

05 Personality, Statehood and Self-determination

International legal personality – the capacity of an actor to exercise rights, duties and powers on the international plane.

- Personality is not an absolute concept; the **capacities** of international actors vary –
 - Subject to some or all international legal obligations;
 - Power to enter into treaties;
 - Enjoys some or all immunities from the jurisdiction of national courts;
 - Can make claims before international tribunals and committees.
- What **kind** of international legal personality might an entity possess?
 1. **Statehood** – attributes:
 - a. Plenary power in the international sphere ie. external sovereignty.
 - b. Exclusive competence within its own territory ie. internal sovereignty.
 - c. Not subject to the compulsory jurisdiction of international courts without consent.
 - d. Enjoy equality – formally, not necessarily substantively
 2. **International organisation** – established by a treaty which determines its function.
 - a. Do not possess general competence, and are governed by the principle of ‘speciality’: **WHO Advisory Opinion**.
 - b. May enter into treaties.
 - c. May be responsible for internationally wrongful acts: **ILC Draft Articles on Responsibility of International Organisations**.
 - **Reparation for Injuries Case (1949)**: Could the UN pursue a claim against Israel for negligent failure to protect a UN official from being killed by a terrorist group in Jerusalem? Held that the UN is an international person, which is not the same thing as saying it is a State or legal personality, which it is not.
 3. **Individual** – before international criminal courts.
 - a. ‘Crimes against international law are committed by men, not by abstract entities’: **Nuremberg Tribunal Judgement**.
 4. **Corporation**: **Texaco Overseas Petroleum Company v Libya (1977)**
 - a. Not generally considered international legal personalities;
 - b. But may be parties to contracts governed by international law ie. ‘internationalised’ contracts.

Statehood – the law of statehood defines which entities qualify as states.

1. Does the **1993 Montevideo Convention** on the Rights and Duties of States apply? Art 1:
 - a. Permanent population – no minimum number, as long as permanent eg. Nauru with <10,000.
 - i. Native people have a connection to the land despite being nomadic (*Western Sahara*).
 - b. Defined territory –
 - i. No minimum size eg. Nauru is ~21 km².
 - ii. Boundaries/borders need not be completely fixed or undisputed (*North Sea Continental Shelf Case*); they need only be a reasonably coherent territory which is effectively governed eg. many states today like Israel and India, have unsettled/disputed borders – but this does not undermine the existence of a territory.
 - c. Government – state must have an organised and effective government of any form.
 - i. EXCEPTIONS:
 1. Where a state comes under belligerent occupation or unlawful annexation by a foreign power eg. the various states occupied by Nazi Germany during WWII did not thereby cease to be states, nor did Kuwait when Iran purported to annex it in 1990-1.
 2. Where a government collapses for internal reasons eg. civil war.
 - d. **The criterion of independence – ‘capacity to enter into relations with other states’ (central criterion for statehood) (Crawford, 2015): **Customs Regime between Germany and Austria (Customs Case)**. This criteria refers to *legal* independence ie. the State must only be subject to *international law*, not the laws of another State.

Facts	Whether a proposed customs union in Germany was compatible with Art 88 of the Treaty of Saint-Germain of 1919, which provided that the ‘ <i>independence of Austria is inalienable otherwise than with the consent of the League of Nations</i> ’.
Analysis	‘...the legal conception of independence has nothing to do with a State’s subordination to international law or with the numerous and constantly increasing states of de facto dependence which characterise the relation of one country to other countries.’ <u>‘...restrictions upon a State’s liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State, however extensive and burdensome those obligations might be.’</u>
Conclusion	Anzilotti J: ‘the independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria ... as a separate State and not subject to the authority of any other State or group of States. <u>Independence is thus understood as really no more than the normal condition of States according to international law</u> ; it may also be described as <i>sovereignty (suprema potestas)</i> , or <i>external sovereignty</i> , by which is meant that the State has over it no other authority than that of international law...’

- e. Other criteria: **EC Declaration on New States in Eastern Europe and Soviet Union (1991)** –
 - i. Respect for UN charter
 - ii. Respect for rights of ethnic groups and minorities
 - iii. Respect for borders
 - iv. Commitment to peaceful dispute settlement

None are accepted, but they point to a potential direction of development.

Reflects customary international law – the first 3 criteria (a. to c.) are ‘elastic’: **Nicholson**.

**Recognition by other states can influence the determination of statehood status, although not binding. In practice, if all UN states were to recognise the a new entity as a state, that would effectively give it statehood status.

2. EXCEPTIONS: UNLAWFULNESS – even if the criteria are fulfilled, an entity may **not** qualify as a State in some cases:

- a. Entities which acquire territory through the **use of force**.
 - i. UN Charter reflects the specific duty of states to refrain ‘from the threat or use of force against the territorial integrity or political independence of any state’ (Art 2(4)). This is a peremptory norm of customary international law – *jus cogens*.
 1. Duty of non-recognition of the entity as a State arises under CIL and is codified in the *Articles on Responsibility of States for Internationally Wrongful Acts* (see Art. 40 and 41).
 2. UNSC may also call for non-recognition.
 - ii. An entity cannot meet the criteria for Statehood if it is not sufficiently independent of the State whose use of force facilitated its attempt at succession.
 - iii. This exception may be undermined if the entity can achieve that outcome (ie. meeting all criteria) by facilitating the creation of a friendly new state.
- b. Entities created by **breaches of other peremptory norms** eg. prohibition of racial discrimination or genocide – duty of non-recognition can extend to other *jus cogens* violations.
- c. Entities created by **unilateral succession** are not an exception to the criteria ie. they are recognised as States.
- Unilateral secession is the acquisition of statehood by an entity whose territory was previously part of an existing state without that parent state’s consent.
 - **Kosovo Advisory Opinion [2010]** – majority unilaterally declared Kosovo to be independent from Serbia; some states argued that such a declaration was prohibited in international law by the principle of territorial integrity.
 - ICJ declared that ‘the principle of territorial integrity is confined to the sphere of relations between States’ → suggests that when an entity is trying to secede and does not yet qualify as a state, the entity and any individuals associated with it are not yet bound by the principle of territorial integrity, meaning that the principle does not prohibit actions such as a unilateral declaration of independence.
 - However, although a unilaterally seceding entity may not have a specific legal duty to respect its parent state’s territorial integrity, other existing states do – that duty prohibits them from recognising the entity as a state before it has acquired statehood ie. ‘premature recognition’.

3. If the features of Statehood are incomplete, see if they may have a right to secession via self-determination.

Right to Self-Determination – the right of all peoples to freely determine their political status, and freely pursue their economic, social and cultural development: Common Art 1 of 1966 ICCPR and 1966 ICESCR.

1. ICJ holds that the ‘respect for the right to self-determination is an obligation *erga omnes* [towards all]’ – meaning that the duty of respecting this right is owed not just to particular peoples, but to the international community as a whole: **Chagos Islands Advisory Opinion**.

Facts	Chagos Archipelago was administered by the UK from 1814 as part of the British colony of Mauritius. In 1965, Chagos was detached from the territory of Mauritius, established as the British Indian Ocean Territory (and islanders were displaced) to enable the establishment of a US military facility on the largest island (Diego Garcia). Mauritius became independent in 1968 and was admitted to the UN. In these advisory proceedings ICJ was asked <u>whether the process of decolonisation of Mauritius lawfully completed in 1968, and what international legal consequences flow from continued UK administration of Chagos?</u>
Analysis	People of non-self-governing territories are entitled to <u>exercise their right to self-determination in relation to the territory as a whole</u> (any detachment by administering power contrary to the will of the people of the territory is contrary to the right to self-determination). • Non-self-governing territories may reach self-government by: <u>(a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State (must be free and genuine will of the people concerned)</u>.
Conclusion	Court found that the right to self-determination crystallised as a customary rule with the adoption of Resolution 1514(XV) in 1960 (the resolution has a ‘declaratory character’). As a result of the unlawful detachment of Chagos, the process of decolonisation was not lawfully completed when Mauritius became independent in 1968. • What are the consequences of this? The UK’s continued administration of Chagos is a wrongful act entailing state responsibility, and UK must bring to an end its administration as rapidly as possible. Since respect for the right to self-determination is an obligation <i>erga omnes</i>, all states have a legal interest in protecting that right. All UN members must cooperate with the UN to complete the decolonisation of Mauritius.

2. **Western Sahara Advisory Opinion** defined self-determination as ‘the need to pay regard to the freely expressed will of peoples’ and accepted that it is part of the CIL.
 - a. Right is most likely a *jus cogens* norm
3. Are they a people or a State?
 - a. ‘Self-determination is the collective right of ‘peoples’. Various conditions or characteristics of ‘peoples’ have been put forward, including common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life, and consisting of a certain minimum number. However, no permanent, universally acceptable list of criteria for a ‘people’ exists’ (Joseph and Castan, 2013).
4. Is there a right to external self-determination? External: entitles people to exercise free will over their status relative to the outside world. ICJ noted in *Western Sahara* that sometimes a consultation may be ‘totally unnecessary, in view of special circumstances’: **Reference Re Secession of Quebec (1998)**.

Facts	Case concerned the possibility of the province of Quebec seceding from Canada.
Analysis	‘The recognised sources of international law establish that the right to self-determination of a people is normally fulfilled through <i>internal</i> self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. <u>A right to external self-determination (ie. right to unilateral secession in this case) arises only in the most extreme of cases, and even then, under carefully defined circumstances.</u>

	- International law does not specifically grant component parts of sovereign states the legal right to unilateral secession. - Extreme cases: colonial domination, alien subjugation, domination or exploitation, possibly also where internal self-determination is denied. <u>'external SD should be a last resort'; test for determining this should be held to a high standard.</u>
Conclusion	High degree of self-determination established; the population of Quebec are granted access to government.

- a. No specific international law grants the right to unilateral secession.
 - b. Only arises in specific circumstances:
 - i. People under colonial rule and non-self-governing territories ('colonial category');
 - ii. People subject to alien subjugation, domination or exploitation (e.g. the Palestinian people) outside a colonial context (smaller 'non-colonial category');
 - iii. (Possibly) people under oppression and denied internal self-determination – may give rise to 'remedial secession' – on the basis that the creation of a new state functions as a remedy for wrongs or injustice.
 1. Arguable examples feature allegations of crimes against humanity, genocide or other grave wrongs.
5. **What to do with the right to self-determination?** A **right** to create a new state is not the same as a **power** to create a new state – a new state does **not** come into being *automatically*; instead, a people's exercise of external self-determination must generally be implemented by creating a new entity that meets the Montevideo criteria of population, territory, government and independence.
- a. Become an *independent* state? Most meet the Montevideo Convention, though applied less strictly.
 - i. The law of self-determination does not supersede or replace the law of statehood – its function is to establish a regime of rights and duties that, if complied with, result in the creation of new states.
 1. A new state cannot be created by the use of force by an existing state, similar in that self-determination may make statehood easier to acquire.
 - ii. Where an administering state forcibly breaches its duty with respect to external self-determination, 'the principle of self-determination operates in favour of the statehood of the seceding territory, provided that the seceding government can properly be regarded as representative of the people of the territory'.
 1. ie. Self-determination renders the criteria of statehood less onerous – may be justified on the grounds that a parent state denying external self-determination is more likely a foreign aggressor than a state lawfully protecting its own territory.
 - b. Free association with the parent state? Eg. Cook Island and NZ.
 - c. Integration with an independent state.
6. Principle of *uti possidetis juris* (respect for existing frontiers) – when they become a new State, the border of the new entity is the border that was applied prior to its independence: **Burkina Faso/Mali (1986).**
7. **Indigenous Peoples eg. of internal self-determination** (remedial secession may be available if this right is not respected).
- a. Are they indigenous? Distinctive characteristics:
 - i. Descent from populations inhabiting the territory at the time of conquest.
 - ii. Retain some of their social, political, cultural, and religious organisation
 - iii. They self-identify as indigenous.
 - b. 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.': **Art 3 of 2007 UN Declaration on the Rights of Indigenous Peoples.**
 - c. 'Indigenous peoples, in exercising the right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions': **Art 4 of UNDRIP.**
 - d. 'Nothing in this Declaration [authorises or encourages] any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.': **Art 46(1) of UNDRIP.**
- **2017 Uluru Statement from the Heart**
 - 'We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish.'
 - 'It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.'
8. **Recognition of new States**
- a. Under international law, recognition is not necessarily a legal act, but a political discretionary act.
 - i. Lack of recognition does not necessarily entail lack of statehood – non-recognition by some states may be driven for political reasons eg. Israel, Taiwan.
 - a. Acknowledge another entity as a State
 - i. Not the same as acknowledging a government – this usually arises when there is an unconstitutional change in government.
 - b. Constitutive and Declaratory Theory
 - i. Constitutive: recognition by other states is a precondition.
 - ii. Declaratory: recognition is merely acknowledgement → tends to prevail.
 - c. Circumstances in which recognition should be withheld?
 - i. Independence as a result of unlawful use of force
 - ii. Stimson doctrine – recognition of state may not be extended when the state was created as a result of an act of aggression and the state is not independent of the aggressor state: **Kosovo Advisory Opinion** e.g. Manchukuo.