

SOVEREIGNTY OF STATES IN MODERN INTERNATIONAL LAW*Sonali Sachdeva*

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INTRODUCTION

A State is a means to rule over a sovereign territory. It comprises of an executive, a bureaucracy, courts and other institutions. The term 'state' is mainly used in international law. There are four essential attributes of statehood- (1) Population, (2) Definite territory, (3) Government and (4) sovereignty.

The fourth attribute that is sovereignty, occupies an important place in international law and international relations. Sovereignty means absolute independence of a State in the management of its internal and external affairs.¹ It refers to the illimitable powers of a State to exercise over its subjects that are population, territory, government and other institutions and to exclude other states from doing any unauthorized interference. Jean Bodin defines the term as the supreme power over its citizens and subjects, unrestricted by the laws.² His definition was further strengthened by Hobbes who maintained that a sovereign was not bound by any authority; not even religious. While writers like Bodin, Hobbes, Bentham and Austin maintained the theory of absolute sovereignty of a State, Pufendorf was of the view that sovereignty is the supreme power in a State but it may well be constitutionally restricted. However, in terms of international law, state sovereignty means that each State possesses the absolute power to take decisions about whatever goes on within its boundaries. The manifestations of sovereignty are as follows-

1. Each state has exclusive jurisdiction over its territory.
2. Other States have a duty not to intervene in the said jurisdiction.
3. Membership of international organizations is not obligatory
4. Jurisdiction of international tribunals depends on the consent of States.

Types of sovereignty Sovereignty can be classified as follows:

1. Internal Sovereignty-It means supreme authority of a State over the activities taking place within its territory. It can further be classified as follows-
 - a. Legal sovereignty- It is the power of a State to make laws and repeal or modify the existing laws

¹ Vergheze, International Law and Organization, p. 173

² Bodin J., De La Republique; Oppenheim, 7th ed. Vol. 1, pp. 115-119

- b. Political sovereignty- It signifies that the will of 'politically sovereign' in a State is ultimately obeyed by the citizens of the State. It is the political sovereignty that comes into play in international law.³
2. External sovereignty- It relates to the recognition on the part of all other States that each possesses this power in equal measure.

DEVELOPMENT OF THE CONCEPT

The development of a system of sovereign States culminated in Europe at the '*Peace of Westphalia*' in 1648. Therefore, the concept of sovereignty finds its origin in customary international law which mainly dealt with the rules relating to diplomatic relations, treaties and war. They were, however, not followed strictly by States. States did not accept any restrictions on their sovereignty and independence. Therefore, the concept of sovereignty as in the customary international law implies absolute powers of a State. It was the concept of 'absolute sovereignty'. The obligations accepted by States were less to a great extent as compared to those accepted under modern international law. Modern international law which developed after the Second World War consists of the UN Charter and international treaties and conventions. States became parties to these documents and thus they became subjects of international law. In this way the concept of absolute of customary international law diluted and transformed into supreme authority of a State.

Sovereignty and the UN

During the 20th century States moved from bilateral treaties to other form of international cooperation. States became parties to the Covenant of League of Nations and the Pact of Paris. The large scale holocaust and devastation in the Second World War resulted in the adoption of the UN Charter to establish and maintain world peace and security. The members- States agreed to fulfill the obligations assumed by them under the Charter. The provisions under the Charter which protect the sovereignty of states are as follows

- Article 2(1) "The organization is based on the sovereign equality of all its members." This principle implies that all States are equal in international law despite the inequalities regarding size, wealth, population, form of government etc. According to Vattel- "A dwarf is as much a man as a giant. A small republic is no less a sovereign State than the most powerful kingdom."
- Article 2(4) "All members shall refrain from the threat or use of force against the territorial integrity and political independence of any State."
- Article 2(7) "Nothing contained in the Charter shall authorize the UN to intervene in the matters essentially within the domestic jurisdiction of any State or shall require the members to submit such matters for settlement under the Charter."
- Article 18(1) "Each member of the General Assembly shall have one vote."
- Article 27(1) "Each member of the Security council shall have one vote."

³ Dicey, Law of Constitution, 1939 ed. p. 40.

- Article 51 “Nothing in the Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN.”

Further the jurisdiction of the International Court of Justice (ICJ) is not compulsory unless States submit an international dispute for settlement. As it has been held in the ‘Eastern Carelia’ case,⁴ that no State can, without its consent, be compelled to submit its international dispute to any kind of pacific settlement. The judgments of the ICJ are binding on the parties to the case and in respect of that particular case only.⁵

The provisions of the charter which curtail the sovereignty of States are as follows

Article 2(2) “All members shall fulfill in good faith the obligations assumed by them in accordance with the Charter.”

Besides this a member of the UN cannot withdraw himself from the membership the UN but he can be expelled.

Veto Power

Decisions on procedural matters are taken by affirmative votes of any nine members of the Security Council and decisions on non-procedural matters, by an affirmative decision of nine members including the votes of the five Permanent Members of the Council. The dissenting vote of a Permanent Member is called ‘veto’ which signifies that a decision on a particular issue has blocked. The veto power is antithesis of the principle of ‘sovereign equality’. Further Article 43 of the Charter provides that all members of the UN undertake to make available to the Security Council armed forces, assistance and facilities necessary for the purpose of maintenance of international peace and security.

SOVEREIGNTY AND INTERNATIONAL TREATIES

Treaty means an international agreement concluded between States in written form and governed by international law.⁶ The States which are parties to a treaty assume obligations on international level as a result of the creation of rights and duties by a treaty. For it is a fundamental principle of the law of contract, free consent is required in treaties also. States are sovereign and cannot be compelled to consent to a treaty. However, when a treaty is entered into; no State can punish the other for disobedience of a provision of a treaty. In this regard the binding effect of treaty rests in the last resorts on the principle of *pacta sunt servanda*’ advanced by Anzilotti which means agreements among the States are binding and to be observed in good faith.⁷ Therefore it is a general rule that a treaty neither confers rights nor imposes obligations on a State which is not a party thereto. The rule endorses

⁴ (1923), PCIJ

⁵ Article 59, Statute of the ICJ.

⁶ Article 2(1)(a), the Vienna Convention on the Law of Treaties, 1969.

⁷ Article 26, the Vienna Convention on the Law of Treaties, 1969.

inviolability of sovereignty of State. However, in the following cases a treaty may create obligations upon third states also-

1. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be a means of establishing the obligation and the third State expressly accepts the obligation in writing.⁸
2. Multilateral treaty declaratory of customary international law is binding on third State also.
3. Multilateral treaty creating new rules of international law are binding on all States. As held in 'Bosnia and Herzegovina v. Yugoslavia'⁹ the treaties which are erga omnes that is valid against the entire world are binding on third States too.
4. The organization shall ensure that States which are not members of the U N act in accordance with the principles so far as the maintenance of international peace and security is concerned.¹⁰

As far as ratification of treaty is concerned there is no duty to ratify a treaty that is to say if a treaty has been signed by the authorized representatives of a State, it neither creates any binding obligations on the States concerned nor the Stat is bound to ratify a treaty. Besides, a State can make reservations in a treaty while signing, ratifying or accepting the same. A treaty may also be amended by a further treaty. These are considered as incidences of sovereignty and equality of States.

SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW

The International Criminal Court (ICC) is the first international court to try and punish international criminals. The crimes falling within the jurisdiction of the ICC are- genocide, crimes against humanity which include extermination, enslavement, torture, sexual offences, apartheid etc., and war crimes.¹¹The jurisdiction of the court extends over the parties to the Statute of ICC. A third State may also accept the jurisdiction by lodging a declaration to this effect. As far as the jurisdiction of national courts is concerned the statute makes it clear that the jurisdiction of national courts is complementary to that of the ICC. As a compromise formula a State with jurisdictional competence has the first right to commence proceedings unless that State is 'unwilling or unable genuinely' to carry out the investigation or prosecution.¹² The parties to the statute with jurisdictional competence have first right to commence proceedings against a criminal and the nationals of non-members States also fall within the jurisdiction of the ICC. The official capacity of an individual does not make him immune from the jurisdiction of the ICC.

Extraterritorial Criminal Jurisdiction of a State

⁸ Article 35, the Vienna Convention on the Law of Treaties, 1969. (1996) ICJ Rep

⁹ (1996) ICJ Rep.

¹⁰ Article 2(6), the UN Charter.

¹¹ Articles 6, 7, 8, the Statute of the ICC.

¹² Article 17, the Statute of the ICC.

State jurisdiction can also extend to foreign nationals whose acts have jeopardized its safety or public order. In *The Lotus case*¹³; it was held that the territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty. Extraterritorial jurisdiction is mainly based on two principles

1. Protective principle- States have jurisdiction to punish acts prejudicial to their security even when they are committed by aliens abroad. Such acts include spying, plots to overthrow government, forging currency, immigration etc.
2. Universal principle- War crimes, slavery, genocide, torture, apartheid and piracy are within the jurisdiction of universal principle. Such offenders are considered as *hostis humani generis* or enemies of all mankind. In case of universal jurisdiction the State's interest is as a member of the international community. Thus extraterritorial jurisdiction protects the territorial integrity of a State by usurping another state's jurisdiction though in the interest of international community. However it is governed by 'effect doctrine'¹⁴ which means a State affected by an act committed by a foreigner outside that State shall have jurisdiction over that person provided the effect is 'direct and substantial' and that State exercises jurisdiction reasonably.

There are certain exceptions to the State's exclusive territorial jurisdiction. A State, in spite of being sovereign, cannot exercise jurisdiction over the following¹⁵-

1. Foreign States and Heads of such States.
2. Diplomatic agents and consuls of foreign States.
3. Foreign public ships.
4. Foreign armed forces. v. International institutions.
5. The international criminal law deals with two important issues- asylum and extradition

Asylum

In international law it means refuge followed by active protection by a State to a criminal, national of another State who seeks refuge and protection. The right to grant asylum is an incidence of territorial supremacy. Granting asylum in one's territory is called territorial asylum which is considered as an attribute of sovereignty of State. When a State grants outside its territory that is in its embassy or warships; it is called extraterritorial asylum. In *Columbia v. Peru*¹⁶; it was laid down that granting extraterritorial asylum involves derogation from the sovereignty of that State.

Extradition

A person may cross over to another State after committing a crime. The first State where he has committed crime may request the other State to deliver him back for his trial and

¹³ France v. Turkey, 1927 PCIJ Series A, No. 10

¹⁴ Oppenheim, International Law, 9th ed., Vol. 1, p. 474.

¹⁵ Article 31, Vienna Convention on Diplomatic Relations, 1961.

¹⁶ Asylum case, 1950, ICJ Rep. 266.

prosecution because he cannot be arrested there on account of territorial supremacy of that State.

SOVEREIGNTY AND INTERVENTION

Every State has the right as an attribute of sovereignty to manage for itself its internal and external affairs. So intervention is an action taken by a State for interference in the affairs of another State with a view to get its desires fulfilled. As a rule, intervention is forbidden by customary international law and modern international law. Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State. The grounds justifying intervention are as follows albeit it is a practice open to abuse

- a) Self defense
- b) Humanitarian intervention
- c) Balance of power
- d) To protect citizens abroad
- e) Collective intervention
- f) Intervention in civil wars

Intervention on the ground of self-defense is an exception to the general duty of all States to respect the sovereignty of other States. Article 51 of the UN Charter provides for the right of self-defense. According to Daniel Webster¹⁷ the essentials of the right of self-defense are instant and overwhelming necessity, no choice of means, no moment for deliberation and the act should not be unreasonable or excessive.

Intervention on humanitarian grounds is permitted if there is barbaric behavior upon human beings, the State is unable to take any action and it may affect the other States too. These two grounds of intervention are most common on international plane. But intervention, as a practice, is often misused by powerful States.

SOVEREIGNTY AND PROTECTION OF HUMAN RIGHTS

The UN Charter contains the firm determination of its members to protect and promote human rights and fundamental freedoms for all.¹⁸ Human rights are no longer 'internal affairs', they are not 'essentially within the domestic jurisdiction of a State' in the terms used by Article 2(7) of the UN Charter. Protection of the human rights of refugees, stateless persons or violation of human rights because of genocide, apartheid, racial discrimination cannot constitute a matter within the domestic jurisdiction of a State.

Besides the UN Charter there have been several conventions on international level for the protection and promotion of human rights. These instruments provide for an international mechanism for implementation and control which can be used either by the other States

¹⁷Caroline Incident (1837).

¹⁸ Article 1(3), the UN Charter.

or individuals. Furthermore, many of these rules protecting human rights have consolidated into customary rules of international law binding on States whether they have ratified those conventions or not. Thus the growth of human rights law limits the sovereignty of States by providing individual human rights in relation to the State. The human rights issue offers a case study of a gradual and significant reconceptualization of State sovereignty.

In the human rights issue-area the primary movers behind the international actions leading to changing understanding of sovereignty are transnational non State actors organized in a principled issue network, including international and domestic non-governmental organizations, parts of global and regional intergovernmental organizations and private foundations.

SOVEREIGNTY AND GLOBALIZATION

It is certainly true that globalization and various new forces have changed the world in a very dramatic way during the last few decades. Economic globalization places significant limits on the behavior of nation-State. The growth of multinational corporations and the free flow of capital have placed constraints on state's ability to direct economic development and fashion social and economic policies. Both to facilitate and to limit the more troubling effects of these developments, super- national institutions have emerged as a significant source of authority that, at least to some degree, place limits on State sovereignty. Further in the era of technological development we cannot talk of absolute sovereignty when spy planes and satellites of the big powers openly monitor the skies of supposedly sovereign states.

CONCLUSION

Summing up it can be said that in spite of the limitations placed on the sovereignty of States, states are still capable of exercising their sovereign powers. States can develop the economy of the nation and frame various policies as per their needs and convenience. Besides this, the restrictions placed by the membership of international institutions and treaties are voluntary. In fact, we see the illusion rather than the reality of dissolving national power and sovereignty. The modern forces of the market and the internet challenge the established forms of national authority but do not alter the political reality that each is subject to State power. Some of the restrictions are placed in the interest of the international community as a whole. Thus the concept of sovereignty of States is no longer absolute but sovereignty is still supreme.