AN ANALYSIS OF THE EVOLUTION OF MODERN CONCEPT OF SOVEREIGNTY

Mazi Udegbulem*

Abstract

The ideas inherent in sovereignty have changed over time in phases[1] and continued to do so up to today. These principles will continue to be re-evaluated in light of new challenges and opportunities faced by individual states and the collective of states at the international level. The Treaty of *Westphalia* which marked the first phase in the development of the modern notions of sovereignty led to the establishment of the modern system of nation-states, in which the sovereign reigned supreme domestically, as well as in its relations with other states. Using the doctrinal method of research, the paper discovered that before the end of World War II, states were basically operating in an international system premised on the ideas inherent in classical *Westphalian* doctrine and that the second phase in the development of the principle of sovereignty was ushered in by World War II and its conclusion in 1945. In this phase, the absolute power claimed by sovereign states came face to face with the creation of the United Nations Organization and various Inter-governmental bodies that espoused the idea of collective actions and state accountability to an international community. The paper concluded that the era of absolute rule ended with the creation of adoption of the various state-consented supranational organizations geared toward predictability in the international system to potentially ensure the continued observance of international humanitarian law principles.

Introduction

Following World War II, there was a proliferation of international organizations which included various inter-governmental organizations, such as the United Nations, the International Criminal Court (ICC), the International Court of Justice (ICJ), the International Monetary Fund, the European Human Rights Convention, and the European Union. These cooperative international institutions were put into place to harmonize both economic and non-economic agendas of the world community. As a result of the overwhelming numbers of these institutions, the international system has now become a "tightly woven fabric of international agreements, organizations and institutions that shape states relations with one another and penetrate deeply into their internal economics and politics[2].

This forms one aspect of the horizontal and vertical ceding of sovereign identified by Cohan[3] Here, states move away from absolute rule and begin to share some of its functions with institutions above and below the national level[4]. This idea is manifested when states become members of international associations that are geared towards pooling resources for common benefits, which may be economic, political or security-based. When states undertake actions to cooperate with each other for mutual benefits, they cede some of their authorities in those areas on decisions that are dictated by such supranational bodies. A vivid example of this is the European Union (EU) and its various quasi-state functionaries that have the authority to make binding decisions that take precedent over the decisions of member states.

---

* **Mazi Udegbulem is a lecturer with the Faculty of Law, Imo State University Owerri. Email: maziudegbulem@rocketmail.com**

[1] Francis M. Deng, 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect',(No. 4 Global Responsibility to Protect 2, 2010):355-56

[2] *Abram Chayes*, and *Antonia H Chayes*, 'The New Sovereignty: Compliance with International Regulatory Agreements', (Harvard University Press, Cambridge: 1995) p.26.

[3] John Alan Cohan, 'Sovereignty in a Post-sovereign World',(932 Journal of International Relations), available on https://www.researchgate.net>publication accessed on 21 August 2018.

[4] Cohan, ibid

Sovereignty and Human Rights

The norms of human rights are another area that has successfully made a push-back against sovereignty. Under current human right conventions, the sovereign state is no longer free to treat its citizens as it pleases. Under constitutional sovereignty[5], where the state serves the people who are seen as the source of state sovereignty[6], the state is held accountable to these citizens on that principle. Furthermore, sovereign states are increasingly held accountable to the international community for human right violations, especially under the new paradigm of conditional sovereignty expressed in the responsibility to protect. We are now at a juncture in the history of state sovereignty where a state's admission into the international community is highly influenced by "good" conduct. Another area in which there is a vertical impact on sovereignty is through the influence of International Non-governmental Organizations on the ability of states to exercise absolute rules in their territories. These organizations[7] act as international lobbyists and pressure groups that seek to influence the policy options of international organizations and states.

Since the signing of the UN Charters in 1945 and the adoption of the Universal Declaration of Human Rights in 1948, there have be concerted efforts by the international community to push back the boundaries of state sovereignty. The situation is such that issues including minority and individual rights, which were once considered to be within the purview of states, have now become open to external scrutiny. This phenomenon follows signing of various human rights agreements by states as members of the UN. Becoming a signatory to any number of these international conventions[8], treaties and or covenants opens a state up to international condemnation, sanctions, on-site monitoring and visits, criticism, and armed intervention in cases where such actions threaten international peace or a state's citizens on a mass scale. It could be argued that organizations, such as the UN, have imposed international norms on their members through diplomatic and public persuasion, coercion, economic sanctions, isolation, and in more egregious cases, through humanitarian intervention. In addition to the norms being imposed by state actors against other states, in recent years, non-governmental organizations (NGOs) have played an important role in vertically influencing the behavior of states[9] In most instances, states cannot escape the diminishing of their sovereignties; once a state comes into existence, it automatically acquires external obligations based on customary international law. The very act of recognition by other states depends on whether the new member to the community has submitted itself to these establish norms. For example, a newly formed state such as South Sudan is obligated to become a member of a vast aerie of established rules, such as the Universal Declaration of Human Rights, the International Court of Justice, and the Nuclear Non-Proliferation Treaty in exchange for recognition.

Another remarkable phase in the development of state sovereignty is rooted in the wave of democratization that swept the world after the collapse of the Soviet Union and subsequent end to the Cold War, which saw an end to dictatorships around the world akin to the political order in the USSR. The challenges posed by ordinary citizens to absolute dictators, who could no longer count on their patrons for protection, saw the demands for democratic institutions, values, and practices necessary to make their government more attuned to their needs. In this phase, there was a renaissance of the idea of sovereignty as something that emanated from the people, rather than being something inherent in

---

5 As we have in Nigeria where section 14 of the Constitution alleges that sovereignty belongs to the people of Nigeria where Government derives its power.

6 See section 14 of 1999 Nigeria Constitution.

7 For example, the Amnesty International Group that report violations of human rights of people within a defined territory with a view to holding the Government accountable.

8 For example, the Vienna Convention on the law of treaty, the Geneva Conventions on Humanitarian Laws, the UN Charter etc

9 Cohan, Ibid

the state. The devolution of power to the people in this era occurred through elections and/or local councils in which the sovereign central government shared power with its population. The distribution of power resulting from this devolution helped to meet the peoples' demand for the accountability of their governments to their needs, in effect reducing the states monopoly of exercise of absolute power. In this era, where the people are the sovereign, sovereignty derives from the degree of respect merited by an institution, the capacity to rule, and the recognition that authority is exercised for the benefit of the people. It is this transition that has helped to reduce the tension between sovereignty and intervention with the later losing most of its draconian tenets in favour of human rights protection. To this end, sovereignty is now seen as owing a responsibility to protect towards its citizen and not the old fashioned idea of state having unlimited control within its borders regardless of how it treats its citizens.

Sovereignty as Responsibility

The Responsibility to protect refers to the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by international community as a whole: it is a principle based on the idea that sovereignty is longer seen as a privilege, but a responsibility.

As late Kofi Annan[10] has put it, the UN Charter was issued in the name of 'the people, not the governments of the UN:

> The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power.

The Responsibility to protect focuses on preventing and halting four crimes, namely genocide, war crimes, crimes against humanity and ethnic cleansing, which it places under the generic umbrella term of "mass atrocity crimes. At the 2005 United Nations World Summit[11], member states included Responsibility to Protect in the Outcome Document agreeing to paragraphs 138 and 139[12], which gave final language to the scope of Responsibility to Protect, as applies to the four atrocity crimes only, namely genocide, war crimes, crimes against humanity and ethnic cleansing. The outcome document represents the first global consensus on the responsibility of individual states and of the world community to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing. It affirms the international community's willingness to take timely and decisive action, through the UN Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to protect their populations from such crimes. The Geneva Laws also described the crimes as grave breaches of humanitarian law and urged member states to respect and ensure the observance of those laws. So both the Geneva Conventions and the World Outcome Document of 2005 places huge responsibility on states to ensure that these crimes are not committed and if committed to ensure the prosecution of the offenders. The World Summit consensus on the Responsibility to Protect was further endorsed by the UN Security Council in 2006[13] in its resolution on the Protection of Civilians in Armed Conflict, thereby formalizing its support for the principle.

---

10 Secretary-General's Report, 1998

11 See the 2005 World Summit Document, ibid

12 Both paragraphs of the Summit Document gave final approval to the Responsibility to Protect and approved 4 crimes within the jurisdiction of the responsibility to protect namely war crimes, crime against humanity, ethnic cleansings and genocide.

13 UN security Council Resolution 1674 (2006) on Protection of Civilians in armed conflict available on https://www.un.org>blog>document accessed on 21 August 2018.

Finally, in Africa, the AU right to intervene is not just a political slogan but a legal obligation for action by the AU in the face of mass atrocity crimes. The AU has bound its members in advance to an obligation to intervene in prescribed circumstances. As responsible Members, by signing the AU Constitutive Act with the right to intervene under Article 4(h), AU Member States accepted responsibilities of membership flowing from that signature, as well as a *de facto* redefinition – from sovereignty as a right of exclusivity to sovereignty as responsibility in both internal functions and external duties. While the host state has the default 'responsibility to protect', a residual 'responsibility to protect' also resides with the broader AU, which is activated when the host state either is unwilling or unable to fulfill its 'responsibility to protect'. The AU right of intervention may be seen as a natural corollary of the extant norm of 'sovereignty as a responsibility', which encompasses the duty of states to uphold human rights and humanitarian norms.

Sovereignty and Humanitarian Intervention

The issue of humanitarian intervention is raised whenever there is armed conflict anywhere and the resultant failure of the warring parties to respect the rules of engagement, the Geneva Convention governing the conduct of war. It is the failure of the state actors to ensure compliance with the laws of war that will trigger the issue of intervention. When intervention is raised, the state actor will readily come up with the defense of sovereignty arguing that as a sovereign state, it has exclusive jurisdiction within its territory. There is therefore a compelling need o balance these two competing ends. That prompted international humanitarian law experts and scholars to develop the concept of responsibility to protect, placing the duty to protect the laws of war squarely at the door of the sovereign state. The state loses its sovereignty only when it is unable to halt the mass atrocity crimes or where the perpetrator is the state itself. Then the larger international community assumes the responsibility to protect the population from these crimes. The African Union's right to intervene is, by and large, on all fours with the notion of Responsibility to Protect. The confluence of both humanitarian streams is shifting the paradigm from sovereignty as a right to sovereignty as a responsibility. Both notions have now imposed an obligation to protect populations from mass atrocity crimes.

Thus, like the normative commitment of Responsibility to Protect, Article 4(h)[14] acknowledges that the State has the principal responsibility for protecting its citizens from avoidable catastrophe, but when they are unable or unwilling to do so, that responsibility must be borne by the wider community of States, in particular the African Union. This view conforms to Judge *Alvarez's* opinion in the *Corfu Channel*[15] case that sovereignty is no longer absolute but rather an institution which has to be exercised in accordance with international law.

According to Stacy:

> National governments must discharge their duty of care towards their citizens, and the 'court' of international opinion passes judgment. The international community acts as proxy for a state's citizens in judging its care for them. If the sovereign fails to treat its citizens, and by that government's own standards, the social contract between the ruler and the ruled collapses, an assessment of the government's failings becomes a tripartite negotiation between sovereign, citizens, and the international community[16].

[14] African Union Constitutive Act, 2000

[15] ICJ Report, 1949, 43

[16] Helen Stacy; 'Humanitarian Intervention and Relational Sovereignty', (SJIR Reports, 2006) p.4, available on https://web.stanford.edu>group>sjir accessed on 18 August 2023.

Today, sovereignty encompasses both the rights and responsibilities of States and underlies the rights and freedoms of peoples and individuals. With the idea of sovereignty as a responsibility follows ideas that other States could have a responsibility to react to the needs of populations suffering from their own States' failure to act responsibly. When the scenario painted above happens, the sovereignty right gives way to the rights of the international community or a coalition of the willing to enforce the human rights of the people. The principle of 'sovereignty as a responsibility' connotes that one of the most important functions of governments, and authorities in general, is to uphold the rights and dignity of community members.

According to Article 29(2) of the Universal Declaration on Human Rights, governments are entitled to impose only such limitations on rights 'as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. This provision implicitly endorses a trust concept of government under which all laws must secure 'due recognition' of the rights of citizens, must be for the benefit of citizens, and must, moreover, be consistent with a democratic society[17]. The Security Council can, within the framework of Article 39 of the Charter, 'do away' with the international dimension in situations which involve grave human rights violations and embark on a collective action to protect human rights.

Thus it can be safely argued that there are provisions in the UN Charter will supports humanitarian intervention and it will still be in pursuance of the objective of the UN. The fact that there is no specific UN Charter provision authorizing humanitarian intervention does not mean that such exercise is unlawful. This is evident in other provisions of the Charter, such as the provisions[18] affirming that 'everyone has the right to life, liberty and the security of person, and the provision[19] that commits the UN to 'promote universal respect for, and observance of, human rights and fundamental freedoms' and the provisions[20] that pledges all Members 'to take joint and separate action' toward this end. It is submitted that unilateral action taken by any member state or states to halt mass atrocities as captured under the 2005 World Summit Document can be safely justified under these provisions of the Charter. Further affirmations of the responsibilities of sovereignty are manifested in the Genocide Convention, the Universal Declaration of Human Rights, and other international covenants that make no distinction on whether the offender is a foreign invader or one's own government. The African Union initiative for unilateral humanitarian intervention though without the UN authorization can be justified under the above provisions which enjoined member states to protect human rights.

By incorporating the right of intervention in the African Union Act, the African Union States consented that sovereignty carries with it the responsibility of States to provide for the security and well-being of those residing on their territories. Notably, the preceding Article, 4(g) of the AU Act, establishes the principle of 'noninterference by any Member State in the internal affairs of another. Although these provisions may initially appear contradictory, but they are not but instead are complementary. They are complementary in the sense that while Article 4(g) warns against unilateral intervention, while 4(h) provides for a doctrine of non-indifference in the form of multilateral action based on a decision of the Assembly of Heads of State'. This is so because once the member states signs the Constitutive Act, it automatically cedes parts of its sovereignty to the Union only to be activated in event of the occurrence of any of the prohibited crimes within her territory. With the arrangement as shown by the AU Act, there is no tension between sovereignty

[17] See Stacy, ibid
[18] See Article 3 of the UN Charter
[19] See Article 55 of the Charter
[20] See Article 56 of the Charter

and intervention as the concerning state has already given her consent by ratifying the Constitutive Act. This is normative compatibility.

Statutory Intervention in Africa

The provision of the right to intervene under the AU Constitutive Act is not only a stark departure from the traditional notions of the principle of non-interference and non-intervention in the territorial integrity of nation States but it is also in sharp contrast with the long-standing principle of state sovereignty. Through Article 4(h), the AU created a regional normative framework for sovereignty as a responsibility equal to Responsibility to Protect as embraced by the World Summit Outcome Document[21]. The consensus endorsement of the Responsibility to Protect reoriented the debate on humanitarian intervention by focusing on the responsibilities of individual States and, if necessary, the UN and its Member States. The notion of Responsibility to protect falls squarely within the objective of Article 4(h) of the AU Act which is intended to protect populations facing mass atrocity crimes.

Going by Article 4(h)[22], the contemporary view in Africa is the observation of the laws of was-the Geneva Convention and that of protection of human rights from mass atrocity crimes, rather than state sovereignty. This explains the endorsement of the statutory right to intervene in a Member State by the supranational body, the African Union. With this provision, the African Union is no longer talking about humanitarian intervention but have moved on to the era of statutory intervention with the consent of the host state. Given the prevalent mass atrocity crimes in Africa, Article 4(h) of the AU provides additional instruments to protect human rights and humanitarian laws on the continent. The African Union is a trailblazer in this regard by introducing enforcement by consent in the form of the right to intervene in Article 4(h). Article 4(h) may be seen as a complement and a valuable contribution, not a substitute for the existing structures and instruments obtaining under the UN Charter. In this case, Article 4(h) offers a wider menu of legal options to respond to mass atrocity crimes which is self-evidently essential. However, financial and institutional incapacity stand in the way and that is the reason why the AU in their *Ezulwini*[23] Consensus recommended enforcement action by the Union with UN bearing the financial burden.

Article 4(h) gives the AU a strong legal basis for intervention in the face of mass atrocity crimes. This is statutory intervention, which removes the need to justify intervention on moral and ethical grounds. The ratification of the Constitutive Act signaled the end of 'humanitarian' intervention, at least, in Africa amongst the AU member states. The AU right to intervene cannot be viewed as a euphemism for humanitarian intervention but as a normative commitment of AU States to prevent mass atrocity crimes on the continent. By consenting to Article 4(h), AU States understood themselves to be granting a responsibility to the AU and the international community to intervene where a Member State is unable or unwilling to undertake to protect its population from mass atrocity crimes. In a quest to avoid a repeat of inaction in Rwanda in 1994, now the legal basis has been laid for the continent to move from a culture of paralysis to a culture of protection. This intervention regime ought to culminate into a culture of prevention and compliance. The conditions for intervention under Article 4(h) are mass atrocity crimes which are subject to universal jurisdiction both under the Rome Statute[24] and the Geneva Conventions and its Additional Protocols. The non-interference principle in the internal affairs of States embodied in Article 4(g) is qualified by Article 4(h), since mass atrocity crimes are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction.

---

[21] See the 2005 World Summit Document, ibid

[22] AU Constitutive Act, ibid

[23] The Report containing the consensus of the African Union on the proposed UN reform.

[24] See Articles 6, 7 and 8

Conclusion

By incorporating the right of intervention in the African Union Act, the African Union States consented that sovereignty carries with it the responsibility of States to provide for the security and well-being of those residing on their territories. Notably, the preceding Article, 4(g) of the AU Act, establishes the principle of 'noninterference by any Member State in the internal affairs of another. Although these provisions may initially appear contradictory, but they are not but instead are complementary. They are complementary in the sense that while Article 4(g) warns against unilateral intervention, while 4(h) provides for a doctrine of non-indifference in the form of multilateral action based on a decision of the Assembly of Heads of State'. This has ushered in the era of statutory intervention in Africa. In Africa, it is submitted that through the AU Constitutive Act, a normative compatibility has been achieved between intervention and sovereignty. We witnessed the erosion of sovereignty from its absolutism to a state of responsibility today the sovereign is now responsible for the protection of its people from the mass atrocity crime or what the Geneva Convention described as grave breaches. It is universally accepted that where a state is unable to protect its population from these crimes, them the responsibility falls on the international community. The redefinition of sovereignty to include a duty to respect human rights is widely reinforced in contemporary international law. Even if state sovereignty remains the basic norm of international law, a state cannot pretend absolute sovereignty without demonstrating a duty to protect human rights. International law becomes more permissive regarding cross-border intervention to protect human rights.

Thus, where a state engages in systematic and large-scale violations of its citizens' rights under the Geneva Conventions and the Additional Protocols and commits any of the universal crimes against its citizens , the international community through UN Security Council and in the case of Africa, the AU may forcefully intervene to end such violations.