

On State Sovereignty: The End of Territoriality as the Starting Point in IR?

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ELIJAH BOSSA, JUL 11 2012

The concept of state sovereignty remains one of the fundamental constitutional developments of the last two centuries. The conception of the nation state and territorial exclusivity as resultant corollaries of sovereignty has been at the forefront of the evolution of both international law and international relations. This essay will argue that the former quintessence of territoriality as the starting point for settling most questions of international relations no longer reflects the constitutional reality of state sovereignty as understood within international law today. This argument will begin with an assessment of the problems posed by the concept of objective territorial jurisdiction highlighting how the obscure 'effects doctrine' has altered conventional understandings of sovereignty. The difficulties posed to territorial exclusivity and state independence by the arbitrariness of extra territorial jurisdiction will be analysed within this context. With reference to global developments such as the rise in sub-state nationalism and the prominence of humanitarian intervention, it will be summarised that not only is state sovereignty no longer so neatly territorialised but the proliferation of international organs outside of the state has developed a pluralistic understanding of state sovereignty that is both more sophisticated and far removed from the traditional understanding in the Island of Palmas case.

The attempt to extend a state's objective territorial jurisdiction through the obscure 'effects doctrine' presents obvious challenges to the traditional understanding of the territorial competence of the state. The tenuous reliance upon economic repercussions within a territory rather than upon elements of intraterritorial conduct not only signals a departure from the doctrine of objective territorial jurisdiction but automatically raises serious questions about a state's exclusive territoriality when claims to jurisdiction can be made without reference to the commission of physical acts within the specified territory. The fullest expression of the 'effects doctrine' was made in the case of *Rio Tinto v Westinghouse Electric Corp* [1978][1] where US anti-trust laws were applied to non-US companies in respect of their acts outside the US at a time when they were forbidden by US law to trade in the US. The only jurisdictional link was the purported economic 'effect' of the cartel in the USA[2]. The House of Lords was critical in its dismissal of the exercise of the effects doctrine stating that the use of US courts as a means to investigate the activities of British companies outside of the US was an "unacceptable invasion of its sovereignty.[3]"

The controversial application of the effects doctrine highlights two critical points about the deviation in international law from the traditional conception of a state's exclusive territorial competence. Firstly, the Post-World War 2 era has witnessed a slow diminution in the formulation of territorial jurisdiction as an absolute concept with what D.A. Lake coined as the "mini-renaissance[4]" to the classical conception of territorial sovereignty. Lake's central premise is that territorial sovereignty is far more complex than previously understood under the classical model and highlights the important "variations of hierarchy within international law[5]" rendering the previous exclusivity of territorial jurisdiction as both inadequate and irrelevant within the current system of international law. Secondly, Lake's reconceptualization of the nature of territorial sovereignty helps to understand much of the criticism of extra territorial jurisdiction and the extent to which it has largely circumvented the notion of state independence[6].

A.V Lowe critiques the application of extra territorial jurisdiction in the case of *United States v Aluminium Co of America* [1949][7] by highlighting that the exercise of jurisdiction in this case was designed to force foreign companies to act in a manner contrary to that which, in line with the laws of their nation states, would have wanted

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them to act[8]. Contrary to conventional wisdom, the acknowledgement under international law of extra territorial jurisdiction as the exception to the territorial principle actually works to re-affirm the large extent to which international practice has derogated from the exclusive competence of the State as the starting point for settling most international law questions. Despite the proclamations of the Court in *Bankovic v Belgium* [2007][9] underlining both the apparent “limitations of extra territorial jurisdiction[10]” and the primacy of “territorial competence[11]”, the existential realities of international relations– which often necessitate the prominence of pragmatism and ‘policy considerations’–have worked to recalibrate the conceptual dimensions of state sovereignty into a very different constitutional feature from that outlined in the Island of Palmas case.

Moreover the views of both A.V Lowe and Lake appear to be conceptually at odds with the doctrine of *uti possidetis*, a principle which harks back to the traditional conception of state sovereignty by acknowledging the territorial integrity of pre-existing colonial boundaries granted to newly independent states. The practice in much of post-colonial Africa and Asia reinforced the approach of emphasising the territorial integrity of the colonially defined territory. In *Burkina Faso v Republic of Mali*[1986][12] it was held that settlement of any disputes between states should be principally based upon the “intangibility of frontiers inherited from colonisation.[13]” The application of *uti possidetis* has gone beyond the colonial context with special regard to the ethno-political situation of the former USSR and former Yugoslavia. In *Opinion No 2 and 3 of the Yugoslav Arbitration Commission* [14], it was highlighted that except where otherwise agreed the former boundaries became frontiers protected by international law[15]. Thus the pre-eminence of *uti possidetis* with particular regard to decolonization both in the Post World War 2 and Post Cold War eras provides a strong premise for the continuity of the traditional understanding of state sovereignty. Within the context of territorial exclusivity, two further academic approaches which supplement the traditional understanding of state sovereignty deserve critical mention.

The first academic approach illustrated that as a matter of public policy economic interdependence and transnational relations were not constraints on sovereignty but the very expression of that sovereignty[16]. The second approach is that of the constructivists who begin from the premise that state sovereignty both in its internal and external form is a socially constructed trait. State sovereignty is not seen as an absolute concept set apart from the international system but is rather an “amorphous concept” reproduced through international practice[17].

In hindsight, both academic approaches fail to critically pay attention to particular global developments which have resulted in the evolution of the inherent qualities of state sovereignty. The first academic approach though correctly pointing out the interplay between transnational relations and economic interdependence limits its analysis by narrowly focusing on only one aspect of global change whilst ignoring other important international actors that have redefined the ambit of the territorial exclusivity of the state. The second approach suffers from a more perplexing limitation. It claims to reject the notion of sovereignty as an absolute concept set apart from international law and yet the very premise of sovereignty being a socially constructed trait reproduced through international practice equally presumes that sovereignty is an absolute condition. By acknowledging that the amorphous nature of state sovereignty is an attribute “inhering in all states equally[18]” the constructivists’ approach conceptually misrepresents sovereignty as being static and inflexible.

The fault lines in both approaches raises broader questions about the current validity of *uti possidetis* within the context of state sovereignty. Despite the reaffirmation of established frontiers within much of the post-colonial world, the reference to geographical boundaries and territoriality as the starting point in international relations has been seriously challenged on two fronts.

The first challenge is the rise of sub-state nationalism and the constitutional implications for the definitional scope of sovereignty. S Tierney argues that the rise of sub-state nationalism even when the resilience of state sovereignty is being questioned is not as “paradoxical as might have first been presumed.[19]” He notes that the elaborate constitutional programmes advanced by sub-nationalist movements are reflective of “wider transformations in the pattern of state sovereignty.[20]” This analysis raises two points regarding a state’s territorial competence. First is the diminution in importance of the nation state within the era of globalisation. Secondly, it becomes clearer that effective sovereignty neither presumptuously begins nor ends from the premise of territorial exclusivity. J Agnew captures the essence of this argument by positing that state sovereignty as understood today is “neither inherently

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territorial[21]" nor is it exclusively organised on a state by state basis.

The next challenge to territorial exclusivity is posed by the principle of humanitarian intervention. In the wake of humanitarian crises in Bosnia, Kosovo and most recently in Libya, the US and other governments have intervened militarily across the globe even when states facing intervention have defended themselves against what they view as violations of their territorial sovereignty. Shen argues that humanitarian intervention violates the principle of non-intervention citing Article 2(7) of the UN Charter which prevents the UN from intervening in matters within the domestic jurisdiction of a state[22]. B Macpherson, though disputing the reasoning of Shen, points out that while the terms 'political independence' and 'territorial sovereignty' under Article 2(4) of the Charter might be broadly interpreted to equate the inviolability of the state, the magnitude of humanitarian crises has necessitated an imaginative interpretation of this provision so as to permit "limited humanitarian intervention.[23]" Both these views illustrate the tenuous interaction between humanitarian intervention and a state's territorial exclusivity. The jurisdictional problems posed by the militarisation of humanitarianism not only underscores the extent to which the post-world war 2 era has recognised limits to national sovereignty regarding human rights but also proves how the extent of a state's domestic authority and the related concept of sovereignty as recognised by customary international law is in continuous flux.

In conclusion, it is clear that state sovereignty is not only increasingly divisible and malleable but the former quintessence of territoriality as the exclusive determinant of effective sovereignty has been rendered both inadequate and parochial. The settling of international questions has fundamentally shifted from being state-centric to a multi-layered approach that has transcended the primacy of territoriality and functional independence. Keating eloquently summarised the current constitutional status of international law by noting that the goal of enhanced constitutional autonomy for society's territorial space makes reference not only to the State but to "the membership of international organisations[24]". In a similar ideological fashion, Appadurai emphasises that in the age of globalisation, the transactional balance of power has tilted in favour of a networked system of authority that "challenges territorialized sovereignty as the singular face of effective sovereignty[25]". Therefore the extraterritorial dynamic of globalisation has crucially morphed state sovereignty into a peculiarly complex creature quite unlike the traditional conception realised in the Island of Palmas case.

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