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Author(s)	Ohbuchi, Niemon
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THE STATE AND THE INTERNATIONAL LAW

By Niemon Ohbuchi

I

The law of a community binds, as a general rule, the will of those who perform volitional activities as the constituents of the community. The law, however, may bind the will of those who are not the constituents of the community when necessary from the legal point of view. By "the legal point of view" here is meant the point of view from within the law itself, and the above-mentioned necessity arises to ensure the mutual life among the constituents of the community. And the "constituents of the community" mean the human factor of the community stipulated as such by the law of the community with their qualifications all prescribed by the law of the community. The law binds, as a rule, the will of the will-exercising bodies that are stipulated by the law as the constituents of the community. Now, the community of nations exists where a number of states maintain such volitional relations among themselves as are necessary for their existence. In this kind of community, therefore, it is evident that states are, as a general rule, the constituents of the cmmunity when viewed from the standpoint of the law deriving from the will of states, i. e. the international law. That is why states are said to be the legal constituents of the community of nations, and the international law binds, as a rule, the will of each state in international relations[1].

This, however, does not mean that what the international law directly binds are confined to states. It also binds the will of those will-exercising bodies which are not states. In this case, the international law, in binding the will of those other than states, is after all binding the will of states. In other words, it is recognized as law among the states carrying on international relations that a certain international law binds the will-exercising bodies

1) Oppenheim's International Law, Vol. I, 3rd Ed., 4th Ed., 5th Ed.

other than states.

In this sense, the international law does not necessarily bind the will of states alone, but it does bind the will of states first of all, since it regards states as the constituents of the community of nations. This is not a mere theory but is attested by the reality of international relations. Thus the international law prescribes the qualifications of a state, stipulates its capacities, provides the acquisition and lapse of its rights and obligations, and legally regulates its relations with other states. Here lies the direct bearing of the international law upon the state. This connection between the international law and the state arises from the necessity of the state in maintaining its relations with other states. Because of this necessity the state is willingly bound by the international law.

As has already been stated, the international law stipulates how a state comes into being as such within the meaning of the international law. According to the existing international law, the substance of the relative stipulations may be classified into three: (1) that an organization called a state does exist, (2) that this state is capable of enjoying the international community life and (3) what is called the recognition of state has been given to this state. A new state just founded, therefore, is not a state within the meaning of the international law unless it satisfies the three requirements mentioned above.

The stipulation of the existing international law to the effect that a state should satisfy the above-mentioned three requirements betore it becomes a state within the meaning of the international law or the subject of the international law, is based on the fact that the international law is the norm of the will or actions of states when they carry on their mutual relations. The state is an organization and no organization can exist without a norm, especially a juristic norm. A state exists because the people who constitute the state are bound by the juristic norm that allows the existence of the state. The existence of a state here, however, concerns its people alone and does not in itself apply to other peoples. But these other peoples, too, constitute their respective states by their own laws of constitution. Therefore, there are no normative relations between one state and another, which means

there are apparently no actual or social relations. When, however, will-exercising bodies enter into mutual relations, it becomes necessary for them to restrain their will mutually and through these restraints arise the normative or legal relations. Therefore, normative relations must wait for social relations, the two taking place simultaneously. The mere existence of more than two states does not necessarily lead to their social relations. Before that, those states must recognize each other as will-exercising bodies.

This mutual recognition must be made by the will of respective states, which means that the will of each state is bound by such mutual recognition. Thus the mutual recognition becomes the law between the states concerned. When these states carry on social relations with other states ever expanding the circle until all these relations are conceived as one community, the law of recognizing each other becomes the law concerning the qualifications of the constituent of this community.

When the law stipulating that states must be mutually recognized before they can be states in their mutual relations has come to exist in the community of nations, and if a new state just founded enters into relations, through the procedure of mutual recognition, with the states which are already the constituents of the international community, the existing law concerning the qualifications of the state naturally applies to the relations between the new and the old states. Therefore, in today's community of nations, a newly-founded state is considered to gain its full status in the light of the international law when the new state and the old constituents of the international community come to take some mutual actions as states.

The above interpretation of the international law concerning the establishment or recognition of state will settle many controversial issues centering around the recognition of state; for instance, so-called Constitutive Theory vs. Declarative Theory concerning the effect of the recognition of state; the controversy upon the legal status of a state which has not yet been recognized; whether the recognition of state is a unilateral legal act or bilateral, etc. According to this interpretation, the Declaration Theory loses its ground. Seen from the standpoint of the international law, a newly-founded state is not a state within the meaning of the in-

ternational law until it is given recognition[2]. But, apart from the international law, the new state is of course a state. In this case, a state is not immediately a state within the meaning of the international law. Then, a state which has not yet been recognized, is not a state within the meaning of the international law, but it is certainly a state from other points of view and can legally be a state when recognized by other states in future. As to whether the recognition of state is a unilateral legal act or bilateral, it must be understood that the recognition is neither a unilateral legal act nor a bilateral one, for it is a factual act given effect by the international law[3]. All legal acts, whether unilateral or bilateral, must be the acts of those who are the subjects of law. When one of the parties is not the subject of law, there can be no legal act. A state is not the subject of the international law before it becomes a state within the meaning of the international law by obtaining the required qualifications. Therefore, no act between an unrecognized state and the constituents of the international community is a legal act.

II

When a certain number of people found a state in order to lead a group life and this state comes to possess the qualifications stipulated by the international law so that it can establish legal relations with other states, the state is said, in the light of the international law, to have acquired "capacity of enjoyment of rights" (Rechtsfähigkeit; hereafter called "passive legal capacity") and "capacity to perform legal acts" (Handlungsfähigkeit; hereafter called "active legal capacity"). The state that has thus acquired these capacities is an organization whose constituting members have already begun their group life. Therefore, the state as an organization already possesses an organized will. When the international law gives passive and active legal capacities to a state, it

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2) Opposite views include: Kunz, Die Anerkennung der Staaten im Völkerrecht; Kelsen, Das Problem der Souveränität; Verdross, Die Verfassung der Völkerrechtsgemeinschaft.

3) Scholars who regard the recognition as a bilateral act include: Verdross, Die Verfassung, S. 127; Anzilotti, Lehrbuch des Völkerrechts, S. 119-120.
Scholars who regard the recognition as a unilateral act include: Franz Pfluger, Die Einseitigen Rechtsgeschäfte im Völkerrecht, 1936, S. 133-167.

does not create the will of the state; the international law can not do that. It only gives a certain legal effect, under certain conditions, to an organization which already exists as a will-exercising body.

The passive and active legal capacities in the international law are different from those in the civil law in that the former are given by the international law to a state on the premise that it is already a will-exercising body or a competent being capable of carrying on social activities. The legal capacities in the civil law concern the legal relations in civil life, and are similar to those in the international law in that they both concern the legal relations in community life, but the civil law provides first of all passive legal capacity of a natural person giving him the capacity to enjoy civil rights, and then stipulates the active legal capacity or the capacity to perform legal acts upon maturity to a certain degree of the faculty of volition. This is probably because the subjects of the civil law are natural persons whose faculty of volition grows to maturity by degrees, and there can be legal relations between mature persons and immature persons which must also be regulated. Therefore, the civil law provides a legal means to supplement the faculty of volition of such incompetent persons as minors and other whose faculty of volition is defective: the provision for the legal representative. On the other hand, the passive and active legal capacities in the international law are of the state which is considered fully capable of exercising its will, and there is no need for supplementing the will-exercising capacity of a state. Therefore, there is no institution of legal representative in the present community of nations. Any state recognized as such in the international law acquires both passive and active legal capacities simultaneously with its foundation unlike the case of natural persons.

As is evident from the above considerations, the establishment of a state according to the international law means that the new state comes to possess both passive and active legal capacities. In reality, the active legal capacity of a state is expressed in its diplomatic relations with other states. By "diplomatic relations" here is meant the relations of a state with other states according to the international law. Therefore, to maintain diplomatic relations

is a proof that the state is a possessor of active legal capacity. In the international law, such a state is said to have diplomatic competency or to be a diplomatically competent state.

In the international law, the state is a possessor of diplomatic competency. Therefore, the moment it loses its diplomatic competency, it is no longer a state within the meaning of the international law. But whether such a state is still an organization called a state as a place of group life for its people, has nothing to do with the international law. Even though the diplomatic competency according to the international law has been lost, there still can exist an organization called a state.

As has already been stated, the requirement for a new state in acquiring the diplomatic competency is the recognition of the state. A new state does not become a possessor of diplomatic competency or active legal capacity as well as passive legal capacity according to the international law until it obtains recognition. From this point of view of the passive and active legal capacities also, the Declarative Theory can not be upheld as a theory of the existing international law. To illustrate further, the Declarative Theory regards any new state as a possessor of passive legal capacity immediately it is founded[1]. And yet, such a state does not possess diplomatic competency until the competency is clarified by recognition. Thus, according to the Declarative Theory, the passive legal capacity of a state is first recognized and then the active legal capacity. This is nothing but a proof that the theory neglects the fact that a state is an organization complete in its faculty of volition—a fact in the eye of the international law.

As a general rule, juridical person in a national law comes to lose its active legal capacity in accordance with the norm of its internal constitution, that is, the articles of association or endowment. In other words, when a juridical person becomes unable to exist as a social being or will-exercising body according to its articles of association or endowment, the juridical person loses its active legal capacity and ceases to exist in the light of the private law concerned. Likewise, a state exists as a will-exercising body by virtue of its national law stipulating its internal

1) Cf. Bluntchli, Das moderne Völkerrecht, 1878; Brierly, The Law of Nations, 1936; Kelsen, Das Problem der Souveränität, 1928.

structure, especially, the Constitution. By its Constitution, a state exists as a social being with faculty of volition. It follows then that when a state ceases to be a will-exercising body, it also ceases to be a social being capable of exercising its will. The international law regulating international relations can not neglect this fact. In other words, when a state ceases to be a will-exercising body according to its Constitution, it also ceases to exist in the light of the international law. This occurs when the Constitution on which a state is founded is removed by a social force different from that which is maintaining the Constitution. The existing Constitution is upheld by the common will of a group of people who wish to maintain the state by that Constitution. But when the will of another group of people different from or against that of the former group comes to prevail and entirely neglects the existing Constitution, the present state must lose its normative ground and ceases to exist. In further detail, when the present Constitution is nullified by a common will different from the existing one, the state founded upon the present Constitution loses its qualifications as a state, and if a new Constitution is established by a new group-will, the new state thus founded is not the same with the old one but an entirely new state. The former state, with its Constitution nullified, not only loses its qualifications as a state but also ceases to be a will-exercising body as an organization. This is a natural conclusion from the fact that a state is an organization based on the norm upheld by the people who constitute it. In other words, a state exists with the norm or law of constitution and perishes with the same law. The international law can not neglect this point; when a state perishes in the way mentioned above, it also loses both active and passive legal capacities according to the international law.

These considerations apply to the changes of Governments by revolution. Here the following objection may be raised: Since a state consists of the people, the territory and the national system or sovereignty, it maintains its identity, even if the national system has changed, as long as the people and the territory are the same. But the people and the territory can be regarded as the elements of a state only because a group of people established an organization called a state by a Constitution, which is the expression of

their common will, upon a certain area as the place of their group life. Without this Constitution there can be no people nor territory as the elements of a state. Therefore, after the old national system has been destroyed by a revolution, the state can not be considered to maintain its identity even if some laws, for instance, laws concerning civil life, are still observed among the people. Originally, civil relations can exist without any national system; therefore, laws concerning them can exist apart from the national system. It is because the people admit, in the Constitution, the state intervention in their civil life that the civil code, commerical code and other private laws are enacted by the state. Therefore, the continued observance of the same private laws after a revolution can not serve as a proof of the identity of the new and old states.

As is stated above, the state whose Constitution has been nullified by a revolution loses its qualifications as a will-exercising body. The intennational law can not neglect this point, since it is the law among the states with the above-mentioned characteristics. When a state ceases to exist from the standpoint of its Constitution, it ceases to exist in the light of the international law as well. According to theories of the international law in the past, when a new Government is established upon the same people and the same territory after a revolution, the new state is considered identical with the old from the viewpoint of the international law, and all the international rights and obligations of the former state are taken over by the new Government or state. But, in this case, the newly-formed Government can not perform international legal acts until it is recognized by the Governments of other states as being capable of performing such acts. This is what is called the recognition of Government[2].

Those who believe in the "recognition of Government" distinguish the establishment of a new state from that of a new Government and maintain that in the latter case the state continues to exist as a state. But, as long as the state is an organization, it is only by the internal law constituting the organization that we can decide whether it continues to exist or not. This is evident

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2) Scholars who distinguish the recognition of state from that of Government include: Kelsen, Das Problem der Souveränität, 1928; Verdross, Die Verfassung der Völkerrechtsgemeinschaft, 1926.

from the observation not only of the international relations but also of the social relations within a state, for instance, the establisnment, reorganization and dissolution of a corporation. Accordig to the view upholding the recognition of Government, a newly-established Government can not immediately represent the state and perform legal acts internationally until it is so recognized by other Governments. In the meantime, such a state is a holder of passive legal capacity but can not perform legal acts internationally. Then how will it assert its rights and obligations during this interval? If there were the institution of legal representative in the international community, the question could be easily settled. As it is, it is entirely of no use to recognize only the passive legal capacity of the state during the time between the establishment of a new Government and its recognition[3]. At the same time, this reveals the fundamental relationship between the state and the international law: the international law does not alter in any way the essential nature of the state, since it exists out of the necessity to regulate the relations between states.

III

The state which carries on its international community life is an organization constituted by a certain group of people for their group life upon a certain territory. Therefore, it is recognized by the people that the state can intervene in all the relation between the constituting members. This means that the organized will of the state, in intervening in the people's community life, surpasses the will of each individual and that of each organization within the state; in other words, each citizen or each organization within the state should obey the will of the state in the above-mentioned relations. In this sense, the state is the supreme being internally, and the other states with which it maintains social relations are also of the same character. Thus, the states carry on their mutual relations as possessors of supreme will or supreme will-exercising bodies.

The international law has its basis on the necessity for states

3) Prof. Ryoichi Taoka: Kokusaihogaku Taiko (Outline of International law) Revised & Enlarged, Vol. I.

with the above-mentioned characteristic to maintain mutual relations. Therefore, from its own point of view, the international law can not neglect, or rather, must legally guarantee this characteristic of states. Viewed from the standpoint of states, it may be said that they can not maintain their relations unless mutually recognized as supreme will-exercising bodies. Because the internal relations or internal constitution of all the states must be of equal quality before they can maintain mutual relations. In this respect, the relations between states are different from those between a state and an organization in another state or between a state and a natural person who is a constituent of another state. This can be ascribed to the character of the state as the place of group life of its people, the character which no other will-exercising body can possess. Therefore, mutual recognition of the above-mentioned character of the state must take place before one state enters into relations with other states. Here arises the necessity of establishing a legal norm concerning such mutual recognition. Once such a law has been established, each state can assert its status guaranteed by the law in dealing with other states. Seen from the standpoint of each state asserting its status, such an assertion can be considered a legal right of the state; and from the viewpoint of the international law, it can be said that the international law gives such a right to the state.

The preceding paragraph concerns the mutual recognition of the internal constitution of states when they establish relations between them. Since the internal constitution of a state is based on the fact that a certain number of people wish to lead a group life within the state, the people who constitute the state, from their own point of view, are considered not to wish to establish any larger field of group life beyond the state. This means that each relationship between one state and another is individual, and no universal field of life embracing all the states of the world can possibly be realized. Therefore, states will not constitute any universal field of life and will not be regulated by the will of such universal organization. There are occasions, however, when several states form a certain organization in order to attain a certain common aim and establish some special relations among themselves, but such special relations are confined to those states which

maintain them and do not apply universally. Moreover, such relations, even though established among all the states of the world, being special or specific, no state is bound by the organization in other kinds of relations. In short, the community of nations today is not a community like a state. Therefore, there can be no legal relations between the state and the international community itself. Thus, all the international relations in the community of nations are mutual relations between states, and the international law stipulates such relations. This comes from the character of the state mentioned above, and the international law guarantees this character as it is. In other words, the international law legally establishes the status of the state with the above-mentioned character, and the state thus acquires its legal status and can assert it against other states. In asserting such status, the state enjoys various rights guaranteed by the international law.

The state enjoys the above-mentioned rights according to the law that guarantees the character of a state as against other states or the social status of a state, and these rights may safely be said the most important and the most fundamental. In other words, the state can carry on its international community life by virtue of these rights, which in this sense can be said the basis of the international community life. That is why rights of this kind are generally called the fundamental rights of the state[1]. By these rights, states maintain mutual relations, and through these relations are established various international laws. Therefore, the above-mentioned rights can be called the primary rights in the international law[2].

Of the fundamental rights of the state in the international law, the most frequently cited are: right of independence, right of intercourse, right to mutual respect, right of self-presevation, right of equality, etc. As to their kinds and meanings, there are slight differences according to scholars, as the relative stipulations remain unwritten, but the differences are after all negligible. The right of independence is the right by which a state can handle its internal and external affairs according to its own will unless otherwise

1) Vattel, Le droit des gens ou principle de la loi naturelle, 1758, Liv. I, Chap. II; Oppenheim's International Law, Vol. I; Martens, Völkerrecht, I, 1880.
2) Cf. Verdross, Völkerrecht, 1937, though this author takes a different stand.

stipulated by the international law; the right of intercourse is the right by which a state is entitled to hold intercourse with other states; the right to mutual respect is the right by which a state is to be respected as such by other states, and the right of self-preservation is the right by which a state can defend itself against aggression by other states. All these rights guarantee the fact that the state is a place for group life of a certain people. In the first place, the right of independence, by which a state can handle its internal affairs unless placed in some special relations with other states, is a proof that the national life is complete in itself and does not require intervention from other states. The right of intercourse and the right to mutual respect show the fundamental status of a state when it maintains its relations with other states on an equal footing. The right of self-preservation also shows, on one hand, that the national life is complete in itself, and on the other, the fundamental status of a state when it maintains its relations with other states. All the above-mentioned fundamental rights prove that the state is a place of life apparently complete in itself for a certain group of people; that it is a possessor of the supreme will, or sovereignty. In this sense, these fundamental rights are the expression of the sovereign nature of the state. Since the state is a sovereign being, all the states are equal and can mutually assert the equality. The international law stipulates this as the right of equality—the right by which a state can assert its equality with other states.

It must be admitted then that states, before entering into international relations, laid down the international law by which they could mutually assert their status, and then made other international laws necessary for their mutual relations. For instance, from the intercourse between states and from their mutual respect derive the international law concerning the diplomatic privileges, the respect to the head and other representatives of the state, and the method of expressing the national will by the organ representing the state and its effect. The existing internatinnal law concerning the conclusion of international treaties, for instance, is considered to have its basis upon the above-mentioned norm of mutually recognizing the national status.

The international law stipulating the fundamental rights of the

state and other international laws made by the states acting under the first-mentioned law came into being from the necessity of states to carry on their international community life, but these laws, once established, set certain limits to the actions of states, when seen from the viewpoint of such laws. This is of course from the viewpoint of those laws, and it is needless to say that they are closely related to the will of those states which observe them. In other words, all laws are closely related to the will of the will-exercising bodies which have enacted them and act according to them, and yet they appear to be independent of the will-exercising bodies. This is one of the characteristics of laws. International laws are no exception. Therefore, the laws, once stablished out of the common necessity of states and according to their common will, give thereafter certain effects upon the relations of those states or give certain status to those states. In this respect, international laws have superiority over the state. This, however, does not mean that they are the laws enacted by a will superior to that of the state, but it means that they exist by the common will of states and yet, once established, they give certain effects upon the acts of states because of their nature as laws. Here lies a characteristic of the direct relationship between the the state and the international law.