International Journal of Law and Legal Jurisprudence Studies : ISSN:2348-8212

ICL: The Guardian of Sovereignty of Nations

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Abstract:

International Community began to realize the value of 'individual human rights' and universal duty to protect humanity during and in the aftermath of the World Wars. International Criminal Law peruses the conviction of 'evil mind' which executed the demonic activities and thereby to punish the criminals, irrespective of the involvement of State officials and political positions. The piece of think is an attempt to showcase the turning of wheel of 'traditional sovereignty' towards 'modern sovereignty' and thereby judging ICL on scales of 'sovereignty' in the modernized broadened sense. The very objective of ICC to stigmatize the 'individual criminal' and not to be restricted to the geographic boundary of the respective states poses the author with certain significant research questions like, How the term 'sovereignty' has been moulded today with the change in 'restricted national theory'? Is ICL really an infringement upon the 'sovereignty' of nations? and Has the Rome Statute tried to preserve the 'sovereignty' of nations in the international plane? The author will test and then try to build the confidence of readers in International Criminal Law for it being a step to reaffirm 'that' notion of 'sovereignty' through the international interferences so as to defend the premises of 'sovereignty' as built in the political science.

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Introduction

International Community began to realize the value of individual human rights and the universal duty to protect the humanity during and in the aftermath of the World Wars while mass atrocities were being committed around the globe at the peak. The final nail in the coffin was the rising consciousness against the disastrous effects of piracy on high seas unleashing the rein of patience. The need of the hour of the nations was to come together with the obvious solution of International Jurisdiction which later formalized into Universal Jurisdiction. This idea sowed the seeds of International Criminal Law (ICL) and the International Military Tribunal at Nuremberg (initially and later ICTY, ICTR etc.) showed to the community the structure of ICL seedling, leaving it to form the full fledged plant – the codified ICL. The Rome Statute or the International Criminal Court Statute is the lifeline of ICL, though ICC takes insights from other sources of International Law as prescribed in the Article 38 of the Statute of the International Court of Justice. The worlds through the eyes of people of Germany, Rwanda, Cambodia, Yugoslavia, Nanking etc. has witnessed too much bloodshed, inhumane and atrocious activities by those belonging to the same humankind. It was a shame on humanity itself and the immediate demand was of 'Justice' to the victims. The very objective of ICC is to stigmatize the 'individual criminal' and hence not to be restricted to the geographic boundary of the respective states. The persuasion was to convict the 'evil mind' which executed the demonic activities. It requires the piercing of veil of traditional sovereignty of nations and thereby to punish the criminals, no matter if the State officials and political positions are themselves involved in the same. The classical scholars raised their eyebrows on the usurpation of such powers by ICC calling it as 'demise of sovereignty', but the broadened attitude and open mind of modern scholars paved the way of debate to the modern concept of sovereignty. The philosophical underpinnings of sovereignty saw the change from traditional to modern idea of sovereignty thereby including the international interference as a way of stabilizing the sovereignty itself. The definitions and understanding of sovereignty is now moulded with a complete different perception and theories justifying it. ICL should be no more accused of demise of sovereignty for in actual sense it helps nations in proclaiming their sovereignty. The present paper is an attempt to showcase the turning of wheel of traditional sovereignty towards modern sovereignty and thereby judging ICL on the scale of sovereignty in the modern and broadened sense.

A. Delving into the idea of Sovereignty

The natural tendency of human civilization towards socialization is the root cause for their strive for powerful position in the community. The instinct is prevalent since ages and the first and most solidified form of the same is the structure of King and his subjects. The 'subjects' considered the King as the most powerful to the extent that it went without saying 'King can do no wrong'. Interestingly, literature has used the connotation of 'subject' and 'sovereign' (from Latin word '*superanus*' meaning supreme) for people being subjugated and for highest authority to control them respectively. This sovereign used to exercise its 'sovereignty' upon its people living within the bounds of prescribed geographical limits. It originated the idea of linkage of sovereignty with territory, within which the sovereign is 'only and the most' powerful entity to rule over its subject. A holder of sovereignty derives authority from some mutually acknowledged source of legitimacy - natural law, a divine mandate, hereditary law, a constitution, even international law.[2] But if sovereignty is a matter of authority, it is not a matter of mere authority, but of supreme authority.[3] The philosophers like Jean Bodin, Thomas Hobbes, John Austin etc. conceptualized the idea of Absolute Sovereignty. According to them, sovereignty is the absolute and perpetual power of commanding in a state as the supreme power over citizens and subjects unrestrained by law.[4] The dreadfulness of the sovereign was also prevalent in the mind of Shakespeare when he wrote:

'Tis a common proof,
That lowliness is young ambition's ladder,
Whereto the climber-upward turns his face;
But when he once attains the upmost round,
He then unto the ladder turns his back,
Looks in the clouds, scorning the base degrees
By which he did ascend.' ~ Julius Caesar, Act II, Scene 1

[2] Adrian Kuah, *Sovereignty and The Politics of Identity In International Relations*, Institute of Defence and Strategic Studies Singapore, RSIS Working Papers ; 48/03, http://dr.ntu.edu.sg/handle/10220/4450.
[3] *Ibid.*
[4] O.P. GAUBA, AN INTRODUCTION TO POLITICAL THEORY, (Macmillan Publishers India Ltd , 4th Ed. 2002).

a) Classical idea of Absolute Sovereignty

The European concept of 'unitary sovereignty' led to the evolution of theory of state sovereignty wherein all the state sovereigns are considered equal in the international community. The interrelation among different nations required the observance of certain code of conduct like diplomatic immunity whereby the sovereigns of other state could operate in accordance of its laws within the boundaries of other state. The idea of 'equality of nations' has the genesis from the very concept of sovereignty for every state assumes itself the most powerful thus negating the idea of higher power. It could be characterized as the nation-state's power to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions.[56] Thus the European conception of sovereignty both legitimized the state and imposed limits on its interference with other states. The elements of State are:[7]

1) A territorial base with determinable boundaries[8]

2) Control a population[9]

3) Controlling internal power and competencies as well.[10]

4) Controlling competence to represent the State or territorially organized body politic in the international environment.[11]

Taking the cue from above, sovereignty can mean ultimate, effective political power. This absolutist idea of sovereignty has not been ascribed to by the international community on grounds of humanitarian intervention.

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[5] *Supra* note 1.

[6] Winston P. Nagan, & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43(1) Colum. J. Transnat'l L. 141, http://jtl.columbia.edu/the-changing-character-of-sovereignty-in-international-law-and-international-relations/.

[7] *Ibid.*

[8] Phillip Jessup, U.S. Representative to the Security Council remarked on the definition of a state to the UN that the reason for the rule that one of the necessary attributes of a state is that it shall possess territory is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some position of the earth's surface which its people inhabit and over which its government exercises authority.

[9] This emerging human element is the foundation of community norm generation.

[10] A state may be characterized as "an autonomous territorial and political unit having a central government with coercive power over men and wealth." See Henry T. Wright, *Toward an Explanation of the Origin of the State*, in EXPLANATION OF PREHISTORIC CHANGE 217 (James N. Hill 1977).

[11] A State may be identified by its ability to defend itself against external international pressures or conflicts. *Ibid* at 216-17.

b) Modern Conception of Sovereignty

There have been diverse opinions on the legality, utility and effectiveness of the traditional understanding of Sovereignty. Today, the world is not ready to accept the restricted view of sovereign as supreme for all. Bertrand de Jouvenel in his work 'Sovereignty: An Inquiry Into the Political Good', accepts the danger attached to the concept of absolute sovereignty as propounded by Hobbes and hence holds that sovereignty must be channeled so that sovereign authority wills nothing but what is legitimate. He argues that "there are…wills which are just and wills which are unjust" and "Authority carries with it the obligation to command the thing that should be commanded".[12] Jouvenel seems to doubt that judicial or constitutional design is alone enough to channel the sovereign and hence placed reliance in the shared moral concepts of the citizenry for the purpose. The wings of ICL have got its spread from the shared view and common conception of humanity of the international community which can be, according to Jouvenel be used as a mechanism to check the unjustifiable will of the sovereign. Bodin's and Hobbes' erroneously conceived sovereignty as an external entity to which people permanently transferred and alienated their powers, which rather than representing the people and being accountable to it, becomes a transcendent entity holding the supreme and inalienable right to rule over the people, independently of them. According to Maritain, the supreme power of the sovereign state is contrary to the democratic notion of accountability.[13]

For the strict classical view of sovereignty was not enough for ICL to break through, the concept of Westphalian Sovereignty posed a real threat to the modern consciousness of sovereignty. There are two dimensions of 'Westphalian or *Vattelian* sovereignty'- a) domestic autonomy which refers to the 'monopoly of the state over a territory' being effectuated through 'prescriptive jurisdiction and enforcement jurisdiction' and b) international autonomy which refers to the autonomy of the sate to act on the international level.[14] The States have been insistent on enjoyment of absolute sovereignty in lieu of internal or external interferences by its people or other nations respectively. Hoffman defines external sovereignty as where the state is

[12] *Supra* note 1.
[13] *Ibid.*
[14] Tahira Mohamad Abbas, *Sovereignty In The Post-Liberal Paradigm Of International Statebuilding*, Academic.Edu , http://www.academia.edu/1258305/_Sovereignty_In_The_Post-Liberal_Paradigm_Of_International_Statebuilding.

subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law.[15] The basic premise of both traditional Absolute sovereignty and Westphalian sovereignty is the isolation of every state with respect to its functioning, giving it the status of sole law maker and executor within its territory.

Today, the world tends to follow the kind of sovereignty as defined by Rousseau wherein the collective general will of people within a state serve as the sovereign. Philosophers like Hugo Grotius, Alberico Gentili, and Francisco Suarez have accepted the authority of a state ought to be limited, not absolute. The traditional idea of sovereignty for it being absolute extending to all matters within the territory, unconditionally is no longer tenable in lieu of the recent trends like European Union (1993) where the member states are sovereign in governing defense, but not in governing their currencies, trade policies, and many social welfare policies, which they administer in cooperation with EU authorities as set forth in EU law.[16] The present globalized world argues that granting of 'excessive sovereignty' to the states will endanger its developmental opportunities and hence the states should only be recognized with the status of 'quasi states' having the de jure sovereignty alone without de facto sovereignty.

c) **Sovereignty as Responsibility**

The development of international law has led to the changing definition of sovereignty encompassing the reality that in many areas, state's legal authority over internal and external affairs is transferred to the Community as a whole. Krasner's 'Westphalian sovereignty' prevents the delegation of powers over the state to an external authority. Such conception of sovereignty is in conflict with the ongoing phases of development of institution of international organizations and code which mandates the parties' obligation to fully accept their rules and decisions as a necessary precondition for their membership to such Charter without the enjoyment of veto power.

We are in an era of "new sovereignty," which is defined as a state's capacity to participate in international and trans-governmental regimes, networks, and institutions that have

[15] Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40(4) JCMS, 743-65 (2002).
http://isites.harvard.edu/fs/docs/icb.topic162929.files/B_Political_Integration/KeohaneIroniesOfSovereignty.pdf
[16] *Supra* note 1.

increasingly become part and parcel of international interactions that enable individual governments to work together to achieve common goals that are nearly impossible or too costly for one state to achieve acting alone.34[17] The existence of a body of law based on the principle of the independence of sovereign states has legitimized and institutionalized the existence of political forms that claim the status of sovereign states.[18] The changing paradigm of sovereignty has exposed it as a socially constructed phenomenon and therefore international norm of state sovereignty and the norm of individual human rights must be comprehended in a constructive manner.[19] Since 1945, with the era of de-colonization and self-determination, the obligation of sovereign states to protect the individual human rights of their citizens has become essential to legitimizing the existence of the international state system itself.[20]

The Responsibility to Protect moves the argument from the "right to intervention" to one about the international community's responsibility to protect."[21] Grotius asserted that every state has jurisdiction over "gross violations of the law of nature and of nations, done to other states and subjects."[22] The old concept of sovereignty has gradually eroded as states accept more and more limits on their freedom, and as the rights of individuals become more important instead.[23] 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.[24] It is therefore generally accepted that international human rights law has binding force limiting the

[17] Davida. Lake, *Reflection, Evaluation, Integration: The New Sovereignty in International Relations*, 5 International Studies Review, 303-23, (2003), http://www.jstor.org/stable/3186572.
[18] Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 Chap. L. Rev. 179-99 (2005).
[19] *Ibid.*
[20] Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 Rev. of Int'l Stud. 519 531-36 (2001).
[21] Donald W Potter, *State Responsibility, Sovereignty, and Failed States,* (Sept. 29, 2004) (unpublished paper presented to the Australasian Political Studies Association Conference, University of Adelaide) https://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf.
[22] Robert Cryer, *International Criminal Law v State Sovereignty: Another Round?,* 16(5) Eur J Int Law 979-1000 (2005).
[23] Renata Giannini, *The Rule of Law: State Sovereignty vs. International Obligations*, ODUMUNC 2010 Issue Brief for the GA Sixth Committee, http://al.odu.edu/mun/docs/Issue%20brief%202010,%20The%20rule%20of%20law.pdf.
[24] John H. Jackson, *Sovereignty - Modern: A New Approach to an Outdated Concept*, 97 Am. J. Int'l L. 782-802 (2003), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1108&context=facpub.

freedom of states to engage in certain activities within their territorial boundaries.[25] The theories of the common interest and the common good entail that states are required to sacrifice their individual interests as well as certain aspects of their sovereignty in favor of the common interest and the common good.[26] The discourse relating to sovereignty has been hold upon by Kant who introduced the concept of "cosmopolitan law," in addition to constitutional law and international law in which both states and individuals have rights, and where individuals have these rights as "citizens of the earth" rather than as citizens of particular states.[27] The decentralized world order now emphasis upon the individualization of international law, the invocation of *jus cogens*, which signals the obligatory character of key human rights norms based on consensus, not state consent, and the emergence of transnational law.[28] The changing nature of the subjects of international law from merely states to the inclusion of individuals made the way smoother for now the states cannot demand absolute sovereignty and thereby the ICL will not be termed as the intervention in their nation.

B. Jurisdiction of ICC & Sovereignty of States

In contemporary international law, the consent of its people is the source of validity of sovereign power. The idea of 'Universal Jurisdiction' gets its legality form the very aspect of the action of the sovereign against its people who themselves have formed the ladder for the sovereign to get to the topmost rung. Universal jurisdiction, in its conceptual and normative design, is an instrument for the protection of sovereignty, which is based on the human and humanitarian rights of people.[29] International Law interferes in the domestic jurisdiction upon the violation of idea of sovereignty and its predicate of authority and legitimacy as rooted in the minds of their subjects.

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[25] F.X. PERREZ, COOPERATIVE SOVEREIGNTY FROM INDEPENDCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW, (The Hague, London, Boston: Kluwer Law International 2000) at 289.
[26] Magdalena Petronella Ferreira-Anyman, *The Erosion of State Sovereignty in Public International Law: Towards a World Law?,* UNIVERSITY OF JOHANSBERG, https://ujdigispace.uj.ac.za/bitstream/handle/10210/3639/Ferreira.pdf?sequence=1.
[27] Cosmopolitanism, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/cosmopolitanism/
[28] Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law,* Ethics & International Affairs18,no.3 (2004), http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7953655.
[29] *Supra* note 5.

d) **ICC and the Consent Theory**

The International Criminal Court exercises its laws on the states who are parties to the Rome Statute as specified in its preamble. The ICC has been created under the Rome Statute, to which states became parties voluntarily thus accepting that the ICC may exercise some of their sovereign powers -namely the right to exercise jurisdiction on their behalf.[30] No other entities than states had the authority to create a permanent international criminal court.[31] In creating the Court, those states have accepted that the ICC may exercise some of their sovereign powers (the right to exercise jurisdiction) in that way.[32] The Foreign Relations Law of the U.S. (S 201) and the 1933 Montevido Convention on Rights and Duties of States defined the state as having: 1) a defined territory and population; 2) said territory and population are under the control of its own governmental apparatus; and 3) the entity engages in or has the capacity to engage in formal relations with other states.[33] There is no reason that states cannot determine that crimes committed on their territory or by their nationals are prosecutable by courts acting on their behalf.[34] A state that seeks to ensure that its officials are not prosecuted before the Court can do one of three things: it can refrain from the commission of international crimes, it can vigorously prosecute allegations of atrocities in domestic courts, or it can choose not to join the ICC at all.[35] When states do willingly sign a treaty, they can (and do) add reservations to specific parts of the treaty, noting not only disagreement but restricting applicability and enforcement of those specific articles and/or stated language.[36] So, the ICC Statute is a result of the *consensus ad idem* of the states preserving their rights as stated therein so as to give them a sense of security from excessive international infringement. The strategic analysis shows that under Article 72 of the Rome Statute the states are given full chance to adequately safeguards and protect their sensitive national security information from being used as evidence in the trial. Article 90 grants priority

[30] Manuela Melandri, *The Relationship between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay,* International Criminal Law Review 9 (2009) 531-545.
[31] *Supra* note 21.
[32] *Ibid.*
[33] Dawn L. Rothe & Christopher W. Mullins, *The Death of State Sovereignty- An Empirical Exploration, 34(1)* International Journal of Comparative and Applied Criminal Justice 79-96 (2010).

[34] *Supra* note 21.
[35] Allison Marston Danner & Beth Simmons, *Sovereignty Costs, Credible Commitments and the International Criminal Court*, http://www.law.yale.edu/documents/pdf/Faculty/DannerSimmons07.pdf.
[36] *Supra* note 32.

to request for surrender by the Court over similar requests by other states for extradition of the same individual.

The grounding of the ICC in the consent of states means, in particular, that the ICC may lawfully exercise jurisdiction over nationals of non-party states when they commit crimes on the territories of consenting states.[37] It has been alleged by US that the ambit of jurisdiction of ICC covers both member and non member states which is derogatory to the idea of sovereignty of non consenting states. Under the traditional law, the foreign nationals can be prosecuted by the national government of the place of execution of the crime. The ICL contains nothing to subvert the doctrines of criminal jurisprudence since the non member states nationals are prosecuted for their criminal acts being committed within the territory of member states, which by way of Rome Statute have delegated or agreed to delegate their power of trial of certain crimes by ICC. Thus, the sovereignty of the states- both member and non member is preserved by way of the volitional theory of ICL, as member states chose to agree to such provisions of International Law and the non member state nationals chose that territory to carry out their malicious plans. Thus ICC represents a mechanism being developed by the states to combat the inability being imposed upon them due to unavoidable and exceptional circumstances. The willingness of the states to accept the Code showcases their eagerness to be bound by such mechanism which could lend a hand in times of extreme incapability and thus set the noose around the real and evil culprits of the community. The sovereign nation or state has the power to delegate some of its function to another body designed for the purpose in a reasonable and bonafide manner. The acceptance of the states for the ICC Statute thus slashes any debate on demise of sovereignty.

e) **The Complementarity Principle of ICC**

The apparent objective of the ICC Statute to not to encroach upon the sovereignty of nations, can be deciphered from the Preamble itself. It mentions "The States Parties to this Statute…Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal

[37] *Supra* note 21.

affairs of any State,…_Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." The Rome Statute being cognizant of the sanctity of the sovereignty of states tries to effectuate in it the sense of modern understanding of sovereignty in the international plane. The idea of the ICC Statute is to supplement the states in reaffirming their sovereignty when their sovereign power is doing wrong or being wronged. The above lines from the preamble showcases the objective and purpose of the Statute which is in fact to provoke and enable the states to assert their jurisdiction on the international criminals, granting supremacy to the domestic jurisdiction at every possible level and to abort the repulsive attitude of states to illegally intrude into the affairs of other nations. The domestic courts are given primacy over the international courts because:[38]

1) National authorities are better placed to collect the necessary evidence and to arrest suspects.

2) The drafters considered it inappropriate for the Court to be flooded with cases from all over the world, given its limited financial resources and infrastructures.

3) To encourage states to exercise their jurisdiction over international crimes.

4) To represent an attempt to find a compromise between respect for state sovereignty and the needs of international accountability.

The Preamble and the Article 1 of the Statute emphasize that the jurisdiction of ICC "shall be complementary to national criminal jurisdictions". The Principle of complementarity as inscribed in the statute is a major answer to the attackers of ICL as it proclaims the bonafide intention of ICL and the purposive infringement by ICC in the national jurisdiction at the peak time. Complementarity addressed two types of concerns-[39]

a) It offered a convenient way to reconcile the priority of domestic jurisdiction with the necessity of international justice as a Court of last resort, which intervenes on an exceptional basis.

b) It tempered fears about the independence of the Court, and in particular, the *proprio motu* powers of the Prosecutor.[40]

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[38] *Supra* note 29.

[39] Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 Criminal Law Forum 87-113 (2008), https://openaccess.leidenuniv.nl/bitstream/handle/1887/13539/carsten+stahn+-+complementary+a+tale+of+two+notions.pdf?sequence=1.

[40] *Ibid.*

ICC has maintained the neutrality of the procedure by granting significant authority to the Court's prosecutor and judges to determine whether or not particular actions carried out by individuals constitute violations of international humanitarian law and hence have placed restriction on a state's ability to determine for itself whether or not particular acts qualify as war crimes, crimes against humanity, or genocide.[41] Cherif Bassiouni states ICC is an extension of national criminal jurisdiction and hence does not infringe on national sovereignty.[42] The ICC Statute has encouraged the states to incorporate the international crimes like genocide, war crimes, and crimes against humanity into their criminal statutes. The step will enable the states to prosecute the criminals under such provisions thus decreasing the probability of assumption of jurisdiction by the ICC. It shows that the motive of ICC is not to subvert the sovereignty of states but to complement it by providing more developed and effective mechanism in the international sphere.

C. ICL: Guardian of 'Sovereignty as Responsibility'

Many legal scholars include an obligation of guaranteeing to citizens basic needs as the test of sovereignty and the defaulters are termed as failed and collapsed states, and thus their sovereign status is affected, and more external interference is allowed.[43] Duggard explains "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."[44] Kelsen states that since in practice nations recognize the equality of each other's legal orders, the doctrine of equality must mean that they recognize a *Grundnorm* higher than the *Grundnorm* of their own legal orders.[45] The equal force of their national systems is only possible with the existence of higher authority which bestows equality and that binding force in international law is international customs like the principle of *pacta sunt servandum*. By emphasizing the supremacy of international law, Kelsen foresees the eradication of the border

[41] *Supra* note 17.
[42] *Supra* note 21.

[43] *Supra* note 22.
[44] JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE, (3rd ed. Juta & Co Ltd) (2006).
[45] *Supra* note 25.

line between international and national law, the creation of a universal legal community and the eventual emergence of a world state.[46] The principle of absolute sovereignty is thus replaced by a concept of relative sovereignty, where the freedom of each state is limited by the freedom of other states and the independence of a state is subjected to international law.[47] In contemporary world, a state must justify its actions to both its citizens and the international community.[48] In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense.[49]

f) International Criminal Law & Preservation of Sovereignty

International law recognizes the entities called states and hence should never be construed to be for the violation of their sovereignty. ICL is an attempt to reassert the theory of 'equality of sovereignty' and provides a system to criminalize those trying to violate the sovereignty of its entities. The authority of sovereignty is questioned when the sovereign itself abuse its power to subjugate illegally and unethically the source of its sovereignty or when the sovereignty of the state is tried to be or has been subverted and ignored by other state or when the nationals of other state commit atrocious activities on the people of a sovereign state giving the indication their total disrespect of the sovereignty of that state. The duty of sovereign to assert authority on its subject for their welfare and good which when abrogated or violated either by internal strife or by external aggression leads to the precarious status of 'sovereignty of sovereign'. The intervention of international community at that 'peak and exceptional' moment helps the sovereign to regain its sovereignty. This statement can be construed in two sense: firstly, the intervention may help the subjects of sovereign to assume their power to make sovereign and saves them from being mutilated at the hands of 'absolute sovereignty' and secondly, the states whose sovereignty has been encroached are given justice through the

[46] HANS KELSEN, KELSEN'S PURE THEORY OF LAW, (The Lawbook Exchange, Ltd., 4th ed. 1967).
[47] Snyman-Ferreira, M.P., *The Evolution of State Sovereignty : A Historical Overview,* 12(2) Fundamina, 1-28, http://uir.unisa.ac.za/bitstream/handle/10500/3689/Fundamina%20Snyman.finaal.pdf?sequence=1.
[48] Fassue Kelleh, *The Changing Paradigm Of State Sovereignty In The International System,* University of Missouri-Kansas City, https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/14672/KellehChaParSta.pdf?sequence=1.
[49] *Ibid.*

criminal justice delivery mechanism by trying those who dared to the 'foul' act of violation of principle of 'equality of sovereignty'.

g) ICC & Accountability of the 'Sovereign'

The ICC should be seen as to provide a mechanism where states are actually encouraged to use their sovereignty in the pursuit of international criminal accountability.[50] The ways in which states are encouraged to do this are threefold: (i) by prosecuting their own nationals thus avoiding the Court stepping in; (ii) by internalizing the value of prosecution of international crimes and by participating in the development of customary international law and a deeply rooted culture of accountability; (iii) by being directly involved in the administration of international justice (i.e. by participating in the nomination and election of judges; voting in the Assembly of State Parties).[51] International criminal law may have the effect of limiting sovereignty through its substantive norms but it also empowers states to assert jurisdiction over an action which is equivalent to exercising a form of sovereignty over it.[52] Thus international criminal law, by accepting Universal Jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders, through the assertion of such a broad form of jurisdiction.[53]

The International Criminal Court is a direct challenge to traditional conceptions of state sovereignty because it creates a supranational judicial authority with the power to rule whether or not particular uses of force by state officials are criminal and sanctionable violations of international law.[54] To preserve the sovereignty is to keep a check on the use of it. The ICC serves the purpose by threatening the states to proceed with international enforcement of genocide, war crimes, crimes against humanity and the crime of aggression crimes if states fail to punish. This can be viewed as recognizing the rights of the citizens of states to be free from victimization as a result of crimes recognized under international criminal law.[55] For weak states

[50] *Supra* note 29.
[51] CLAIRE DE THAN AND EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (London: Sweet & Maxwell, 2003), p. 317.
[52] *Supra* note 21.
[53] *Ibid.*
[54] The Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999.
[55] *Supra* note 17.

that have difficulty maintaining law and order in their own territory, the ICC creates a tremendous incentive and a standing mechanism to request international assistance in carrying out investigations and trials of gross human rights abusers.[56]

In *Sovereignty as Responsibility,* Deng and his co-authors had argued that responsibility rather than control should be seen as the essence of sovereignty.[57] *Sovereignty as Responsibility* explicitly raised the question of the lawfulness of authority, arguing that if a government could no longer guarantee the security and welfare of the population, it might no longer be recognizable as the lawful authority over a territory.[58] Sovereignty implies responsibility "that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare'.[59] The failure of the state, as evidenced by the fact that 'millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse' and where the state does not have the power, the capacity, or the will to meet its responsibility to protect, the need for international action arises, a 'residual' or 'fallback' responsibility to protect on the part of the 'broader community of states' is activated.[60]

The world today is witnessing the shift form unconditional sovereignty to responsible sovereignty. According to Falk, Government legitimacy that validates the exercise of sovereignty involves adherence to minimum humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well being that derive from adverse conditions within a country.[61] The enjoyment of sovereignty is no longer measured by the degree of a state's autonomy but by the extent of its membership and participation in international and regional organizations.[62] Since the state is involved in the perpetration of these crimes, there is no hope that it will punish the perpetrators, at least where no leadership turnover has occurred

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[56] *Ibid.*
[57] Anne Orford, *Moral Internationalism and the Responsibility to Protect,* 24(1) European Journal of International Law 83-108 (2013), http://ejil.oxfordjournals.org/content/24/1/83.abstract.
[58] *Ibid.*
[59] Panel on United Nations Peace Operations, '*Report to the Secretary-General'*, A/55/305-S/2000/809, 21 Aug. 2000, at 13.
[60] *Ibid* at 17.
[61] Falk R, *Sovereignty and human dignity: The Search for Reconciliation,* in STEINER HJ ALSTON P AND GOODMAN R, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 3rd ed. (2008), 697.
[62] CHAYES A & HANDLER CHAYE, THE NEW SOVEREIGNTY:COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS, (Harvard University Press 1995).

and leaving the traditional state sovereignty intact means granting impunity to the perpetrators.[63] The ICC serves as a complementary process for the effective judicial mechanism since even after assumption of jurisdiction over the criminals of a nation; it is dependent entirely on the cooperation of domestic authorities to collect evidence and arrest suspects, thus reaffirming the sovereignty of the state.

D. Conclusion: International Criminal Law Reaffirms the Sovereignty

The realm of International Criminal law has been devised in such a way that the real effect is to supplement the sovereignty of nations. State sovereignty is a claim to authority; a claim which has been institutionalized, defined and redefined within the framework of international law.[64] Sovereignty entails three presumptions: firstly, a state is presumed to be obligated only to the extent of its actual or constructive consent; secondly, a state's obligations, while fully binding internationally on the state as a corporative entity, are presumed to have direct legal effect within the state only to the extent that domestic law has incorporated them; and thirdly, the inviolability of a state's territorial integrity and political independence, as against the threat or use of force or extreme economic or political coercion, is presumed to withstand even the state's violation of international legal norms.[65] Cherif Bassiouni has urged that "we no longer live in a world where narrow conceptions of jurisdiction and sovereignty can stand in the way of an effective system of international cooperation for the prevention and control of international and transnational criminality."[66] Prohibition of international crimes has attained the status of *jus cogens* thus a peremptory norm of international law, from which no derogation is permitted.[67]

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[63] Elisa Orrù & Miriam Ronzoni, *Which Supranational Sovereignty? Criminal And Socioeconomic Justice Compared,* 37(5) Review of International Studies (2011) 2089-2106 http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8406658.

[64] WOUTER WERNER, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL DISCOURSE, IN GOVERNANCE AND INTERNATIONAL LEGAL THEORY 133 (Wouter G. Werner & Ige F.Dekker eds., 2004).

[65] BRAD R. ROTH, STATE SOVEREIGNTY, INTERNATIONAL LEGALITY, AND MORAL DISAGREEMENT, (Oxford University Press, 2011).

[66] M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court,* 1 Ind. Int'l & Comp. L. Rev. 1 (1991).

[67] *Supra* note 29.

The in-depth analysis of the authority of international criminal court dispels the doubt and reaffirms the view that conception of international courts is indeed a way of affirmation of the state's sovereignty. The international community needs to redefine sovereignty in lieu of the increasing compliance by many nations to the international law through the methodology of Monism or Dualism. ICL is the result of the gross violation of inalienable human rights bringing the shame to humanity. The states have realized the efficacy with which the perpetrators or the international criminals can be brought to trial through the implementation of ICC Statute. ICC acts as a savior to the victims in grave situations when human rights abuses occur within a particular state under the guise of state laws causing the unreliability and failure of domestic institutions. The locus of ICL has been misplaced by the world for they view it as an external interference rather appraising it as certain core constitutional values, which are shared by all national societies. A progressive society is always ready to flow with the wind and hence must accept the modernization of sovereignty in the interest of protection of the 'very concept of sovereignty' ingrained in the mind of the 'source of sovereignty'- people of the state. The concept of emergence of the sovereign for safeguarding the interests of society was illusioned in the traditional idea of absolute sovereignty causing mass atrocities on humanity. The International Criminal Law is a step to reaffirm 'that' notion of sovereignty through the international interferences so as to defend the premises of sovereignty as built in the political science. The Rome Statute preserves the sovereignty of nations by employing certain principles for the same purpose. The Complementarity principle, the Consent theory of states, Preamble and other provisions are in a perfect endeavor to proclaim Sovereignty as Responsibility and not Irrationality.

'States are to be understood to be instruments at the service of their peoples, and not vice versa'.

~ Kofi Annan, former Secretary-General of the United Nations

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