

DOI 10.5817/MUJLT2023-1-2

ON SOVEREIGNTY *

by

DAN SVANTESSON [†] SAMULI HAATAJA [‡]
DANIELLE IRELAND-PIPER [§] KUAN-WEI CHEN [¶]

The concept of sovereignty is more important than ever in the cyber context, yet it is poorly understood. With this article, we seek to contribute towards a shared understanding of the concept of sovereignty by succinctly addressing the following six, interrelated, questions:

1. *Who can claim to have sovereignty;*
2. *Over what can one have sovereignty;*
3. *What are the consequences of having sovereignty over something;*
4. *Who can violate sovereignty;*
5. *What is the threshold for violating sovereignty; and*
6. *What are the consequences of violating sovereignty?*

However, this article is not limited to a descriptive account of the law as it stands today. A purely descriptive account would not provide a full picture of the complex concept of sovereignty, and we have felt it appropriate to enter the territory of law reform options in parts of the discussion. While sovereignty is a technology-neutral concept and the article addresses it as such, particular attention is directed at sovereignty in the cyber context.

KEY WORDS

Sovereignty, Cyberspace, Cyberconflict, International law, Cyberwar

* This research was supported by the Australian Government through a grant by the Australian Department of Defence. The views expressed herein are those of the authors and are not necessarily those of the Australian Government, the Australian Department of Defence, or the universities or other institutions the authors are affiliated with.

[†] dasvante@bond.edu.au, Professor, Faculty of Law, Bond University, Australia

[‡] s.haataja@griffith.edu.au, Senior Lecturer, Griffith Law School, Griffith University, Australia

[§] Danielle.Ireland-Piper@anu.edu.au, Associate Professor, National Security College, Australian National University and Honorary Adjunct Associate Professor, Faculty of Law, Bond University, Australia

[¶] kuan-wei.chen@student.bond.edu.au, Senior Research Assistant/PhD Candidate, Faculty of Law, Bond University, Australia

1. INTRODUCTION

The topic of sovereignty is currently gaining an enormous amount of attention, not least in the cyber context. Yet, there seems to be little, or no, progress in our understanding of this key concept. In fact, it may be the case that the increased use of the term is resulting in an even lower level of shared understanding of what sovereignty is and does.

This discrepancy between increase in attention on the one hand, and lacking increase in understanding on the other hand, is both remarkable and unusual. It is also a major obstacle for a productive discourse on the topic. On the cyber arena, we see this e.g., in the form of imprecise – slogan-like – calls for cyber sovereignty, data sovereignty, digital sovereignty, information sovereignty, and the like.

To move towards a shared understanding of the concept of sovereignty, it seems essential to address, at the minimum, the following six, interrelated, questions:

1. Who can claim to have sovereignty;
2. Over what can one have sovereignty;
3. What are the consequences of having sovereignty over something;
4. Who can violate sovereignty;
5. What is the threshold for violating sovereignty; and
6. What are the consequences of violating sovereignty?

In this article, we seek to address these questions with the aim of providing an accessible overview of the concept of sovereignty. Hopefully, by addressing these important questions we may help to facilitate a shared understanding of sovereignty. However, this article is not limited to a descriptive account of the law as it stands today.

The reality is that there are fundamental disagreements on key aspects of sovereignty. Thus, a purely descriptive account would not provide a full picture of the complex concept of sovereignty, and we have felt it appropriate to enter the territory of law reform options in parts of the discussion. Great care has, however, been taken to clearly indicate to the reader what is our proposals and what is established law.

Put simply, it may be said that there are, at least, five problems with the current concept of sovereignty:

1. It is often approached in an unstructured manner;
2. It is vague and abstract;
3. It is anchored in territoriality;

4. It is binary; and
5. As a component of international law, its enforcement is difficult.

To give the reader an idea of what to expect from this article, it is appropriate to make a few comments about which of these problems the article seeks to address. It is hoped that this article will go some way towards providing a structured lens through which to discuss sovereignty, not least by breaking down the concept into the six questions outlined above.

However, it is less likely that the article manages to address the second problem; that of the concept of sovereignty being vague and abstract. Indeed, the proposal of anchoring sovereignty in the concept of State dignity may admittedly make sovereignty even more vague and abstract. Compared to conventional conceptions of sovereignty, one anchored in State dignity has potential to offer a more honest and transparent way to accommodate for flexibility in the international relations of States.

By anchoring sovereignty in the concept of State dignity, this article seeks to address problems three and four. However, it is not our ambition to reform the overall operation of international law, and the reality is that whether sovereignty is anchored in territoriality, or as we propose in State dignity, enforcing sovereignty is always going to be difficult.

As to the structure, the article commences with some brief and general observations about sovereignty and how sovereignty is discussed today, with emphasis on how it is discussed today in relation to the Internet. It then addresses the six highlighted questions one-by-one. In doing so, no attempt has been made to divide the attention equally between those questions. The first four are relatively straightforward, while the latter two are highly controversial. This is reflected in how we address them. The article concludes with some observations about the uncertain future of the concept of sovereignty, and of the environment in which it will operate.

While sovereignty is a technology-neutral concept and the article addresses it as such, particular attention is directed at sovereignty in the cyber context.

2. SOVEREIGNTY TODAY

Sovereignty as a concept has been taken for granted as being absolute and as being the foundation of the international legal order.¹ The concept of sovereignty is understood and manifested in a number of ways,² and it is “both a source of international law and international-law based”.³

Sovereignty is a key concept in relation to several of the world’s biggest current challenges such as Russia’s invasion of Ukraine,⁴ environmental challenges,⁵ and China’s aspiration to the so-called ‘reunification’ of Taiwan.⁶ Without exaggeration, it may be said that the degree to which the concept of sovereignty instils stability in international law impacts all these challenges and how well we can handle them. Yet, we are remarkably far from a clear consensus on how the concept of sovereignty operates.

However, there is one matter on which there is agreement; while it has not always been so,⁷ today, it is uncontroversial to suggest that sovereignty applies online.⁸ This is important, but the value of this consensus is

¹ See e.g. Jackson, J. H. (2003) Sovereignty-Modern: A New Approach to an Outdated Concept. *American Journal of International Law*, 97 (4), pp. 782-802; and Simonovic, I. (2002) Relative Sovereignty of the Twenty First Century. *Hastings International & Comparative Law Review*, 25, p. 371. Cf. Louis Henkin who does not find it useful to perpetuate the ‘myth’ of and use of the term sovereignty: Henkin, L. (1994) *The Mythology of Sovereignty*. In: RStJ Macdonald (ed.) *Essays in Honour of Wang Tieya*. Martinus Nijhoff: Dordrecht, pp. 353-355. See also Waldron, J. (2011) Are Sovereigns Entitled to the Benefit of the International Rule of Law? *European Journal of International Law*, 22 (2), p. 328.

² Crawford, J. (2006) *The Creation of States in International Law*. 2nd ed. Oxford: Oxford University Press, p. 32. See also Svantesson, D. et al (2021) *The developing concept of sovereignty: considerations for defence operations in cyberspace and outer space*, Technology and Jurisdiction Research Team, Bond University, p. 19; and Klabbers, J. (1998) Clinching the Concept of Sovereignty: Wimbledon Redux. *Austrian Review of International and European Law*, 3 (1), p. 346.

³ Besson, S. (April 2011) Sovereignty. In: *Max Planck Encyclopedias of International Law*, paragraph 113.

⁴ See e.g. Kremlin. (2015) *Article by Vladimir Putin “On the Historical Unity of Russians and Ukrainians”*. [online] Moscow: Kremlin. Available from: <http://en.kremlin.ru/events/president/news/66181> [Accessed 7 November 2022].

⁵ See Paris Agreement, 12 December 2015, 3156 UNTS (entered into force 4 November 2016), art 13(3).

⁶ *The Taiwan Question and China’s Reunification in the New Era* (2022). [online] Beijing: Taiwan Affairs Office of the State Council and The State Council Information Office of the People’s Republic of China. Available from: <https://english.www.gov.cn/atts/stream/files/62f34db4c6d028997c37ca98> [Accessed 7 November 2022].

⁷ Barlow, J. A. (1996) *Declaration of the Independence of Cyberspace*. [online] Electronic Frontier Foundation: San Francisco. Available from: <https://www.eff.org/cyberspace-independence> [Accessed 7 November 2022].

⁸ Consider e.g. UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ‘Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security’ (24 June 2013) UN Doc A/68/98, and Open-ended working group on developments in the field of information and telecommunications in the context of international security, “Final

superficial indeed given that those who say that sovereignty applies online generally do not engage with the considerably more difficult question of how sovereignty applies online.

Perhaps this suggests that the only reason why we have a consensus on that sovereignty applies online is because we can answer that question while turning a blind eye to the ‘how question’. The very prospect of this being the case shows the primitive level we currently are at and how strong the need is for more expertise being directed at this question.⁹

It is this combination of the central importance of the concept of sovereignty, and its current relatively primitive level of understanding, that made us write this article even though there already is a wealth of literature on the topic, and indeed, on the application of international law to cyber conflicts more broadly.¹⁰ In other words, the nature of the current discussions is such that further works, such as this article, are justified, and this article is of course by no means the last word on this important topic. Much work lies ahead.

3. WHO CAN CLAIM TO HAVE SOVEREIGNTY?

On the surface, the question of who can claim to have sovereignty is uncontroversial; the answer is that States can claim to have sovereignty. Of course, the question then is what a State is, and fortunately international law provides answers to that question.

The State is the primary¹¹ subject or legal person of international law which possesses “the totality of international rights and duties recognized by international law”.¹² Laying down the widely-accepted criteria of statehood,¹³ the 1933 Montevideo Convention on the Rights and Duties of States provides that a State “*should* possess the following qualifications: (a)

Substantive Report” (10 March 2021), [online] New York: UN Office of Disarmament Affairs. Available from: <https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-A-AC.290-2021-CRP.2.pdf> [Accessed 7 November 2022].

⁹ See further: Svantesson, D. (2020) Is International Law Ready for the (Already Ongoing) Digital Age? Perspectives from Private and Public International Law. In: Busstra, M. et al (eds.) *International Law for a Digital World*. T. M. C. Asser Press: The Hague, 147, pp. 113-155.

¹⁰ For an excellent recent contribution to this debate, in this specific journal, see: Osula, A.-M., Kasper, A. and Kajander, A. (2022) EU Common Position on International Law and Cyberspace. *Masaryk University Journal of Law and Technology*, 16 (1), p. 89.

¹¹ Higgins, R. (2000) *Problems and Process: International Law and How We Use It*. Oxford: Clarendon, p. 39. See also Klabbbers, J. (1998) Clinching the Concept of Sovereignty: Wimbledon Redux. (1998) *Austrian Review of International and European Law*, 3 (1), p. 367.

¹² *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, [1949] ICJ Rep 174, p. 180; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, paragraph 25.

¹³ Higgins, R. (2000) *Problems and Process: International Law and How We Use It*. Oxford: Clarendon, p. 39; and Cançado Trindade, A. A. (2013) *International law for humankind: towards a new jus gentium*. 2nd ed. Leiden: Brill, pp. 166-167. See also ‘Draft Declaration on Rights

a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States".¹⁴

The criteria for statehood is prescriptive, for the seemingly objective criteria of what makes a State a State "have always been interpreted and applied flexibly, depending on the circumstances and the context in which the claim of statehood is made".¹⁵ Divorced from the political (and often politicised) matter of the recognition of States,¹⁶ various examples of 'States' demonstrate that despite lacking one or more of the component elements of statehood does not prevent them from being considered a member of the international community.¹⁷ For example, as the Vatican and the Federated States of Micronesia demonstrate, there is no minimum requirement to satisfy the criteria of either territory or permanent population.

Further, the capacity to enter into relations with other States, according to Crawford, "is no longer, if it ever was, an exclusive State prerogative".¹⁸

and Duties of States with Commentaries' [1949] *Yearbook of the International Law Commission* 287, p. 289, paragraph 49.

¹⁴ *Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art I (emphasis added).

¹⁵ Higgins, R. (2000) *Problems and Process: International Law and How We Use It*. Oxford: Clarendon, 39. See also Cançado Trindade, A. A. (2013) *International law for humankind: towards a new jus gentium*. 2nd ed. Leiden: Brill, ch VII; and Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion [2010] ICJ Rep 403, paragraph 51.

¹⁶ See *Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 3. See also Oppenheim, L. and Roxburgh, R. (2005) *International Law: A Treatise, Vol I: Peace*. 3rd ed. The Lawbook Exchange: Clark, p. 136, paragraph 72; and p. 373, paragraph 209. See generally, International Law Association (2018) I, Sydney Conference. [online] London: International Law Association. Available from: https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-6 [Accessed 7 November 2022]. For instance, Taiwan is (for lack of a better term) an entity that fulfils all objective criteria of statehood: see generally Crawford, J. (2006) *The Creation of States in International Law*. 2nd ed. Oxford: Oxford University Press, pp. 198-219. More recently, Russian President Vladimir Putin unilaterally claimed that 'Ukraine never had a tradition of genuine statehood': Reuters. (2022) *Extracts from Putin's speech on Ukraine*. [online] London: Reuters. Available from: <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/> [Accessed 7 November 2022]. This assertion is overwhelmingly refuted by the international community: see e.g. UNGA, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, GA Res ES-11/4, UN Doc A/RES/ES-11/4 (12 October 2022) (143 in favour, 5 against, 35 abstentions).

¹⁷ International Law Association (2018) *Recognition/Non-Recognition in International Law*, Sydney Conference. [online] London: International Law Association. Available from: https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-6 [Accessed 7 November 2022], p. 6.

¹⁸ Crawford, J. (2006) *The Creation of States in International Law*. 2nd ed. Oxford: Oxford University Press, p. 61. See also *Recognition/Non-Recognition in International Law*, proceedings from the Sydney Conference of the International Law Association (2018), p. 5. [online] London: International Law Association. Available from: https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-6 [Accessed 7 November 2022].

Instead, independence, or “sovereignty in the relation between States”,¹⁹ is considered the “central criterion for statehood”.²⁰ And here our quest to map out who can claim to have sovereignty arguably ends up in a degree of circularity; that is, having sovereignty is a criteria for being a State, and being a State is a criteria for having sovereignty.²¹ Put in a more favourable light, it may perhaps instead be said that, this points to a link between, on the one hand, the question of how sovereignty may be established, and on the other hand, the question of who can claim to have sovereignty.

At any rate, it might now be tempting to conclude that we have successfully answered the first question. However, that is not quite the case. For example, the concept of ‘data sovereignty’ is frequently discussed in the context of indigenous populations, which highlights that sovereignty is not strictly speaking limited to States in all its meanings.²² That, however, is a topic we do not pursue further here.

4. OVER WHAT CAN ONE HAVE SOVEREIGNTY?

A State is said to be sovereign over “a portion of the surface of the globe”, meaning that it enjoys the “the right to exercise therein, to the exclusion of any other State, the functions of a State”.²³ This clearly anchors the concept of sovereignty in the type of territoriality thinking that increasingly is recognised as incompatible with the online environment. Further, territorial sovereignty, in short, is the “exclusive competence of the State in regard to its own territory”,²⁴ and respect for such territorial sovereignty “is an essential foundation of international relations”.²⁵ A violation of territorial sovereignty would be in breach of the principle of sovereignty equality and non-intervention,²⁶ and constitute an internationally wrongful act. There are, however, obvious difficulties in applying this to the cyber domain.

The fact that our thinking of territoriality in the context of sovereignty

¹⁹ *Island of Palmas Case (the Netherlands v. United States of America)* (1928) 2 RIAA 829, p. 838. See also *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*, *Advisory Opinion*, PCIJ (ser A/B) No 41, p. 57 (per Judge Anzilotti).

²⁰ Crawford, J. (2006) *The Creation of States in International Law*. 2nd ed. Oxford: Oxford University Press, p. 62.

²¹ See also Koskenniemi, M. (2005) *From Apology to Utopia: the Structure of International Legal Argument*. Cambridge: Cambridge University Press, pp. 224-302.

²² See further: Hummel P., et al. (2021), *Data sovereignty: A review*. *Big Data & Society*, p. 12.

²³ *Island of Palmas Case (the Netherlands v. United States of America)* (1928) 2 RIAA 829, p. 838.

²⁴ *Ibid*, p. 838.

²⁵ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 35. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 202. See also Jackson, J. H. (2003) *Sovereignty-Modern: A New Approach to an Outdated Concept*. *American Journal of International Law*, 97 (4) 782, p. 790.

²⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 212.

has evolved over time, can be seen in that territorial sovereignty is now not limited to the landmass of the Earth that is said to be within the physical confines of a State. It also extends over territorial waters,²⁷ which spans up to 12 nautical miles from territory of the coastal State.²⁸ A coastal State is also said to exercise certain sovereign rights to explore and exploit natural resources in the exclusive economic zone²⁹ and on the continental shelf that adjoins its territorial waters.³⁰ Further, a State is said to enjoy “complete and exclusive sovereignty” over the airspace above its territory,³¹ which has been confirmed as “firmly established and longstanding tenets of customary international law”.³² This means that any human-made object (for instance an aircraft or spacecraft) wishing to transit through sovereign airspace must obtain authorisation from the overflown State.³³ In contrast, despite there being no universally accepted demarcation line between airspace and outer

²⁷ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 30. See also United Nations Convention on the Law of the Sea, signed on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 2(1).

²⁸ *United Nations Convention on the Law of the Sea*, signed on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 3; and *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO 7300/9 (entered into force 4 April 1947), art 2.

²⁹ *United Nations Convention on the Law of the Sea*, signed on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 55; art 57.

³⁰ *Ibid*, art 77; and art 76. See also *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. the Netherlands)* [1969] ICJ Rep 3; and *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] ICJ Rep 13.

³¹ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO 7300/9 (entered into force 4 April 1947), art 1. Though the upper limit of sovereignty over airspace is unsettled, it is accepted that sovereignty over airspace ends where outer space begins, for there can be no claim of sovereignty over outer space: *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967), art II. Some States have set an arbitrary height of 100km as where outer space begins, see e.g. Denmark, *Law on Activities in Outer Space* [online], L 128 (2016). Available from: https://www.ft.dk/RIPdf/samling/20151/lovforslag/L128/20151_L128_som_vedtaget.pdf (in Danish), paragraph 4(4); Kazakhstan, *Outer Space Activities Act (2012)*, art 1(6).

³² *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 212.

³³ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO 7300/9 (entered into force 4 April 1947), art 5. See also *International Air Services Transit Agreement*, 7 December 1944, 84 UNTS 387 (entered into force 30 January 1945), art 1, Section 1(1). For a space object, see Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954 (1979), Annex A: Statement of Claim. International Legal Materials, 18 (4), p. 899, paragraph 21; and UNCOPUOS, *Questionnaire on possible legal issues with regard to aerospace objects: replies from Member States*, UN Doc A/AC.105/635/Add.7 (2003); UNCOPUOS, *Questionnaire on possible legal issues with regard to aerospace objects: replies from Member States*, UN Doc A/AC.105/635/Add.8E (2003), reply of the Netherlands; UNCOPUOS, *Questionnaire on possible legal issues with regard to aerospace objects: replies from Member States*, UN Doc A/AC.105/635/Add.7 (2003), replies of Costa Rica; Czech; Ecuador; Mexico; South Africa; and Turkey.

space, it is universally agreed that outer space and celestial bodies are areas beyond territorial sovereignty.³⁴ Further, the right to carry out remote sensing of natural resources without the consent of the targeted state is also generally accepted as customary international law.³⁵

Given these expansions of how territoriality is viewed in the context of sovereignty, it may be argued that it would be illogical if we felt restrained from allowing it to expand also in response to the realities of cyberspace. Or as we argue, better still, it may be argued that this persistent need to evolve and expand the way in which we apply territoriality in the context of sovereignty finally has reached a breaking point created by cyberspace and that the time, thus, has come to adopt an approach to sovereignty that is not anchored in territoriality.

In terms of objects, on the high seas, it is said that “a ship [...] is assimilated to the territory of the State of the flag it flies”,³⁶ while an aircraft bears the nationality of the State that registers the aircraft.³⁷ Similarly, a space object launched into Earth orbit or beyond is considered an extension of the territory of the State that registers the object, over which that State may exercise jurisdiction and control.³⁸ This is referred to as quasi-territorial jurisdiction.³⁹

Territorial sovereignty, however, cannot be claimed over the global commons, which include the high seas,⁴⁰ Antarctica,⁴¹ outer space as well as the Moon and other celestial bodies.⁴² Notably, however, the United

³⁴ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967), art II.

³⁵ Jakhu, R. S. and Freeland, S. (2016) *The Relationship between the Outer Space Treaty and Customary International Law. Proceedings of the International Institute of Space Law*, 59, p. 186.

³⁶ *S.S. Lotus, (France v. Turkey)*, (1927) PCIJ Ser. A, No. 10, p. 25.

³⁷ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO 7300/9 (entered into force 4 April 1947), art 17.

³⁸ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967), art VIII; and *Agreement among the Government of Canada, Governments of the Member States of the European Space Agency (ESA), the Government of Japan, the Government of the Russian Federation and the Government of the United States of America Concerning Cooperation on the Civil International Space Station*, 29 January 1998, 80 Stat 271, 1 USC 113 (entered into force 27 March 2001), art 5

³⁹ See Cheng, B. (1965) *The Extra-Territorial Application of International Law. Current Legal Problems*, 18 (1), p. 135.

⁴⁰ *United Nations Convention on the Law of the Sea*, signed on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 89.

⁴¹ *Antarctic Treaty*, signed on 1 December 1959, 402 UNTS 7 (entered into force 23 June 1961), art IV(2). Territorial claims advanced by Argentina, Australia, Chile, France, the United Kingdom, New Zealand, and Norway have been ‘frozen’ as a result of the Treaty.

⁴² *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into

Nations Convention on the Law of the Sea provides that all States enjoy traditional freedoms of navigation, overflight, scientific research and fishing on the high seas, provided they cooperate with other States in managing living resources.⁴³ Arguably, this principle could also apply in other global commons, subject to the relevant *lex specialis*.

At least dating back to Menthe's pioneering work in 1998, commentators have periodically tried to argue that cyberspace is another of these global commons.⁴⁴ However, while doing so is useful in the sense of emphasising the need for everyone to take responsibility for avoiding a so-called 'tragedy of the commons' for cyberspace, the problems associated with such an approach are well-documented.⁴⁵

5. WHAT ARE THE CONSEQUENCES OF HAVING SOVEREIGNTY OVER SOMETHING?

There are obvious (and less obvious) political, social, economic consequences of sovereignty. However, our focus is on those consequences of sovereignty that are a legal construct and linked with statehood. Statehood entails both rights and responsibilities.⁴⁶ Put simply, traditionally, under international law a State enjoys the ultimate entitlements of sovereignty to shoulder rights and obligations,⁴⁷ and the freedom to determine its own affairs free from intervention.⁴⁸ In other words, notions of sovereignty and the legal rights and responsibilities of statehood are interconnected concepts.

Under international law, jurisdiction is a manifestation of State sovereignty⁴⁹ and is an expression of a State's authority to make and/or

force 10 October 1967), art II; and *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, signed on 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984), art 11(2).

⁴³ See generally, *United Nations Convention on the Law of the Sea*, signed on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

⁴⁴ Menthe, D.C. (1998) *Jurisdiction in Cyberspace: A Theory of International Spaces*. *Michigan Telecommunications and Technology Law Review* 4, p. 69.

⁴⁵ See e.g., Svantesson, D. (2006) *Borders on, or border around – the future of the Internet*. *Albany Law Journal of Science & Technology*, 16 (2), pp. 343-381.

⁴⁶ See e.g. Annan, K. (2005) "In Larger Freedom": Decision Time at the UN. *Foreign Affairs* (May/June 2005).

⁴⁷ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, [1949] ICJ Rep 174, p. 180.

⁴⁸ See Haass, R. N. (2003) *Sovereignty: Existing Rights, Evolving Responsibilities*. [online] Washington D.C: US Department of State. Available from: <https://2001-2009.state.gov/s/p/rem/2003/16648.htm> [Accessed 7 November 2022]. Cf. Jackson, J. H. (2003) *Sovereignty-Modern: A New Approach to an Outdated Concept*. *American Journal of International Law*, 97 (4) 782, p. 790; and Simonovic, I. (2002) *Relative Sovereignty of the Twenty First Century*. *Hastings International & Comparative Law Review*, 25, 371, p. 374.

⁴⁹ *Island of Palmas Case (or Miangas) (United States v the Netherlands)*, (1949) II RIAA 829, p. 838.

enforce rules binding on natural or juridical persons, and objects.⁵⁰ Such exercise of jurisdiction can be territorial, or in the case of natural or juridical persons based on nationality.⁵¹ As yet another attribute of sovereignty, a State may exercise discretion whether to secure the protection of a national who has been injured by another State.⁵²

5.1. RIGHTS AS A CONSEQUENCE OF SOVEREIGNTY

As a consequence of sovereignty, a State is entitled to enjoy respect for its territorial sovereignty,⁵³ the equality of States,⁵⁴ and the right to be free from intervention in matters “which are essentially within the domestic jurisdiction of any State”.⁵⁵ The latter encompasses the entitlement to freely determine the choice of political, economic, social, and cultural governance of the State,⁵⁶ and enjoying the right to formulate and conduct foreign

⁵⁰ See *Nationality Decrees Issued in Tunis and Morocco [French Zone]*, Advisory Opinion, [1923] PCIJ Rep (Ser B) No 4, p. 24; and *S.S. Lotus*, (France v. Turkey), (1927) PCIJ Ser. A, No. 10, pp. 18-19.

⁵¹ *Nationality Decrees Issued in Tunis and Morocco* [1923] PCIJ (ser 8) No B4, p. 24; *Nottebohm (Liechtenstein v. Guatemala)*, [1955], ICJ Rep 4, p. 20. See also *Convention on Certain Questions relating to the Conflict of Nationality Laws*, 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937), art 1.

⁵² *Mavrommatis Palestine Concessions* [1924] PCIJ (ser A) no 2, p. 1; *Nottebohm (Liechtenstein v. Guatemala)*, [1955], ICJ Rep 4, p. 24; *Barcelona Traction, Light and power Company* [1970] ICJ Rep 3, paragraphs 78-79. See also International Law Commission, *Draft Articles on Diplomatic Protection*, UN Doc A/CN.4/L.684 and Corr.1-2, UN Doc A/61/10.

⁵³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraphs 202, 213, 251; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, paragraph 165. Further, as a result of sovereignty, diplomatic and consular staff enjoy diplomatic immunity, while consular premises are inviolable: see *Vienna Convention on Consular Relations*, signed on 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967). See also *Case Concerning United States Diplomatic and Consular Staff in Tehran (Iran v. United States of America)* [1980] ICJ Rep 3, paragraph 77.

⁵⁴ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(1). See also *Draft Declaration on Rights and Duties of States*, UNGAOR 4th Sess, UN Doc A/RES/375 (1949), art 5; and UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXV) (1970), Annex.

⁵⁵ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 7. See also *Draft Declaration on Rights and Duties of States*, UNGAOR 4th Sess, UN Doc A/RES/375 (1949), art 3; *Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 8; and UNGA, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UNGAOR 20th Sess, UN Doc A/RES/2131(XX) (1965), paragraph 1. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraphs 202, 205, 251, 288.

⁵⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 263. See also UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXV) (1970), Annex.

policy.⁵⁷ In addition, sovereignty entails also the entitlement to exploit natural resources on its territory,⁵⁸ enforce laws in its territorial jurisdiction, and over objects and nationals within its territory,⁵⁹ and to not be the injured by another State.⁶⁰ More recent rights that have evolved as a result of decolonisation and emergence of newly independent States include the right to pursue economic and social development in a way it desires,⁶¹ and the right to “benefit from the advances and development in science and technology”.⁶² Fundamentally, sovereignty also entails the right to self-preservation, which is the fundamental right to exist and the right to resort to self-defence when the State’s survival is threatened.⁶³

5.2. RESPONSIBILITIES RELATED TO SOVEREIGNTY

Responsibilities that arise as a consequence of sovereignty and statehood include human rights obligations owed to individuals, and relatedly, legal obligations not to engage in internationally wrongful acts. The issue of State responsibility as a consequence of sovereignty is discussed in further detail under heading 8 below. For now, on the specific consequence of owing human rights obligations, it is worth noting that international human rights

⁵⁷ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 265.

⁵⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, paragraph 244; and *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, paragraph 19. See also UNGA, *Permanent sovereignty over natural resources*, UN Doc A/RES/3171 (1973), paragraphs 2-3; and UNGA, *Charter of Economic Rights and Duties of States*, UN Doc A/RES/3281(XXIX) (1974), art 2. Such rights extend also to exploit resources found in the territorial sea and exclusive economic zone: see fn 29 above.

⁵⁹ See *Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 9; and UNGA, *Draft Declaration on Rights and Duties of States*, GA Res 375(IV), UN Doc A/RES/375(IV) (1949), art 2. See also S.S. *Lotus*, (*France v. Turkey*) (1927) PCIJ Ser. A, No. 10, pp. 18-19. To a limited extend, a State also enjoys the right to assert jurisdiction over nationals places outside of its territory, which Bin Cheng calls ‘jurisdiction’, which is the ‘enjoyment’ of State jurisdiction beyond its territory: see Cheng, B. (1965) *The Extra-Territorial Application of International Law. Current Legal Problems*, 18 (1), pp. 135-136.

⁶⁰ E.g. *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 22. See also *Trail Smelter Case (United States, v Canada) (Decision of 11 March 1941)* [1949] III RIAA 1905, p. 1965. It may be noted that, injury does not necessarily need to result from an internationally wrongful act (consider e.g. transboundary pollution).

⁶¹ See generally UNGA, *Charter of Economic Rights and Duties of States*, UN Doc A/RES/3281(XXIX) (1974), art 4; art 5; art 7; art 10; and art 12(1). This should be read in conjunction with the right to be free from political or economic coercion that results in the ‘subordination of [...] sovereign rights’: see UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXV) (1970), Annex.

⁶² UNGA, *Charter of Economic Rights and Duties of States*, UN Doc A/RES/3281(XXIX) (1974), art 13(1)

⁶³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, paragraph 96.

law, along with international criminal law, “recognises individual persons as the subject of rights and duties both between themselves and with respect to their relationship with a relevant State”.⁶⁴ This links sovereignty with the relationship between States and citizens, as well between States and persons with State control. What amounts to a ‘relevant State’ may not always be clear in the cyber environment.

As a starting point, the Charter of the United Nations opens with a commitment to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.⁶⁵ This language was subsequently adopted in the Preamble of Universal Declaration of Human Rights (UDHR) in 1948.⁶⁶

However, human rights obligations as a result of sovereignty and statehood are not limited to the geographic notions of sovereignty but can also extend to notions of effective sovereignty and power. In short, human rights obligations can apply “extraterritorially”. This is the case when a State has “effective control” of a territory or a person, even if that person is outside sovereign territory. In its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, the International Court of Justice (ICJ) held that State parties to the International Covenant on Civil and Political Rights should be bound to comply with its provisions, even when exercising jurisdiction outside national territory.⁶⁷ This clearly has implications when applying the concept of sovereignty online.

By way of further example, in *Al-Skeini and Others v the United Kingdom*,⁶⁸ the European Court of Human Rights found that that the obligations of the United Kingdom (UK) under the European Convention on Human Rights (ECHR) applied in Iraq. In failing to investigate the circumstances of the killings of Iraqi civilians by UK soldiers, the UK had breached its obligations under the ECHR. An analogous reasoning could arguably be applied in relation to Internet-based situations.

In sum, consequences of sovereignty are political and legal, linked with notions of statehood, and include both sovereign rights and sovereign

⁶⁴ Freeland S. and Ireland-Piper, D. (2021) *Space Law, Human Rights and Corporate Accountability*. *UCLA Journal of International Law and Foreign Affairs*, 26(1), p. 6.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, [2004] ICJ Rep 136, paragraph 109. See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168, paragraph, 216; and *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Request for the Indication of Provisional Measures)* [2008] ICJ Rep 353, paragraph 109. Note also *Bankovic v. Belgium*, 52207/99 [2001] ECHR 2001-XII.

⁶⁸ *Al-Skeini and Others v United Kingdom*, 55721/07 [2011] 1093.

responsibilities that extend beyond physical borders. This is of great significance as we move forward since it supports ideas of a sovereignty concept relying less on territoriality than the traditional notions of sovereignty have done.

6. WHO CAN VIOLATE SOVEREIGNTY?

Before seeking to canvass who can violate sovereignty, it must be admitted that not everyone agrees that sovereignty is something that can be violated. The debate about whether sovereignty is itself a binding rule of international law, or rather a principle of international law that guides State interactions but does not dictate results under international law, has been discussed in a multitude of publications,⁶⁹ including in this journal.⁷⁰ That topic will consequently not be re-visited in detail here.

But put briefly, most of the States that have expressed a view on the matter seem to have sided with the proposition that sovereignty is indeed a binding rule of international law, rather than merely a principle. Examples of States falling into this category now include the Netherlands,⁷¹ France,⁷²

⁶⁹ See e.g.: Ginsburg, T. (2017) Introduction to Symposium on Sovereignty, Cyberspace, and Tallinn Manual 2.0. *American Journal of International Law Unbound*, 111, pp. 205-206, and Svantesson, D. et al (2021) *The developing concept of sovereignty: considerations for defence operations in cyberspace and outer space*, Technology and Jurisdiction Research Team, Bond University.

⁷⁰ Svantesson, D. (2018) 'Lagom jurisdiction' – What Viking drinking etiquette can teach us about Internet jurisdiction and Google France. *Masaryk University Journal of Law and Technology*, 12 (1), pp. 29-47.

⁷¹ *Letter from the Government of the Kingdom of the Netherlands, Minister of Foreign Affairs to Parliament* (July 2019), p. 2. [online] United Nations Office for Disarmament Affairs: New York. Available from: <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2020/02/appendix-International-law-in-cyberspace-kingdom-of-the-netherlands.pdf> [Accessed 7 November 2022].

⁷² UNGA, *Developments in the Field of Information and Telecommunications in the Context of International Security: Report of the Secretary-General*, UN Doc A/74/120 (24 June 2019) 22-6.

Austria,⁷³ the Czech Republic,⁷⁴ Finland,⁷⁵ Iran,⁷⁶ Japan,⁷⁷ Norway,⁷⁸ and Germany.⁷⁹ Indeed, Osula et al correctly concluded that “there seems to be a broad agreement among 23 [European Union Member States] regarding the interpretation of sovereignty as a standalone rule, entailing both rights and obligations”.⁸⁰ However, it must be noted that this apparent consensus is superficial indeed since the respective positions adopted amongst these

⁷³ Austria maintained that “a violation of the principle of State sovereignty constitutes an internationally wrongful act”. *Comments by Austria, Pre-Draft Report of the OEWG – ICT* (31 March 2020). [online] New York: United Nations Disarmament Office. Available from: <https://front.un-arm.org/wp-content/uploads/2020/04/comments-by-austria.pdf> [Accessed 7 November 2022].

⁷⁴ The Czech Republic noted that it considers “the principle of sovereignty as an independent right and the respect to sovereignty as an independent obligation”. *Statement by Richard Kadlčák at Open-ended Working Group on developments in the field of information and telecommunications in the context of international security of the First Committee of the General Assembly of the United Nations* (11 February 2020). [online] Prague: National Cyber and Information Security Agency, Czech Republic. Available from: https://www.nukib.cz/download/publications_en/CZ\%20Statement\%20-%20OEWG\%20-%20International\%20Law\%2011.02.2020.pdf [Accessed 7 November 2022].

⁷⁵ According to Finland, sovereignty is “a primary norm of public international law, a breach of which amounts to an internationally wrongful act and triggers State responsibility”. *Ministry for Foreign Affairs, Finland, Finland published its positions on public international law in cyberspace* (15 October 2020). [online] Finnish Ministry of Foreign Affairs: Helsinki. Available from: <https://valtioneuvosto.fi/en/-/finland-published-its-positions-on-public-international-law-in-cyberspace> [Accessed 7 November 2022].

⁷⁶ See *Declaration of General Staff of the Armed Forces of the Islamic Republic of Iran Regarding International Law Applicable to the Cyberspace* (July 2020) [online] Tehran: Nour News. Available from: <https://nournews.ir/En/News/53144/General-Staff-of-Iranian-Armed-Forces-Warns-of-Tough-Reaction-to-Any-Cyber-Threat> [Accessed 7 November 2022].

⁷⁷ *Basic Position of the Government of Japan on International Law Applicable to Cyber Operations* (28 May 2021). [online] Ministry of Foreign Affairs of Japan: Tokyo, p. 3. Available from: <https://www.mofa.go.jp/files/100200935.pdf> [Accessed 7 November 2022].

⁷⁸ Norway in UNGA, *Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, UN Doc A/76/136* (2021), p. 67; and *International Law Applied to Operations in Cyberspace: Paper shared by France with the Open-ended working group established by resolution 75/240* (December 2021), p.2. [online] New York: United Nations Office of Disarmament Affairs. Available from: <https://documents.unoda.org/wp-content/uploads/2021/12/French-position-on-international-law-applied-to-cyberspace.pdf> [Accessed 7 November 2022].

⁷⁹ *On the Application of International Law in Cyberspace* (March 2021), p. 4. [online] Berlin: Ministry of Foreign Affairs, Germany. Available from: <https://www.auswaertiges-amt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyberspace-data.pdf> [Accessed 7 November 2022].

⁸⁰ Osula, A.-M., Kasper, A. and Kajander, A. (2022) EU Common Position on International Law and Cyberspace. *Masaryk University Journal of Law and Technology*, 16 (1), p. 114.

states differ, or are silent, on the circumstances in which sovereignty is in fact violated.

The main proponents for sovereignty to be viewed as a principle rather than a rule are UK and at one stage the United States (US).⁸¹ For example, the UK has articulated the position that sovereignty is “fundamental to the international rules-based system” but that there is no “specific rule or additional prohibition” for cyber activities that fall below the use of force and intervention thresholds,⁸² and that “there is no such rule as a matter of current international law”.⁸³ Furthermore, according to a 2017 US Department of Defense memo, the law does not presently support the proposition that “sovereignty acts as a binding legal norm” relevant to cyber activities.⁸⁴ Yet other States have managed to adopt both of the views noted above.⁸⁵

Authoritarian States have a history of using sovereignty as a shield against foreign criticism of what they see as purely domestic affairs.⁸⁶ Thus, while most States have noted that certain cyber activities may violate State sovereignty, China has asserted that “[s]overeignty in cyberspace is the internal supremacy and external independence that States enjoy”.⁸⁷

Having made these important observations, we can now turn to the question of who can violate sovereignty, assuming sovereignty can be violated. While under international law, sovereignty attaches to States, sovereignty can be violated by States as well as non-State actors alike. Conduct that is directed or controlled by a State can be attributed to that

⁸¹ See further Heller, K. J. (2021) In Defense of Pure Sovereignty in Cyberspace. *International Law Studies*, 97, p. 1436.

⁸² Wright, J. (2018) *Cyber and International Law in the 21st Century*. Speech, Chatham House, Royal Institute of International Affairs. [online] London: Government of the United Kingdom. Available from <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> [Accessed 7 November 2022].

⁸³ *Ibid.*

⁸⁴ O'Connor, J. M. 'International Law Framework for Employing Cyber Capabilities in Military Operations' (Memorandum, 19 January 2017), p. 3.

⁸⁵ *The Application of International Law to State Activity in Cyberspace* (1 Dec 2020). [online] New Zealand Foreign Affairs & Trade: Wellington. Available from: <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> [Accessed 12 December 2022].

⁸⁶ Østerdahl traces back the origin of “information sovereignty” to a former Soviet concept implying “that the State has a right to control the dissemination of information within its territory. The State according to this doctrine has the right to control the news flowing out of the country and the news coming in”. Østerdahl, I. (1992) *Freedom of Information in Question: Freedom of information in international law and the calls for a New World Information and Communication Order* (NWICO). Uppsala: Iustus Förlag AB, p. 137.

⁸⁷ See China, *China's Views on the Application of the Principle of Sovereignty in Cyberspace* (2022), submitted to the Open-ended Working Group on security of and in the use of information and communications technologies, sec I and sec III.

State, and thereby cause a violation of other States' sovereignty.⁸⁸ Conduct of private persons that is acknowledged and adopted by a State as its own can also violate the sovereignty of another State.⁸⁹ Of course, in such a situation, an argument could be made that it then is the State acknowledging and adopting the conduct of private persons that conducts the violation. That, however, is a discussion into which we need not enter here.

The situations that generally are easiest to assess are violations by States. A State, by virtue of its acts, can violate the sovereignty of another. Thus, for example, in allowing its satellite to crash on Canadian territory, the Soviet Union was said to violate Canada's sovereignty and interfere "with the sovereign right of Canada to determine the acts that will be performed on its territory".⁹⁰

Often, the difficulty – especially online – is the issue of attribution. Under international law, acts carried on by governmental agencies are directly attributable to the State,⁹¹ and this includes any person or entity which has that status in accordance with the internal law of the State.⁹² The conduct of soldiers and the armed forces are clearly attributable to the State.⁹³ As under international law a State is not responsible for conduct of individuals or private entities, for acts of non-governmental entities to be violative of sovereignty, the act must be attributable to that State.

Sovereignty also entails a corollary duty "to protect within the territory the rights of other States".⁹⁴ Thus, in *Corfu Channel*, the ICJ held that it is "every State's obligation not to allow knowingly its territory to be used for

⁸⁸ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 8. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraphs 86, 115 ["effective control"]; cf. *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, paragraph 120 ["overall control"]; see also and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43, paragraphs 406-407; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168, paragraph 160.

⁸⁹ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 11. See also *United States Diplomatic and Consular Staff in Tehran*, [1980] ICJ Rep 3, paragraph 74.

⁹⁰ *Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954* (1979), Annex A: Statement of Claim. International Legal Materials, 18 (4), paragraph 21.

⁹¹ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 4. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* [1999] ICJ Rep 62, paragraph 62; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43, paragraph 385.

⁹² UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 4(2).

⁹³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, paragraphs 213-214.

⁹⁴ *Island of Palmas Case (the Netherlands v. United States of America)* (1928) 2 RIAA 829, p. 839.

acts contrary to the rights of other States”.⁹⁵ Such violations of sovereignty may be caused by activities undertaken by the State itself, or by entities or persons under the jurisdiction and control of the State. A State may therefore find itself held responsible for allowing transboundary pollution to injure the interests of other States.⁹⁶ Similarly, where a State allows its territory to be used for cyber attacks on another state, it may be in violation of international law.⁹⁷

The UN Charter provides that States must “refrain [...] from the threat or use of force against the territorial integrity or political independence of any State”.⁹⁸ Therefore, a State can violate the sovereignty of another State, typically through use of the armed forces. However, *Nicaragua* demonstrates that *contras*, or irregular forces or armed bands can also violate sovereignty.⁹⁹ Indeed, the Friendly Relations Declaration obliges States “to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State”.¹⁰⁰ This may have implications for cyber operations involving what may be seen as ‘irregular forces’ such as some forms of ‘cyber militia’; be as it may that the definition of ‘incursion’ may be critical in the cyber context.

The UN Charter foresees the potential violations of sovereignty and empowers the Security Council to act to threats to the peace, breaches of the peace and acts of aggression.¹⁰¹ Thus, the Security Council may employ “measures not involving the use of armed force”¹⁰² or “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”.¹⁰³ However, as seen in relation to the Russian aggression in Ukraine, the value of this power is limited when the aggressor is a member of the Security Council.

⁹⁵ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 22. See also *Trail Smelter Case (United States, v Canada)* (Decision of 11 March 1941), [1949] III RIAA 1905, p. 1965; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep 14, paragraph 101.

⁹⁶ *Trail Smelter Case (United States v Canada)* (Decision of 11 March 1941), [1949] III RIAA 1905.

⁹⁷ See Coco, A. and de Souza Dias, T. (2021) “Cyber Due Diligence”: A Patchwork of Protective Obligations in International Law. *European Journal of International Law* 32 (3), p. 771.

⁹⁸ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(4).

⁹⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraphs 251-252.

¹⁰⁰ UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXV) (1970), Annex, paragraph 1. See also UNGA, *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN Doc A/RES/42/22 (1988), I, paragraph 5. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraphs 195, 228.

¹⁰¹ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(7).

¹⁰² *Ibid*, art 41.

¹⁰³ *Ibid*, art 42.

Finally, it may be noted that humanitarian interventions in Kosovo, Haiti and Bosnia Herzegovina suggest that sovereignty violations by a “coalition of the willing” to prevent widespread human rights abuses and stem the breaches of humanitarian law in conflict situations may legitimatise what otherwise would be a violation.¹⁰⁴ Put differently, most international lawyers would say that what occurred in those instances was, technically, a violation of the prohibition on the use of force (and thus an unlawful intervention and violation of sovereignty) but that it was ‘legitimate’ given it was done for humanitarian reasons.¹⁰⁵ This may be seen as a developing area of international law in relation to which the cyber implications have not yet fully been canvassed. However, one thing is clear, it certainly points to a degree of flexibility.

7. WHAT IS THE THRESHOLD FOR VIOLATING SOVEREIGNTY?

As already noted, there are those who take the view that sovereignty is not of a nature to be ‘violated’ and for them, the question of what may be the threshold for violating sovereignty is of course nonsensical. Here, we will proceed on the basis that sovereignty may indeed be the object of violation. We first outline what may be seen as the standard views on the topic of the threshold for violating sovereignty, and then proceed to provide details about a possible future direction; it is in relation to this crucial question we have concentrated our law reform proposals.

7.1. THE CURRENT STANDARD POSITION

In the cyber context, it may be said that there are two bases on which a violation of sovereignty can be established. First, where there is a violation of a State’s territorial integrity; and second, where there is interference or usurpation of inherently governmental functions. This approach originated from the Tallinn Manual, and a number of States have expressed support for this approach.¹⁰⁶ Violations of territorial sovereignty are predominantly determined based on the significance of the effects caused by the cyber

¹⁰⁴ Simonovic, I. (2002) Relative Sovereignty of the Twenty First Century. *Hastings International & Comparative Law Review*, 25, p. 373.

¹⁰⁵ However, in *Corfu Channel*, the ICJ warned against the “alleged right of intervention”, which in the past has “given rise to the most serious abuses” by particularly the “most powerful States and might easily lead to perverting the administration of international justice itself”: *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, pp. 34-35. See also Henkin, L. (1994) *The Mythology of Sovereignty*. In: RStJ Macdonald (ed.) *Essays in Honour of Wang Tieya*. Martinus Nijhoff: Dordrecht, p. 358).

¹⁰⁶ Schmitt, M. (ed.) (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. 2nd ed. Cambridge: Cambridge University Press, p. 20.

operation, and generally this requires physical effects to occur. Violations of sovereignty on the second basis can occur irrespective of the nature of the effects caused by the cyber operation, provided it involves interference with or usurpation of inherently governmental functions.

7.1.1 Violations of territorial sovereignty

In relation to the first basis, the Tallinn Manual experts agreed that cyber operations causing physical effects in the territory of another State would constitute a violation of sovereignty.¹⁰⁷ However, the experts were divided on the threshold at which cyber operations causing loss of functionality would violate sovereignty on this basis. Here they agreed that disruptions requiring repair or replacement of hardware components would be sufficient (this was likened to physical damage), but there was no consensus about disruption requiring reinstallation of software.¹⁰⁸ The experts could not reach consensus on whether cyber operations that do not damage hardware or disrupt the functionality of systems would amount to a violation of territorial sovereignty.¹⁰⁹

This is important not least in that it highlights just how limited agreement there is on this topic; far from all States embrace the Tallinn Manual, and even in the Group of Experts drafting it, there was significantly divergent opinions on key matters such as this.

A number of States have adopted the position that cyber operations can violate territorial sovereignty where significant effects are caused. For example, according to the Czech Republic, cyber operations that cause significant physical damage or harm to individuals, and those that damage or disrupt the operation of cyber or other infrastructure where it has a “significant impact on national security, economy, public health or environment” will constitute violations of sovereignty.¹¹⁰ Similarly, Germany

¹⁰⁷ This was likened to a non-consensual physical presence on a State’s territory and was considered to be “consistent with object and purpose of principle of sovereignty, which clearly protects territorial integrity against physical violation”. *Ibid*, p. 20.

¹⁰⁸ *Ibid*, p. 21.

¹⁰⁹ *Ibid*, p. 21. Those who argued that these cyber operations would violate territorial sovereignty provided the examples of cyber operations that cause another State’s cyber infrastructure or programs to operate differently; cyber operations that involve altering or deleting data; the installation of malicious software or backdoors; and DDoS attacks causing temporary but significant disruptions to the functioning of systems. This argument was premised on the object and purpose of sovereignty as a principle, and the notion that States have the right to full access and control over cyber activities on their territory.

¹¹⁰ *Statement by Richard Kadlčák at Open-ended Working Group on developments in the field of information and telecommunications in the context of international security of the First Committee of the General Assembly of the United Nations* (11 February 2020). [online] Prague: National Cyber and Information Security Agency, Czech Republic. Available

maintains that a cyber operation that causes “physical effects and harm” in another State’s territory will violate sovereignty, as well as disruptive cyber operations particularly where they cause “substantive secondary or indirect physical effects” in another State’s territory.¹¹¹ Norway gives the example of a cyber operation causing physical damage, such as a fire at a petrochemical plant, and one causing a loss of functionality, such as encrypting the data of systems that renders them “unusable for a substantial period of time”.¹¹² Canada also provides that a cyber operation must “rise above a level of negligible or de minimis effects” and cause “significant harmful effects within the territory of another State without that State’s consent” for a violation of sovereignty to occur.¹¹³

A minority of States consider cyber operations below the threshold of significant effects or loss of functionality to violate territorial sovereignty. According to France, a cyber operation that involves the “unauthorised penetration” of its computer systems may constitute a violation of its sovereignty.¹¹⁴ Iran similarly maintains that any unlawful intrusions into its cyber infrastructure constitute violations of its sovereignty.¹¹⁵ However, most other States require cyber operations to cause significant physical effects to constitute violations of sovereignty on this basis, though there remains some uncertainty about the precise threshold.

from: https://www.nukib.cz/download/publications_en/CZ\%20Statement\%20-\%20EWG\%20-\%20International\%20Law\%2011.02.2020.pdf [Accessed 7 November 2022]

¹¹¹ *On the Application of International Law in Cyberspace* (March 2021), p. 4. [online] Berlin: Ministry of Foreign Affairs, Germany. Available from: <https://www.auswaertigesamt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyberspace-data.pdf> [Accessed 7 November 2022].

¹¹² *Norwegian positions on selected questions of international law relating to cyberspace* (May 2021), p. 3. [online] Oslo: Government of Norway. Available from https://www.regjeringen.no/contentassets/a8911fc020c94eb386alec7917bf0d03/norwegian_positions.pdf [Accessed 7 November 2022].

¹¹³ *International law applicable in cyberspace* (4 April 2022). [online] Ottawa: Global Affairs Canada, paragraph 15. Available from: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng [Accessed 7 November 2022].

¹¹⁴ United Nations Secretary-General, I, UN Doc A/74/120 (24 June 2019), p. 22. Some scholars have expressed support for a similar position: see Buchan, R. (2018) *Cyber Espionage and International Law*. Oxford: Hart, p. 54; and Delerue, F. (2020) *Cyber Operations and International Law*. Cambridge: Cambridge University Press, p. 214.

¹¹⁵ *Declaration of General Staff of the Armed Forces of the Islamic Republic of Iran Regarding International Law Applicable to the Cyberspace* (July 2020) [online] Tehran: Nour News. Available from: <https://nournews.ir/En/News/53144/General-Staff-of-Iranian-Armed-Forces-Warns-of-Tough-Reaction-to-Any-Cyber-Threat> [Accessed 7 November 2022].

7.1.2 Violations of sovereignty on the basis of interference or usurpation of government functions

In relation to the second basis, the Tallinn Manual experts maintained that a violation of sovereignty occurs where a cyber operation interferes with or usurps inherently governmental functions. In this context they argued that there is no need for a threshold of physical effects or disruption to the functionality of systems.¹¹⁶ As examples of cyber operations that interfere with inherently governmental functions, the Tallinn Manual experts said that this occurs where a State “changes or deletes data such that it interferes with the delivery of social services, the conduct of elections, the collection of taxes, the effective conduct of diplomacy, and the performance of key national defence activities” in another State.¹¹⁷ In relation to usurpation of inherently governmental functions, the Tallinn Manual experts gave the example of exercising law enforcement functions without the State’s consent.¹¹⁸

Recently, a growing number of States have adopted the position that a violation of sovereignty can also occur on this basis. Canada maintains that cyber operations with “significant harmful effects on the exercise of inherently governmental functions” violate international law “regardless of whether there is physical damage, injury, or loss of functionality”.¹¹⁹ It outlines inherently government functions to include “health care services, law enforcement, administration of elections, tax collection, national defence and the conduct of international relations, and the services on which these depend”.¹²⁰ A violation of sovereignty could occur on this basis where a cyber operation “interrupts health care delivery by blocking access to patient health records or emergency room services, resulting in risk to the health or life of patients”.¹²¹

Norway also adopts the Tallinn Manual approach that a violation of sovereignty can occur on this basis, and this is irrespective of “whether

¹¹⁶ Schmitt, M. (ed.) (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. 2nd ed. Cambridge: Cambridge University Press, pp. 21-22.

¹¹⁷ *Ibid.*, p. 22.

¹¹⁸ The example given in this context is where a state conducts a law enforcement operation against a botnet in order to gather evidence in a criminal prosecution: Schmitt, M. (ed.) (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. 2nd ed. Cambridge: Cambridge University Press, p. 22.

¹¹⁹ *International law applicable in cyberspace* (4 April 2022). [online] Ottawa: Global Affairs Canada, paragraph 18. Available from: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng [Accessed 7 November 2022]

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

physical damage, injury, or loss of functionality has resulted”.¹²² It maintains that the precise threshold is not settled, and this will be assessed on a case-by-case basis. But Norway does provide examples of situations where a violation would occur. These include “altering or deleting data or blocking digital communication between public bodies and citizens so as to interfere with the delivery of social services, the conduct of elections, the collection of taxes, or the performance of key national defence activities”.¹²³ Further, it provides that a violation would occur where a cyber operation manipulates “police communications so that patrol cars are unable to communicate with police dispatch/operation centres”.¹²⁴ The Czech Republic maintains that a violation of sovereignty occurs on this basis where there is a significant disruption to inherently government functions.¹²⁵ It gives the example of “distributing ransomware which encrypts the computers used by a government and thus significantly delaying the payment of retirement pensions”.¹²⁶

A number of other States, including New Zealand,¹²⁷ the Netherlands,¹²⁸ Switzerland,¹²⁹ and Sweden,¹³⁰ also maintain that a violation of sovereignty

¹²² *Norwegian positions on selected questions of international law relating to cyberspace* (May 2021), p. 4. [online] Oslo: Government of Norway. Available from https://www.regjeringen.no/contentassets/a8911fc020c94eb386a1ec7917bf0d03/norwegian_positions.pdf [Accessed 7 November 2022].

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Statement by Richard Kadlčák at Open-ended Working Group on developments in the field of information and telecommunications in the context of international security of the First Committee of the General Assembly of the United Nations* (11 February 2020), p. 3 [online] Prague: National Cyber and Information Security Agency, Czech Republic. Available from: https://www.nukib.cz/download/publications_en/CZ/%20Statement%20-%20EWG%20-%20International%20Law%2011.02.2020.pdf [Accessed 7 November 2022].

¹²⁶ *Ibid.*

¹²⁷ *The Application of International Law to State Activity in Cyberspace* (1 Dec 2020), paragraph 11. [online] New Zealand Foreign Affairs & Trade: Wellington. Available from: <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> [Accessed 12 December 2022].

¹²⁸ *Letter from the Government of the Kingdom of the Netherlands, Minister of Foreign Affairs to Parliament* (July 2019), p. 3. [online] New York: United Nations Office for Disarmament Affairs. Available from: <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2020/02/appendix-International-law-in-cyberspace-kingdom-of-the-netherlands.pdf> [Accessed 7 November 2022].

¹²⁹ *Switzerland's position paper on the application of international law in cyberspace* (2021), p. 3. [online] Bern: Federal Department of Foreign Affairs, Switzerland. Available from: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf [Accessed 7 November 2022].

¹³⁰ *Position Paper on the Application of International Law in Cyberspace* (2022), p. 2. [online] Stockholm: Government of Sweden. Available from: <https://www.regeringen.>

can occur on this basis but do not provide further detail on their positions or examples of situations where this may occur. The Swiss and Swedish positions provide that this is assessed on a case-by-case basis depending on the nature and effects of the incident.¹³¹ Accordingly, many States have expressed support for the Tallinn Manual's approach to violations of sovereignty either on the basis of territorial sovereignty where the effects are significant, or on the basis of interference or usurpation of inherently governmental functions irrespective of whether there are physical effects or not.

Importantly, the above shows that there is already a degree of detachment between sovereignty and territoriality. That is, while violations of sovereignty can occur through effects equivalent to a physical intrusion into a State's territory, many States are also recognising that sovereignty can be violated where cyber operations without physical effects interfere with or usurp government functions. This may arguably be seen to support the feasibility of our proposal below.

7.2. A POSSIBLE PATH FORWARD

While we hasten to acknowledge that just about everything we have said so far lacks worldwide consensus, it nevertheless represents a viable description of what may be viewed as the closest thing we have to a consensus position. In the remaining discussion in this section, we turn our focus to a possible law reform option. In doing so we build on an idea first canvassed in 2017,¹³² and that has been elaborated upon in an, at the time of writing, forthcoming book chapter. We here aim to take that proposal one step further by providing additional clarifications and some views of its practical application.

se/4a1ce0/contentassets/2bf3882c23bb4fd935310b03d562a1/swedens-position-paper-on-the-application-of-international-law-in-cyberspace.pdf [Accessed 7 November 2022].

¹³¹ *Switzerland's position paper on the application of international law in cyberspace* (2021), p. 3. [online] Bern: Federal Department of Foreign Affairs, Switzerland. Available from: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf [Accessed 7 November 2022]; *Position Paper on the Application of International Law in Cyberspace* (2022), p. 2. [online] Stockholm: Government of Sweden. Available from: <https://www.regeringen.se/4a1ce0/contentassets/2bf3882c23bb4fd935310b03d562a1/swedens-position-paper-on-the-application-of-international-law-in-cyberspace.pdf> [Accessed 7 November 2022].

¹³² Polcak, R. and Svantesson, D. (2017) *Information Sovereignty – Data Privacy, Sovereign Powers and the Rule of Law*. Cheltenham: Edward Elgar Publishing, p. 64.

7.2.1 Briefly about the proposal

As noted in the introduction, one key problem with sovereignty in the cyber context, and specifically with attempts at canvassing a threshold for violations of sovereignty, is the fact that sovereignty – under the conventional thinking – is largely grounded in a territoriality thinking. As is now widely accepted, this territoriality thinking is a poor fit with the online environment.¹³³ Relatedly, due to the focus on a territoriality thinking, the traditional notion of sovereignty is – to a great extent – something binary, and also this is a poor fit with what we are dealing with in the concept of sovereignty.

In an attempt to address these weaknesses, it is suggested that we can anchor sovereignty in the concept of ‘State dignity’:

an infringement of sovereignty would only result in legal consequences where it impacts the dignity of the state in question. In this sense, the reference to dignity would work like a filter, sorting actions according to the level of infringement in which they result. In other words, the function would be similar to how the requirement of actual harm filters the severity of actions in relation to certain torts (such as injurious falsehood).¹³⁴

As infringements of State dignity may be assessed as a matter of degree,

¹³³ See further Svantesson, D. (2017) *Solving the Internet Jurisdiction Puzzle*. Oxford: Oxford University Press; Handl, G. et al. (eds.) (2012) *Beyond Territoriality*, The Hague: Martinus Nijhoff; Mills, A. ‘Rethinking Jurisdiction in International Law’, 84(1) *British Yearbook of International Law* (2014) pp. 187-239; Slaughter, A. ‘The Future of International Law Is Domestic (or, The European Way of Law)’, 47(2) *Harvard International Law Journal* (2006) pp. 327-352; Schiff Berman, P. (2014) *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, Cambridge: Cambridge University Press; Oster, J. ‘Rethinking Shevill. Conceptualising the EU private international law of Internet torts against personality rights’, 26(2-3) *International Review of Law, Computers & Technology* (2012) pp. 113-128; Schultz, T. ‘Carving up the Internet: Jurisdiction, Legal Orders, and the Private/ Public International Law Interface’, 19(4) *European Journal of International Law* (2008) pp. 799-839; Cooper, D. and C. Kuner, C. ‘Data Protection Law and International Dispute Resolution’, 382 *Recueil des Cours of the Hague Academy of International Law* (2017) pp. 1-174; C. Ryngaert, C. and Zoetekouw, M. ‘The End of territory? The e-emergence of community as a principle of jurisdictional order in the Internet era’, in Kohl, U. (ed.) (2017) *The Net and the Nation State: Multidisciplinary Perspectives on Internet Governance*, Cambridge: Cambridge University Press, pp. 185-201; Keyes, M. (2005) *Jurisdiction in International Litigation*, Sydney: The Federation Press, p. 181; Ubertazzi, B. (2012) *Exclusive Jurisdiction in Intellectual Property*, Tübingen: Mohr Siebeck; Cooper, D. et al. (eds.) ‘Data protection law and international dispute resolution’, 382 *Recueil des Cours of the Hague Academy of International Law* (2017); and Orakhelashvili, A., ‘State Jurisdiction in International Law: Complexities of a Basic Concept’, in Orakhelashvili, A. (ed.) (2015), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham: Edward Elgar Publishing, Chapter 1

¹³⁴ Polcak, R. and Svantesson, D. (2017) *Information Sovereignty – Data Privacy, Sovereign Powers and the Rule of Law*. Cheltenham: Edward Elgar Publishing, p. 64.

we can steer away from sovereignty as something binary when anchoring sovereignty in State dignity. In more detail, while an act either does, or does not, take place on a given State's territory (binary), a State's dignity may be assessed as negligibly or severely impacted or anything in between (a matter of degree). Importantly then, when working with the State dignity concept we need to maintain this characteristic of it being a matter of degree rather than be seen as a distinct threshold for sovereignty infringements; otherwise, it ends up being as binary as the current – territoriality-based – approach to sovereignty. This clearly has implications for how we approach the consequences of sovereignty infringements.

Further, infringements of State dignity need not be assessed from the traditional perspective tied to territoriality, so by anchoring sovereignty in State dignity, we can free it from its territoriality focus. Admittedly, without more, we are still confronted with a vague test that is little more than a 'wet finger in the air' type test whereby one abstract concept is traded for another. Yet the practical advantages over the current conception of sovereignty – in particular the move from a largely binary concept anchored in territoriality to a nuance-recognising concept free from territoriality – should not be underestimated.

Furthermore, it is possible to point to an important ideological basis for the proposed change. As the world has become increasingly 'civilised', it should be natural to undertake a shift from sovereignty as a territoriality-focused concept based on physical control (strengths) to a more sophisticated normative concept based on mutual respect and the rules of international law (rights).¹³⁵

¹³⁵ As noted by Khan:

[I]n recent years there are increasing signs that the traditional and rather categorical symbiosis between territory and power may no longer lay a legitimate claim for exclusivity. This is hardly deplorable since from an international law perspective, possession and transfer of territory have never been considered an end in itself. *L'obsession du territoire* of modern States was always meant to serve people, not vice versa.

Khan, D.E. (2012) Territory and Boundaries. In: Fassbender, B. and Peters, A. (eds.) *The Oxford Handbook of The History of International Law*. Oxford: Oxford University Press, p. 248 (footnote omitted). But given the direction the world is heading, we understand the point of view of those who would argue that perhaps we have missed the window of opportunity for this change and increased sophistication.

7.2.2 A demonstration of the proposal

Imagine that State A undertakes a cyber-attack with serious societal implications – important research data is deleted, and patient records manipulated making it impossible to safely carry out medical procedures – in the victim state (State B). Under the conventional approach to sovereignty, we would presumably start by asking whether the affected cyber infrastructure was located on the territory of State B. For example, as noted by Heller, Switzerland asserts that “State sovereignty protects information and communication technologies (ICT) infrastructure on a State’s territory against unauthorised intrusion or material damage,” including “computer networks systems and software supported by the ICT infrastructure, regardless of whether the infrastructure is private or public”.¹³⁶ Thus, the physical location of the ICT infrastructure becomes central.

In contrast, under the State dignity focused approach, it would not matter whether State B had used local cyber infrastructure or a cloud-based structure wholly or partly abroad – attention would be placed on the degree to which State A’s action infringes State B’s dignity. Another advantage is that the proposed structure also recognises that an attack on 100 small ‘soft targets’ may be a serious attack even if none of those targets individually meet the threshold of e.g., being critical infrastructure on the territory of the victim State.¹³⁷

The idea of anchoring sovereignty in the concept of State dignity may also be used to explain some of the “anomalies” in how sovereignty operates.

¹³⁶ Heller, K. J. (2021) In Defense of Pure Sovereignty in Cyberspace. *International Law Studies*, 97, p. 1459, referring to Directorate of International Law, Federal Department of Foreign Affairs, Switzerland’s Position Paper on the Application of International Law in Cyberspace, UN GGE 2019/2021 (2021), annex at 2. [online] Switzerland Federal Department of Foreign Affairs: Bern. Available from: https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf [Accessed 7 November 2022].

¹³⁷ In this respect there are similarities to the so-called “accumulation of events doctrine”: see further: Kudláčková, I., Wallace, D. and Harašta, J. Cyber Weapons Review in Situations Below the Threshold of Armed Conflict. In Jančárková, T. et al (Eds.) *20/20 Vision: The Next Decade*. Tallinn: NATO CCDCOE Publications. Available from: https://ccdcoe.org/uploads/2020/05/CyCon_2020_6_Kudlackova_Wallace_Harasta.pdf [Accessed 20 April 2023]; Delerue, F. (2020) *Cyber Operations and International Law*. Cambridge: Cambridge University Press, pp. 334-5; Francisco Lobo, J. (2018) One Piece at a Time: The ‘Accumulation of Events’ Doctrine and the ‘Bloody Nose’ Debate on North Korea. [online] Lawfare Blog. Available from: <https://www.lawfareblog.com/one-piece-time-accumulation-events-doctrine-and-bloody-nose-debate-north-korea> [Accessed 20 April 2023]; and McLaughlin, M. (2023) Detering the Next Invasion: Applying the Accumulation of Events Theory to Cyberspace. [online] *Opinio Juris*. Available from: <http://opiniojuris.org/2023/03/02/detering-the-next-invasion-applying-the-accumulation-of-events-theory-to-cyberspace/> [Accessed 20 April 2023].

For example, as discussed above, current thinking on international law may seek to explain the humanitarian interventions in Kosovo, Haiti, and Bosnia Herzegovina as instances that, technically, were violations of sovereignty but that were 'legitimate' given the humanitarian reasons. However, arguably a better explanation is that these humanitarian interventions – given their context – did not violate any State dignity. Thus, while some commentators no doubt will point to the risk of the flexibility of the State dignity concept being exploited, it may equally well be argued that this flexibility is already in place and that anchoring sovereignty in the concept of State dignity is merely a more honest and transparent way to accommodate this flexibility.

Indeed, in some ways anchoring sovereignty in the concept of State dignity may provide a degree of rigour where there is none today. As noted above, authoritarian States have a history of using sovereignty as a shield against foreign criticism of what they see as purely domestic affairs. Imagine, for example, that a certain State (State C) mistreats a domestic minority in violation of their fundamental human rights, and that State C imposes a ban on information about the human rights violations being communicated to the citizens of State C. Under the current thinking on sovereignty, State C may argue that any other State communicating such information to the citizens of State C violates State C's sovereignty. Such misuse of sovereignty would not be possible if we adopt the idea of anchoring sovereignty in the concept of State dignity since it is State C's own conduct that undermines its dignity rather than the information that brings the human rights violations into the spotlight.

7.2.3 More about State dignity

While adding some clarifying examples, the above has mainly summarised what has already been proposed elsewhere. However, we will here seek to add to the picture painted so far by exploring further the concept of State dignity in some detail. In this context, it should be noted that we seek to draw upon a broad range of sources that deal with the concept of State dignity (and indeed dignity more broadly). Thus, we make no claim that all these sources ought to be authoritative for how we understand the concept of State dignity. We do, however, see all these sources as informative for how we understand the concept of State dignity.

The dignity, honour, or prestige of a State¹³⁸ or nation has been "described

¹³⁸ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, (1990) XX RIAA 215, paragraphs 108-109.

as a fundamental endowment of a sovereign and equal subject”.¹³⁹ As a related concept to State sovereignty, there have been many instances where States have explicitly invoked or referenced the notion of State or national dignity.

For example, after the downing of a Russian Sukhoi Su-24M attack aircraft in 2015, Russia imposed economic sanctions on Turkey, to which Turkey’s President Erdogan responded that such actions were not “in line with ‘State dignity’”.¹⁴⁰ Former Iranian president Rouhani invoked “protecting national dignity and standing against world powers”,¹⁴¹ while China recently underscored support “safeguarding [Iran’s] sovereignty and national dignity”.¹⁴² When Kiribati and the Solomon Islands decided to recognise the People’s Republic of China, the government of Taiwan terminated diplomatic relations “with immediate effect to uphold national dignity”.¹⁴³ The Democratic People’s Republic of Korea often invokes the “dignity and sovereignty of the state”¹⁴⁴ when defending against what

¹³⁹ Fitzgerald, J. (2006) *The Dignity of Nation*. In: Chien, S. Y. S. and Fitzgerald, J. (eds.) *The dignity of nations: equality, competition, and honor in East Asian nationalism*. Hong Kong: Hong Kong University Press, pp. 1, 3. This notion of dignity should be distinguished from the obligation of the receiving State to protect consular premises against impairment of the ‘dignity’ of consular premises under the Vienna Convention on Consular Relations: see *Vienna Convention on Consular Relations*, signed on 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), arts 31, 59. See also *Case Concerning United States Diplomatic and Consular Staff in Tehran (Iran v. United States of America)* [1980] ICJ Rep 3, paragraph 77.

¹⁴⁰ Al Arabia. (2 December 2015) *Turkey won’t retaliate against Russia’s sanctions*. [online] Dubai: Al Arabia. Available from: <https://english.alarabiya.net/News/middle-east/2015/12/02/Erdogan-vows-no-retaliation-against-Russian-sanctions> [Accessed 7 November 2022].

¹⁴¹ *President at the inauguration ceremony of direct reduction plant: Iranian nation unsanctionable/ We’ll negotiate anywhere necessary for nation’s interests*, press statement (11 November 2019). [online] Tehran: Ministry of Foreign Affairs of the Islamic Republic of Iran. Available from: <https://en.mfa.gov.ir/portal/NewsView/568055> [Accessed 7 November 2022].

¹⁴² *President Xi Jinping Meets Iranian President Ebrahim Raisi* (16 September 2022). [online] Beijing: Ministry of Foreign Affairs of the People’s Republic of China. Available from: https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202209/t20220916_10766906.html [Accessed 7 November 2022].

¹⁴³ *The R.O.C. (Taiwan) government terminates diplomatic relations with Solomon Islands with immediate effect to uphold national dignity* (16 September 2019). [online] Taipei: Ministry of Foreign Affairs of the Republic of China (Taiwan). Available from: https://en.mofa.gov.tw/News_Content.aspx?n=1330&sms=274&s=34155 [Accessed 7 November 2022]; and *The R.O.C. (Taiwan) government terminates diplomatic relations with Republic of Kiribati with immediate effect to uphold national dignity* (20 September 2019). [online] Taipei: Ministry of Foreign Affairs of the Republic of China (Taiwan). Available from: https://en.mofa.gov.tw/News_Content.aspx?n=1330&s=34156 [Accessed 7 November 2022].

¹⁴⁴ See e.g. *Statement of Spokesman for DPRK Foreign Ministry* (5 November 2022). [online] Pyongyang: Ministry of Foreign Affairs of the Democratic People’s Republic of Korea. Available from: <http://www.mfa.gov.kp/view/article/16089> [Accessed 7 November 2022]; and *Country-Specific “Special Rapporteur” Mechanism Must Be Abolished Immediately* (17 October 2022). [online] Pyongyang: Ministry of Foreign Affairs of the

it sees as interference with its domestic affairs. Further, in response to sanctions imposed as a result of the treatment of Uyghurs in Xinjiang, the Ministry of Foreign Affairs of China expressed that China vows to “take forceful measures to firmly defend its own interests and dignity”,¹⁴⁵ while Chinese Communist Party Chairman Xi Jinping defended accelerating military development as being necessary for the “rejuvenation of the Chinese nation” and to ‘safeguard China’s dignity and core interests’.¹⁴⁶

Damage to State dignity or reputation has not just been referenced by the State that feels such emotional attributes have been violated. In 2021, while accusing the Chinese Ministry of State Security of carrying out cyber-attacks to steal intellectual property, then Australian Home Affairs Minister underscored that the public attribution of such attacks means “significant reputational damage to China”.¹⁴⁷

It has been said that “[r]eferences to national dignity usually surface when [S]tates have little to fall back on but their dignity”, and this is particularly the case for regimes that feel threatened by (real or imaginary) external elements or pressure.¹⁴⁸ However, it is unclear whether these assertions have been made based on legal, historical or political grounds.¹⁴⁹

Democratic People’s Republic of Korea. Available from: <http://www.mfa.gov.kp/view/article/15966> [Accessed 7 November 2022].

¹⁴⁵ *Foreign Ministry Spokesperson Zhao Lijian’s Regular Press Conference on June 2, 2022* (2022). [online] Beijing: Ministry of Foreign Affairs of the People’s Republic of China. Available from: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202206/t20220602_10698118.html [Accessed 7 November 2022]. See also Sydney Morning Herald (27 May 2021) *Chinese foreign minister tells Germans ‘you know what genocide looks like’*. [online] Sydney: Sydney Morning Herald. Available from: <https://www.smh.com.au/world/europe/chinese-foreign-minister-tells-germans-you-know-what-genocide-looks-like-20210526-p57vdy.html> [Accessed 7 November 2022] [per the Chinese Foreign Minister Wang Yi ‘When those EU sanctions were launched, the Chinese people were reminded of the days when we were bullied by European imperialists. We have our national dignity to uphold’]

¹⁴⁶ Al Jazeera. (16 October 2022) *Xi vows to strengthen China’s military as Party Congress begins*. [online] Doha: Al Jazeera. Available from: <https://www.aljazeera.com/news/2022/10/16/xi-touts-zero-covid-policy-as-communist-party-congress-begins> [Accessed 7 November 2022].

¹⁴⁷ Sydney Morning Herald. (20 July 2021) *‘Illicit gain’: Australia accuses China of criminal cyber attacks*, [online] Sydney: Sydney Morning Herald. Available from: <https://www.smh.com.au/politics/federal/illicit-gain-australia-accuses-china-of-criminal-cyber-attacks-20210720-p58b6s.html> [Accessed 7 November 2022].

¹⁴⁸ Fitzgerald, J. (2006) *The Dignity of Nation*. In: Chien, S. Y. S. and Fitzgerald, J. (eds.) *The dignity of nations: equality, competition, and honor in East Asian nationalism*. Hong Kong: Hong Kong University Press, pp. 3-4. State dignity is cited as an expression of nationalism particularly in the East Asian context: *Ibid*, p. 6; and Sung-Won Yoon (2008) *Sovereign Dignity, Nationalism and the Health of a Nation: A Study of China’s Response in Combat of Epidemic*. *Studies in Ethnicity and Nationalism* 8 (1), p. 85.

¹⁴⁹ China’s insistence on sovereign dignity may be attributed to its historical experience of what the Chinese government terms the ‘century of humiliation’: see generally, Chan, P. (2014)

There is a clear and important pattern in this, and it is a pattern that provides an additional impetus for the idea of anchoring sovereignty in the concept of State dignity. The pattern suggests that, authoritarian States, in particular, are seeking to 'hijack' the concept of State dignity so as to use it as a shield against criticism by the international community. But just like an individual criminal should not have the avenue to argue that being prosecuted is against her human dignity, States should not have the option to use State dignity as such a shield against their obligations under international law, including under human rights law.

Thus, by adopting and giving meaning to the concept of State dignity in the manner advocated here, we may not only help develop sovereignty, but we can also prevent the attempt by authoritarian States to hide behind a twisted interpretation of the concept of State dignity in a manner undermining the international system.

From the perspective of international law, injury to dignity may arguably be approached in the light of the law governing reparations for damage arising from internationally wrongful acts.¹⁵⁰ Damage may be material (pecuniary) or moral,¹⁵¹ and *Lusitania* held "there can be no doubt" that there is an entitlement to compensation "for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation".¹⁵² That seminal case specifically referenced the afflictions suffered by individuals

China's Approaches to International Law since the Opium War. *Leiden Journal of International Law*, 27 (4), p. 859; and Sung-Won Yoon (2008) Sovereign Dignity, Nationalism and the Health of a Nation: A Study of China's Response in Combat of Epidemic. *Studies in Ethnicity and Nationalism* 8 (1), 93. Similarly, such escape from humiliation and attainment of dignity can be traced to the modern histories of Korea, Taiwan and Japan: see Fitzgerald, J. (2006) The Dignity of Nation. In: Chien, S. Y. S. and Fitzgerald, J. (eds.) *The dignity of nations: equality, competition, and honor in East Asian nationalism*. Hong Kong: Hong Kong University Press, p. 13.

¹⁵⁰ *Factory at Chorzów*, [1928], PCIJ, Ser A, No 17, p. 29. See also *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, [1949] ICJ Rep 174, p. 184. See also UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 31(1). Reparations should 'as far as possible, wipe out the illegal act and re-establish the situation which would, in all probability, have existed' had the internationally wrongful act not been committed: *Factory at Chorzów*, [1928], PCIJ, Ser A, No 17, p. 47; and Pirim, C. Z. (2020) Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, pp. 258-259.

¹⁵¹ *Opinion in the Lusitania Cases (United States v Germany)* (1956) VII RIAA 32, p. 34 et seq. Sometimes, it is referred to as 'political damage': see ILC, *Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 5, paragraph 13.

¹⁵² *Opinion in the Lusitania Cases (United States v Germany)* (1956) VII RIAA 32, p. 40. See also UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 36(2); and also Pirim, C. Z. (2020) Reparation by Pecuniary Means

who have feelings and emotions, and who enjoy certain social standing or reputation. As States are “deprived of any feelings”, the notion that a State can suffer pain, humiliation, or injury to reputation may no doubt be termed “problematic”.¹⁵³

Even so, the matter of moral injury to the State was discussed at length by Special Rapporteur on the draft articles on State responsibility Gaetano Arangio-Ruiz.¹⁵⁴ A distinction was made between moral damage to natural or legal persons of a State, and “non-material damage which the offended State sustains more directly as an effect of an internationally wrongful act”.¹⁵⁵ The latter has been termed “direct moral damage”,¹⁵⁶ and consists of “infringement of the State’s right per se” and “injury to the State’s dignity, honour or prestige”, which are considered an integral part of the State’s personality.¹⁵⁷ These two elements of moral damage should be considered one and the same, for the “mere infringement of the injured State’s right [...] is felt by that State as an offence to its dignity, honour or prestige”.¹⁵⁸

Indeed, there has been a long line of cases whereby legal persons are said to suffer moral damage.¹⁵⁹ As both States and entities such as corporations “are both abstract legal entities which cannot feel pain”,¹⁶⁰ the idea that non-pecuniary damage cannot be awarded to legal persons which do not

of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, p. 245.

¹⁵³ Pirim, C. Z. (2020) Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, pp. 242-243. See also Annacker, C. (1994) Part Two of the International Law Commission’s Draft Articles on State Responsibility. *German Yearbook of International Law*, 37, p. 227.

¹⁵⁴ ILC, *Second report on State responsibility*, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989).

¹⁵⁵ *Ibid.*, p. 5, paragraph 13. Pirim, C. Z. (2020) Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, p. 248.

¹⁵⁶ Pirim, C. Z. (2020) Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, p. 246.

¹⁵⁷ ILC, *Second report on State responsibility*, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 6, paragraph 14. Claudia Annacker, however, distinguishes between moral damage and legal damage: see Annacker, C. (1994) Part Two of the International Law Commission’s Draft Articles on State Responsibility. *German Yearbook of International Law*, 37, p. 231.

¹⁵⁸ ILC, *Second report on State responsibility*, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 6, paragraph 14.

¹⁵⁹ See e.g. *Comingersoll S.A. v. Portugal* [2000], App no 35382/97, ECHR 2000-IV, paragraph 35; and *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (United States v Chile)* (1992) 25 RIAA 1, p. 16; and *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010 ICJ Rep 639, paragraph 18.

¹⁶⁰ Pirim, C. Z. (2020) Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts. *Journal of International Dispute Settlement* 11, p. 254.

have any feelings must be refuted.¹⁶¹ It has also been said that the purposes of reparations for moral damage is aimed at “covering the losses suffered in moral values because of the offences committed to their reputation and at sending a message to the international community that States’ dignity, honour and prestige should be respected”.¹⁶²

In *Rainbow Warrior*, it was held that the infringement of “non-material interests, such as acts affecting the honor, dignity or prestige of a State” entitle the affected State to receive “adequate reparation”.¹⁶³ Though the unilateral removal of French agents responsible for blowing up a ship in the harbour of Auckland from the island of Hao caused no material damage to New Zealand, the Tribunal held that the damage to New Zealand is “of a moral, political and legal nature, resulting from the affront to the dignity and prestige” of New Zealand itself and the injured State’s judicial and executive authorities.¹⁶⁴ Further, in *LaGrand*, Germany claimed that it “suffered moral and political damage by the fact alone that its rights and the rights of its nationals were violated by the United States”¹⁶⁵ when German nationals were executed despite an order by the ICJ not to do so pending final judgement in the case.¹⁶⁶ It may also be noted that in *M/V ‘Saiga’ (No 2)*, compensation was granted for “violation of [a State’s] rights in respect of ships flying its flag”.¹⁶⁷

Satisfaction (discussed further below) is a form of reparation reserved for injuries arising from moral or legal damage that are not financially assessable.¹⁶⁸ There is ample jurisprudence whereby courts and tribunals

¹⁶¹ *Ibid*, p. 254. Note however, it ‘is undeniable that measuring direct moral damages suffered by States is difficult, subjective and variable’: *Ibid*, p. 259.

¹⁶² *Ibid*, p. 261. It may be no surprise that in *Lusitania*, the umpire noted:

as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature.

ILC, *Second report on State responsibility*, by Mr. Gaetano Arangio-Ruiz, *Special Rapporteur*, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 34, paragraph 114. See also Annacker, C. (1994) Part Two of the International Law Commission’s Draft Articles on State Responsibility. *German Yearbook of International Law*, 37, p. 231.

¹⁶³ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, (1990) XX RIAA 215, paragraph 109 (citing Soerensen).

¹⁶⁴ *Ibid*, paragraph 110.

¹⁶⁵ *LaGrand (Germany v. United States of America)*, Memorial of the Federal Republic of Germany of 16 September 1999, paragraph 6.53. This issue was not addressed, but the ICJ did reference this *LaGrand (Germany v. United States of America)* [2001] ICJ Rep 466, paragraph 125.

¹⁶⁶ *LaGrand (Germany v. United States of America) (Provisional Order)* [1999] ICJ Rep 9.

¹⁶⁷ *M/V ‘Saiga’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10, paragraphs 176-177.

¹⁶⁸ *Case concerning the difference between New Zealand and France concerning the interpretation or*

have awarded satisfaction¹⁶⁹ to “as far as possible, wipe out the illegal act and re-establish the situation which would, in all probability, have existed” had the internationally wrongful act not been committed.¹⁷⁰ Often an acknowledgement of the wrongful act and an apology for the conduct of their national, or for its own conduct¹⁷¹ or a judicial or arbitral finding of the failure of a State to fulfil its obligations¹⁷² is sufficient satisfaction. Such case law may be said to demonstrate that “the existence of moral damages in international law has been taken for granted and not challenged”.¹⁷³

In addition, it should be noted that – at least under our conception of the concept – State dignity also imposes obligations on a State arguing that its sovereignty has been violated. This is because in the assessment of whether State dignity was infringed upon, we must also take account of how that State has acted. The significant implications of this were already illustrated above via the imaginary example of State C seeking to rely on sovereignty to suppress information about its human rights abuses.

Finally, it may be possible to make the argument that, given that we are now all living in a world organised into different States, the human

application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, (1990) XX RIAA 215, paragraph 122.

¹⁶⁹ See UNGA, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/CN.4/SER.A/2001/Add.1 (2001), p. 106. See particularly, e.g., *Mixed Claims Commission Netherlands-Venezuela* (1903) X RIAA 703, p. 730 (expression of regret); *Isaac M. Bowers (United States) v. Great Britain (Fijian Land Claims)* (1923) VI RIAA 109, p. 112 (payment of nominal sum of one shilling); and *Affaire relative à la concession des phares de l'Empire ottoman (Grèce c France)* [1956] XII RIAA 155, p. 216.

¹⁷⁰ *Factory at Chorzów*, [1928], PCIJ, Ser A, No 17, p. 47.

¹⁷¹ *Claim of the British Ship "I'm Alone" v. United States* (1935). *American Journal of International Law*, 29 (2), p. 326. See also ILC, *Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, UN Doc A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 36 et seq outlining various diplomatic practice before and after the Second World War. Examples of forms of satisfaction include:

apologies, with the implicit admission of responsibility and the disapproval of and regret for what has occurred; punishment of the responsible individuals; a statement of the unlawfulness of the act by an inter national body, either political or judicial; assurances or safeguards against repetition of the wrongful act; payment of a sum of money not in proportion to the size of the material loss.

Ibid, p. 41, paragraph 139. See also *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (United States v Chile)* (1992) 25 RIAA 1, p. 16.

¹⁷² *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 36; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, paragraphs 463; 465; and *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, paragraph 161.

¹⁷³ Markert, L. and Freiburg, E. (2013) Moral Damages in International Investment Disputes - On the Search for a Legal Basis and Guiding Principles. *Journal of World Investment & Trade*, 14 (1), p. 17.

dignity recognised in the Charter of the United Nations,¹⁷⁴ necessitates the recognition of State dignity; that is dignity on the individual level is only possible with dignity on the community level.

At any rate, the overview provided in this section (7.2.3) have covered a broad range of different sources relating to dignity and more specifically State dignity. Given its diversity, the conclusions that can be drawn are limited. However, it is hoped that – not least via analogies – this section has usefully brought attention to some sources that may be relied upon to develop further the idea of anchoring sovereignty in the concept of State dignity. Arguably it provides a precedent, and provides guidance, for the application of a conception of sovereignty anchored in State dignity.

8. WHAT ARE THE CONSEQUENCES OF VIOLATING SOVEREIGNTY?

As we have established, violations of sovereignty can occur through a number of means and, in turn, may result from violations of territorial integrity, the principle of non-interference/intervention, and principles relating to the prohibition on the use of force (other than in self-defence, collective self-defence, or on the authorisation of the United Nations Security Council). These violations can have both political and legal consequences. The political consequence may be many, varied, and complex, and, at this juncture, consider some of the potential legal consequences.

The starting point is that there are legal consequences when a State commits an internationally wrongful act.¹⁷⁵ Each internationally wrongful act entails the international responsibility of that State.¹⁷⁶ An international wrongful act can result from the act or omission of a State. For instance, engaging in an armed attack against another State would clearly be an act that violates the sovereignty of the victim State, and would entail the international responsibility of the attacking State. Meanwhile, the failure to prevent transboundary harm from injuring the interests of another State would also entail international responsibility.¹⁷⁷

¹⁷⁴ Freeland S. and Ireland-Piper, D. (2021) Space Law, Human Rights and Corporate Accountability. *UCLA Journal of International Law and Foreign Affairs* 26(1), p. 6.

¹⁷⁵ Chirwa, D. M. (2004), The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights. *Melbourne Journal of International Law* 5 (1), citing Brownlie, 1983, p. 9.

¹⁷⁶ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 1; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, (1990) XX RIAA 215, paragraph 75; and *Phosphates in Morocco*, [1938], PCIJ, Series A/B, No. 74, p. 28.

¹⁷⁷ *Trail Smelter Case (United States v Canada)* (Decision of 11 March 1941), [1949] III RIAA 1905.

The *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) are (generally speaking) the authoritative statement of the law of State responsibility.¹⁷⁸ By way of background, however, an earlier development in the law of State responsibility was the Treaty of Westphalia 1648, which embedded State-centric ideologies such as sovereignty, territorial integrity, and non-intervention in the modern international law landscape. After decades of work, the ARSIWA were finalised and adopted by the International Law Commission (ILC) in 2001.¹⁷⁹ In 2002, the Articles on Responsibility of States were adopted by the General Assembly, converting their status from draft articles to articles “commended to the attention of governments”.¹⁸⁰

Fundamentally, however, to incur State responsibility requires a State to be sovereign, and therefore, in control of its actions and the actions of those it directs or controls.¹⁸¹ In this way, State responsibility is a consequence of sovereignty. From a legal perspective, there are two key elements required for State responsibility to arise at international law.¹⁸² First, the conduct must be attributable to the State,¹⁸³ and attribution is – as noted above – notoriously difficult on the cyber arena. For example, a violation of sovereignty or a failure to prevent a violation of sovereignty by a government body, or a private entity,¹⁸⁴ in *theory* could be attributable to the State.

¹⁷⁸ Shaw, M. N. (2021) *International Law*. 9th ed. Cambridge: Cambridge University Press, p. 680; Koskenniemi, M. 2001, p. 341; Crawford, J. (2002) *The International Law Commission's articles on state responsibility : introduction, text, and commentaries*. Cambridge: Cambridge University Press, p. 889.

¹⁷⁹ Ireland-Piper, D., Fehlhauer, M., & Bonenfant, A. (2023). International State Responsibility and Commercial Space Activities. *Oxford Research Encyclopedia of Planetary Science*.

¹⁸⁰ See UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), paragraph 3. The phrase “commended to the attention of governments” is expressed as a formal seal of approval by the UNGA but has no otherwise legally binding effect (like UNSC resolutions). Therefore, ARSIWA does not have the status of international treaty and while ARSIWA remain the key instrument on state responsibility, the articles leave certain areas of law underdeveloped. Further, the generality with which the articles are written leaves interpretation subject to the specific subject matter of law, or *lex specialis*, in question. This means the principles of State responsibility can be supplanted by references to specific areas of law, such as cyber law and space law, for example.

¹⁸¹ Crawford, J. (2014) *State Responsibility: The General Part*. Cambridge: Cambridge University Press, p. 133.

¹⁸² *Prosecutor v Tihomir Blaškić (Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum)* IT-95-14-PT (18 July 1997), paragraph 96; *Dickson Car Wheel Company (United States of America v United Mexican States) (Award)* (1931) 4 RIAA 669, p. 678; and *United States Diplomatic and Consular Staff in Tehran*, [1980] ICJ Rep 3, paragraph 56.

¹⁸³ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 2(a). See also *Phosphates in Morocco*, [1938], PCIJ, Series A/B, No. 74, p. 28; and *United States Diplomatic and Consular Staff in Tehran*, [1980] ICJ Rep 3, paragraph 56.

¹⁸⁴ See e.g. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* [1990], ICSID Case No. ARB/87/3 [75].

Generally speaking, the conduct of *de jure* or *de facto* organs of the State are directly attributable to the State.¹⁸⁵ A *de jure* organ is one empowered to function as an executive, legislative or judicial limb of the State.¹⁸⁶ A *de facto* organ is a person or entity, which although not an organ of the State, is empowered to exercise elements of governmental authority, provided that the person or entity is acting in the capacity of that authority.¹⁸⁷ This can include both public corporations and private companies.¹⁸⁸

For example, Article 5 of the ARSIWA provides that the conduct of a person (including a legal person, such as a body corporate) which is not a State but is empowered by the law of a State to exercise “elements of governmental authority” can, in some circumstances, trigger State responsibility. Notably, under Article 7, responsibility can still arise, even where that authority is technically exceeded. The overall test for responsibility, however, is generally understood to be “effective control.” This is where a State directs the specific conduct and that conduct results in the alleged internationally wrongful act.¹⁸⁹ There has been debate as to whether to the test should more appropriately be “overall control”, a lower threshold, where specific instructions are not necessary to establish State control over an entity.¹⁹⁰ However, in *Bosnian Genocide*, the ICJ appeared to affirm the effective control test.¹⁹¹

¹⁸⁵ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion* [1999] ICJ Rep 62, paragraph 62; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43, paragraph 385.

¹⁸⁶ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 4; UNGA, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/CN.4/SER.A/2001/Add.1 (2001), p. 31.

¹⁸⁷ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 5. UNGA, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/CN.4/SER.A/2001/Add.1 (2001), p. 51.

¹⁸⁸ UNGA, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/CN.4/SER.A/2001/Add.1 (2001), p. 51.

¹⁸⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Federal Republic of Yugoslavia) (Judgment)* [2007] ICJ Rep 43, paragraph 299–400; UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 8.

¹⁹⁰ *In Prosecutor v Duško Tadić (Judgement)* IT-94-1-A (15 July 1997), paragraph 120, the ICTY broke with the ICJ’s conceptualisation of control. It preferred the lower threshold of ‘overall control’, which did not require specific instructions from a State to establish control over the actions of a *de facto* organ. This test was purportedly developed to recognise the influence of hierarchy in quasi-military political organisations. See also the most recent MH17 judgement of the District Court of the Hague (17 November 2022). [online] The Hague: District Court of the Hague <https://www.courtsh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html> [Accessed 7 November 2022].

¹⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep 43, paragraph 406; Ireland-Piper,

Second, the conduct in question must constitute a breach of an international legal obligation, applicable at the time the conduct occurred.¹⁹² Those obligations may originate from treaties, customary international law, or general principles of law.¹⁹³ States must know “or ought to have known”¹⁹⁴ that the conduct in question constituted a breach. Notably, Article 3 of ARSIWA provides that the characterisation of an act as internationally wrongful is question of international law, not domestic law. This means that a State cannot escape responsibility for an act on the basis that the relevant conduct was lawful under its own domestic law.¹⁹⁵

Once these two elements are established (in relation to a violation of sovereignty that constitutes an international wrong, for example), a State may be under an obligation to cease conduct or make reparations. Specifically, Article 30 of ARSIWA provides that a State responsible for an internationally wrongful act is under an obligation: “(a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require”.¹⁹⁶ Under Article 31, the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Notably, injury includes “any damage, whether

D., Fehlh Haber, M., & Bonenfant, A. (2023). International State Responsibility and Commercial Space Activities. *Oxford Research Encyclopedia of Planetary Science*.

¹⁹² UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 2(b). See *Phosphates in Morocco*, [1938], PCIJ, Series A/B, No. 74, p. 28; and *United States Diplomatic and Consular Staff in Tehran*, [1980] ICJ Rep 3, paragraph 56.

¹⁹³ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 12. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, (1990) XX RIAA 215, paragraph 75; and *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, paragraph 47. For the sources of international law, see *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, pp. 22–23., 24 October 1945, 33 UNTS 993 (entered into force 18 April 1946), art 38(1).

¹⁹⁴ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, pp. 22–23.

¹⁹⁵ Crawford, J. (2002) *The ILC's Articles on State Responsibility: Introduction, Text and Commentary*. Cambridge: Cambridge University Press, p. 100; and Ireland-Piper, D., Fehlh Haber, M., & Bonenfant, A. (2023). International State Responsibility and Commercial Space Activities. *Oxford Research Encyclopedia of Planetary Science*. See also *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion*, [1949] ICJ Rep 174, p. 180; and *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic (ICSID Case No. ARB/97/3)*, Decision on Annulment of 3 July 2002, paragraphs 101–103. See also *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (entered into force 27 January 1980), art 27.

¹⁹⁶ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 30. See also *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, (1990) XX RIAA 215, paragraph 113-114.

material or moral, caused by the internationally wrongful act of a State".¹⁹⁷ Reparations can take the form of restitution,¹⁹⁸ compensation,¹⁹⁹ and/or satisfaction.²⁰⁰

Responsibility for an international wrong may also entitle the wronged State to take lawful countermeasures. However, the injured State may only direct its countermeasures against the responsible State and only to induce it to comply with its obligations to make reparations.²⁰¹ Countermeasures must be a non-forcible response to a breach of an international obligation,²⁰² which need to be proportionate to the initial wrongful act,²⁰³ and do not mitigate all other obligations, including, for example, obligations relating to peremptory norms, the non-use of force, and human rights.²⁰⁴

Notably, however, the notion of "State responsibility" is distinct from "international liability". As Ireland-Piper, Fehlh Haber, and Bonenfant have observed:

It is easy to confuse the two. The term international responsibility refers to the liability of States to pay compensation for damage, without necessarily having committed an internationally wrongful act. State responsibility, on the other hand, refers to the attribution of responsibility to a State for an internationally wrongful act. To put it another way:

¹⁹⁷ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, Art 31(2).

¹⁹⁸ *Ibid*, art 35. See also *M/V 'Saiga' (No 2) Case (Saint Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10, paragraph 171; and *ICSID, CMS Gas Transmission Company v. Argentine Republic*, Case No ARB/01/8 (2005), paragraph 399.

¹⁹⁹ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 36.

²⁰⁰ *Ibid*, art 37.

²⁰¹ *Ibid*, art 49. See also *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, paragraph 83.

²⁰² UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 50(1); and UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625(XXV) (1970). See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paragraph 202; and *Guyana v Suriname Maritime Boundary Arbitration (Guyana v Suriname)*, [2004] PCA No 2004-04, paragraph 446.

²⁰³ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 51. See also *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, paragraph 85; and *Case Concerning United States Diplomatic and Consular Staff in Tehran (Iran v. United States of America)* [1980] ICJ Rep 3, paragraph 86. Any countermeasure that is disproportionate to the internationally wrongful act is "considered excessive and therefore unlawful": *Naulilaa Case (Germany v Portugal)*, (1928) II RIAA 1011, p. 1028.

²⁰⁴ UNGA, *Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp, UN Doc A/56/83 (2002), Annex, art 50.

“State responsibility” refers to a State’s responsibility under international law in general, whereas “international liability” denotes a State’s ‘civil responsibility’, or obligation to pay compensation or make reparations for injuries that non-nationals suffer outside its national boundaries as a result of activities within its territory or under its control.²⁰⁵

One legal consequence of violating sovereignty, for instance through a violation of a primary obligation such as the principles of non-interference, non-use of force, and those regulating the conduct of armed hostilities, is that a State can incur legal obligations. This includes legal obligations to cease certain conduct, make reparations, or it entitle another State to take lawful countermeasures. The obligation to make reparations (see above) or the right of an injured State to take countermeasures is recognised under the principles of State responsibility.

9. CONCLUDING REMARKS

As correctly noted by Osula et al, sovereignty is one of the most politically loaded terms in the discussions of state behaviour in cyberspace.²⁰⁶ The concept of sovereignty is constantly in the news. At the time of writing, violations of sovereignty such as both threatened and actual invasion and use of force, including allegations of war crimes, are taking place. This tells us quite a lot about the central role that the concept plays – it is literally used as a compass to point to right and wrong in conflicts that may literally ruin the world. Unfortunately, it is questionable whether it – in its current form – is up to the task.

This article has aimed to help address some of the challenges we face by outlining the key features of sovereignty in a brief, and hopefully accessible manner. We have also sought to provide some ideas for possible law reform.

Time will tell whether we have succeeded in relation to either of these goals. But the worry is that we do not know just how much time we have. It seems to us that given its centrality in international law and international relations, we must make urgent progress with how we understand sovereignty.

²⁰⁵ Ireland-Piper, D., Fehlhaber, M., & Bonenfant, A. (2023). International State Responsibility and Commercial Space Activities. *Oxford Research Encyclopedia of Planetary Science* (citations omitted). See also ILC, *Third report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)*, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur, UN Doc Document A/CN.4/510 (2000), paragraph 27.

²⁰⁶ Osula, A.-M., Kasper, A. and Kajander, A. (2022) EU Common Position on International Law and Cyberspace. *Masaryk University Journal of Law and Technology*, 16 (1), p. 95.

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