PRINCIPLES OF PUBLIC LAW

LAWS50024

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THE CONCEPT OF A STATE

WHAT IS A STATE AND THE BENEFITS

STATE DEFINITION: No generally accepted definition of statehood (Crawford), the definitions often focus on recognition (Crawford). Difficult to comprehensively define but the Montevideo Convention provides the basis for an assessment of statehood. State is the person of international law.

Crawford: 'Statehood is rather a form of standing than a set of rights'. Not to have treaty making power is conclusive against being a state.

Two broad theories for statehood:

1. **declaratory theory:** recognition does not matter (art 3 Montevideo Convention)
   -this one is not used in practice, would lead to an extremely unstable international environment
2. **the constitutive theory:** a state is only a state when it is recognised as such

WHAT IS A STATE: *Montevideo Convention 1933* (always start with) -some internal contradiction: Article 3: "political existence of the State is independent of recognition by other States" vs Article 6 that seems to need more recognition.	
State as a person of international law should possess: (art 1 Montevideo)	
1. Permanent population	Not transient
2. Defined territory	Have jurisdiction, separable from other territories. Have to have a clear set of borders

	(200 miles away from land is the high seas- international waters)
3. Government	Have to have effective control over the defined territory and over the permanent population.
4. Capacity to enter into international relations (recognition)	Recognition is the most important factor. The standing of the state (Crawford). To get the benefits of a state, state must be recognised by other states. Eg. Vatican fails on factor 1 but is recognised, hence a state. Eg, Taiwan note recognised= not a state.

BENEFITS OF BEING A STATE *(5 legal characteristics by Crawford +2)*

- Power to enter into treaties, perform acts in the international sphere (one meaning of the term sovereign as applied to States (Crawford).

- All states are juridically equal; equal in the eyes of law (UN Charter art2(1)) (Montevideo art 4), that states have equal standing and status (Crawford) not that they have equal influence or votes.
  -UN Security Council counters this idea.

- Subject of the principle of non-intervention (basic presumption of international law) (Crawford):
  - States have exclusive control over their internal affairs (UN Charter art 2(7)) unless subject to enforcement measure under Chapter VII of the UN Charter
  - No state has the right to intervene in the internal or external affairs of another state (article 8, Montevideo)
  - Territory of a State in inviolable (art 11 Montevideo)

- Consent is needed to be subject to international adjudicative bodies (ICJ, ICC etc.), for settlement, and other international processes (Crawford)

- Derogations from the principles will not be presumed, in case of doubt international court or tribunal will tend to decide to favour the freedom of action of States whether in external or internal affairs or as having not consented to international jurisdiction. This rebuttable presumption has declined in importance (Crawford).

- Diplomats enjoy diplomatic immunity.

STATE AND TERRITORY

Link between territory and sovereignty: Jurisdiction of States within their territories applies to all inhabitants, national and foreigners (art 9 Montevideo). Law is imposed on the State's territory and all present in the territory.

Principle of non-intervention: From this we can infer that sovereignty is territory- based

GENERAL INTERNATIONAL PRINCIPLES LINKING TERRITORY AND STATE:

CHARTER OF THE UN:

Article 1 - Purposes of the UN:

1. To maintain international peace and security, to take effective collective measures for the removal of threats to peace.
2. To develop friendly relation among nations.
3. To solve international problems cooperatively and encouraging respect for human rights.
4. To be a centre for harmonising the actions in the attainment of these common ends.

Article 2 - Principles of the UN:

1. *Sovereign equality* of all members.
2. Fulfil the obligations articulated in the charter.
3. Settlement of international disputes by peaceful means.
4. *Refrain from the threat or use of force against the territorial integrity or political independence of any state.*
5. Assist the UN and refrain from assisting states which the UN is taking preventative or enforcement action.
6. UN to ensure states which are not members act in accordance with principles so far as necessary.
7. *UN not to intervene in matters which are within the domestic jurisdiction of any state.*

EXTRATERITORIALITY

Sovereignty and territory are linked; territory is one of the crucial factors for being recognised as a state. Principle of non-intervention reinforces this link. The Australian Commonwealth has extraterritorial power- it can legislate extraterritorially but must always beware of the international repercussions (int law principle of non-intervention), plus enforcement can be an issue.

COMMONWEALTH'S EXTRATERRITORIAL POWER:
S51 (xxix) external affairs: "The Parliament shall, subject to this Constitution, have power to make laws for peace, order, and good government of the Commonwealth with respect to – xxix External affairs -Horta case-cite Polyukovich v Commonwealth: The majority: "law with respect to a matter which is territorially outside Australia is a law with respect to 'External affairs' for the purposes of s51 (xxix) of the CC"

ACQUISITION OF TERRITORY

3 WAYS OF ACQUIRING TERRITORY:

1. *Conquest:* violent occupation by armed forces defeating people/government/society already on the land -pre-existing law in the land
2. *Cessation:* cede by treaty/agreement of some kind (treaty).
3. *Settlement/Occupation of terra nullius* – empty land. Terra nullius is a legal fiction and has two meanings:
    - Literal sense: land is literally uninhabited (international law conception- Western Sahara case, adopted in Australia in Mabo)
    - Extended sense: (The common law approach) it is 'practically uninhabited' -civilisation test: inhabited by people who are not civilised, don't have a self-governing organisation or social organisation. (later adopted by colonial powers but displaced by Mabo)

Crawford: Original Acquisition and Problems of Statehood
-explores the acquisition of territory and the legal status of indigenous groups

- Terra nullius- could be acquired merely by an occupation (sufficiently effective) accompanied by an intention to acquire sovereignty.
- Territory regarded as 'occupied' if the people have a degree of political organisation.
- Occupied territory can only be ceased or conquered.
- The rules on acquiring territory were to a large extent created by European powers, the benefactors of the rules.
- Historically a conflict between the views of: as long as the indigenous tribes had some political organisation the colonial powers signed treaties with the peoples (the US for example, New Zealand), only when the peoples were considered "wondering savages" were they not dealt with through treaties; and that only sovereignty as understood by the European powers precluded settlement/occupation.
- Modern international law takes the restrictive approach of the literal sense of terra nullius (Western Sahara Opinion (Morocco)- definite rejection of the civilisation as a test for terra nullius).

History of the concept of terra nullius: (pre-Mabo)

-*Blackstone (1765-1769) narrow definition of terra nullius*: 'desart and uncultivated' or 'uninhabited'.

-*Cooper v Stuart Privy Council 1889:* expanded Blackstone definition of terra nullius by describing Australia as "practically" unoccupied (uncivilised behaviour)- thus no land rights pre-existing British occupation in Australia.

-*Millirpum v Nabalco (1971):* supreme court of NT, M claims proprietary rights in Cth land, Blackburn J acknowledged existence of community and society prior to British coming to Australia, but decide not to decide as beyond power of the court, ducks the question essentially

-*Advisory Opinion on Western Sahara (1975) ICJ*= terra nullius= land EMPTY of inhabitants, 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

-*Coe v Cth (1979):* attempt in the HCA to get the terra nullius concept out, but court unwilling to go there yet.

Pre Mabo position regarding terra nullius:	
Common law UK	International law
Practically empty, civilisation requirement.	Terra nullius= empty land

MABO V QUEENSLAND (1992) 175 CLR 30	
Acquisition of territory is non-justiciable, but the court can examine the effect of the acquisition in municipal law. The crown can get radical and beneficial title only when terra nullius. Court adopts international law concept of terra nullius, hence Australia is not. Hence Crown can get radical title but not beneficial.	
"International law is an important and legitimate influence on the common law".	
Court:	High Court
Parties:	Eddie Mabo and others (Meriam people from the Murray islands in the Torres Strait and the state of Queensland)
Material Facts:	Prior to European contact the Meriam people lived on the islands in a subsistence economy based on cultivation and fishing. Land on the island was not subject of public or general community ownership, but was regarded as belonging to individuals or groups. The plaintiffs (Mabo) sought a declaration that the Meriam people were entitled to the Murray Islands as 'owners; possessors, as occupiers or as persons entitled to use and enjoy the said islands. The Queensland government argued that when the land was settled as terra nullius, the law of England became the law of the colony and by that law, the Crown acquired absolute beneficial ownership of all the land in the territory.
Legal issues:	Can the HCA examine UK sovereignty and determine the legitimacy of its actions? What legal rights to the land did the UK gain on acquisition of the territory? Validity and ramifications of the doctrine of terra nullius.
Ratio:	Essentially the court recognises the compatibility of native title and common law.
Reasoning:	Brennan J: • **Non-justiciability - Courts can't challenge the acquisition of territory**: 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'. • **Annexation of territory by exercise of the prerogative is an act of State**. • **But they can examine the legal consequences**: 'Although the question whether a territory has been acquired by theCrown is not justiciable before municipal courts, those courts have **jurisdiction to determine the consequences of an acquisition** under municipal law'. • **Reception of English common law on the basis of Australian law being terra nullius:** 'When sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of municipal law that territory … could be treated as a "desert uninhabited" country. The hypothesis being that there was **no local law already in existence in the territory**, the law of England became the law of the territory' • Thus, the law of England '**became the law of the land**, protecting and binding colonists and indigenous inhabitants alike and equally'. • So, once the Murray Islands were annexed to Queensland, the Meriam people became British subjects. 'This is so irrespective of the fact that, in 1879, the Meriam people were **settled** on their land, the **gardens were**

	being tilled, the Mamoose and the London Missionary Society were keeping the peace and a **form of justice** was being administered' ➢ **HOWEVER:** it is one thing for our contemporary law to accept that the laws, so far as applicable, became the laws of NSW and of the other Australian colonies, but it is another thing to assert that this theory accords with our present appreciation of the facts. ➢ The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a **discriminatory denigration of indigenous inhabitants'.** The basis of that theory is now unacceptable in our society. ➢ Problem Brennan faces: can apply the common law precedent, or look at the facts and reinterpret the legal logic and **look to international law** (cites Western Sahara case and the ICCPR as evidence of Australia being part of the international community); which is what he does: ➢ 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, and unjust and discriminatory doctrine of that kind can no longer be accepted' ➢ **Only when the land is terra nullius can the UK get both the radical and the beneficial title to land.** ➢ **Here UK gets the radical title but the indigenous inhabitants retain beneficial title.** ➢ 'The radical title of the Crown [over Australian land] is quite consistent with a beneficial title (native title is a type) to the land' by its original indigenous inhabitants'.
Relevant principles:	• Separation of powers- non justiciability of acquiring territory through prerogative power. • **Common law does not necessarily conform with international law but International law is an important and legitimate influence.** • Court rejects the common law conception of terra nullius and applies the international law conception of terra nullius.