

# INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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which signals a fundamental alteration in the constitutive principles of sovereignty, particularly as regards the Third World periphery.

#### DECOLONIZATION

President John F. Kennedy once characterized decolonization as “a worldwide declaration of independence.”<sup>17</sup> This is certainly true of sub-Saharan Africa, where in 1955 there were only three independent countries: Ethiopia, Liberia, and South Africa. By the end of 1965, there were thirty-one, and decolonization was looming even in the so-called white redoubt of southern Africa. By 1980, the entire continent was sovereign apart from Namibia.

African decolonization, like the partition of the continent three-quarters of a century earlier, is the instance of a straight line in international history: a political artifact largely and in some cases almost entirely divorced from substantive conditions; a supreme example of “rationalism” in Michael Oakeshott’s meaning of politics “as the crow flies.”<sup>18</sup> It is not only possible but has become conventional to regard a single year – 1960, the year of Prime Minister Harold Macmillan’s famous “wind of change” speech and of the decolonization of the entire French African empire – as a historical dividing line separating the era of European colonialism from that of African independence. That year is matched only by 1884–85, when the continent was subjected to international partition according to rules established by a conference of mainly European states meeting in Berlin.

The political map of Africa is devoid by and large of indigenous determinations in its origins. All but a very few traditional political systems were subordinated or submerged by the colonialists. Decolonization rarely resulted in their elevation. “Most of the boundary lines in Africa are diplomatic in origin and, in very many instances, they are that abomination of the scientific geographers, the straight line.”<sup>19</sup> In colonial Africa, according to an important study, “the ultimate decisions in the allocation of territories and the delimitation of borders were always made by Europeans.”<sup>20</sup> Despite the fact that it was European in origin, the

<sup>17</sup> Quoted by E. Plischke, *Microstates in World Affairs* (Washington, DC.: American Enterprise Institute, 1977), p. i.

<sup>18</sup> Oakeshott, *Rationalism in Politics*, p. 69.

<sup>19</sup> G. L. Beer, *African Questions at the Paris Peace Conference* (New York: Scribners, 1923), p. 65.

<sup>20</sup> S. Touval, *The Boundary Politics of Independent Africa* (Cambridge, Mass.: Harvard University Press, 1972), p. 4.

political map of Africa was accepted in its entirety by post-colonial African governments. A 1964 resolution of the Organization of African states considered “that the borders of African States, on the day of their independence, constitute a tangible reality” and declared “that all Member States pledge themselves to respect the borders existing on their achievement of national independence.”<sup>21</sup> Political Africa is an intrinsically imperial cum international construct.

Colonial governments were never particularly large or imposing, and it is something of a misnomer to speak of them as colonial “states.” They were comparable not to states but, rather, to small provincial, county, or municipal governments in European countries. We come close to committing the historical fallacy of retrospective determinism if we conceive of them as emergent or prospective national states. A. H. M. Kirk-Greene refers to the British colonial service in Africa as “the thin white line.”<sup>22</sup> When we speak of a colonial government in Africa we are usually referring only to several hundred and occasionally – in the larger dependencies such as Nigeria and the Belgian Congo – several thousand European officials. Their numbers could be small because colonies were not sovereign: rather, they were parts – often small parts – of a far larger transoceanic imperial state which backed up the colony. Their presence was absolutely crucial, however, and enabled the modest governing apparatus to be a going concern. Unlike the Indian civil service, these administrations were never substantially indigenized at decision-making levels before independence. For all intents and purposes they were the colonial state.

In substance, decolonization typically involved the resignation or retirement of European administrators, which therefore meant the elimination of the crucial operative component of empirical statehood. It also involved the loss of the imperial backstop, of course. The new rulers usually could not replace the operative component because there was no group of Africans with comparable experience in running a modern government. After the Europeans left, the new states consequently acquired the unintentional characteristics of “quasi-states” which are summarized below. The Congo, for example, collapsed with the abrupt departure of the Belgians in 1960 and could only be restored to a marginal

<sup>21</sup> As quoted in A. McEwen, *International Boundaries of East Africa* (Oxford: Clarendon Press, 1971), p. 22.

<sup>22</sup> A. Kirk-Greene, “The Thin White Line: The Size of the British Colonial Service in Africa,” *African Affairs* 79 (1980), pp. 25–44.

semblance of organized statehood by a large-scale UN rescue operation. Most other ex-colonies deteriorated more gradually into pseudo-statehood. They are all preserved more or less in this condition by new accommodating norms of international society.

Independence, therefore, was not a result of the development of individual colonies to the point of meeting classical empirical qualifications for statehood. On the contrary, it stemmed from a rather sudden and widespread change of mind and mood about the international legitimacy of colonialism which aimed at and resulted in its abolition as an international institution. During and after World War II, colonialism became controversial and finally unacceptable in principle. Self-determination for ex-colonies was transformed into a global human right during the same period. Whatever else it may also have been, decolonization was an international regime change of the first importance: a “revolutionary” change, as Puchala and Hopkins put it.

Independence could occur widely and rapidly across Africa because it basically required little more than agreement or acquiescence concerning a new international legal principle that acknowledged as incipiently sovereign all colonies which desired independence. It was essentially a legal transaction: African elites acquired title to self-government from colonial rulers, with the transfer generally recognized – indeed promoted and celebrated – by the international community and particularly the UN General Assembly. \* \* \*

#### QUASI-STATES

When we look at the contemporary African states, we immediately notice the extent to which most of them depart from current conceptions and expectations of statehood. It is not that they, along with all other states, to some extent fail to live up to their ideals. Rather, it is that they do not disclose the empirical constituents by which real states are ordinarily recognized. African states frequently lack the characteristics of a common or public realm: state offices possess uncertain authority, government organizations are ineffective and plagued by corruption, and the political community is highly segmented ethnically into several “publics” rather than one. The effect is to confuse political obligation almost fatally:

Most educated Africans are citizens of two publics in the same society. On the other hand, they belong to a civic public from which they gain materially but to which they give only grudgingly. On the other hand, they belong to a primordial public from which they derive little or no material benefits but to which they are

expected to give generously and do give materially. To make matters more complicated, their relationship to the primordial public is moral, while that to the civic public is amoral. . . . The unwritten law . . . is that it is legitimate to rob the civic public in order to strengthen the primordial public.<sup>23</sup>

This statement discloses what undoubtedly is the fundamental predicament of statehood in Africa: its existence almost exclusively as an exploitable treasure trove devoid of moral value. Unlike solidly established authoritarian states, moreover, the typical African state's apparatus of power is not effectively organized. Corruption and incompetence infiltrate virtually every agency of government, not merely hampering but in most cases undermining state autonomy and capacity. Corruption is integral rather than incidental to African politics.<sup>24</sup> Self-enrichment and personal or factional aggrandizement constitute politics. Many "public" organizations are thoroughly "privatized" in the unusual sense that they are riddled with nepotism, patronage, bribery, extortion, and other personal or black market relationships. In what has become a modern classic Stanislav Andreski coins the apt term "kleptocracy" to characterize African systems of government.<sup>25</sup>

The state in Africa is consequently more a personal- or primordial-favoring political arrangement than a public-regarding realm. Government is less an agency to provide political goods such as law, order, security, justice, or welfare and more a fountain of privilege, wealth, and power for a small elite who control it. If there is a consensus among political scientists it is probably that the state in Africa is neo-patrimonial in character.<sup>26</sup> Those who occupy state offices, civilian and military, high and low, are inclined to treat them as possessions rather than positions: to live off their rents – very luxuriously in some cases – and use them to reward persons and cliques who help maintain their power. According to

<sup>23</sup> P. Ekeh, "Colonialism and the Two Publics in Africa," *Comparative Studies in Society and History* 17 (1975), p. 108.

<sup>24</sup> Robert Williams, *Political Corruption in Africa* (Aldershot, England: Gower Publishing, 1987), chap. 1.

<sup>25</sup> Stanislav Andreski, *The African Predicament: A Study in the Pathology of Modernization* (New York: Atherton Press, 1968), chap. 7.

<sup>26</sup> See, among others, Thomas S. Callaghy, *The State-Society Struggle: Zaire in Comparative Perspective* (New York: Columbia University Press, 1984); Christopher Clapham, *Third World Politics* (Madison: The University of Wisconsin Press, 1985); Robert H. Jackson and Carl G. Rosberg, *Personal Rule in Black Africa* (Berkeley: University of California Press, 1982); and Victor T. LeVine, "African Patrimonial Regimes in Comparative Perspective," *The Journal of Modern African Studies* 18 (1980), pp. 657-73.

a candid analysis, “west African governments represent in themselves the single greatest threat to their citizens, treat the rule of law with contempt, and multiply hasty public schemes designed principally for their own private and collective enrichment.” “Development” in such circumstances is empty rhetoric: “a world of words and numbers detached from material and social realities.”<sup>27</sup>

Large segments of national populations – probably a big majority in most cases – cannot or will not draw the necessary distinction between office and incumbent, between the authority and responsibility of officials and their personal influence and discretion, upon which the realization of modern statehood depends. Many governments are incapable of enforcing their writ throughout their territory. \*\*\* Most African countries, even the smallest ones, are fairly loose patchworks of plural allegiances and identities somewhat reminiscent of medieval Europe, with the crucial difference that they are defined and supported externally by the institutional framework of sovereignty regardless of their domestic conditions. \*\*\*

Can we speak intelligibly of African “states” in such circumstances? Arguably we cannot, because they obviously are not yet substantial realities in the conduct of public officials and citizens. They are nominal by and large: abstractions represented by written constitutions, laws, regulations, and the like which yet have too little purchase on behavior to realize the conditions of empirical statehood. The reality is the non-statal and anti-public conduct briefly described. \*\*\*

Some international theorists therefore speak of these countries as “nascent,” “quasi,” or “pseudo” states to draw attention to the fact that they are states mainly by international “courtesy.”<sup>28</sup> They enjoy equal sovereignty, as Bull and Watson point out, but they lack established legal and administrative institutions capable of constraining and outlasting the individuals who occupy their offices; “still less do they reflect respect for constitutions or acceptance of the rule of law.”<sup>29</sup>

African states are indeed states by courtesy, but the real question is why such courtesy has been so extensively and uniformly granted almost entirely in disregard of empirical criteria for statehood. It is surely because a new practice has entered into the determination and preservation of statehood on the margins of international society. The new states \*\*\*

<sup>27</sup> Keith Hart, *The Political Economy of West African Agriculture* (Cambridge: Cambridge University Press, 1982), pp. 104–5.

<sup>28</sup> Bull and Watson, *International Society*, p. 430.

<sup>29</sup> *Ibid.*

possess “juridical statehood” derived from a right of self-determination – negative sovereignty – without yet possessing much in the way of empirical statehood, disclosed by a capacity for effective and civil government – positive sovereignty.<sup>30</sup> Juridical statehood can be understood as, among other things, the international institution by which Africa and some other extremely underdeveloped parts of the world were brought into the international community on a basis of equal sovereignty rather than some kind of associate statehood. It was invented because it was, arguably, the only way these places could acquire constitutional independence in a short period of time in conformity with the new international equality.

#### JURIDICAL STATEHOOD IN INTERNATIONAL LAW

We can begin to clarify the juridical framework of African states by glancing at the relevant international law on the subject. Although “juridical statehood” is not a legal term of art, there are of course established legal practices concerning the criteria of statehood. \*\*\*

The usual point of departure for analysis of these criteria is Article 1 of the Montevideo Convention on Rights and Duties of States (1933), which declares: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”<sup>31</sup> Ian Brownlie notes that the core legal idea of a “state” is a stable political community in a territory with an established legal order. “The existence of effective government, with centralized administrative and legislative organs, is the best evidence of a stable political community.”<sup>32</sup>

These empirical criteria are the successors of classical positive international law which emphasized qualifications for admission to the community of states. The main difference from former (late 19th and early 20th century) doctrine is the absence of the standard of “civilization” criterion, which emerged in support of European expansion into the non-Western world to deal not only with the philosophical problem of knowing which governments to recognize as “authentic” sovereigns but

<sup>30</sup> See Robert H. Jackson, “Negative Sovereignty in Sub-Saharan Africa,” *Review of International Studies* 12 (October 1986), pp. 247–64.

<sup>31</sup> Quoted by Ian Brownlie, *Principles of Public International Law*, third ed. (Oxford: Clarendon Press, 1979), p. 74.

<sup>32</sup> *Ibid.*, p. 75.

also with the practical problem of protecting the persons, property, and liberties of Europeans in non-Western countries.<sup>33</sup> By the 1930s, however, that qualification was controversial and emphasis had shifted to "effective government." It was the latter criterion which defenders of colonialism ordinarily used to ward off demands by African nationalists for immediate self-government.

This criterion is problematical, however. Part of the difficulty is conceptual. \*\*\* Governments are "institutional" rather than "brute" facts in which or concepts of government are bound to enter.<sup>34</sup> Legal and political practice is what ultimately determines effective government, and not the reverse. And these practices have changed fundamentally. The problem is disclosed in legal practice.<sup>35</sup> \*\*\* Writing of Zaire (the Congo) in the early 1960s, following the abrupt departure of the Belgians, when the government literally collapsed, James Crawford comments:

Anything less like effective government it would be hard to imagine. Yet despite this there can be little doubt that the Congo was in 1960 a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was approved without dissent.<sup>36</sup>

Other considerations were evidently more important than this one. The criterion is also problematical in reverse cases. For example, Rhodesia was an effective government at least from 1965 to 1975 when, with the independence of neighboring Mozambique, the civil war began to undermine it. Crawford remarks: "There can be no doubt that, if the traditional tests for independence . . . applied, Rhodesia would . . . [have become]. . . an independent state."<sup>37</sup> However, these tests do not apply any longer and have been replaced by something else. \*\*\* Crawford concludes: "The proposition that statehood must always be equated with effectiveness is not supported by modern practice."<sup>38</sup>

<sup>33</sup> See G. W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), chap. 2.

<sup>34</sup> "A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said that a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules." J. Crawford, "The Criteria for Statehood in International Law," *British Yearbook of International Law 1976-1977* (Oxford: Oxford University Press, 1978), p. 95.

<sup>35</sup> See the discussion of "effective control" in Malcolm N. Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986), pp. 16-24.

<sup>36</sup> Crawford, "Criteria for Statehood in International Law," pp. 116-17.

<sup>37</sup> *Ibid.*, p. 162. Also see the penetrating analysis of the Rhodesian case in James, *Sovereign Statehood*, pp. 153-60.

<sup>38</sup> Crawford, "Criteria for Statehood in International Law," p. 144.



Insofar as the criterion has any content today, it is not that of actual effectiveness but of title to exercise authority within a certain territory. In theory this is a "category mistake," but in international legal and political practice, it is merely an expediency. All ex-colonial governments in Africa today have the title, but far from all are actually effective throughout their territorial jurisdictions. The effectiveness of some is extremely dubious.

An international society in which substantial political systems \*\*\* are denied legal personality, while quasi-states \*\*\* enjoy it, is indicative of new international practice. And according to this practice, once sovereignty is acquired by virtue of independence from colonial rule, then extensive civil strife or breakdown of order or governmental immobility or any other failures are not considered to detract from it. We see international law adapting to the new, inclusive, pluralistic, egalitarian, and far-flung community of states, by a definite and indeed pronounced loosening of empirical qualifications on sovereign statehood. It could not be otherwise if there must be a world exclusively of sovereign states and entirely devoid of colonies, protected states, associate states, or any other nonsovereign jurisdictions.

This change arguably reflects the ascendancy of a highly accommodating international morality which, at its center, contains the principle of self-determination as an unqualified, universal human right of all ex-colonial peoples. It is revealed perhaps most clearly in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples, which affirmed that "all peoples have the right to self-determination" and that "inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence."<sup>39</sup> Subsequently it has been disclosed by various UN Resolutions condemning colonialism as not only illegitimate but also illegal and justifying anticolonial revolutions.<sup>40</sup> In short, one cannot at the same time have empirical qualifications on statehood and such a right institutionalized within the same international regime. Decolonization was necessary to go from old facts to new rights.

Nowadays, at least in Africa \*\*\* the key if not the sole criterion of statehood is legal independence, based on the ground of self-determination, which is of course a juridical and not an empirical condition. This is almost exactly the reverse of historical practice. Sovereign statehood, as

<sup>39</sup> *Everyman's United Nations* (New York: United Nations, 1968), pp. 370-71.

<sup>40</sup> See especially UN General Assembly Resolutions 2621, 2627, and 2708 of Session XXV, 1970, and 3103 of Session XXVII, 1973.

previously indicated, originated both logically and historically as a de facto independence between states.<sup>41</sup> States had it “primordially”: “the nature of the sovereign state as constitutionally insular is analogous to that of the individual as a developed personality, dependent indeed upon society, yet at the same time inner-directed and self-contained.”<sup>42</sup> Traditional sovereignty was like the predemocratic franchise: it was determined by capacities and competencies and therefore acknowledged inequality.

When sovereignty was linked to recognition in nineteenth-century positive international law, it was still based on the postulate that the recognized political entity was primordially capable of modern and civilized government. Recognition was “a sort of juristic baptism.”<sup>43</sup> The analogy rings true because of the reasonable assumption that the one being baptized had the marks and merits of a state. This was reflected in the small number of independent as compared to dependent political systems. In short, statehood was still prior to recognition. Even the practice of “constitutive recognition” was the acknowledgment of relevant political facts which warranted the baptism of some but not all political entities. In other words, sovereignty by its original nature was a privilege of the few rather than a right of the many.

Today in \*\*\* Africa this relationship is reversed. Independence is based primarily on an external universal right rather than an internal particular reality. \*\*\* Juridical statehood divorced from the empirical conditions of states now evidently has a place in international law.<sup>44</sup>

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#### A NEW DUAL CIVIL REGIME

These changes disclose the emergence of a new dual civil regime. According to Martin Wight, “the dual aspect of the states-system” was

<sup>41</sup> The historical practice involved was expressed in early modern times by the new and radical claim: *Rex est imperator in regno suo* – the king is emperor within his own realm. See McIlwain, *Political Thought*, p. 268. Also see the brief but penetrating discussion in Martin Wight, *Power Politics*, 2d ed. (Baltimore: Penguin Books and Royal Institute of International Affairs, 1986), pp. 25–26.

<sup>42</sup> Wight, *Power Politics*, p. 307. Also see Crawford, “Criteria for Statehood in International Law,” p. 96.

<sup>43</sup> Crawford, “Criteria for Statehood in International Law,” p. 98.

<sup>44</sup> Self-determination is part of the *jus cogens* according to Brownlie, *Principle*, p. 515. He also notes (p. 75) that “self-determination will today be set against the concept of effective government, more particularly when the latter is used in arguments for continuation of colonial rule.”

conceived originally, if tentatively, by Grotius. "There is an outer circle that embraces all mankind, under natural law, and an inner circle, the *corpus Christianorum*, bound by the law of Christ."<sup>45</sup> Dualism in different forms has persisted in international relations ever since. It is a very big subject, of course, and as yet there exists no comprehensive account of which I am aware.<sup>46</sup> However, it is possible to review briefly the changing images of dualism in international relations to gain some background perspective on the dual civil regime which exists today and the place of juridical statehood in it.

Three approximate "stages" are discernible in the development of international dualism. The first is that apprehended by Grotius: an outer or universal circle governing the relations of mankind and reflected in the *jus gentium*; and an inner circle of international law among Christian-European nations. Relations between the two spheres, between Europe and the rest of the world, were nevertheless pragmatic politically, uncertain morally, and untidy legally.<sup>47</sup> They were conducted on a basis of rough equality notwithstanding the accelerating inequality of power in favor of Europe, and they expressed a fair measure of international toleration. There was not yet anything resembling a global regime under common rules.

Insofar as European relations with Africa were concerned,

African heads of state had not yet been downgraded from Kings to Chiefs . . . . African states were clearly not considered members of the family of nations. They sent no accredited ambassadors to Europe and received none in return . . . . Nevertheless, their legal rights were recognized in a series of treaties on which the Europeans based their own rights to their footholds along the coast.<sup>48</sup>

It was a tentative and initially accommodating encounter between two utterly different worlds, but Africa was a political world and not merely *terra nullias*. Traditional continental Africa is far better characterized by anthropology or sociology, however, than by political theory, jurisprudence, diplomatic history, or international law. It was a world of societies more than states: "the nation-State in the European sense did not really develop in Africa."<sup>49</sup> Even "states" in the anthropological

<sup>45</sup> M. Wight, "The Origins of Our States-system: Geographical Limits," in *Systems of States* (Leicester: University of Leicester Press, 1977), p. 128.

<sup>46</sup> The closest to it is Bull and Watson, *International Society*.

<sup>47</sup> Ian Brownlie, "The Expansion of International Society: The Consequences for the Law of Nations," in Bull and Watson, *International Society*, p. 359.

<sup>48</sup> P. D. Curtin, *The Image of Africa*, vol. 1 (Madison: University of Wisconsin Press, 1964), pp. 279-80.

<sup>49</sup> Shaw, *Title to Territory*, p. 30.

definition – centralized political systems – of which there were not a large number, exercised uncertain control, and “the authority and power of the central government faded away more and more the further one went from the centre toward the boundary. Thus boundaries between the states were vague, sometimes overlapping.”<sup>50</sup> Although there were of course complex and particular customs which regulated intercourse among contiguous local societies, “(t)here was no African international system or international society extending over the continent as a whole, and it is doubtful whether such terms can be applied even to particular areas.”<sup>51</sup> Africa scarcely existed even as a politically recognizable, not to mention a diplomatically recognized, international jurisdiction.

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After the middle of the 19th century a new form of international dualism appeared which was connected with European colonial expansion in Asia and Africa: rough equality and diversity was replaced by precise hierarchy and uniformity in the relations between European and non-European countries, with the former in a position of superiority. The determination of sovereignty throughout the world now derived from a Western and specifically liberal concept of a civil state which postulated certain criteria before international personality could be recognized. As previously indicated, these included the standard of “civilization” as well as effective government. Europe had the power and the will to impose this conception on the rest of the world. Even highly credible non-Western states which were never colonized, such as Japan, had to assert their statehood in these terms.<sup>52</sup> The consequence – and arguably the design – was the establishment of numerous colonial dependencies in those parts of the world, such as Africa, which were not considered to have any positive claim to sovereignty on these grounds and could therefore legitimately and legally be ruled by Europeans. The rules were clearly biased in favor of the “civilized,” who also happened to be the strong.<sup>53</sup>

<sup>50</sup> J. Vansina, *Kingdoms of the Savanna* (Madison: University of Wisconsin Press, 1966), pp. 155–56. Also see Lucy Mair, *African Kingdoms* (Oxford: Clarendon Press, 1967), chap. 1.

<sup>51</sup> H. Bull, “European States and African Political Communities,” in Bull and Watson, *International Society*, p. 106.

<sup>52</sup> See Hidemi Suganami, “Japan’s Entry into International Society,” in Bull and Watson, *International Society*, chap. 12.

<sup>53</sup> “[S]trong states accepted the legitimacy of colonialism and weak states would not challenge the status quo.” Puchala and Hopkins, “International Regimes,” p. 75.