PUBLIC INTERNATIONAL LAW

LECTURE SEVEN

International Personality.

The History of Sovereign Nation State System

It is useful to study history as a tool to analyse proposals to reorganise the system for example in situations where the United Nations systems regarding restraint of force do not work. The present system is not actually very old and with the establishment of new international organisations the system could well change again.

History preceeding the Present System : Following on from 1648 and the Peace of Westphalia at the end of feudal period. There were no European states before 1648 merely small princedoms which formed part of the Holy Roman Empire. However the Roman Catholic church and the Holy Roman Empire had started to break down and the Canon Law and the feudal system of Law were victims of the Reformation. The two parallel systems crumbled and Nation states emerged. Whilst it may be possible that a new federal state of Europe is developing because the present system does not work the lessons of the Reformation indicate that it too is unlikely to survive.

When the Nation state emerged, that feudal hangover, the Head of State e.g. The King gradually changed. Louis XIV had declared "1'etat c'est moil' I am the state, but this is no longer true. Thus today we have the Commonwealth, the United Kingdom, The United Provinces, The Netherlands and The State became the International Person and not its figure head.

The typical International Person is territorially orientated but compare the United Nations which show that territory not necessary ! Semble the P.L.O.

The Independent State

Rules of recognition. The power to recognise an International Person is discretionary, even if it exhibits the attributes of an International State. Three conditions before recognition granted

1) Stable government not recognising an outside superior.
2) Must rule supreme over a territory with more or less strict boundaries (often there is not universal agreement regarding a new administration or independent nation state.)
3) Must have a population !

The degree of stability, the size and the population mayvary significantly. Immediately after independence the Congo not a stable state but was nonetheless recognised and joined United Nations. Moritania and Mongolia were not recognised till relatively recently - whilst Serbia during the continuing dispute is still not recognised. Instability is external however, not apparently internal. Compare the relative size of China & Monaco.

Political & Constitutional Structure

Economic structures may well be alien to potential recognisers. Likewise Domestic Jurisdiction but these factors are no reason to prevent recognition. However since recognition is discretionary it can be a barrier. Semble the method of rise to power may be opposed. Recognition may be conditional on payment of debts etc as demonstrated by Slovakia and the Cheks who reaffirmed debts of the fprior regime before the two newly independant and separate parts emerged.

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Composite States

There may be a wide variety which provide models for reorganisation of International society.

Federation . Federal state . enjoys International Personality, individual states do not Federal Government has International Person. This is the normal situation but there are exceptions since names are terms of politic science and may be used in different way. One must analyse the Political structure to find the power base.

Confederation . A number of full sovereign states linked together for maintenance of external and internal independence by a recognised Treaty into a Union with organs of its own which are vested with certain powers over the member states - but not over the citizens of those states e.g. Senegal and Gambia 1982 and Senegambia see. Vol. 22 I.L.M. 1983 p. 260. Compare Switzerland and the so called Confederation Helvetique which is not a confederation but a federation.

The E.C / EU. is a functional federation not a Political federation though it may coalese into a Political Federation through evolution if Santer has his way.

Condominia and Co-Imperium

Condominia : A Condominium features joint sovereignty over a territory by two sovereign states e.g. United States and United Kingdom over Canton and Enderbury a pair of Pacific Islands. France and United Kingdom regarding the New Hebrides in the Pacific which in 1980 became independent as "Vanamatou"

Co-imperium : Two administrative powers in respect of a territory as a distinct International Person e.g. Post 1945 . Inter-allied government in Germany - and continuing in Berlin till 1989. The Republic of Andora is a remnant of the feudal system with joint administration by France and a Spanish Bishop.

Neutrality Neutral and Neutralised states non legal differences reflecting the manner in which neutrality was achieved ie voluntary or imposed from outside. A Neutral State is one which commits itself to Neutrality : e.g Vatican City 1929 Austrian City 1949. A Neutralised State results from an Initiative outside ! Switzerland 1815: Belgium 1831 - 1919 : Luxembourg 1867 - 1919. A Neutral State has its neutrality guaranteed by main powers. Neutrality may be "opposable" - state estopped from acting contrary - e.g. Cyprus 1959 which was a disadvantage when Turkey went in since the guarantors did not adhere to the guarantee.

Sovereignty

Sovereignty according to the ***Palmas Case*** 1928 P.C.A : According to one of the judges. *"The development of the National organisation of States during the last few centuries and as a corollary of the development of International Law has established this principle of the exclusive competence of the state regarding it's territory in such a way as to make it a point of departure in settling questions of International relations".*

Corfu Channel Merits 1949 : Between independent states, respect for territorial sovereignty is an essential foundation of International relations.

Sovereignty in Terms of Politicians, Social Scientists & Lawyers

Political Science involves pre legal sovereignty and omnipotence (Political) Absolute Power is the De facto ability to (defend) control territory, persons and objects in defiance to outside authority.

Legal Sovereignty Within an International legal system is only recognized within recognisable boundaries and spheres of International Law.

The Territorial Sovereignty of a state is geographic and circumscribed by recognisable boundaries.

'**Quasi Sovereignty**' is restricted sovereignty in respect of the Nationality of ship or plane in question and its flag.

Personal Sovereignty is restricted by Obedience and the Nationality of the individual implying Citizenship.

Sovereignty and International Law implies recognition of the sovereignty of others not of RAW power and illegal sovereignty. Recognition is reciprocal.

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Classic definition of sovereignty . Gruber - ***Corfu Channel*** (1) *"Sovereignty in the relationship between states signifies independence in regard to a proportion of the globe. Is the right to exercise force to the exclusion of any other state re the functions of a state (The negative aspect of sovereignty : right to exclude others' Juris.) This right has as its corollary a duty, the obligation to protect within the territory the rights of other states - in particular their right to integrity and inviobility in Peace and War, together with the rights each state may claim for it's Nationals in foreign territory. The state cannot limit itself to it's negative side ....."* a country must not be used as a base for terrorists against another state

Is it possible that even without it's consent a subject of International Law is bound by principles of International Customary Law ?

1) Is all International Law based on consent ? Therefore based on express consent.

2) Additional responsibility . imposed only by consent. ***The Lotus Case*** P.C.I.J. 1927 : International Law governs relationships - independent states - the rules of law binding on the states emanate from their own free will as expressed by conventions or generally accepted usages of International Law.

3) Unless the territorial jurisdiction of the state is excluded or limited by rules of International Law it's exercise is exclusive of the state in question.

4) Subjects of International Law may claim jurisdiction over persons or things outside territorial jurisdiction - but in the absence of permissive rules to the contrary they may exercise such jurisdiction over concrete instances within their jurisdiction.

5) Unless authorised by permissive rules to the contrary intervention by subjects of International Law in one or the other's spheres of Domestic Jurisdiction constitutes a Breach of International Law.

Analytical Process

A) Sovereignty - National Laws .

B) International Customary Law - limits.

C) Limits - by treaty

D) Exclusive Domestic Jurisdiction . No restraints limiting it by International Law.

Nationality Decrees in Tunis & Morocco P.C.I.J. 1923 : Article 15 Para. 8 League of Nations covenant of exclusive domestic jurisdiction - did not extend to spheres where the exercise of sovereignty is permissible but no longer a fetter.

Whether a certain matter is, or is not, solely within the jurisdiction of a state is essentially a relative question depending on the development of international relations. Regarding the Nationality of a person this is a matter which, in principle, is not required by International Law but compare if a state sold its nationality to another state and then defended him in an action against another state. ***Notlebohn Case*** : acquired Lithuanian Nationality (German) : refused entry to Guatemala International Law case : represented by Lithuania

"It may well happen that a matter of nationality is not enclusive in International Law. None the less the state is restricted regarding actions affecting other states. In such a case, jurisdiction which in principle belongs solely to the state is limited by rules of International Law . To hold that a state has not exclusive jurisdiction does not prejudice the final position as to whether that state has the right to adopt such measures."

Article 15 (8) . "A matter which by International Law is 'solely within' the jurisdiction of the party".

Article 2 (7) United Nations Charter : extends to matters "essentially" within the domestic jurisdiction.

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Wimbledon Case - Claims of "loss of sovereignty, e.g. when a government enters a treaty" e.g. the E..C. In so doing one only limits the exercise of sovereignty under rules of International Law. *"The court declines to see in the conclusion of a treaty by which a state undertakes to perform or refrain from a particular act an abandonment of sovereignty. No doubt any court creating an obligation of this kind places a restriction on the exercise of sovereign rights in that it exercises restrictions on it's exercise in a particular way ... but entering into a Treaty is an exercise of sovereignty".*

One could exercise sovereignty to extinguish sovereignty e. g. enter a confederation.

The Presumption in favour of sovereignty is strong and **The Lotus** restriction cannot be presumed.

Asylum K.J. 1950

Derrogation from Territorial sovereignty regarding diplomatic asylum involved compare

a) Refuge in an Embassy (a derogation ! heavy onus to show International Law recognises it).

b) Legal basis must be established in each case. Territorial asylum - viz : in another country

The very exercise of state sovereignty in a territory will produce a title to a state in the absence of a better title.

United Nations Charter : sovereign equality . Not really an extension of the term all sovereignty states have equal sovereignty equal persons before International Law.

FURTHER READING

Schwarzenberger & Brown : Manual : Ch 3

Schwarzenberger : Vol 1 Ch 5-6

Harris : Cases Ch 4

O'Connell : International Law for Students 1971 Ch 3

Okeke : Controversial subjects of Contemporary International Law 10974 109

Mendelson : Diminutive States in the UN 21 ICLQ 1972

Gunter : What happened to the UN Ministate problem ? 71 AJIL 1977 p110

Tunis & Morocco PCIJ 1923 Green p102

Palmas Case PCA 1928 Green p421

Reparation for UN Service Injuries Green 146

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UN Convention on the Jurisdictional Immunities of States

On 17 January 2005, the UN Convention on the Jurisdictional Immunities of States and their Property opened for signing. Yet, as was demonstrated by the decades of negotiation required to conclude the international agreement, state immunity remains an unclear and contentious area of law. Questions persist as to the history and development of the doctrine, and as to whether it reflects a rule of national or customary international law.

In the context of increased efforts to combat impunity for violations of international human rights and humanitarian law, national courts have begun to consider the relevance of state immunity in this regard. However, the reasoning advanced by domestic courts diverges significantly and as such demonstrates the uncertainty in this area of law. For example, in ***Al-Adsani v. Kuwait1*** and ***Bouzari v. Iran*** 2, the English Court of Appeal and the Court of Appeal for Ontario, Canada, held that the states of Kuwait and Iran enjoyed immunity from the jurisdiction of their respective domestic courts, the allegations of torture notwithstanding. By contrast, in the cases of ***Ferrini v. Germany*** 3 and Prefecture of ***Voiotia v. Germany*** 4, the Italian Court of Cassation and the Greek Areios Pagos (the supreme courts of both countries) found that a state does not enjoy jurisdictional immunity for *jus cogens* violations.

In all four cases, the courts acknowledged that the underlying abuse constituted a violation of a *jus cogens* norm with peremptory status under international law. However, the judgments demonstrate the lack of clarity as to the legal significance and content accorded by such a status. In ***Prefecture of Voiotia v. German***y, the ***Areios Pagos*** held that state immunity, as a rule of international law, *"in its contemporary manifestation … constitutes a consequence of the sovereignty, independence, and equality of states and purports to avoid any interference with international affairs"* 5 but found that immunity was not absolute. Rather, in holding that immunity only applies to acts of a sovereign nature, it denied immunity to Germany finding that violations of *jus cogens* norms could not be defined as sovereign or public acts. Further, it found that a breach of a peremptory rule of international law invoked an implied waiver of immunity. 6

In ***Ferrini v. Germany***, the Italian Court of Cassation found that Germany was not entitled to the protection of immunity in civil proceedings where the underlying violation (forced labour) constituted a *jus cogens* norm on the basis of a hierarchy of norms under international law. Although the court cited the decision by the Greek ***Areios Pagos*** in support of its findings, it also criticised the judgment's focus on implied waiver. Notably, the application of implied waiver to state immunity has also been rejected in the US courts in ***Princz v. Germany***. 7

By contrast, the English and Canadian decisions both focused on the existence of domestic statutes on state immunity, despite the recognition of the status of the prohibition of torture as a *jus cogens* norm. In ***Al-Adsani v. Kuwait,*** the Court of Appeal rejected the plaintiff's claim on the basis of the lack of an express human rights exception in the State Immunity Act 1978 which it referred to as a "comprehensive code". In ***Bouzari v. Iran***, the Ontario Court of Appeal similarly found no exception to the Canadian State Immunity Act and therefore dismissed the case.

Most recently, the English case of Ron Jones v. Saudi Arabia8 also raises the issue of the relationship of the immunities of individual officials to the immunity of the state. Currently on appeal to the House of Lords, the Court of Appeal upheld the immunity of the state of Saudi Arabia but denied the individual officials immunity from the jurisdiction of the English courts. Questions arise as to whether the accountability of states and individual officials can and should be divided in this manner.

Finally, the use of civil proceedings to enforce international human rights and humanitarian law has become a contentious issue itself. In the Court of Appeal in ***Ron Jones v. Saudi Arabia*** and the Ontario Court of Appeal in ***Bouzari v. Iran***, the courts questioned whether Article 14(1) of the UN Convention Against Torture required the provision of a civil remedy for torture committed extraterritorially. The use of civil suits has also raised a range of questions relating to the ability for survivors of human rights abuse to bring a case directly without relying on the state authorities to initiate proceedings. For example, in common law countries, where survivors are not afforded the opportunity to participate in proceedings by way of the *constitution de partie civile,* courts appear concerned about the potential for opening a floodgate of claims

through civil proceedings. In ***Al-Adsani v. Kuwait***, the Court of Appeal cited the difficulty the Court would face in attempting to assess the genuineness of allegations of torture made by asylum seekers and refugees coming to the UK.

1 ***Al-Adsani v. Government of Kuwait and Others***, CA 12 March 1996; 107 ILR 536; later upheld by the European Court of Human Rights in *Al-Adsani v. United Kingdom* 34 EHRR 11 (2002)

2 ***Bouzari v. Iran***, Ontario Court of Appeal, O.J. No. 2800 (2004)

3 ***Ferrini v. Federal Republic of Germany***, (Cass. Sez. Un.5044/04)

4 ***Prefecture of Voiotia v. Federal Republic of Germany***, Case No. 11/2000 (Areios Pagos, Sup. Ct. of Greece, 4 May 2000)

5 ***Prefecture of Voiotia v. Federal Republic of Germany***, Case No. 11/2000 (Areios Pagos, Sup. Ct. of Greece, 4 May 2000); *see also* M. Gavouneli, *International Decision: Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000, Areios Pagos (Hellenic Supreme Court), May 4, 2000*, 95 American Journal of International Law 198, 198 (2001)

6 Although the Special Highest Court of Greece and the European Court of Human Rights subsequently found that Germany enjoyed immunity at the execution stage, these two decisions did not alter the finding that immunity does not apply at the jurisdictional stage.

7 ***Princz v. Federal Republic of Germany***, 26 F.3d 1166 (1994)

8 ***Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Sudiya and another; Mitchell and others v Al-Dali and others***, EWCA Civ 1394 (2004)