THE INTERNATIONAL COURT OF JUSTICE IN A CHANGING WORLD THE CONCEPT OF SOVEREIGNTY IN PERSPECTIVE

BY

HENRY C. ALISIGWE*

ABSTRACT

Against the backdrop that law reflects the conditions and cultural traditions of the society within which it operates and which society always (albeit randomly) evolve a certain specific set of values social, economic and political which inevitably stamps its mark on the legal framework which orders life in that society; International Law being a product of its environment must develop within the purview of prevailing notions of international relations and thus must be in harmony with the realities of the age if it must survive.[1] A' fortiori, international law since the second half of the twentieth century has been developing in many directions as the complexities of life in the modern era has multiplied. This dynamism of international law has had to contend with tensions between those rules already established and the constantly evolving forces that seek changes within the system.[2] Thus, a major problem of international law is to determine when and how to incorporate new standards of behavior and new realities of life into the already existing framework so that on the one hand the law remains relevant whilst on the other hand, the system itself is not too rigorously disrupted. A' fortiori, all these developments demand a constant reappraisal of the structures of international law and its rules. It is within these contexts therefore that the jurisprudence and position of the International Court of Justice is to be appraised; moreso as it is the principal judicial organ of the United Nations and the guardian of International legality.

INTRODUCTION

The United Nations Charter[3] in contradistinction to the system engendered by the League Covenant[4] envisages an organization that is wider, more resilient and dynamic in its scope of activities. Consequently, it espouses a certain number of principles and promotes ideas of human aspiration aimed at as far as possible ameliorating the human condition and against the backdrop of indignities committed before and during the Second World War 1945, ensure their non-occurrence. In order to emphasis its resolve for a United Nations under a regime of Laws, Article 92 of the United Nations Charter provides for an International Court of Justice with its statutes annexed therein and whereby parties to the Charter are ipso facto parties to the statute. This belief of a new orderly and peaceful world run under a regime of laws has in the words of Elias:

*Henry C. Alisigwe, LLB, BL, LLM, Lecturer, Faculty of Law, Imo State University, Owerri; alihench@yahoo.com.

[1] Shaw M.N, International Law, Fifth Edn (Cambridge: Cambridge University Press, 2004) P.42

[2] Ibid

[3] 1925

[4] 1945

"being the governing principles of the new contemporary International Law that its doctrine of universality becomes its main shibboleth and governing characteristics and main purpose. Universality ... must now be the catchword in the expanding frontiers of International Law under the United Nations Charter".[5]

The scope of international law today being immense, changes that occur within the International Community can be momentous and reverberate throughout the system. Thus, as the evils of colonialism fades back into human history due to the ascendancy and veneration of the right of self-determination of people inhabiting such territories, economic and environmental matters ravaging virtually most parts of the world has thrust new challenges unto the consciousness of the world such that contemporary world discourse centers around them. Consequently, issues pertaining to sovereignty, regionalism and globalization have assumed greater vibrancy. Thus, this work will focus on the role of the International Court of Justice in a changing world vis-à-vis the concept of sovereignty. This is because the ascendancy of the International Court of Justice in building an empire of nations ruled by law must necessarily lead to the diminution of the classical meaning ascribed to the concept of sovereignty. This is because in a world that is constantly politicized, the role of law albeit international law as a stabilizing index of our collective aspiration should not be underestimated. Therein lies the challenges of an international law like the International Court of Justice in the twenty-first century.

HISTORY OF THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ)is the highest court on earth in so far as sovereign states which are obligated under the United Nations Charter to settle their disputes peacefully are willing to bring disputes before it. It serves as the principal judicial organ of the United Nations.

It began its birth in February 1944 when the informal Inter-Allied Committee of Experts under the chairmanship of William Malkin published a stimulating report on the future of the International Court. The Committee whose sole objective was to make recommendations to the United Nations as a whole had a purely informal status and its members were appointed on the basis of personal capacity. The Committee recommended that the statute of the Permanent Court of International Justice (which was the predecessor of the ICJ) was a highly workable instrument for any future court and should be retained as such. The report of the Committee was indeed a highly valuable contribution to the future thinking regarding the court and in the words of a writer "a tribute to the ideals which the very notion of International Justice inspires".[6] This was followed by the Dumbarton Oaks talks of August September 1944. The talks centered on the proposals for the establishment of an international organization for the maintenance of peace and security. Chapters 4, 5, 7 and 8 respectively of the proposal talked about the court as one of the principal organs of the organization, election of Judges, functioning of the court (whether in accordance with a statute either of the Permanent Court of International Justice (PCIJ) or a new statute based thereon which would be annexed to and be part of the Charter of the Organisation and competence of

[5]Rosenne S. Law and Practice of the International Court 2nd Edn. 1945 cited by Akaraiwe I.A. in Onyeama: Eagle on the Bench (Lagos: Touchstone Books, 1999) p. 158

[6]Akaraiwe I.A. Ibid at P. 59

the court. The difference between the Dumbarton Oaks Conference and the Malkins Committee of Experts was that the former recognized the organic connection between the court and the organisation. Note however that issues such as whether to establish a new court or retain the old one, the number of Judges, the method of election and finally the matter of compulsory adjudication remains outstanding.[7] It is instructive to note that these very issues had for so long prevented the establishment of an International Court.[8] However, the full appreciation of these problems at this stage and the general desire to solve them led to the establishment of a new Committee on a broad footing to examine these delicate issues. In March 1945, the United States Government issued an invitation to the members of the allied coalition to send delegates to a committee of jurists meeting in Washington in April and to prepare the statute of the proposed International Court. Green Hackwood, an official of the United States State Department and member of the P.C.A. since 1937 chaired the Committee. During its meetings, the Committee carefully scrutinised the statute of the PCIJ and proposed a number of amendments albeit of a technical nature. It however left open the question whether the planned court was to be considered a new institution or an extension of the PCIJ as well as the recurrent issues of election and compulsory jurisdiction.

At the San Francisco Conference which was to prepare the Charter of the United Nations on the basis of the Dumbarton Oaks proposal, the drafting of the statute of the court was entrusted to a special technical committee. The Committee established four sub-committees to deal with issues such as continuity, nominations, elections and jurisdiction. The Committee's report after the verification by the advisory committee of jurists of the conference was incorporated into the Charter and adopted as its chapter fourteen (i.e. Articles 92-96) to which the statute of the court was then annexed.[9] The preference for a new court rather than for a continuance of the old one was a political decision arising primarily by the agreement between the United States and the defunct USSR which had emerged from the Second World War as the world's leading powers. Moreover, they were not signatories to the statute of the PCIJ. A second consideration was that as the court was to form part of the United Nations system, it seemed inappropriate for this role to be filled by the PCIJ which was closely linked to the League of Nations which was on the verge of dissolution. A third factor was the feeling in some quarters that the PCIJ represented the old world order in which European states had enjoyed both political and legal predominance and pre-eminence in the international arena. As a fresh start and a new institution, it was felt would make it easier and more attractive for non-European powers to join and make their influence felt. However, save for the change in nomenclature and the technical motives of incorporating the statute into the United Nations Charter, it remains arguable whether in substance, the ICJ is not a continuation of the PCIJ.[10]

On 26th June 1945, the Statute of the International Court of Justice together with the Charter was adopted whilst both came into force in October 24th 1945. The PCIJ met for

---

[7]Ibid

[9]Ibid at P. 161

[10]Harris D.J. Cases and Materials On International Law (5th Edn. London: Sweet and Maxwel 1998) P. 989, Oduntan G. The Law and Practice of the International Court of Justice (1945-1996) (Enugu: Fourth Dimension Publications, 1999) P. 17; cf Satow E. Satow's Guild to Diplomatic Practice (5th Edn. London: Longman Group, 1959) P. 356.

the last time in October 1945 and took all appropriate steps to ensure the transfer of its archives and effects to the new Court. On February 6th, 1946, the first bench of the ICJ was elected and on April 18th 1946, the inaugural sitting of the court took place at the Peace Place at the Hague, Netherlands.

STRUCTURE AND COMPOSITION OF THE INTERNATIONAL COURT OF JUSTICE[11]

The composition of the bench is one element which cannot be dispensed with if adherence and credibility is to be given to decisions of the Court over matters submitted to it for adjudication. Thus, the statute of the ICJ lays down two requirements for the proper functioning of the court. The first concerns the personal qualification of the Judges in the moral and professional spheres.[12] The second deals with the adequate representation on the court's bench of the world's prevailing legal and cultural traditions.[13] In between these two Articles are those relating to quorum (which is put at 15 members) and procedure for election of members.[14] The Judges enjoy diplomatic privileges and immunities when on an official duties[15] as well as security of tenure.[16] Its jurisdiction is encapsulated under Article 36[17]and 96[18] of the statute.

THE CONCEPT OF SOVEREIGNTY

In International law cum relations, one concept which has always dogged the behavior of states is the use of the term sovereignty. This is against the backdrop that the international system is made up of a conglomeration of sovereign states which though willing to work together for the overall benefit of the international system is nevertheless conscious of its independence where its core interests are concerned. This is more so when it is considered that at the international arena, there is no supreme sovereign to whom all owe its allegiance.

The theory of sovereignty began as an attempt to analyse the internal structures of a state.[19] Political philosophers cum jurists (especially of the positivists school of

---

[11]Harris D.J. Cases and Materials On International Law (5th Edn. London: Sweet and Maxwel 1998) P. 989, Oduntan G. The Law and Practice of the International Court of Justice (1945-1996) (Enugu: Fourth Dimension Publications, 1999) P. 17; cf Satow E. Satow's Guild to Diplomatic Practice (5th Edn. London: Longman Group, 1959) P. 356.

[12]For further details on this, see Oduntan, op. cit. p. 45 et. Seq, Shaw M.N. International Law, 5th (Cambridge, Cambridge University Press, 2003) pp. 959-1005; Elias T.O. op. cit. pp. 80-95, 110-129; Harris D.J. Cases and Material on International Law, 6th edn. (London, Sweet and Maxwell, 2004) pp. 1027-1088; http://www.icj-cij.org.

[13]See Article 2 of the Statutes

[14]See Article 9 of the Statutes

[15]See Article 3-8 of the Statutes

[16]See Article 19 of the Statutes

[17]See Article 18 of the Statutes

[18] ie Its contentious jurisdiction. Article 34 of the Statutes provides that only states may be parties in the court's exercise of it contentious jurisdiction.

[19] ie Its advisory jurisdiction.

Akerhust M.A. Modern Introduction to International Law (London; George Allen and Urwin Ltd, 1978) P. 26; See also Mensah H.H. and Okpeahior R. "Limits of States Sovereign Over the Airspace: An Analysis and Comparism of State Practices in Contemporary International Law" (2010) 1 Ebonyi State University Journal; International and Jurisprudence Rev. (EBSU J.I.L.J.R) pp. 242-245; Nkwo J.c. "The Desirability of Globalization Over Economic Sovereignty in African Development" (2008/2009) NJLS viii pp. 52-53.

jurisprudence) espoused the view that there must be within each state some entity which possessed supreme legislative and/or political power and who thus cannot be bound by the laws put in place by each entity. By a shift of meaning, the word came to be used to describe not only the relationship of a superior to his inferiors within a state but also the relationship of the ruler or of the state towards other states.[20] Thus the word still retains its emotive over tones of unlimited power above the law and therefore giving a totally misleading picture of international law cum relations. Consequently, one of the persistent source of perplexity about the obligatory character of international law is the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be bound by or have an obligation under international law. This is in view of the fact that a sovereign head (in the classical sense) whist free to do as he wishes vis-à-vis his own subjects does not have such freedom vis-à-vis other states. Thus, it is instructive to note that at international law, the use of the word "sovereignty" in relation to a state means no more than that the state is independent not that it is above the law. This is to detach the concept of a state sovereignty from the emotive concept of a person above the law whose word is law for his inferiors or subjects. Thus in the words of Harts:

> "a state is not the name of a person or thing inherently outside the law; it is a way of referring to two fact: first that a population inhabiting a territory lives under the form of ordered government provided by a legal system with its characteristics structure of legislature, courts and primary rules and secondly that the government enjoys a vaguely defined degree of independence."[21]

Evolving norms of International Law in contemporary inter-state discourse has encroached upon hitherto settled rules of international law that one may argue without equivocation that rules of international law in recent times seem vague and conflicting on many points that there is doubt about the area of independence left to states. Thus, the sovereignty of a state may be dependent upon the form international law takes on a particular subject.

The above notwithstanding, given the unique feature of international law which unlike Municipal Law has no centralized and unified structure to whip parties into line through the coercive apparatus, the concept of sovereignty is what gives the system the leverage to operate effectively. A' priori, most instrument establishing international organizations accord this principle utmost primacy, for the feeling that in entering international relations, one is subject to no other control on ground of power, influence etc is a psychological boost in striving to maintain international peace and security. A' fortiori, we agree with Lazhari that:

> "in an international society which is divided among territorial units that differ greatly in size, population and wealth, culture and ideologies, sovereignty is the guarantor of the co-existence of such differences as it helps the weaker units of international society to survive without fear."[22]

Without the concept of sovereignty, majority of today's states would have little chance of independence.

At the doctrinal level, two views have emerged as to the role of sovereignty in

---

[20]Ibid pp.26-27.

[21]Hart H.L.A. The Concept of Law (Oxford: Oxford University Press, 1972) P.216

[22]Lazhari B. " The Role of Sovereignty in Contemporary World Order" ASCIL 5 (1993) P. 216

inter-state relations. On the one hand are those who feel sovereignty is primarily responsible for insufficiencies of the Law of Nations and a rigid barrier against the spread of internationalism and peaceful relations among states.[23] On the other side are those who regard it as a guarantee for democracy inside the state and for peaceful and orderly International Relations in the outside.[24]

The arguments of the antagonists center around the fact that the problems facing humanity such as violence, population, explosion, hunger and pollution can only be solved on a planetary basis ie a world government. But the realities of contemporary international relations belies this view. States are doing their best to solve those problems not by relinquishing their sovereignty but by cooperating via universal supra-national organizations, regional integration and of diplomatic co-existence in accordance with the realities of the present times. Any rejection of the role of sovereignty would only be in the interest of the developed countries and their multi-national corporations who are already struggling for the abolition of borders and jurisdictions in order to have access to markets and national resources. Abandonment of sovereignty will never be in the interest of the weak units of international society as they will lose everything, control over their destinies and their social, cultural and political particularism. Note that the fact that states are entering into supra-national or regional cooperation does not necessarily connoterelinquishment of their sovereignty. For even in such establishments, states have a great measure of freedom in running their affairs and are very sensitive to their sovereignty especially when their vital interest is involved.[25]

The protagonists of sovereignty invoke a moral basis for defending sovereignty. Beitz is of the view that "states like persons have a right to be respected as autonomous sources of end".[26] He argues further that "the claim to autonomy by a state must rest on the conformity of its institutions with some appropriate principles of justice."[27] Other writers are of the view that sovereignty has its foundation in the psychology of nations and peoples and that it is a matter of fact the expression on the political and legal levels of feeling of belonging to one community which share common virtues.[28] It needs reiterating here with emphasis that sovereignty does not connote that states are not subject to law, for in every sphere of human activity, there must be rules guiding conduct. It is for these reasons that a state cannot rely on the concept of sovereignty to breach all known human rights norms relating to the condition of people within its jurisdiction. For that may entail intervention into its territory by other members of the International Community at least on humanitarian grounds to save the victims of rights violations.

THE INTERNATIONAL COURT OF JUSTICE AND THE CONCEPT OF SOVEREIGNTY

At this juncture, it is necessary to examine how the concept of sovereignty impinges on the work of International Court of Justice (ICJ). The ICJ as noted earlier is

[23]Ibid

[24]Ibid

[25]Ibid at P. 225.

[26]Beitz R. Political Theory and International Relations (Princeton: PUP, 1979) P. 83

[27]Beitz R. Political Theory and International Relations (Princeton: PUP, 1979) P. 83

[28]Ibid at P. 218.

the main judicial organ of the United Nations. But its jurisdiction vis-à-vis disputes submitted before it is not automatic as it is dependent on the willingness and cooperation of states. Thus, consent of the parties lies at the root of the court's exercise of its powers in the exercise of its contentious jurisdiction under the United Nations Charter. The basis of this is the general principle of international law that no state can be compelled to litigate against its will, for as Oppenhein observed, "International Society has not reached as national societies have, the point at which any creditor or party injured can summon his debtor before a court without the latter's consent to go there."[29] Moreso, it is a trite fact that states have always attempted not appearing before the court due to one or all of the following reasons, to wit:

1. That vital interests are involved.
2. That the disputes are essentially of a political character.
3. That the states concerned is right in its view and therefore should not submit to any third party intervention.
4. That the means proposed is not suitable for the particular dispute.
5. That the procedure would involve delay.
6. That the procedure would involve excessive cost.

Where the court finds out that the requisite consent is lacking, it will decline jurisdiction.[30]The essence of providing for the consent of the parties appearing before it is in keeping with the concept of the state being sovereign and the fact that international law has not yet developed to the level whereby the jurisdiction of an international court or tribunal can be invoked willy-nilly upon any state without its consent. But herein lies the dilemma and shortcoming in the court's duty of bringing about peaceful settlement of international disputes. The essence of any adjudicatory process should not be dependent on the consent of any party to appear before the adjudicatory body if the process must be functional and effective. The idea of law and judicialism is not a strange phenomenon to states as within individual states, it is the glue that holds the municipal system together. Transposing this system of law and judicialism to the international arena should not be seen as a dimunition in the concept of sovereignty but a consolidation of states aspiration that inter-state intercourse be conducted orderly and peacefully and that any dispute arising therefrom be also resolved amicably. Consequently, we are of the view that incidence of consent vis-à-vis the court's jurisprudence should be dispensed with if the court is to function properly. An analogy should be drawn from the Municipal Law set-up wherein the view that the sovereign cannot be sued in court is now being supplanted with provisions making that possible.[31]

Another related albeit thorny issue is whether states having consented to the court's exercise of jurisdiction can also in reliance of its sovereignty withdraw such consent by for example repudiating the judgment of the court. While not diminishing our argument that the issue of consent should not be pre-condition for the court to assume jurisdiction in today's world, it is our view that where such consent has been given, it enures even unto judgment. Moreover, Article 94(1) of the United Nations Charter makes it obligatory on states to

---

[29]Oppenheim L. International Law: A Treaties. Vol 11, Disputes, War and Neutrality. Edn H. Lauterpacht 7th Edn. (London: Longmans, Greens and Co. Ltd, 1952) p. 57.

[30]Monetary Gold Case, ICJ Reports 1954.

[31]See Section 6(6)b of the CFRN 199; Alisigwe H.C. "Doctrine of State Immunity in Private International Law: The Nigerian Perspective" (2008/2009) NJLS Viii, pp. 36-37.

comply with the judgment of the court whilst Article 94(2) provides that in the case of non compliance, the successful party or judgment creditor can have recourse to the security council which may enumerate measures for complying with the court's judgment.

Flowing from the above thesis, and given the onerous task of the United Nations in maintaining international peace and security, any state which values international law and its unifying role and also as a desideratum for peace among the comity of states must see the role of the independent state as one to be played in the community of states. A' priori, states must see strengthening of international law, instruments and procedure as the best and highest exercise of its sovereignty.

CONCLUSION

We commenced this work by looking at the intrinsic purpose of law in any given society given the dynamic nature of man. Law validates the condition and cultural traditions of the society within which it operates. When this is transposed to the international arena, it becomes evident that law (International Law) plays the same role moreso given the dynamism of the international society. International law which serves as the touchstone for the validity of norms of international conduct cannot but be in tandem with the unfolding realities of international life. This is against the backdrop that one of the major thrusts of every legal system (of which international law is a specie) is the integrating of that particular system it is meant to regulate (ie preventing and controlling deviations from existing social cum international norms as well as charting a new and orderly path for controlling the challenges of the future without disrupting the equilibrium of the past). Thus, international law seeks to integrate the disparate and often conflicting aspirations and interests of states into a harmonious whole for the benefit of mankind. Nowhere is this dynamism and internationalism of law more reflected than in the ICJ which is at the center of norm creation and maintenance at the international arena through its role as the principal judicial organ of the United Nations and pro tanto the guardian of international legality for the International Community. The histology of the ICJ as well as the structure was looked at. Against the backdrop of the indignities wrought on the psyche of man by the two World Wars and man's intrinsic desire for a peaceful resolution of all disputes. We agree with Akaraiwe when he posits that "the court came into being when the nightmare of the First World War made the dreams of pacifists for a fleeting moment reach out and touch the utter despair of the pragmatists."[32] What had long been considered the panacea by some had now become the last resort for others.[33] The ICJ as a pinnacle and man's symbol for peaceful resolution of disputes operated above all as an apt and practical mechanism to prevent and counteract the use of force. The expression "pacis tutela apud judisem" sums it all.[34]

We next looked at the concept of sovereignty which remains one of the vital attributes of the modern state and considering its pristine usage in municipal legal

---

[32]Akaraiwe, op. cit p. 119.

[33]Eyffinger A. The International Court of Justice 1946-96 (Kluver Law International 1996) p. 2

[34]Means the Judge is the guardian of peace. It is the inscription at the Peace Palace at the Hague which is the headquarter of the ICJ.

system, presents some perplexity when same usage is transposed to the international arena. However, given the general belief among states that some rules are necessary to guide inter-state intercourse, it becomes pertinent that there must necessarily be a shift in the perception of the term sovereignty, to wit: independence of states in their actions and not that they are above the law (ie international law). However, when it is realized that law is a reflection of the values of the particular society it seeks to regulate, this independence of states action presents its own problem. This is because states in reliance on their sovereignty can decide not to give cognition to any emergent rule of law that is not in sync with what they perceived to be their core interest in their inter-state intercourse. This recourse to the concept of sovereignty, it has been argued was a fetter to realizing the aims of supra-national bodies like the defunct Organization of African Unity (OAU) and has continued to dog the efforts of its successor African Union (AU).

Finally and considering the entrenched desires of the international community, of a world devoid of conflict and where every dispute is amicably resolved, this concept of sovereignty was discussed in juxtaposition to one of the institutional mechanisms for peaceful resolution of disputes, to wit: the ICJ. We found out that Article 36 of the ICJ statutes which founds the jurisdiction of the court in its contentious jurisdiction to be dependent on the consent of the disputing state parties is a veneration of the concept of sovereignty. We argued that such leverage given to states should be dispensed with as it is a cog on the wheels of internationalism based on law. If the international community in order to avoid the carnages foisted on mankind by the two World Wars deemed it fit to establish a supra-national body the United Nations and an organ the ICJ to resolve all disputes amicably, the concept of sovereignty must necessarily give way to this innate desire of mankind for a peaceful resolution of all conflict. Functional internationalism requires the surrender of sovereignty in matters of international legal norms. If all member states of the United Nations accept that the ICJ is the principal judicial organ of the United Nations, the strengthening of international law of which the ICJ is at the epicenter must be seen as the logical imperative to building an empire of peace among the comity of states. This should in turn lead to a dimunition in the concept of sovereignty in favour of the strengthening of the instruments, practice and procedure of international law. This we believe is the best and highest exercise of sovereignty by states.

---

[35]Akintayo I. "A Legal Enquiry into the Feasibility of African Integration" Published in the Guardian of Tuesday, February 14th, 2012, Vol. 29, No. 12, 101 at p. 88.