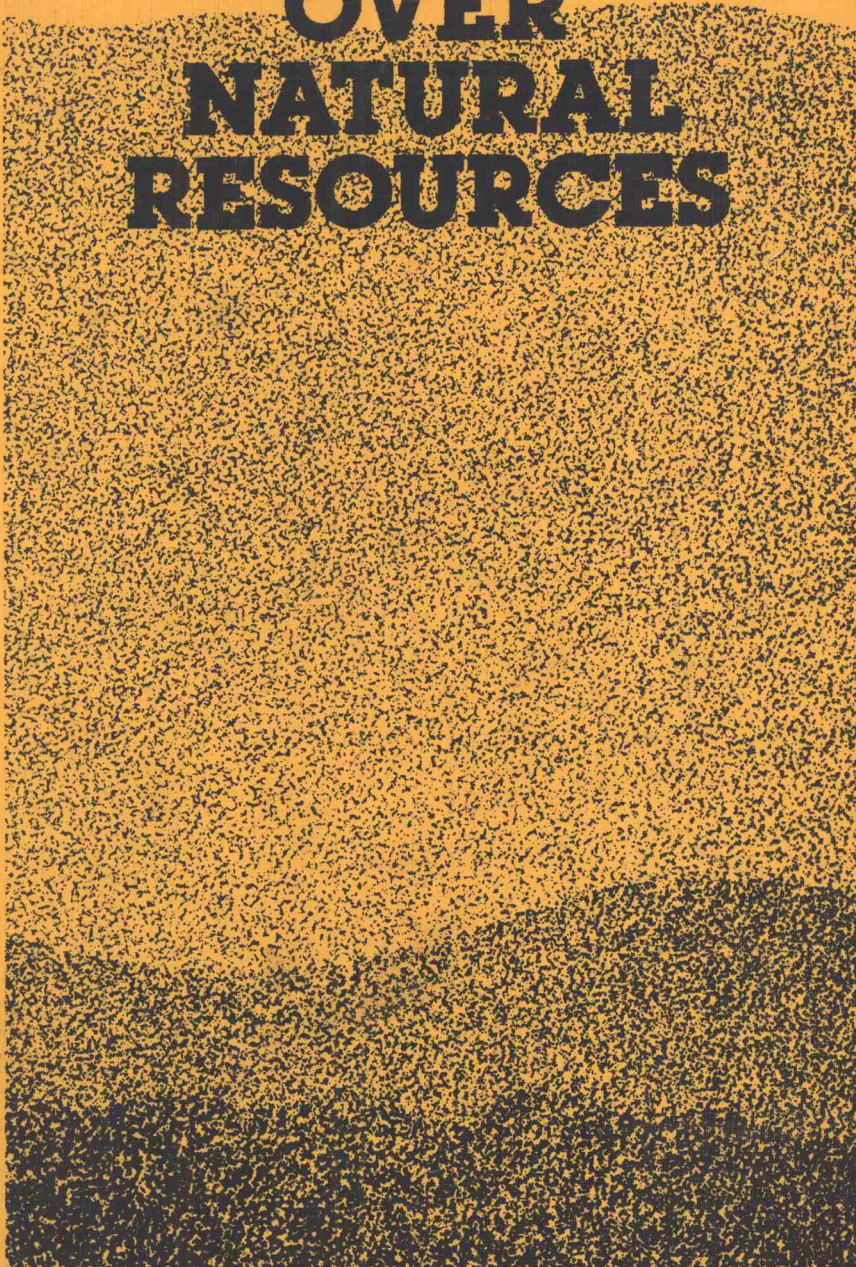


**THE PRINCIPLE
OF SOVEREIGNTY
OVER
NATURAL
RESOURCES**



THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES

by

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“National sovereignty and national feelings are a vital element of our society. At their best they represent the highest degree of political and social cohesion which it has so far been possible to achieve.”

*Kurt Waldheim
Secretary-General
of the United Nations*

— September 1, 1977 —

INTRODUCTION

Tomorrow's world might suffer dreadfully in conditions of rapid disintegration following the dwindling and then almost abrupt disappearance of some of the classical natural resources. For the time being, our cars use petrol, while natural gas burns in many of today's dwellings and factories. But these are nonrenewable natural resources which—according to the data available—are doomed to inevitable exhaustion within a future that can be counted in decades. Side by side with other natural resources, they form the object nowadays of many different legal regimes of study as regards States' rights to them, forms of ownership and utilization and the conditions in which they are offered for international commercial exchanges.

I wish this book to make a contribution to the juridical settlement of the problems arising in the world in connection with the utilization of the world's natural resources. Sovereignty over natural resources is a reality which cannot disappear overnight, very much as multinational companies cannot. The problem of the access of all States to raw materials for the benefit of mankind as a whole cannot be solved through a policy of confrontation but only through cooperation. Very much as UN Secretary-General Kurt Waldheim showed in a report addressed in 1977 to the fifth session of the Committee for Natural Resources,¹ cooperation between States in this field would set the finest example of an international program focussing on scientific and technical problems whose importance and scope very much exceed the power of one country alone. Sovereignty over natural resources should not prevent but, on the contrary, support future international economic cooperation, which is still facing many political, economic and juridical obstacles. International law and lawyers everywhere can make a valuable

1. E/C/7/67/Add.1.

contribution to removing these obstacles. In this sense, the present work is a plea for establishing new economic relationships between the world's States, for instituting a better atmosphere of international cooperation.

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CONTEMPORARY ASPECTS OF SOVEREIGNTY OVER NATURAL RESOURCES

1.1. Considerations on the Notion of Sovereignty

During the historical development of human society, sovereignty appeared alongside the emergence of the State as a social-political phenomenon and an attribute of the State. The definitions which have been given to this concept have, for a long time now, converged in a mutual assessment: sovereignty means the independence and supremacy of the State. More precise specifications and comments on the content of the two elements making up sovereignty often complete the definitions given for it. There are many diverse opinions on the extent and legitimacy of the right to sovereignty. Thus, for the ancient States with their institution of slavery, the independence and supremacy of power mainly meant the continuous struggle for preserving the State's existence and for extending its domination. Towards the end of the era of slavery, some religious-philosophical doctrines—predominantly mystical—emerged, asserting that the essence of sovereign power was a divine right. Some of these doctrines have been kept alive down to our time in order to demonstrate the superior origin of sovereign power and absolute monarchs in States which were backward from the point of view of their social-political system. The juridical justification of sovereignty, the appearance and definition of this notion and its theoretical grounding, took place during the feudal period, more precisely during its latter part. J. Bodin (*Les six livres de la république*) in the 16th century and Thomas Hobbes in the 17th century must be considered—in the question of sovereignty—theorists of feudal absolutism. Bodin held sovereignty to be an expression of the State's political power, exerted by the king. Hobbes considered that the monarch must exercise unlimited powers, being entitled to use the State's force as he thinks fit.

Examining sovereignty from a new angle—that of the people’s right to control the actions and deeds of “sovereign power”—began as early as the 17th century, through Grotius. According to Grotius, sovereign power is unique and indivisible, its main feature being independence.¹ For the first time in a century of intolerance, Grotius took a step forward along the line of a more thoroughgoing analysis of the notion of sovereignty. Sovereign power in the State must only be vested in the king, he asserted, who will be guided in governing activity by the principles of natural law. In Grotius’ conception, sovereignty is assimilated with property right; State leaders, not being in any way bound by the people’s will, may alienate power and the State itself. In spite of Grotius’ cautiousness in tackling the problems of State leadership and of the juridical relationships between States in matters of peace and war, his book was banned by the Catholic Church (1627). Grotius’ work was highly influential, however, in the subsequent elaboration of the principles of international law. His ideas on the origin of sovereignty and inter-state relations made numerous proselytes, some of whom developed natural law along new lines (Wolff, Vattel, Pufendorf, Barbeyrac, etc.). *De jure belli ac pacis* is a very important work because—while acknowledging the king’s sovereign power—it asserts the existence of some natural rights of man which, until then, were ignored by feudalism.

A century later, the French writers and philosophers of the Enlightenment lent new substance to the theory of sovereignty. Their writings proceed from the fundamental conception of the sovereignty of the people and nation, by which they understood the entire population settled on the State’s territory, irrespective of social classes, or other differences. In their works there were many generous ideas which inspired the revolutions in the late 18th century and in the early half of the 19th. The main promoter of the new ideas was Rousseau, anticipated as regards the idea of sovereignty by the Swiss Vattel (*Traité du droit des gens*, 1758), mentioned above as an advocate of natural law. In Rousseau’s conception (*Le contrat social*, 1762), the only legitimate sovereign is the people, while the State is the result of a revocable contract concluded between the people and those who exert power in the State. According to Rousseau, the unlimited development of private property and the privileges the ruling classes arrogated to themselves had distorted the initial content of the contract. For their time, Rousseau’s ideas marked sub-

stantial progress through their criticism of the acquisition of State power by the feudal aristocracy. Later on, the socialists of the 19th century and then the communists of the 20th considered that Rousseau's ideas and—generally speaking—the ideology underlying the bourgeois-democratic revolutions had been unsatisfactory for the subsequent development of society and the State. Thus, Soviet philosophers consider that Rousseau was wrong to denounce only the large private property concept, his “levelling” theory on the distribution of property appearing utopian.²

The origin of sovereignty was a cardinal preoccupation of numerous philosophers and jurists in the 18th and 19th centuries. The delegation of power by the people and the necessity to separate the attributes of State power (Montesquieu), the State as a factor of progress and as the initiator of its own reforming (Kant), the State as the achiever of higher stages of freedom (Hegel), the existence of the State as an outcome of people's will and wishes, and the negation of the divine origin of power in the monarchic State (L. Feuerbach)—these are extremely significant theses on the origin of the State and sovereignty, put forward by philosophers who preceded the French revolution and—subsequently—in German classical philosophy. Mention is also due here of the theories of some German jurists (A. Lasson, Zorn, E. Kaufmann) who—continuing Hegel's thinking—upheld at the end of the last century and the beginning of this one that sovereignty embodied force, the right of the strongest. Moreover, early in this century, Jellinek considered that the supremacy of the State was absolute to such an extent that the State could at any time ignore the principles acknowledged in international law.

It must be pointed out that some of these ideas are preserved and found in various forms even nowadays in the treatment of sovereignty by certain contemporary Western philosophers and jurists. Moreover, it is worth noting that the origin and legitimacy of sovereignty continues to form the subject of attentive analysis by the same philosophers and jurists. Enumerating the opinions and analysing the theories on sovereignty prevailing in the West are not within the province of the present work, however. On the other hand, we will show that, as regards the legitimacy of sovereignty, the ideas of Marxian philosophy made public in the 19th century have occasioned a permanent confrontation on this subject, more particularly since

the emergence in the world of a new type of State—the socialist one—whose features differ radically from those of other systems either in the past or in the present.

Marx and Engels elaborated their political ideas on the State and sovereignty mainly between the time of the revolutions of 1848–1849 and the Paris Commune. Marx considered sovereignty as an essential attribute of the State when, on the one hand, the latter may be taken for an “independent State” in relation to the rest of the world and on the other hand, when sovereignty can be expressed as sovereignty of the people.³ But, “the people’s sovereignty” is only an abstraction if one fails to identify the class which represents the people at a certain period of development of the State. Therefore, sovereignty has a class content, and the class supposed to embody the people is the one which possesses sufficient power to ensure the progress of the nation as a whole. The interests of this class must embody the national interests, the class thus becoming the representative of the nation.⁴ While at a certain stage in the development of social life the role of this leading class could be fulfilled by the bourgeoisie, in the subsequent periods the proletariat has represented the main rising force, which had to take over this role. Through abolishing the exploitation of man by man, the abolition of the exploitation of some nations by other nations must also be achieved. Such changes are not possible, however, in the organization of the bourgeois State which—according to the Marxian conception—should be abolished and replaced by a State of another type. In the conditions of setting up the Soviet State, Lenin linked the right to independence to the nations’ right to self-determination.⁵ Therefore, the sovereignty of the socialist State represents the peoples’ sovereign right to determine their own fate by themselves, to ensure the development necessary to the new State’s power, to ensure the exercise of the right to independence in relationships with other States.

Over the years, the Marxian theory itself has been subject to development and criticism. Developments proceed from the analysis of certain elements, of certain features specific to the sovereignty of the socialist States and of the States that have embarked upon the socialist road of development, which is the case of many developing countries. The points of criticism naturally emanate from the advocates of other systems. What is astonishing, on the other hand, is the diversity of the definitions given to the concept of sovereignty by jurists, philosophers and

polemologists everywhere. Actually, as stated above, two essential elements of the notion remain dominant: the supremacy of power within the country, the State's independence outside. The rest is made up of specifications—undoubtedly important—which are the fruits of the personal investigations and convictions of all those who have studied and defined sovereignty. Some of these specifications are objective, verified in the activity of the States and in their leadership. Others start from their authors' own background, which determines the way of thinking of each researcher and particularly of each jurist. We cite below some of these definitions, made either in socialist countries or in Western ones.

Thus, "State sovereignty is the unique, full and indivisible supremacy of State power within the limits of the territorial frontiers and the independence of this power, in relation to any other power, which is expressed in the State's exclusive and inalienable right to lay down and carry out its home and foreign policy independently, to discharge its functions, to implement the practical measures for organizing its social life at home and its foreign relations on the basis of respect for the sovereignty of other States, for the principles and norms of international law accepted of its own free will".⁶ In another work, sovereignty is defined as "full political and economic independence of the State, the latter's right to establish and carry out an independent home and foreign policy".⁷ An interesting recent definition considers sovereignty as a faculty, as an aptitude of a people to shape their fate and destiny freely—a formulation which justifies the political and juridical representation on an international plane of some liberation movements.⁸ In a course of lectures on international law—also published recently—sovereignty is defined as a "specific and essential attribute" of the State, which is entitled freely to solve its home and foreign problems, without encroaching upon the rights of other States and upon public international law.⁹

The features of sovereignty are (a) exclusive State power in discharging the functions specific to the State; (b) indivisibility—that is, full freedom of choice in using the whole set of prerogatives of State power; (c) inalienability—which means the impossibility of ceding State power either to some foreign power or to some international body.¹⁰

The development of international relations in today's world, the progress of relations of economic interdependence and the

increase in the number of cooperation agreements as well as the theorization of some integrationist trends have resulted in thoroughgoing analyses of the concept of sovereignty in many countries—above all in the small and medium-sized ones.

The classical elements of sovereignty are found again in the definitions offered by Soviet jurists. D. B. Levin defines sovereignty as “the supremacy of State power inside the country and its independence of any other power in international relations” while N. A. Ushakov terms sovereignty “the supremacy inherent in the State on its territory and its independence in international relations”; in a Soviet course of lectures on international law (1967), State supremacy and independence are listed as the two elements of sovereignty.¹¹ Contemporary Western jurists point out the same characteristics of sovereignty in the definitions they offer. According to N. Lauterpacht, sovereignty is the supreme power, depending on no other territorial power and presuming full independence inside the country and beyond its limits.¹² René-Jean Dupuy is of the opinion that sovereignty and independence are the same thing.¹³ L. Delbez holds sovereignty to have two facets: one internal and the other external, the former expressing State dominion internally and the latter expressing independence, which excludes any subordination in relation to foreign States, which are considered all sovereign and equal from the juridical point of view.¹⁴

Therefore, supremacy of power and independence are the two features to be found in nearly all definitions of sovereignty. The matter is not as simple as this would suggest, however, because the meaning of these characteristics is construed differently, either in the reflections, arguments and conclusions of the thinkers analysing them or in order to serve the purposes of the various social-political systems in the extremely diverse States of the contemporary world.

The legitimacy of sovereignty is one of the moot issues yet this is a domestic State matter. An important problem is that of the extent of sovereignty, of the absolute or limited nature of sovereignty. In this matter, conceptions are extremely differentiated, while discussions on the sovereignty of States are carried on not only among researchers; different opinions in this respect are advanced in international organizations and also at the level of heads of States and governments. Thus, we have seen that there were opinions in favor of absolutizing the qualities of independence and supremacy, upheld through the power of the

State. Without the least doubt, there were ephemeral empires in the past which resulted from the development of remarkable military and organizational forces.

Conditions have changed nowadays: there are a few very powerful States in the world; however, they cannot enforce their will in an absolute way. On the contrary, in their relations with the other States, they often resort to arguments of international law and—at least formally—base their contentions on reciprocity and equality, whatever the size of their partner. They acknowledge the principle of equality of States as a rule governing international relations and for this purpose they signed not only the UN Charter thirty-five years ago but also more recent international documents including the Final Act of the Conference on European Security and Cooperation (Helsinki, 1975). Moreover, there are in the world many developing countries, including a large number of former colonies which have acceded to independence in the last twenty-five years. Those States do not boast vast military forces, but they are rich in natural resources. As far as they can, they defend the independence they have acquired, while subordination and political integration do not appeal to them in the least.

Some theorists of international law describe integration as the most suitable solution—if not the most desirable one—in the present organization of the world. One of the most outstanding proponents of the integration theme was H. Kelsen, who—while asserting the absolute nature of sovereignty¹⁵—considers it can only be achieved either through the primacy of home law or through that of international law. Proceeding from the necessity of the primacy of international law over home law, Kelsen concludes that the State becomes a relative reality, being subordinated to the international juridical order. The evolution of international relations twenty-five years after the assertion of these ideas has failed, however, to confirm the monistic predictions of a world super-state. Another theory—supporting the setting up of a global juridical system in the world—was elaborated in the so-called “solidarist” currently promoted by P. Scelle.¹⁶ He upholds the subordination of internal law to international law within the framework of a community of States, asserting that absolute sovereignty can only apply to a global international society. The theory of the world State and law is also advocated by other jurists who seek the transformation of the UN Organization into a supra-national organi-

zation, into a world State. In this respect, they propose the revision of the UN Charter¹⁷ or the replacement of the notion of sovereignty, believing that it is only a matter of competence delegated to the States by a higher juridical order, on whose basis the States establish between them international relationships and norms of behavior—mutually-accepted—which allegedly make up the body of international law in this way.¹⁸

Another idea, presented in different ways by some contemporary jurists, is that of limited sovereignty. Without denying the existence of the notion of sovereignty as such, they maintain that in the present-day conditions of international relations, sovereignty is “limited”. Therefore, the State itself can allegedly give up certain prerogatives of sovereignty, accepting that these attributes should be exerted by a supra-national organization. For instance, accepting the promulgation within such an organization, by a majority vote, of some juridical norms binding upon the territory of the Member States appears as a self-limitation of sovereignty, as it were, on the part of those States. Here, various forms of political or economic integration are involved which we shall have further occasion to dwell on in the present work. At stake, however, is the would-be limitation of the States’ sovereignty as a result of external as well as internal political-juridical phenomena.

Thus, sovereignty is alleged to appear as “vulnerable”,¹⁹ limited—as regards its domestic nature—by the existence of a certain system, of a certain national law, of some problems specific to the State which exerts it and which, being confronted with such realities, is prevented from fully exercising it. The conditions in which State power is exercised on an internal plane cannot, however, be considered a limitation of the State’s supremacy, of its sovereignty. It is but natural and necessary that the State, while pursuing its aims, should reckon with and act in harmony with the existing conditions peculiar to each State. This does not mean the limitation of the States’ sovereignty on an internal plane. Nor can inter-State relationships limit the attributes of sovereignty on an external plane; they can only determine the behavior of the State in specific cases and situations. One cannot consider as a limitation of sovereignty the adoption by a State, in one situation or another, of some attitude, of some political or economic standpoint. The cases of limited sovereignty enumerated as such for the inter-State relations in the past²⁰ are inconceivable in the relations between