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INTERNATIONAL LAW AND THE INDEPENDENT STATE

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Preface

Problems relating to independence are becoming of increasing importance in the modern international community, particularly to developing nations. In this work I shall analyse the meaning of independence and self-determination and their practical implications: the right to secede from colonial rule, the right to organize a community as a state sees fit, and the right to remain free from foreign interference.

In particular, I shall concentrate on the power a state exercises in its own territory. Here, a state has, by tradition, been the 'supreme power' and entitled to enact whatever laws or regulations it deemed necessary in its own domain. However, I shall show how this 'supreme' power has diminished to allow for certain prerogatives of other states under general international law or under special treaties. Second, I shall establish that states, especially developing nations, enjoy some protection against undue foreign interference under modern international law.

A state may bind itself by treaties to allow restrictions of its territorial sovereignty. But its power in its own territory may also be restricted under general international law—that is, whether or not the state has concluded a treaty on the matter. A state's territorial sovereignty may be restricted in two ways under general international law: there are restrictions which relate to the territory itself, or to the environment—for example, certain rights of transit and a duty to refrain from pollution—and there are restrictions which relate to individuals residing in the territory, for example immunity

of state agents and human rights. Contrary to the old concept that a state could enact any laws in its own territory, a modern state is bound by international law to respect such restrictions, whether or not it has adhered to any treaty on these matters. According to the traditional view, the rules protecting diplomats and other state agents were one of the few exceptions where a state, in its own territory, had its own power reduced under international law—on the basis of reciprocity. But I shall establish that in this sphere the power of the territorial state is actually growing: state agents no longer enjoy absolute immunity and their prerogatives are gradually diminishing as their role as the sole medium of international cooperation has decreased. Nowadays, many of the functions formerly carried out by state agents are, for example, transferred to international organizations.

On the other hand, there are other matters in which a state formerly had complete power in its own territory and where modern international law has introduced restrictions. I shall establish that, contrary to what most traditional works on international law indicate, rules on transit, pollution and human rights have greatly changed in recent years. These changes show that the international community has adopted other standards and has introduced new priorities. Modern rules, for example, take more notice of the interrelationship of states in the contemporary community of nations, and, on the basis of reciprocity, allow for far-reaching restrictions of a state's sovereignty as to how it uses its own territory, or as to how it treats individuals, aliens or nationals, in its own land. In other words, international law is gradually breaking through the walls of a state, and the so-called 'reserved domain' which used to grant complete freedom to a state to handle its 'internal affairs' is being continually reduced.

The 'reserved domain' has thus been decreased by new rules of general international law which bind a state whether or not it has adhered to an agreement or treaty on the matter. But a state may also wish to restrict its territorial supremacy further by special treaties, for example to allow another state to use its territory for a certain purpose. Such territorial restrictions by treaty merit some special attention. Here, states are nowadays protected by new rules on coercion and by certain rules requiring the full and free consent of states when they enter into treaties. These rules are of particular

importance to developing nations: such states may need special guarantees under international law to make sure that they do not suffer undue pressure in treaty negotiations where, because of their lack of strength, they may find it difficult to make their voices heard.

Treaties allowing for territorial restrictions are of particular importance to the problems of independence. It appears that some of these treaties constitute a new category of agreements which states by certain mechanisms may even denounce. I shall advance a new theory by which the rule of *pacta sunt servanda,* or the rule on sanctity of treaties, may be safeguarded although a state, in certain specific circumstances, may exercise a right to denounce treaties on territorial restrictions under the rules of self-determination.

I shall analyse in detail certain treaties relating to military bases. Such treaties reduce effectively important sovereign functions of a state in its own territory. Treaties by which a state allows its territory to be used for military bases have sometimes been called agreements on 'military servitudes'. But lawyers who have written on such 'servitudes' have not paid much attention to the type of coercion under which some of these agreements were concluded, nor have they analysed the character and function of such alleged 'servitudes' under international law. On the other hand, writers who have dealt with state succession have often claimed that treaties on military bases, being *in rem*—that is, relating to the territory—are 'inherited' by newly independent states. These writers have avoided discussing the problem of consent, the problem of 'unequal treaties', as well as the problem of whether a treaty concerning military bases can become unequal and burdensome to a successor state. Conversely, recent writers on unequal treaties have not noticed that the problem has a bearing on state succession and on the problems relating to independence.

It is the purpose of this work to cast some light on the intricate relationship between the host of questions mentioned above in order to present a systematic view of new problems of international law.

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PART ONE

INTRODUCTION

Chapter 1

Sovereignty and Self-determination

1:1 SOVEREIGNTY AND ITS ASPECTS

Sovereignty has traditionally been used as a term to denote the collection of functions exercised by a state. Initially, it implied the supremacy enjoyed by a prince over his subjects—that is, it was a term concerned with the powers *within* a state. Later it came to be used to describe both internal powers and certain external relations. Jean Bodin perceived in his *Six livres de la république*, published in 1577, that sovereignty has a double aspect: it means that the state, or the prince, is the supreme power over subjects in a particular territory; second, it also signifies that the state enjoys freedom from interference by other states. Thus, there are both internal and external aspects of sovereignty. However, the external aspects only became important after the rise of the nation-states in the sixteenth and seventeenth centuries: after this time when there were several states in Europe, it became vital to examine the relationship between states and sovereigns.

Certain incidents of sovereignty gradually crystallized mainly because of the formation of several new states. The concept was used to cover three important rights of a state under international law: the right of equality, the right of independence and the right of self-determination. The first of these incidents appears to be mostly concerned with the external relations of a state whereas the

rule of independence is concerned both with external aspects and with the power of a state in its own territory. In other words

> Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.[1]

There appears to exist a certain causality between the concept of equality and the rule of independence: *because* all states are equal under international law they all enjoy the rights of independence. Furthermore, self-determination appears to be part of the rule of independence concerned mainly with the powers within the territory itself. It could also be pointed out that the rule of independence represents the negative aspects (the right to remain free from foreign interference) whereas the rule of self-determination represents the positive elements (the right to exercise the supreme power in the territory).

This book concentrates on the actual power of a state in its own territory under modern international law and analyses the practical implications of independence and self-determination.

1:2 TERRITORIAL INDEPENDENCE AND SELF-DETERMINATION

The territory of a state is the framework within which the state exercises its competence; the territory could even be said to furnish the very title of that competence. To have a territory is, in fact, one of the conditions of statehood and one of the main differences between a state and an international organization. Some international organizations nowadays exercise functions remarkably similar to those of a state: a law-making function, as well as executive and judiciary functions.[2] In the past many international organizations specialized in a certain field and were endowed with specific and limited powers. Now there are organizations, such as the European Economic Community, that enjoy a general legislative power, which is one of the corollaries of a state. The EEC also has 'subjects' over which it can exercise judiciary and executive functions. These

subjects are not only the civil servants of the organization itself but also the member states and their citizens. But one important condition for statehood is not fulfilled by the European Community: it cannot be said to have a territory of its own within which it exercises general functions.

The territory of a state furnishes the title for the competence of the state: it is mainly within this territory that the state exercises its functions. However, this does not mean that the limits of the territory impose boundaries on the competence of the state. There are numerous functions which are extraterritorial or which have extraterritorial effects. For example the jurisdiction of a state extends for certain purposes beyond territorial waters to the contiguous zone which does not come within the limits of its territory. Some states may further claim jurisdiction over their subjects abroad or even over the subjects of other states for crimes committed abroad if the consequences of the crime extend to their own territory. But this book is not concerned with problems related to so-called 'objective' jurisdiction or other functions that a state may justly or unfoundedly claim outside its own territory. We are here concerned more with the actual exercise of power within the territory itself.

A state has been said to have *exclusive* competence within its own territory,[3] and *general* competence to legislate on all matters.[4] However, since international law regulates the behaviour between members of the society of nations there must necessarily exist some rules, based on reciprocity, which restrain the power of a state within its own territory in the interest of the community. A state cannot enjoy its exclusive and general rights within its territory under international law without at the same time assuming corresponding obligations. Max Huber, arbitrator in the *Island of Palmas* case formulated this rule as follows:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit

> itself to its negative side, i.e. to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[5]

Most writers have assumed that the obligations that a state has to respect in its own territory mostly concern the treatment of aliens. A state would be bound to give aliens some minimum standard of treatment to comply with its obligations under international law. Rather than invent some artificial 'minimum standard' for aliens as writers have attempted in the past, I wish to suggest that obligations concerning aliens could be related to general rules on human rights.[6] Indeed, it is not only aliens who have such rights under international law: the state's own nationals also enjoy some basic human rights. The rule that a state can legislate 'as it pleases' for its own nationals —a view which is still held by many writers of today[7]—cannot be reconciled with emerging rules on human rights. The current view that rules on human rights have no effect 'inside' a state unless that state has adhered to a specific treaty on the matter can hardly be justified after the Second World War and the Nürnberg trials. Of course, a state can reserve a host of other matters for itself and it cannot be claimed that the whole cobweb of human rights applies to a state that has not adhered to the binding conventions on such rights: it is submitted merely that the state's power to legislate for aliens *and* its own subjects is limited by a few fundamental human rights, as I shall proceed to show.

1:2:1 Historical Background of the Rule of Self-determination

On 19 November 1792 the French National Assembly issued the following declaration:

> In the name of the French people the National Assembly declares that it will give help and support to all peoples wanting to recall their freedom. Therefore, the Assembly considers the French authorities responsible to give orders to grant all means of assistance to those peoples to protect and compensate

> the citizens who might be injured during their fight for the case of liberty.

The Assembly furthermore declared that it would not interfere in the affairs of other states. Numerous declarations by states have repeated these principles of self-determination. But it is only during the last few decades that the rule of self-determination has assumed real importance for nations under colonial rule aspiring to acquire their independence.[8]

Article 1(2) of the Charter of the United Nations, which deals with the purposes of the organization, states that one aim of the UN shall be

> to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace.

Furthermore, article 55 of the Charter provides that

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development.

Apart from these general articles there is nothing in the Charter which specifies the right of developing countries to acquire independence and self-determination and no rules which safeguard the independence of new developing nations once they have emerged as states.

It could be argued that chapters 11, 12 and 13 of the Charter, which concern the administration of non-self-governing territories and trust territories, reflect the international concern for such territories. Under article 73, members of the UN which administer non-self-governing territories undertake to 'develop' self-government and to 'take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free