

Is Australia obliged to recognise (state X) statehood and government?

Statehood

It is occasionally suggested that a state is legally entitled to be recognised if it fulfils all the criteria of statehood. Where this is true, Australia would currently be obliged to recognise (state X) as a state. However, the preponderance of state practice views that recognition is a discretionary act which is validly subject to political considerations.

Australia is therefore free to recognise (state X) statehood at its own discretion and (state X) is not entitled to demand recognition from Australia as a matter of legal right.

If this advice is correct in its conclusion that (state x) satisfies all the essential elements of statehood then no unlawful violation of (other states) sovereignty would result from Australia's recognition of (state X).

OR

If (state x) lacked any of the four essential indicia of statehood, the (other state) would be justified in arguing that an act of recognition by Australia would be an unlawful intervention in the (other states) internal affairs.

Self-determination – acknowledgement of independence

(state X) also seeks an 'acknowledgment' that its statehood dates from the declaration of independence in __ (date). This request is linked to a claim to a right of self-determination by the (state X) people. It is already evidenced that the essential criterion of effective government was not satisfied by (state X) until __ (date). Granting the acknowledgment requested would prima facie constitute an unlawful intervention in the (other states) internal affairs.

Nevertheless, there is a state practice to support the view that a new entities statehood may be recognised where a movement enjoying popular support is fighting for independence in pursuit of a right of self-determination, and the movement controls 'substantial territory'. After the declaration of independence in this case, the pro-independence forces never controlled less than approximately 1/3 of (state X) territory. This is likely to amount to 'substantial territory'.

However, it must also be shown that (state X) people enjoyed a right to self-determination. To the extent that the principle of the self determination of peoples entails a right to choose independent statehood, it applies to people only inhabiting a colonial or other dependent territory, or to a 'people' within a sovereign state who are systematically denied their right of internal self determination to pursue their own political, economic, social and cultural development. Undoubtedly, (state X) are people for the purposes of self-determination. (*final report on concept of the right of people UNESCO*), but this entitles them only to certain minority rights under customary international law and not to separate statehood. (GA resolution 47/125). This is so, unless they are systematically being denied their right of internal self determination to pursue their own political, economic, social and cultural development. (*Quebec*). (state X) was part of a sovereign state and not a colonial or dependant territory. There is also no evidence that the (state x) peoples internal rights of self-determination were being suppressed by the (other state). Therefore, (state X) declaration of independence was not made in accordance with a right of self determination.

Accordingly, Australia would likely commit an unlawful intervention in the SRT internal affairs were it to acknowledge (state X) statehood as dating from any time earlier than ____ (date).

Cases

Sierra Leone Telecomm Co v Barclays Bank (1988)

- ▶ sets out position at common law (undemocratic change of government, plaintiff company incorporate & wholly owned & controlled by SL, held account w Barclays in London, coup in SL & effectively new military government sought to change the arrangements with account & get access to \$\$, company insisted this wasn't allowed as account was subject to original signatories →
- ▶ Court found that new SL government should not be recognised) (new policy of agnosticism in UK - stopped recognising new foreign governments b/c sometimes that gave impression that there was endorsement of new government even where change in government had been achieved undemocratically) (Applying these criteria to facts of case - Justice Creswell - (1) whether/not constitutional government of the state, (2) degree, nature & stability of administrative control that new government exercises over territory, (3) whether executive of UK government has had any dealings w new foreign government, (4) marginal factor - extent of international recognition that new foreign government has assumed) (UK gov has condemned coup, has continued dealings w dethroned government, has had no dealing w new military junta, new illegal government had very little control over territory of SL →
- ▶ in conclusion, have to treat bank account under its original terms & new government couldn't get access to account) (disappearance of idea of express recognition of foreign governments → new idea of implied recognition & courts must decide in circumstances whether foreign government should attract recognition)

Reparation for injuries Suffered in the Service of the United Nations Advisory Opinion ICJ Reports (1949) 178

Facts

- ▶ Swedish UN Diplomat murdered in Israel. Found
- ▶ Recognised the multiplicity of models of personality in stressing that the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights. There are however, two basic categories
- ▶ Objective duties: operates *erga omnes*. The entity is subject to a wide range of international rights and duties and it will be entitled to be accepted as an international person by any other international person with which it is conducting relations.
- ▶ operates against the whole world, harder to achieve b/c need '50 states representing vast majority of international community...power to bring into being an entity possessing objective international personality and capacity to bring claims'

- ▶ Qualified personality: binding only the consenting subject. Any legal person may accept that another entity possesses a personality in relation to itself and that determination will operate only *in personam*.