Personality, Statehood and Recognition

Process
- Overall idea:
  o Statehood needs to be established to determine whether State/organisation/individual is an international person, capable of possessing and exercising rights and duties under IL including:
    • Make international claims before international tribunals re rights under IL
    • Subject to some or all obligations imposed by IL
    • Power to makes treaties or other international agreements binding in IL
    • Enjoy some or all immunities from jurisdiction of national courts
- Distinguish between:
  o States
    • Consider recognition as additional evidence.
  o Public International Organisation
  o Individuals
  o Non-territorial institutions

States, PIO and Individuals
States
- ‘It must first be established that ‘x’ is state, permitting ‘x’ to (look at list above)’. This requires an assessment of the criterion enunciated under the Montevideo Convention, recognised as ICL and including population, territory, government and the capacity to enter into relations, supplemented by notions of self-determination and recognition.’

- Population
  o Requirements:
    • No minimum number of population
    • Must be permanent
      • Nomads – no clear answer if crossing boundaries but unlikely to be satisfied
- Territory
  o Requirements:
    • No minimum size
    • Boundaries do not need to be fixed or undisputed BUT sufficient consistency is required – Polish State
      • Need to be broadly fixed
      • Do NOT need to be perfectly defined and settled – link to state sovereignty over territory

- Government
  o Requirements:
    • Existence of a relatively stable political organisation asserting control over the territory of the entity – Aaland Islands Case
      • ‘Stable political organisation’ NOT a requirement when (Failed State issue):
        o There is a civil war,
        o When there is a collapse of law and order in State that already exists
    • Public authorities strong enough to assert themselves throughout territories of State without resistance from foreign troops – Aaland Islands Case
  o Not require:
    • Particular constitutional patterns (i.e. bureaucracy, dictatorship or democracy)
  o Failed States:
- **Thuerer**: still recognised as states – do not lose legal capacity just the ability to exercise it → Remember once recognised as state cannot be ‘de-recognised’.
- Elements to recognise State as a failed State:
  - Geographical and Territorial
    - Internal and endogenous problems
  - Political
    - Internal collapse of law and order
  - Functional
    - Absence of bodies to represent State at international level and be influenced by outside world
  - UN organised administration on interim basis
    - Support provided assist in satisfying this criterion
    - Example – Kosovo has increased recognition but not member of UN due to likely Russian veto
- Is there a revolutionary or unconstitutional change in government?
  - If yes → need to assess recognition
    - Government Recognition
    - Note: only relevant when there is a change in government is revolutionary or unconstitutional
    - ‘In the context of revolutionary or unconstitutional change in government, current state practice varies as to whether notions underpinning the Estrada doctrine are applied. Whether the practice of recognising governments is adopted, or it becomes a judicial function, its recognition and whether the governments has the capacity to bring claims may be determined by factors including:
      - Republic of Somalia v Woodhouse Drake Carey Suisse S.A
        - Whether it is the constitutional government of the State
        - The degree, nature and stability of administrative control, if any, that it of itself exercises over territory of the State
          - Specifically this refers to whether the government can exercise effective control of the territory of the state concerned and whether this seems likely to continue.
        - Whether government has any dealings with it
          - If yes → what is the nature of those dealings
        - In marginal cases – extent of international recognition that it has as the government of the State

- **Capacity to enter into relations with other States – Independence from authority of another state**
  - ‘To determine whether independence and the capacity to enter into relations with other States exists, both factual and legal independence is required.
    - (1) Legal independence = independence from authority of a state
      - To assess:
        - ‘As the relationship between ‘x’ and ‘y’ suggests that ‘x’ may not be independent, it is apposite to compare the current situation to that of a dependent relationship, pursuant to Austro-German case per Judge Anzilotti.’
          - Characteristics of a dependent state:
            - Voluntary acts which illustrate that its sovereign will subordinated to will of another power: Austro-German Customs Case.
            - Subject to authority of another State
Superiority relationship where superior State able to impose its will on inferior State who is legally compelled to submit to that will

These are **NOT** states that delegate sovereign powers for reasons of convenience
- Argue act of delegating is a sovereign act

Factors of independent state:
- In addition to the contrast of abovementioned characteristics of a dependent state factors which bolster the conclusion supporting an independent state include:
  - Freedom to conduct foreign affairs;
  - Ability to enter into international engagements: Wimbledon Case;
  - Not subject to control by other state or entity or external political power: Austro-German Customs Union Case.

Characteristics not relevant to independence
- Submission to IL or de facto dependence
- Restrictions on liberty arising from IL or contractual agreements
  - Regardless of how burdensome obligations are

*(2) Factual independence* = Cannot be a mere puppet state – Lauterpacht
- Puppet states are dictated in regards to their government and policies
- Example - Manchukuo

‘Therefore whilst [enter facts suggesting not independent] suggest a lack of independence negating the statehood of ‘x’, focusing upon the independent will of ‘x’ and [enter facts suggesting independent] suggests that state does have sufficient independence and satisfies this criteria of statehood.’

- **Other criteria:**
  - Evidence
    - Membership with IOs only admitting states as members – e.g. UN
    - Recognition by other States (see below)

  **Recognition (IF STATE ALWAYS FINISH WITH THIS – IT FLOWS TO CONCLUSION)**
  - State Recognition
    - ‘State recognition may be a valid indicator of Statehood, given its effect varies depending on the view adopted.’
  - ‘Whilst the constitutive theory suggests that recognition is a precondition to establishing international personality, lending itself to issues including disparate outcomes if differing views are held by different states, the declaratory theory suggests recognition does not bring a state into legal existence but utilised to further national policy.’
  - ‘Whilst these divergent views exist, it is first required to assess whether a mode of recognition exists.’
    - ‘Given that [insert facts] may be interpreted as a mode of recognition, whether it is or not depends on the intent of the act
      - [Insert facts] – when inserting facts these are examples of what is a mode of recognition:
        - Entry into diplomatic relations
• The making of a bilateral treaty arranging for commercial or other relations
• Support for states admission to UN
• Come to a conclusion on the intent of the act

- ‘Therefore, given the intent of the act suggests its purpose is recognition; the effect of recognition varies depending on the theory adopted. Whilst state practice and judicial decisions support the constitutive theory (Tinoco Arbitration), its application in this instance would suggest the condition is met and ‘x’ has acquired international personality. Despite the declaratory theory only suggesting IL requirements are met (Tinoco Arbitration), this is established above, and thus bolsters the conclusion that ‘x’ does have the requisite international personality.’

○ Entity has to be created **legally** – has the state come into existence?
  • ‘Whilst not specified in the Montevideo convention criterion, State practice suggests that it may be unlawful to recognised statehood if it has been established unlawfully or for unlawful purposes’
    • New State via force
      ○ Example: Turkish republic of North Cyrus used force and declared independence only to be held invalid by UNSC
    • New State for Apartheid
      ○ Example: Rhodesia
      ○ Example: Transkei
  • Exception

○ Self-determination
  • General principle = political future of colonial/non-independent territory should be determined in accordance with the will of inhabitants, pursuant to 1960 UN Declaration
    • Embodies **erga omnes** character – East Timor Case
  • NOTE: this is important as it will go towards establishing independence for purposes of part 4 of Montevideo Convention.
  • Crawford: may **legitimise recognition** that would otherwise be premature
  • Who it applies to
    • ‘All peoples’ pursuant to 1960 UN Declaration – which is defined in Resolution 1514 and subsequent practice as entire people of a state OR all persons comprising distinctive groupings on basis of race, ethnicity and religion.
      ○ Crawford: applicable where self-determination applies as of right – including:
        ▪ Entities whose right of self determination established pursuant to international agreements (especially mandated trust and non self-governing territories);
        ▪ Existing states → right to choose form of government; and
        ▪ Parts of existing states governed in such a way as to make then in effect non-governing territories.
        ○ Kosovo.
    ○ Does NOT extend to MINORITY GROUPS (EC Conference on Yugoslavia Opinion No.2)
      ▪ Two scenarios for minority groups:
        • If minority group is a population sub-set which extends across existing boundaries
Right to self-determination conflicts with *uti possidetis*.

Whilst both are equal consideration, this conflict in tandem with the general approach of not extending self-determination rights to minority groups suggests that this particular population subset will not have such rights.

If minority group within existing boundaries or frontiers:
- Approach in Opinion No.2 was that SD rights do not extend to such minority groups and emphasised the obligations of States to minorities to respect their rights.
- Higgins holds same view.

**Public International Organisations**

- ‘Whilst traditionally international personality was reserved for States, indicted by ICJ statute Art 34(1) and UN Charter Art 4(1), emerging trends and previous decisions highlight the willingness to extend international personality to Public International Organisations.’
- ‘However, given personality is not synonymous with statehood and subsequent the totality of rights and obligations associated with the existence of a state, the rights and obligations recognised under IL for PIO is determined by purpose and function of the organisation. Also, an organisation is deemed to possess powers which, although not expressly conferred upon it, is impliedly necessary as being essential to the performance of its duties.’
  - For specific information on UN – see Reparation Case

**Conclusion**

- Possible to possess international rights and duties limited by IOs function.
- In order to determine whether it has capacity to possess rights/duties compare MF with functions of IO → go to next point if UN or EC.

- Reconciling claims made by organisation and national states
  - ‘Whilst PIO have international personality subjecting them to certain rights and obligations, including bringing certain claims, the need to reconcile these rights with national rights to bring claims for its nationals arises’
  - ‘As no rule of law assigns superiority to either party, the solution may be based on considerations of:
    - Goodwill
    - Common sense

- **Reparation for Injuries Suffered Case**
  - Established UN has international personality based on intent to exercise and enjoy functions and rights
  - UN able to bring claims:
• Against **member States** for injury suffered by the organisation and V representing the organisation
  - Damage actionable include damage to:
    - Interests of the organisation itself
    - Administrative machine
    - Property and assets
  - Note: if assessing V – state that it is an implied right to bring the action based on desire to ensure:
    - An agent performs duties satisfactorily → must feel protection is assured by Organisation
    - Agent performs independently → agent must not rely on other protection
      ▪ i.e. relying State for protections → comprises independence

• Against **non-member states** for injury to both UN and V
  - Damage actionable is same above

  - **European Community**
    - Legal personality to enter into agreements with non-member states and organisations.

**Individuals**
- ‘Lauterpacht reveals that whilst traditionally international personality was reserved for States, emerging trends and previous decisions highlight the willingness to extend international personality to individuals’
- ‘Individuals are generally recognised as objects of IL rather than subjects of IL, however, trends reveal limited substantive rights but increasing procedural rights existing. It is imperative to bear in mind, however, that it is STATES (whom substantive rights remain vested in) which must confer procedural rights on individuals via treaty
  - See First Optional Protocol to ICCPR (Australia).

**Other**
- Transnational Corporations
  - Activities affect individuals and environment across international boundaries
  - Wealth and economic power is greater than most States
  - However – seems to not have ben accorded substantive international legal personality which would consist of duties and rights
    - Standards regulating conduct exist in various instruments but these are usually in form of soft law
- Non-territorial Institutions
  - Can enter into legally binding conventions
    - Holy See and the Vatican City (Graham).

- Extinction and Succession → to determine if state ceases to exist
  - Extinction
    - State will cease to be an international person when state ceases to exist
    - Occurs when:
      - Merger:
        - One state merges into another and becomes part of it, or
        - Two or more states merge to form a single new state
      - Break-up
State breaks up so that its whole territory comprises of two or more new States

New territorial units either:
- New states, or
- One is a continuation of the original state (Succession)

Distinguish between:
- Universal succession
- Partial succession

Important to determine whether all new states or succession occurs as rights and obligations form former state will or will not pass on
- To determine:
  - Territory and population percentages
    - Not determinative but persuasive
  - Reactions of other members of International community
- When state breaks up into parts all of which became part of other
  - Usually surrounding States
- Formerly when State has been subjugated
  - I.e. annexed by victorious State after conquest in war

- Topic areas and cases not in structure
  - Protected States
  - French Indemnity Case
  - SC Canada – right to SD arises in 3 situations
  - All the guidelines on recognition etc.
Title to territory:

General
- A defining feature in statehood (see personality, statehood and recognition structure).
- Territory:
  - A region where state’s authority can be exercised (normally exclusively);
  - Determines jurisdiction of state; and
  - Determines international obligations of state.

If there is a valid claim for territory – it includes (see territorial sea for more)
- Land;
- Internal waters (including bays per Art 10 Law of the Sea 1982);
- Territorial sea, airspace over territorial sea as well as its bed and subsoil (UNCLOS 1982, Art 2 – see below);

Claim for territory – ask following questions:
‘In order to determine whether state A or state B has a title claim to state X the method of acquiring territory must be considered. The presence of factors ‘x’ and ‘y’ suggest that state A’s claim would tend toward claim based on ‘x’ and state B’s claim on ‘y’, however, further analysis is required’.

- Note:
  - Consider effect of intertemporal law on claim
    - The legal effect of an act is assessed according to the law in force when the act occurred.

- Is this boundary dispute or a territory dispute?
  - If territory dispute → next question.
    - Note: in a boundary dispute it is not the fact and mode of acquisition of territorial title that is in dispute but the proper interpretation of some instrument, award or adjudication or historical development which has established boundary in question.
      - Look to uti possidetis juris principle → obligation to respect pre-existing international frontiers: Land, Maritime Frontier Dispute Case.
- Was there a formal act suggesting an intention to occupy and was state authority being continuously and peacefully displayed in state?
  - Next ask: was there a previous sovereign before sovereign authority exercised on state (i.e. terra nullius?)
    - If yes → go to prescription
    - If no → go to occupation.
- Was sovereignty over state transferred by one state to another?
  - Go to cession.
- Was a threat or force used?
  - Go to conquest.
- Was land created as a result of natural forces
  - Next ask: did this happen slowly or quickly
    - If slowly → accretion
    - If quickly → avulsion

Most likely claims (if in doubt):
- Occupation; or
- Prescription (most likely).

Occupation:
- Only applies when *terra nullius*.
  o Note: presence of social and political organisation will suffice to negative *terra nullius* claim: *Western Sahara Case*.

- Requires TWO elements (*Eastern Greenland Case*):
  o Possession
    ▪ Requires FORMAL ACT (planting flag, making proclamation), signifying intention to occupy.
      - Example of declaration of sovereignty: *Clipperton Island Case*.
      - Example of planting flag: *Island of Palmas Case*.
    ▪ Ordinary requirement of actual settlement.
      - However, there may be exception if territory is particularly inaccessible or inhospitable: *Clipperton Island Case*.
  o Administration
    ▪ Exercise of continuing and peace display of state authority in period leading up to the **critical date** (time when dispute crystallises): *Island of Palmas Case*; *Pulau Ligitan and Pulau Sipidan*.
      - Note: ‘period’ = time long enough for other claimants to have reasonable chance of asserting rights.
      - Should be an OPEN and PUBLIC display: *Island of Palmas Case*.
      - Contingent upon kind of territory, population etc
        o May not exercise continuous and peaceful display over whole area and still claim title: *Eastern Greenland Case*.
      - Evidence of continuous and peaceful display of state authority
        o This requires a responsible authority exercises government functions (effectivites): *Minquiers and Ecrehos Case*.
          ▪ Consider Pulau Ligitan and Pulau Sipidan; Pedra Branca
            - ‘Concrete manifestations of territorial sovereignty’ – Judge Huber.
        o Peaceful (*Pedra Branca Case*)
          ▪ Acquiescence by other interested states.
            - Uncertainty regarding meaning of acquiescence → are protests enough to negative acquiescence or are further, more formal steps required such as breaking off diplomatic relations (see *Falkland Islands*).
            - Failure to respond to conduct a titre de souverain (with the title of a sovereign) may constitute acquiescence.
            - Silence may mean acquiescence if the conduct of the other state calls for a response.
            - Evidence of protest from interested states sufficient to negative this element: *Falkland Islands case*.
            - Note: if not peaceful, i.e. no acquiescence exercise of continuous and peaceful display of state authority of no legal importance and would merely be *historical consolidation*: *Fisheries Case*.
              - Never been used as basis for title

- Conclusion
  o As both requirements of possession and administration have been proven at critical date – i.e. time dispute crystallised – state A should raise a claim under occupation.

**Prescription:**
- Same as occupation HOWEVER, territory was previously under possession of another sovereign.
  o Adverse possession – exercising sovereignty over territory for so long that previous sovereign regarded as having forfeited title.
  o Immemorial possession – sovereignty authority has been exercised for so long that any competing claims have been forgotten.
- Go through same steps as occupation
  o Possession; and
  o Administration.
- Note recognition by court of possibility of attaining title via means of prescription, notwithstanding being in derogation a treaty establishing title to another state: Frontier Land Case.

**Occupation and prescription (general):**
- Test for both methods of acquiring territory relative – tribunal often satisfied with very little in way of actual exercise of sovereign rights, provided other state cannot make superior claim: Eastern Greenland Case.

**Conquest:**
- Although of historical importance it is unlikely that State A would NOT have a claim under conquest, as it is no longer possible under Briand-Kellog Pact and Art 2(4) of UN Charter which outlaws the use of threats or force as a means of acquisition of territory.
- It is important to note however, that given intertemporal law considerations, it may still be valid provided the claim for title acquired by force/threat before it was declared illegal at international law (1928).
- Query whether acquisition of title via self defence a sufficient means → suggested by Jennings and Akehurst as “curious” if self-defence permitted defender in course of defence to seize and keep resources and territory of attacker.
- Recognition
  o In 1970 Declaration on Principles of International Law → every state has a duty to refrain from recognising any territorial acquisition by another state contrary to Pact of Paris or Covenant of League of Nations.

**Cession**
- Refers to the transfer of sovereignty over state territory by the owner-state to another state.
- Can cede part of territory or whole territory (i.e. merge with another state).
- Ceding state must have intended to pass on sovereignty: Gibraltar Case.

**Accretion and Avulsion**
- Attaining sovereignty over new land created by natural forces.
- This can happen:
  o Slowly → accretion – such as through gradual movement of river bed; or
  o Quickly – avulsion – such as through volcanic action.
- If an international boundary is affected
  o Accretion – if change gradual boundary will change with it.
  o Avulsion – if change is sudden the boundary will not change: Chamizal Arbitration.
- Contiguity?? AN ALTERNATIVE WAY OF CLAIMING TITLE?
  o May give rise to rebuttable presumption for extending title based upon geographical proximity. May be presumption that any islands close to coastal state may belong by