The Acquisition of Territorial Sovereignty by Newly Emerged States

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In the last decade, an unprecedentedly large number of new States have been admitted into the international community. As is well known, these have been predominantly African and Asian States, and it may be that, in the future, they will inspire material alterations in the existing traditional rules of international law, which had their origin in the relations between States belonging preponderantly to Europe, and to North and South America.

This is said at the outset, in order to make it clear that the present article is not at all concerned with the problem of whether such newly emerged States may exercise some influence in bringing about alterations in the existing principles of international law concerning the acquisition of title to territory. Nor does the article purport to formulate any thesis that after newly emerged States have been in existence some time after their formation, different rules as to the acquisition of further territory should apply to such States by contrast with the rules governing the acquisition of territory by States, which were already at the time of such formation members of the international community.

The article deals in fact with the position of newly emerged States at the moment of time that statehood is attained, and when territory has come under the sovereignty of their governments. The problem is almost entirely one of theoretical analysis, and of endeavouring, in particular, to ascertain whether there is a need to alter or extend the existing theoretical structure of international law, so far as concerns the acquisition of territorial sovereignty, to meet the recent numerous instances of the emergence of new States, and therefore of the inception of new State territorial titles.

It may be observed, to begin with, that the attainment of statehood, with the concomitant new territorial title of the newly emerged State concerned, has been and may be achieved in different ways. A colonial or dependent territory may by the agreement or assent of the parent State be conceded independence. This may or may not involve a formal agreement between the parent State, on the one hand, and the colonial or dependent territory, on the other hand; when Burma attained statehood, there had been a prior Burma-United Kingdom agreement dated 27 June 1947 and a subsequent formal Treaty signed on 17 October 1947, leading eventually to independence. Or again, there may or may not be also some internal constitutional act or internal legislation by the parent State whereby the new statehood is provided for in express terms; once more, an illustration is provided by the case of Burma, in respect of which the United Kingdom legis-

lature enacted the Burma Independence Act 1947, section 1 of which provided that on the "appointed day", 4 January 1948, Burma was to become an independent country. The Ceylon Independence Act 1947, is a further example in the same connexion.

A colonial or dependent territory receiving a concession of independence from the parent State is one thing; the case of a people as such, by some plebiscite or act of self-determination, choosing independence is another. The Algerian people perhaps represent a case in point, inasmuch as, strictly speaking, no colonial or dependent territory was involved, and the people by a referendum on self-determination conducted on 1 July 1962, opted for independence from France.

Into this category of peoples as such moving towards statehood, it seems possible to fit the case of trust territories, under the United Nations Charter, becoming emancipated, for the trust territory is certainly not a colonial or dependent territory of the Administering Authority which has entered into a trusteeship agreement in respect of that trust territory. The concern of the United Nations has been to bring about the independence of the people as such, although necessarily it has had to attend to the formalities, as for example when by resolution of the General Assembly a trusteeship is dissolved. There have been one or two interesting variations in the pattern of emancipation of a trust territory, which perhaps serve also to confirm the importance in this connexion of the peoples concerned, rather than the nature of the trust territory viewed as a formal entity. Thus when Belgium was discharged from its trusteeship over the trust territory of Ruanda-Urundi in 1962, a single State of Ruanda-Urundi did not emerge, but two separate States, Burundi and Rwanda. Moreover, there have been the "mixed" cases of independence, as when a trust territory has combined with a colonial or dependent territory to form a newly constituted State; illustrations are the merger of the British trust territory of Togoland with the British colonial territory, Gold Coast, to form the new State of Ghana in 1957, and the union of the Italian trust territory of Somaliland with British Somaliland, constituting in 1960 the new Somali Republic.

It has to be considered also that one of the extraordinary features of this multiple emergence of new States was the almost immediate general recognition they received from the Great Powers. Where the parent State had conceded independence, on the one hand, or where, on the other hand, the emancipation of the trust territory had taken its course under the auspices of the United Nations, consummated by the appropriate resolution or resolutions of the General Assembly, it was hardly open to States other than the parent State, or—in the case of a trust territory—a State which was not the Administering Authority to refuse or defer recognition upon one or more of the grounds usually called in aid for this purpose.

Mention may also be made of the historical cases of States which have been formed by revolution or secession. The revolution need not necessarily be one in which violence has been used. The difference from the cases above mentioned is that the State from which a portion

of its population and a portion of its territory have broken away has not immediately conceded that the revolution or secession has legally resulted in the emergence of a new State.

These being in broad outline the circumstances in which most newly emerged States have obtained their footing in the international community, the next step is to pose, albeit rhetorically, the theoretical questions which relate to the territorial title of such States.

(1) Modes of acquisition of territorial title

(a) Has the acquisition of territorial title nothing to do with the foundation of a new State,[1] or is there in that respect an acquisition of territorial title, original or derivative?

(b) If there is such an acquisition, can it be fitted within the traditional categories of modes of acquisition of territorial sovereignty (in this case, the only appropriate modes, if at all, would seem to be occupation or cession), or has the practice of the last decade shown that there may be one or more new heads of acquisition?

(2) Who does acquire the territorial title?

Assuming that there is an acquisition of territorial title, who does acquire such title?

The reason that the question is posed in this way is that there is a traditional view (see 12, *post*) that territory constitutes one of the essential elements of statehood. Theoretically, therefore, it could be said that the territorial title must have vested or become acquired before the newly emerged State came into being, for the element of territory is a *sine qua non* of its personality, while until it has become constituted as a State it is incapable of acquiring territorial title. What entity is it then that does acquire territorial title? Is it the people whose self-determination has been decisive in the attainment of statehood? Or can we speak of an entity such as an "emerging State", in whom the title can become vested pending its evolution towards statehood?

(3) Has recognition any bearing upon the matter?

This brings us back again four-square to the difference between the declaratory and constitutive theories of recognition, and also indeed to the difference between the two kinds of constitutive theories, the traditional constitutive theory and the constitutive theory, which has received some acceptance, under which States other than the entity to be recognized are under *a duty* to accord recognition, if all the elements of statehood, including the element of sovereignty over a certain extent of territory, are present, whereupon recognition operates in a constitutive manner.

These being the theoretical questions involved, it is now appropriate to glance at some of the views expressed by the writers who dealt with the matter before there occurred the phenomenon, in the period dating from 1950, of the multiple emergence of new States.

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1 This is the view expressed in Oppenheim, *International Law*, vol. 1, 8th ed (1955), p. 544.

Hackworth appears to have included revolution and secession within the enumerated modes of acquisition of territory; this is shown by the following relevant passage in his *Digest*[2]:—

> "Revolution and secession constitute a historically familiar method of effecting changes in territorial sovereignty. They usually involve a declaration of independence from former political ties, withdrawal from the jurisdiction of the former sovereign, and the maintenance of the new independent status as the result either of military operations or of the acceptance of the situation by States in a position to challenge."

Hackworth's *Digest* is, in that regard, in contrast with the earlier Moore's *Digest*, for though the latter *Digest* deals elaborately and in detail with the different modes of acquisition of territorial sovereignty,[3] no reference is made to revolution or secession as a mode of such acquisition.

Dickinson also adopted the view expressed by Hackworth, for in his book, *The Law of Peace* (1951), he stated that revolution is a form of acquisition of territory, and that the "transfer by revolution is perfected by the revolution's success".[4]

Hyde is another United States international lawyer who was prepared to treat revolution as a mode of acquisition of territorial sovereignty, and according to him it was one *sui generis* neither involving any activity upon the part of the parent State, nor upon the part of the newly emerged revolutionary State. Moreover, according to Hyde the *ratio* of this acquisition of territory is to some extent succession. One wonders why Hyde did not explicitly state that the succession itself was a mode of acquisition, unless he was conscious of the theoretical difficulty that if territory be an essential qualification of statehood, then it is difficult to describe a revolutionary State as having "acquired" or "succeeded" to territorial sovereignty. However, the relevant passage from his treatise[5] does not suggest that he did have the theoretical difficulty in mind; the passage reads:—

> "When by virtue of a successful revolution a new State comes into being, it necessarily succeeds to the rights of sovereignty over the territory which it occupies and which previously belonged to the parent State. No act on the part of the latter is required in order to validate the succession. The new State is regarded as having perfected by its own achievement the transfer of rights of property and control."

This passage purports to be based on a proposition formulated in a dispatch by Secretary of State Marcy in 1856:—

> "The United States regard it as an established principle of public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the parent country."

If territory were an essential ingredient of statehood, Secretary Marcy's proposition would be more exact than Hyde's statement of the

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2 (1940), vol. 1, p. 444, s. 65.

3 (1906), vol. 1, pp. 258-301, ss. 80-9.

4 At p. 47; see also p. 46.

5 *International Law*, vol. 1 (1947), p. 390.

principle, for Secretary Marcy speaks of succession only to the "territorial limits", the assumption being that the revolutionary State has fulfilled the territorial qualification of statehood.

Turning aside from revolutions or secessions, can a plebiscite or any other form of act of self-determination be regarded as a method of acquisition of territorial sovereignty?[6] *Semble*, not, because these are merely processes for testing whether a people, and admittedly the term "people" is relative and fluid, can ultimately form a State with a particular area of territory exclusively, for the most part, inhabited by it.

So far as the recent practice goes, it is neutral and inconclusive.[7] The specific problem of acquisition of territorial sovereignty does not seem to have troubled those who drafted the resolutions, documents, or agreements associated with the formation of the new States of the past decade. They seem to have been more concerned with the termination of the condition of dependence of the colonial or trust territories in question, and with their attainment of statehood, particularly the date or the time of this event. To this extent, it could perhaps be said that recent practice supports the view that the acquisition of territory is not to be confused with the foundation of a new State.

The documentary materials do not suggest even that the parent or tutelary States concerned considered themselves as making a cession or transfer, express or implied, of territorial sovereignty to their former dependants. This would be in accordance with principle under international law. It should not be an invariable requirement that if territory formerly belong to State A is acquired by another entity or State, State A must evince an *animus disponendi*.

Yet if the documentary materials throw little light on the problem, the facts themselves cannot be denied. Dependent entities, or peoples who had attained or were about to attain some degree of political organization, did become seised of the sovereignty *de facto* of territory, in some instances before the proclamation of the foundation of the State concerned.

It is believed, indeed, that it is time to discard the hard-frozen technicality that only States can acquire plenary territorial sovereignty. Such a rigid conception of international law is unacceptable generally to the group of new Afro-Asian States. It seems to over-emphasize unduly the importance of the State as such, a Hegelian notion which has been with us for a long time and which is not well received by the newly emerged States. We ought to adjust ourselves to the idea that a people, provided that it has attained or is ready to attain some degree of political organization, is, as such, capable of acquiring sovereignty over territory pending the foundation of the State, of which this territory is to represent a constituent element. This is preferable indeed to having recourse to the conception of an "emerging State", and to saying that such an "emerging State" is an entity which

6 Cf. Whiteman's *Digest*, vol. 2 (1963), pp. 1168-73.

7 See for conspectus, Whiteman, *op. cit.*, vol. 2 (1963), pp. 119-42.

may duly acquire territorial sovereignty, because then we are seeking to introduce a fiction to avoid squaring up to a reality. In this connexion, the practice of the last decade, the emphasis on "peoples" in the preamble to the United Nations Charter, and the views of the newly emerged States themselves as to the rights of peoples are matters which cannot be ignored. Besides, there is the reality that the arrangements for independence were actually transacted by the peoples themselves with the parent or tutelary States.

There is nothing in such an approach which can do violence to the underlying purposes or principles of international law. Precedents do exist for the assumption of territorial sovereignty by an entity, not a State; see, for example, article 3 of the Treaty between Italy and the Vatican, signed on 11 February 1929, under which Italy recognized the full possession and exclusive and absolute power and sovereign jurisdiction of the Holy See over the Vatican territory, "as at present constituted", with all its appurtenances and endowments.

By admitting that a people, satisfying the test that it possesses or is about to possess some degree of political organization, can acquire territorial sovereignty pending the attainment of *de jure* statehood, we avoid the theoretical dilemma, referred to *ante*. It does not matter whether the case be one of the people of a dependency, or of a trust territory, or of a combination of the people of a dependency and of the people of a trust territory.

The General Assembly resolution which may be necessary in respect to a trust territory to discharge the Administering Authority from its responsibilities, and to confirm the independence of the people, has no bearing upon the question of acquisition of territorial sovereignty. It cannot and ought not to be deemed, expressly or impliedly, an adjudication of territory made by an international organization.

Assuming that a former dependent people, having the qualifications mentioned, can acquire territorial sovereignty, how is the mode of acquisition to be described? There is no occupation, because there is no *res nullius*, and there is no express cession. In the case of a colonial dependency, but not in the case of a trust territory, it might be said that there has been a succession, but the term "succession" seems more appropriate to describe the result than the mode, in the absence of some actual international instrument comparable to a deed of transmission under domestic State law. It is perhaps best left as a case of a mode of acquisition *sui generis*.

The concept of dependent peoples, so qualified, acquiring territorial sovereignty pending the attainment of statehood obviates, too, any aggravation of the present theoretical difficulties which already bedevil the question whether recognition is declaratory or constitutive in operation. In other words, recognition is quite irrelevant so far as the acquisition of sovereignty over territory is concerned.

The same analysis could indeed be applicable to most cases of emergence of revolutionary States. However, the writer would prefer to limit the views stated in this article to the instances of newly emerged States during the past decade.

It remains to mention two qualifications, corresponding to special cases which might arise:—

(1) The parent State might by some definitive instrument actually make a cession of territorial sovereignty to a dependent people.

(2) A newly emerged State might almost immediately after its foundation receive an addition of territory, as to which there may have been a prior dispute. This could only be a case of acquisition by a State, and not by a people as such, but whether the mode of acquisition be cession or international adjudication must depend upon the particular circumstances under which the territory was received, and the terms of any relevant treaties or instruments.