

# **Subjects of International Law**

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# I n t r o d u c t i o n

Why is it important to ask who the subjects of international law are?



Legal personality

- possession of rights and duties
- important for any legal system to function
- connected to status, capacity, competence; scope of rights and duties
- characteristics of the legal system will be reflected in its legal personalities

# I n t r o d u c t i o n

Subjects of international law are:

entities capable of possessing international rights and duties

*Full* subjects: only states

*Partial* subjects: IOs, individuals, NSAGs, NGOs?, transnational corporations?

- international participation
- some form of community acceptance
- often reflects need

# S t a t e s (and state-like entities)

- Remain by far the most important subjects of international law
- What makes a state a state?
  - Matter of fact?
  - Matter of law?
  - Today: creation of new states more of a political process regulated by international law

# S t a t e s (and state-like entities)

## **Traditional statehood criteria**

Art.1 Montevideo Convention on the Rights and Duties of States, 1931 (custom):

‘...a state as an international person should possess

- a) a permanent population,
- b) a defined territory,
- c) government, and
- d) capacity to enter into relations with other states.’

Today: neither exhaustive nor immutable criteria

# States (and state-like entities)

## a) Permanent population

- Stable community
- No minimum number required
- Citizenship as connection between state and people

## b) A defined territory

- particular territorial base upon which to operate, but no need for settled boundaries
- can be non-contiguous (e.g. UK-Falklands; Denmark-Grønland)
- no fixed lower limit (micro-states)

# S t a t e s (and state-like entities)

## **b) A defined territory**

- includes
  - part of the globe's surface
  - ground under this territory,
  - air space above,
  - some portions of the sea along the coast line (territorial waters)
- Territory subject to state's sovereign authority

## Acquisition of territory

- Traditionally: occupation of so-called *terrae nullius* or through conquest
- Today: peaceful transfer or creation of new states on territory of existing state

# S t a t e s (and state-like entities)

## change of territory and state sovereignty (today)

Dissolution	Splitting of an existing state into several new sovereign states; extinction of the original state	Czechoslovakia – into Czech and Slovak Republics, 1999 Soviet Union, 1991 Socialist Federal Republic of Yugoslavia (SFRY), 2000
Secession	Breaking away of a new sovereign state from an existing, diminished state	Ethiopia – Eritrea, 1993 Serbia – Montenegro, 2006 (arguably: Kosovo, 2008) Sudan - South Sudan, 2011
Cession	Transfer of territory from one state to another; continuation of both states	USA buying Alaska from the Russian Empire, 1867
Merger	Merging of two states into one new state; extinction of the old states	Yemen, 1990
Incorporation	Incorporation of one state into another, already existing state	German Democratic Republic becoming part of the Federal Republic of Germany, 1990

# States (and state-like entities)

## c) Government

- Some sort of central control over a political community
- Criterion is somewhat relative
  - Burundi, Rwanda (1962)
  - Croatia, BiH (1992)
  - Kosovo (2008)?
- some sort of foundation for effective control/government is necessary
- Breakdown of central organs of an already established state does not obviate statehood
  - Somalia
  - Occupied territory (cp. Arts. 43, 48 and 55 Hague IV, 1907)

# S t a t e s (and state-like entities)

## d) Capacity to enter into relations with other states

- Independence: e.g. capacity to enter into legal relations with other units as state *itself* sees fit
- Independence of other states' legal orders
- Relativity of the criterion:
  - 1995 Dayton Peace Agreement, appointing a High Representative for BiH as 'the final authority in theatre' (Art.II, Annex 10)
  - Kosovo (executive functions of UNMIK and EULEX)?

# S t a t e s (and state-like entities)

Taiwan?

Somaliland?

European Union?

BiH, Croatia (1992)?

Kosovo?

Palestine? Western Sahara?

Could pacific island states disappear through climate change?

→ self-determination, no 'illegal creation', recognition, counterclaims to territorial integrity

# S t a t e s (and state-like entities)

## **Additional considerations**

a) Self-determination (Arts.1(2), 55 UN Charter; Art.1 ICCPR and ICESCR)

distinction between full 'external' and qualified 'internal' self-determination

## Colonial context

- right of the peoples subjected to colonial rule to elect independence (statehood within colonial borders – *uti possidetis*)
- statehood accorded even if not all Montevideo criteria are fulfilled (e.g. Burundi and Rwanda, 1962)

Outside colonial context (see: Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217)

- self-determination should be sought within the framework of an existing state
- no right to unilateral secession
- (Very) controversial: right to remedial secession? (unfortunately no clarification in ICJ Kosovo Advisory Opinion, 2010)

# S t a t e s (and state-like entities)

## **Additional considerations**

b) States cannot be created illegally

- Violation of the prohibition of the use of force (Art.2(4) UN Charter, e.g. 'Turkish Republic of Northern Cyprus')
- Violation of right to self-determination/  
fundamental human rights: Southern Rhodesia, 1965
- however: if an existing state commits grave violations of international law, this will not call its statehood into question

# States (and state-like entities)

## Additional considerations

### c) Recognition

- implies an undertaking by the recognising state that it will treat the entity in question as a state
- Legal effects? -> 'declaratory' or 'constitutive'?
- recognition or non-recognition of an entity as a state can have some effect (in addition to other considerations)
  - Effects of (almost) universal recognition: 'solidification of statehood', e.g. successor states SFRY
  - Effect of universal non-recognition: denial of statehood, e.g. 'TRNC', 'Moldovan Republic of Transdniestria', Somaliland, Taiwan
  - Controversial non-universal recognition: Kosovo

# S t a t e s (and state-like entities)

## Additional considerations

### d) Territorial integrity

- Important in the process of creation of new states today (absence of *terrae nullius*)
- Works as a counterclaim to secession
- Can be overcome by
  - Waiver of the claim to territorial integrity by parent state (South Sudan, Montenegro)
  - Consensual dissolution of the parent state (SU and ČSSR)
  - Collective international action (SFRY, East Timor)
  - ‘Widespread recognition’? (controversial: Kosovo)

# States (and state-like entities)

## Fundamental rights and duties of states

- independence/ 'sovereignty'
  - Today: catch-all phrase describing the rights held by states (*Brownlie*)
  - right as entity to exercise control over its territory (jurisdiction)
  - right to act on international plane, representing territory/its people
  - duty not to interfere with the affairs of other independent/sovereign states
- Equality
  - irrespective of size or power, all states have same juridical capacities/functions
  - UNGA: one state, one vote
  - But: P5's veto in UNSC

# International Organisations

- Most IOs established after WWII
- Diverse membership and functions
- Examples: UN (universal membership), EU, CoE, CIS, OSCE, AU, ASEAN, OAS, Arab League (regional), WHO, ILO, WTO, IWF (specific functions)

Definition: “‘international organisation’ means an organisation established by treaty or other instrument governed by international law and possessing its own legal personality. International organisations may include as members, in addition to states, other entities.”

(Draft Articles on the Responsibility of International Organisations, Art.2(a))

# International Organisations

## Personality in international law

### Source

- treaty (e.g. Art.47 TEU)
- powers/purposes of IO, its practice
  - ICJ, *Reparations for Injuries* Advisory Opinion, 1949
    - no provision in UNCh granting legal personality to UN
    - international legal personality indispensable to achieve purposes and principles specified in UNCh
    - obligations of member states towards UN; ability to enter into treaties; immunities
    - intention of member states to grant legal personality
- Member and non-member states usually recognise (objective) legal personality of IOs

# I n t e r n a t i o n a l O r g a n i s a t i o n s

Consequences of IO's international legal personality  
(*Akande*)

- Separates rights and duties of IO from rights and duties of its member states
- IOs can bring claims
- Liability
- Privileges and immunities
- Power to conclude treaties (scope depending on IO's competences)

Distinguish international legal personality from domestic legal personality of IOs (Art.104 UNCh)

# I n d i v i d u a l s

## Historically: individuals as 'objects'

'It may be readily admitted that, according to well-established principle of international law, the *Beamtenabkommen* (a treaty between Poland and Germany) being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the Contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations enforceable by the national courts.'

(PCIJ, 1928, *Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service*, paras.17/18)

Diplomatic protection only through states

# I n d i v i d u a l s

## **Modern international law**

### a) Obligations of individuals

- Individual criminal responsibility for war crimes, crimes against humanity, genocide
- Source: custom and treaty (e.g. Art.25 ICC Statute)
- An individual is responsible without any need to link individual to a state

### b) Individual rights

- Through human rights treaties
- Depending on the treaty, rights may be exercised in the municipal sphere only or regionally/internationally

→ Individuals can be considered as partial subjects of international law, but have a '*lopsided* position' (Cassese)

# Non-state armed groups/insurgents

## Historically

- Recognition of belligerency

## Today

- NSAGs have obligations under IHL applicable to non-international armed conflicts
  - Through agreement, they can accept IHL applicable to international armed conflict; however: Art.3(4) GCI-IV
- NSAGs/insurgents as *transitional*, partial subjects of international law

# Non-governmental organisations?

- Members are private individuals
- Legal personality under domestic law
- Some rights under international law:
  - E.g. Art.11 ECHR and Arts.21/22 ICCPR
- Ability to claim their rights
  - E.g. Art.34 ECHR and Art.44 ACHR
- Consultative status at ECOSOC (Art.71 UNCh) and with other UN organs

# Transnational corporations ?

- Transnational corporations = private business organisations comprising of several legal entities linked together by parent corporations
- On-going discussion about their international legal personality
  - No international obligations
  - No international agreement (explicit or implicit) between states establishing transnational corporations as subjects of international law (cp. IOs)
  - ICSID principles: States and multinational companies equal parties to a dispute
- TNCs rather not considered as partial subjects of international law

# S u m m a r y

- ‘definition’ of subjects of international law: entities capable of possessing international rights and duties
- Distinguish between full and partial subjects of international law
  - States as full subjects of international law with a wide range of (sovereign) rights and duties
  - IOs: widely recognised international legal personality
  - Individuals: possess direct obligations and rights
  - NGOs and transnational corporations: debate is on-going
- Rights and obligations of different subjects vary, depending on type of entity, claims, expectations, functions, and attitude towards them of other subjects of international law