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Week 2 – Subjects and Actors in International Law

Cases in International Law

- ❖ Cases and judicial decisions do not create international law, unlike domestic common law systems
→ Art 38(1) Statute of the ICJ
- ❖ Judicial decisions do not create binding precedent, they create supplementary or subsidiary law.
- ❖ Contentious Jurisdiction → One state brings a claim against another state
 - Binding only on the two states in dispute
- ❖ Advisory Jurisdiction → International bodies (e.g. the UNGA), can ask for the court's legal opinion from the ICJ on an area of international law without the existence of a dispute or issue.
 - Advisory opinions are not binding, but are highly persuasive

States as Subjects of International Law

- ❖ A subject of international law (IL) is an entity which possesses international rights and relations, and is able to maintain rights by bringing claims and can be held responsible for breaches of obligations by being held responsible for claims made by other subjects.
- ❖ States are full subjects of IL and are the only primary subjects of IL and have complete international legal personality.
 - Primary → A State's subjectivity to IL is not conferred by other actors.
 - This is different to other subjects of IL (e.g. international organisations, individuals etc.) who have derivative legal personality → their legal personality only extends as far as states have agreed it does.
 - Complete → There are certain legal capabilities that are reserved only for States (Art 36 of ICJ Statute)
- ❖ According to the UN Charter, all states are sovereign and equal (Art 2(1) of UN Charter)
- ❖ States have supreme authority over their own territory and people.
- ❖ By definition, international law is an interference with that sovereignty.
- ❖ International law only impedes State sovereignty to the extent that States consent to it.
- ❖ Consent can be express (e.g. treaties signed by States) or implied.

Other Subjects of International Law

Individuals

- ❖ Historically, individuals could only seek redress in IL via their State.
- ❖ Now, human rights treaties (e.g. ICCPR) gives individuals limited direct rights
- ❖ For an individual to bring a claim at the international level:
 - Their State must have ratified the relevant treaty and its optional protocol
 - The claim must fall within the treaty's subject matter
- ❖ Individuals can also be held criminally responsible for international crimes by the ICC

- ❖ If the individual's state of nationality is the perpetrator of the alleged crimes, diplomatic protection is ineffective – this prompted the development of *erga omnes* obligations.

Obligations Erga Omnes & Genocide Cases

- ❖ Obligations *erga omnes* – duties owed to the international community as a whole, allowing any state to invoke them regardless of direct injury.
 - Genocide is recognised as an *erga omnes* obligations
- ❖ State-to-state claims can be brought by any state, even with no direct link to the victims.
 - E.g. The Gambia brought a case against Myanmar for alleged genocide against the Rohingya to the ICJ even though the countries are over 10,000km apart.

International Organisations

- ❖ International Organisations (IOs) created by states to pursue certain goals (e.g. peace, free trade, environmental protection) can be universal (e.g. UN) or regional (e.g. ASEAN) in their membership
 - E.g. League of Nations, WTO, WHO, OECD, EU
 - UN → has legal ability to act independently of other States to promote aims and purposes, but not to create legally binding decisions, more so for political influence, needs consent of all member States to change its Charter.
- ❖ “international organisation” means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities (Draft Articles on the Responsibility of International Organisations, 2011)
- ❖ ICJ Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations (1949)
 - Personnel working for the UN were injured or killed during their service for the UN. Their home States were unable to provide reparations for these people. The UN questioned whether they could pay reparations as a subject of IL.
 - ICJ determined that while the UN Charter does not explicitly grant itself legal personality, the functions and powers conferred on the UN led to an assessment that the UN possesses a significant measure of international personality, enabling it to act in international courts.
- ❖ Key implication → international organisations can have rights and obligations to the extent of their statutory powers, though they are not states.

Minority Groups & Self-Determination

- ❖ Self-determination – the collective right of a people to determine their own political status and pursue their economic, social and cultural development.
- ❖ Minority groups have a special status at IL - they are recognised, although they are not states, they have rights which exist, independent of the state in which they reside.

- The rights of minority groups are protected by human rights treaties (e.g. ICCPR, UNDRIP) and customary international law which recognises duties towards minority groups.

Corporations

- ❖ Corporations operate internationally and are no longer merely domestic entities. They do not possess full international legal personality, but engage with international law through limited mechanisms.
- ❖ Currently: Corporations are only liable in domestic courts; international responsibility is generally attributed to States.
- ❖ Arguments for extending legal personality of Corporations
 - Direct responsibility for war crimes → e.g. Wagner Group
 - Accountability for environmental violations → e.g. by large petroleum firms
- ❖ Without a clear treaty framework, state responsibility remains the primary avenue for addressing corporate misconduct internationally.

Investor-State Dispute Settlement (ISDS)

- ❖ Treaties allow corporations to bring claims directly against states for breaches of investment conditions.
- ❖ The purpose of ISDS is to give foreign investors a forum to enforce investment protections.
- ❖ The scope of ISDS is very limited → only a few treaty-based systems exist.
- ❖ Expansion of ISDS is generally discouraged, the current limited use is considered sufficient.

International NGOs

- ❖ Non-governmental organisations (e.g. Amnesty International, Greenpeace, International Committee of the Red Cross) lack formal international legal subjectivity but are active in the international arena.
- ❖ Their main tool in international litigation is amicus curiae briefs → friend-of-the-court submissions
- ❖ NGOs role in International Organisations
 - They participate in standard-setting bodies (e.g. ISO, WTO committees) as corporate or NGO representatives.
 - They exercise soft power to shape norms and policies despite lacking legal personality.

Constitution of Statehood

Montevideo Convention on Rights and Duties of States (1933)

- ❖ According to the Montevideo Convention, as a subject of IL, a state should possess the following:
 - Permanent population
 - Defined territory
 - Government
 - Capacity to enter into relations with other States.

- ❖ Note: the four criteria for statehood are widely considered to be a codification of customary international law, as such, even if a State hasn't signed the convention, the criteria can still be applied under CIL.

Permanent Population

- ❖ Peoples with a homeland → broad definition
- ❖ A population that is linked to a specific territory
- ❖ No minimum size specified by the convention
- ❖ There is no ethnic/cultural homogeneity requirement - states can be highly diverse.
- ❖ The requirement for a permanent population does not explicitly exclude nomadic populations
- ICJ Advisory Opinion on Western Sahara → indicated that permanent settlement is not a necessary condition for statehood.
- ❖ Populations with a large diaspora are not necessarily excluded from statehood
- E.g. In the 1970s, ⅓ of Barbados' citizens lived in the UK, yet Barbados retained its statehood.
- ❖ Special Case - Vatican City
- Vatican City (Holy See) is considered a State even though their population is entirely made up of adult men and the population is reproduced 'asexually' through recruitment.

Defined Territory

- ❖ Ability to identify and exercise control over a territory
- ❖ There is no minimum size of the territory
- E.g. The Holy See's territory is 0.44km².
- ❖ Has to be a natural formation of land → *re Duchy of Sealand*, Administrative Court of Cologne (1978)
- ❖ A core territory is necessary, but the boundaries of the territory do not have to be fully delimited
- ❖ Partial or contested boundaries do not undermine statehood
- E.g. North Sea Continental Shelf Cases → uncertainty over the boundaries over a State's territory does not affect their claims to Statehood.
- ❖ Territory-less Entities
- E.g. The Sovereign Order of Malta lost its physical territory in 1978, yet continued to act as a subject of international law, signing treaties and maintaining diplomatic relations.

Effective Government

- ❖ Capacity to control and exercise sovereignty
- ❖ Irrelevant factors:
 - How the government came into control
 - Longevity of the government – but might have influence on how the government is able to exercise control.
 - No obligation to be democratic, but government must be in effective control of the
 - Political system of the government territory and population and have a real capacity to exercise state functions
 - “Stable political organisation” (Aaland Island Case 1920)

- If the state collapses at some point, that does not impact the statehood of the already existing state.
- The temporary or even long-term absence of a functioning government does not lead to a deprivation of Statehood
 - E.g. Somalia has been affected by internal conflict for over 20 years, there has not been a government recognised by all parts of Somali territory since 1991 and it has not lost its statehood.

Capacity to Enter into International Relations

- ❖ Ability to conclude treaties and join organisations → recognition by other states.
- ❖ A territory, even with all of the other qualifiers, could not be a State if they were under the direct or indirect control of another state.
- ❖ Signifies independence from the authority of other States
- ❖ Indicates full competence to act in the international arena and exclusive jurisdiction over internal matters.

Independence?

- ❖ Potential fifth element?
- ❖ Qualifiers (3) and (4) both imply that a State must be independent.
- ❖ However, it is important to distinguish between a state delegating functions or power to another State and a State delegating decision making capabilities to another State.
- Delegated functions (e.g. immigration, tax collection, defence) are permissible if the state retains the right to reclaim those powers.
 - E.g. Vatican City → delegates border control to Italy

Admission to UN Membership

- ❖ Admission to UN Membership as a form of determining a State is unsatisfactory.
- ❖ UN membership is inherently political and the veto power held by the P5 means that certain states will never have the chance to gain UN membership.
- ❖ However, all members of the UN are considered States
 - E.g. Kosovo
 - Kosovo is a non-self governing, autonomous province within Serbia
 - In 2008, Kosovo declared independence via a Unilateral Declaration of Independence, without Serbia's consent
 - The ICJ Advisory Opinion on Kosovo in 2010 held that there is no prohibition in IL against a declaration of independence and that illegality only arises when linked to the unlawful use of force or other grave violations.
 - Current status of Kosovo - meets Montevideo Convention criteria but is not a UN member as Russia's Security Council veto power blocks admission.
 - Illustrates how admission to the UN cannot be used to determine Statehood.

Creation of States

Name Change & Transfer of Sovereignty

- ❖ Name change ≠ creation of a new state → merely a 'rebranding'
 - E.g. Rhodesia → Zimbabwe, East Timor → Timor Leste
- ❖ Transfer of Sovereignty – involves cession of territory from one state to another **without** forming a new entity.
 - E.g. Alaska transferred from Russia to the United States
- ❖ Neither of these processes alter the underlying statehood status under International Law

Creation of New States in IL

- ❖ Decolonisation – former colonies attain full independence
- ❖ Unilateral Declaration of Independence (UDI) / Secession – a territory declaring independence without the parent state's consent.
- ❖ Succession – an existing state dissolves and a successor state inherits its rights and obligations
- ❖ Break Up of Federated States – a federation fragments into multiple independent states.

UDIs and Self-Determination vs Territorial Integrity

- ❖ When a territory issues a Unilateral Declaration of Independence (UDI), a conflict between self-determination and territorial integrity arises.
 - People have a right to self-determination but States have a right to territorial integrity
 - E.g. Hypothetically, if Tasmania declared independence, its people would be saying that they have the right to govern themselves and that they don't want to be part of Australia anymore. However, Australia would argue that it has a right to the territory of Tasmania as part of the Commonwealth of Australia.
 - Territorial integrity is enshrined in the UN Charter – the right of States to territorial integrity is in Article 2(4) of the UN Charter.
 - As such, States have an argument that they have the right to maintain their territory but the people have an argument that they can govern themselves and have the right to self-determination.

Legal vs Illegal States

- ❖ James Crawford argues that a potential State meeting the four Montevideo criteria may still be deemed illegal if its creation breaches international law.
- ❖ Illegal state → other states may refuse recognition, treating it as *prima facie* incapable of statehood.
- ❖ Example: