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International Law as a Limit to States' Sovereignty

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Abstract:
There has been a growing concern within the International legal order about the relevance of International Law in the 21st Century. Many have argued that with the current disposition of states to Sovereignty, many states are beginning to feel threatened by the International legal system. This study examines whether International law threatens states' sovereignty. This is imperative because International Law is necessary to ensure order in the world and to promote peaceful interaction among states. If states consider it necessary to disobey international in order to protect their sovereignty, international law will lose its relevance. The result of this will be chaos and anarchy. This study adopts teleological, comparative and applied legal research methodology. This work makes reference the works of scholars like Hugo Grotius, Thomas Hobbes and other scholars. It gives in-depth analysis of various theories of sovereignty. The study also examines the intertwined history of sovereignty in international law and the impact of each one on the other. This study establishes how international law limits and threatens states' sovereignty and various ways through which this happens have been highlighted. More so, the study considers colonization and its effect on international law and the concept of sovereignty, particularly the sovereignty of third world states how colonialism threatened the sovereignty of independent states that existed in Nigeria before the amalgamation of 1914 and how international law still threatens the Sovereignty of Third World States even after colonization. The study finally recommends practical solutions to the problem with the aim of promoting a just world order.

Keywords: *International law, a limit to States' Sovereignty*

1. Introduction

International law has been defined in various ways by various scholars from various perspectives. International law refers to customs, rules, conventions which make up the laws regulating interactions amongst states. International law relies upon the existence of the state. According to the Montevideo convention of 1933, an entity is considered a state when it possesses a permanent population, a defined territory, government and capacity to enter into relations with other states.[i] The Montevideo convention reiterates as sovereignty as a fundamental requirement for statehood. Consequently, international law is dependent on statehood and statehood is dependent on Sovereignty. Although, there have been many arguments on whether International law is Law. According to Eric Posner and Jack Goldsmith, *international law has long been burdened with the charge that it is not really "law." This misleading claim is premised on some undeniable but misunderstood facts about international law: that it lacks a centralized legislature, executive, or judiciary; that it frequently ratifies existing international behavior rather than compelling change; and that is sometimes, though by no means always or usually, violated with impunity……..Put briefly, our theory is that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the relevant distribution of national power.*[ii]The question that arises from the above excerpt is whether or not International law is truly representative of the interests of a Sovereign state. There is a contradistinction between International law and sovereignty, according to Stephen D. Krasner; *sovereignty was never quite as vibrant as many contemporary suggest. The conventional norms of sovereignty have always been challenged. A few states, notably the United States have had autonomy, control and recognition for most of their existence, but most others have not. The politics of many weaker states have been persistently penetrated, and stronger nations have not been immune to external influence. China was occupied. The constitutional arrangement of Japan and Germany were directed by the United States after World War II, the United Kingdom despite its rejection of Europe is part of the European Union.*[iii]Unfortunately and strategically, in the International community, some nations are more powerful than others, unlike the municipal law where everybody is a subject of the law, law within a state is permissive and coercive, the citizens cannot decide which law to obey or which law to break. International law on the other hand is subjected to the interest of a member state subscribing to the law, in other words, a state can decide whether or not to obey International law, it is immaterial that the State in question has subscribed to the law. The problem that arises with this double standard is that some powerful countries bully other weaker states and often times, infringe on their sovereignty and independence. This increases the gap between the stronger and weaker states which will result in an imbalanced international community.

At this juncture, it is apt to examine Sovereignty in the context of International law. According to Brownlie[iv], 'sovereignty' is legal shorthand for legal personality of a state and the incidents of that personality. He says, the principal corollaries of the sovereignty and the equality of the states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states and; (3) the dependence of obligations arising from customary law and treaties in the consent of the obligor[v]. The above can be explained as the principles of Sovereignty, however, these principles and theories of sovereignty are limited by International law in reality, in other words, it is safe to state that in international law, no true sovereignty exists.

Sovereignty has assumed a double nature in International law, to weaker states, sovereignty is not a good enough reason for not subscribing to the enforcement of international law and they almost always face sanctions for this, ranging from military sanctions to economic sanctions to mention but a few while to the powerful state, it is a justification for not subscribing to the enforcement of International law and agreements. This is the problem with the contradistinction that exists with sovereignty and international law, in reality, there is a difference between what sovereignty is and what it ought to be. The varying theories of state sovereignty do not embody the constant adaptation of state sovereignty to the international community. Sovereignty and international law are relational concepts which will continue to evolve depending on changing realties. Both concepts do not remain unchanged but change with the world. New situations, inventions and ways of doing things bear significantly on both concepts.

This problem affects mostly the weaker nations, for instance, constant prosecution of African leaders for war crimes (purported crimes against humanity) and the constant refusal of the United Nations to prosecute countries like Israel for war crimes against the Palestine and the United States for war crimes in Libya or Iraq. Also recently, the activities of United States in Kunduz, Afghanistan.[vi] If a panacea is not provided to this quagmire, the chasm between the powerful and weaker states will widen until there is an emergent form of neo- colonization of the weaker states and this is a problem in the international community that cannot be overlooked. This paper sets out to examine the ambivalent meaning of Sovereignty and its far reaching consequences in the context of International law. It examines the scope and limit of the application of sovereignty in theory and in practice, appraises contending political and diplomatic factors and their implications on the doctrine of sovereignty in International law. The paper will further consider the concept of hegemony in international law and the effect on state sovereignty.

2. Significance of the Concept of Sovereignty

The study exposes the fundamental problems of International law which have been ignored by scholars, diplomats, states and International organizations i.e. the effect of double standards in International law, on States' Sovereignty. States' participation in international law is premised on the concept of sovereignty, which is a unique feature of International law. But unfortunately, it is clearly evident that International law in recent times has been a threat to the sovereignty of many states. Hence, this paper will enunciate how International law has limited the sovereignty of states. It will highlight both legal and political limitations of state sovereignty as well as legally justifiable and unjustifiable limitations of state sovereignty. This is turn will present a new dimension to some of the issues in International law.

Thus, this work will investigate how major international institutions favour majorly the power blocs of the world over the weak states and come to a conclusion on whether or not these institutions are tools for the promotion of the policies of world power blocs. This is necessary because it will draw attention to the bias, if any in international institutions and in the enforcement of international law.

Sovereignty has assumed a dual nature in international law. It establishes the double standards applicable to the doctrine of sovereignty, to weaker states, sovereignty is not a good enough reason for not subscribing to the enforcement of international law and they almost always face sanctions for this, ranging from military sanctions to economic sanctions to mention but a few while to the powerful state, it is a justification for not subscribing to the enforcement of International law and agreements. Thus, the paper will establish the claim that 'sovereignty' is a broad term that can be used in whatever context states decide (especially when it is in their favour), in essence, sovereignty is what anybody and any state wants it to mean. Analysing this situation will present new dimensions into ensuring the concept serves general human purpose and not a sword or shield for select state

More importantly, it offers a new perspective to the politics and intrigues in the International community, examining re occurring themes of legitimacy and power. In other words, it informs thoughts on why some states act in specific circumstances and why some states make some international policies.

2.1. Law

The relationship between international law and state sovereignty has often been described as a symbiotic relationship as each relies upon the other for survival. International law is dependent upon the concept of statehood, and the concept of statehood is in turn dependent on international law. Also international law was created to protect and preserve state sovereignty, thus the concept of state sovereignty and its preservation is in turn dependent on international law. In light of recent events, the question has arisen, if international law limits state sovereignty. It is impossible to consider this question without examining the relevant key concepts. Thus this chapter will elucidate in great details the relevant concepts to this topic and their history. The chapter will also review previous works of scholars on this topic, focus on same and reemphasize the relevance of this work by exposing the lacunae of the previous works.

The society has been distinguished from the state; the state certainly exists to protect the lives and properties of the members of the society, to do this, the state establishes various institutions to protect those lives and properties. Law is one of the many institutions the state employs to regulate the conduct of members of the society. An attempt to give a universal definition of law will amount to an effort in futility because there is no such definition. As a matter of fact, many scholars have opined that law is what anyone wants it to

mean, nonetheless, this chapter shall make an attempt to define law with reference to various works of scholars. No doubt, law exists for the common good which entails realization of justice, thus, according to Stammler, the idea of law is the application of the concept of law in the realization of justice. The legal implication of a government is the creation of institutions to regulate the conduct of individuals within a State for the promotion of the interest of the state.[vii]

Philosophers, jurists and scholars have given various definitions of law; this cause has given birth to many schools of thoughts at different times in history giving several definitions of law and related concepts. Natural law philosophers argued that law is that which reflects, or is based on, the built-in sense of right and wrong that exists within every person at birth. This moral barometer, which operates through the functioning of conscience, gives each person the capacity to discover moral truth independently. Some believed that this sense was God-given; others believed it was an intrinsic part of human nature.[viii] Natural law philosophers argued that moral goodness is conceptually independent of institutional views of goodness or evil. Thus, no government can make a morally evil law good or a morally good law evil. Moral goodness exists prior to institutional lawmaking, and sets a moral standard against which positive law should be measured.[ix]Thus, even though during apartheid the all-white South African government may have had the power to enact racially discriminatory statutes, such statutes were not truly "law" because they were morally abhorrent. This natural law philosophy was very influential in seventeenth- and eighteenth-century Europe. Revolutionaries who sought to overthrow established monarchies were attracted to natural law because it established a philosophical foundation for political reform. Thomas Aquinas is described as one of the modern natural law theorists, according to Aquinas, law is nothing else than an ordinance or reason for the common good, made by him who has the care of the community and promulgated.[x]

Analytical positivist sasserted that law was a self-sufficient system of legal rules that the sovereign issues in the form of commands to the governed. According to John Austin, law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.[xi] Law is a general command of a sovereign backed by sanctions. These commands did not depend for legitimacy on extraneous considerations such as reason, ethics, morals, or even social consequences.[xii] However, the sovereign's will be law only if it was developed according to duly established procedures, such as the enactments of a national legislature. Thus, the apartheid laws passed by the previously all-white South African legislature were "the law" of that country at that time to the same extent that civil rights legislation enacted by the U.S. Congress was the law of this country. Each of these lawmaking bodies was exercising sovereign power in accordance with provisions of a national constitution.

Positivists would maintain that individuals and governmental officials have no right to disobey laws with which they personally disagree due to moral, ethical, or policy objections. Positivists would also maintain that trial jurors have a legal obligation to apply the law according to the judge's instructions, even if that means disregarding strongly held personal beliefs about the wisdom of the law or its application in a particular factual dispute. It is quite evident that a universal definition of law cannot be given; the best approach is to interpret the concept contextually, then law will mean anything anyone wants it to mean. For example, to the law breaker, law is that thing that will prevent the individual from taking a particular action while the law maker see law as a means of regulating the actions of individual in the society. Though a universal definition might be impossible, no doubt, its relevance in the society cannot be under-emphasized; it is an institution that is very much needed for the growth of any society.

With the creation of law comes the birth of a legal system; generally, within the state, this is referred to as the municipal legal system and this regulates the behaviour of individuals within the state, in other words, municipal legal system is territorially bound, such laws are expected to be known by the judiciary of that state, thus, in Nigeria, the Nigerian laws are judicially noticed, hence, foreign laws must be ascertained and proven.[xiii]Human interactions no longer have spatial and temporal limits, the world is fast becoming a global village and relationships have become cross-border; marriages, business, communication, transportation and all these developments have led to the creation of an international legal system which unlike the municipal legal system is concerned about inter- state relations.

2.2. International Law

International law is a broad aspect of law; its frontiers are still emerging, often times, the modus operandi of international law is dictated and set by the global happenings and challenges. Thus, as relevant as international law is, it has a lot of challenges which affect its application within States. We can say of international law, that it is the product of the codification of the social mentality of nations of the world, replacing wars with arguments of what is right and wrong. Black's law dictionary defines international law as[xiv];

- The legal system governing the relationships between nations; more modernly, the law of international relation, embracing not only nations, but also such participants as international organization and individuals (such as those who invoke their human rights or commit war or crimes).

According to Philip C. Jessup[xv];

- International law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states. International law may also, under this hypothesis be applicable to certain inter-relationships of individuals themselves, where such inter-relationships involve matters of international concern

Suffice to note that international law regulates inter-state relations,[xvi]activities of individuals in their relations with other states,[xvii] and the activities of international legal system can be executed through certain agencies and institutions.[xviii] It has often been argued, whether international law is indeed law and why states obey international law. Some scholars rely on the Rational Choice Theory, i.e. that states act rationally to maximize their interests while some attribute compliance to mutual interest and cooperation while some others ascribe legitimacy to the presence of sanctions as in municipal law.

2.3. The Role of Force

Unlike the municipal law system, in international law there is no unified system of sanctions. However, there are situations when the use of force is considered justifiable and legal.[xix] Upon the determination of a threat to the peace, breach of the peace or act of aggression within the United Nation system, sanctions may be imposed by the Security Council, [xx] These sanctions may be military, economical or a combination of both. Rhodesia which is now known as the republic of Zimbabwe received such economic sanction in 1966. A Military sanction was placed on North Korea during the Korean war of 1950-1953. Iraq received a combination of military and economic sanctions in 1990.

The coercive action within the framework of the UN is rare because it requires co-ordination amongst the five permanent members of the Security Council and this obviously needs an issue not regarded by any of the great powers as a threat to their varying vital interests. Korea was an exception and joint action could only be undertaken because of the fortuitous absence of the USSR from the Council as a protest at the seating of the Nationalist Chinese representatives. Apart from such institutional sanctions, one may note the bundle of rights to take violent action known as self-help. Shaw likens the resort to self-help to what is obtainable in a primitive society. He also states that the state engaging in self-help either as the aggressor or in self-defence, does so on its own authority according to the extent of its measures and there is no supreme body to rule on their legality or otherwise, in the absence of an examination by the International Court of Justice, acceptable to both parties, although international law does laydown relevant rules.[xxi] Writers who attribute the legitimacy of international law to the use of sanctions will face difficulties in describing the legal nature of international law as to see the sanctions of international law in the states' rights of self-defence and reprisals is to misunderstand the role of sanctions within a system because they are at the disposal of the states, not the system itself. Shaw highlights the current trend in international law which is to restrict the use of force as far as possible, and the consequently absurd result that the more force is controlled in international society, the less legal international law becomes. It is clear that the nature and legitimacy of international law cannot be fully explained and understood in the context of the use of force.

2.4. Sovereignty in Theoretical Framework of International Law and in Practice

As already established, the concept 'sovereignty' is an important element of International law. As with other concepts of international law, understanding the concept of sovereignty is based on understanding the social structure to which international law applies. The State and the international community are not only opposite but depend on each other, drawing their life blood from the combination of mutual desire and revulsion that marks their tormented relationship.[xxii] Sovereignty and international law must be understood in relation to one another. Both international law and sovereignty are not static concepts fixed to one entity or another but are relational concepts, which change over time depending on the others in the relationship.[xxiii] The term sovereignty is somewhat ambiguous in meaning.[xxiv] There have been several attempts to define sovereignty; an authoritative definition of sovereignty is given by Judge Huber in the Island of Palmas case as follows;

- Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international.[xxv]

2.5. Internal and External Sovereignty

- States whose subjects or citizens are in the habit of obedience to them, and which are not in themselves subject to any other (or paramount) State in any respect ... In the intercourse of nations, certain States have a position of entire independence of others ... This power of independent action in external and internal relations constitutes complete sovereignty[xxvi]

From Bodely's definition of state sovereignty, we can deduce that state sovereignty may be internal or external. External sovereignty may be described as the competence and authority to exercise the function of a state within national borders and to regulate internal affairs freely. Internal sovereignty thus comprises of the whole body of rights and attributes that a state possesses in its territory. External sovereignty is traditionally understood as legal independence from all foreign powers, and as impermeability, thus protecting the state's territory against all outside interference.[xxvii] Sovereignty has positive and negative implications. The positive implication of sovereignty is the freedom to conduct state affairs without external interference while the negative implication of sovereignty is the responsibility of the state to protect the sovereignty of other states from harm. The distinction between internal and external sovereignty make it possible to contemplate the division and limitation of state sovereignty.

2.6. Theories of Sovereignty

Sovereignty is perhaps, one of the most over flogged topics in Public International Law. There are widely varying views on the nature and relevance of sovereignty as it is an overly complex concept that cuts across various disciplines. The different theories propounded highlight the constant evolution of sovereignty over the centuries. The concept of sovereignty is often considered in the context of *domestic or state sovereignty, international legal sovereignty, Westphalian sovereignty and interdependent sovereignty*.[xxviii]

2.7. Historical Theories

The French scholar and politician Jean Bodin (1520-1596) was the first scholar to seriously consider the issue of sovereignty and conceptualize it.[xxix] His definition of sovereignty in his work *Six Laws of the Commonwealth* led to the traditional understanding of sovereignty as independent and supreme authority over a body politic. His work was based on the background of the waging wars of

religion which he attributed to the jumbled feudal order, with its innumerable principalities, guilds, cities, and trading unions, formally united under the Church and Emperor, but with none of them having the power to subdue the others in the time of crisis.[xxx] He proposed absolute power and perpetuity of the state. Bodin argued that for a government to be strong, it must be perceived as legitimate, and to be legitimate it must follow certain rules of 'justice and reason' comprehensible through the divine law. He however, posited that the sovereign be not restricted by any other laws but natural law and the law of God. In other words, the sovereign alone is competent to make laws but is not subject to such laws. Thus to Bodin, sovereignty is "absolute and indivisible".[xxxi] He explains;

- The attributes of sovereignty are . . . peculiar to the sovereign prince, for if communicable to the subject, they cannot be called attributes of sovereignty . . . Just as Almighty God cannot create another God equal with Himself, since He is infinite and two infinities cannot co-exist, so the sovereign prince, who is the image of God, cannot make a subject equal with himself without self-destruction.[xxxii]

It was Bodin's opinion that the sovereign is not bound by the constitution or by positive law but may be bound by divine law or natural. This has been interpreted to include international law. Although Bodin's work was well received in the 16th century by most writers, these writers also agreed that the sovereign should be bound by constitution and positive law. Thomas Hobbes disagrees and goes even further than Bodin on the rights of the sovereign.

2.8. Thomas Hobbes (1588-1679)

The 17th century writer takes Bodin's notion of sovereignty even further. He maintains that the sovereign should not be subject to the constitution, positive law, natural law or even religion. Thomas Hobbes like Bodin, wrote his magnum opus *Leviathan* during the period of a civil war, wishing to mitigate this 'worst of all evils'. His concept of sovereignty knows however even less limits than that of Bodin. Whereas Bodin acknowledged that there are some actions by the sovereign which might be perceived as illegitimate.[xxxiii]

In his work *De Cive,* he further stated that the sovereign was not bound by anything and had a right over even religion. Hobbes believes that limiting authority generates difficult disputes about what the precise limits are of authority itself. Moreover, ifthe individual citizen may unilaterally determine whether the government should be obeyed or not,then the result may be civil war or paralyzed government[xxxiv]. He however accepted the right of the individual to self-preservation albeit grudgingly.[xxxv] The right to self-preservation may be considered a limit to sovereign absolutism. Hobbes work on sovereignty is rather ironic when considered alongside his social contract theory. This is because although the sovereign basis his legitimacy on the relationship between him and his people, he subsequently becomes autonomous from them and might even act against their interest. Hobbes view on this, that the fundamental obligation on the sovereign is the obligation to protect the citizen. Ifthe sovereign fails to do so, this obligation no longer holds.[xxxvi] John lock holds a similar view to Bodin and Hobbes, but agrees that the sovereign is subject to natural law. The only difference between his work and Bodin's, is the mention of the social contract and the 17th century English context.

2.9. Hugo Grotius

A discourse on sovereignty in the context of international law is incomplete without the mention of the Dutch jurist Hugo Grotius, who is regarded as the father of international law. The major contribution of Grotius is his discourse on sovereignty in the environment of multiple sovereigns.[xxxvii] His work was largely influenced by the backdrop of the struggle of his nation for independence from Spanish colonialism[xxxviii]. Grotius' masterfully integrates the notions the independence and autonomy of the sovereign state, and the challenges of developing orderly relations between states in periods of war and peace with a thorough examination of the imperatives of sovereign power and authority and the constraints suggested by reason and expressed in the form of international law.[xxxix] Grotius creates a distinction between customary international law and *ius naturae* concerning international relations between states. He recognized the will of the states as well as the binding nature of international law on state sovereignty.[xl] He also held that rational thought could be employed to give reason to the conduct of sovereigns amongst themselves. His idea of *ius naturae* law was based on the reasoning capability bestowed on all men. The principal aim of his international legal order was the restraint of war. Grotius had a strong aversion to war, as expressed in the following quotation:

- Fully convinced **...** that there is a common law among nations, which is valid alike for war and in war, Ihave had many and weighty reasons for undertaking to write upon the subject. Throughout the Christian world Iobserved a lack of restraint in relation to war, such as even barbarous races should be ashamed of, Iobserved that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law,divine or human; it is as if, in accordance with a general decree, frenzy hadopenly been let loose for the committing of all crimes.[xli]

He distinguishes between righteous and unrighteous laws and denies the sovereigns absolute right to war. He maintained that there were discoverable natural justice principles which would justify war as just cause. He agrees that states may employ the use of force in self - defense, seeking reparations and addressing violations of international law norms. Just war maintains peace while unjust law is forbidden in international law.

2.10. Limitation of State Sovereignty

The traditional notion of state sovereignty which connotes territoriality, independence and non-intervention is gradually fading, the distinction between actions that affect interstate relations and actions that affect the domestic affairs of other states is becoming increasingly difficult to ascertain. The collective sovereignty is exercised on common global issues such as environmental pollution and terrorism. The principle of sovereignty and the norms derived from it are constantly adapting to changing realities. This adaptation

amounts to a limitation of state sovereignty. The fact that international law limits state sovereignty is confirmed in the UN charter, Article2 (2), which subjects, states' sovereignty to international law. It provides as follows;

- All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter[xlii]

Some scholars have posited that states reserve the right to subscribe to international law and to consent to treaties and conventions, however, it has been categorically stated by Judge Alvarez that all states are bound by international law. In the *Corfu Channel Case*[xliii], it was confirmed that states are bound by international law. In a dissenting opinion Judge Alvarez acknowledges that sovereignty has evolved and that a new conception of sovereignty, which will be in harmony with the new conditions of social life, must be adopted. According to Judge Alvarez, state sovereignty cannot be seen as an absolute right. States are bound by international law, including even those rules to which they have not consented.[xliv]

In its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice again confirms that sovereignty is limited and subject to international law, by rejecting the argument that a state's sovereignty allows it to become a party to a multilateral convention subject to any reservation it wants to formulate. States are not free to frustrate the aims of a convention by adhering to it while making reservations with regard to its fundamental content. State sovereignty is thus not only subjected to international law in general, but also to its purposes.[xlv] Article 1 (1) UN charter highlights international peace as one of its main purposes.

2.11. The Limitation of State Sovereignty as a result of the Changing Nature of International Law

The principle of absolute sovereignty of equal states came to be recognized as the foundation of modern international relations theory.[xlvi] It is generally accepted that sovereignty is a fundamental principle of international law. The United Nations is founded on the principle of the sovereign equality of all its members.[xlvii]

The principle of equality in Article 2(1) is typical of the *Westphalian* model, as this principle legally sanctions the existing power relationships in the world community and formally acknowledges and confirms the claim that all states, irrespective of their stature, should be treated as equal.[xlviii]However, the introduction of the phrase sovereign equality into international law by the Charter of the United Nations indicates a significant change in the history of the notion of state sovereignty.

Fassbender[xlix] explains the adoption of this new term as follows:

- The idea of equality of States in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun 'equality'. In this combination, sovereignty meant to exclude legal superiority of any State over another, but not to exclude a greater role of the international community played vis-à-vis all its members. The new term proved to be an accurate description of the development characterizing the international legal order in the age of the League of Nations and, in particular, the UN: from the two elements, 'sovereignty is in a process of progressive erosion, inasmuch as the international community places even more constraints on the freedom of action of States'. We witness a development towards greater community discipline ... driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established.

The Friendly Relations Declaration of 1970[l] confirms that the principle of sovereign equality is understood as expressing the right of states to equality in law.[li]

The Declaration explains the principle of sovereign equality as follows:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social political or other nature. In particular, sovereign equality includes the following elements:

(a) States are juristically equal;
(b) Each State enjoys the rights inherent in full sovereignty
(c) Each State has the duty to respect the personality of other States;
(d) The territorial integrity and political independence of the State are inviolable;
(e) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle is thus an umbrella concept that embraces the two distinct notions of sovereignty and legal equality.[lii]

With regard to specifically sovereignty, states often use this concept as a justification to demand the non-intervention of other states in matters that they consider to be in their exclusive jurisdiction.[liii]However, due to the role of regional and international organizations and the influence of universal norms and values, the present idea of state sovereignty differs greatly from the classical understanding of sovereignty as absolute.In a growing interdependent world where national boundaries are increasingly permeable, traditional notions of territoriality, independence and non-intervention are losing some of their meaning.[liv]

It is becoming more and more difficult to separate actions that have an exclusive effect on one state's internal affairs from those actions that have an impact on the domestic affairs of other states[lv] and, therefore, to define the legitimate boundaries of sovereign authority. Consequently, states will have to accept that, particularly in respect of common global issues, sovereignty has to be exercised collectively. The principle of sovereignty and the norms that derive from it must, therefore, be adapted in accordance with changing realities.

International law limits the sovereignty of states in a number of ways in a variety of areas. The Charter of the United Nations confirms that the sovereignty of states is limited, by subjecting sovereignty to international law. In this regard Article 2(2) of the Charter reads

as follows: *all Members, in order to ensure to all of them the right and benefits resulting from membership shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.*

In combining the principle of sovereignty with the principle that states have to respect international law, the Charter of the United Nations distinctly show that there is not a contradiction, but rather a connection between state sovereignty and respect for international law. The Charter thus confirms the supreme nature of international law and describes sovereignty as sovereignty within and subject to international law and thus as a limited concept.

2.12. Multilateral Treaties

International law also limits the sovereignty of states through multilateral treaties dealing with a wide range of international issues, and the creation of international legal norms with the status of *jus cogens* and international legal obligations with an *erga omnes* character. The twentieth century marked a growing interest among states to conclude multilateral treaties. When a state accedes to a particular multilateral treaty, it may have the effect that such a state voluntarily relinquishes certain elements of its own sovereignty and independence.[lvi]Multilateral treaties of particular importance in this regard are the following:

2.13. Treaties Establishing Supranational Institutions

Not only in Europe, but in various parts of the world a process of regional integration is taking place. States transfer certain aspects of their national sovereignty to a supranational body, such as the European Union and the African Union. These institutions are created by states because they recognize that there exist certain issues which they cannot adequately address independently.

A more communitarian international law is thus developing where states pursue most of their individual interests through multilateral institutions. The strengthening of international organization and institutionalized cooperation is regarded as the key to reaching new stability within the international system.

This movement towards increased institutionalization of international cooperation indicates a growing readiness of the international community to accept far-reaching restraints on their sovereignty in favour of the implementation and enforcement of international law. There is simultaneously growing consensus as to the foundations and binding force of international law which is a prerequisite for a more effective international legal order as the basis of international peace. Already in 1964, Friedmann[lvii] identified the beginning of the integration of West European states with a long tradition of national sovereignty in supranational communities. According to him contemporary international relations and law are developing on three different levels namely:

(i) The traditional system of interstate diplomatic relations or the relations of "co- existence". The United Nations in its principal political organs, the General Assembly and the Secretariat, is in essence an institutionalized extension of this traditional international society.

(ii) A transnational society which is represented by increasing international cooperation in matters of common concern. The principal agents of these transnational relations are the states, using multilateral or bilateral conventions in fields such as international transport, communications and health and also semi-public and private groups such as the International Red Cross.

(iii) A supranational society in which the activities and functions of states are merged in permanent international including, regional institutions. These institutions derive their status from treaties and are supported by the agreement and the contribution of the member states.

The developments referred to by Friedmann are evident in the establishment of the World Trade Organization in 1995 and the International Criminal Court in 2002. An example of the kind of international issues the World Trade Organization deals with is contained in the preamble to the World Trade Organization Agreement which inter alia determines that *optimal use should be made of the world's resources in accordance with the object of sustainable development while at the same time seeking to protect and preserve the environment.*

As a result of the Second World War there is general acceptance of the principle that states that act as aggressors abuse their sovereignty and that their leaders may be accountable directly to the international community. The establishment of this principle marked a revolutionary change in the ambit of state sovereignty.There is increasing agreement amongst members of the international community that those people, who commit gross violations of internationally recognized human rights, should face international criminal justice.

On 17th July, 1998 the majority of states that attended the Rome Conference adopted the Statute of the International Criminal Court. The jurisdiction of the court covers genocide, war crimes and crimes against humanity. The establishment of the International Criminal Court is a significant step towards the legitimization of certain principles of national responsibility and transnational law that have preference above claims of national sovereignty. Wismer[lviii] specifically views the international Criminal Court system as an indication of the development of a world law where certain supranational norms, which are not exclusive to one state's unique set of legal rules, are enforced towards individuals directly. The creation of the International Criminal Court is a clear indication of the international community's willingness to hold individuals accountable when the exercise of their state authority is beyond legal limits.[lix]

2.14. Treaties Protecting International Human Rights

The promotion of international human rights is a fundamental objective of the United Nations. The Charter therefore gives formal and authoritative expression to the protection of human rights. In the preamble of the Charter of the United Nations it is stated that *the United Nations is determined to reaffirm the faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.* Especially with regard to the protection of human rights, the Charter not

only limits the sovereignty of a state in respect of its relations with other states in the international community, but also with regard to its subjects within its own territory.[lx]

The human rights provisions of the Charter of the United Nations are supplemented by the Universal Declaration of Human Rights,[lxi] adopted by the General Assembly in 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that were both adopted by the General Assembly in 1966. These instruments are often referred to as the International Bill of Rights.[lxii]The regional organizations such as the African Union have similar objectives to protect and promote human rights in their constitutive documents. Since the end of the Second World War it is generally accepted that the protection of fundamental human rights has become a matter of international concern. Especially since the adoption of the Universal Declaration of Human Rights by the United Nations in 1948, a considerable number of multilateral treaties specifically aimed at the international protection of human rights, have been concluded between states. This is a direct consequence of Article 55 of the Charter of the United Nations that links the international protection of human rights to the maintenance of international peace and security.[lxiii]

The relevant provisions of Article 55 provide, inter alia, that, with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations between states and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This approach has placed the protection of human rights squarely in the international arena. Prior to 1945 state sovereignty was generally viewed as absolute; the regulation of the relationship between the state and its citizens was initially treated as an internal matter and therefore confined to municipal law. However, since 1945 almost all states elected to become involved in international regime that in some instances had a profound influence on the concept of state sovereignty as being absolute. The international arrangements concerning human rights constitute such a regime. Today very few states would probably seriously claim that the protection of human rights should solely be treated as a domestic affair.

In this regard Forsythe[lxiv]argues that the idea of state sovereignty no longer provides an automatic and impenetrable shield against international action on issues once regarded as essentially domestic. In the past state sovereignty protected by the principle of non-intervention into the internal affairs of a state has been a strong impediment in the way of effective protection of human rights. Although the Security Council and the General Assembly established the well-founded interpretation and practice with regard to Article 2(7) that violations of internationally recognized and protected human rights are not matters essentially within the domestic jurisdiction of member states, states nevertheless continued to use sovereignty and the non-intervention principle as a political tool to impede the protection of international human rights. The principle of non-intervention is challenged by the international community's belief that it has a "responsibility to protect". A consequence of the international protection of human rights is the weakening of the notion of absolute state sovereignty and a simultaneous increase of mutual solidarity between states.

The limitation of state sovereignty is thus explained with the argument that human rights are no longer essentially within the domestic jurisdiction of a state, but concerns the international community. It is therefore generally accepted that international human rights law has binding force limiting the freedom of states to engage in certain activities within their territorial boundaries. International environmental law and human rights are recognized as sharing a close relationship. It is affirmed by modern legal rules that a fundamental human right is the right to live in a clean environment. A polluted, degraded, or desecrated environment violates that fundamental right. Likewise, does poverty and human degradation, which demonstrate the connection between international environmental law and sustainable development. Therefore, the world community needs to manage its activities in order to keep these adversities within bounds and redress current imbalances. There is a clear need for integrated, global management of the links among poverty, population, consumption and the environment, as well as a world-wide acceptance of the discipline of sustainable development.

2.15. Sovereign Immunity

There are several uncertainties regarding the concept of sovereign immunity. International law had usually avoided dealing directly with individuals but eventually came to realize that certain crimes are attributable to individuals alone.[lxv] This controversy was resolved by the Nuremberg Tribunal when it ruled that:

- "…crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced…"[lxvi]

Although the controversy of individual responsibility has been resolved, with its resolution arises the controversy of sovereign immunity. The *Pinochet* case caused a division in Europe on the issue of sovereign immunity.[lxvii]Similarly, a division was caused in the US, in the case of *Princz V. Federal Republic of Germany.*[lxviii] The realist argued for the importance of upholding sovereign immunity for maintaining stable and peaceable relations among states while the idealist argued that states are obliged to deny state sovereignty in cases regarding fundamental human rights and other international crimes. In the cases of *Al-Adsani*[lxix]and *McElhinney*[lxx] and the similar *Arrest Warrant*[lxxi]case, courts argued in favour of sovereign immunity. The ICJ also has accepted that aright to sovereign immunity exists. The ICJ however had a contrary opinion in the *Ferini* case and the *Dostomo* case[lxxii]. In summary, the ICJ is not clear on the position of Sovereign immunity, it has been posited that sovereign immunity is a principle, not a rule, and whether or not the court will uphold it will be determined by the facts of the case. This in my opinion gives the court a very wide discretion and leads to uncertainty in International law especially in relation to states' sovereignty.

3. Conclusion

Traditionally, consent of states forms the basis of a state's participation in the international community. International society is viewed as a horizontal system premised on the sovereign equality of states, while international law is seen as a body of rules based on consent and characterized by their neutrality. A necessary consequence of this is that all legal norms are equal in status. This horizontal character of public international legal norms has been modified in so far as a hierarchy of rules has been created. Those norms that can be classified as peremptory norms, from which no derogation is permitted, namely *jus cogens*, and obligations *erga omnes*, take the highest position in this hierarchy and amounts to a limitation on the sovereignty of states.

The concepts of *jus cogens* and obligations *erga omnes* have had a profound effect on international law. Together these notions have transformed international law from a system in which all rules carried equal weight to a system of "graduated normativity" in which certain norms enjoy a higher status. This development has been challenged on the ground that the international community has not yet evolved to a point that such a two-tier system can be sustained. Nevertheless, there can be little doubt that these concepts have transformed the nature and structure of international law. Although international human rights are mostly contained in treaties, some certain human rights have already attained the status of customary international law and even *jus cogens*, in other words, principles from which derogation either by legislation or by treaty is prohibited.

Human rights principles can therefore be binding on states without specific consent on the part of the states. The implication of this is that if states are bound by these principles, part of their sovereignty has been eroded. There is also an increasing acceptance of fundamental rights that accord the status of obligations *erga omnes*, because of their extraordinary importance for the international community. The recognition of *erga omnes* norms in the field of international human rights, for example, the prohibition of torture and discrimination based on race, sex and religion, indicates a major step towards the universalization of human rights.[lxxiii]

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