanctity of domestic jurisdiction and the principle of non-interference as

standards of IL. The UN charter, based on the Nuremberg precedent, allows interference if a particular action poses a threat to international peace. Interrupted by the emerging Cold War, it would take another four decades before the possibility of intervention would become a legitimate political threat. Legal arguments draw their persuasive power from the fact that they are grounded in precedent (which is why contemporary emphasis on the Nuremberg trials comprises such an important part of our story). Thus it was hardly surprising that the Nazi crimes were initially constructed as a 'war of aggression' (an existing legal category) rather than as a 'crime against humanity' (an emerging legal category). The basis for the war crime tribunals in Nuremberg and Tokyo were laid on August 8, 1945 in the 'London Agreement' articulating the charter of the International Military Tribunal. It listed a number of crimes that were previously not part of IL, posing new challenges to prevailing assumptions regarding state sovereignty. The Tribunal rejected the 'cog in the system' theory which does not recognize individual action in the system of criminal states. The charter of the International Military Tribunal (IMT) in Nuremberg asserted a new cultural and social paradigm, which posited the individual subject with his/her rights and responsibilities. The centerpiece of the Nuremberg Trials was article 6 of the London Agreement. Emphasizing 'crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility', it listed three specific offenses: Article 6a introduced the notion of crimes against peace, 'namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing' (International Military Tribunal I: 11). Article 6b focused on 'violations of the laws or customs of war'. This category of war crimes had a secure footing in the Hague convention of 1907, while 6a was grounded in the Kellogg-Briand Agreement of 1928.

It was the aforementioned notion of conspiracy and the concept of 'crimes against humanity' specified in Article 6c, however, which were intended to provide a legal basis to cope with the atrocities of the Holocaust itself. Following Article 6c, crimes against humanity included 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds . . . whether or not in violation of domestic law of the country where perpetrated' (International Military Tribunal I: 11). Article 6c pointed toward a radical departure from existing International Law by recognizing individual responsibility not just in wartime extending protection to one's own civilian population, granting supremacy to International Law over domestic law, and internationalizing the persecution of minorities. In that sense, the Nuremberg trials affirmed sovereignty, as crimes against Germany's own citizens could only be persecuted after Germany started its 'aggressive war'. War was still the major crime. Stressing 'mens rea' [criminal intent],

essentially implied the criminalization of a certain type of politics – namely the kind of extreme sovereignty, envisioned by Schmitt and others. Furthermore, the assumption of criminal intent also implies individual responsibility. Accordingly, we observe a return to liberal attempts at reconciling the tension between individual rights and state sovereignty. Here the Tribunal accepted and re-affirmed the Enlightenment notion of individual agency and morality not subsumed by the state. For Hans Joas (2003) this process – in which human rights violations are being treated like criminal acts within states, resulting in a relatively autonomous law filling the space between politics and morality – is one of the most significant consequences of the Nuremberg tribunal. This should have far reaching consequences not only for sociological theory but for the legal memory of Nuremberg itself. Political accountability and criminal responsibility were interwoven into one procedure.

From its inception, the Cold War was an obstacle to transforming the human rights declarations of the postwar period into salient features of international politics. Cold War alliances and the reaffirmation of national sovereignties remained the pillars of international relations, rendering the universalistic aspirations of the immediate postwar period largely irrelevant. However, triggered by several historical junctures (most notably the end of the Cold War and the humanitarian intervention in Kosovo), human rights eventually became a legal and moral authority, that would become politically consequential and culturally meaningful. Memories of the Nuremberg tribunal have been inscribed into international politics, and become an important legal and moral point of reference for a host of trials that have engaged a global public since the late 1990s. Through the ritualistic power of trials, memories of past human rights abuses, would subsequently serve as a continuous reaffirmation of these individual rights.

### *The post-Cold War period*

Despite the statist stalemate of Cold War bloc politics, or possibly precisely as a remedy against them, human rights were increasingly addressed by non-governmental organizations (Boli and Thomas 1997).<sup>10</sup> Because of global interdependencies and the legitimacy NGOs enjoy, they can claim jurisdictional authority, which in turn, is often translated into ‘official’ legal regimes (Berman 2002). Non-state jurisdictional assertion encompasses the development of transnational common law through accretion of norms into practice (Berman 2002: 504). ‘Contemporary norm making in the international realm is not simply an expression of interstate relations. In the global context of fragmented power, other agents, namely private parties, non-governmental actors and transnational institutions, play a growing role in the production of IL’ (Teitel 2003: 362–6). Legitimacy is delegated away from the national sovereign

to external forces and/or non-state actors in the form of NGOs or INGOs. It is a key factor in the emergence and consolidation of a global civil society (Shaw 1996).

Another visible instance for the transformation of nation-state sovereignty is the use of force to engage in 'humanitarian intervention'. The standard justification for humanitarian intervention is the allegation that gross violations of human rights are occurring on such a massive scale as to override the foundational principle of the Westphalian order, namely that territorial sovereignty is inviolate. It was the historical backdrop of the Balkan crisis and unsuccessful demands for intervention in Bosnia, fermenting a link to memories of the Holocaust and pressures for intervention in Kosovo, which set new standards.<sup>11</sup> As controversial as they continue to be, humanitarian interventions that had long been mooted with no real expectation of response, are now taken seriously as policy options (Holzgrefe and Keohane 2003).

In contrast to genocidal activities in Rwanda, interethnic warfare in Kosovo with its European setting and its televised images resonated with Holocaust iconography. By the late 1990s, the Holocaust had been reconfigured as a de-contextualized event. It is a concept that has been dislocated from space and time precisely because it can be used to dramatize any act of injustice. The future of the Holocaust (and not the past) is now considered in universal terms: it can happen to anyone, at anytime, and everyone is responsible. The Holocaust is no longer about the Jews being exterminated by the Germans. Rather, it is about human beings and the most extreme violation of their human rights. The Holocaust is turned into a holocaust and becomes a de-contextualized symbol. Genocide, ethnic cleansing and the Holocaust are blurred into an a-political and a-historical event circumscribed by human rights as the positive force, and nationalism, as the negative one. Hence, military involvement in Kosovo was primarily framed as a moral obligation largely in response to memories of previous failures to intervene on behalf of innocent civilians. 'Never again Auschwitz' was frequently invoked, but it was no longer only the failure to stop the Holocaust. The slogan of 'Never Again' was simultaneously a reminder of World War II and the delayed involvement in Bosnia. This transposition of Holocaust memory onto contemporary sensibilities about genocide provided the foundation to push the Nuremberg concept of 'Crimes Against Humanity' into a global arena. The war in Kosovo is one example for the changed relationship of legal sovereignty and the legitimacy conferred by adherence to a rights discourse. In the absence of a clear UN mandate the war technically was illegal. Notwithstanding, an independent international commission on Kosovo concluded that even in the absence of formal legality human interventionism could be legitimate.<sup>12</sup>

This trend has been reinforced through the legal inscription of the Nuremberg ethos. In February 1993, the Security Council demanded the establishment of an 'International Tribunal to Prosecute Persons Responsible for

Humanitarian Law Violations in Former Yugoslavia' (ICTY). It started its work in 1994. Nuremberg was the undisputed legal and moral precedent for the tribunal, which was the first such body to be created since the end of World War II. As in Nuremberg, the trial's task was not to write history, but to establish juridical responsibility. As in Nuremberg, the history of the massacre in Srebrenica and other war related events was written in that trial. The ICTY is a formative example for the transformation of sovereignty. In both cases the domestic integrity was challenged by International Law and it came in response to internal strife rather than international armed conflict, blurring internal and external boundaries.

Another prominent example reflective of and contributing to the broadening presence of the Nuremberg ethos and the cosmopolitanization of international legitimacy, were the activities of the Spanish judge Baltasar Garzon. Starting in 1996 he demanded the arrests of Argentina's former military dictators for their role in 320 unsolved murders and 'disappearances' of Spanish citizens during the so-called 'Dirty War.' Gaining even wider attention was Garzon's 1998 order of detention against Augusto Pinochet, who at the time was in London. Garzon argued that these were crimes against humanity and that they were similar to those committed by the Nazis in World War II, giving Spain the right to prosecute the offenders under IL. Garzon's attempts to try gross human rights violations across borders established a precedent against heads of state who may now be tried for crimes like torture and genocide, which are no longer considered to be covered by sovereign immunity. Even if universal jurisdiction in actuality has limited appeal, it carries great political-symbolic consequences as it reaffirms both a de-territorialized understanding of sovereignty and notions of individual responsibility. Furthermore, it embeds particular historical memories of past abuses into a global narrative of human rights imperatives, whose political salience no longer relies merely on their symbolic appeal. Rather these trials create legal precedents, which can become customs, which in turn, can harden into law over time (Berman 2002).

Many of these changes and historical experiences have found their way into the recently installed International Criminal Court (ICC).<sup>13</sup> Against the background of memories of the Holocaust and other genocidal atrocities, the statutes of the ICC are a self-reflexive manifestation of the transformations discussed in this paper. Most of all, it is an international recognition that circumscribes state sovereignty in several forms. Like the UN charter it ensures that national self-determination and statehood remain the central political units in IL. However, at the same time, it consolidates the hierarchy of values according to which human rights supersede the previous untouchable status of nation-state sovereignty. Especially article 7, dealing with 'crimes against humanity' solidifies a shift away from national jurisdiction to an international body as it blurs the differentiation of international and internal conflicts. The ICC has also shown considerable sensitivity to the possible

charges of victor's justice and the outside imposition of law, containing a provision that stipulates legal procedures in the country of origin. As such, it is a good example for how a transnational legal system can become part of domestic debates.

Whatever the motivation behind the internalization of these treaties and conventions, they circumscribe the possibilities of domestic law and external bodies frequently monitor their compliance. Thus, for instance, the treatment of its citizens is no longer the exclusive domain of the state. Moreover, many countries are relinquishing aspects of their sovereignty to supranational bodies as well as incorporating international legal norms into their domestic adjudication. The most developed example of this trend would be the adjudicatory authority individual states have conferred upon the European Union. The European Court of Human Rights and the European Convention on Human Rights came into being during the 1950s. They are both exemplary cases for the symbolic value and the juridical power that human rights (can) carry. The commission accepts complaints from a variety of non-state actors and national jurisdictions have to abide by the decisions of the European court.

This new International Law 'is not solely defined in terms of the prevailing statist lexicon of national self-determination and state sovereignty. Instead, the new discourse goes to the very core of the prevailing paradigm. The present move shifts the emphasis from the protection of state borders or territoriality, which is the core of the established state system, to other more juridical dimensions of the state such as the stability of peoples' (Teitel 2003: 370). In terms of political legitimacy, this shift underscores a transition from the absoluteness of nationalism to global interdependencies. 'Just as the prior international legal regime, premised on state sovereignty and self-determination, was associated with the growth of modern nationalism, the new legal developments of the emergent humanitarian law regime are associated with the contemporary phenomena of political transition and globalization' (Teitel 2003: 370). The transformation of sovereignty is thus not leading to the erosion of the state but rather becomes a necessary condition for maintaining its legitimacy in the first place. This cosmopolitanized sovereignty blurs conventional divisions of endogenous and exogenous factors. Accordingly the links in which state, nation and legitimacy remain interchangeable, and authority structures continue to be perceived as coterminous with geographical entities, are severed.

#### **IV. The sociology of the Human Rights regime**

Globalization has brought the tension between the current imperatives of the Human Rights regime and the previous prerogatives of sovereignty into sharp

relief. While the rights revolution since the mid 1970s has not always deterred further human rights abuses, it has created strong normative and institutional foundations to interrupt the sovereign shield of impunity. The ability to generate memories about past failures to prevent human rights abuses is a crucial variable for the institutionalization, that is the legal inscription, of human rights principles. States retain their sovereignty, but the basis of their sovereign legitimacy transcends the contract with their nation. Instead, international and domestic legitimacy are increasingly mediated by how willing states are to engage with the emerging Human Rights regime itself.

As much as the end of the Cold War constituted an important juncture for the consolidation of the Human Rights regime, the terrorist attacks of September 11, 2001 and their geo-political aftermath have added a new urgency to discussions about the political status of human rights and sovereign prerogatives (Calhoun, Price and Timmer 2002; Freeman 2003). Modernity, following Hobbes' logic, created the modern state to avoid civil war through the monopolization of the means of violence (Sznaider 2006). People gave up some of their liberties in order to be safe. This notion has been confronted with a competing set of human rights that privileges the individual. Many political communities are no longer exclusively based on collective notions of solidarity, war, and blood, but often rely on a citizenship conception that is anchored in the notion of universal personhood and memories of how even citizens can be victimized when the state assumes too much power.

Terrorism challenges these developments and throws the state back to its founding moment: the provision of security for its citizens. Anti-terrorist measures and the trend towards more executive powers, frequently infringe upon civic rights and have led some to demand that sovereignty be less conditional (Ignatieff 2004). Terrorism is shifting the attention away from state abuse and redirects national memories to failures by the state to protect its citizens. However, despite these challenges, or perhaps precisely because of them, even the national interest through which anti-terrorist measures are being justified, continues to be articulated in the global context of a human rights discourse. It is the recurrence of strong executive powers and national interest politics, which incur international legitimacy deficit and require extensive justifications vis-à-vis human rights standards (Levy, Pensky and Torpey 2005).

To be sure, we are not claiming that this Human Rights regime necessarily implies less abusive conduct, nor do we suggest that reactions to human rights abuses are going to be the same everywhere. Rwanda, Sudan, Guantanamo Bay and Chechnya, are recent cases that illustrate continuous abuses. However, it is precisely the memories of these failures to enforce human rights principles and the continual recourse to international jurisdiction, which are the driving forces behind a further consolidation of the Human Rights regime. Official commemorations of the 10<sup>th</sup> anniversary of the Rwandan genocide, spearheaded by the UN, are but one example of this trend. The ongoing



failure to prevent genocidal activities in Darfur and attempts to hold the Sudanese government accountable, are the latest. The recent replacement of the widely criticized UN Human Rights commission with a new UN Human Rights Council is another indicator for how memories of failures to address past abuses structure the parameters of legitimacy. Approved with a vote of 170 to 4 by the General Assembly on March 15, 2006, the new body restricts membership of rights abusers, enforces mandatory periodic reviews, meets more frequently (4 times year) to address acute situations that were previously ignored and neutralized through regional (as opposed to new individual) voting patterns.

It is another step in which the adherence to and deployment of human rights principles in both domestic and international politics have become a prerequisite to obtain forms of legitimacy that cannot be isolated within the conventional nation-state container. Ignoring the Human Rights regime incurs a legitimacy deficit and nation-states are increasingly part of 'interdependent sovereignties' (Krasner 1999).<sup>14</sup> States are expected to respect the nation-transcending imperatives of human rights and at the same time they remain the primary implementers of these rights, thus reconfiguring sovereignty and the primacy of nationhood.

Assessing the salience of human rights idioms and their transformative impact on sovereignty for future research necessitates a case driven analysis that addresses general conditions of possibility. The changing diffusion of human rights norms and the transformation of sovereignty raise questions about the modular effects of the nation-state model itself. The diffusion of global norms is not a linear process, but also depends on the motivation of domestic actors to accept new normative prescriptions. We thus need to distinguish between mimetic processes and isomorphic trends, on the one, and the resistance and contentions that are subject to local negotiations, on the other. The impact of this Human Rights regime on both international politics and state-society relations has become a significant nation-transcending principle of legitimacy. On this view, the institutionalization process of human rights principles provides a historical perspective to Bryan Turner's universalist stipulation about human rights. Further work towards a theory of human rights can be perceived as a functional equivalent to other ontological principles that inform traditional sociological analysis such as class, gender, nation and ethnicity.

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## Notes

1. This project was conducted under a grant from the German Research Foundation (DFG). Thanks also to the Rockefeller Foundation and the participants of the

Bellagio workshop on 'The Promises and Pitfalls of International Courts' for their comments.

2. Instead of reducing 'universalism' and 'particularism' to their ideological assumptions, we treat them as an important object in our investigation. We historicize these notions, thereby de-moralizing them, while retaining them as valuable sociological tools.

3. Cosmopolitan law is 'the emerging body of law that aims to protect the human rights of individuals and groups primarily from serious threats that may be posed to them by their "own" states [...] it is one response to the inadequacy of nationalism and its actualization in the nation state' (Hirsh 2003: XIII & XV).

4. For an expansive critique of this methodological nationalism see the 2006 special issue of the *British Journal of Sociology* 57(1).

5. Political theorists and international relation scholars have long debated the concept of sovereignty. International Relations journals such as *Millennium*, *International Organization*, the *International Studies Review* have paid recurrent attention to the topic.

6. For a detailed analysis of the concept of 'cosmopolitan memory' see Daniel Levy and Natan Sznaider (2005).

7. Some have suggested that the politics of human rights are merely a tool of powerful countries (Evans 2001). Conversely, despite the unrivaled military supremacy of the USA there is a growing recognition that power does not equal force (Nye 2002). A continuous refusal to ratify human rights treaties comes at the expense of necessary international legitimacy. The political price that the non-recognition of this dimension of 'soft power' incurs becomes a liability in a world of interdependencies.

8. It should be noted that there are additional sites in which the nexus of justice and memory are constituted. James Booth points to three manifestations of 'memory-justice

as it deals with the past: trial and punishment (criminal charges); illumination and acknowledgment (truth commissions); and forgetting for the sake of a future in common (amnesty)' (Booth 2001: 778).

9. Finnemore and Sikkink (1998) describe this process of international socialization by way of emulation (of heroes), praise (for conformity) and ridicule (for deviation). Three possible motivations for responding to 'peer pressure' are legitimation, conformity, and esteem.

10. See Boli and Thomas (1997). Suffice to say here that from about 2000 NGOs in 1960 the number rose to 38000 in 1996, of which approximately half were international NGOs (INGO).

11. For a comparative-historical analysis tracing the iconic impact of Holocaust memories see Levy and Sznaider (2002, 2005).

12. See the report by the Independent International Commission on Kosovo (<http://www.kosovocommission.org/>).

13. The statute, which entered into force on July 1, 2002, can be found at <http://www.un.org/law/icc/statute/rome fra.htm>.

14. Examining the impact of the Human Rights regime on human rights practices of states, Hafner-Burton and Tsutsui speak about a 'paradox of empty promises'. They argue that 'the global institutionalisation of human rights has created an international context in which (1) governments often ratify human rights treaties as a matter of window-dressing, radically decoupling policy from practice and at times exacerbating human rights practices, but (2) the emergent global legitimacy of human rights exerts independent global civil society effects that improve states' actual human rights practices' (Hafner-Burton and Tsutsui 2005: 1373). This trend confirms our finding that emerging features of global interdependency at the beginning of the twenty first century make it far more difficult to ignore the pressures of the international community on human rights issues.

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