

## SUBJECTS OF INTERNATIONAL LAW



- Subjects of international law = entities to whom or which international law applies. “An entity capable of independently bearing rights and obligations under international law” (Klabbers)
- Checklist: ask whether an entity enjoys direct rights and obligations under international law. If so, it is probably a subject.
- For centuries, **states** were held to be the only subjects of international law
- **Intergovernmental organisations** can also be subjects eg. UN, EU, IMF, WTO. Confirmed by ICJ in Reparations for Injuries Advisory Opinion (1949).
- **Minorities** can be regarded as subjects because they have at least the right to be free from discrimination.
- **Peoples** have the right of self-determination
- **Companies** are subjects in that their investments tend to be protected under international law (e.g. under bilateral investment treaties)
- **NGOs** are increasingly recognised as having a right to speak at international conferences, bring matters to the attention of international tribunal (amici curiae), and even more broadly a right to participate in the making of international law.

## Rights and Obligations of States

Rights	Obligations
Jurisdiction within territory	To respect international legal obligations
Territorial integrity	To respect the rights of other states
Sovereign equality	To refrain from violations of international law
Right to use international areas	To settle disputes by peaceful means

### WHAT IS SOVEREIGNTY?

- Island of Palmas case (1928) per Judge Huber: '[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State...Territorial sovereignty involves the exclusive right to display the activities of a State'
- Nicaragua (1986): sovereignty extends also to political independence.
- article 2(1) UN Charter: 'based on the principle of the sovereign equality of all its Members'
- article 2(4) UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'
- UN General Assembly's 1970 Declaration on Principles of International Law: 'territorial integrity and political independence...[of all States] are inviolable' a State has a right to determine its own 'political, social, economic and cultural systems'

## WHAT IS STATEHOOD?

- Arbitration Commission on Yugoslavia (Opinion No.1 (1991)): 'the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority'
- Aaland Islands case (1920): 'stable political organisation...public authorities strong enough to assert themselves throughout the territories...without the assistance of the foreign troops'
- article 1 1933 Montevideo Convention on the Rights and Duties of States:  
'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'

### (a) PERMANENT POPULATION

- It promotes the rationality for government itself. The purpose of government was the promotion of the prosperity and happiness of the populace.
- No minimum population. Andorra, Monaco, Brunei, Kiribati, Vanatu – all have a population under 1m. Tuvalu – 10,000
- 'The fact that the Vatican City is recognised as a state in international law suggests that there is no problem if an entity restricts its population almost entirely to adult men and the population is reproduced asexually, through recruitment'  
(Charlesworth & Chinkin)

### (b) DEFINED TERRITORY

It has long been accepted that the absence of clearly delimited boundaries is not a prerequisite for statehood.

- A core territory suffices, even if the boundaries remain disputed – and wisely so, as most states have boundary disputes with their neighbours. This even applies between such peaceful states as the NL and Germany or the NL and Belgium. And some states have boundaries that are so controversial that a requirement of fixed boundaries would be hopelessly unrealistic eg Israel.
- Island of Palmas Case: 'Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State'
- Deutsche Continental Gas-Gesellschaft v Polish State (1929): 'In order to say that a State exists and can be recognised as such...it is enough that...[its] territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited'
- Monaco is less than 1.95km. The issue is not size, nor indeed the mere factual possession of territory or control over territory, but rather the ability to rightfully claim the territory as a domain of exclusive authority.

*Acquisition of territory: discovery, possession, prescription, cession.*

- *Discovery*: This method of acquiring territory has long since discarded, legally speaking. It's generally accepted that discovery gave rise to an inchoate (incomplete) title, which could be perfected by further acts. This only worked when the

discovered territory was uninhabited or more likely, that the original inhabitants were somehow of 'lesser status' than their European counterparts.

- *Possession: Islands of Palmas arbitration*. The issue was sovereignty over islands located between the Philippines and Indonesia, a Dutch colony. The Spanish had discovered it and could thereby claim title, but the Dutch had actually occupied and administrated it. Huber argued that the law at the 'critical date' (the moment of cession when the Philippines became a US colony), the exercise of effective government was more important. Hence title rested to the Netherlands. A once valid title could thus be superseded in light of later events.
- *Prescription*: The Dutch settling on the Island of Palmas – authority was exercised over an extended period of time, along with the will to do so (*animus occupandi*)
- *Cession*: New Amsterdam was traded with the British and renamed New York

*Eastern Greenland Case (Denmark v Norway) (1933)*: Norway 'officially confirmed its taking possession of Eastern Greenland by a declaration in 1931. Denmark contested. ICJ:

- A claim of sovereignty based not on a particular act or title such as a treaty of cession but merely upon continued display of authority needs two criteria. (i) intention and will to act as a sovereign; (ii) some actual exercise and display of such authority. Another circumstance which must be taken into account is the extent to which the sovereignty is also claimed by some other power.
- Although Denmark had not colonised Eastern Greenland, the Court found sufficient evidence of its claim and of exercise of state authority over the area during many centuries to show that it had established title to it at the 'critical date.' Denmark had protested against Norway's actions there (e.g. conducting winter expeditions, building a wireless station). Ct said that in previous decisions, the tribunals have been happy with very little as regard to sovereign rights provided that the other state could not make out a superior claim.

*Western Sahara Advisory Opinion (1975)*

- Morocco claimed that it had 'legal ties' with Western Sahara amounting to sovereignty at the time of its colonisation by Spain in 1884.
- Was WS terra nullius? State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terra nullius.
- At the time of colonization, WS was inhabited by peoples.
- Morocco tried to make claim on 'continued display of authority'.
- The paucity of evidence of actual display of authority renders it difficult to consider this case on all fours with that of Eastern Greenland. This argument failed.
- Although there was evidence of personal allegiance owed by Saharan tribes to Morocco, there was no political authority of the sort associated with sovereignty. The Court also rejected the Moroccan claim that its sovereignty over WS had been recognised by the international community.

### **(c) GOVERNMENT**

- Arbitration Commission on Yugoslavia: 'an organised political authority'
- Aaland Islands case: 'public authorities strong enough to assert themselves throughout the territories'

- Crawford: Government is the most important single criterion of statehood
- Arbitrator Huber's opinion in the Islands of Palmas – effective government served to allow other states to contact someone if things were going wrong. In other words, if a territory lacks effective government, there is no one to contact or hold responsible should, for instance, one of your citizens get mugged. The underlying idea is that a state can be accepted as such only when it is in a position to guarantee that law and order will be upheld.
- No specific form of government is prescribed. This is controversial of course, as it means that nasty dictatorships are treated in the same way as enlightened democracies.
- Government is understood as a power to assert a monopoly over the exercise of legitimate physical violence within a territory.
- Crawford: given that nationality is dependent upon statehood, not vice versa, and that territory is defined by reference to the extent of governmental power exercised there is a good case for regarding government as the most important single criterion of statehood, since all the others depend on it.

#### **(d) CAPACITY TO ENTER INTO RELATIONS WITH OTHER STATES**

- This is no longer, if it ever was, an exclusive prerogative of States.
- No doubt States pre-eminently possess that capacity, but this is a consequence of statehood, not a criterion for it—and it is not constant but depends on the situation of particular States.
- In other words, capacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence.

## The role of recognition by the international community

1. **declarative theory:** The State existed for legal purposes from the moment of its existence de facto, and recognition and 'participation' were merely complementary benefits. Supported by the Montevideo convention. Recognition is used to specify that entity X meets the requirements of statehood. Thus, an act of recognition can declare that entity X is indeed a state, but given that X meets the requirements a declaration is not necessary.
  - **constitutive theory:** Since the community of states is essentially a political community, membership is dependent on existence by existing members
  - 1948 Charter of the Organization of American States: 'political existence of the state is independent of recognition by other states'
  - EC Arbitration Commission on Yugoslavia (Opinion No.1): 'existence or disappearance of the state is a question of fact...the effects of recognition by other states are purely declaratory'
  - EC Arbitration Commission on Yugoslavia (Opinion No.8): 'while recognition of a state by other states has only declaratory value, such recognition, along with membership of international organisations, bears witness to these states' conviction

that the political entity so recognised is a reality and confers on it certain rights and obligations under international law'

- Recognition is nonetheless important:
  - It's clear that recognition of another state will have certain legal implications. It implies that, at the very least, a commitment to respect sovereignty and territorial integrity.
  - Recognition of states presupposes the existence of the criteria for statehood ie a fixed territory, a population, effective government. It is good evidence of statehood
  - Affects the lives of individuals (give example of Kosovo extradition)
  - Lauterpacht: Where dispute exists as to the existence of the elements of statehood, recognition constitutively settles that dispute. He saw a duty for recognition where the criteria are met.
  - However it is clear that recognition does not create the state. It only confirms that the entity has reached statehood.
  - Mosler: Recognition of a state, although very important in former times, has been substituted to a large extent by admission to the UN. Although claims of non-recognition have been upheld even after the respective states became UN members (eg Arab states re Israel), it is clear that the quality of a state as a UN member cannot be denied. Thus while non-recognition will have a specific political meaning, eg underlining the wish to have change brought about in the future, that change can only be brought about in full respect of Charter obligations.

## The Badinter Commission

The break-up of Yugoslavia has provided international lawyers with lots of material on statehood, recognition, and state succession. The EU established the Badinter commission (named after its chairperson, French lawyer Robert Badinter). This Commission issued a number of highly relevant opinions on issues such as state dissolution, the applicability of the right to self-determination and how this affects the earlier internal boundaries, and state secession.

- Declared that the principle of *uti posseditis*, holding that earlier boundaries in principle continue to exist after independence or dissolutions, should be seen as a binding general principle.
- 1991: EU adopted a set of guidelines on recognition of new states in Eastern Europe.
  - Confirmed their attachment to the principles of self-determination. Adopted a common position on the process of recognition of these new states which require
    - Respect for the provisions of the Charter of the UN Final Act of Helsinki, Charter of Paris, especially with regard to the rule of law, democracy, and human rights
    - Guarantees for ethnic and national groups
    - Respect for inviolability of all frontiers
    - Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as security and regional stability
    - Commitment to settle by agreement all questions relating to state succession and regional disputes
    - Will not recognise entities which are the result of aggression. They would take into account of the affects of recognition of neighbouring states.

- EC and MS recognised as states 11 of the 15 republics of the former USSR. Russia accepted as the continuing state of the SU. Estonia, Latvia, and Lithuania had already been recognised.
- The guidelines have in mind the Montevideo Convention when they refer to the 'normal standards of international practice and the political realities in each case.' The conditions for the rights of minorities, the inviolability of borders etc go beyond the legal requirements of statehood in the Montevideo Convention.
- Guidelines are political guidelines, not legal requirements

## Self-determination (SD)/secession

### Timeline of the right of self-determination

- self-determination was invoked many times after WWII.
- UN Charter recognised SD in Art 1(2) – one of the principles of the UN is to develop friendly relations based on respect for....SD
- Chapter XI referred to decolonisation.
- Over the course of the next 30 years, most of the territories identified as 'non-self governing' by the UN were to acquire their independence.
- 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples Resolution 1514: All peoples have the right to SD. Adopted without dissenting vote. The administrative powers were called upon to take immediate steps to transfer without reservation all powers to the peoples in the trust and non-self-governing territories or all other territories which had not yet attained independence 'in accordance with their freely expressed will and desire'
- Art 1(1) of the two UN Covenants (1966 International Covenant on Civil and Political Rights and 1966 Covenant on Economic, Social, and Cultural Rights) reaffirmed self-determination. SD was given the characteristic of a fundamental human rights
- 1970 Friendly Relations Declaration, UN GA adopted by consensus. This Declaration said that SD embraces the right of all peoples 'freely to determine, without external interference, their political status and to pursue their economic social and cultural development.'
- Kashmir (after 1948) and Algeria's struggle for independence – SD chosen as the basis for negotiation
- Became applicable to non-self-governing territories, trust territories, mandates (ICJ – South West Africa, Western Sahara)

### Self-determination beyond decolonisation

Decolonization has always been the firm ground on which the right to self-determination was applied. Outside this context, it is by no means self-evident that it applies. But it's been recognised by UNGA to apply to Palestinians and South Africa.

The right of self-determination applies to a 'people' but what is the 'peoples'? Often the claim of a particular group to constitute the people goes unchallenged. Often said to have subjective and objective elements.

Said to take a different form internal sd – Quebec. ‘the recognised sources of international law establish that the right of SD of a people is normally fulfilled through internal SD.’  
A basis for the exercise self-determination on the part of a community suffering oppression or access to government (remedial succession)?

Reference re Sucession of Quebec, Canadian Supreme Court [1998]

- ‘The international law right to self-determination [gives rise to]...a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.’
- Since Quebec did not meet this threshold of a colonial people or an oppressed people and since the Quebecois had not been denied ‘meaningful access to government’ they did not have the right of secession unilaterally. They had the right to negotiate the terms of a separation under the constitution. A claim for secession SD might be sustained simply by reason of the fact that the parent State is no longer in the position of being able to justify its claim to sovereignty (remedial notion of SD).

Kosovo:

**Recognition of its independence was explicitly linked to violence directed at Albanian population**

**Was constantly emphasised as being sui generis to avoid setting precedent.**

Activity

<https://www.youtube.com/watch?v=P LnPYRSLlc>

1. Is sealand a state?
2. Does it matter that it is just outside UK territorial waters?
3. Does it matter that it has a royal family, currency, national anthem, flag?
4. Does it matter that Sea Land is a gun platform (aimed to attack Natzi bombers during WW2)
5. Does it matter that no state has recognised it?