Power Grab:

Why States Cede Sovereignty to International Law

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Abstract

Sovereignty and the rule of law are the cornerstones of modern-day statehood. Yet, in the aftermath of armed conflict since the end of the Second World War, various states have set up courts in order to prosecute war crimes, crimes against humanity, genocide, and aggression, prompting these states to surrender sovereignty in their legal processes. These states have experienced armed conflict and subsequently utilized various mechanisms of international criminal law to provide redress for heinous violations of human rights committed within their territories. This article explores why some states voluntarily cede sovereignty to international law in the pursuit of prosecuting these crimes within their own borders and why they do so to varying degrees.

Key Words: Crimes against humanity, genocide, internationalized criminal courts, international relations theory, sociological legitimacy

Main Argument

Why do states voluntarily cede sovereignty to international law – and why do they do so to varying degrees? This can be explained by political actors seeking to exercise power by attempting to show the public that the state is unbiased and accountable. Doing this garners them broad public support, which legitimizes the judicial system and other state governing institutions. These political leaders are thus acting in their own interest to sustain their own power. Establishing broad public support for state institutions– in a process known as sociological legitimacy – aids states in transitioning from *de facto*[i] sovereignty to *de jure*[ii] sovereignty, domestically and within the international community. In essence, states and their leaders cede sovereignty (in the short term) to gain sovereignty (in the long term).

Policy Implications

- There is an ongoing debate about the efficacy of international criminal law, specifically in the realms of *Lex Lata* (law as it is) and *Lex Ferenda* (law as it ought to be). In a globalizing world, international criminal law is constantly changing. Over the last 25 years, the international community has intervened in states where ethnic conflict or civil war has caused serious violations of human rights. Even heads of state are now culpable of being prosecuted for these crimes and no longer receive the protection of sovereign immunity. Knowing why states voluntarily cede sovereignty in their legal processes to prosecute war crimes and crimes against humanity can aid international adjudicators in delivering effective methods of redress and relief to victims who have suffered injustice.

- Understanding state behavior in the aftermath of conflict can aid the international community in developing solid foundations, methods, and procedures for reconciliation in post-conflict states. Due to globalization, sovereign states collectively make and enforce laws that are binding within the international system. This affects the relationships states have between themselves. Post-conflict reconciliation can be complicated, and understanding the behavior of states in this period can be used to predict which specific aspects of international criminal law will contribute or fail in the procedures of a tribunal or hybrid court. Solving this puzzle can aid international adjudicators in understanding the nuances involved in prosecuting war crimes, crimes against humanity, and genocide.
- Both international relations and international law are intertwined. Utilizing international relations theory within the context of internationalized criminal courts to predict state behavior can generate solutions for inclusive and unbiased procedural, substantive and judicial protocols that can aid in the reconciliation process of states emerging out of conflict.

Introduction

As a young United States Marine in the late 1990s, a NATO peacekeeper in Bosnia and Herzegovina, a combatant during the Kosovo War and the U.S. invasion of Iraq in 2003, I was afforded the unique firsthand experience of witnessing the atrocities of the ethnic cleansing and the resulting international intervention that followed. Seeing events unfolding in real time gave me a distinct perspective of war. It was no longer safely through the television screen, nor could the words in a newspaper fully encompass the actual situation. Instead, it was real and became personal. While patrolling the streets amidst the rubble of a ravaged Sarajevo, I interacted with

multiple survivors of the conflict, saw, and felt the anguish of those who lost loved ones, and listened to accounts from women who had been brutalized, raped, and tortured. These same accounts became more amplified in Kosovo combined with my first combat experiences.

One instance during this time that has been ingrained and scarred into memory: I will never forget the sorrow of a surviving mother present at the mass grave site, who wept with such grief after the bodies of her family were carried away to be properly buried. I felt her pain was representative of all those who have suffered in this decade-long ethnic conflict, which not only yielded an estimated 140,000 deaths but extracted the highest toll of mental and emotional damage on its victims, which will last a lifetime. While both on the ground and for years removed from the war, I've often reflected on these experiences, prompting me to research the various methods that international adjudicators utilize to prosecute war crimes, genocide, and crimes against humanity.

The article will first provide a background on the mechanisms of international law, explaining the nuances of international criminal law within the context of international criminal tribunals and hybrid courts. This will include a basic understanding of how various international criminal tribunals and hybrid tribunals are established, their legality, and how they function. I will be utilizing primary source documents such as statutes of multiple tribunals and courts, United Nations documents, and literature which contains customary international, procedural and substantive law.

Next, the article operationalizes key variables and terms, including "ceding sovereignty." While there is an ongoing debate on the modern-day conception of sovereignty, I highlight a specific definition that will be utilized in my research. I am using a combination of academic

journals, published books, law reviews, and articles on sovereignty, from the works of international law and international relations scholars.

The article will then identify and explain some common misconceptions about why states cede sovereignty in their legal processes to prosecute war crimes, crimes against humanity, genocide, and aggression.

An investigation of sociological legitimacy is conducted by utilizing various scholarly articles and books combined with the international relations theories of realism and liberalism to explain the criteria of sociological legitimacy and why these are the factors that lead states to cede sovereignty within their legal processes to prosecute war crimes, crimes against humanity, genocide, and aggression. This will also answer the subsidiary question of why states do this in varying degrees.

The article will highlight the impact of international tribunals or hybrid courts in terms of the legal system and governance in Sierra Leone, Cambodia, Kosovo, and Bosnia and Herzegovina. This context consists of research into the nature of conflict in the afflicted state, the type of government the state had before and after the conflict, judicial systems, the style of government, political stability post-conflict, election transparency, other human rights abuses, and civic engagement. Evidence drawn from these sources will provide data on public acceptance of the tribunal or court and other state governing institutions. This empirical evidence will indicate that the necessary elements meet the criteria of sociological legitimacy in each case country, The final case study of Bosnia and Herzegovina will be conducted in a semi-IRAC (Issue, Rule, Analysis, Conclusion) format to show how a particular case, *Mrs. A v. Bosnia and Herzegovina,* displays indicators of sociological legitimacy and state motivations for ceding sovereignty to international law.

This method employs data in the form of empirical evidence and applies it to the theory of why states cede sovereignty. Data and evidence were collected and analyzed from various primary sources such as Freedom House, Human Rights Watch, Amnesty International, Fragile State Index, BTI Transformation Index, and U.S. State Department reports, as well as tribunal and court websites.

The article will conclude by summarizing the main argument, state this study's limitations, and discuss the successes and criticisms of both international criminal tribunals and hybrid courts. It will also discuss the contributions of such bodies of law.

Background & Context: The Mechanisms of International Criminal Law, Internationalized Criminal Courts, and the Legality of International Intervention.

This section will provide a background on the mechanisms of international law, explaining the nuances of international criminal law within the context of international criminal tribunals and hybrid courts. It introduces the primary sources of international criminal law, explains the differences between international criminal tribunals and hybrid or special courts, then explains the legal principles in which both are established in post-conflict states.

International Criminal Law

In 52 BC, Marcus Tullius Cicero penned the Latin maxim *Pro Milone*. This speech contained the phrase, "*Silent enim lēgēs inter arma*," which translates to "For, among arms, the laws are silent" or, more recently and widely interpreted as "In times of war, law falls silent." Cicero used this phrase at a time when politically motivated mob violence was a daily occurrence on the streets of Rome. Armed gangs led by partisan leaders ruled and were elected to high offices. Both interpretations of this phrase can describe modern-day ethnic wars, civil

wars, and wars of independence. With *jus in bello*[iii] abrogated, serious violations of human rights, commonly known as crimes against humanity, war crimes, genocide, and aggression often compose the *actus reus*[iv] of the belligerents, which falls within the purview of international criminal law.

International criminal law is a subset of international law that emerged after the Second World War following the Nuremberg and Tokyo Military Tribunals. Modern-day international law typically concerns inter-state relations, and international criminal law concerns individuals. In particular, international criminal law places responsibility on individual persons, not states or organizations. It proscribes and punishes acts that are defined as crimes by international law.[v] International criminal law is neither universal nor uniform. Although each tribunal and hybrid court have the same mandate of adjudicating war crimes, crimes against humanity, genocide, and aggression through prosecuting those most responsible, they have different mechanisms of procedural law. Its jurisprudence systematically analyzes the crimes, individual criminal responsibility[vi], and defenses for the most heinous violations of international law. Considered "crimes that shock the conscience of humanity," the modern-day global community of states is bound to act under the principles of *opinio juris* or customary international law such as the Geneva Conventions, Genocide Convention, and the Universal Declaration of Human Rights. International criminal law draws from 5 distinct sources[vii]

1. Treaty law (Genocide convention / Rome statute of the International Criminal Court)
2. Customary international law (custom and customary law) Geneva Convention and Genocide Convention are both treaty law but have entered the realm of customary international law
3. General principles of law (legal norms existing among the majority of nations).

4. Judicial decisions (subsidiary) in various cases from Nuremberg, Tokyo, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda to develop principles and jurisprudential interpretations of other sources of international law - for example, the Genocide Convention specifically is interpreted with international criminal tribunals. Jurisprudence may not be internationally binding but point to precedence that is set and principles that are established.
5. Writings of scholars (subsidiary)

These sources of law are an intricate part of establishing internationalized criminal courts and their various apparatuses.

Internationalized Criminal Courts

In the aftermath of armed conflict involving war crimes, crimes against humanity, genocide, and aggression, international intervention takes form via agreements between the state and international institutions such as the United Nations or regional organizations, sanctions to compel, or even military intervention. International criminal tribunals or hybrid criminal courts are then established with the consent of the belligerents who initially possess *de facto*[viii] control over the territory post-conflict. Historically, an international criminal tribunal or a hybrid court was established to adjudicate these crimes.

An international criminal tribunal or *Ad Hoc*[ix] such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) was established in response to severe offenses such as ethnic cleansing, sexual crimes, and genocide and reaffirmed that all parties in conflict comply with international humanitarian law. The tribunals focused on individuals who bore the most responsibility for the crimes committed during the conflict. These international criminal tribunals followed the principle of

judicial primacy, meaning that international law prevailed over national courts, and states were obliged to bring crimes, witnesses, suspects, and evidence before the tribunals and not to try and prosecute cases themselves.[x] The chambers and the apparatuses of both the ICTY and ICTR consisted of judges and staff of an international nature; not one justice was from any Republic of the former Yugoslavia or Rwanda. Additionally, proceedings were held away from the conflict nations or in the Hague, Netherlands. Both the ICTY and ICTR, with their respective cases, developments in substantive and procedural law were influential in laying the bedrock for the International Criminal Court (ICC).[xi]

A hybrid or special court differs from an international criminal tribunal in that it amalgamates domestic actors and norms while providing deference to international *jus cogens*[xii]. The harmonization of international law and domestic jurisprudence is conducted at varying levels. Hybrid courts sometimes follow the principle of complementarity in which states have the primary competence and authority to investigate and prosecute international crimes, and the ICC has secondary jurisdiction. Given that complementarity is assessed on a case-by-case basis, the ICC and states must together ensure that all atrocities in each situation are addressed.[xiii] If a state is not a party to the Rome Statute of the ICC, it harmonizes international law within its domestic constitution utilizing both to adjudicate cases brought before the court. The judges and staff are a mix of international and local personnel, with judicial authority shared between international and domestic judges. This also varies in each hybrid criminal court as some had international judges holding full judicial authority, interpreting international law and domestic jurisprudence. In contrast, other hybrids had domestic judges exercise judicial authority with international judges present to act in an advisory capacity.

The Legality of International Intervention

The legality of international intervention by the global community of states presented with cases of war crimes, crimes against humanity, genocide, and aggression can be drawn from several sources. The first is the principle of universal jurisdiction or universality. This principle holds that the domestic judicial systems of a state can investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals. Because of the heinous nature of these crimes, states are obligated to intervene and restore peace and stability to the global world order.[xiv] Legality of international intervention also rests within the United Nations Security Council and its Chapter VII powers. Article 39 stipulates that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. Article 41 holds that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[xv] These provisions are valid with states that are members and recognized by the United Nations and states that are not. International intervention also derives its legality through customary international law, binding to all states regardless of status. Many of the provisions contained within the Geneva Conventions and their protocols are considered part of customary international law and applicable in armed conflict.[xvi]

Operationalizing and Measuring Key Terms

This section will operationalize "ceding sovereignty." It first describes the ongoing debate within international relations and legal scholarship on what sovereignty encompasses in the modern globalized community of states. It then moves to select an accepted definition of sovereignty and explains the levels of how sovereignty is ceded within a state's legal process.

Sovereignty defined

Sovereignty is defined as the right to exercise supreme and exclusive authority within a state's territory.[xvii] Throughout legal and international relations scholarship, there has been an ongoing debate encompassing the understanding of sovereignty and how it has evolved in the modern-day international law system. This tension originates in the acknowledgment of a globalized community of states.

Some hold that because of globalization, sovereignty is no longer necessary or as defined as it used to be. Such a sacrosanct conception of sovereign authority has come into serious question, buffeted by the frequent and insistent effects of globalization, the world market, cyberspace, and the human rights movement.[xviii] Modern-day states within the international system compromise their sovereignty when they become a party to various conventions, agreements, and treaties ranging from human rights to trade. Because of the impact of these various international conventions and treaties, state behavior is thus transformed as they act interdependently within the international system of states.

The argument on the reverse side of this coin is that sovereignty has had more meaning and influence since the end of the Second World War. International relations and legal scholars that support this argument posit that sovereignty is the state's ultimate authority, giving it control

over all persons and acts that transpire within its territory. With that comes the ability to interact with other states in the international system. States continue to be the creators and enforcers of international law, and it is clear that in recent decades, international law has grown enormously in volume, content, and importance.[xix] This holds true with the proliferation of various treaties and conventions within modern-day international law. Sovereignty is critical as each state has equal responsibilities and duties within the international system.

For the purposes of my research in this article, I am utilizing the latter definition of sovereignty. This definition suggests that the state is not subject to any external influence or authority without its explicit voluntary consent. The state has moral authority, the power to consent, to enter into relations, to conclude agreements, and to form associations.[xx] With the ability to consent to external authority or influence, states become the creators and enforcers of international criminal law and thus create norms and institutions to govern international relations. Thus, for the purpose of this article, ceding sovereignty is defined as a state voluntarily authorizing any encroachment of international law on its domestic jurisprudence, legal process, constitutions, or courts.

Encroachment of international law into a state's domestic jurisprudence, legal process, constitutions, or courts occurs at differing levels of procedural law, the selection of judges and court personnel, and the amount of domestic state involvement in the investigation of witnesses and gathering of evidence. Within the Military Tribunals at Nuremberg and Tokyo and the International Criminal Tribunal of the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, or *Ad Hoc* tribunals, full legal sovereignty was ceded to international law. International criminal law was utilized as the primary legal authority in which cases within these tribunals were adjudicated, prosecuted, and decided. Judicial authority was given to judges who

were familiar with local customs and laws but were international and not from the state in which the conflict took place. These judges applied strict scrutiny tests with deference to international law when making procedural, substantive, or judicial assessments and decisions.

Encroachment of international law into a state's domestic jurisprudence in a hybrid or special court differs from that of an *Ad Hoc* tribunal. Only partial legal sovereignty is ceded by the state. National law and international law are harmonized within domestic constitutions and courts, with interpretations of procedural law and substantive law drawing inferences from each. Deference leans towards domestic jurisprudence, and international law is applied where domestic law does not provide mechanism. Additionally, the selection of staff and judges are mixed between international and domestic personnel. Judicial authority tended to be given to domestic judges as international judges augmented the chambers in an advisory role. Because international law is not uniform or universal, judicial authority in some hybrid or special courts can also be given to an international judge, with domestic judges acting in an advisory capacity.

Literature Review: Common Misconceptions of Why States Cede Sovereignty to International Law in the Pursuit of Prosecuting War Crimes, Crimes, Against Humanity, Genocide, and Aggression.

This section identifies and explains some common misconceptions about why states cede sovereignty in their legal processes to prosecute war crimes, crimes against humanity, genocide, and aggression. It also provides justifications for why these common explanations are insufficient or do not support why states cede legal sovereignty.

Ceding Sovereignty because of Ineffective or Nonexistent Legal Systems

A common misconception of why states cede sovereignty within their legal processes in pursuit of prosecuting serious violations of human rights laws is because the state has an ineffective or nonexistent legal system. In 1994, United Nations Security Council Resolution 955 established an international tribunal to prosecute persons responsible for genocide and other serious violations of international law committed in the territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in neighboring States.[xxi] In the aftermath of armed conflict, legal systems in afflicted countries are often ineffective or nonexistent. The sheer scope and scale of the Rwandan genocide could have easily enveloped and overwhelmed any stable justice system. In Rwanda, effective jurisprudence was even harder to attain since many judges, lawyers, and judicial staff were killed during the genocide, and much of the country's infrastructure was destroyed. Additionally, in many other countries and conflicts in which either hybrid courts or international criminal tribunals were established, the legal systems were insufficient to adjudicate violations of international humanitarian and human rights law. This holds with the declaration of independence of the six former republics of what was known as Yugoslavia, subsequent wars of independence, and the establishment of the International Criminal Tribunal for the Former Yugoslavia. When the first judges arrived at the Tribunal in November 1993, there were no rules of procedure, no cases, and no prosecutor. Professional and qualified staff had to be recruited quickly, and their often quite different experiences and methods of work from national systems needed to be merged into a functioning international criminal prosecution system. Both the Tribunal's opponents and its well-wishers were uncertain of its success.[xxii] With no domestic judiciary in place, the establishment of the tribunal was necessary to pursue the prosecution of these crimes. The establishment of hybrid or

special courts and chambers in lieu of domestic courts is similar with respect to that of international criminal tribunals set up because of ineffective and non-existent legal systems. The question remains whether states such as Sierra Leone, which has just recently emerged out of a decade-long conflict, or states such as Cambodia, which is a divided society, can provide the necessary rule of law. In both countries, legal institutions were under institutionalized before the outbreak of conflict. Especially in the case of Cambodia, the legal system itself came under attack and was virtually destroyed.[xxiii] While it is preferable to adjudicate these crimes in domestic courts because of deference to the sovereignty of the state, these courts are necessary to facilitate adjudication. Ineffectiveness or nonexistent legal systems may answer why international or hybrid tribunals are established in lieu of national criminal courts. However, more is needed to answer why states voluntarily cede sovereignty in their legal processes or what states gain in allowing this encroachment. What is missing from this explanation are the motivations and goals of the state in enabling a full or partial encroachment of international law in domestic jurisprudence and why, if a state has the ultimate jurisdiction over its inhabitants, it will let an international entity prosecute individuals under that jurisdiction. Common knowledge suggests this is contrary to the principle of territorial jurisdiction. The motivations and goals of states are indicators of state behavior. Simply conceding that states cede legal sovereignty because of ineffective or non-existent legal systems is lacking and does not explain such behavior.

Ceding Sovereignty because of the Legality of Tribunal or Court.

The next misconception about why states cede sovereignty to prosecute war crimes, crimes against humanity, genocide, and aggression is because an international criminal tribunal or hybrid court is legal in fact. As a relatively new and emerging form of international

jurisprudence, international criminal law draws from 5 sources: treaty law, customary international law, general principles of law, judicial decisions, and the writings of scholars. Questions on the binding and legal nature of international criminal law are often referred back to these sources. Because of the nature of crimes against humanity, war crimes, genocide, and aggression, as crimes that shock the conscience of humanity, the international community is bound to respond in accordance with both customary international law and the principle of universal jurisdiction. Articles 39 and 41 of the United Nations Security Council's Chapter VII powers confirm the legality of international tribunals or hybrid courts.[xxiv] The legal existence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the International Criminal Court, are predicated upon these sources of law.

Moving forward, the establishment of the International Criminal Court drew from these sources to establish legality. Once a state becomes a party to the Rome Statute, its obligations to cede sovereignty within its legal processes become binding. However, in 2013 the Kenyan Parliament passed a motion to withdraw Kenya from the International Criminal Court. The decision came about days before Vice President Samoei Ruto faced trial at The Hague following his indictment for committing crimes against humanity in the bloody 2007 election violence.[xxv] Prior to its withdrawal from the International Criminal Court, the state refused to comply with the requirements and responsibilities of being a party to the Rome Statute. Under international law, states have a responsibility to investigate and appropriately prosecute (or extradite for prosecution) suspected perpetrators of genocide, war crimes, crimes against humanity, and other international crimes. The ICC does not shift this responsibility. It is a court of last resort. Under what is known as the "principle of complementarity," the ICC may only exercise its jurisdiction

when a country is either unwilling or genuinely unable to investigate and prosecute these grave crimes.[xxvi] Kenya ratified the Rome Statute on 15 March 2005. The ICC, therefore, may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Kenya or by its nationals from 1 June 2005 onwards.[xxvii] Although states are legally bound to comply, and legality is essential in administering a tribunal or court, states such as Kenya have simply withdrawn from the proceedings and refused to cede sovereignty in their legal processes. Legality, by itself, is not a sufficient condition for why states cede sovereignty in their legal processes.

Suspension of Sovereignty

An additional misconception of why states cede sovereignty in their legal processes in the pursuit of prosecuting war crimes, crimes against humanity, genocide, and aggression is that the sovereignty of the state emerging from conflict is suspended. Over the last 25 years, international humanitarian law and international human rights law has grown in procedure and substance. This is evident with the proliferation of numerous international conventions and treaties within the international community. An emphasis on human rights was the paramount concern prompting the emergence of modern international criminal law and placing the protection of human rights as *erga omnes*.[xxviii] Human rights violations are no longer merely a moral matter but also reflect a legal breach. The two converge, thus allowing for the suspension of certain parameters of sovereignty that were previously monopolized by the nation-state. The inauguration of the International Criminal Court in 2003 is but one example of this trend.[xxix] A contentious debate now exists about the functions of sovereignty within a globalized international system.

On one side of this argument rests the premise that adherence to globalization and the liberal democratic institutions of the post-Second World War modifies sovereignty because

human rights place checks on what sovereign states can and can not do. Thus, any violation of human rights suspends sovereignty as the international community is bound to act in response. Accepting this position as valid repudiates the need for states to cede sovereignty in their legal processes because of the modifications on sovereignty that human rights bring to bear. This is problematic for two reasons: the first is consent, and the second is the concept of *de facto*[xxx] possession. State consent implies a notion of sovereignty and not that sovereignty is suspended. If sovereignty were suspended, the need for the state to consent to have international criminal law supersede or complement a state's legal processes would not be required. State consent can also be linked to *de facto* possession or control. At the cessation of hostilities, a belligerent party, in fact, possesses control of a territory by right or not, and these parties render consent to international institutions for establishing tribunals or special courts. Therefore, the suspension of sovereignty is insufficient to answer why states cede sovereignty in their legal processes to prosecute war crimes, crimes against humanity, and genocide.

Ceding Sovereignty because of the Principle of Universal Jurisdiction (UN-based).

Universal jurisdiction is the ability of the domestic judicial systems of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals.[xxxi] Universal jurisdiction has recently become a more popular and accepted mechanism aiding with the legality in seeking adjudication of war crimes, crimes against humanity, genocide, and aggression. Many states, particularly in Africa, claim that the universality principle is being used by Western countries and, in particular, by some European countries, as a subtle and pernicious way of interfering in the sovereignty of those African countries in which the defendants live. African countries also insist on the emergence of a double standard in international criminal justice: in their view, Western countries

or other great powers whose state officials engage in war crimes or crimes against humanity, in fact, eschew any effective prosecution because those countries have remained outside the ICC and, in addition, fail to prosecute their own nationals.[xxxii] In the hybrid tribunal of the Extraordinary African Chambers, the government of Senegal opted to enter into an agreement with the African Union rather than the United Nations because of conceptions surrounding western bias toward African defendants. While universal jurisdiction may also be used to answer why international tribunals and courts are established, they do not answer why states voluntarily cede sovereignty in their legal processes. What is missing here is also the factors, reasons, and motivations behind why states allow international criminal law to infringe on domestic legal systems.

Argument & Discussion: Why States Cede Sovereignty to International Law

This section presents the main argument of the article. It identifies the juncture of when sovereignty is ceded to international law, investigates the concept of sociological legitimacy, changing public perceptions on what factors affect sociological legitimacy, its impact on the courts, and its implications on the main argument. It then utilizes the international relations theories of realism and liberalism to analyze state behavior in post-conflict states.

Main Argument

Why do states voluntarily cede sovereignty to international law – and why do they do so to varying degrees? This can be explained by political actors seeking to exercise power by attempting to show the public that the state is unbiased and accountable. Doing this garners them broad public support, which legitimizes the judicial system and other state governing institutions. These political leaders are thus acting in their own interest to sustain their own power.

Establishing broad public support for state institutions– in a process known as sociological legitimacy – aids states in transitioning from *de facto*[xxxiii] sovereignty to *de jure*[xxxiv] sovereignty, domestically and within the international community. In essence, states and their leaders cede sovereignty (in the short term) to gain sovereignty (in the long term).

The Juncture of when Sovereignty is Ceded

United Nations Resolutions are enacted to establish peacekeeping missions in conflict states to assess the situation on the ground. These peacekeeping missions help countries navigate the difficult path from conflict to peace. They possess unique strengths, burden sharing, and an ability to deploy troops and police from around the world, integrating them with civilian peacekeepers to address a range of mandates set by the United Nations Security Council and General Assembly.[xxxv] An additional function of these peacekeeping missions is to establish the protocol for the adjudication of heinous violations of human rights. In every instance where a tribunal or hybrid court has been established, an agreement between the state and an international body such as the United Nations, European Union, or African Union is present in the founding documents of the tribunal or court.[xxxvi] With the consent of the belligerents, who possess *de facto* control, tribunals or hybrid courts are established. The agreements to which the state allows these missions to proceed and consent to establish and maintain an international tribunal or hybrid court displays the juncture at which the "ceding of sovereignty" occurs in the state's legal process.

Sociological Legitimacy

When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the

relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.[xxxvii] Sociological legitimacy's end game is public acceptance and widespread public support, which leads to state legitimacy. Dissent may be present, but the overall decision or authority remains intact. In turn, other state governing institutions and functions become sociologically legitimate, re-establishing the rule of law and domestic social contract, which was nullified during the conflict.

Widespread public support or sociological legitimacy of the tribunal or court is an essential first step towards reconciliation and reconstruction in post-conflict states. Both international criminal tribunals and hybrid courts present unbiased judicial adjudication. By ceding sovereignty within its legal processes, the state is attempting to display to the public, which consists of belligerents from all sides, that it is willing to be held accountable and to hold accountable those that possessed the most responsibility for committing war crimes, crimes against humanity, genocide, and aggression. It has been observed that victims tend to prioritize diverse measures to address the consequences of large-scale violence. Among those measures, we find: the acknowledgment of their injury, the reparation of harms (material and non-material), and the emergence of the truth about what happened.[xxxviii] Displaying truth, unbiasedness, and accountability acknowledges that the state is committed to reconciliation and the reconstruction of social and political fabrics. This infers public trust, confidence, and acceptance. Additionally, it displays that the law is applied evenly, reestablishing the rule of law. Unbiasedness and accountability lessen the animosity between the belligerents as both redress and relief are afforded to victims of such heinous crimes regardless of which side they identify with.

Public acceptance and discourse have changed the nature of selection between an international criminal tribunal or hybrid court. The first international criminal tribunals arose at

the end of the Second World War at both Nuremberg and Tokyo. Allied Powers claiming *de facto* control over territories asserted judicial primacy, which spurred what is controversially known as "victor's justice," as German and Japanese war crimes were punished with little to no account given to Allied war crimes. Additionally, There is far less compensation for victims of international crimes as a result of *ad hoc* tribunals because of the separation of justice from the crime. These removal mechanisms, which cause the significant deficiencies enumerated above, result from the *ad hoc* tribunal's failure to respect state sovereignty.[xxxix] These tribunals were too international in nature, with little to no involvement in adjudication from domestic states. Perpetrators were removed from the cultural and legal expectations of the state where they performed the crime and were scrutinized under foreign standards. Victims could not participate in the trial nor be present for the punishment. Hybrid courts emerged as a solution to domestic criticisms of international criminal tribunals. Hybrid tribunals allow for such flexibility in interpreting universal standards into specific national laws rather than intrusively supplanting domestic law with international standards.[xl] Hybrid courts keep the perpetrator and crime local instead of removing them to a foreign venue. While there are certain *jus cogens* norms that are held to both international standards which possess universal acceptance, perpetrators who are most responsible are prosecuted with deference to the domestic laws and not solely under international jurisprudence that represents the international community's view on norms that may conflict with that of the state in which these crimes transpired. If domestic law does not possess the substantive or procedural law to prosecute these crimes, international law augments domestic courts to provide redress and relief. Public perception and acceptance through sociological legitimacy are thus attained because of the respect that the hybrid court has for local laws and customs while still having the ability to resort to international criminal law if redress or

relief is not attained at the domestic level. The varying degrees to which states cede sovereignty is dependent on what the public will accept in terms of international judicial primacy or complementarity and the status of the legal system within the conflict state.

The legitimacy of law or legal institutions may make a significant difference to what agents have a moral reason to do. Legal rights and obligations are frequently treated as conclusive reasons for action in both private deliberation and public justification or criticism.[xli] When broad public acceptance of the court or tribunal is present, even with dissent, the legal system within the state is legitimized, establishing the first instances of the rule of law. In the eyes of the public, the law is now just within the conflict state. The law is clear, publicized, stable, and applied evenly. It ensures human rights, property, contract, and procedural rights.[xlii] Heinous violations of international law are checked, and reconciliation is initiated.

Legality combined with sociological legitimacy is jointly sufficient in understanding why states cede sovereignty in their legal processes. The principle of legality stipulates that no defendant may be punished arbitrarily or retroactively by the state. Additionally, it holds that no person is to be superior to the law. The nature of international criminal law in which tribunals and hybrid courts function primarily is rooted in individual criminal responsibility. States that cede sovereignty in their legal processes to prosecute these crimes display to the public that it is willing to be held accountable and hold accountable those most responsible which is legal. This indicates an unbiased justice system which in turn receives sociological legitimacy from the public. Sociological legitimacy combined with legality enables the state to transition from *de facto* sovereignty to *de jure* sovereignty. With the state in *de jure* control, the government and its various apparatuses are considered legal and legitimate within their territory and by other states.

International Relations Theory: Realism, Liberalism, and State Behavior

Realism

The international relations theory of realism postulates that international politics are anarchic and that sovereign states are the principal actors in international politics. Its main tenets suggest that states are rational unitary actors motivated by their national interests, with the state's primary goals being national security and survival.[xliii] Additionally, realists consider power to be an end in itself. Realism is in general conflict with international law. Realism focuses on competition and the balance of power, whereas international law is rooted in international cooperation and interdependence. International law is enshrined in conventions, treaties, and standards which are indicators of international cooperation. Realists hold that international law is a factor in inter-state relations, but the defining characteristic of the international system is anarchy with no higher authority to enforce violations of international law, and the most important empirical reality is national power.[xliv] International rules will often prove ineffective in restraining the struggle for power. States will interpret them to their own advantage, and so international law will be obeyed or ignored according to the interests of the states affected.[xlv] It seems unlikely that realism can explain state behavior with respect to international law. However, the main argument asserts that states cede sovereignty to gain sovereignty. Political actors within the state seek sociological legitimacy to exercise *de jure* sovereignty which grants the state exclusive power to exercise exclusive jurisdiction within its territories. This is a unique example of how realism is not in conflict with international law. Realism explains the *raison d'état*[xlvi] of why a state cedes legal sovereignty to attain sociological legitimacy. By ceding sovereignty in their legal systems and attaining sociological legitimacy, states and political leaders are acting in their own interests by using international law to sustain their own power and

institutions, making the state's primary goals its own national security and survival. States act in their own national interests to achieve stability and exert authority over their territories, which their populations accept as both legal and legitimate. Realism also tells us sovereign states are principal actors in international politics. The state's goals are to attain the status of statehood under the provisions of the Montevideo Convention[xlvii], which cements the state's position as an international legal personality under customary international law. This designation gives states the capacity and authority to interact with other states on the international stage by creating contractual relationships and legally binding rules for themselves. Additionally, states afflicted by these ethnic conflicts and wars of independence are usually smaller states and differ in their goals from that of great or medium power states. With greater protections afforded to smaller states under international law from aggressors, states can maintain the balance of power, ensuring state survival.

Liberalism

The international relations theory of liberalism posits that interdependence and peaceful growth create stronger connections within the international community. Liberals focus primarily on state-society relations, which is why the emphasis on human rights is critical to this theory.[xlviii] States work in coordination for mutual benefit to prevent conflict through diplomacy and strengthening political and economic relationships within the international system. Liberal institutions support the global international order, and international law governs state conduct and behavior. In describing why states cede sovereignty in their legal processes through the lens of liberalism, because there is no mode of enforcement of international criminal law outside of national judiciaries, cooperation and trust are essential for international criminal law.[xlix] Cooperation and trust by the state in adjudicating these war crimes display a state's willingness

to safeguard and uphold human rights. By ceding legal sovereignty, the state is adhering to human rights principles protected by international law, a cornerstone of liberal principles and ideals. The state is holding itself up to the international norms projected by liberalism. An international social contract between the state and the international community is formed. *De jure* Sovereignty enables the state to participate on the global stage through coordination and cooperation as it has the authority to enter into conventions and treaties with other states through human rights, economic growth building, and trade. These states also contribute to the changing nature of international criminal law. Following the shared values and cooperation that liberalism projects, decisions made in these courts or tribunals, both procedural and substantive in nature, set precedence and contribute to the sources of international criminal law, which are then shared and utilized by future tribunals and hybrid courts.

Realism and liberalism permit us to understand and try to make sense of the state behavior that affects the world around us. Each of them represents a different theoretical perspective of state behavior through various lenses. While they are opposing theories, each explains state behavior with respect to using international law. Both realism and liberalism converge in answering why states cede sovereignty to international law to prosecute war crimes, crimes against humanity, genocide, and aggression. Realism explains the behavior of post-conflict states acting in self-interest to consolidate, sustain and exercise power domestically. Liberalism explains state behavior once power is attained and how states exercise this power through cooperation and coordination within the global community.

Case Studies: Sierra Leone, Cambodia, Kosovo, Bosnia and Herzegovina.

This section discusses the indicators of sociological legitimacy and factors that indicate state power both domestically and within the international system. It applies empirical evidence to the main argument within the cases of Sierra Leone, Cambodia, and Kosovo. The last case, Bosnia and Herzegovina, will be analyzed through a semi-IRAC (issue, rule, analysis, and conclusion) format.

The Indicators of Sociological Legitimacy

Sierra Leone, Cambodia, Kosovo, and Bosnia and Herzegovina have all experienced an armed conflict that resulted in war crimes, crimes against humanity, genocide, or aggression, prompting international intervention. In the cessation of hostilities between belligerents and following United Nations Security Council Resolutions, various international missions were created to establish special *ad hoc* tribunals or hybrid courts to investigate and prosecute these crimes. By ceding legal sovereignty political leaders are attempting to secure sociological legitimacy to sustain and exercise power. The indicators of sociological legitimacy considers the representativeness and openness of the state and its relationship with its citizenry.[l] It considers the openness and fairness of the political process in terms of political rights existing for competing entities in government and the makeup of government that is representative of the people. Indicators of sociological legitimacy take into account free and fair elections, both in terms of perception and monitoring.[li] It also considers the ability of the state to exercise basic functions that infer a population's confidence, trust and acceptance in its government and institutions, such as the ability to collect taxes or render judicial decisions by the courts.[lii] The presence of the rule of law[liii] is also an indicator of sociological legitimacy because it does not depend simply on the formal rules and procedures of states, but also on the actual and the

perceived functioning of those rules and procedures.[liv] These indicators will be utilized throughout each case study.

Sierra Leone

After an 11-year civil war between the Revolutionary United Front (RUF) and Liberian forces of Charles Taylor's National Patriotic Front attempting to overthrow the sitting government of Joseph Momoh came to an end, an estimated 50,000 people were killed as a result of various war crimes and crimes against humanity. In 2002 the government of Sierra Leone requested help from the United Nations to establish a special court to address the seriousness of international crimes committed against civilians and United Nations peacekeepers.[lv] This resulted in a ceding of Sierra Leone's sovereignty within its legal processes and the creation of the Special Court for Sierra Leone (SCSL). Mandated to prosecute those "bearing the greatest responsibility," it was the first hybrid international tribunal incorporating domestic law with international criminal law.[lvi] The Special Court For Sierra Leone was composed of mixed domestic and international staff. The court is unique in nature as it was the first to prosecute a sitting head of state and investigate the use of child soldiers.

The court received wide public support in its proceedings as an interrelationship between the SCSL and the establishment of the Truth and Reconciliation Commission provided a forum for victims and perpetrators of human rights violations to tell their stories to both initiate and facilitate reconciliation. Within the same year of the installation of the SCSL and Truth and Reconciliation Commission, President Alhaji Ahmad Tejan Kabbah and the Sierra Leone People's Party (SLPP) established a Constitutional Republic through a fair and free election. Kabbah declared the civil war officially over in early 2002. Tens of thousands of Sierra Leoneans across the country took to the streets to celebrate the end of the war. Kabbah went on

to easily win his final five-year term in office in the presidential election later that year, defeating his main opponent Ernest Bai Koroma of the main opposition All People's Congress (APC), with 70.1% of the vote, the largest margin of victory for a free election in the country's history. International observers declared the election free and fair.[lvii] Free and fair elections combined with the widespread support of the Truth and Reconciliation Commission and the Special Court for Sierra Leone are indicators of sociological legitimacy. In displaying truth, unbiasedness, and accountability, the Truth and Reconciliation Commission and the Special Court for Sierra Leone acknowledged that the state was committed to reconciliation and the reconstruction of the social and political fabric. Victims in the general public prioritized diverse measures to address the consequences of large-scale violence. Among those measures is the acknowledgment of their injury, the reparation of harms, and the emergence of the truth about what happened. The Court also displayed to the general public that the law was applied evenly, as redress and relief were provided to victims from all sides of the conflict inferring trust, confidence and acceptance, legitimizing the judicial system within Sierra Leone. Analyzing this through the lens of realism, with sociological legitimacy attained in Sierra Leone, President Kabbah and the SLPP acted in the state's own interests by using international law to sustain and consolidate power to ensure Sierra Leone's survival. This granted them the *de jure* right of sovereignty to govern Sierra Leone. Additionally, free and fair elections in Sierra Leone are indicators of sociological legitimacy because they display the representativeness and openness of the state and its relationship with its citizenry, as well as displaying that political rights were present for competing entities within the state.

The Special Court for Sierra Leone made its final major decision on 26 September 2013 when its Appeals Chamber upheld the 50-year sentence handed down to former Liberian

President Charles Taylor. The court ruling in April 2012 found Mr. Taylor guilty of five counts of crimes against humanity, five counts of war crimes, and one count of other serious violations of international humanitarian law perpetrated by Sierra Leone's Revolutionary United Front (RUF) rebels, who he supported.[lviii] Since the end of the mandate of the SCSL, the Residual Special Court for Sierra Leone was established to carry on the legal responsibilities of the SCSL. This residual court was established between the United Nations and the Government of Sierra Leone, signifying that Sierra Leone's transition from *de facto* sovereignty at the end of the civil war to *de jure* sovereignty has given it the status of an international legal personality, effectively giving the state the power to engage in entering and ratifying agreements and treaties within the international community. Sierra Leone has become a signatory or party to various bilateral and multilateral human rights and economic treaties.[lix] When viewed through the lens of liberalism, Sierra Leone is both cooperating and contributing to the shared values of the international community by continuing its practice to ensure the protection of human rights law. Today the government of Sierra Leone has retained sociological legitimacy and its ability to exercise power as it possesses a functioning government as freely elected national legislative representatives determine the government's policies. Ethnic and religious minorities typically enjoy full political rights and electoral opportunities.[lx] By ceding sovereignty in its legal process short term, Sierra Leone has gained sovereignty in the long term.

Cambodia

In 1997, the Cambodian government requested that the United Nations assist in establishing a tribunal or court to prosecute members of the Khmer Rouge that violently seized power in 1975 and was subsequently overthrown in 1979. In the period when the Khmer Rouge was in control of Cambodia, an estimated 1.7 million people were killed from starvation, torture,

execution, and forced labor. In 1991 following the Paris Peace Accords, the United Nations Transitional Authority in Cambodia (UNTAC) provided the path for national elections. The result was an uneasy political relationship between the Cambodian People's Party (CPP) and the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC). Emerging as the more powerful of the two parties, the CPP attained government control, maintaining a constitutional monarchy. The CPP won the national election by a large margin, capturing 74 of 123 seats, reflecting a change in Cambodian views on what constitutes a legitimate government or a strong leader. While it is true to say that some voters supported the CPP because they were grateful for what it had done for them and the country in the past, other factors were also at play.[lxi] In 2001, the Cambodian National Assembly passed a law to create a court to prosecute the perpetrators most responsible for genocide. The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established. This hybrid court was created by the Cambodian government and the United Nations; it is independent of both of them, applying international criminal law standards to individual cases.[lxii] The government of Cambodia requested that for transparency and the benefit of the people,

> members of the court should consist of Cambodian judges but mixed with international judges and staff due to the international nature of the crimes. With deference to local laws and customs, a hybrid tribunal was selected for the purposes of adjudication.

By requesting a special hybrid court for transparency and for the benefit of the people, the CPP displayed unbiasedness and accountability to attain widespread public support. The rights provided to the victims regarding the ECCC are stated in the Cambodian Law under the Internal Rules of the ECCC. Victims have the opportunity to actively participate in judicial proceedings through complaints and civil parties, and they can seek collective and moral

reparation.[lxiii] Cambodian victims prioritized diverse measures to address the consequences of large-scale violence. Among those measures were the acknowledgment of their injury, the reparation of harms, and the emergence of the truth about what happened. In displaying truth, unbiasedness, and accountability, the CPP acknowledged that it was committed to reconciliation and the reconstruction of social and political fabrics. Additionally, victims are a subset of the general public. By giving the opportunity of victims to participate in judicial proceedings and providing relief in the form of moral reparations, the rule of law is present as all persons are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, making it an indicator of sociological legitimacy. As a result, the ECCC has received broad public support. With extensive outreach initiatives, more than 353,000 people have observed or participated in the court's proceedings. In Case 001, 36,493 people observed the trial and appeal hearings. In Case 002, the first trial involving multiple Khmer Rouge leaders, 98,670 people attended the 212-day trial hearings. In addition, nearly 67,000 people from rural areas in Cambodia have attended ECCC community video screenings.[lxiv] Widespread interest and participation in the judicial proceedings signify indicators of sociological legitimacy as it focuses on the public's confidence in state governing institutions. Participation in judicial proceedings by members of the public displays confidence in the Court and legitimizes the judicial system.

Starting in the early 2000s, the national economy began growing at an astounding rate of around 10 percent annually, substantially improving the living conditions for millions of Cambodians. Farmers could now find markets for their products. A new generation of entrepreneurs sprung up in search of opportunities from the economic boom, all due to policies set out by the CPP.[lxv] These are indicators of sociological legitimacy because they demonstrate

confidence in the decision-making abilities of the CPP. Indicators of sociological legitimacy focus on the population's level of confidence in state institutions and processes.[lxvi] Through implementing these policies the CPP was able to garner additional public support.

The motivations of the CPP in ceding legal sovereignty to international law can be assessed through the lens of realism. The CPP acted in its own interest to sustain its power. When assessed through the lens of liberalism, on the international level, Cambodia, under the control of the CPP, has utilized *de jure* sovereignty to enter into multiple economic treaties with the United States, South Korea, and ASEAN, cementing its place on the international stage as an international legal personality. Cambodia was seen to both cooperate and contribute to the shared values of the international community because of its practice of ensuring the protection of human rights law by utilizing the Court to prosecute serious violations of human rights. While this was true directly after the establishment of the ECCC, things have taken a turn for the worse.

While Cambodia experienced some reconciliation and stabilization after establishing the ECCC, the CPP has failed to prosecute certain members of the Khmer Rouge for war crimes and crimes against humanity due to them switching alliances during and after the conflict. Khieu Samphan, the former head of state of the Khmer Rouge, appeared before the Extraordinary Chambers in the Courts of Cambodia in August to appeal his 2018 conviction for genocide. In December, the tribunal dropped charges against Meas Muth, a lower-level official in the Khmer Rouge, citing insufficient evidence and the "absence of a definitive and enforceable indictment.[lxvii] Additionally, significant protests have been initiated against the CPP and its hold on power. In 2015, Cambodia passed two new election laws that permit security forces to participate in campaigns, punish parties that boycott parliament, and mandate a shorter campaign period of 21 days.[lxviii] The CPP also controls nine of nine seats in the National Election

Committee, and rampant corruption is present. This renders electoral laws and frameworks unfair and ineffective. The rule of law, which had a chance to flourish amid ECCC proceedings, has been diminished by corruption within the state.

Kosovo

In 1999, NATO intervention led to a cessation of hostilities between Serbian forces and the Kosovo Liberation Army (KLA) in the embattled region of Kosovo. The war caused the displacement of millions of Ethnic Albanians, Serbs, and Romani, in addition to tens of thousands killed by both Serbian Forces and the Kosovo Liberation Army. As a newly founded independent state, crimes against humanity and war crimes were tried under the International Criminal Tribunal for the former Yugoslavia (ICTY). With a declaration of independence in 2008, the Kosovar government ceded sovereignty in their legal processes to establish the Kosovo Specialist Chambers and Special Prosecutor's Office. This was put into legal effect pursuant to an international agreement that the Kosovo Assembly ratified.[lxix] Its mandate and jurisdiction are over war crimes and crimes against humanity committed in Kosovo from 1998-2000. The Chambers are located in the Hague and consist of an entire international staff with no judges coming from Kosovo. The Kosovo Specialist Chambers and Special Prosecutor's Office is the most recent hybrid tribunal to be created. Kosovo is not a signatory member of the Rome Statute, which established the International Criminal Court, nor does it have full membership in the United Nations, making international law litigation difficult. However, Kosovo entered into a contractual obligation with the European Union through the Stabilization and Association Agreement. Once entered into force, Kosovo will be required to cooperate with the ICC and the ICTY (Article 3) but is also required to abide by the Rome Statute of the International Criminal Court and, in this respect, take the necessary steps for its implementation at domestic level[lxx]

Kosovo's implantation of this at the domestic level comes via ratified amendments in its constitution. In the process of internationalizing its criminal justice system, Kosovo's constitutional changes through ratification by the Kosovo Assembly are similar to a principle in American Legal Doctrine known as the Charming Betsy Canon, which posits that congressional statutes should be construed in harmony with international law.[lxxi] By absorbing and harmonizing international law into its domestic constitution, Kosovo's resolve to prosecute violations of human rights is strengthened. It has more teeth to enforce a violation of an international *jus cogens*. Kosovo has entered into and ratified various bilateral and multilateral human rights and trade treaties.[lxxii] These are all indicators that the state is indeed exercising *de jure* sovereignty as it is regarded as a legitimate international legal personality despite not being recognized by the United Nations. When viewing this through the lens of liberalism, Kosovo, as an international legal personality, is acting with liberal principles by upholding and safeguarding human rights. Secondly, its ability to engage with other states within the international system signifies cooperation and coordination.

On the domestic level, criticisms of the ICTY were twofold, the first being that it did not go far enough to prosecute those most responsible, and it was biased in that it prosecuted members of Serbian ethnicity and not those of Albanian Ethnicity. As a form of a residual court of the ICTY, the Kosovo Specialist Chambers and Special Prosecutor's Office now focuses on members of the Kosovo Liberation Army (KLA) who have committed crimes against the Kosovar Serbian minority and suspected conspirators who aided the Serbian regime. Some members of the Kosovo Liberation Army who committed heinous violations of international law integrated into influential members of society, making the sociological legitimacy of The Kosovo Specialist Chambers and Special Prosecutor's Office and other state governing

institutions difficult to attain. Ethnic Albanians form the majority in Kosovo, with over 93% of the total population; significant minorities include Bosniaks 1.6%, and Serbs 1.5%. [lxxiii] Because Kosovar Albanians consider Serbians as the aggressors in the conflict, and the vast majority of human rights violations were committed on Kosovar Albanians by Serbians, the public feel that it is wrong to prosecute former members of the KLA who were viewed as their protectors.[lxxiv] Nevertheless, indicators of sociological legitimacy are present. Kosovo is a Parliamentary Republic, and the current head of the government and other chief national authority figures are elected through free and fair elections.[lxxv] Free and fair elections in Kosovo are indicators of sociological legitimacy because they display the representativeness and openness of the state and its relationship with its citizenry, as well as displaying that political rights are present for competing entities within the state. Political pluralism and participation are also indicators of sociological legitimacy. Citizens have the right to organize in different political parties of their choice, providing a realistic opportunity for the opposition to support or gain power.[lxxvi] These are indicators of sociological legitimacy because it affirms the trust and acceptance of the government through civic participation. Parties in dissent have the opportunity to contest the government in an election displaying political pluralism and participation. There is a realistic opportunity for the opposition to increase its support or gain power through elections. In analyzing these factors through the lens of realism, establishing that sociological legitimacy was essential in establishing *de jure* sovereignty to sustain state power. Though there is dissent within the population, the authority of the government and the Kosovo Specialist Chambers and Special Prosecutor's Office remains intact. Additionally, By exercising its *de jure* sovereignty to ensure state survival and entering into agreements with the European Union to establish the Kosovo Specialist Chambers and Special Prosecutor's Office, the state is also ensuring a balance of

power with Serbia. Kosovo is a smaller state and differs in its goals from that of medium power states. Since its declaration of independence from Serbia and the constant threats that Serbia may attempt to reclaim the country, Kosovo is receiving greater protections under the cooperation and coordination of international law.

Bosnia and Herzegovina

Bosnia and Herzegovina was a republic that declared its independence after the fall of Yugoslavia. With no effective legal system to prosecute war crimes, crimes against humanity, genocide, and aggression, criminal cases from within the state were adjudicated in the International Criminal Tribunal for the Former Yugoslavia (ICTY). After the end of the mandate of the ICTY, the War Crimes Chamber in the Court of Bosnia and Herzegovina resumed its authority as a hybrid tribunal. Like the ICTY, the War Crimes Chamber in Bosnia and Herzegovina is responsible for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. When it was initially established, it was responsible for trying the cases of lower to mid-level perpetrators referred to it by the ICTY.[lxxvii] Bosnia and Herzegovina have also ratified several human rights treaties as a condition of recognition by the United Nations. Of these treaties is the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The Committee against Torture (CAT) is the body of ten independent experts that enforce the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It holds state parties accountable for human rights violations, systematically investigating reports of torture to stop and prevent this crime.[lxxviii]

A landmark case that the CAT decided and has significant meaning in international law where adjudicators have used various approaches to punish perpetrators and deliver justice to

victims is *Mrs. A v. Bosnia and Herzegovina*. Two issues are relevant. First, is Mrs. A entitled to fair and adequate compensation, including free medical and physiological care from the state of Bosnia and Herzegovina, and second, is rape considered a form of torture? The applicable rules are Article 14 in conjunction with Article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

In 1992 the complainant (Mrs. A) lived in Semizovac, an area controlled by the forces of Respublika Srpska during the armed conflict in Bosnia and Herzegovina. In 1993 Mr. Slavko Savic, a member of Republike Srpske, forcefully entered her home armed with a firearm, brutalized her, and forcefully put her into his car. He took the complainant to a bus station and repeatedly raped her. Subsequently, Mrs. A became pregnant and had to terminate the pregnancy, leaving her with severe psychiatric conditions, including permanent personality disorder and chronic post-traumatic stress disorder, which degraded her quality of life. Mrs. A remained in the same region where the Vojska Republike Srpske controlled civil functions and lived in a constant state of fear due to widespread threats and violence at the hands of state officials. She did not report the rape as she feared retribution.

In June 2015, the Court of Bosnia and Herzegovina found Slavko Savic responsible for the rape and guilty of war crimes, sentencing him to 8 years in prison and ordering him to pay compensation to the complainant. Claiming he had no assets to pay, Mr. Savic defaulted on payments. Mrs. A never received compensation from him as an individual or from the State. The complainant then filed suit to receive compensation, but her case was dismissed in the domestic court, which ruled that such civil claims are subject to a statute of limitations of three to five years, leaving Mrs. A with no redress. After exhausting all domestic remedies to attain redress, the case was brought to the CAT.[lxxix]

Under Article 1 of the CAT, torture consists of 3 elements, (1) intentional infliction, (2) severe pain and suffering, both physical and mental (3) the act was committed by or at the acquiescence of the government. In applying fact to law, Mrs. A meets the criteria of a torture victim. The intentional infliction being rape and the severe physical and mental pain is the psychiatric condition that she still suffers. The act was committed by Mr. Savic, a member of the Republike Srpske, which is a part of the government. Under Article 14 of the CAT, victims of torture are entitled to compensation and rehabilitation.

The CAT's decision found that rape is a form of torture and directed Bosnia and Herzegovina to pay compensation and to ensure that she receives free and immediate medical and psychological care. Bosnia and Herzegovina was required to make an official apology to Mrs. A. Additionally, the state is required to implement an "effective reparations scheme" at a national level to provide all forms of redress to victims of war crimes, including sexual violence.[lxxx]

The indicators of sociological legitimacy:

1. The rule of law is present. Mr. Savic is held accountable for publicly promulgated laws, equally enforced and independently adjudicated. Additionally, his conviction is consistent with human rights principles. Sociological legitimacy is achieved as formal rules and procedures, as well as the actual and perceived functioning of the law, is attained.
2. The Court, which is an apparatus of state, rendered a decision. This is an indicator of sociological legitimacy as the state can exercise its basic functions and infers a population's confidence in government and institutions.

3. Allowing for the plaintiff's participation is an indicator of sociological legitimacy because it displays the representativeness and openness of the government vis-a-vis the courts and its relationship with its citizenry.
4. With Mrs. A unable to achieve redress and relief by the Court and to exhaust all domestic remedies, suit was brought to the CAT inferring the presence of a legitimate judicial system.

Bosnia and Herzegovina has been a party to the convention since October 1993, giving CAT jurisdiction over such legal matters. Additionally, the subjective territorial principle, in which a state may exercise jurisdiction concerning all persons or things within its territory, enabled the Constitutional Court of Bosnia and Herzegovina to prosecute and convict Mr. Savic of war crimes and compelled him to pay compensation to the complainant.

This indicates that the state possesses *de jure* sovereignty both domestically and internationally:

1. Domestically, the court, which is an apparatus of the state, applied jurisdiction over Mr. Savic and the crimes committed within its territory. It exercised its power by simply adjudicating the case and rendering a decision.
2. Internationally, the ability of Bosnia and Herzegovina to become a party to the CAT indicates that the state holds the designation as the international legal personality.

Mr. Slavic's lack of assets combined with the state's lack of funds to compensate Mrs. A prompted the Constitutional Court of Bosnia and Herzegovina to dismiss her civil claims on the grounds of statute of limitations. With all domestic remedies exhausted, and the unlikeliness of relief from the state, the CAT concluded that rape and other forms of sexual violence are

considered torture and that a statute of limitations prevents the right of compensation to torture victims, making the complaints rights to compensation enforceable. Domestically, the Constitutional Court of Bosnia and Herzegovina was able to provide a conviction, punishing the crime of rape, but failed to provide redress. The CAT was able to provide not only redress but, most significantly, specify that rape and other forms of sexual violence are considered forms of torture, which also set the stage of precedence for ensuring the right to fair and adequate compensation for future victims of rape or sexual violence. The elements of liberalism are present in interpreting the behavior of Bosnia and Herzegovina. *De jure* sovereignty was exercised by harmonizing international law into Bosnia and Herzegovina's domestic constitution. This displays Bosnia and Herzegovina's support and protection of human rights. Cooperation by the state with the international community is also displayed. The ability of Mrs. A to bring suit to the CAT displays coordination between Bosnia and Herzegovina and the international community. This coordination and cooperation have led to a contribution by both Bosnia and Herzegovina and the CAT to international law by setting the precedence that rape and sexual violence indeed constitute torture, future victims of these crimes can receive legal remedy and binding justice.

Conclusion

The conclusion will summarize the main argument and discuss the limitations of this study. It will then discuss the successes and criticisms of internationalized criminal courts and closes by discussing the contributions of international criminal tribunals and hybrid courts to international law.

Summary

Conventional wisdom suggests that sovereignty is inalienable. It grants a state supreme authority within its own territory and allows it to interact with other states within the international community. War crimes, crimes against humanity, genocide, and aggression are serious violations of human rights that prompt the international community to intervene under principles of customary international law. This study proposes that if sovereignty is indeed sacrosanct, then why would a state concede to an international body to prosecute individuals they have authority over? The main argument asserts that political leaders and states cede sovereignty in the short term to gain sovereignty in the long term. When they do so, it is through explicit consent within the legal processes of its domestic judicial system. Within this study, it is determined that political leaders within the state attain sociological legitimacy through unbiasedness and accountability, which garners them widespread public support, legitimizing the domestic judicial system and other state governing institutions. Additionally, the varying ways states cede sovereignty in their legal processes is explained by the capacity or lack thereof of the existing domestic judicial system and public acceptance of a complete or partial concession to international law. Both realism and liberalism converge in answering why states cede sovereignty to international law to prosecute war crimes, crimes against humanity, genocide, and aggression. Realism explains the behavior of post-conflict states acting in self-interest to consolidate, sustain and exercise power domestically. Liberalism explains state behavior once power is attained and how states exercise this power within the global community with cooperation and coordination. Establishing sociological legitimacy aids states in transitioning from *de facto* sovereignty to *de jure* sovereignty nationally and within the international community.

Limitations

One of the limitations of this study is that it explores the impact of four hybrid courts within their respective conflict states. There are more cases to consider in applying the theoretical model defined by this study.[lxxxi] Additional research is required to take a deeper look at all of them which can potentially yield more evidence. A second limitation of this study is; because of the abundance of scholarship in both international law and international relations about internationalized criminal courts, sovereignty, legitimacy, etc., there are many areas of contention. Some scholars may agree with one definition or analysis but disagree with others. For example, there are definitions and criteria of what legitimacy entails in both international law and international relations scholarships. Many of these definitions and analysis have conflicts and intersections that are used to determine if something is legitimate, including what indicators make it such. This study focuses on sociological legitimacy, state legitimacy, and its indicators within the context of internationalized criminal courts and post-conflict states.

Another limitation of this study is that only two international relations theories were utilized in conjunction with the main argument. While liberalism and realism provide solid answers as to why states cede sovereignty to international law to prosecute war crimes, crimes against humanity, genocide, and aggression, other theories of international relations can provide additional answers. For example, Constructivism asserts that significant aspects of international relations are shaped by ideational factors (historically and socially constructed), not simply material factors.[lxxxii] It can be useful in ascertaining its ramifications on state behavior in the context of human rights and international criminal law. Additionally, a deeper analysis of the

subsets of realism and liberalism, like structural realism or neoliberalism, can also provide additional explanations.

Successes and Criticisms

The success of internationalized criminal courts is not measured by a state's political stability or strength in its democratic processes. Nor is it measured in terms of the number of cases it adjudicates or renders decisions on. Many states that have endured ethnic conflict, wars of independence, and civil wars and have undergone international intervention with internationalized adjudication processes range from politically stable to politically volatile. Some are even considered failed states or are still in the reconciliation and reconstruction process. A criticism of internationalized criminal courts is that they teeter on the border of legality. Both in procedural and substantive law. But specifically in that, international criminal law can be viewed as *ex post facto* law, or law that retroactively changes the legal consequences of actions that were committed. Another criticism of internationalized criminal courts is that they do not go far enough to prosecute lower-ranking members of organizations that initiated these crimes.

Success is measured by the ability of the tribunal or hybrid courts ability to fulfill its mandate to prosecute those most responsible for war crimes, crimes against humanity, genocide, and aggression. The overall success of international intervention and international adjudication is that they both cause a cessation of mass killings. International law and its subset international criminal law is not uniform nor universal, and the ability of its practitioners to adapt to the various nuances reflects the complexity of the conflict and domestic laws, customs, and traditions. Since both Nuremberg and Tokyo to the most recent hybrid tribunal active today, procedural and substantive law has been amended and built upon, creating multiple avenues for

which both international adjudicators and scholars can utilize to not only punish those most responsible but provide relief to victims.

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Endnotes

[i] in fact, or in effect, whether by right or not,

[ii] A de jure government is the legal, legitimate government of a state and is so recognized by other states. In contrast, a de facto government is in actual possession of authority and control of the state.

[iii] the law that governs the way in which warfare is conducted. IHL is purely humanitarian, seeking to limit the suffering caused. It is independent from questions about the justification or reasons for war, or its prevention. "Jus in Bello - Jus Ad Bellum." International Committee of the Red Cross, November 30, 2017.

[iv] actions or conduct which is a constituent element of a crime, as opposed to the mental state of the accused.

[v] https://www.law.cornell.edu/wex/international_criminal_law

[vi] Individual Criminal Responsibility - the basic principle of criminal law that individual criminal responsibility for a crime includes attempting to commit such crime, as well as assisting in, facilitating, aiding, or abetting, the commission of a crime. It also includes planning or instigating the commission of a crime.https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102

[vii] "Sources of International Law" https://libguides.uchastings.edu/international-law/sources

[viii] in fact, or in effect, whether by right or not.

[ix] created or done for a particular purpose as necessary. Temporary

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[xxiv] Article 39 UN Charter - The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. Article 41 - The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations

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[xxviii] obligations that are owed towards all

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[xxxiv] A de jure government is the legal, legitimate government of a state and is so recognized by other states. In contrast, a de facto government is in actual possession of authority and control of the state.

[xxxv] “United Nations Peacekeeping,” United Nations (United Nations), https://peacekeeping.un.org/en.

[xxxvi] On August 22, 2012, the Establishment of the Extraordinary African Chambers within the Senegalese court's agreement was signed between the African Union and the Government of the Republic of Senegal. The Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement) was promulgated on October 27, 2004. On April 23, 2014, the Law on ratification of the international agreement (“The Exchange of Letters”) was adopted between the Republic of Kosovo and the European Union. The agreement was based on the European Union Rule of Law Mission in Kosovo. On August 9, 2000, the UN Permanent Representative of Sierra Leone sent a letter on behalf of President Alhaji Ahmad Tejan Kabbah to the United Nations Security Council, requesting assistance in the establishment of a special court for Sierra Leone to address serious crimes against civilians and peacekeepers during the civil war. On August 7, 2014, the transitional government of the CAR and the UN Multidimensional Integrated Stabilization Mission the CAR (MINUSCA) signed a MoU requiring the government to establish a “Special Criminal Court”.In 2007, the Lebanese government signed an agreement for the Special Tribunal for Lebanon, but the Prime Minister said that the Speaker refused to convene parliament and the agreement could not be ratified.UN Security Council Resolutions 1503 (2003) and 1534 (2004) requested domestic courts make efforts to assist with War Crimes prosecutions in Bosnia and Herzegovina, Serbia and Montenegro, Republika Srpska, and Croatia..

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[xlv] Korab-Karpowicz, W. Julian. “Political Realism in International Relations.” Stanford Encyclopedia of Philosophy. Stanford University, May 24, 2017. https://plato.stanford.edu/entries/realism-intl-relations/.

[xlvi] purely political reason for action on the part of a ruler or government

[xlvii] “Montevideo Convention on the Rights and Duties of States,” The Faculty of Law,://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml.

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[l] “P1: State Legitimacy.” Fragile States Index. https://fragilestatesindex.org/indicators/p1/.

[li] ibid

[lii]ibid

[liii] Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are: Publicly promulgated. Equally enforced. Independently adjudicated. And consistent with international human rights principles.

[liv] Wojciech Sadurski, Michael Sevel, and Kevin Walton, “The Rule of Law and State Legitimacy ,” in Legitimacy %the% State and Beyond (Oxford: Oxford University Press, 2019).

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[lxviii] ibid

[lxix] Kosovo Specialist Chambers & Specialist Prosecutor's Office, May 20, 2016, https://www.scp-ks.org/en.

[lxx] July 2014 and the Council of the EU agreed to its signature on 22 October 2015 - The SAA focuses on respect for key democratic principles and core elements that are at the heart of the EU's single market. The SAA will establish an area that allows for free trade and the application of European standards in other areas such as competition, state aid and intellectual property in Kosovo.

[lxxi] The Charming Betsy Canon, Separation of Powers, Harvard Law Review. https://harvardlawreview.org/wp-content/uploads/pdfs/customary_international_law.pdf. PP. 1

[lxxii]Brussels Agreement (2013)

Central European Free Trade Agreement

Treaty establishing the Energy Community

Hague Conventions of 1899 and 1907

Articles of Agreement of the International Bank for Reconstruction and Development

Articles of Agreement of the International Development Association

Articles of Agreement of the International Finance Corporation

Articles of Agreement of the International Monetary Fund

Convention establishing the Multilateral Investment Guarantee Agency

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

[lxxiii] "Demographics of Kosovo ." Kosovo demographics profile.https://www.indexmundi.com/kosovo/demographics_profile.html.

[lxxiv] Maria Stefania Cataleta and Chiara Loiero, "The Kosovo Specialist Chambers the Last Resort for Justice in Kosovo?," The Kosovo Specialist Chambers The last resort for justice in Kosovo? / 978-620-3-46295-1 / 9786203462951 / 6203462950 (LAP Lambert Academic Publishing, February 23, 2021), https://www.lap-publishing.com/catalog/details/store/gb/book/978-620-3-46295-1/the-kosovo-specialist-chambers-the-last-resort-for-justice-in-kosovo.

[lxxv] "Kosovo: Freedom in the World 2022 Country Report." Freedom House. https://freedomhouse.org/country/kosovo/freedom-world/2022.

[lxxvi] "Kosovo: Freedom in the World 2022 Country Report." Freedom House. https://freedomhouse.org/country/kosovo/freedom-world/2022.

[lxxvii] "Hybrid Justice." Hybrid Justice. https://hybridjustice.com/.

[lxxviii] "Committee against Torture." OHCHR, https://www.ohchr.org/en/treaty-bodies/cat

[lxxix] "Home Page - Trial International." https://trialinternational.org/wp-content/uploads/2019/08/Decision-CAT-A-BIH-2August2019.pdf.

[lxxx] "Bosnia: Landmark Decision for a Survivor of Sexual Violence." *TRIAL International*, 7 Dec. 2020, https://trialinternational.org/latest-post/bosnia-landmark-decision-for-a-survivor-of-sexual-violence/

[lxxxi] There are two Military Tribunals, Nuremberg and Tokyo. two International Criminal Tribunals, the International Criminal Tribunals of the Former Yugoslavia and Rwanda. Nine Hybrid or Special Courts: Extraordinary African Chambers, Extraordinary Chambers of the Court of Cambodia, Iraqi High Tribunal. Kosovo Specialist Chambers and Specialist Prosecutor's Office, Special Court for Sierra Leone, Special Criminal Court in Central African Republic, Special Panels of the Dili District Court, Special Tribunal for Lebanon, The War Crimes Chamber in Bosnia and Herzegovina.

[lxxxii] Alexandra Gheciu and William Curti Wohlforth, "Constructivism," in The Oxford Handbook of International Security (Oxford, UK: Oxford University Press, 2020), p. 17.