**Cours 3 : how an entity qualifies for statehood**

Cours 3

State-Hood : State : matter of fact, matter of law

Approach of the Badinter commission :

Montevideo convention: 1933? Adoption of three criteria to objectively determine if a state was a state.

Even if states are not parties to the Montevideo criteria, the criteria are still relevant.

3 criterias to define a state:

* Territory
* Population
* Effective government

If an entity does not fulfil those criteria, an entity cannot be seen as a state.

* capacity to enter into international relations
  + all the modern conception of the state is territorial
    - need to rethink the Montevideo Criteria?
      * Published in 1933, only 51 states in the world…The world and the international community have evolved
      * So these the criteria may have evolved as well
        + For instance: Issue of climate change: territory submerged : what would be the status of that state ? is it still considered as a state ?

Statehood: “state vis à vis a state”=> recognition then could be a criteria for instance

* If the international community does not recognise a country: impossible to be a state
  + Objective laws: Kosovo case
    - Need of an objective body of law and an objective assertion to avoid unpredictability
  + Palestine is now a state: part of the UNESCO member
    - US stopped founding
* Need to have legal predictability in the system
* The capacity to enter in legal relations:
  + Refers to the international legal personality of the state:
    - Possibility to have rights and obligations ate the international level
      * Agreement between Marshall Islands, Micronesia and the US: consultancy of the US before any foreign affairs decisions
        + And still Marshall Islands and Micronesia are both two real independent states
    - An effective government: able to exercise the government activities
      * Ex: Vatican

Sovereignty: article 1 of the Montevideo Convention does not mention sovereignty as a criteria to statehood, but it is the sine qua non element: without sovereignty there is no state. A state is first and foremost a sovereign entity.

Sovereignty:

* Max Uber: great arbitrator, Suisse professor beginning 20th century, gave a definition of sovereignty in the Palamas case.
  + Island of Palmas case, 1928
    - “**Sovereignty in the relations between states signifies independence, independence in relations to a portion of the globe is the right to exercise there in, to the exclusion to any other state, the function of a state**”
      * right to adopt regulation, exercise jurisdiction over your people,… sovereignty is independence.
        + Within your borders, only authority that imposes its decisions
        + And no state is exercising these rights

No external pressure

However, possible to accept a reduction of the sovereignty: but independent decision

* Are you able to be independent?
  + Colonised: no independent
  + But if there is occupation: still independent
* Without sovereignty an entity cannot claim being a state
* These criteria are basics: but other criteria? Two new criteria

1. Legitimacy: today more and more states and scholars think that legitimacy should be a criteria for statehood
   * + Ex: Cyprus – creation of northern Cyprus, involved force
   * **Inter-temporal law**: the assessment of a legality of a situation has to be made in light of the applicable law when the situation occurred (Max Uber, in Island of Palmas Case)
     + Inter-temporal law apply for the creation: whether it was legally created, look at the law at that time, but, not the case of maintenance: discrimination in Australia for instance
       - Many states has been created on the use of force, but only prohibited since 1955
   * Crime against humanity: crimes that allow a retrospective condemnation
     + Exception to the inter-temporal law
   * Legitimacy criteria: more and more considered when tackling the questions of the state criterions

* Fundamental principles: cannot reject the rules, pillars
  + The social contract of the international community is based on fundamental laws
* Violations: legal framework but in international relations, different situations can occur
  + Lawless World, Philip Sands, made investigations with regards to the Iraqi World.

1. Recognition

* Basically 2 theory
  + The constitutive theory of recognition:
    - For a state to exist, need first to be recognized as a state:
      * Recognition has a constitutive effect
  + The declaratory theory of recognition:
    - Recognition has only a declaratory effect
      * Recognition does not mean that the entity has achieved statehood

Montevideo convention, article 3: recognition does not have any constitutive effect, only a declaratory. That you are recognized or not you can live as a state

* but is this the reality in the system ?
  + today if there is no recognition, you are not a state: if no recognition, you cannot accomplish the act of a state
    - “Being a state is a way of life”
    - if you are an entity and want to be a state, you have to live like a state, and then you need to be recognized
      * without recognition you cannot be a state
      * and it is also about who is recognizing you.
        + Ex: Kosovo is not a UN member
        + But does it mean it does not exist as a state?
      * Recognition is necessary to live as a state but you can live without
        + Just a political effects?
  + Dilemma recognition/capacity:

There is an objective legal definition of statehood: situation of uncertainty that can be abused, but if an entity has to demonstrate that an entity is not a state based on criteria: objectively the entity has the right to behave as a state.

The modes of acquisition of territorial sovereignty: a state is first a territory: how do you acquire that territory?

* how can an existing state can expand its sovereignty ? or a state saying this is my territory?
* Comment acquiert on la souveraineté territorial ?
  + Conquest: For long time it was conquest: no longer possible
  + Discovery: outdated, but even at the time could only give you an inchoate title: meaning was not giving you title of the territory: still need to do several things for the territory to belong t you
  + The main way today is exercise of effective control : how you are proving you have a territory: you have been displaying peaceful and continuous authority (Max Uber)
    - Islands of Palmas: US v Netherlands:
      * Netherlands: continuously and peacefully exercising authorities other there
        + Most important thing to acquire sovereignty

Les effectivités

Cours 4

Legitimacy: a criteria of statehood?

* entity has to be created with regards to international law
  + However, is the Islamic State a state?
    - In this case, an entity based on racial discrimination, religion discrimination… even if we admit that the basic criteria are fulfilled: how can we accept that such an entity is a state with regards to all the un-legitimate elements of the Islamic State: a state created on the basis on the violation of international principles regarding human rights perhaps cannot and should not be recognized as a state
      * Brach of all the fundamental values of the system

The modes of acquisition of international sovereignty: it is seen as a territorial notion

* **Discovery**
  + But in quiet title: need effective control : evidence of continuous and peaceful display of sovereignty
* **Occupation**: can only happen in a terra nullus
  + The only type of occupation that can give you sovereignty would be an occupation of a territory occupied by nobody:
    - Ex of the occupation by the Brits of Australia
* **Cession**: a state can accept to cede some part of its territory
  + Ex: Louisiana against monetary compensation, HongKong and the Brits
* **Prescription**: also an occupation of a territory, but occupation of a territory that used to be
  + Occupation can only occurs when res nullus
  + Prescription: territory that used to belong to a sovereign but as your occupation has been peaceful, public and that it lasted for a certain time, you are then perceived as the new state
    - Falkland islands: Malvinas according to Argentina, Falkland
      * Implicit acquiescence
    - Referendum organized by the UK and people said they were Brits
* **Accretion**: when your territory is extended because of a natural phenomenon
  + Ex: river that has dried up
    - For instance : El Chamizol at the frontier between US and Mexico
  + Avultion: with volcano
  + Artificial Island: in your territorial sea: still on your territory
* **Uti possidetis juris**:
  + The principle of the intangibility of frontiers inherited from colonization
    - It came from Latin America: colonial powers drew artificial frontiers, but when independence came, they said that if they started to discuss the frontiers, there would be war everywhere.
  + *Self determination*: people under colonial colonisation should have the right to freely choose whether they want to become independent as a new state or whether they want to integrate the former colonial power
    - Ex: Comorres
  + Two types of self determination
    - *Internal self determination*
      * People leave under a state and pretend to have a self existence: they have a right to internal self determination:
        + The government needs to provide them for institutions, study in the language,

Quebec: not under colonisation, people are different but everything is made to grant you internal self determination

Already exercising self determination inside Canada

* + - *External self determination*
      * Under colonisation, and then the right to self determined
* **Secession**:
  + Is considered as a way of becoming a new sovereign state: you separate yourself from an existing state
    - Ex: South Sudan
    - Problem is the unilateral declaration of secession
* **Exercise of effective control**:

* Today, we do have more statehood problems than it appears.
  + Lex lata (hard law)/lex referenda (what it shoud be)

Cours 5

* Sahara
* Israël/Palestine
* Cyprus
* Vatican

1929: the Lateran Accords: recognizes the Holy See

180 diplomatic missions

Sui generis territorial entity

* Kosovo

Terrorist organisation, drugs

Legal advisement of 2010: silent meaning permission for the ICJ, and hope for a change

**International organizations**

They are derived subjects of international law: states are the first subjects of international law.

* Comparison with Frankenstein’s creature.

They are derived subjects.

What is an international organisation?

They can only be created by states

In the typology is the distinction between:

* Public and private international organizations
  + Private international organisations: NGO’s : they are not international organisations as with regards to international law
  + International organizations under international law can only be public international organization
* Open international organization and close international organisation
  + Open: to which potentially any state can become a member
    - Based on universal membership
      * But to what extent are they really “open”?
      * Conditions are set to become members
        + “semi-open”?
        + potentially any international subject can become a member

ex: IMF: to become member of the IMF you have to become member of the World Bank

* + Close:
    - Not opened to every state, set of criteria:
      * Functional organisations:
        + OECD: high level of development, capitalistic form of economy, promotion of capital markets…
        + OPEC: only countries that export oil can become oil
      * Regional :
        + Regional criteria, it is because of your links with a region, territorial link
        + EU, Asean, Mercosur,…
      * Based on a common background:
        + Share the same language, religion, culture,…

Commonwealth, Organisation de la Francophonie, league of Arab States, Organisation of the Islamic conference,

Cours 6

International organizations are the product of states.

* Distinction between public and private international organization
* International organization: recent phenomenon : appear with a new raison d’être
* In 1941: advisory opinion of the International Court of Justice about the reparation case:
  + Injury suffered
* The New International order: new subject of international law
  + Until 1945: states were the main actors/subjects
  + The court said that “*subject of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international life, and the progressive increase in the collective activities of states have already given rise to instances of actions, upon the international plane, by certain entities which are not state*”
    - The court came with this very important phrase to confirm the appearance of new subjects

What is a public international organization? For an international institution to be a international organization:

* First thing is needed is a treaty establishing such an organization
  + Need of a constitutive act
    - There is no international treaty implementing the GATT: never institutional treaty
      * Common Wealth? no treaty and no proof : it is a voluntary association of independent state
      * The ASEAN: 1947: not yet an international organization, but it became an international organization when they negotiated the treaty in 2008
  + You have a treaty: agreement between subjects of international law in agreement
    - Not all treaties are called treaties
* The second criteria: the organization has to be predominantly composed by states
  + Its functions are mainly governed by international law
    - But some aspects are governed by domestic law for instance if they want to buy material, equipment: need to conclude contract: local providers
  + Examples
    - International Labour Organisation: based on tri-partism
      * It’s a very unique structure that characterise the ILO: delegates of states, delegate of employees and delegate of employers: only international organization based on tri-partism
    - ITSO: international telecommunication satellites organisation : states and a private structure into it
* Third criteria : an international organization is governed by international law
  + - ICRC: not an international organization
    - The Office of Public Health
      * International organization must be governed by international law
    - The bank of international settlement: governed by Swiss law :
  + Governed by international law does not mean there is no relevance of the domestic law
* The organization need to be autonomous of the member states
  + WTO
  + Difference between Principle organs vs Subsidiary organs
    - Principle organs: organs established in the treaty as principle organs
      * UN: General Assembly, the International Court of Justice, Security Council, ECOSOC, the Secretariat of the UN
    - Subsidiary organs: the ones created by the principle organs:
      * Unicef, UN Development Program,
    - Specialised agency : international organizations that have an agreement with the UN which authorize them to ask for an advisory opinion of the ICJ and which report to the ECOSOC
      * Unesco, International Civil Aviation Organization, IMF, the World Bank is a group (IBRD, IFC, IDA, MIGA, ICSID…)
      * The WTO is not a UN specified organisation
  + Plenary vs. non plenary
    - Plenary : everyone : UN General Assembly,….
    - Non plenary: not everyone : UN Security Council
* Last criteria: international legal personality: subjectivity: the capacity of being subject of rights and obligations at the international level : most important criteria
  + The capacity to conclude treaty: to be a party to dispute, to conduct diplomatic relations, the possibility to make international claims
  + Many treaties, in particular the one ratified the last 20 years, do not specify that
    - The WTO: shall have legal personality
    - Sometimes it is not written but the international organization has it
      * Problem when the treaty is silent or not clear
        + The UN charter does not say anything: the most important international organization is silent on the international personality of the
        + Article 104 of the UN Charter: “domestic legal personality”

On the territory of each of its members shall have legal capacity

Story with Comte Bernadott: Can the UN bring any claim in front of the ICJ?

Silence of the charter

* + - * The court deduce the international personality of the organization: using the aims, goals, powers,… the intent was to gran the UN
        + Advisor opinion in 1949
  + Therefore it is no because it is not written that there is no international personality: functions, powers, aims… : “domestic international personality” is not international legal personality

The interpretation of the powers of international organizations

* when interpreting their powers : need to go to their constitutive act: the treaty
  + need to start with the explicit powers
  + but these organizations also have implicit powers: powers that are necessarily implied by the explicits powers
* International organizations are not only explicit powers, once you know explicit powers you can deduce implicit power
  + Ex: Tadic case, ICTY
    - Subsidiary organ of the UN
    - Created to judge persons who had committed crimes
    - Tadic : his lawyers claimed the ICTY had no jurisdiction
    - The judges went to the verify the jurisdiction
      * In the explicit powers: not written
      * However “primary responsibility for the international peace and security”
        + Therefore also created in order to prevent such crimes to exist

Implicit powers: pursuing of the maintenance of international peace and security

* + - * + So the Tribunal was legally created
  + Implicit powers can be deduced from explicit powers
* Principle of speciality: an international organization can only do things that are related to its special function or mandate:
  + Principle of speciality: keep in mind the very purpose for which they have been created
    - In the 90’s WHO: request in 1996 a legal advisory on the nuclear weapons: legality of use of nuclear weapons in the system.
      * The ICJ refused to answer: no competence regarding such a matter
        + Principle of speciality: specialisation is health
        + Epistemologic line:
    - principle of Speciality is what rationalize the implicit powers
  + Individuals are not on the international plane yet

Cours 6

Eurofirma :

Public intergovernmental corporation

* need to replace railroad equipment after WWII
* Brownlie: “where there is…”
* five criterias:
  + a treaty: the case 1956
  + specific composition
  + specific requirement about the governing law
  + specific organization of the institution
  + Last criterion: international legal personality
* New definition of legal personality: an international coporation is a specific case of international organization that rely on a treaty on state cooperation and that fulfil a task of material excecution for the benefit of individuals

ITSOS : check the structure, created by a treaty, but inside a private entitee

ICRC:

* Creation in 1863: statutes as an “association under” the Suisse Civil Code provisions
  + But ICRC action heavily rely on international law: governed by international law
  + Geneva convention
* Membership today: 18 Swiss citizen
  + Not states: only individuals
* Third criterion fulfil
* The mandate of the ICRC
* The activities of the ICRC are explicitely mentioned in the Geneva convention

Ian Brownlie: restricted definition

It is not an international organisation, domestic legal personality, however, its mandate : international community recognized privilege

Three international actors that have accepted the ICRC personality: States in their legislation, observer status in the US and International jurisdictions

Class:

Legal framework governing the relation through which international person cooperate

How do you create/make international law?

Article 38 of the statutes od the ICJ: but only a start, there had been changes in the system

**Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Nobody can deny that international convention are the most important source : States have the possibility to derogate to international law through international convention : there is a hierarchy.

* First source: international conventions -> refer to treaties, it is the “source par excellence”
  + Most of the time international lawyers: applying a treaty
  + The basic notions of the laws of treaties
  + What is a treaty?
    - The customery definition is found in **Article 2 of the Vienna convention of 1969**
      * Codifies the customery rules on the law of treaties “Bible of treaties”

Article 2: Use of terms

1. For the purposes of the present Convention:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

* + - The first condition for an agreement to be concluded you need it to be passed between subject of international law
    - The second criteria: need to be in written form, taciyt agreements are not recognized as being a treaty
    - The third criteria: the agreement must be governed by international law: the fact that the implementation for instance is governed by Russian law
    - The fourth criteria: whether embodied in a single instrument or two or more related instrument: a treaty is not necessarily one piece, one document: Annexes of a treaty : an integral part of the treaty : they relay on the same instruments
    - Last but not least: whatever its particular designation : states are free to designates its treaty as its want
      * Be careful with the title, a treaty can be called a declaration, the DSU of the WTO…a memorandum d’accord
      * Very important point to be careful about: title are not bound
      * The Vienna Convention does not really give importance to the form
      * For instance exchange of letters can be a treaty
        + Danger today: everything can be a treaty
        + Pandora Box opened by the court : Case in 1978 Agean Sea : press communiqué – Greece went to the ICJ and asked the join press communiqué : ICJ agreed with Greece that the Communiqué could be a treaty
        + What matters is the actual terms of the document and tge context in which the terms were formulated
        + “They decided that these issues should be solved by peaceful means and therefore by the International court at the Hague”
        + But the court said that it could only be agreed if the two were going jointly to the court
        + It can be a treaty even if it does not fulfil the domestic criteria
      * Other instance: Qatar and Bahrain
        + Saudi Arabia as a mediator
        + If after 6 months, the scope of the dispute was still not decided, one could go to the ICJ
        + The Court considered the “minutes of the meeting” to found its competence
        + The Court said that intent did not matter: objectively the terms and the context are sufficients
      * Today: anything can be called a treaty
  + Three persons can generally bind a state: head of state, prime minister and