State Sovereignty and International Protection of Human Rights: The Way Forward

By
Simeon Ola Oni *

Abstract
The concepts of human rights and national sovereignty in the 21st century social-political system appear to be antithetical to each other. The co-existence of the two has not been easy particularly in a sovereign State that blatantly violates the rights of her people. In that situation, the two principles have confronted rather than partnered in the sense that any promotion of universal Human Rights by the international community is seen as a restraint on State sovereignty leaving the individual whose rights are violated to suffer. In this regard, this article will discuss the differences between the two concepts, the impact of State sovereignty on the protection of human rights in both Nigeria and United Kingdom, and fashion out a substantial degree of symbiotic relationship that will be of benefit not only to nation-state but also to individual.
Keywords: Human Rights; State Sovereignty; International law; Domestic Law

1.1 Introduction

The origin of the concept 'human rights' could be ideally traced to year 539 BC when Cyrus the Great, the legendary Persian leader conquered the Ancient Babylon. Among other things, Cyrus established racial equality, freed the slaves and declared the right to choose the religion of one's choice. These and other declarations of Cyrus formed the basis for the first four Articles of the Universal Declaration of Human Rights which are as follows:

> *Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*
> *Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*
> *Article 3: Everyone has the right to life, liberty and security of person.*
> *Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.*

* Simeon Ola Oni LL.B, BL, LL.M, MPhil, Ph.D, Senior Lecturer, Department of Public and International Law, Lead City University, Ibadan, Oyo State. simeonolaoni@yahoo.co.uk,+234 8074559030

Consequently, the end of World War II marked the period when the international community reached agreement on the belief that States have obligations to respect and protect the natural rights of their citizens.[1]

Human rights mean different things to different people and groups. According to the natural school of thought, human rights mean all-natural rights that emanate from human nature. The natural school believes that there are some things that are universally valuable for or harmful for every human being which human beings should not be denied of. Therefore, humans have the right to the things that are universally valuable, and the right to be protected against those things that are universally harmful.[2]

However, the concept of 'human rights' became internationalized in the 20th century, precisely in 1948 when the Universal Declaration of Human Rights (UDHR) was adopted and more developments were witnessed in Europe towards democracy and human rights following its introduction by the United Nations. This instrument inspired the Europeans and served as the basis for the drafting of the European Convention on Human Rights.[3]

The Declaration established a liberal ideal of human rights that the individual is the basic unit while the State is the creation of its citizens. In theory, it considers human rights first before any government, but in practice, unless there is an explicit enforcement mechanism attached to the obligations of the State parties, its enforcement rests simply on the discretion of the State.[4]The UDHR is an instrument that sets out the guidelines for the human rights that are to be upheld by all States under the aegis of the United Nations. The guidelines were intended to be enforced by the consenting States, the domestic laws of which should mirror the standards set out in the Declaration. Though the UDHR is not legally-binding, it is a bundle of guiding principles meant to check the excesses of the State party and this has rendered the provisions of the UDHR on State sovereignty optional.[5]

Human rights imply that all people regardless of nationality should be granted rights and these rights have the potential to undermine governments' traditional claims to the

[1]Richard, B.*An Overview of International Human Rights Law*, Guide to International Human Rights Practice, Hurst Hannum ed., 1984.
[2]Dembour, Marie-Benedicte, *What are Human Rights? Four Schools of Thought*, *Human Rights Quarterly*, vol. 32, no. 1, 1–20, 2010
[3]Alston, P. and Weiler, J.H. *The European Union and Human Rights*, P. Alston et al. eds., Oxford: Oxford University Press, 1999, p. 3.
[4]Donnelly, J. *State Sovereignty and Human Rights*. *Human Rights and Human Welfare: Working Papers*. 21 (1), 1-28, 2004.
[5]Thakur, R. and Malcontent, P**.** *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. UN University Press, 2004.

inviolability of State sovereignty.[6] When human rights are seen as more inviolable than State sovereignty, the human rights regime can claim humanitarian grounds as reasons to impinge on State sovereignty and put the State's treatment of its citizens under external scrutiny.[7] Popovski argues that discourse surrounding the balance between State sovereignty and human rights is shifting in favour of increasing permissiveness towards cross-border action to protect human rights because State sovereignty has the political power to suppress human rights at will.[8]

1.2 Nature of State Sovereignty

The concept of sovereignty was developed in the 17th century as a consequence of the emergence of modern States in Europe. Traditionally, sovereignty ascribed unlimited freedom and absolute authority to each State within its own territories.[9] The concept can be termed as constitutional independence of the States within the international community.[10] By sovereignty, all States are equal under the law and entitled to self-determination, and this means that no other State has the power to intervene in the internal affairs of sovereign State.

In 1648, the Peace of Westphalia was signed and the great powers in Europe agreed among themselves that sovereignty should be respected. The Peace of Westphalia regulated the relationship between the European powers and introduced a new concept that embraced the two basic norms of sovereignty: territorial integrity and non-intervention. In other words, even in the comity of States, the integrity and the autonomy of each State must be respected by the other States.[11] According to Amstutz, 'existing States, as sovereign members of the decentralised international community, are entitled to recognition and respect and to the right of political autonomy...'[12] By the Peace of Westphalia, States are understood in principle as legally equal entities which work to maintain international peace through

[6]Posner, E. *The Case Against Human Rights,* Para. 4, The Guardian, December 4, 2014.< https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>Accessed on 24thSeptember, 2019.
[7]Cole, W. *Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966–1999*, American Sociological Review, Vol. 70, No. 3, 473, 2005.
[8]Popovski, V. *Sovereignty as Duty to Protect Human Rights*, UN Chronicle, vol. 4, pp. 16-18, 2004. <http://www.un.org/Pubs/chronicle/2004/issue4/0404p16.html> Accessed on 15th September, 2019.
[9]Dowling, Anne.*"Un-Locke-ing" a "Just Right" Environmental Regime: Overcoming the Three Bears of International Environmentalism-Sovereignty*, Locke, and Compensation, 26 WM. & Mary Envtl. L. &Pol'y Rev. 894, 2002.
[10]Morgenthau, H. J. *Politics Among Nations: The Struggle for Power and Peace*. New York: Knopf. 6th ed. Pp 688, 1985.
[11]Bartelson, J. *The Concept of Sovereignty Revisited*. The European Journal of International Law, Vol.17, No.2, Pg.465, 2006.
[12]Amstutz, M. *International Ethic: Concepts, Theories, and Cases in Global Politics,* Rowman & Littlefield Publishers, Inc. 129, 2005.

accepted declarations, treaties, conventions and agreements.[13] The treaty of Westphalia defines sovereign States as one with clear borders, having the right to rule over its people and expecting its territorial integrity to be respected while respecting that of other States.[14]

The term sovereignty can mean that of the State and that of the people. While a sovereign State can be a totalitarian entity, it can also be a democratic one particularly where the people in the pursuit of their human rights, exercise their sovereignty as a form of control mechanism over the sovereignty of the State through democratic election.[15] In this regard, where sovereignty is that of the people, the State is not the sole possessor of absolute power under both international and domestic law.

The United Nations Declaration of 1970, for example, stated that the main constitutive elements of sovereignty are the following: all States are equal in legal terms; each State enjoys the inherent rights in full sovereignty; every State has the right to freely choose and develop its political, social, economic and cultural system; every state has an obligation to respect the personality of other states; territorial integrity and political independence of the State are inviolable; each is required to discharge in full and in good faith its international obligations and to live in peace with others.The principle of State sovereign is about the sovereign equality of States which forms the basis for cooperation of United Nations Member States under article 2, paragraph 1 of the UN Charter. By State sovereignty, the States have not only rights but also duties under the international law for peaceful coexistence which limits the potential for abuse of power, both internally and internationally.

The European Union is an international organisation in the classic sense of the concept, or as stated by Sabine Saurugger "*Europe is neither state, nor international organization, nor an empire*."[16] According to Anghel, the concept of State sovereignty in Europe is "*burdened with commitments and impaired*" compared to the situation of their membership to other organizations, this suprastatal being acquired through the transfer of sovereignty from the Member States having as effect "*a clear limitation of sovereignty of the Member States*".[17]

[13]Croxten, Derek. *The Peace of Westphalia of 1648 and the origins of sovereignty,* The international History Review Vol.21, No.3 (1999), pg 569.
[14]Osiander, Andreas. Sovereignty, International Relations and the Westphalian myth. The MIT Press, (2001), Vol.55, No2, pg 251
[15]Delbrueck, J. *International Protection of Human Rights and State Sovereignty*, Indiana Law Journal, vol. 57, no. 4, 567–578, 1982.
[16]Saurugger, S. *Theorie et de l'integration concepts européenne/Theory and concepts of European integration*. Paris: Presse de Science Po. pp. 319-320, 2009.
[17]Anghel, I. M. (2002). *Subiectele de drept internațional*/*The subjects of international law*. Bucharest: Lumina Lex. P.2, 2010

The North Atlantic Treaty also mentioned the objectives and principles of the United Nations Charter, therefore implicitly the principle of sovereign equality, by expressing the agreement to be part of these organizations through numerous treaties and conventions concluded later, the Member delegate, in fact, part of the competences towards organization, which represents a restriction, even if it is deliberate of the attributes of the sovereignty.[18]

1.2.1 Interplay between State Sovereignty and Human Rights

Sovereignty of State is the major factor that is responsible for non-implementation of the internationally controlled human rights.[19] The sovereign State is one of the many constituent parts of international law which also includes *inter alia,* international organizations, Security Council, UN Secretariat, Member States, the individual, etc. Out of all the constituent elements of the international system, the sovereign State remains the prime of the international system politically, socially or legally.[20]

The two fundamental values in international relations are State sovereignty and protection of human rights. The State has the responsibility to protect the basic rights of its people and to allow individual to enjoy freedom within its legal boundaries.[21] The concept of State sovereignty and that of human rights are often in conflict because the emphasis of the State on sovereignty often leads to the violation of human rights.[22] Morgenthau, while analyzing the relationship between sovereignty and international law noted that Governments make legal commitments cynically and "are always anxious to shake off the restraining influence that international law might have upon their national policies, and only use international law instead for the promotion of their national interests"[23]

The discourse surrounding the balance between State sovereignty and human rights is shifting in favour of increasing permissiveness towards cross-border action to protect human rights because State sovereignty has the political power to suppress human rights at will. For instance in United Kingdom, the government is under obligation to comply with the decisions of the European Convention whether it agrees with the outcome or not.[24] That is the essence of the rule of law. The supposed primacy of human rights over State sovereignty is common with the United Kingdom but rarely applied in Soviet Union, where

[18]Von Kleffens, E. *Sovereignty in International Law,* in R.C.A.D.I., vol. 82.1953
[19]Falk, R. *Human Rights and State Sovereignty* at 3 passim, 1981.
[20]Clapham, A. *Human Rights Obligations of Non-State Actors.* Oxford: Oxford University Press, 2006.
[21]Krasner, S. *Sovereignty, Regimes, and Human Rights*, V. Rittberger and P. Mayer (eds.), Regime Theory and International Relations, Oxford: Oxford University Press, 140, 1995.
[22] Morgenthau,(n 10)
[23]Supra
[24] Soering V. United Kingdom, No. 14038/88, 7.7.1989.

the governments most times uphold State sovereignty above human rightsfor the purpose of protecting the human rights violators.[25]

The UDHR is not binding even on State Parties because some of its provisions have assumed the status of *jus cogens.* While the United States Supreme Court in *Sosa v Alvarez-Machain*, held that the UDHR "does not of its own force impose obligations as a matter of international law,"[26]the Soviet Union strongly objected to the wordings of several provisions of the Declaration guaranteeing individual liberties. This is the same reason why Saudi Arabia is not a party to some human right treaties hence it refused to comply with the condition in Article 18 of the UDHR which sets out the right to change religion and the provisions that guarantee women's right both of which are considered offensive to Islam.[27]

The different understandings on sovereignty and human rights help to explain the difficulties in political relations. Thus, the sovereign States do not only create the international norms for the protection of human rights, but also determine the process of their implementation or non-implementation in line with their sovereign will.[28] From this perspective, State sovereignty and international protection of human rights appear to be incompatible. Though the exercise of sovereignty can be the source of violation of fundamental human rights it can also be equivalent to fundamental human rights expression. Therefore, in some instances, sovereignty and its exercise can be crucial to the protection of human rights because it can be an expression of how individual and the community put into practice those elements of self-determination that are constitutive of human rights.[29] This submission is well captured in the words of Quincy Wright:

> *The universal maintenance of human rights may create conditions in which these relations between groups may become one of co-operation and the expectation of peace. The rules of international law, which have defined the relations of State to State, must develop to meet this new situation. The rights of States must be considered relative to the rights of individuals. Both the State and the individual must be considered as subjects of world law and the sovereignty of the State must be regarded not as absolute, but as a competence defined by that law. Such development, however, implies that the world community is sufficiently*

[25]Popovski, Vesselin. *Sovereignty as Duty to Protect Human Rights*, UN Chronicle, vol. 4, pp. 16-18, 2004. <http://www.un.org/Pubs/chronicle/2004/issue4/0404p16.html> accessed on 15th September, 2019.
[26]*Sosa v. Alvarez-Machain*, (2004), 542 U.S. 692, 734.
[27]Littman, D. *Universal Human Rights and "Human Rights in Islam*, Midstream(New York, Feb/Mar 1999
[28]Thakur, R and Malcontent, P. *From Sovereign Impunity to International Accountability: The Search For Justice In A World Of States*. Tokyo: UN University Press, 2004.
[29] Wright, Q. *Relationship Between Different Categories of Human Rights, in Human Rights*: Comments and Interpretations 149 (UNESCO staff eds., 1949.

> *organised and sufficiently powerful to assure the security of States under law.*[30]

The incompatibility of the principle of State sovereignty with the international protection of human rights has generated divergent views amongst scholars and this has polarised them into various schools of thought: The transnational and the non-international schools of thought. The main aim of the transnationalists is to overcome the dominance of the sovereign State as a constituent element of international system so as to transform the traditional nature of the State, which is characterised by the exercise of exclusive jurisdiction over its people and territory.[31]

In this regard, Falk states that without the emergence of a new system of world order that is not based on sovereign States, the international protection of human rights would remain weak or marginal. In other words, as long as the sovereign State which is seen as the core element of international human rights law is saddled with the responsibility of protecting the fundamental human dignity, there will be a direct conflict between the two[32] and as such, international human rights obligations are regularly seen as "eroding state sovereignty."[33]However, one begins to wonder whether or not in line with the thought of the transnationalists, an individual is indeed in possession of his human rights particularly where the dominance of State sovereignty is overcome by international mechanisms.

On the other hand, the non-internationalists are the writers and practitioners in the field of foreign policy who take a rather negative attitude towards the notion of international protection of human rights. They claim that the protection of human rights is essentially an internal matter of States and certainly not a proper or primary object to be pursued by means of foreign policies. According to Henry Kissinger, one of the progenitors of the non-international school of thought, the non-intervention of one State in the internal affairs of another State, takes precedence over human rights.[34]To the non-internationalists, respecting State sovereignty means that any tangible human rights enforcement mechanism must come from State's own domestic legal system, which means that where a State ignores or carries out human rights abuses, the principle of State sovereignty comes into conflict with any other possibility of resolution.[35]

---

[30]Supra
[31]Delbrueck (n 13) 571.
[32]UNESCO, *The Grounds of An International Declaration of Human Rights*: Comments and Interpretations, UNESCO staff eds., 1949, at 258, app. II
[33]Mohammed, A. *Humanitarian Intervention and International Society, (cover story) Global Governance, 7*(3), 225, 2001. Retrieved from Business Source Complete database.
[34]Forsythe, D. *Human Rights and World Politics*, Moral Claims in World Affairs 79, Pettman ed. 1979.
[35] Hallal, A. *How useful are International Human Rights in a Sovereign and Democratic State?* Right Now, 2014, <http://rightnow.org.au/opinion-3/how-useful-are-international-human-rights-in-a-sovereign-and-democratic-state/> Accessed on 20th September, 2019.

The non-internationalists agree with the belief of Westphalian treaty which teaches that the law emanates from the State and its will is upheld.[36] Thus, their belief stems from the constitutional safeguards that project the individuals as the masters of their fates.[37] The non-internationalists believe that the international human rights are the law of the land only if the State recognizes them as such. The assumed overriding power of international law is if and only if it is recognised by the State and this recognition confers on the State the duty to protect international human rights.[38]

On the contrary, some scholars while examining the relationship between the constitutional and the international laws, have established the primacy of the international law over and above the constitutional law. Scholars like Georg Jellinek argued that as members in the comity of States, all States are necessarily bound by international law.[39] Henry Wheaton opines that the European society of States is bound by a shared legal order,[40] Of all the internationalists, Hans Kelsen was the first to offer a systemic elaboration of the relationship between constitutional and international laws, concluding that constitutional law is necessarily derived from the international legal order.[41]

On the other hand, Lauterpacht upturned the primacy of international law by observing that the universal law of humanity revolved round the individual human being, as the ultimate sovereign over the limited province of the State[42]Benvenisti and Harel argue that 'the overriding power of State's constitution is necessary to guarantee the inalienable rights of the citizens.' According to them, the value of human rights depends on the active participation of the citizens in the definition and the exercise of their rights.[43]

---

[36] Hobbes, T. *Leviathan,* (London 1651/C. B. Macpherson (ed.), London, Penguin Classics, 1985), 527, ch. XVII.
[37]Mandelstam, A. *Declaration on the International Rights of Man,* New York session, 1929, <http://www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf> Accessed on 19th September, 2019
[38]The Lisbon Treaty judgment (Federal Constitutional Court) June 30, 2009, 2 BvE 2/08 (Cited in Benvenisti, E. and Harel, A.*Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity,* Oxford University Press, 2017).< https://academic.oup.com/icon/article/ Accessed on 23rd September, 2019.
[39]Jellinek, G. *The Origins of Liberal Constitutionalism in International Law*, 4 Goettingen J. Int'l L. 659, 672–673, 2012.
[40]Wheaton, H. Elements of International Law Pt. I and 11, 8th ed. 1866, (Cited in Benvenisti E. and Harel, A. *Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity,* Oxford University Press, 2017).<https://academic.oup.com/icon/article/> Accessed on 23rd September, 2019.
[41]Kelsen, H. *Pure Theory of Law*, 1st ed. 1934, (Translated by Bonnie Litschewski Paulson & Stanley L. Paulson as Hans Kelsen, *Introduction to the Problems of Legal Theory*, 1992)
[42] Lauterpacht, H. *The Grotian Tradition in International Law*, 23 Brit. Yb Int'l L. 1, 47, 1946. See Roman Kwiecień, *Sir HerschLauterpacht's Idea of State Sovereignty: Is It Still Alive?* 13 Int'l Community L. Rev. 23 2011.
[43] Benvenisti and Harel supra (n 29).

1.3 International Human Rights Systems and their Enforcement Mechanisms

The creation of the United Nations in 1945 ushered in many treaties and conventions which were signed by the member states. These include the International Covenant on Civil and Political Rights (ICCPR) having a petition system through which State parties to the ICCPR may lodge complaints of non-compliance by other Parties.[44] Today the main forum for verifying compliance to the ICCPR is the Human Rights Committee (HRC)saddled with the main role of receiving and commenting on reports periodically submitted by States parties, detailing steps taken by those States to give effect to the rights set out in the ICCPR. [45] Although, this is a great development towards solving the problem of compliance, the opinions of the Committee on performance and their recommendations International law has no enforcement mechanisms, but States have obligations to implement concluding observations of the HRC.[46]

Some of the enforcement of human rights are more of the domestic courts making reference to general comments and concluding observations of treaty mechanism bodies. For instance, the Supreme Court of Canada used the Reports issued by the UN Human Rights Committee and stated that:

> *In the process of monitoring compliance with the International Covenant on Civil and Political Rights, however, the Human Rights Committee of the United Nations has expressed the view that corporal punishment of children in schools engages Article 7's prohibition of degrading treatment or punishment*.[47]

This shows that the Supreme Court of Canada will look to International and Regional Human Rights Courts for precedent and for interpretation, especially when it pertains to treaties to which Canada is a party, and also to the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[48]

Furthermore, McLachlin C.J. in *A. v United Kingdom,* while commenting on Article 3 of the European Convention on Human Rights which forbids inhuman and degrading treatment, stated that the European Court of Human Rights interpreted this article as including the parental treatment of a child. She used as precedence the decision of the

[44] Currie, JH. Public International Law, 2d ed. (Toronto: Irwin Law, 2008) at 421.
[45] id, p. 427.
[46] Farrior, S. *International Reporting Procedures,* in H. Hannum, ed., Guide to International Human Rights Practice, 4th ed .Ardsley, NY: Transnational, 2004) at 189.
[47] *Canadian Foundation for Children, Youth, and the Law v A.G. Canada* [2004] 1 S.C.R. 76 at para 33. [Canadian Foundation]
[48] Kindred, H. M. *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006), at 856.

European Court of Human Rights.[49] The European Court of Human Rights as well as African Court of Human Rights permit individual to make direct claims against member States. Unlike the Inter-American Court, the jurisdiction of the European Court is compulsory for all States parties to the European Convention on Human Rights.[50]

In addition to the final judgment of being binding, there are interim measures that are available to the European Court. While it is not stated specifically in the Rule 39 of the Rules of the European Court,[51] the European Court in *Cruz Varas v Sweden* held that any State party to the Convention to which interim measures have been granted in order to avoid irreparable harm being caused to the victim of an alleged violation, must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.[52]In practice the capacity of international law to interfere with States' domestic affairs or impose certain practices on them is severely limited. I strongly believe that though the indirect impact of the international law may not question the notion of sovereignty itself, it may empower the ideals of human rights and foster domestic change.

1.4 Conflicts between State Sovereignty and International Protection of Human Rights

The relationship between the sovereign States and the protection of human rights depends only on the agreement and codification by the sovereign States in their domestic laws. In Africa where state sovereignty and the principles of non-interference in state affairs are protected and jealously guided, it is difficult for the African Court on Human and Peoples' Rights to achieve the main objective of its creation. Even in the face of grave human rights violations, the State Party can use State sovereignty to avoid compliance with the judgment of the African Court.[53] Where other human rights protection bodies such as the African Commission on Human and Peoples' Rights have struggled to have an impact,[54] resistance to the Court has taken a variety of forms, some of which are not the same with those found in other regions. In other words, the assertion of state sovereignty is not limited to the African continent alone, it is also found in Europe. A clear example of this idea in Europe

[49]*A. v United Kingdom* Eur. Court H.R. [1998], Reports of Judgments and Decisions 1998-VI, at 2699.
[50] M. Freeman and V.E. Gibran, *International Human Rights Law, Essentials of Canadian Law,* Irwin Law Inc, at 438, 2004.
[51] ECHR, Rules of the Court, July, 2009, <http://www.echr.coe.int/RulesOfCourt.pdf>Accessed on November 31, 2019
[52] *Cruz Varas v Sweden* (1991), vol. 201, E.C.H.R. (Series A); *Conka v Belgium* No. 51564/99 , [2001], I, E.C.H.R.; *Mamatkulov and Abdurasulovic v. Turkey* No. 46827/99 ; 46951/99, [2003], E.C.H.R. at paras. 107-10.
[53]Rowland, C. *The African Court on Human and Peoples' Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions?* The Comparative and International Law Journal of Southern Africa 43, 23-45, 2010.
[54]Bekker, G. *The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations*, Human Rights Law Review 13, 499-528, 2013.

is seen in the 1919 Treaty of Versailles which established a commission to investigate any persons liable for war crimes. Kaiser Wilhelm II of Germany was to be investigated for war crime and the victorious allies opposed such an idea stating that any trial of a national Head of State in an international court was "contrary to the basic concept of national sovereignty."[55]

Sovereign States do not only create the international norms for the protection of human rights, they also determine the process of their implementation or non-implementation according to their sovereign will'.[56]The request by the African Commission to release Saro-Wiwa and the eight Ogoni activists who were sentenced to death by the Nigerian government was ignored because of State sovereignty.[57] Other cases that demonstrate lack of authority and diminishing power of the African Court in carrying out its protective function in the face of State sovereignty includes *inter alia*, the early cases of non-compliance of Tanzania (the host State of the African Court), with the key judgments of the African Court on Human Rights,[58] and also that of Kenya in *Pattni& Ano v Republic of Kenya* where Article 2 of the Kenyan Constitution was ruled supreme to the provision of the African Charter.[59]

In *Amnesty Int'l (on Behalf of Banda &Chinula) v. Zambia,* the African Court held that the non-compliance with the decisions of the African courts on human rights is mostly hinged on the assertion of States sovereignty which permits the national laws to supersede the Charter. Hence, the Charter is unable to protect individuals from their governments who are the main violators of human rights.[60]

1.4.1 ***Refusal to Ratify the Court's Founding Protocol*****:** The first and most basic form of resistance is the refusal to ratify the Court's founding Protocol. In a situation where parties to a communication are only member States who do not ratify the founding Protocol of the Court like in the case of Angola, Botswana, Democratic Republic of Congo, Ethiopia, Eritrea, Sudan and Zimbabwe, compliance with the Court's decisions becomes impossible. In line with Article 5, Rule 33 of the Protocol, Non-Governmental Organizations with observer status and individuals from States which have made a declaration accepting the jurisdiction of the Court can also institute cases directly before the African Court. Despite

[55]Sunga, L. *Individual Responsibility in International Law for Serious Human Rights Violations*. Dordrecht: Martinus Nijhoff Publisher26-34, 1992.
[56]Delbruck, (n14) 574
[57]*International PEN (on Behalf of Saro-Wiwa) v Nigeria* Communication. Nos. 137/94
[58]Daly, T.G. and Wiebusch, M.*The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court*, International Journal of Law in Context 14(2) 2018.
[59]*Pattni & Another v Republic of Kenya* [2001] KLR 262.
[60]*Amnesty Int'l (on Behalf of Banda &Chinula) v. Zambia*, Coram. No. 212/98, 2000 AHRLR 325 ACHPR 1999 [*Zambian Deportation* case].

this unequivocal provision, many States have declined to permit petitions by individuals and recognised NGOs to the African Court. Out of the thirty existing member States who ratified the Protocol establishing the African Court, only nine made the special declaration that permits petitions to the Court by individuals and recognised NGOs.[61] Rwanda that initially made the special declaration, however withdrew its accent when it appeared it was going to undermine its sovereignty.

As a result of State sovereignty, it is common that some States do have partial ratification of certain international law based on the implication of such ratification on their sovereignty.[62] Thus, a State may avoid full responsibility of the law it ratifies as in the case of the Kingdom of Saudi Arabia which conditionally ratified the Convention on the Elimination of all Forms of Discrimination Against Women but not when it conflicts with Islamic law.

1.4.2 ***The relationship between International and Constitutional Law:*** Some constitutions specify monist model where the customary international law, and the ratified treaties form part of municipal law without the need for further state action. Monism is a system in which municipal and international law form part of a single system. It fosters a symbiotic relationship between the international and constitutional law and secures compliance with international protection of human rights. However, it restricts the sovereignty of the State and accordingly limits the capacity of the internal political process to oversee the state's international obligations. For instance, in the United Kingdom, the common law recognises customary international law as a direct source of rules in municipal law.[63]
On the other hand, in the States where the law adopts a dualist model, treaties have no direct effect on national law because there is no constitutional provision for domestication which could transform them into municipal rules. In dualism, courts will often use treaties as aids in deciding questions of municipal law, but not as a source of law in their own right. The clear instance of national courts actively resisting the European Human Rights Courts can be seen in the decision of the Russian Constitutional Court in *Anchugov and Gladkov v Russia* which held that the State can refuse to execute the judgments of the European Court of Human Rights as a result of State sovereignty.[64]

In the context of the African Court, the relationship between national courts and the African Court is underdeveloped, for a variety of reasons. First, unlike Europe, where

[61] The member States who have made this special declaration are: Benin, Burkina Faso, Cote D'Ivoire, Ghana, Malawi, Mali, Rwanda (* withdrawal), Tanzania and Tunisia.
[62]Saladin Meckled-Garcia, *The Legalisation of Human Rights. Multidisciplinary perspectives on human rights and human rights law*. Cali, Eds., London: Routledge, 35, 2006.
[63]*Trendtex Trading Corporation v Central Bank of Nigeria* (1977) QB 529.
[64] *Anchugov and Gladkov v Russia* App. Nos. 11157/04 and 15162/05, Eur. Ct. H.R. (Sept. 12, 2013), <http://hudoc.echr.coe.int/eng.> accessed on 26th September, 2019.

Member States incorporate the ECHR into their domestic law (although with varying levels of intensity and supremacy), incorporation of the African Charter into domestic constitutions of Member States is rare as States like Angola, Guinea, Benin, etc. are yet to do so. In addition, unlike the strong and region-wide domestic judicial practice of referring to international human rights law in Europe, the African Union Member States rarely refer relatively to international human rights law. For instance, Zambian courts avoid it completely.[65] In that regard, Dinokopila observed that despite increasing reference to the decisions of the African Commission by national courts, there is little evidence of the use of the precedence of other regional and sub-regional courts.[66]

1.4.3 ***Non-implementation of the Court's decisions*****:** This includes the refusals to implement the decision of the international Court, failure to inform the Court of what measures have been taken, and the slow pace or 'reluctance' to comply, limits the Court's effectiveness.[67] In 2013, for example, the African Court adopted an Interim Report noting that Libya has failed to comply with a judgment of the Court.[68] The Commission forwarded a recommendation to the African Union (AU) Assembly of Heads of State to take such other measures as it deemed appropriate so as to ensure that Libya fully complied with the Court Order. However, the Assembly did not take any action. This shows that non-compliance and non-enforcement applies to both the Commission's recommendations as well as the Court's orders. Thus, the ability of the AU organs to impose sanctions consistently on non-complying States is necessary in order to strengthen the credibility of the decisions of the African Court.

Some States on the other hand, have used the concept of sovereignty as double standard. They use the concept when they want to avoid compliance with the decisions of the human rights courts, and also in haste to violate the sovereignty of another State when they want to force a State to comply with the decisions of the human rights courts. For instance, Australia claimed the inviolability of its State sovereignty as justification for human rights abuses of those it detained in the Manus Island detention centre, however, the same Australia supported the United States 'humanitarian' intervention in Iraq and Afghanistan, citing the inviolability of human rights as rationale for violating the sovereignty of the States being invaded.[69]century, the development of the concept of human rights was helped in

[65]Killander, M. and Adjolohoun, H. *Human rights litigation in Africa,* Francophone African, 4, 1 ed 2010.
[66]Dinokopila, B. R. *The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana*, University of Botswana Law Journal, Vol. 24, 2017.
[67]African Court, Mid-Term Activity Report, 1 January-30 June 2017, paras 45–46; AU Executive Council, Report on the Activities of the African Court to the Executive Council, 22–27 January 2017 para 57.
[68]African Court, Interim Report of the African Court notifying the Executive Council of non-compliance by a State (Interim Report on Libya), 17 May 2013 para 8.
[69] Brooke, H. *State Sovereignty and Human Rights—Irreconcilable Tensions,* 2017, https://medium.com/@hollybrooke/state-sovereignty-and-human-rights-irreconcilable-tensions, Accessed on October 30, 2019.

great measure by the events in Africa and Europe. Further occurrences in Somalia, Sudan, Cote de Ivoire, Sierra Leone, Liberia, and former Yugoslavia greatly bore

1.5 Recommendations

The frictions between the international protection of human rights and State sovereignty have been a global concern that has defiled almost all suggested proposals and suggestions because the State parties are not willing to surrender their sovereignty under any condition, not even for the protection of the human rights of their citizens. In view of this uphill task, the achievements of the international mechanisms for the implementation of human rights appear very marginal and have made very slow progress. However, none of the proposals ever made for the implementation of human rights has yielded enduring results. Nevertheless, the following proposals may contribute to the resolution of these perennial problems:

i. As long as the sovereign State is saddled with the responsibility of protecting human dignity, there will always be a conflict. In other to prevent this conflict, there must be an emergence of a new system of world order that is not based on sovereign States.
ii. The use of international mechanisms for the implementation of human rights may be made more effective if supplemented by non-governmental organizations and other non-state actors towards creating global awareness and understanding of world citizenry through international activism that brings to bear pressures on States violating human rights.
iii. The concerted support of the international efforts to implement human rights given by those democratic States could wield considerable political and economic pressure on the reluctance of any given State to fulfil its obligations under international instruments for the protection of human rights.
iv. The international law should be developed into a more value-oriented legal order. The right and capacity of the State to participate in this order may be made dependent not only on being sovereign political entity as usual, but also on being one that lives up to basic human rights standards.
v. Most of the suggested implementation mechanisms remain ineffective because they are focused on solving all the problems together, but they could be more effective if they are channeled on solving each problem one after the other.
vi. The international institutions should be empowered to increase its legitimacy and reduce its dependence on powerful States for its authority. By this they will be bold to check the excesses of State members. Just as the United Nations General Assembly excluded South Africa in 1974 from participating in the work of the UN and its specialized agencies, the international community should be bold to sanction

any erring State which violates human rights. Also, the 2019 boycotts and protests by African countries against South Africa on xenophobic attacks on Nigerians and other Africans were effective and indeed compelled the government of South Africa to apologise to the concerned African States.

The combination of these recommendations can help invigorate human rights as global norms which leave the States with no option than to either comply or give reasons that justify their departures from the concept of human rights.

1.6 Conclusion

There is no doubt that State sovereignty is always in conflict with international protection of human rights as the State persistently claim its inviolability particularly when it is beneficial for such State to do so. For instance, Australia claimed the inviolability of its State sovereignty as justification for human rights abuses of those that the government detained without trial in the Manus Island detention centre. Therefore, alternative conception to sovereignty needs to be re-conceptualised such that it will no longer antagonize but rather complement the concept of human rights', and that 'the sovereignty of the State should mean the sovereignty of the people and not of leaders.'[70] In other words, if sovereignty belongs to the people and not to the leaders, some of the apparent conflicts between state sovereignty and protection of human rights will be eradicated.

The current human rights treaties bestow rights on individuals, not on States. These new treaties seem to divert from the Westphalian notion which puts nation-State as principal actor in international politics. However, as States pool their authority to define the proper level of human rights protection, one can argue that the Westphalian idea of the State is not totally ignored in current human rights treaties. With pooled sovereignties, the international community should be the power that defines specifically what each State should do to protect human rights.[71]

[70] Sidorsky, D. *Contemporary Reinterpretations of the Concept of Human Rights*, Essays on Human Rights 89, 1979.
[71] J. Dunoff and J.Trachtman, *Economic Analysis of International Law*, 24 Yale J. Int'l L. 1, 13, 1999.