

Critical Analysis of the Relationship between Sovereignty and the International Criminal Court in Fostering International Peace and Security

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Abstract

The article examines the relationship between the doctrine of state sovereignty and its further division into pooled and shared sovereignty and the International Criminal Court (ICC) in ensuring international peace and security. This is important considering the indiscriminate violations of human rights in many states across the globe and the decreasing support of the ICC. This is argued to have a negative impact on the global fight against violation of human rights and international criminal justice. The research concludes that there is no doubt a relationship exists between state sovereignty and the ICC. In addition, although the ICC is not a human rights court, it can be argued to be a mechanism for the protection of human rights.

Keywords: Sovereignty, Pooled Sovereignty, Shared Sovereignty, International Criminal Court, Responsibility to Protect, International Peace and Security, ‘pactasuntservanda’, human right

Chapter One

1.0 Introduction

The International Criminal Court (ICC) was established as a result of coming into force of the Rome Statute¹. This has however, posed questions on the relationship between State Sovereignty, the ICC and human rights. Meanwhile, one of the main contentions is the protection and enforcement of pre-determined human rights such as right to life, movement and human dignity. This issue has further raised claim of disparity of unequal treatment by some state parties of the court mainly members of the African Union (AU) such as Gambia and Kenya and Russia². Therefore, it is worth researching the question as to what extent the court limits the sovereignty of state parties of the Rome Statute³ and to what extent are human rights of citizens protected, this is the hypothesis to the research.

Therefore, this research will attempt to critically analyze one of the dimensions to state sovereignty which is pooled or shared sovereignty and the ICC with a view to unravelling any limitation, implication, benefit and challenges as well as protection of pre-determined human rights. References and inferences will be drawn from state sovereignty and the European Union (EU) due to the relative newness of pooled or shared sovereignty. Socio-legal approach to doctrinal research methodology was adopted in conducting this research. This is as a result of the legal, social and political dimension of both pooled and shared sovereignty, the ICC and protection of human rights in an increasing interdependent world where globalization is affecting all aspects of life of humanity⁴.

¹ Anna Holligan, (2016) Russia withdraws from International Criminal Court treaty [Online] Available:<http://www.bbc.co.uk/news/world-europe-38005282> (November 19, 2016)

² BBC, News, Africa, (2017) African Union backs mass withdrawal from ICC [Online] Available: <http://www.bbc.co.uk/news/world-africa-38826073>(February 22, 2017)

³Kal R.(2003). Rethinking the Sovereignty Debate in International Economic Law.J Int Economic Law, 841.

⁴ ibid

1.1 Understanding Sovereignty

Sovereignty may be vaguely, the freedom, independence, authority, power and ability of all states around the globe to take charge and be responsible for their internal affairs and external relationships⁵ without interference from other nations big or small and far or near⁶. It empowers a State to exercise its authority over a particular territory to the exclusion of all other States⁷. Sovereignty is the bedrock of a state which is the subject of international law⁸. States are therefore urged to refrain from threat or actual use of force against other states⁹ otherwise called intervention. Article 2 (7)¹⁰ of the UN Charter particularly provides for the non interference into the domestic affairs of states. The article provides thus:

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Meanwhile, sovereignty's enforcement and normative nature has always been in doubt¹¹, as such, its relationship with the ICC is complex¹².

However, the above position on intervention is not absolute as there are exceptions to the general rule. The United Nations Security Council (UNSC) by a resolution relying on Chapter VII of the UN Charter, can authorize intervention in the affairs of other nations for the protection of international peace and security. An instance of invoking the provision was seen by the UN resolution for intervention in the First Gulf War¹³, when Iraq invaded and occupied Kuwait in the early 1990's. Recent developments have also continued to limit sovereignty through its redefinition to mean responsibility, hence the need to know the limit to the redefined and multi-dimensional approach to sovereignty and how it affects protection of human rights.

1.2 Development of Sovereignty

Neil Walker¹⁴ argued that there are divergent views on the currency of sovereignty. Experts opined that the Westphalian phase of state sovereignty is characterized by authority of the state, internally by the operation of constitutional law and externally by its relations with other states. This is slowly in transition into a Post-Westphalian phase which recognizes other non-state actors and polities assuming responsibilities of state through increasing establishment of international organizations such as the UN and the ICC. This development led to multi-dimensional approach to sovereignty, such as, pooled or shared sovereignty, joint sovereignty, late sovereignty and unitary sovereignty¹⁵.

Similarly, there is territorial sovereignty which even though initially applies only to the state¹⁶, is continuously considered to be applicable to international organizations not only as administering a territory but as an agent assuming responsibility of a state¹⁷. This was the position in an opinion decision of the International Court of Justice (ICJ) in a South West African¹⁸ case. This position apart from categorizing territorial sovereignty, further signifies the relationship between sovereignty and international organizations in general and the ICC in particular (by inference).

⁵ *ibid*

⁶ Charter of the United Nations 1945, Preambles

⁷ *Island of Palmas Case (Netherlands v United States)* 2 RIAA 829 (1928) 838

⁸ Malcolm N. S. (2008) *International Law*. (6th ed.). Cambridge University Press, 487.

⁹ Charter of the United Nations, *op. cit.* Article 2 (4)

¹⁰ *ibid*, Article 2 (7)

¹¹ Samantha B. (2005). *Book Reviews--Sovereignty in Transition*. *Int J Constitutional Law*, 147.

¹² Robert C. (2005). *International Criminal Law Vs State Sovereignty: Another Round*. *Eur J Int Law*, 16.

¹³ UNSC Resolution 678 of 1990

¹⁴ Neil W. (2003) *Late Sovereignty in the European Union*. in N. Walker (ed.), *Sovereignty in Transition* (pp. 8-14). Hart Publishing.

¹⁵ Bardo F. (2003) *Sovereignty and Constitutionalism in International Law*. in N. Walker (ed.), *Sovereignty in Transition* (pp. 116) Hart Publishing.

¹⁶ James C. (2012). *Brownlie's Principles of Public International Law*. (8th ed.). Oxford.

¹⁷ *ibid*

¹⁸ ICJ Reports 1970 128

Richard Bellamy¹⁹, argues that there are two main views of sovereignty, the first being that states maintain their sovereignty and developed new means of depending it and secondly, that state sovereignty is transferred to other bodies, institutions or post national entities based on human rights. He further argued that states being bound by municipal and international law cannot claim to do whatever they like with their citizens and hence, sovereignty is curtailed or limited by those laws and charters. Therefore, 'sovereignty has been to a degree 'pooled' or shared with other states and partly divided' ... 'passing to bodies such as the WTO, the UN or the European Court of Human Rights'²⁰ and now the ICC. Therefore, Bellamy further argued that, no state in Europe has been sovereign in the last half century due to the pooling and sharing of sovereignty in the EU²¹. This is reiterating the relationship between sovereignty, international organizations and the ICC, by extension, and human rights.

On the other hand, Eric Engle²², opined that sovereignty is obsolete and outdated, this is due to globalization and increasing creation of international organizations which to a large extent subsumed the once known principle of sovereignty which signifies absoluteness and un-limitedness. Eric further argued that 'sovereignty must however be re-conceptualized and understood as a relative and partial power shared at multiple levels in an intensively networked world'²³. One significant argument of Engle despite the arguments on obsolescence was the issue of 'shared' and 'multiple levels' which are referring to pooling sovereignty by the international organizations including the ICC by necessary inference as well as the proposition for the re-conceptualizing the concept.

1.3 The ICC and State Sovereignty

Accordingly, the ICC is the first permanent international criminal court established by a treaty²⁴ and not the UNSC²⁵. It complements national criminal law²⁶, thereby reiterating the relationship between states' sovereignty and the ICC. The court has the aim of fighting heinous crimes that shock the conscience of humanity; genocide, war crimes, crime of aggression and crimes against humanity²⁷. Consequently, prevention and protection from committing serious crimes of concern to the international community was the hallmark of the creation of the ICC²⁸, in addition to the protection of human rights. However, disregard for human rights had led to acts which touched the conscience of humanity by resulting in rebellions²⁹, such as the Second World War, the genocide in former Yugoslavia and Rwanda and ethnic cleansing in the Balkans³⁰. It also brought an end to the use of 'sovereignty' as a shield against perpetrators of international crimes³¹. The Nuremberg³² tribunal decision states thus;

'Crimes against international law are committed by men, not by abstract entities (of States), and only by punishing individuals who commit such crimes can the provisions of international law be enforced'

This position is further supported by the adoption of the UN General Assembly 2005 World Summit Report³³ and resolution which brought into bear the doctrine of 'responsibility to protect' (R2P), bringing in another perspective to sovereignty. The resolution provides in parts:

¹⁹ Richard B. (2003) Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU' in N. Walker (ed.), Sovereignty in Transition (pp. 167-168). Hart Publishing.

²⁰ ibid pp. 176

²¹ William W.(1999). The Sharing of Sovereignty: The European Paradox. Political Studies, 503-521.

²² Eric A. E.(2008) Beyond Sovereignty? The State after the Failure of Sovereignty, From the Selected Works of Eric A Engle, 2008 [Online] file:///Users/mac/Downloads/fulltext_stamped%20(1).pdf (March 27, 2017)

²³ ibid pp. 10

²⁴ Rome Statute 1998

²⁵ ICC Home (2016), About ICC. [Online] Available:https://www.icc-cpi.int/about(November 22, 2016)

²⁶ ibid

²⁷ Press Release on Assembly of State Parties (2016),[Online] https://www.asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/pr1248.aspx (November 22, 2016)

²⁸ Rome Statute op. cit. Article 5 (1)

²⁹ Universal Declaration of Human Rights 1948, Preamble

³⁰ Nicholas S.(2015). Book Reviews: Theology for International Law. Ecclesiastical Law Journal, 111-113.

³¹ UNA – UK, Home (2017)[Online] https://www.una.org.uk/r2p-detail (March 18, 2017)

³² Nuremberg Judgment (1948) 22

³³ United Nations General Assembly Resolution on Responsibility to Protect 2005

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. ... the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity ...

Therefore, R2P contemplates that 'state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself'³⁴. Apart from redefining sovereignty, R2P also provides for intervention by use of force as a last resort in ensuring protection against human rights violation and mass atrocity crimes of genocide, war crimes, crimes against humanity and ethnic cleansing³⁵.

Therefore, a relationship exists between sovereignty and international institutions and organizations and hence; the ICC³⁶, this is emphatically because, the ICC is a creation of states as well as the principles of complementarity which ensures that the ICC acts only where the state fails, refuses or is unable to deal with such violations of human rights. However, there is growing fear of threats to sovereignty due to increasing global governance through international institutions³⁷ and the question of protection of human rights by member and non-member states of the ICC.

More specifically, John Dugard³⁸ in his book, opined that in balancing the concept of state sovereignty, the ICC operates on the basis of complementarity. That is to the effect that the ICC is neither superior nor inferior to the national court. For example, the ICC intended to try Simone Gbagbo, the former first lady of the Ivory Coast, for crimes against humanity in support of her husband during the 2011 post-election violence but later allowed the Ivory Coast national court to try her, where the court later found her not guilty to the charges³⁹.

Chapter Two:

2.0 Critical Analysis of the Relationship Between Pooled Sovereignty and the International Criminal Court

2.1 Development of Pooled Sovereignty

Pooled or shared sovereignty is relatively a new concept, it is derived as a result of increasing development of international organizations as highlighted in the introduction, however, it is as old as the European Community law⁴⁰. Mancini Federico⁴¹, an international law expert and Judge of the Court of Justice of the European Communities, quoted Pliakos to have written that 'international organization implies a pooling of sovereignty by its member states'. To Pliakos, international organization is synonymous to pooled sovereignty. However, like sovereignty, pooled or shared sovereignty is not left without challenges, according to Walker. Although pooled or shared sovereignty is used as a new position against the Unitarian sovereignty which is synonymous to constitutional pluralism, it explains the disaggregation and re-aggregation or currency of sovereignty. Therefore, as a result of pooling, sovereignty is seen to be everywhere and hence nowhere particularly important⁴².

³⁴ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001

³⁵ James F. (2017). The Relationship between IHL and IHRL in Peacekeeping Operations: Articulating the Emerging AU Position. *Journal of African Law*, 1–22.

³⁶ Kal R. op. cit.

³⁷ *ibid*

³⁸ John D. (2012). *International Law: A South African Perspective*. (4th ed.). JUTA.

³⁹ Ken Schwartz, (2017). 'Former Ivory Coast First Lady Acquitted of Crimes Against Humanity' (VOA News Africa, March 28, 2017) [Online] <http://www.voanews.com/a/former-ivory-coast-first-lady-acquitted-of-crimes-against-humanity/3786251.html> (March 30, 2017)

⁴⁰ Neil W. op. cit. pp. 14

⁴¹ Mancini G. F. (1998). Europe: The Case for Statehood. *European Law Journal*, 29.

⁴² Neil W. op. cit. pp. 14

Other dimensions of sovereignty which include Unitarian sovereignty or one dimensional approach to sovereignty is otherwise called constitutional pluralism referring to the existence or limitation of authority and power at a particular center or entity, meaning sovereignty is absolute rather than pooled or shared. Neil Walker⁴³ on the other hand suggests 'late sovereignty' in referring to the multi-dimensional approach to sovereignty. To Walker, late sovereignty signifies both continuity, distinctiveness and irreversibility, meaning that sovereignty is continued, different and not going back to its original form i.e. unitary sovereignty.

2.2 Limitation of Pooled Sovereignty by the International Criminal Court

Although the pooling and sharing of sovereignty is largely attributed to the EU, this cannot be directly the case as far as the ICC is concerned, but by inferences only. The EU and the ICC share some similarities both being created by a treaty and between different states (like any other treaty based organization such as the WTO, AU and OAS). However, notwithstanding their similarities, they share some differences. While the EU is regional and limited only to Europe, the ICC is more international covering all the continents across the globe. Secondly, the EU regulates almost all affairs of human endeavors from human rights to economic activities, while the ICC deals with human rights violation and largely criminal law. This led to why references and inferences will be drawn to the research from arguments on the EU and state sovereignty as the rules do not apply *mutatis mutandis*.

Furthermore, in determining the limitation of the relationship between pooled or shared sovereignty and the ICC, drawing some inferences from the EU, Article 5⁴⁴ of the Lisbon Treaty 2007 provides for the limitation of the Union on its member states and also recognizes the sovereignty and constitutional regimes of member states. Article 5 of the Treaty provides in parts thus:

2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*

3. *Under the principle of subsidiarity, ... the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level...*

4. *Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties...*

However, even though the Rome statute complemented national law regimes, similar provision to the Lisbon Treaty was not made. This needs to be provided because of its importance for setting in clear terms, the extent of the relationship between member states and the organization particularly on the extent of their relationship and limitation. However, it is important to note that the limitation, ceding and transferring part of the state's sovereignty a.k.a. 'pooling' or 'sharing' is by consent of the member state⁴⁵. Therefore, the principles of '*pactasuntservanda*' applies, meaning, states are bound by their obligations⁴⁶. This, restrain the exercise of sovereignty by a state⁴⁷, also known as voluntary limitation of state sovereignty.

However, Eric Engle⁴⁸ though referring to the EU considered pooling sovereignty to have led to creation of a confederated state as 'an international legal person, constituted of states which irrevocably cede some of their sovereign power to the confederation, and which retain their own international legal personality'. The author argues that even though pooling sovereignty created a sought of confederated state, not affecting the international legal personality of the member states, this did not cede some of their sovereign power. By implication, this is meaning that it has limited its sovereignty by its action for all intent and purposes. However, KalRaustlia⁴⁹ argued that contrary to the popular argument, sovereignty is indeed strengthened rather than limited by international organizations.

⁴³ *ibid* pp. 19

⁴⁴ Lisbon Treaty 2007, Article 5

⁴⁵ James C. *op. cit.* pp. 447

⁴⁶ Mark V.(2009). Commentary on the 1969 Vienna Convention on the Law of Treaties, pp. 363-368.

⁴⁷ James C. *op. cit.* pp.45

⁴⁸ Engle E.(2006-2007). Theseus's Ship of State: Confederated Europa Between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism. Florida Costal Law Review, 49.

⁴⁹ Kal R. *op. cit.*

To him, international organizations, like the WTO, strengthen sovereignty by the working together of different states to achieve a collective goal of trade, rather than limiting it as widely argued by experts.

2.3 Judicial Perspective to Pooling Sovereignty and the International Criminal Court

From the judicial point of view, the case of *Costa v ENEL*⁵⁰ is often cited on the relationship and consequence of pooling sovereignty to form an international organization and the effect to the sovereignty of member states. The European Community Court held inter alia that;

'The transfer by the States from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail'

The decision of the court above signifies permanent limitation of sovereignty to the international organization. It further illustrates the fact that all subsequent unilateral actions and inactions of the member state will automatically be affected, challenged and limited by the membership of the organization. Deriving reference from the above decision, signing the ICC treaty will automatically limit, challenge and affect the sovereignty of a member state.

Anna Wyrozumska⁵¹ while reviewing the European Community Court decision in *Costa v ENEL*, opined that there exists '...limitation of sovereignty of the member states by creating a community comprising not only member states but also individuals... stemming from the Treaty, which independent of the legislation of the member states imposes obligations and confers rights on individuals which become part of their legal heritage and cannot be overridden by domestic law'. By this, Wyrozumska is attesting to the limitations, benefit and challenges of states' sovereignty by being a member of an international organization.

In the UK case of *Blackburn v Attorney General*⁵² which was dealing with Crown sovereignty in the UK, the court per Lord Denning MR held that the Queen enters into agreements by means of a treaty and the content of the agreement reached bind all citizens. It further held that no one or English court can challenge that decision. This is signifying been bound and therefore limitation to the contents of the treaty. The court further referred to the case of *Rustomjee v Reginam*⁵³ on the question of the authority of the Queen in a treaty signed between the Queen and the Emperor of China. In that case, the court held that the Queen, when signing an agreement, is acting as sovereign and cannot therefore be questioned in any UK court. However, this also signifies the fact that the Queen and citizens are bound by the treaty and hence limited to the contents of the treaty.

In the recent case of *R (on the Application of Miller) v Secretary of State for Exiting the EU*⁵⁴ dealing with whether the UK needs parliamentary approval before invoking Article 50⁵⁵, though not dealing with the ICC, but, was having the contention of state sovereignty as the reason behind the exit. The Supreme Court in the case held that the Prime Minister require parliamentary approval to invoke and trigger exit. This decision unlike the previous once is emphasizing the significance of state sovereignty, (parliamentary sovereignty in the case of the UK), notwithstanding membership of the EU, meaning notwithstanding having already pooled sovereignty at the EU.

2.4 Parliamentary Perspective to Pooled Sovereignty

Furthermore, from the United Kingdom's parliamentary perspective, Lord Spicer⁵⁶, on the debate on European Union (Notification of Withdrawal) Bill, (Amendment) states that 'Indeed, it is necessary that we should have greater sovereignty because the powers of parliament have been eroded ever since the Maastricht treaty' while, Lord Anderson⁵⁷ states that 'Brexiters argued for restoring national and parliamentary sovereignty'.

⁵⁰ ECJ 1964 590

⁵¹ Anna W. (2012). Withdrawal from the Union. in Hermann-Josef B. & Stelio M. (Eds.), The European Union After Lisbon: Constitutional Basis, Economic Order and External Action. Springer.

⁵² [1971] 2 All ER

⁵³ [1876] 2 QBD 69

⁵⁴ [2016] EWHC 2768

⁵⁵ Lisbon Treaty 2007

⁵⁶ HL Deb 1 March 2017, Vol 779, col 904 (2017)[Online][https://hansard.parliament.uk/lords/2017-03-01/debates/EE9DF3A9-2E05-4568-8CF8-A61F11172391/EuropeanUnion\(NotificationofWithdrawal\)Bill\(May28,2017\)](https://hansard.parliament.uk/lords/2017-03-01/debates/EE9DF3A9-2E05-4568-8CF8-A61F11172391/EuropeanUnion(NotificationofWithdrawal)Bill(May28,2017))

⁵⁷ HL Deb 20 February 2017, Vol 779 col 87 (2017) [Online][https://hansard.parliament.uk/lords/2017-02-20/debates/30224DBB-4C77-4D65-A591-699EB7F99981/EuropeanUnion\(NotificationofWithdrawal\)Bill\(March28,2017\)](https://hansard.parliament.uk/lords/2017-02-20/debates/30224DBB-4C77-4D65-A591-699EB7F99981/EuropeanUnion(NotificationofWithdrawal)Bill(March28,2017))

From lords Spicer and Andersons' view, sovereignty of parliament and the nation has been adversely affected since the Maastricht treaty, thereby reiterating the challenges and limitation to sovereignty as a result of pooling at the EU. Earlier, Lord Hennessy⁵⁸ still on the debate, quoting the Prime Minister, Theresa May who spoke on January 17 at Lancaster House on exiting the EU, said thus;

"...the principle of Parliamentary Sovereignty is the basis of our unwritten constitutional settlement ... as a result supranational institutions as strong as those created by the European Union sit very uneasily in relation to our political history and way of life".

From the above, although the PM was neither making reference to the ICC nor human rights but, the limitations and effect of the supranational institutions such as the EU on the UK political history and way of life and an intention to move away from such influence. This is otherwise, a direct indication of the relationship and challenges of pooled or shared sovereignty and international organization, and the ICC by inference.

Chapter Three:

3.0 Protection of Human Rights in Member and Non Member States of the International Criminal Court

3.1 Meaning and Development of Human Rights

Human rights are indivisible, interdependent, inalienable and destined rights. They are rights of all people to enjoy from birth to death⁵⁹. These are therefore, the pre-determined rights, for example, right to life, expression, movement, human dignity and liberty. Protection and enforcement of human rights has been the focus and development of international law after the Second World War⁶⁰. These are enshrined in the United Nation's Universal Declaration of Human Rights (UDHR)⁶¹. Although, the UDHR is declaratory and not enforceable, many international treaties, conventions and national legislations stem from it with force of law or enforceability. For example, the European Convention on Human Rights 1950 (ECHR) and Human Rights Act 1998 (UK)⁶². However, recent developments in international law give more emphasis on collective rights as against individual rights⁶³. Therefore, protection of human rights by states contribute in achieving international peace, security and understanding, it is also, the basis for the establishment of the ICC. Therefore, this has safely further reiterated the existing relationship between states, protection of human rights and the ICC.

Accordingly, Sabelo Gumedze⁶⁴ in an article on human rights and the responsibility to protect citizens from human rights violation, states thus;

'upholding human rights is one of the most effective ways of contributing to international security... human rights arguably prevent conflicts, both intra-state and interstate... achieving international security requires states to fulfil their responsibility to protect their citizens against human rights violations...'

The above statement upholds the importance of protection of human rights in promoting international peace and security as well as the responsibility of states to ensure protection of citizens for the larger aim of contributing to international peace and security for all. As summarized by ZHU Lijiang in an article⁶⁵ that the significance of international law are, political independence, territorial integrity and sovereign equality of states, non-interference in the affairs of other states and respect for human rights; these leads to international peace and security. Lijiang further signifies the efforts of the ICC and the UN in achieving international peace.

⁵⁸ HL Deb 20 February 2017, Vol 779 col 73 (2017) [Online][https://hansard.parliament.uk/lords/2017-02-20/debates/30224DBB-4C77-4D65-A591-699EB7F99981/EuropeanUnion\(NotificationofWithdrawal\)Bill](https://hansard.parliament.uk/lords/2017-02-20/debates/30224DBB-4C77-4D65-A591-699EB7F99981/EuropeanUnion(NotificationofWithdrawal)Bill) (March 28, 2017)

⁵⁹ Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Comparative Experiences of Justiciability, Human Rights and Rule of Law Series: N0. 2 International Commission of Jurists 2008

⁶⁰ Lerner N.(2003). Group Rights and Discrimination in International Law. (2nd ed.) The Hague:

⁶¹ Universal Declaration of Human Rights op. cit.

⁶² Equality and Human Rights Commission (2017) [Online]<https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights> (March 02, 2017)

⁶³ Malcolm N. S. op. cit.

⁶⁴ Sabelo G. (2010). The African Union and the Responsibility to Protect. African Human Rights Law Journal, 136.

⁶⁵ ZHU L.(2016). Chronology of Practice: Chinese Practice in Public International Law in 2015. Chinese Journal of International Law, 639–689.

3.2 Human Rights, Sovereignty and the International Criminal Court

Meanwhile, protection of human rights by the ICC in member states is governed by the Rome Statute. Article 12⁶⁶ of the Statute provides;

2. ... the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court ... (a)

The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

3. *If the acceptance of a State which is not a Party to this Statute is required ... by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question...*

The article, contemplates territoriality and nationality as jurisdiction of the court that is, suggesting crimes committed in a member state or by a national of a member state respectively⁶⁷. Therefore, jurisdiction of the court is territorial rather than universal⁶⁸. Moreover, acceptance of non-member state to the court's jurisdiction is required where the requirement of membership is not achieved⁶⁹. However, the obvious question here is, what will happen to protection of human rights where such acceptance is not complied with by a non-member state?

In such a situation, the UNSC have the mandate by the combined provisions of Article 13 of the Rome Statute 1998 and Chapter VII of the UN Charter 1945 to refer such violation of human rights and refusal to comply with Article 12 (3) of the Rome Statute to the ICC for proper action to be taken accordingly. An example was the referral to the Prosecutor of the case of Darfur region of Sudan by Resolution 1593 of the Security Council in March 2005⁷⁰. However, still the question remained, what happen when the Security Council fails, refuses or cannot refer a case to the court due to veto or other reasons? For instance, the situations currently happening in Syria and South Sudan where the UNSC and super powers have not taken any action notwithstanding the wanton violation of human rights⁷¹.

In addition, the ICC faces challenges from stakeholders in their efforts towards protection of human rights, international peace and security. The recent call⁷² by the Chairwoman of the United Nations Human Rights Commission in South Sudan at Geneva, Switzerland for an establishment of a special court by the UNSC to prosecute perpetrators of human rights abuses, (which are the government and rebel groups) in South Sudan. This undermines the import and purport of the establishment of the ICC as a permanent court established to prosecute violations of international law and peoples right. Although, South Sudan the youngest country on earth is not a member state of the ICC⁷³, this cannot stop the ICC from entertaining its case. This can be by referral of the UNSC as provided by Article 13⁷⁴ and Chapter VII of the UN Charter or by accepting jurisdiction by the state. An example of a non member state accepting jurisdiction was illustrated by Ivory Coast.

Furthermore, in a recent decision of the European Court of Human Rights, in the case of Al-Dulimi and Montana Management Inc. v Switzerland⁷⁵, the court held;

"Individuals being the epicentre of international law, human rights are today the central factor of legitimation of international law. Like a new universal Esperanto, the language of international human rights law is individual-centred, not State-centred.

⁶⁶Rome Statute op. cit.

⁶⁷ John D. op. cit. pp. 190

⁶⁸Malcolm N.S. op. cit. 412

⁶⁹ Rome Statute op. cit. Article 12 (3)

⁷⁰United Nations - Security Council Resolution 1593 (2005) S/RES/1593

⁷¹Hurst H.(2016). Reinvigorating Human Rights for the Twenty-First Century. Human Rights Law Review, 409–451.

⁷² VOA News – Home Africa (2017) UN Official Insists on Swift Action to End Abuses in South Sudan [Online] <http://www.voanews.com/a/united-nations-official-insists-swift-action-abuses-south-sudan/3765973.html> (March 15, 2017)

⁷³ ICC – Assembly of States Parties, African States (2017)[Online] https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (March 16, 2017)

⁷⁴Rome Statute op. cit.

⁷⁵[2016] ECtHR 5809/08 (Emphasis mine)

The primary role of sovereignty is the responsibility to protect human rights.”

The decision of the court above apart from restating the focus of international law towards protection of human rights also emphasized the primary role of sovereignty which is protection of human rights and thereby reiterating the relationship between sovereignty, human rights and international law and by extension international organization including the ICC.

Chapter Four:

4.0 Conclusion

In conclusion, there is no doubt an established relationship exists between state sovereignty and in particular pooled or shared sovereignty as currently widely argued and attributed to international organizations, the ICC and protection of human rights. This was seen to have had genesis from antecedents after the Second World War to the Nuremberg and Tokyo tribunals, the genocide in the former Yugoslavia and Rwanda as well as the coming into being of the UDHR and the establishment of the ICC.

Therefore, it is the considered opinion of the writer that the ICC even though concerned with criminal violation of human rights particularly as it affects the crimes of genocide, war crimes, crimes against humanity and the crime of aggression, is yet one of the international mechanisms for the protection of human rights particularly collective rather than individual rights in countries with weak legal systems and where national courts failed, refused or neglected to ensure protection of human rights of its citizens.

However, while the majority of international law experts agreed that sovereignty is limited by international organizations such as the ICC through pooling to sharing of sovereignty, some experts have the considered opinion that pooling sovereignty does not limit sovereignty but rather strengthens it and creates an institution or polity that is neither sovereign nor stripped of all elements of sovereignty. Therefore, there is no consensus among experts as it is still subject of discussion. However, it is largely agreed that sovereignty is in a transition from the Westphalian phase to a post-Westphalian phase due to increasing development of international organizations and polities such as the ICC assuming the responsibilities of a state.

Finally, therefore, the research has further exposed the unanswered questions to the international community particularly as it relates to human rights. An example is, the protection of human rights in non-member states of the ICC especially when faced with inaction by the UNSC as seen in the case of Syria and South Sudan above. This will call for more research and rethink on the protection of human rights in those non-member states of the ICC.