The Rise of the Territorial State and The Treaty Of Westphalia

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I. INTRODUCTION

Territory is one of the most important ingredients of Statehood. It is a tangible attribute of Statehood, defining and declaring the physical area within which a state can enjoy and exercise its sovereignty.[1] According to Oppenheim:

State territory is that defined portion of the surface of the globe which is subject to the sovereignty of the state. A State without a territory is not possible, although the necessary territory may be very small.[2]

Indispensably States are territorial bodies. In the second Annual message to Congress, December 1. 1862. in defining a Nation, Abraham Lincoln identified the main ingredients of a State: its territory, its people and its law.

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1   The term sovereignty is a complex and poorly defined concept, as it has a long troubled history, and a variety of meanings. See Crawford J, The Creation of States in International Law (1979) 26. For example, Hossain identifies three meanings of sovereignty:

1. State sovereignty as a distinctive characteristic of states as constituent units of the international legal system:

2. Sovereignty as freedom of action in respect of all matters with regard to which a state is not under any legal obligation: and

3. Sovereignty as the minimum amount of autonomy which a state must possess before it can be accorded the status of a sovereign state.

Hossain K. *State Sovereignty and the UN Charter* (Oxford. MSD Phil D) (1964) 3227 as quoted in Crawford J. supra at 27. However, generally sovereignty can be defined as 'supreme authority - independent of any other earthly authority - it implies independence all round, within and without the border of the country. Oppenheim L, *International Law* 8th ed. (1955) 118-119. The learned Max Huber, Arbitrator in the Island of Palmas Arbitration. states: 'Sovereignty, in the relation 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 function of a state.' (1928) 22 American Journal of International Law 875. It is to be noted, although this idea about sovereignty is derived mainly from the writings of Bodin, (a French jurist of the 16th century), these assertions are to be found before Bodin's time. Examples of this are in Justinian's Institute and in the medieval conflicts over sovereign power between Church and State. For details. see Huntington JF. *Sovereignty: An Inquiry into the Political Good* (1959) chs 10-12.

2   Oppenheim L, *International Law* Vol - 1. 8th ed. (1955) 451-52.

He then added "the territory is the only part which is of certain durability".[3] In modern system, a successful State is a territorial Unit. As a territorial Unit, its sovereignty extends over all the individuals and other things within its given territory. According to Dunleavy and O'leary:

> |A| State is sovereign or the supreme power, within its territory and that state sovereignty extends to all the individuals in a given territory.[4]

It is needless to say, in relation to supreme authority, State territory is very important. Oppenheim further observed :

> |T|he importance of State territory lies in the fact that it is the space within which the State exercise its supreme authority.[5]

At present it is a recognised fact that States have sovereign power and exclusive authority within their territory. This imparts an equality between States.

The territorial sovereignty and sovereign equality of States are recognised by the international community. They are the most important phenomena in international relations as well. Terrotorial sovereignty and sovereign equality are also general principles of international law. But these understandings have not come in a day. There is a long history behind this achievement.

The objective of this paper is to see how the territorial State system emerged and the role of the Treaty of Westphalia in relation to the establishment of the territorial State system. The paper commences with a discussion on the significance of territoriality followed by examining the origin of and concept of territory. Territory as an Anti-Hegimonic concept and the Westphalia settlement are considered next. The paper then moves on to present Westphalia as a pioneer of territorial State practice and its importance in relation to growth of national consciousness. The changing trends of territoriality are also discussed. The paper concludes that in terms of progressive development of modern territorial State system the significance of the Treaty of Westphalia is without parallel.

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3   Duchacek ID, "Components of International and National Systems", in Duchacek ID (ed.) *The Territorial Dimension of Politics Within, Among and Across Nations* (1986) 20.

4   Johnston, R.J, "Bounded Places" in Johnston RJ (ed.) *A Question of Place: Exploring the Practice of Human Geography* (1991) 191-92.

5   Supra note 2 at 452.

II. SIGNIFICANCE OF TERRITORIALITY

Territoriality is a primary geographical expression of social power[6] which is related to the definition and operation of States. Territoriality indicates within what physical boundaries States can legitimately act. The defining of the area provides a form of communication and of enforcement control.

Origins and Concept of Territory

Jim Gottmann has described the origin of the concept of territory.[7] It derives from the Latin *Terra* for land and *Torium*, belonging to ruler. That is, Territory is the land belonging to a ruler or State. This meaning has been tracked back to 1494, approximately to the birth of the modern world economy.[8]

Although this concept emerged approximately at the same time as the world economy, it was finalised by the Treaty of Westphalia in 1648, which is recognised as the first treaty of modern international law. It confirmed that within its own territory, each State is sovereign. That is, interference in the internal affairs of another country was the first offence of international law.[9] After this treaty, many sovereign States emerged in Europe. This was the original territorial basis of the modern interstate system, the first world political map.[10] To ensure the internal order, the territorial State was deemed the most durable and comparatively most efficient unit.

III. ANTI-HEGIMONIC CONCEPTS AND WESTPHALIA SETTLEMENT

In the medieval Europe, under feudalism, there was a hierarchical system of power and authority instead of territorial sovereignty and sovereign equality. In the medieval period, sovereigns were divided into various categories. They were as follows:

(i) Some sovereigns were universally recognised as independent, both de-facto and de-jure;

(ii) Some were independent in practice but not altogether in juridical theory: and

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6   Sack R.D, *Human Territoriality: Its Theory and History* (1986) 5.

7   Gottman, J *The Significance of Territory* (1973) 15.

8   Taylor P.J. "Territoriality. State and Nation" in *Political Geography: World Economy: Nation State and Locality* (1985) 96.

9   Ibid, 96.

10   Ibid, 96

(iii) Some states were separately constituted with their own laws and institutions but dependent, such as Southern Netherlands and various states in Italy and around the Baltic.[11]

As can be seen, the territorial State system was not introduced during the medieval period. In this respect, by the beginning of the seventeenth century there was a demand for the establishment of norms and rules for peaceful relations. According to Pugh:

> |B|y the beginning of the seventeenth century the growing complexity of international customs and treaties had given rise to a need for compilation and systemisation. At the same time the growing disorders and suffering of war, especially of the thirty year war, which laid waste, hundreds of towns and villages, and inflicted great suffering and privation of peasants and city dwellers urgently called for some further rules governing the conduct of war.[12]

Settling the Hobbesian chaos, anarchy and destruction called for some rules for peace and order. There was a need for an alternative design to the hierarchical feudal concepts and other evils, which led to an anti-hegimonial alliance and establishing the balance of power. In this respect, the Westphalia settlement was a remarkable and significant development. It recognised the homogenial system and acknowledged all Princes or States as equally sovereign. It removed temporal power from the church. It was therefore a fundamental charter in nature. As a fundamental and comprehensive charter it established many rules and principles of the new society of states. Some of the general ideas clearly expressed by this charter have been echoed in the following international settlements and in the permanent congress of the League of Nations and United Nations.

The Westphalia settlement emphasised the separation and equality of states rather than the unity of Christendom. It rejected any idea that the Pope or Emperor had any universal authority.[13] The Westphalia settlement established the anti-hegimonic concepts of territorital sovereignty and sovereign equality.

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11   Watson, A "Westphalia : an Anti-Hegimonial Commonwealth of States" in *The Evolution of International Society : A Comparative and Historical Analysis* (1992) 187.

12   Henkin L. Pugh G. Schachter O. & Smit W. *Cases and materials on International Law* (1980) 3.

13   Watson A, supra n 11 at 188.

As a separate State the sovereign were no longer bound by the Church norms which regulated the conduct of lay rulers in medieval period. In order to function, they needed new rules and institutions in place of old ones.[14] To regulate the dealings of the Princes or States with each other, there developed a new concept of International law as a substitute for such norms.

So, in the strict sense the modern International law and sovereign territorial States occurred at the same time. The history of modern International law begins with the emergence of independent nation-States from the ruins of the medieval Holy Roman empire and is commonly dated from the peace of Westphalia (1648).[15]

There was no short way to the transition of territorial sovereign States from the integrated medieval hierarchical system. It was very hard and difficult. This system emerged through a triangular struggle, that is, struggle between kings and Emperors, Emperors and Popes, Popes and kings. At that stage, international relations were not based on equally distributed power, either in fact or in theory. The weak were always threatened by the strong and the survival of the weak was uncertain. The idea of territorial State was related to collective security of nations and to establish rule of law for the equal protection of sovereign States from indiscriminate use of force by the higher or stronger authority.

The territorial State system originating in the swinging between war and peace, developed as a system of political control. It evolved out of the struggle between the forces supporting the then hegimonic order[16] and those who were pushing the Europe towards a sort of secular independence and who intended to constitute a new Europe. Westphalia settled this. It ended thirty years of war. In practice, the Wesphalia settlement added some new and significant matters in relation to territorial practice. It was the first effective general congress of Europe and this congress made a scope for individual representation of the secular sovereigns.

It gave the formal sanction of territorial and equal sovereignty of secular States and coordination between them. The Westphalia settlement legitimised a sort of commonwealth of sovereign States. This legitimation of acommonwealth of sovereign states was marked as a victory because in general this was the ambition of the Princes, specially of the German Princes, both Protestant and

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14   Ibid, 188.
15   Kennedy D, "A New Stream of International Law Scholarship" (1988) 7 Wisc. International Law Journal 19.
16   Watson A, supra n 11 at 182.

Catholic in relation to The Holy Roman Empire.[17] At this stage , there emerged the idea that the co-existence of territorially separate and equally sovereign States afforded a better guarantee of peace than the Holy Roman Empire.[18]

IV.   WESTPHALIA AS A PIONEER OF TERRITORIAL STATE PRACTICE

The territorial practice was legitimised and also standardised by the Westphalia settlement. It emphased the separation of States. Therefore Christendom was divided into sovereign secular States with a thick line between them and the government were the absolute authority inside that line. This change brought a new image in every sovereign territorial limit, that is, all Governments are the exclusive authority and their decisions and arguments are exclusively carried out within their territorial limit, as the concept of Westphalian sovereignty is tied to State territory. According to territorial sovereignty, within a territory there is only one absolute temporal power, the Government of that territorial State.

This territorial division of sovereign authory, in the modern sense, was not found in the Greek city states, nor in Roman Empire, nor in Medieval Christendom. The Great Wall of China and Roman line may be an example in this context but these were not like modern times. Littimore states:

> [T]he concept of a man made great wall .. was more a product of the kind of state created with in China than of the kind of pressure against China from the steppe.[19]

Similarly the lines conceived by the Roman Empire were not real territorial divisions. They were used as a temporary stopping places where the potentially unlimited expansion of the Pax Roman had come to a halt.[20] Very often they unilaterally expanded their empire and their territory was simply extended over another territory. In the context of sovereign territorial division, the Westphalia settlement is notable. As a first treaty of modern International law, it opened the door to and legitimised the territorial practice of exclusive authority and sovereign State equality.

The Treaty of Westphalia embodied some normative conceptions which were very significant in interstate relation. As these conception are significant in the international arena, they have been embodied in subsequent instruments.

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17   Ibid, 186.

18   Herz J H. "The Rise and Demise of the Territorial States" (1957) 9 World Politics 476.

19   Kratochwil F, "Of System, Boundaries and Territoriality : An Enquiry in to the formation of the State system" (1986) 39 World Politics 35.

20   Ibid, 35-36.

Two dominant conceptions of the Treaty of Westphalia have been embedded in Article (2) of the United Nations Charter. Article 2(1) and Article 2(7) are appropriate from the perspective of their interrelation.

Article 2(1) of the Charter states:

> The organisation is based on the principle of sovereign equality of all its members

and Article 2(7) states:

> [N]othing contained in the present charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter.[21]

The ideas originating from Westphalia, that sovereign equality and exclusive domestic jurisdiction are the best guantors of peace between peoples are formally perpetuated in the United Nations Charter.[22]

V. WESTPHALIA IN RELATION TO GROWTH OF NATIONAL CONSCIOUSNESS

In relation to the growth of national consciousness, Westphalia settlement is remarkable. It paved the way to look at, or even to conceive of, the national interest. This conception was reflected in the function of the European States and even now, in the changing world context, it greatly influences the modern welfare States.

At present, the number of States has grown enormously and there have emerged many changes in inter-State relations and in the State system. We know that most of the Asian, African, and Latin American Countries were once under the control of European powers. After the Second World War there came a significant change in the world politics. Through decolonisation a large number of Asian, African, and Latin American countries became independent, equal sovereign States and became member of the United Nations, once again echoing the Westphalian understanding that recognizing a community of territorial sovereign and equal States was the best method either to attain

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21 United Nations, *Charter of the United Nations and the Statute of the International Court of Justice* (1945) 4.

22 Falk R A. "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in Falk R A & Black C E (eds.) *The Future of International Legal Order* (1969) Vol. 1, 49.

or to keep peace between peoples. At present the position of these States in the United Nations is significant. They are organised in their national and economic interest.

VI.   THE CHANGING TREND

At present the idea of Globalization is active in the international arena . It emphasizes the interdependence of States. Similarly to the International Human Rights movement, it views solving socio-economic and political problems requires collective efforts and restrictions on State sovereignty. These movements argue that the problems of a country are not only territorial but global. Therefore, there is an argument of the need to increase the mutual cooperation among the States. Without totally abolishing the equal territorial sovereign power of States, they want to see the world, geopolitically, as a single place.[23] Ironically, this thinking has been running mainly by the developing countries and gradually they have gained some benefit in this respect. Whether a return to more centralized and hierarchical power can or will better serve promoting peace and order than the Westphalian model is an interesting question. Which model would best serve the factually less powerful, on which theorizes an equal independent sovereign status or one which centralizes power will likely not be the decided by the less powerful themselves. That is always a cause for concern.

VII.CONCLUSION

Today human race is divided into more than 200 States. The State system and International law have progressively developed. Interstate relations have rapidly grown in the various fields and these relations are governed by International law. The territorial sovereignty and sovereign equality of States is recognised in the interstate system. These are basic principles of International law.

These conceptions are rooted in the Treaty of Westphalia. Therefore in relation to modern State system the Treaty of Westphalia is a landmark. This treaty attempt to systemise the spheres of social and political life. By ending the thirty year war, it situates International law as a rational philosophy, a handmaiden of statehood and the cultural heir of religious and moral principle.[24]

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23   Brown R. "Globalisation and the End of the National Project", in J. MacMillan and A. Linklater (eds.) *Boundaries in Question : New Directions in International Relations* (1995) 55.

24   Supra note 14 at 14.

With time, and according to the demands of the world society, new thoughts about the interstate system have been and are still being introduced. New Institutions have been established to maintain the peaceful relations among the States. New International treaties have been concluded for the development of world system. Nevertheless, as a first treaty of modern international law the significance of this treaty is immortal because it introduced modern State system and enabled peaceful co-existence between equals. We should not forget its basic wisdom as we move forward to new models.

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