

## CHAPTER THREE

# THE CONSTITUTION OF INTERNATIONAL LAW: A SOCIOLOGICAL APPROACH

As discussed, the rising importance of international law after 1945 was marked by growing hostility towards positivist interpretations of international legal order, which defined the sovereign nation state as the main unit of analysis in international society. This was especially visible in the widespread construction of single persons as rights holders under international law, which was perceived as a principle that pierced the classical order of national sovereignty (Jessup 1947a: 406–8). Naturally, positivist ideas did not disappear in the post-war period. Many theorists retained only slightly modified variants on the positivist model of state authority (St Korowicz 1958: 150–51). Even theoretical architects of the UN, who were conceptually sympathetic to monist concepts of international law, recognized national sovereignty as the cornerstone of international society. This was clearest in the relevant writings of Kelsen (1944: 208). Core documents of international law at this time also persisted in employing positivist constructions of sovereign statehood. As mentioned, the inviolability of state sovereignty was clearly enshrined in Art 2(1) and Art 2(7) of the UN Charter and, in Art 38 of the Statute of the ICJ. An enduring positivist bias was also reflected in the International Law Commission's *Draft Declaration on Rights and Duties of States* (1949), Art 1 of which declared as follows: 'Every state has the right to independence and hence to exercise freely, without dictation by any other state, all its legal powers, including the choice of its own form of government'. Moreover, the UN's residual commitment to national sovereignty was strongly reflected in documents pertaining to the process of decolonization, and to related rights

of national self-government. The *UN Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) endorsed classical ideas of sovereignty, and it stated that all peoples have an inalienable right to complete freedom, to the national exercise of sovereignty and to the integrity of national territory.<sup>1</sup> Later, Article 1 of the ICESCR (1966) also remained close to sovereignty-based ideas of statehood. Despite this partial persistence of positivist principles, however, after 1945, international law was increasingly conceived as a free-standing legal order, supplanting the system in which sovereign state volition formed the basis of international society. Leading observers of the post-1945 legal order defined their objective in creating a system of international human rights law as ‘the limitation of the sovereignty of States’, and they challenged the conception of the state as a dominant unit in international society (Lauterpacht 1945: 211; 1947: 77; 1950: 8; Winter and Prost 2013 350). Typically, many theorists ascribed to international law a position similar to the position of constitutional law in domestic societies, which they saw as creating ‘rights of man as against the State’ (Lauterpacht 1945: 123). Even theorists hostile to the ‘menace of internationalism’ viewed the imposition of external legal restraints on the ‘domestic jurisdiction’ of national government as a pronounced – in fact, ‘ominous’ – tendency in post-1945 legal politics (Finch 1956: 311). Across the spectrum of enthusiasm, therefore, international law was observed after 1945 as an increasingly powerful *constitutional* check on the power of sovereign nation states.

This reaction against positivism and its central category of state sovereignty has led many observers to claim that, after 1945, the growth of the international legal system was imposed externally on national states, and it marked a decisive breach with patterns of legal formation within historically formed societies. Indeed, the rise in the power of international law after 1945 is commonly observed as the result of a series of elite-led normative agreements, which were strategically designed to relativize national sovereignty, and constitutionally to curtail the powers of national state institutions.<sup>2</sup> In particular, it is habitually argued that the post-1945 system of international law was designed by the victorious allied forces after World War II to prevent the renewed collapse of national states into the extreme political

<sup>1</sup> On the re-emergence of classical ideas of sovereignty during decolonization, see Jennings (2002: 29).

<sup>2</sup> See p. 70 above.

authoritarianism that had been widespread in the interwar period (see Henkin 1999: 4; Normand and Zaidi 2007: 16; Tomuschat 2008: 22; Bates 2010: 8). This intention was of course declared in the preamble to the UDHR, which pledged to prevent renewed perpetration of 'barbarous acts', associated with interwar dictatorships. As a result, a large body of legal literature has been produced which analyses the growth of international law, and especially international human rights law, as an immediate response to the experience of European fascism between the wars (see Brownlie 1964: 450; Cassese 1989: 30). This literature usually interprets the extension of supra-positive laws in the international domain as the consequence of a wide turn toward natural-law theory after 1945, entailing a rejection both of the formal positivist principles that supported both national-constitutional and international law in the interwar era and of the monolithic ideas of state sovereignty associated with positivism.<sup>3</sup> In political theory, similarly, the claim is widespread that international human rights were promoted after 1945 for the 'guaranteed control and limitation' of national states (Vincent 2010: 106). Central to such literature, generally, is the suggestion that the period of history leading up to 1939 was the era of sovereign states, and, after 1945, national sovereignty was at least relativized by the rising force of international law, dictating a constitutional grammar for and within national states. This perception of international law has proved very enduring, and it is broadly revived in contemporary inquiry. As discussed, influential positions in contemporary legal debates claim that international law, and especially the rights of single persons prescribed by international law, have established an international countervailing power, imposing normative constraints on the powers of national state institutions, thus amounting to a *global constitution*. The rejection of state-centric positivism in post-war international law has now re-appeared in the body of literature concerned with global constitutionalism, which also construes international law as a legal order that supplants national sovereignty, and whose origins are essentially external to national states and national societies.

*Contra* such assumptions, it is proposed here that the constitutional power of international legal norms cannot be adequately comprehended if the widening force of international law, and especially international human rights law, is attributed to processes of legal formation

<sup>3</sup> See, for example, Zayas (1975: 208), Henkin (1979b: 408) and Falk (2008: 16). The natural-law basis for early UN laws was clearly formulated in Lauterpacht (1945: 49).

located outside national societies. Further, the rise of international law cannot be construed as a process that invariably *restricted* the power of national states. To be sure, at a reflexive level, the normative instruments established after 1945 through the foundation of the UN and the Council of Europe were guided by deliberate moral concerns, especially by the desire to prevent future tyranny and to promote humanitarian education. The resultant promotion of international norms also meant, as discussed, that some acts of national states were subject to international jurisdiction, and the formal autonomy of states was, in some respects, constrained. Nonetheless, if observed sociologically, the growing constitutional power of international law after 1945 also contained structural, or *inclusionary*, dimensions, and it was partly driven by inner pressures affecting national societies and their institutions. As a result, the increasing constitutional authority of international law after 1945 cannot be explained, conclusively, as an occurrence that was imposed upon national states through extra-national factors. In fact, there are clear structural reasons for the formation of a more constitutionally consolidated international legal domain after 1945, and these reasons are closely linked to classical sociological processes. At one level, most obviously, the rise of international law was propelled by pressures on the *external structure* of national states. That is, pressures on the external structure of states were registered in international law, especially human rights law, and international law helped states to organize their reactions to the changing external realities of global society. At the same time, however, the emergence of an international legal system integrating national legal and political institutions in a vertical constitution was shaped by pressures affecting states in the *internal structure* of national societies, and causes of the rise of international law can be observed in the inner inclusionary fabric of national societies.

The account of international law offered in this and subsequent chapters contains a sociological critique of the common assumption that the gradual constitutional consolidation of international law after 1945 was stimulated by normative principles, prescribed externally to national societies. Such views, it is argued throughout, are themselves too strongly obligated to positivist or dualist analyses of international law, and they separate international law too seamlessly from social and historical factors within national societies. [Chapters 5](#) and [6](#) offer a sociological account of the specific origins of international law in the inner-societal dimension of statehood, examining pressures on the inner inclusionary structure of a number of different states, which led

to the elevation of international norms to a constitutional position. This chapter, however, examines the pressures on the *external* structure of states that stimulated the growth of international law, and it proposes a sociological explanation of the constitutional force of international law by focusing on the inter-state domain of global society. On this account, by 1945, national states were becoming incapable of meeting the demands for legislation and legal inclusion generated by the external environments in which they operated, and the expansion of international law was propelled by the increasingly complex mass of relations and demands for legislative inclusion in the inter-state arena. International law was reinforced after 1945, first, because it helped national states to compensate for weaknesses in *their external dimensions*, and international legal norms allowed national states to remedy problems in their external inclusionary structure, which, as entities founded in simple assertions of national sovereignty, they struggled to resolve. After 1945, in fact, international human rights law increasingly formed an inclusionary structure for the external dimension of statehood, and, far from restricting state autonomy, this structure was often an effective precondition for the stabilization of states as sovereign actors, able to produce legislation to address the external phenomena that they encountered. Like national constitutions, the constitution of international law was produced in order to secure the inclusionary structure of the political system, both in its global and in its national dimensions, and the global constitution evolved as an external extension of national constitutions, expanding a legal order to insulate states against pressures (especially escalating demands for legislation) to which they were exposed in their external functions.

#### THE GLOBAL INCLUSIONARY SYSTEM: THE SPREAD OF GLOBAL LEGAL PHENOMENA

Observed in a sociological perspective, the rise of international law, and especially human rights law, after 1945 was induced by the fact that many national states struggled to manage their reactions to phenomena in the sphere of inter-state relations, and they were increasingly subject to strain in their external structure. After 1945, notably, inter-state society as a whole began to assume truly global dimensions, the international arena was populated by many new states and new organizations, and new legal phenomena presented unprecedented regulatory challenges to national states, both new and

established. This meant that single states were required to produce an increasing volume of law to address international phenomena, and global society as a whole witnessed an exponential growth in its basic demand for, and consumption of, law. One result of this was that classical methods for authorizing law between states were overtaxed, and states required more expansive and more easily extensible resources for producing laws and for regulating inter-state exchanges. The rise of international law, and of international human rights law in particular, becomes sociologically explicable as part of this process of structural transformation. After 1945, international law evolved as an aggregate of norms, constitutionally situated above the jurisdiction of national states, which made it possible for states progressively to meet the demands of an increasingly global society, and it helped to establish a basic inclusionary structure for the global domain as a whole.

At a most obvious level, the sharply increasing importance of international human rights after 1945 altered the inclusionary structure of society because it produced a normative basis for *intergovernmental institutions*, and it allowed states to delegate some functions to free-standing organizations. In this context, international human rights expressed a normative vocabulary to determine acts of, and between, the increasing number of organizations that acted exclusively in the international domain. In the decades after 1945, international human rights norms were widely internalized as 'operational guidelines and directives' by a growing range of international organizations, and they projected a normative order in which organizations operating beyond stable jurisdictions were able both to legitimate and to regulate their activities (Wellens 2002: 15). This directive function of human rights is visible, for example, in the fact that prominent international organizations, in particular the UN itself, explained their inner functions and order through reference to international human rights instruments. Notably, at its founding, the UN defined its legal basis by indicating that, under Art 24(2) of the Charter, its organs had an implicit obligation to act in accordance with guiding principles of the UN, including human rights norms (Reinisch 2001: 136; Paust 2010: 11). The UN's legal personality was further formalized in the *Convention on the Privileges and Immunities of the United Nations* (1946). In the *Reparation* case (1949), accordingly, the ICJ construed the UN as endowed with a legal personality, able to assume and impute accountability in its exchanges with other legal persons. Even international organizations whose functions were not closely related to human rights, such as the International

Monetary Fund (IMF) and the World Bank, projected their functions, in part, as related to international human rights, and they proportioned their interaction with national states to the basic principles of public international law (see Skogly 2001: 192). To some degree, as discussed in Chapter 7, this function of rights can also be observed in large-scale economic entities, whose operations have a cross-jurisdictional dimension. At one level, the fact that international organizations defined their functions through reference to human rights meant that they could assume a legally founded personality, with corporate control over their members, and so participate in international governance in legally accountable fashion (Alvarez 2005: 264). At a different level, this use of rights by international organizations also meant that national states could easily transfer some responsibilities to inter-state organizations, and they could construct their delegation of functions to inter-state actors in legally determinate categories. In principle, this meant that inter-state bodies remained subject to legal control, and their functions were defined and regulated by a partial constitutional order.

On these points, to be sure, some caution is required. In their original conception, international organizations were not subject to human rights instruments, they were not bound by inter-state treaties, and they were not obliged to submit to formal review by judicial actors. Articles on the responsibility of international organizations were not promulgated by the UN until 2011,<sup>4</sup> and legal accountability for international organizations has traditionally been very difficult to guarantee. Indicatively, the ICJ has refused to review acts of other organs of the UN, and leading international organizations have claimed immunity from national courts. Moreover, where recognized, the international legal personality of international organizations has not been easy to translate into domestic legal personality (Reinisch 2000: 64). Notably, the UN itself still claims immunity from action in national courts under 105 of the Charter and under Art 2(2) of the 1946 Convention on the UN's privileges and immunities. Furthermore, national courts have repeatedly accepted the immunity of the UN, non-recognition of which would entail a breach of duties of national states under UN treaties.<sup>5</sup>

<sup>4</sup> In fact, the 2011 Articles on the Responsibility of International Organizations do not say anything about obligations on international organizations produced by human rights.

<sup>5</sup> See rulings in *Mothers of Srebrenica et al v State of The Netherlands and the United Nations*, Supreme Court of The Netherlands (2012); *Delama Georges, et al, v United Nations, et al*, U.S. District Court for the Southern District of New York, No. 1:13-cv-7146 (2015).



Despite this, however, the rise of rights as general international norms still produced a broad normative grammar for the emerging intergovernmental domain, which distilled principles of accountability for international organizations. This grammar in fact began to take shape at a relatively early stage, and some international organizations began to control their inner operations through rights quite soon after 1945.<sup>6</sup> This even, albeit somewhat implicitly, became visible in the UN itself, despite its special privileges in claiming immunity from suit (Reinisch 2000: 153).<sup>7</sup> In recent years, however, intergovernmental organizations, including the UN, have been more strictly held to account by inter- and supranational courts,<sup>8</sup> and they have widely been subject to supervision by human rights panels (see Peters 2014: 436). Moreover, both international tribunals and national courts have shown less deference in reviewing different international organizations.<sup>9</sup> Courts of different kinds have deemed it essential that intergovernmental institutions and intergovernmental directives should be amenable, in some matters, to some type of judicial review; in particular, they have insisted that persons employed by international organizations should have access to courts in cases of dispute.<sup>10</sup> This presumption has been widely constructed through reference to international human rights norms.<sup>11</sup> However incompletely, therefore,

<sup>6</sup> Reinisch (2008: 291) provides important support for this claim from the Administrative Tribunal of the International Labour Organization (ILOAT). Reinisch states: 'In 1957, the ILOAT held, in *Waghorn v ILO* (1957) ILOAT Judgment No. 28, that it is also "bound [...] by general principles of law". In *Franks v EPO* (1994) ILOAT Judgment No. 1333, it included alongside "general principles of law" also "basic human rights".'

<sup>7</sup> See ICJ Advisory Opinion [1954] ICJ Rep 57. Here, it was stated that, although the UN was not subject to judicial review, it could be seen as bound by express aims of the Charter, including promotion of human rights, to offer arbitral remedy for its employees.

<sup>8</sup> The claim that different courts of law are allowed to review acts of the UN acts for conformity with rights possessing *jus cogens* status was made in the *Kadi* cases in the EU courts. In 2008, the ECJ argued that laws implementing UN directives in the EU could be subject to judicial review for conformity with the rights norms contained in EU law. The ECJ used this case to harden the autonomy of EU law against international law, and to imply that the EU possessed higher human rights standards than the UN. Kingsbury (2008: 113) has explained this point, arguing that national and supranational courts can apply *jus cogens* against external governance bodies, including international organizations. Review of UN directives on grounds of derogation from human rights norms, albeit under domestic *ultra vires* provisions, is also expressed in the important UK case *Ahmed and others v HM Treasury* (2010). See below p. 308.

<sup>9</sup> For an important rejection of an international organization's claim to immunity from suit in a national court, see the Belgian Labour Appeal Court case, *Siedler v Western European Union* (2003).

<sup>10</sup> See the ECtHR rulings in *Waite and Kennedy v Germany* (1999); *Beer and Regan v Germany* (1999).

<sup>11</sup> Some observers (Reinisch and Weber 2004: 91) now see the right of access to courts as a global *jus cogens*, enforceable against all public bodies, including international organizations.



the construction of international human rights as general norms has provided elements of constitutional consistency and accountability for the inter-state domain, and it has created certain reasonably stable rules of conduct for the growing number of functions performed by international organizations (Alvarez 2005: 601).

This ordering of the intergovernmental domain through human rights played an important role in creating an inclusionary structure for global society. In particular, it meant that a number of bodies and institutions could play a role in global law making. Progressively, after 1945, the inter-state domain was populated by an expanding array of organizations, some international, some non-governmental, some political, some judicial, which assumed authority to create laws and binding norms, applicable both nationally and internationally. Such bodies typically placed their law-making functions in some relation to human rights norms. Over a longer period of time, obligations deriving from internationally defined fundamental rights norms helped to create a legal structure in which many functions could be accountably devolved to intergovernmental bodies, and these bodies could be regulated as they assumed legislative powers, classically assigned to states (see Alvarez 2002: 223; Mégret and Hoffmann 2003: 327). In these respects, human rights helped to cement an underlying legal structure for the nascent global political system, and the preconditions of the intergovernmental domain were partly based in rights.

However, the growing salience of international human rights norms had still greater implications for the global inclusionary structure because of their impact on *national institutions*. After 1945, international human rights law played a core role in allowing national states to adapt to pressures arising directly from global society. In fact, international human rights norms assumed rapidly increased prominence after World War II precisely because they promoted an inclusionary structure in which national states could address escalating demands for legislation, originating in the inter-state domain. Over a longer period of time, of course, international human rights law established a relatively hard legal structure for cross-border phenomena in many spheres of social practice, including diplomacy, road transport, medicine, sport, economic cooperation, education and scientific knowledge transfer. By the end of the twentieth century, many spheres of interaction were subject to international rules, with varying degrees of obligatory force, in which international human rights norms formed overriding constitutional directives. In the first instance, however, the growth of international

law after 1945 was induced by quite acute and immediate pressures on national institutions and national borders, and it resulted from intense challenges to national regulatory mechanisms: international law acquired increasing constitutional importance as national processes of legal authorization were overstrained. In general, the rise of international human rights law after World War II was propelled by the fact that the intensified global conflict during the war, and the accelerated geopolitical transformations following the war, had exposed national states to a mass of legal phenomena that were not specifically located in one given territory or jurisdiction, and over which, accordingly, they struggled effectively to legislate. States were increasingly required to conduct processes of law making, which extended beyond the confines of national societies, and which, in consequence, were often uncertain, and insecurely mandated. Moreover, the rise of international human rights law was propelled by the fact that, as society became more identifiably *global*, states confronted common external realities and external subjects, and they were faced with very similar external problems, and with very similar demands for legislation. On both counts, states were forced to construct their external environments in relatively generalized legal categories, and often to co-ordinate external acts around uniform legal norms. On both counts, this created a demand for a system of legal/political inclusion in which political institutions, in both national and international settings, could use transferable norms to address external regulatory demands. International human rights law thus developed as a normative system that rapidly heightened the inclusionary capacities of national states, and which insulated the inclusionary structure of national political institutions against international pressures. Indeed, the construction of the single person as a holder of legal rights formed a core construction through which states reacted to the growing legal complexity of their external boundaries. To this degree, sociologically, the rising force of international human rights law after 1945 was caused by deep inclusionary pressures on national states, and it allowed states to project a constitution in which they were able to stabilize themselves in face of external challenges presented by new global phenomena.

To illustrate these points, for example, one immediate factor behind the rise of international law after 1945 was that World War II had seen an immense expansion of airborne military conflict. This meant that, to a hitherto unknown degree, civilians in military conflict situations were placed at constant risk of injury and death. The fact that military

operations could easily traverse national boundaries meant that many states were confronted with single persons, claiming legal relevance, outside their own borders. This placed national states in an unprecedentedly immediate relation to individual persons in other societies, and it transformed traditional relations between belligerent nations, as states encountered notionally hostile populations in conditions not solely defined by adversity. This in turn created pressures on states which could not easily be absorbed by customary legal forms, and it meant that states were required to project legal constructions for single persons in circumstances in which clearly authorized jurisdiction and responsibility were difficult to determine. Indeed, in some respects, groups of civilians in military conflict zones formed an early *global subject*, existing, in almost all regions of the world, alongside the frontiers of established forms of state authority, and they presented a distinct challenge to the legal structures of all states. Owing to the rising vulnerability of the civilian, then, states began to ascribe more uniform rights to single persons, increasingly observing individual citizens in legal categories which could be generalized across jurisdictional boundaries, and they used rights to simplify their reactions to the emergence of legally unprotected external communities. Notably, early duties of the UN included defining legal principles for protecting and, equally importantly, identifying civilians, and for establishing rights for single non-combatant persons. This was formalized, most obviously, in the Geneva Conventions (1949), which gave enhanced protection to individuals in conflict situations and clearly applied human rights norms to distinguish civilians from military personnel, who remained more strictly subject to national jurisdiction (Partlett 2011: 222–4). The construction of the single person as rights holder thus emerged, in this case, as a principle that allowed states to adjust to their new immediacy to new global subjects, and to the pressures placed by these subjects on their external structure.

In addition, World War II and its aftermath witnessed an almost global relocation of population groups, which created a need for general mechanisms of legal recognition and organization able to address large flows of refugees, political migrants and displaced persons. Customary international law, with its primary focus on inter-state acts, could not easily produce legal categories for addressing such quantities of stateless persons (Hathaway 1984: 374). To be sure, the League of Nations had initiated attempts to codify customary refugee law in the 1920s. The apparatus of the League of Nations for dealing with

refugees had been mainly created as a response to the collapse of the Russian Empire, and the resultant exodus of regime enemies from the Soviet Union, in and after 1917. Moreover, until 1930 and again after 1938, the League of Nations had a High Commissioner for Refugees (Haddad 2008: 109–10). However, mass population transfers became a far more pressing and in fact almost general phenomenon through the 1930s and 1940s. This began with Hitler's concentration camps, which, alongside their genocidal functions, entailed a vast extraction of different populations from their national legal systems, creating anonymized transnational migrant communities inside the camp walls. This continued, in diverse fashion, through World War II itself, through the resultant expulsion of minorities in some parts of Eastern Europe, and then through the redrawing of national borders after 1945. In 1945, in consequence, there were approximately 30 million refugees and displaced persons in Europe. The fragmentation of European Empires and the formation of new states during decolonization in Africa and Asia quickly exacerbated this problem, as the emergence of new states created new, vulnerable minorities, for some of whom co-existence with dominant groups within newly imposed frontiers was not possible. New nation states thus inevitably led to further mass movement of populations.<sup>12</sup> In many cases, moreover, refugees were transplanted into nation states, which were structurally weak and lacked capacities to deal with large population influxes.

Against this background, the early functions of the UN were integrally linked to the codification of Refugee Law and the promotion of institutions to protect refugees. The UN began to assume obligations for refugee protection right at the end of World War II, and it founded the International Refugee Organization in 1946. Art 15 of the UDHR specifically proclaimed nationality as a core human right, and by 1949 the ILC placed statelessness on its list of objects for urgent codification (see McDougal, Lasswell and Chen 1974: 966). In 1950, then, the United Nations High Commissioner for Refugees (UNHCR) was established, which formed a distinct legal office, able to assume protective powers for refugees in different national societies without national invitation (Hurwitz 2009: 255). International refugee law was formalized in the Convention Relating to the Status of Refugees (1951) (see Malkki 1995: 500–01). This Convention, the basis for

<sup>12</sup> On the deep correlation between rising national statehood and population movements see Haddad (2008: 68). On the relation between the collapse of Empires, nation building and displacement of minorities see Zolberg (1983: 3).

later refugee law, was conceived as part of international human rights law (Hathaway 2005: 4, 24, 53, 75). In fact, refugee law was not always neatly separable from general human rights law (Hathaway 2005: 24); the Preamble to the Refugee Convention referred to both the UN Charter and the UDHR and, in Art 33, it implicitly linked its provisions to more general human rights instruments (Garvey 1985: 483; Clark 1999: 390; Egli 2002: 99). The UN Convention relating to the Status of Stateless Persons was adopted in 1954, and finally, in 1961, a Convention on the Reduction of Statelessness was approved, both of which were strongly influenced by concepts of human rights (Schwelb 1959: 27). One well-positioned observer (Krenz 1966: 115) described UN refugee law as the 'earliest and most effective attempt towards an application of Human Rights and a recognition of the international status of certain individuals'. The development of refugee law in the UN was also reflected under other human rights instruments. For example, the American Declaration of the Rights and Duties of Man emphatically guaranteed the right to asylum (Art 27).

The rise of human rights as dominant, constitutional principles for international legislation can be partly explained for these reasons. The increasing presumption that single persons should be perceived as rights holders reflected the fact that during and after 1945 states were confronted with masses of dislocated persons, extricated from the legal order of national states: the simple single person became a general external environment for national states. This led both to a generalization and to an individualization of the basic categories of international law, and it fostered the use of legal categories which could be used across diverse territories to address communities and subjects, which had been released from national systems of collectively acknowledged rights (see Slaughter and White 2002: 13). Indeed, the fact that the individual person was constructed as a holder of rights made it possible for states to react to population movements, and the figure of the refugee was translated into a legal category that could be approached in similar fashion, by different states, across jurisdictional boundaries. In this respect, too, human rights law softened pressures on the external structure of states, and they allowed states to adapt to the emergence of new subjects along their borders.

In close relation to this, World War II and its aftermath also gave rise to legal questions regarding the status of minority populations, and the constitutional consolidation of international human rights norms provided a diction in which this could be addressed. The question

of legal protection for minorities had repeatedly attracted attention under the League of Nations. After 1945, this question assumed renewed importance, both because of the violent oppression and attempted liquidation of minorities in interwar Europe, and because of the emergence of new nation states through decolonization, many of which contained multi-original populations. Here, it needs to be noted that the UN was much more reticent in addressing minority rights as free-standing collective rights than in sanctioning rights of refugees. Tellingly, the UDHR did not provide for protection of minority rights, distinct from general human rights; even lawyers critical of the UDHR because of its insufficient obligatory force were only willing to ascribe subsidiary standing to minority rights (Lauterpacht 1945: 145). Effective protection for minorities was not established until the 1980s, and recognition of minorities as distinct collectives, with determinant patterns of affiliation separate from the national systems of rights, in which they were located, was not even partially secured until the early twenty-first century.<sup>13</sup> In some respects, in fact, the promotion of universal rights after 1945 can easily be viewed as a device for securing general basic rights for minorities without encouraging separate community identities or secessionism. Manifestly, many emergent post-colonial states risked fragmentation through recognition of minorities as claimants to distinct group rights, and for many decades after 1945 rights of self-determination offered to distinct national populations were not extended to sub-national groups (Errico 2007: 742). Despite this, however, protection of individual members of minority populations remained an important area of concern for the UN. The UN established a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1947), which developed a legal framework for minority protection. Basic minority rights were then protected, rudimentarily, in the ICCPR, which imposed obligations of tolerance for minorities, and, in Art 27, offered limited rights of cultural integrity for minority groups. ECOSOC Resolution 1503 (1970) made provisions enabling the UN to hear complaints about abuse of minorities. The most powerful instrument addressing anti-minority violence and imposing tolerance for non-dominant groups was of course the Genocide Convention, which, like the Refugee Convention, was effectively a human rights instrument.

<sup>13</sup> See pp. 293–4 below.

Overall, in sum, the individualization of international law after 1945 was closely correlated with the dislocation of persons from state jurisdictions, which resulted partly from World War II, partly from advances in military technology, and partly from the end of imperial administration. The rise of the individual person as a focus of rights and duties reflected both the porosity of state borders to international problems and new global subjects and the need for uniform inclusionary categories, which could be adopted by many states at the same time, in addressing such problems and subjects. In the last respect, the concept of the single person as international rights holder established a constitutional structure in which national states could absorb their increasing exposure to global phenomena, and in which transnational phenomena could be addressed in roughly like fashion in different national settings.

#### THE GLOBAL INCLUSIONARY STRUCTURE: THE PROLIFERATION OF STATES

In the above respects, the rise of international human rights law was integrally linked to pressures on national states caused by processes partly resulting, directly or indirectly, from global military conflict. In such contexts, international human rights produced a normative system above states, but they also produced a structure on which states increasingly relied to control their own legislative actions, and that supplemented and reinforced their external organizational order. The role of international human rights in reinforcing the inclusionary structure of the state, however, became most visible in the waves of post-colonial state formation that began after the World War II and gathered pace through the 1950s and 1960s. In this setting, the growth of international rights protection, centred around the increasingly constitutional emphasis placed on the single legal person, accompanied the proliferation of states as dominant centres of national political administration, and international human rights law helped to stabilize national states as statehood became a common model of political organization. In general terms, decolonization and the resultant multiplication of national states had a deep impact on the growth of international law. Indeed, the rapid and unforeseen decline of imperial regimes caused by World War II exposed nation states, both new and established, to distinctive inclusionary crises, and it created a need for radically new legal/constitutional frameworks to regulate phenomena previously addressed within domestic jurisdictions. The growth of international



law, and especially international human rights law, acquired particular normative and organizational significance in this context.

The impact of decolonization on international human rights law can be observed in many ways. Some observers have claimed that anti-colonial movements played a vital role in consolidating human rights as elements of global law (Kay 1967: 804; Burke 2010: 35–58; Reus-Smit 2013: 12, 153). By contrast, other researchers query the connection between human rights and movements promoting decolonization (Shivji 1989: 23; Simpson 2001: 300, 305; Moyn 2010: 96). Some historians have argued that early UN norms served a mainly ideological function for European powers reacting to challenges caused by decolonization (Mazower 2009: 9). Some analysts have argued that decolonization slowed down the promotion of human rights, as ailing Empires were reluctant to implement human rights law as this threatened to expose them to censure during the last years of imperial rule (Madsen 2010: 203). Other observers, further, have argued that post-colonial states ultimately weakened human rights, as they placed primary emphasis, not on personal rights, but on rights of national-territorial independence, which were not open to all ethnicities in multi-original societies (Okere 1984: 158). These reservations notwithstanding, however, from the sociological perspective advanced here, the constitutional rise of international human rights law can be seen as deeply connected with the formation of post-colonial societies: in fact, the end of formal imperialism created deep structural pressures for national states, and international human rights law evolved partly in response to such pressures.

To illustrate this, three points warrant particular note.

Most evidently, first, the sudden demise of imperialism as a dominant system of political administration after World War II had the quite simple result that the number of states in the world grew very quickly. In fact, it was only through the fragmentation of the great European empires that national statehood became the uniformly preferred mode of socio-political organization across the globe. At the beginning of the twentieth century there were roughly fifty-five states, but by the early twenty-first century there were 192 states (Herbst 2004: 304). In 1945, almost 35 per cent of the global population lived under imperial rule. By 1970, this was the case for less than 1 per cent of the world's population (Jacobson 1984: 375). The period 1950–1970, in short, was a period defined at once both by accelerated imperial collapse and by hyperactive national state building. At this time, in short, states became global subjects.

This simultaneous expansion of national statehood and reduction in the influence of traditional hegemonic powers had obvious implications for the legal structure of the emergent global domain, and it meant that states, both new and established, soon required new legal constructions for organizing inter-state relations. Most obviously, the global spread of statehood created – simply – a requirement for *more law* in the inter-state arena, as states (new and old) were required to organize their relations with an expanding number of similar entities. In particular, the rapidly increasing number of states, all of which, under UN norms, were notionally placed on equal sovereign footing, meant that traditional forms of inter-state agreement, bilateral treaty making and dispute settlement through negotiated consent became unwieldy and unmanageably time-consuming. In many cases, questions that had previously been regulated either by imperial administrations enforcing metropolitan law or by simple treaties between powerful imperial states were placed in a new legal context, demanding laws that could be created and acknowledged relatively quickly and positively, on reliable multi-lateral foundations, and which could be applied without constant elaboration of specific agreements between all parties (Falk 1966: 785; Charney 1993: 551; Weiler 2004: 557). As their number grew, states necessarily encountered a need for legal norms that could be acknowledged as legitimate by a broad range of political subjects, and that could be positively applied across the borders between nominally separate political systems, often in contexts in which jurisdictional boundaries were being rapidly redrawn (Szasz 1995: 40). This was particularly important because, owing to the growing number of states, laws were required to regulate relations between states of very unequal authority and stability, and often between existing states and potential states or states which did not yet fully exist. A free-standing legal order was thus required so that emerging states could be located within an already existing normative order, the rights and expectations of nascent states could be pre-defined, and interactions between already existing states and emergent states could be formally pre-structured (see D’Amato 1982: 1113).

The fact, after 1945, that international law showed an emphatic focus on human rights norms becomes explicable, in part, against this background. The growing importance of human rights as the basic underpinning for international law had the result that laws could be created *more quickly*, and they could be authorized quite simply, by autonomous iterable principles (Delbrück 2001: 30), able to gain

recognition in reasonably generalized manner across the borders of different states. As discussed, the construction of the single person as rights holders first played an important role immediately after 1945 in supporting legislation addressing transjurisdictional legal problems, such as refugees, displaced populations and minorities. Eventually, the UN covenants of the 1960s established human rights as principles for controlling other transnational phenomena, such as education (ICESCR Art 13), and scientific exchanges (ICESCR Art 15). Later, in the Vienna Convention on the Law of Treaties, all treaties between states were made subordinate to peremptory norms, and the UN Charter was defined as a founding set of norms to shape all inter-state agreements, so that rights dictated a basic grammar for all legitimate state actions. The use of single rights in such laws meant that exchanges between states could be regulated in similar ways, and that all inter-state acts had similar foundations. Gradually, it meant that legal processes in different national domains could establish points of congruence, so that laws with relevance for the inter-state domain, addressing objects and persons moving across jurisdictions, could be similarly constructed and legitimated in many different contexts (McDougal and Bebr 1964: 606). Ultimately, this created a basis for a complex constitutional system of inter-state recognition and interaction, in which states could enter common legal arrangements with other states regarding many internal and external functions: i.e. joint use of scientific and educational resources, economic cooperation, crime prevention, protection of intellectual property.

In these respects, the rise of international law, and especially international human rights law, filled a regulatory gap that emerged, primarily, because of the erosion of imperial power. Arguably, as soon as national statehood replaced imperialism as the most prevalent model of socio-political organization across the globe, national law *on its own* was not able adequately to fulfil the inclusionary requirements of states, and it was not able to support the legislative functions of states in the complex domain that arose between them and other states. The rise of international law, in consequence, was inextricably linked to the dismantling of European Empires: it is no coincidence that the two periods of the most accelerated growth of international human rights law were the years after 1945, which saw the collapse of West European Empires, and the 1990s, which saw the collapse of the Soviet Empire. It was only after 1945 that states confronted other states, with similar legal personalities, as their basic general environment. Prior to that point, political entities

had confronted each other in multiple, typically highly asymmetrical relations – for example, as Empires, colonies, dependencies, mandate territories, protectorates, dominions. In each of these relations, quite separate legal orders had been produced for political administration, usually reflecting the basic asymmetry of the given power relation. However, the general increase in the number of sovereign states after 1945 created a global legal domain, in which states acted as globally constructed subjects, and states required global legal forms to structure their actions, and, above all, to co-ordinate their actions with other, notionally equal, sovereign states. At this time, states became reliant on the existence of an independent legal order, possessing a certain constitutional autonomy against national state institutions, which they were not required separately and singularly to construct and to legitimize, and through which they could conduct international interactions and establish legal principles for the inter-state domain. The emergence of a legal order whose authority was sustained outside national jurisdictions allowed states to adapt to their new environments, reducing the exposure of states and their legitimational processes to highly uncertain external realities, and ensuring that states could orient their actions towards other states around abstracted norms. The consolidation of independent sovereign statehood as the basic pillar of the global political order, in short, generated the need for a constitutional structure in which states could insulate themselves against demands for legislation posed by other states, and in which law could be produced and authorized across state boundaries without the constant engagement of single governments or the constant need to elaborate new principles for all treaties. The accelerated growth of a system of international human rights law can be explained, in part, as a reaction to this process.

Of great importance in this regard, second, is the fact that, owing to the rapid collapse of inter-continental Empires and the hurried re-drawing of national boundaries after 1945, the simple concept of a state became a contested term. Indeed, no fixed or legally binding definition of statehood, or of its exact institutional determinants, existed. In many territories, self-proclaimed governing bodies claimed powers of statehood in circumstances which deviated from intuitively accepted categories of political sovereignty; this was especially the case in post-colonial societies, where newly emerging political institutions often lacked infrastructural support. As a result, the UN began to operate as a body that established internationally accepted norms to

determine whether new political entities could obtain recognition as states. The basic categorical determinants of statehood after 1945 were carried over from the interwar era, notably from the Montevideo Convention (1933). However, entities seeking to present themselves as states after 1945 usually applied for membership in the UN, and membership in the UN rapidly became an indicator of the demonstrable presence of statehood under international law. The role of UN recognition in constituting statehood was often disputed, but it undoubtedly played an important role in providing evidence of statehood (van der Vyver 1991b: 23–4). Importantly, only states could be members of the UN, so UN membership, together with the legal obligations implied in this, became externally constitutive of statehood (see Lauterpacht 1947: 6; Claude 1966: 376; Crawford 1979: 129; Grant 1998: 456). Indeed, recognition through UN membership was actively welcomed by many parties in the process of decolonization, and it simplified the administration of this process for all implicated actors. For former imperial powers, UN recognition brought the benefit that governments of new states could be expected to recognize basic principles of international law, which appeased ex-colonial minorities in newly independent territories. This facilitated the relatively ordered transfer of power from imperial to post-colonial governments, often protecting existing interests of minority elites.<sup>14</sup> In some cases, imperial governments used international norms as guidelines for their policies in recognizing the independence of former colonies; Harold Wilson's policies regarding Rhodesia reflected this (see McDougal and Reisman 1968: 2). For countries in the process of gaining independence, however, membership in the UN meant that governments could follow a path to recognition that was separate from the interests and authority of former colonial rulers. As a result, normative principles proposed by the UN played a central role in the end of European imperialism and in the legitimization of successor states and interim governmental forces (Shaw 1986: 87, 179), and the UN was able to project a series of legal/moral qualities, defined by the UN Charter, which states were expected to demonstrate in order to be considered states. Notably, Art 93 of the UN Charter stated that all members of the UN were *ipso facto* parties to the statute of the ICJ, which meant that the acquisition of statehood necessarily implied recognition of rights-based conventions and international jurisdiction (see Higgins 1963: 42, 48).

<sup>14</sup> For examples of this in some African states, see Parkinson (2007: 273) and Dudziak (2008: 75).

Statehood became a quality that depended – literally – on acceptance of normative rights-based terms and conditions (Dinčič 1970: 254).

Both factually and normatively, therefore, the UN assumed great importance both in assisting post-colonial areas in the acquisition of statehood and in assisting established states to recognize other states as such. The authority of the UN was substantially increased by the fragmentation of imperial rule, and many important early functions of the UN related to the legal ordering of decolonization. At a very early stage, for example, the UN used human rights norms, under Art 73 of the Charter, to define trusteeship arrangements for non-sovereign post-imperial territories, to protect citizens of societies under trusteeship, and to supervise mandatory powers (Schwelb 1959: 34–5, 38).<sup>15</sup> Trusteeship arrangements placed large populations directly under international law, and they clearly promoted the recognition of individual personalities, outside recognized states, as points of direct international legal attribution. Ultimately, the insistence that all territories possessed a right to self-determination, stated by the General Assembly first in 1952 and then declared formally in 1960, provided the basic constitutional foundation for decolonization (El-Ayouty 1971: 173, 234).

As a result, the UN General Assembly assumed a central role in identifying those groups in colonial societies able to claim rights of self-determination, and in stabilizing the position of national liberation movements in an ordered legal system. Throughout its early years, the UN operated committees to monitor the institutional conditions of territories under external control (Non-self-governing Territories), and to assist in consolidating independent government in these areas. As the competence of the UN expanded over time, it began to intervene more directly in state-building processes, in some cases using arguments based in international human rights law to assess the validity

<sup>15</sup> See the ICJ's *Advisory Opinion concerning the International Status of South West Africa*, claiming that the 'rights of the peoples' under trusteeship arrangements needed to be 'effectively safeguarded' through 'international supervision': [1950] ICJ Reports 136–7. Unfortunately, this sentiment was badly undermined by the ICJ's eventual ruling in the *South West Africa* case in 1966. However, the Court soon reversed the 1966 decision, stating of South Africa's position in Namibia: 'Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 57. Ultimately, the Court came to the view that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character': *East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Reports 102.

of claims to statehood and to urge independence (Duxbury 2011: 98–9). For example, in 1965 the UN passed a resolution that the people of Southern Rhodesia had an inalienable right to be free. In this, it ruled the apartheid system in Rhodesia illegal under international human rights law, and withheld recognition for the white-supremacist state declared independent of Britain by Ian Smith, the Duke of Monrovia, and others. Similar principles underpinned the UN's declaration of 1970, following the ICJ's fluffed lines in 1966, that South Africa's occupation of Namibia was illegal (see van der Vyver 1991b: 39, 62). Later, UN norms and powers were even used to establish territorial administrations to prescribe the ground rules for constitution writing in emergent states (see Chesterman 2004: 140; Feldman 2005: 858; Dann and Al-Ali 2006). Many constitutions of new states, consequently, were strongly influenced by UN provisions, and they incorporated extensive catalogues of rights. Even where the UN did not intervene immediately, norms and expectations dictated by the UN widely figured as lines of direction for democratic state building and political transition, and the progressive consolidation of post-colonial states was deeply shaped by international norms embodied in the UN and the ICJ.<sup>16</sup>

In these respects, international human rights norms again provided a legal structure for capturing and managing the rise of statehood. Internationally defined rights facilitated the emergence of new states, but they also made it possible for consolidated states to impute reliable and consistent features to new states, and so to project consistent legal personalities on other states. In each respect, rights created a normative diction in which states, new and established, were able to proportion their external acts to the global reality of generalized statehood.

In this relation, third, one consequence of the decline of imperialism was that in many newly independent territories a political realm emerged in which acts of high public administration could not draw legitimacy from classical processes of collective or democratic volition, or even from an existing tradition of formal sovereign statehood. In many cases, societies emerging through decolonization did not possess clear institutional mechanisms for generating visible authority either to support external recognition of their state institutions or to legitimate primary domestic laws.<sup>17</sup> The states located in these societies usually had to be constructed in hastily improvised fashion. Often, the foundations for new states were simply created through expedited negotiations

<sup>16</sup> See below p. 124.

<sup>17</sup> For commentary see Jackson and Rosberg (1982: 14).



between metropolitan powers and new, uncertainly authorized national elites, and constitutions were imposed by former colonial elites before either states or nations had been fully consolidated (see Rooney 1988: 182; Branch and Cheeseman 2006: 19; Branch 2009: 179). Paradoxically, therefore, the increasingly universal acceptance of the sovereign national state as a fulcrum of social organization meant that, in many societies, the actual locus of legitimate political sovereignty could only appear in fractured and loosely co-ordinated form, and many new post-colonial states did not initially meet conventionally endorsed standards of normative legitimacy or sovereign societal control. Moreover, as sovereign national statehood became a general norm, many countries proclaimed sovereign power without the means to motivate or demonstrate extensive national support for their political institutions, and even without populations organized as nations.<sup>18</sup> In such societies, political institutions were often forced to rely on, and outwardly to explain their authority through reference to, artificially constructed sources of legitimacy, which were not embedded in factually manifest societal endorsement. In consequence, many states strategically used compliance with international norms to signal their legitimacy, both externally and domestically. In this respect, accession to the UN and acknowledgment of international law became a common international vocabulary of legitimacy (see Koskenniemi 2002: 206; 2007: 19). The institutionalization of human rights norms often allowed new states to symbolize legitimacy towards their own populations, and it allowed other states to recognize new or emergent states as having qualities of legal personality and statehood. Acceptance of human rights norms provided a general standard, albeit often counterfactual, in which states could observe both themselves and each other, legally, as national states, and, in so doing, simplify inter-state relations.

In this respect, in particular, international law offered to newly independent states the distinctive benefit that it allowed them to construct their legitimacy slowly and incrementally, in a form adapted to precarious processes of institutional transition. The fact that international law could be absorbed and enunciated in domestic law in composite fashion, without reliance on single constituent acts, and that it could be assimilated domestically through formal, sometimes quasi-symbolic inter-judicial procedures, meant that, in many societies, new institutions

<sup>18</sup> See pp. 325, 338 below.

could acquire legitimacy in gradual, simplified, internally adaptive fashion (Claude 1966: 370). This was particularly discernible in newly recognized national societies which, owing to inner inter-group divisions, weak centration, limited history of institutional autonomy and prevalence of local structure, could not easily be made to converge around single legitimating acts of a classical constituent or national-democratic power (Strebel 1976: 336). In such settings, actors within the state were able to extract norms from international law, usually through the constitutional recognition of international human rights, and this often allowed them to claim legitimacy and sovereignty for the state without demonstrating unified resources of national sovereign power. Assimilation of international law in fact often provided a shortcut to national statehood, and it allowed states outwardly to project themselves as legal personalities, without passing through a conclusive process of national formation or state construction.<sup>19</sup> In some cases, norms imported from international law helped to create, and gain recognition for, national states where they did not exist, and compliance with externally defined norms replaced single acts of constituent power as the essential source of national political legitimacy and acceptance: international law often assumed a force close to that of a constituent power in societies where such power could not easily be activated.<sup>20</sup> In many cases, it was only

<sup>19</sup> For example, the drafting of the Indian constitution, which defined the state's legitimacy through reference to international human rights law, occurred in a context in which unified nationhood was not easy to find, and society as a whole was partitioned by deep sectoral, regional, stratificatory and religious divisions (see Chandavarkar 1998: 321). One historian argues that before independence the 'plural and deeply regionalized society' of India was beset by a 'crisis of nationhood' (Brown 1985: 282). Ultimately, therefore, international human rights law helped to galvanize Indian nationhood.

<sup>20</sup> For example, late colonial Kenya was marked by extreme ethnic diversity, inter-group discrimination, and the allocation of group rights in accordance with population affiliation (Singh 1965: 940). The making of the constitutions that progressively separated Kenya from the UK was, therefore, hardly driven by a unified nation, able to supply legitimacy for state institutions. The first meeting of Kenyan delegates in Lancaster House, London, to deliberate the form of the independence constitution (1960) reflected this ethnic polarization of interests. The second Lancaster House Conference in 1962, however, included a Bill of Rights in the constitutional draft. This imposed a system of uniform rights on the different factions involved in constitution making, and it created a legally uniform national society in which the constitution could take effect (Singh 1965: 914). The first post-colonial constitution (1963) then designed the new state on a federal model, in which regions were separated partly on ethnic lines: it endorsed *majimboism* as a compromise pattern of nation building. During decolonization, moreover, the British government was unwilling to recognize Kenya as a sovereign nation state because of the large settler community that lived there, which feared expropriation. From this perspective, too, a Bill of Rights, with strong protection for property rights, was a precondition of independence. In both respects, constitutional recognition of basic rights was a path to sovereignty and international recognition. The Bill of Rights in the Kenyan constitution did not imply the existence of a monist legal system; on the contrary,

on the foundation of a normative mix of national and international law that national states could actually be formed, and international law created a system of recognition in which new states could compensate for their basic structural weaknesses, and other states could observe these states in accepted legal categories, despite their structural weaknesses.

On each count, the initial growth of international law after 1945 was not simply the outcome of processes occurring outside national states, imposing external limits upon the sovereign powers of already existing state forms. On the contrary, if seen from a more sociological perspective, the expanding, semi-constitutional force of international law after 1945 was intrinsically linked to the basic functions of statehood: it resulted from the fact that statehood became a generalized phenomenon, and states, as global subjects, formed a generalized environment for each other. Before 1945, the organization of societies in the form of states was not a dominant pattern of social order, and most societies had experience only of either local or imperial governance. After World War II, however, statehood increasingly became a global political phenomenon. The increasing *globalization of statehood*, however, brought two closely linked challenges: first, it undermined the power of established states to absorb inclusionary pressures channelled towards them from the international domain; second, it led to the emergence of weak and uncertainly authorized states in former Empires, which struggled to generate external or internal acceptance. The globalization of statehood thus created a demand for an inclusionary structure, or a *basic constitution*, reaching across and cutting through national boundaries, able to simplify state reactions both to new phenomena and to new states.

As a result, the growth of a constitution of international law was shaped – quite simply and immediately – by the fact that the international arena was populated by national states, and that states alone lacked the capacity to respond to this reality. The rise of international law was shaped by a complex crisis of inclusion in the basic external structure of statehood, which in many cases penetrated deep into the domestic functions of national institutions, and which was caused by

Kenyan courts were quite hostile to international law until the early 2000s, and, under President Moi, they even abandoned responsibility for rights-based review of statutes. However, the original Bill of Rights involved direct incorporation of international human rights instruments. See analysis in Ghai (1967: 192) and Munene (2002: 142–3).

the fact *that states were surrounded by other states*. Far from placing limits on the efficacy of national sovereignty, international law, and especially international human rights law, was cemented after 1945 precisely *as, because, and to the extent that* sovereign national statehood became the preferred mode of socio-political organization. As they began to operate in a world of states, national political organizations immediately encountered complex demands for legislation and regulation, which they, acting as sovereign national states, were not able to satisfy. To resolve this, states either constructed or accepted norms that extended vertically, with constitutional force, above national jurisdictions, and most states consolidated their existence as states by, at least in part, locking their basic inclusionary structure into an extra-national legal order. As discussed earlier, this does not even remotely imply that, after 1945, international legal norms immediately acquired conclusive or sustained effect. However, the emergence of a formal grammar of rights, stabilized above national states, progressively became a precondition, both factually and symbolically, for the globalization of national sovereign statehood.

Against more standard views, therefore, the constitutional expansion of international law after 1945 can be viewed as a direct outgrowth, or in fact as a precondition, of state power. The broadening impact of international law facilitated the construction of statehood, and it accelerated the emergence of sovereign states. It also provided a legal framework in which both new and old states were able to secure principles for addressing a world society marked by rapidly escalating complexity, and by rapidly proliferating claims to statehood. The basic fact underlying the rise of international law was simply that after 1945 the national sovereign state became an increasingly dominant centre of authority. This necessarily meant that national sovereign states, acting alone, were incapable of constructing an effective inclusionary structure for their societies. As soon as the sovereign state became a global phenomenon, in fact, states presupposed a constitutional system of international law, strongly marked by international human rights norms, to sustain their external inclusionary functions. National states first stabilized their position in society around constitutional principles of national sovereignty. As soon as national sovereignty became a common reality, however, states necessitated a constitutional order that abandoned the strict norm of national sovereignty. The proliferation of national sovereignty provoked a crisis in the inclusionary functions

of national states, and states positioned themselves, externally, within a transnational constitution in order to compensate for this crisis. National sovereignty proved impossible to secure, internationally, on the basis of purely national constitutions.

## RIGHTS AND THE AUTONOMY OF THE GLOBAL LEGAL STRUCTURE

In the aftermath of 1945, the impact of international human rights norms on the legal structure of global society might not have been easy to detect. In some settings, this was a period of national-democratic re-orientation, and attention was widely focused on everyday realities of political foundation. Moreover, the significance of human rights law was often obscured amidst the geopolitical conflicts of the Cold War and the domestic struggles surrounding decolonization, none of which was conducive to recognition of border-crossing legal norms. As a result, the growth of an international inclusionary structure only became visible very slowly, and its ability to create new legal and political forms did not become fully evident until more recent decades. Nonetheless, in the decades following 1945, the principle that there existed a legal structure standing independently of national laws was slowly consolidated, at least in skeletal form. This structure then slowly formed a basic two-tier global constitution for an emergent global political system. On one hand, it formed a constitution for inter-state actions. On the other hand, it formed a constitution that gave effect to international human rights law within national polities and tied national institutions to the global legal domain.

At the core of the global political system which began to evolve after 1945 was a paradoxical process. The rise of a constitutional structure traversing national societies was driven by the fact that single states could not easily produce sufficient quantities of law to stabilize the complex legal environments of global society, increasingly defined by states, as global subjects. As a consequence, national states began to bind their legal structures into a legal or constitutional system located, relatively autonomously, above national jurisdictions. In this system, states transferred some responsibility for producing and legitimizing laws to actors and organizations working in a global normative order, and, to some degree, they proportioned their inner legislative functions to norms prescribed by this order. Global society thus engendered a relatively differentiated constitutional system, standing above national

states.<sup>21</sup> Central to this constitutional system was the fact that the *single person* located within national societies was constructed as a holder of rights, and the single person, replicable across national jurisdictional boundaries, became a defining source of authority for the law, both nationally and globally. In consequence, law increasingly obtained authority as it was applied to persons as rights holders, and as it accounted for the person *qua* rights holders as its essential normative origin. At this time, national sovereignty slowly lost its standing as the sole basis for society's inclusionary structure, and the global political system, both in its national and extra-national dimensions, was re-centred, however gradually and imperceptibly, around rights held by singular persons. Once established on this foundation, then, the constitutional system formed by international human rights law began to assume an increasingly autonomous position towards national law and assertions of national sovereignty. The fact that, in the global legal order, legislation was explained through single human rights meant that national states gradually became secondary components of a wider, global legal/political system, whose reliance on classical sources of legitimacy was limited, and which was able to authorize laws across societal boundaries, and to reproduce its own structure at a high level of abstraction. As discussed, however, the rise of a relatively autonomous global legal order was not propelled by a weakening of state sovereignty. On the contrary, the factual consolidation of sovereign statehood as a uniform legal phenomenon was only possible because states were able to position themselves, as secondary components, within a transnational legal system, which enabled them to shield themselves against the implications of their own sovereignty. As states were formed as dominant sovereign actors in world society, paradoxically, they presupposed reinforcement in their external dimensions from an international legal structure, which became increasingly autonomous against national states themselves. In essential terms, the global growth of national statehood and national sovereignty both produced and presupposed an autonomous structure of global legal inclusion: a global constitution.

<sup>21</sup> For a similar claim see Albert (2002: 321).