CO-EXISTENCE OF THE OLD AND NEW MODELS OF THE WORLD LEGAL ORDER OF TERRITORIALITY - WHERE DOES THE PRIMACY LIE?*

I

INTRODUCTION

The Cold War is over, political, economic, religious and cultural barriers that used to divide nations and peoples are gradually breaking, and the international community is getting pretty close to the final step leading to an interdependent or "one world". Could it, consequently, be claimed that the state-oriented Westphalian international state system stands abandoned or national sovereignties are totally lost so that from now on there will be no disputes concerning territories and boundaries between nations? This paper is purported to demonstrate that despite current integrationist tendencies, the old territorial order based on state sovereignty is just about as firm as it ever was (although some structural alterations are needed) and that disputes concerning territories or boundaries are going to stay on, with fluctuating intensity and alarm though.

II

TERRITORY, TERRITORIAL SOVEREIGNTY, AND INTERNATIONAL LAW

Territory is a fundamental concept of international law. Although possession of a land mass is not a pre-condition for acquiring personality in international law, there cannot be a state without territory. As Oppenheim has stated: "A State

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without a territory is not possible."[1] Endorsing this, another scholar has noted that statehood is inconceivable in the absence of a "reasonably defined geographical base."[2] To be able to exercise authority at the national level and to participate effectively at the international level, a territorial entity must have a territory in its possession. In particular regard to the latter, Kratochwil *et. al.* have observed: "since the extension of the European State System to the rest of the world, the possession of territory has been the precondition of the exercise of legitimate political authority on the international level."[3] Indeed, as Hill has observed, "international relations in their more vital aspects revolve about the possession of territory."[4] One of the qualifications prescribed under the well known criteria of statehood is that the state as a person of international law must have "a defined territory",[5] although it should not be taken to mean that the frontiers of such an entity should be precisely fixed beyond dispute before its existence can be recognized.[6]

[1] I Oppenheim, *International Law* 451 (8th ed., 1955). Cf. Menon, "Some Aspects of the Law of Recognition. Part II: Recognition of States", Revue de Droit International (January - March 1990), No. 1, p. 5.

[2] Shaw, *Title to Territory in Africa* 1 (1986).

[3] Kratochwil, Rohrlich, Mahajan, *Peace and Disputed Sovereignty-Reflections on Conflict over Territory* 1 (1985)

[4] Hill, *Claims to Territory in International Law and Relations* 3 (1945).

[5] See Montevideo Convention on Rights and Duties of States 1933. Menon states: "The Convention is accepted as reflecting, in general terms, the characteristics of statehood at customary international law." *supra* note 1, at 4.

[6] The German - Polish Mixed Arbitral Tribunal in the *Detuche Continental Gas-Gesellschaft* case, decided in 1929, held that the significance of the delimitation of boundaries does not imply that the state in question cannot be considered as having any territory whatever as long as the delimitation has not been legally effected. The court ruled that it would suffice if "the territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited." Ann. Dig. (1929-30), (case No. 5). In the *Mosul Boundary Dispute*, the Permanent Court of International Justice went as far as holding that a principle of title may be determined even before the territorial boundaries are precisely established. PCIJ Reports, Series B. No. 12 (1925) at 21. I Hackworth, in *Digest of International Law* (715-717), provides cases where certain entities were internationally recognized prior to fixation of boundaries. The International Court of Justice in *North Sea Continental Shelf* cases observed: "There is ... no rule that the land frontiers of a state must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations." ICJ Rep. 1969, p. 32. See Sharma, *International Boundary Disputes and International Law* 1-2, n. 4 (1976), ; Cukwurah, *The Settlement of Boundary Disputes and International Law* 3-5 (1966); Menon, *op. cit. supra* note 1, at 5.

The concept of territory plays an important role in the development of international law. International law recognizes that the possession of a land mass or territory is fundamental to the bases of national power. The size and richness in resources of the national land mass determines in large measure a state's power in relation to other states.[7] "Territory is, of course, itself a geographical conception relating to physical areas of the globe," but, as Shaw observes, "its centrality in ... international law derives from the fact that it constitutes the tangible framework for the manifestation of power by the accepted authorities of the State in question."[8] So that they may enjoy the fullest benefit from their territories as bases of power, international law protects states in their territorial integrity and independence of decision. That a state is entitled to exercise exclusive control and power (sovereignty) over its defined territory is a well known principle of classical international law. Territorial Sovereignty is a pre-condition of statehood. In the celebrated judgement in the *Island of Palmas* case, the arbitrator, Judge Huber, remarked that "... sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State."[9] The principle of territorial sovereignty — consisting of a body of rights, powers and duties in relation to a specific geographical area — encompasses the concept of independence manifesting as it does freedom of decision-making in regard to internal matters of a state as well as its external relations. As to the latter, Shaw notes that independence "is a manifestation of territorial effectiveness in relation to other entities of international law."[10]

The concepts of territory and territorial sovereignty have been ascribed a wider role in modern times. More specifically, these expressions have been projected in terms of their vital links with people. As, in the *Western Sahara* case, the Inter-

[7]Sharma, *op. cit. supra* note 6, at 1.

[8]*Op. cit. supra* note 2, at 1. Observations of Hill are also pertinent: "Territory, in the past, has been worth possessing more because it adds to the power of a state than for any other reason." *supra* note 4, at 13.

[9]II U.N. R.I.A.A. 829, 838.

[10]*Op. cit. supra* note 2, at 148.

national Court of Justice (ICJ), while addressing the question of legal ties of sovereignty between Western Sahara and the Kingdom of Morocco and the Mauritanian entity, remarked that such legal ties could not have been "limited to ties established directly with the territory and without reference to the people who may be found in it."[11] Adding, it said: "legal ties are normally established in relation to people."[12]

It has been observed that the concept of territory not only expresses the power balance between coexisting or competing entities, it also reflects the relationship between the people and the geographical space they inhabit.[13] This interrelationship has been cogently expressed by Kratochwil *et. al.* as follows: "Territory is no longer a purely administrative concept employed to delineate spheres of state authority; instead, it is directly associated with the core values which link individuals to their large community."[14] It will not be an exaggeration to state that the concept of territory represents a social process in which people participate for shaping and sharing values. The nation of territory, beyond projecting the physical aspect of life, reflects the identity (or goal values) of the society as a whole. It has also been a vehicle by which people in a defined territory have communicated with peoples of other lands and have participated in the world power process.

Just the same way as territory, the territorial sovereignty symbolizes a strong bond between a particular piece of territory and the peoples identified with, or living in, that territory, which can be seen in the form of this community of people, exercising jurisdiction within the bounds of that territory by using the governmental machinery as an instrument, "while being distinguished from other peoples exercising jurisdiction over other areas."[15]

[11] *Western Sahara, Advisory Opinion,* I.C.J. Rep. 1975, p. 4, para. 86.

[12] *Id.*

[13] *Op. cit. supra* note 2, at 3.

[14] Kratochwil *et al., op. cit. supra* note 3, at 1. Jennings has observed that a territorial change usually involved "a decisive change in the nationality, allegiance and way of life of a population." The Acquisition of Territory in International Law 3 (1963).

[15] *Op. cit. supra* note 2, at 12.

Thus, one can say that the concepts of territory, state, territorial sovereignty, independence and sovereign equality are inter-related, inclusive terms — playing as they do an important role in the promotion and development of an international legal order of territoriality. Indeed, the all-embracing notion of territorial sovereignty may be seen in terms of a social process displaying interrelationship between state, people and territory. It may also be seen in terms of a body of specific international legal rules and policies protecting states and safeguarding their independence and territorial integrity, and fulfilling "the need for security, stability and identity" felt by peoples of those territories. And above all, territorial sovereignty together with its attendant concept of sovereign equality of states serves as a strategy which a community can employ to enter into the international arena and contribute to the achievement of a viable world public order system.[16]

III

THE OLD (WESTPHALIAN) AND NEW (POST-WAR) PATTERN IN THE INTERNATIONAL LEGAL ORDER

Westphalian Model

Although the idea of territory as an essential component in the sovereignty of a geographically based community was known even to the ancient Greeks and the Romans, it was not until the Peace of Westphalia (1648) that a system of sovereign states based on defined territorial units was introduced symbolizing as it were a starting point in the formation of modern international legal order.[17] The treaties of Westphalia introduced two fundamental doctrines of complementary nature known as territorial sovereignty and sovereign equality of states. The former carried the notion of unlimited

[16]See *ibid.* at 16.

[17]In confirmation of this, Leo Gross has observed that "the Peace of Westphalia was the starting point for the development of modern International Law ...." "The Peace of Westphalia 1648-1948", 42 *Am. Jr. Int'l L.* 20-41 (1948)

sovereignty of states over territories under their control; the latter doctrine meant that each state had exclusive competence to make decisions within its territorial domain. It also meant that all states had capacity to conduct international relations.[18]

The functions of territory under the Westphalian legal order were primarily two-fold: providing security to the people against external attacks and excluding harmful effects caused by other entities. Advances in modern technology manifested in the fastest means of communication and devices of mass destruction rule out the possibility that mere possession of a territory can serve as an absolute guarantee against external attacks and violence. Also, in the ordinary course states rely on their own strength and resources to safeguard their security, but in the post-Cold War setting nations are returning to the idea of collective security, initiated by Woodrow Wilson after World War I. Even as powerful a country as the United States, as a partner of the allied powers, saw advantages in taking recourse to collective approach in the 1991 Persian Gulf crisis in seeking United Nations approval, before initiating the use of force, to secure the vacation of Iraqi occupation of Kuwait. Indeed some scholars have emphasized the need for peace-keeping forces of the United Nations for deterrence purposes, even before hostilities actually begin and even if the consent of one of the parties is not obtainable.[19] It has been suggested that if at the request of Kuwait a peace-keeping force had been deployed on its border with Iraq in August 1990, the Gulf war might have been avoided.[20] Thus, a new international order is evolving in which "collective, not unilateral, security becomes the norm."[21] The idea of such a world order was endorsed by the first Security Council Summit that met in New York at the end of January 1991. An appeal was made to strengthen the UN's capacity for "preventive diplomacy, peacekeeping and peacemaking." World leaders who met at the summit wanted the United Nations

[18]See Gottmann, *The Significance of Territory* 14 (1973).
[19]See Russett and Sutterlin, "The U.N. in a New World Order", *Foreign Affairs* 71 (1991).
[20]*Ibid.*
[21]Gaddis, "Toward the Post-Cold War World", *Foreign Affairs* 108 (1991).

to play a strong role in spotting flashpoints before they turn into major conflicts. In fact, in 1988 the Soviet Union had proposed that the United Nations could station observers along "frontiers within the territory of a country that seeks to protect itself from outside interference at the request of that country alone." "Without further authorization," according to this proposal, "the Secretary-General could send military observer missions, and fact-finding missions to a state or states where a conflict, or outside interference, threatens the peace."[22]

Similarly, the utility of the second function has also very much diminished due to threats of adverse effects posed by trans-boundary pollution, international terrorism, drug trade, virulent new diseases, nuclear fall-out, mushrooming growth of multinational corporations and economic cartels. As a consequence, the power and influence of states within their own territories have been enormously restricted. It is not a surprise, therefore, that due to these limiting factors some of the publicists in recent times have expressed serious reservations about the continuation of the sovereign territorial state-oriented Westphalian international legal order. For instance, Allott, in a recent study, has observed that sovereignty over territory will disappear as a category from the theory of international society and from its international law and that international organizations will become true international societies in their own right.[23] This is an extreme view. A more balanced view is held by Shaw who has summed up the current scenario in the following terms:

> ...structural changes in the political, economic, social, and cultural environments are altering the fundamental basis upon which the exclusitivity of the territorial state developed. As a result of this, the

[22]The aide-memoire entitled "Towards Comprehensive Security Through the Enhancement of the Role of the United Nations" [43 U.N. GAOR Annex at 2, U.N. Doc. A/43/629 (1988)], circulated by the USSR on 22 September 1988.

[23]Allott, *Eunomia: New Order for a New World* 329-30 (1990). See also De Visscher, *Theory and Reality in Public International Law* 405 (1968), stating that territory no longer possessed the same significance as before since the end of the middle ages. Gottmann, *supra* note 18, at 126, has observed: "By 1970 a motley carpet of independent sovereign states had been thrown over most of the planet."

state-centered framework of international law is in the process of being modified to accommodate these changes in the world system.[24]

New Changes - Emergence of a New Model

The on-going changes in the corpus of international law may be described in terms of the growing impact of the principle of self-determination of peoples which is now part and parcel of *jus cogens*, of respect for human rights which is universally accepted, and of international cooperation which nation states have pledged to observe.

The roots of the principle of self-determination can be found in President Woodrow Wilson's 11-point declaration and in many legal instruments of the League of Nations and the United Nations. During the League, its application, limited though it was, can be found in various provisions ensuring the protection of minorities. Subsequently, it was prominently enshrined in Article 1(2) of the Charter of the United Nations and was further referred to in Article 55. The former records one of the purposes of the United Nations being development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...." The latter provision emphasizes that observance of human rights and fundamental freedoms are essential for promoting equal rights and self-determination, and to this end, Article 56 directly obligates member states to implement the provisions of Article 1 and 55. Moreover, chapters XI and XII of the Charter, dealing with obligations of the member states in regard to non-self-governing and trust territories, can also be read as reflecting the principle of self-determination.

Practice since the establishment of the United Nations leaves no doubt that self-determination has been transformed into a binding rule of international law (*jus cogens*). In this connection, reference may be made to some of the important conventions, declarations, and resolutions adopted by the United Nations, constituting authoritative application of the Charter. In 1960, the Declaration on the Granting of Inde-

[24]*Supra* note 2, at 5.

pendence to Colonial Countries and Peoples was adopted that contained seven principles.[25] The Declaration proclaimed that all "peoples have the right to self-determination; by virtue of that they freely determine their political status and freely pursue their economic, social and cultural development." Similarly, the two 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,[26] in an identical Article 1, declared that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The states parties to the Covenants were obligated to promote the realization of the right to self-determination. Subsequently, in 1970, the General Assembly unanimously adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[27] The Declaration laid down seven principles including the one regarding equal rights and self-determination due to which "all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development." Every state is enjoined to respect "this right in accordance with the provisions of the Charter". More recent declarations of the General Assembly recognizing the right to self-determination include the Declaration on the Establishment of a New International Economic Order (1974),[28] the Charter of Economic Rights and Duties of States (1974),[29] and the Declaration on the Right to Development (1986).[30] The right to self-determination is further

[25]G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) p. 66. U.N. Doc. A/4684 (1960).

[26].G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) p. 52, U.N. Doc. A.6316 (1966) (the Covenant on Civil and Political Rights); G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) p. 49. U.N. Doc. A/6319 (1967) (the Covenant on Economic, Social & Cultural Rights). Text respectively in 6 I.L.M. at 360 and 368 (1967).

[27]G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) p. 121, U.N. Doc. A/8028 (1971); 9 I.L.M. 1292 (1970).

[28]GA Res. 3201 (S-VII); 13 I. L.M. 715 (1974).

[29]GA Res. 3281 (XXIX) 1974, 29 U.N. GAOR Supp. (No. 91) p. 52; 14 I.L.M. 251 (1975).

[30]GA Res. 41/128. Text in 28 *Indian Journal of International Law* 154 (1988).

strengthened by the pronouncements of the International Court of Justice.[31] Notice should also be taken of new trends, currently in sight, indicating the expansion of the meaning and scope of self-determination.[32] The practice of states and of the United Nations suggest that gross violation of human rights is no longer an exclusively domestic matter of a state and external interference against human rights abuses is relatively legitimate.[33] What is now suggested is that in the light of "the recent attempts at popular participation world wide, the United Nations should adopt democracy as the norm and create a corresponding global entitlement."[34] Furthermore procedures, individual as well as collective, to monitor compliance and enforce the participatory entitlement through sanctions — since its denial is a gross violation of

[31]See *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), I.C.J. Rep. 1971, p. 16, 31. See also the *Western Sahara, Advisory Opinion*, I.C.J. Rep. 1975, pp. 35-36.

[32]The success of this principle in granting independence to colonial peoples and peoples under foreign domination is now taken for granted. Self-determination has also been used in the sense of rearranging the territorial order of sovereign states with a view to meet the demands of particular groups and communities (for instance ethnic). More recently, the principle has been interpreted "as a criterion for the democratic legitimation of the governments of sovereign states." Cassese, *International Law in A Divided World* 135 (1986). Cassese takes the view that the principle of self-determination is part of *jus cogens*. *Id.* at 136. See also Gros-Espiell, "Self-Determination and *Jus Cogens*," in *United Nations Law/Fundamental Rights* 167 (Cassese ed. 1974).

[33]Through the U.N. Charter [see Articles 1(2) and 1(3)], the many Conventions and Declarations [such as the Universal Declaration of Human Rights (1948)], the two Covenants on Human Rights (1966)] as well as the consistent practice of international institutions, a general principle has emerged requiring states to refrain from gross and large-scale violation of basic human rights. In recent legal writings, this principle has been characterized as *jus cogens*. For instance, see Cassese, *op. cit. supra* note 32, at 149. Gross violations of human rights have been considered as a threat to the international peace and security, and when this happens the argument invoking non-interference in the domestic affairs of the states and the sovereign equality of states both based on the territorial concept becomes inadmissible. Schwelb has noted that the generality of the U.N. Charter position on human rights as well as the domestic jurisdiction clause have not prevented or deterred the United Nations from "considering, investigating, and judging concrete human rights situation." "The International Court of Justice and the Human Rights Clauses of the Charter," 66 *Am. Jr. Int'l L.* 339 (1972).

[34]Franck, "United Nations based Prospects for a New Global Order", 22 *New York University Journal* of *International Law and Politics* 621 (1990).

domestic human rights — should be devised. As a matter of fact, there are already some prescriptions in international law signalling recognition of the right to democracy.[35] The recent instances of spread of democracy in Eastern Europe and in the former Soviet Union, if any thing, lend urgency to the demand that the right to democratic government may be placed in an institutionalized framework with adequate provisions for its monitoring and enforcement. Horrors of World War II created a conviction that effective protection of human rights was indespensable for international peace and progress. This explains reference to the problem of human rights in the United Nations Charter's Preamble and as many as six different Articles. The Charter purposes include promotion and encouragement for human rights and for fundamental freedoms for all. The subsequent three international legal instruments — the Universal Declaration of Human Rights (1948), the Civil and Political Rights Covenant along with the Optional Protocol (1966) and the Economic, Social and Cultural Rights Covenant (1966) — together constitute an International Bill of Rights.

Whatever might have been the intention of the authors of the Universal Declaration, subsequent events and the practice of states during the past four decades have proved that it has acquired the force of customary international law binding on all states.[36] The two Covenants and the Optional Protocol, beyond creating treaty - obligations, form a comprehensive code on human rights. Concerning implementation of human rights, the Universal Declaration sought to put into force the United Nations Charter Obligations, and the two Covenants seek to enforce the obligations contained in the Universal

[35]In this connection certain provisions of the 1966 International Covenant on Civil and Political Rights are significant. See, for instance, Articles 1, 22, 25 etc., *supra* note 26. This covenant, according to Franck, "may now be regarded as having entered the process of becoming customary international law," *Supra* note 34, at 630.

[36]See Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character", in *Human Rights - Thirty Years after the Universal Declaration* 33 (Ramcharan, ed. 1979). See also Lillich in I Meron (ed), *Human Rights in International Law - Legal and Policy Issues* 116-117 (1984). Some authors suggest that the Universal Declaration has "the attributes of *jus cogens*." See McDougal, Lasswell and Chen, *Human Rights and World Order* 274 (1980).

Declaration. Additionally, the two Covenants and the Optional Protocol stipulate concrete procedures for implementing human rights.

Authority for the pledge to seek international cooperation can be detacted in Article 1(3) of the United Nations Charter stressing international cooperation in solving international economic, social, cultural or humanitarian problems and in Article 56 obliging states to take joint and separate action in cooperation with the United Nations to achieve the purposes mentioned in Article 55. The 1970 Declaration on International Law lends further substantiation to the pledge of cooperation in that it obligates states to cooperate in various spheres of international relations in order to maintain international peace and security and to promote international economic stability and progress.[37] The 1986 Declaration on the Right to Development categorically states that "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development."[38] These sort of stipulations have led one commentator to take the view that "any State is duty-bound to cooperate with other States and with the U.N. and its various agencies specializing in economic and social field."[39] A state's refusal to cooperate can in certain contexts, according to his opinion, be treated as amounting to a breach of duty attracting the imposition of "collective sanctions".[40]

The operation of the above discussed principles suggest, if anything, that the current trends in the international legal order emphasizing as they do the role of non-state entities are moving away from the territorial doctrine. Such has been the influence of the modern developments that the position of the subjects of the international community has itself changed over the years. Traditionally, the sovereign states were the sole subjects of the world community, but since the Second World War other entities have gained the status of international legal subjects that include international

[37]*Op. cit., supra* note 27.
[38]Article 3(3). See also Article 4(1) and 4(2). *Op. cit. supra* note 30.
[39]Cassese, *op. cit. supra* note 32, at 151.
[40]*Ibid.*

governmental organizations, individuals, and organized peoples such as national liberation movements.

Predominance of the Traditional Model

Do the above mentioned current trends necessarily lead to the conclusion that the Westphalian legal order based as it has been on territoriality principles faces the danger of being uprooted? The answer is obviously "no" for the reasons that follow. The territorially based view of international law still retains its pivotal position. A substantial body of principles of international law are founded upon the territorial exclusivity of the state, and indeed are aimed to preserve and protect the traditional structure of the world territorial order. The core principles of this order are: state sovereignty, territorial exclusivity of states, sovereign equality, non-intervention in the domestic affairs of states and so on. Even in the Charter of the United Nations, such territorialist principles as the protection of states' territorial integrity and political independence against the threat or use of force,[41] sovereign equality of members,[42] maintenance of international peace and security,[43] and non-intervention in essential domestic matters of any state find prominent place.[44]

In addition there are hosts of other legal instruments aiming to protect the basic principles of territoriality. For instance, the 1970 Declaration on International Law explicitly stipulates that all states enjoy sovereign equality; that each state enjoys the rights inherent in full sovereignty; that each state has the duty to respect the personality of other states; that the territorial integrity and political independence of states are inviolable; and that each state has the right freely to choose and develop its political, social, economic and

[41]Article 2(4) of the U.N. Charter. See also Article 1, of the Consensus Definition of Aggression adopted in 1974 by a Special Committee defining aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State ...." Text in 13 I.L.M. 713 (1974).
[42]Article 1(2) of the U.N. Charter.
[43]Chapters VI and VII of the U.N. Charter.
[44]Article 2(7) of the U.N. Charter.

cultural systems.[45] The Charter of Economic Rights and Duties of States (1974) has a provision highlighting the sovereign and inalienable right of states to choose their own economic as well as political, social and cultural systems without outside interference. The Charter also emphasizes every state's right to full permanent sovereignty over all its wealth and natural resources.[46] Also relevant in this regard is the Declaration on the establishment of a New International Economic Order (1974).[47] Furthermore, the 1986 U.N. Declaration on the Right to Development accords recognition to the right of peoples to exercise their full and complete sovereignty over all their natural wealth and resources.[48] There are also legal norms providing for "due regard" for sovereignty of other states. For instance, Article 30 of the Charter of Economic Rights and Duties of States declares: "All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[49] Similarly, Article 194 of the 1982 Law of the Sea Convention requires states to take all necessary measures to ensure that activities under their jurisdiction or control are so conducted as not to cause demage by pollution to other states and their environment.[50] The principle of non-intervention is protected by the U.N. Charter Article 2(7), the 1970 Declaration on International Law and certain resolutions of the General Assembly. The 1970 Declaration proclaims: "No State or group of States has the right to intervene,

[45]*Supra* note 27.
[46]*Supra* note 29.
[47]*Supra* note 28.
[48]*Supra* note 30. See also Resolution on Permanent Sovereignty over Natural Resources adopted by the General Assembly under, No. 1803 (XVII) 1962, paras 1-4, 8, 17 U.N, GAOR Supp. (No. 17) pp. 15-16; Article 193 of the 1982 Law of the Sea Convention recording sovereign rights of states to exploit their natural resources pursuant to their environmental policies. Text in 21 I.L.M. 1261 (1982).
[49]*Supra* note 29. See also Principle 21 of the Stockholm Declaration on the Human Environment (1972). 11 I.L.M. 1416 (1972). In *Trail Smelter Arbitration* (U.S. v Canada), the Tribunal ruled that under the principles of international law, no state had the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another or the properties or persons therein. 3 *U.N.R.I.A.A.* 1965-1966 (1941). Cf. The *Corfu Channel* case, I.C.J. Rep. 1949, pp. 6 and 22.
[50]Text in 21 I.L.M. 1261 (1982).

directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[51]

It is interesting to find in some of the above mentioned Declarations, which indicate a trend away from the principle of territoriality, a concurrent emphasis on territorial integrity of states. For instance, self-determination has been recognized as a binding legal norm only in the colonial contexts, but its legitimacy in non-colonial setting has been questionable. Accordingly, the Declaration on the Granting of Independence to Colonial Countries and Peoples, while acknowledging the right of all peoples to self-determination, also provides: "Any attempts aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[52] Similarly, one of the principles of the 1970 Declaration on Principles of International Law is the principle of equal rights and self-determination, nevertheless it also emphasizes the concept of territorial integrity. It states: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states... ."[53]

Moreover, modern demands for expansion of national jurisdiction into the seas culminating in the redefinition of the concepts of territorial waters,[54] contiguous zone[55] and

[51]*Supra* note 27. See also "Declaration on the inadmissibility of intervention in the domestic affairs of States and the Protection of their independence and sovereignty," adopted by the General Assembly in 1965 by Resolution 2131 (XX), text in - 5 I.L.M. 369 (1966) and the 1981 General Assembly Resolution 36/103 containing a General Declaration on this matter. Operative paragraph 11h of the latter provides that one of the consequences of the principle is the duty of states "to refrain from entering into agreements with other states with a view to intervening or interfering in internal or external affairs of other states." From this clause Cassese implies that the principle of non-interference belongs to the category of *jus cogens*, and in consequence agreements contrary to this principle will be null and void. *Op. cit. supra* note 32, at 147-148.

[52]*Supra* note 25.

[53]*Supra* note 27.

[54]Article 3 of the 1982 Convention on the Law of the Sea. *Supra* note 50.

[55]*Ibid.* Article 33.

the continental shelf,[56] and in the introduction of the new exclusive economic zone concept[57] are directed to preserve the doctrine of territoriality.[58] If any further substantiation is required, reference may be made to actions, in several fields, of the vast majority of states, especially of those belonging to the Third World, supporting or adopting the territorially-based conception of international law and emphasizing the principles of state sovereignty, domestic jurisdiction, and the territorial exclusivity of states.[59] Surely, the current trends in global cooperation in a number of specific areas as well as some new principles might have modified the state-oriented conception of international law. One can point to a number of new frontiers in international law which place new limits on state sovereignty, domestic jurisdiction and territorial integrity of states, which oblige states to promote cooperation in solving economic, social and cultural problems, and which involve non-state-entities (most of them) in the international legal process. These include international

[56]*Ibid.* Article 76.

[57]*Ibid.* Article 55.

[58]For fuller discussion, See Parts II, V and VI of the 1982 Convention on the Law of the Sea. *Supra* note 50. Of course, this Convention reaffairms the traditional freedoms of the high seas and introduces the notion of the common heritage of mankind in respect of the deep seabed and ocean floor, but the balance clearly is in favour of "sovereign rights" of the coastal states and further expansion of their national territories into the sea. *Cf.* Shaw, *op. cit. supra* note 2, at 8. Cassese's observation with reference to the 1982 Convention may be noted: "That the 'territorial' principle of national appropriation has to a great extent shattered the principle of the freedom of the high seas is hardly surprising." *Supra* note 32, at 378.

[59]See *supra* notes 42 and 44. The attitude of Third World countries is reflected in provisions of the Charter of Economic Rights and Duties of States and in resolutions concerning the "New International Economic Order". *Supra* notes 29 and 28, respectively. African view is found in the Charter of the Organization of African Unity. Section 3(3) lays stress on the sovereign equality of states, non-intergerence in the internal affairs of the states, and respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence. See also Articles 2(1) and 4. These provisions enabled the Assembly of Heads of States and Governments of the OAU at Cairo in July 1964 to adopt a resolution solemnly declaring "all member States pledge themselves to respect the borders existing on their achievement of national independence". O.A.U. Doc. AHG/Res. 16(I). The African practice in accepting the legal validity of colonial frontiers has been viewed by a Chamber of the International Court of Justice as a rule of international law. *Case concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) I.C.J. Rep. 1986, para. 20.

environmental law;[60] the law of outer space, moon and other celestial bodies;[61] the law of the sea;[62] recent legal instruments regulating international terrorism on land, in the air and the sea[63] as well as torture[64] and hostage-taking;[65] the law con-

[60]Article 30 of the Charter of Economic Rights and Duties of States provides that all "should co-operate in evolving international norms and regulations in the field of the environment." *Supra* note 29. The Convention on Long-Range Transboundary Air Pollution (1979) provides a system of exchange of information (Article 3) [18 I.L.M. 1442 (1979)]. The 1987 Vienna Convention for the Protection of the Ozone Layer provides for cooperative exchange system to protect environment against adverse effect of human activities on the ozone layer (26 I.L.M. 1516). See also Resolution on the Protection of Global Climate for Present and Future Generations of Mankind of 1989, para 9 [GA Res. 45/53 1989, 28 I.L.M. 1326 (1989)]; Convention on the Regulation of Antarctic Mineral Resource Activities (1988). Text in 28 *Indian Journal of International Law* 579 (1988).

[61]Outer space, including the moon and other celestial bodies, which, according to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, [text in 6 I.L.M. 387 (1967)], has been declared as not subject to national appropriation by claim of sovereignty, and the treaty requires that its exploration and use must be for the benefit of the mankind as a whole. The 1979 Convention on the Moon and Other Celestial Bodies goes one step further and enshrines the concept of the common heritage of mankind into it. [See Articles 4(1), 6, 11, and 18. Text in 18 I.L.M. 1434 (1979)]. The Convention excludes the right of appropriation and casts on states a duty to exploit the resources in the interest of mankind in such a way as to benefit all, including developing countries.

[62]The concept of the common heritage (see supra note 61) was incorporated in the Law of the Sea Convention (1982) as well [See Articles 136, 137 of Convention. Text in *supra* note 50]. This Convention excludes national appropriation of the area and its resources, which are declared to be vested in mankind as a whole. According to the Convention, the minerals recovered from the area may only be alienated in accordance with the relevant provisions of the Convention and the rules, the regulations and procedures of the Seabed Authority, in a nutshell according to the scheme of the equitable sharing to be drawn by the authority taking into particular consideration the interests and needs of developing states (Article 160). The concept of the common heritage is also found in "Declaration on Principles governing the Seabed and the Ocean Floor and the Subsoil thereof, Beyond the Limits of National Jusrisdiction" [adopted in 1970 in resolution 2749 (XXV). Text in 10 I.L.M. 220 (1971)].

[63]See Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft (1963). [Text in 2 I.L.M. 1042 (1963)]; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971). [Text in 10 I.L.M. 1151 (1971)]; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970). [Text in 10 I.L.M. 133 (1971)]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988). [Text in *Blackstone's International Law Documents* (Evans ed.) at 322].

[64]See International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1985). Text in 23 I.L.M. 1027 (1984).

[65]See International Convention Against The Taking of Hostages (1979). Text in 18 I.L.M. 1456 (1979).

cerning the protection of diplomats and so on.[66] Then there are some new principles like self-determination marking their impact at the international level.[67]

Most broadly speaking, the above referred changes can be explained in terms of forces of integration playing active role in the international arena. Politically, a new revolution in support of popular participation and democratic governance is sweeping through many parts of the world. In the field of international institutions, nations are reposing greater faith in collective approach and international cooperation, especially under the auspices of the United Nations. Economic integration can be exemplified by the emergence of Europe, in the form of the European Economic Community, as a strong global economic power. The EEC is now seen as a political power as well. Already an idea is floating that it should be given a permanent seat in the Security Council. At the cultural and social level, there is an ever increasing integration of ideas made possible by fast means of communication. With the relative peace existing in the world, democratic forces are moving ahead to put an end to authoritarian regimes and are persuading nations to respect individual human rights. If integrationist trends are active at the global level, so are the disintegrating forces making their weight felt on the world scene. As one commentator states: "There are also forces of fragmentation at work that are resurrecting old barriers bet-

[66]Vienna Convention on Diplomatic Relations (1961). [Text in 500 UNTS 9]; Vienna Convention on Consular Relations (1963); [Text in 57 *Am. Jr. Int'l L.* 995 (1963)]; International Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973) GA Res. 3166 (XXVIII). [Text in (Evans, ed.) *supra* note 63, at 209].

[67]However, it may be noted that the territorial concept of international law is in no way jeopardized by the principle of self-determination. Observe, for instance, Article 1(2) of the Declaration of the Right to Development (*supra* note 30) stating that the right of peoples to self-determination includes "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". This reinforces the view that the territorial basis of international law is retained under the concept of international law. This view has been supported by scholarly opinion. After stating that the application of self-determination has generally been confined to the colonial situation, Shaw has added: "Once a State has obtained independence, international law imposes a duty upon other States to respect and preserve this territorial arrangement." *Supra* note 2, at 10.

ween nations and peoples - and creating new ones - even as others are tumbling."[68] Observe, for instance, the rising wave of renewed nationalism as a disintegrationist factor manifesting itself in German unification and in breaking up of Yugoslavia and the Soviet Union. The break away republics in the latter two countries are now being recognized as independent states based on the principles of sovereign equality and territorial exclusivity.

IV

PARALLEL EXISTENCE OF THE OLD AND NEW MODELS — THE QUESTIONS OF PRIMACY

For the forgoing reasons, new intergrationist trends as well as norms of functional cooperation pose no realistic danger to the prevailing dominant concept of the territorial exclusivity of states and sovereign equality. The emerging "new" framework of the legal order is not powerful enough to replace the fundamental elements of the old structure. Moreover, while the positive elements in the new "global cooperation" approach cannot be ignored, it will be incorrect to say that the two approaches -- old and new -- are exclusive. Ample support exists in the current scholarly writings in favour of these formulations. Recognizing the unique coexistence of the "Westphalian" and "post-War" patterns in the international legal order, Cassese has observed that whereas the principles rooted in the former are less controversial and command greater respect among sovereign states, the principles reflecting the latter model are relatively weaker, since certain sections of the world community are reluctant to adopt them. Consequently, in case of conflict "the principles belonging to the old model tend to override the "new ones".[69] Thus, his conclusion is that "the old and new models coexist, for the latter has not succeeded in supplanting the former, which resurfaces again and again ...."[70] Similarly Shaw has

[68]Gaddis, *op. cit. supra* note 21, at 105.
[69]Cassese, *op. cit. supra* note 32, at 163.
[70]*Ibid.*

noted that the two models may exist side by side as dual tendencies in international life, but "the territorial pattern of international law remains the dominant one even if its predominance has been modified."[71]

At the political level, there is a competing existence of processes of integration and of disintegration. As one scholar has remarked "... the problems we will confront in the post-Cold War World are more likely to arise from competing processes - integration versus fragmentation - than from the kinds of competing ideological visions that dominated the Cold War."[72] The current scene is exemplified by the recent events in the former Soviet Union. The formation of the Commonwealth of Independent States (CIS) following the triumph of liberalism — an integrating feature — has had some disintegration results as well which can be seen in growing rivalries between the CIS and Ukraine over such issues as the control of Black Sea fleet and in the announcement by four republics to form their own armies. Pressures are also building for boundary realignments between some of the republics.

Impact on the World Territorial Order

The increasing tension between the two processes — integration and disintegration — has consequences for the stability of the world territorial order. For instance, the redrawing of the boundaries of Germany and the former Soviet Union may have unsettling effects on the territorial *status quo* in other parts of the world. Demand for revision of boundaries may be revived, especially in Africa and the Middle-East where the colonial boundaries were drawn with little regard for ethnic, nationality and religious considerations. This has led one scholar to remark: "If the Lithuanians are to get their own state, it will not be easy to explain to the Palestinians or the Kurds or the Eritreans why they should not have theirs also. If the boundaries of the dying (now dead) Soviet empire are to be revived, then why should boundaries established by empires long since dead be preserved?"[73] The revival

[71]*Supra* note 2, at 11.
[72]Gaddis, *op. cit. supra* note 21, at 108.
[73]*Ibid.* at 110.

of boundary and territorial claims may take place despite the ruling by the Chamber of the International Court of Justice in the case concerning the *Frontier Dispute* (Burkina Faso/Republic of Mali) that the territorial *status quo* existing at the time of independence is now a firmly established rule of international law whenever decolonization occurs.[74]

In view of the above discussion it can be asserted that issues concerning title to territory and modes of acquiring or transferring them, also the importance of the principles of territorial sovereignty, may continue to dominate international law, and their study by scholars is bound to be useful.

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[74] I.C.J. Rep. 1986, p. 554, para. 20.