Personalidad I

Objetivos

- Reconocer al **Estado – nación** como el principal agente de las relaciones internacionales
- Reconocer el surgimiento de **otros** agentes y sujetos del derecho internacional como las organizaciones internacional y los seres humanos
- Conocer los criterios clásicos para calificar la **existencia de un Estado**
- Conocer la discusión reciente sobre **autodeterminación** de los pueblos y derechos de comunidades indígenas
- Conocer los efectos legales en el ámbito internacional y nacional del **reconocimiento** de estados

Teoría tradicional

- El estado es la “persona” internacional por excelencia

  - Anglo Iranian Oil Company 1952 ICJ
  - Barcelona Traction Case ICJ 1970
  - Serbian Loans 1929 PCIJ
  - Texaco Case 1977

Anglo Iranian Oil Company 1952 ICJ

- El UK señaló que la concesión con la compañía era un tratado (el gobierno del UK era el mayor accionista)

- ‘It is nothing more than a concessionary contract between a government and a foreign corporation.”

Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970

- Barcelona Traction era una compañía creada bajo las leyes de Canadá, que operaba en Barcelona
- El gobierno español generó dificultades para operar a las empresas extranjeras, lo cual hizo perder dinero a los accionistas de la compañía (belgas)
- 1948 un tribunal español la declaró en quiebra

Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970

- (33) When a State admits into its territory foreign investments ... it is bound to extend to them the protection of the law ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations ***erga omnes***

Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970

- Para poder llevar un caso en protección diplomática se requieren dos condiciones:
- "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations,* pp. 181-182.)
- La Corte dictaminó a favor del Estado español, manteniendo que sólo podía demandar el estado de quien era nacional la compañía

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

- Entre 1878 y la Primera Guerra Mundial, El reino de Serbia – Croacia y Eslovenia, emitió bonos en “francos”. Bancos de Viena, Paris y Berlín le compraron los bonos y los pusieron después en circulación en el mercado secundario.
- Debido a movimientos en los tipos de cambio Serbia no pudo pagar los intereses en francos y decidió pagarlos en su moneda

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

- Los afectados eran los poseedores de los bonos
- [38] ... by taking up a case on behalf of its nationals before an international tribunal, a State is asserting its own right — that is to say, its right to ensure in the person of its subjects, respect for the **rules of international law…**

in all cases with which the Court has so far had to deal and in which private interests have been involved, the State's claim has been based upon an alleged **breach of an international agreement**

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

- [38] The controversy ... solely relates to the existence and extent of certain obligations which the Serbian State is alleged to have assumed in respect of the holders of certain loans. It therefore is exclusively concerned with relations between the borrowing State and private persons, that is to say, relations which are, in themselves, within the domain of municipal law.

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

- (41p) **Any contract**, which is **not a contract between states** in their capacity as subjects of international law, **is based on the municipal law** of some country. The question as to what this law is forms the subject of that branch of law which is at the present day usually described as private international law or the theory of conflicts of laws [cf. Texaco]

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

(42p) The court which has before it a dispute involving the question as to the **law which governs the contractual obligations** at issue can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creations, though it may also take into account the expressed or presumed intention of the parties.

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

(42p) In court's opinion this law is Serbian law and not French law… the **loans in question are loans contracted by the state of Serbia** under special laws which lays down the conditions relating to them, these laws are cited in the bonds and it appears that the validity of the obligations set out in the said bonds is indisputable **Serbian law**

Case concerning various Serbian Loans Issued in France, France vs. Yugoslavia, 1929, PCIJ

- (44p) But the establishment of the fact that the obligations entered into do not provide for voluntary subjection to French law as regards the substance of the debt, does not prevent the currency in which payment must or may be made in France from being governed by French law. It is indeed a generally accepted principle that a State is entitled to regulate its own currency.

Texaco Overseas Petroleum Co and California Asiatic Oil Co. v. Libya, 1977, AT, **TOPCO case**

- Libia nacionalizó Texaco
- Clause 28, (7) **Concession shall be governed** by law of Libya common to the principles of International Law, in absence by General International Law, including such principles as applied by International tribunals.

Texaco Overseas Petroleum Co and California Asiatic Oil Co. v. Libya, 1977, AT, **TOPCO case**

- **Treaties are not more the only type of agreements governed by international law** [against Serbian loans 1929]
- Reference to the general principles of law is always regarded to be a sufficient criterion for the internationalisation of a contract. (Abu Dhabi arbitration 1951) A clause providing international arbitration is another process for internationalisation of a contract (Sapphire 1963) A third element of internationalisation result from the fact of the new dimension of agreements between states and private persons: ‘economic development agreements’

Texaco Overseas Petroleum Co and California Asiatic Oil Co. v. Libya, 1977, AT, **TOPCO case**

- To say that IL governs contractual relations between state & foreign private party neither means that the latter is assimilated to a State nor that the contract is assimilated to a treaty; it only means that for the purposes, interpretation and performance of the contract, it should be recognized that a **private contracting party has specific international capacities**. But unlike a State, the private person has only a limited capacity and his quality as a subject of IL does enable only to invoke the rights which derives from the contract.

Persona legal internacional

Entidad a la que se le imputan ciertos derechos y ciertas obligaciones de conformidad con el derecho internacional

- Personalidad legal objetiva (general): erga omnes, oponible a la comunidad internacional, ONU, Estados
- Personalidad legal especial (particular): solo entre la entidad y el Estado que la reconoce, orden de Malta

Nanni v Pace and the Sovereign Order of Malta, Italian Court of Cassation, 1935

- It is impossible to deny to [the order and] other international collective units a limited capacity of acting internationally within the ambit and the actual exercise of their own functions with the resulting **international juridical personality** and capacity which is necessary and natural corollary… such personality was never denied to the Holly See and it is unanimously conceded to the League of Nations, it is equally conceded to certain international administrative unions.

Personalidad internacional

- La supremacía de los Estados como las “personas” internacionales sobre otros actores continúa hoy día
- La categoría de Estado es el tipo central de personalidad internacional
- El punto central mas delicado es la relación entre la categoría de Estado y el reconocimiento

Existe una definición legal de “Estado”?

1. Competencia plena para llevar a cabo actos en la esfera internacional
2. Competencia exclusiva respecto a sus asuntos internos
3. No están sujetos a jurisdicción compulsiva, a menos que lo consientan
4. Los Estados son considerados como “iguales” por el Derecho internacional
5. Cualquier derogación a estos principios debe estar claramente establecida

James Crawford

Convención de Montevideo, 1933, art. 1

El Estado, como una persona de derecho internacional, debe poseer las siguientes calificaciones:

a) una población permanente

b) Un territorio definido

c) Gobierno, y

d) Capacidad para relacionarse con otros Estados

Teoría declarativa vs constitutiva (del reconocimiento)

- Al nacer los Estados – Nación, (**S. XVI - XVII**) el poder supremo se ejercía en un territorio y este era un fenómeno desde y hacía adentro, no había necesidad de que otro príncipe lo reconociera, era soberano
- Vattel: “una Nación es … libre de actuar como le plazca, mientras sus actos no afecten los derechos de otra nación… **otras naciones no pueden quejarse ya que no tienen el derecho de ordenarle**”
- En el mundo de Vattel, la **soberanía** es **inherente a la comunidad** y por lo tanto **independiente del consentimiento** de otros estados
- Un Estado no necesitaba ser reconocido para existir

Teoría declarativa vs constitutiva

- **En el siglo XVIII**, las colonias americanas se independizaron y para sobrevivir buscaron el reconocimiento de la comunidad internacional.
- Cuál es el efecto legal de dicho

Teoría declarativa vs constitutiva

- **Siglo XIX.** La obligación de obedecer el derecho internacional **nace** del consentimiento (**positivismo**)
- El derecho internacional es contractual, el **re-conocimiento** es visto como un acuerdo que descansa en la libertad de los Estados de entenderse con sus iguales
- Si un nuevo Estado surge, nuevas obligaciones surgirán para los Estados ya existentes
- Se distinguió entre soberanía interna (factual)

Teoría declarativa vs constitutiva

- El derecho internacional era la ley entre las naciones civilizadas, los no civilizados eran Estados en *status nascendi*
- La manera en cómo un Estado llegaba a nacer (legitimidad) no era un tema del derecho internacional. El reconocimiento era un bautismo legal
- El que un Estado surgiera era una cuestión de **hecho**, y el reconocimiento era la manera **legal** en que se volvía súbdito del derecho internacional

Reconocimiento de Estados

- There is probably no other subject in the field of international law in which law and politics are more closely interwoven. *Stefan Talmon*
- Acto **jurídico** (lo político no nos interesa) unilateral de un estado, implícito o explícito, que tiene **efectos jurídicos** (legales o ilegales)
  - ¿Efectos constitutivos o declarativos en la categoría de Estado?
- ¿Existe un deber legal a reconocer?
- Reconocimiento de gobiernos (no lo veremos)

Criterios para la categoría de Estado

Consideraciones de efectividad, Jellinek, 1900, *Allgemeine Staatslehre*

- Territorio definido, **Deutsche Continental Gas-Gesellschaft v Polish State, 1929**
- Población permanente, **Western Sahara Case 1975 ICJ**
- Autoridad pública efectiva (Gobierno estable (+/-), **Isla de Palmas Case, 1928 PCIJ**

Factores periféricos

- Permanencia, **Austro-German Custom Union Case, 1931 PCIJ**
- Voluntad de someterse al derecho internacional, **The Wimbledon, 1923 PCIJ**

Los criterios para la categoría de Estado dan una guía cuya aplicación es siempre difícil en situaciones de conflicto

Deutsche Continental Gas-Gesellschaft v Polish State, AT, 1929

- Napoleón crea El Grand Ducado de Varsovia como recompensa a la ayuda polaca en su lucha contra Prusia (María Waleska)
- Tras la derrota de Napoleón, en 1815 el Congreso de Viena crea el Zarato de Polonia, Polonia del Congreso o la Polonia rusa, como recompensa a Rusia, pero sin dárselo formalmente
- En 1830 fue integrado al Imperio ruso hasta 1915 cuando Alemania la invadió.

Deutsche Continental Gas-Gesellschaft v Polish State, AT, 1929

- De acuerdo al Tratado de Versalles, Polonia dispuso la disolución de la compañía demandante por ser propiedad de alemanes
- la compañía se ubicaba en Varsovia, antes territorio ruso
- La demandante alegó que Polonia no tenía posesión de jure sobre el territorio que incluía Varsovia (antes ducado de Varsovia) porque los límites con Rusia no habían sido fijados y seguían perteneciendo a

Deutsche Continental Gas-Gesellschaft v Polish State, AT, 1929

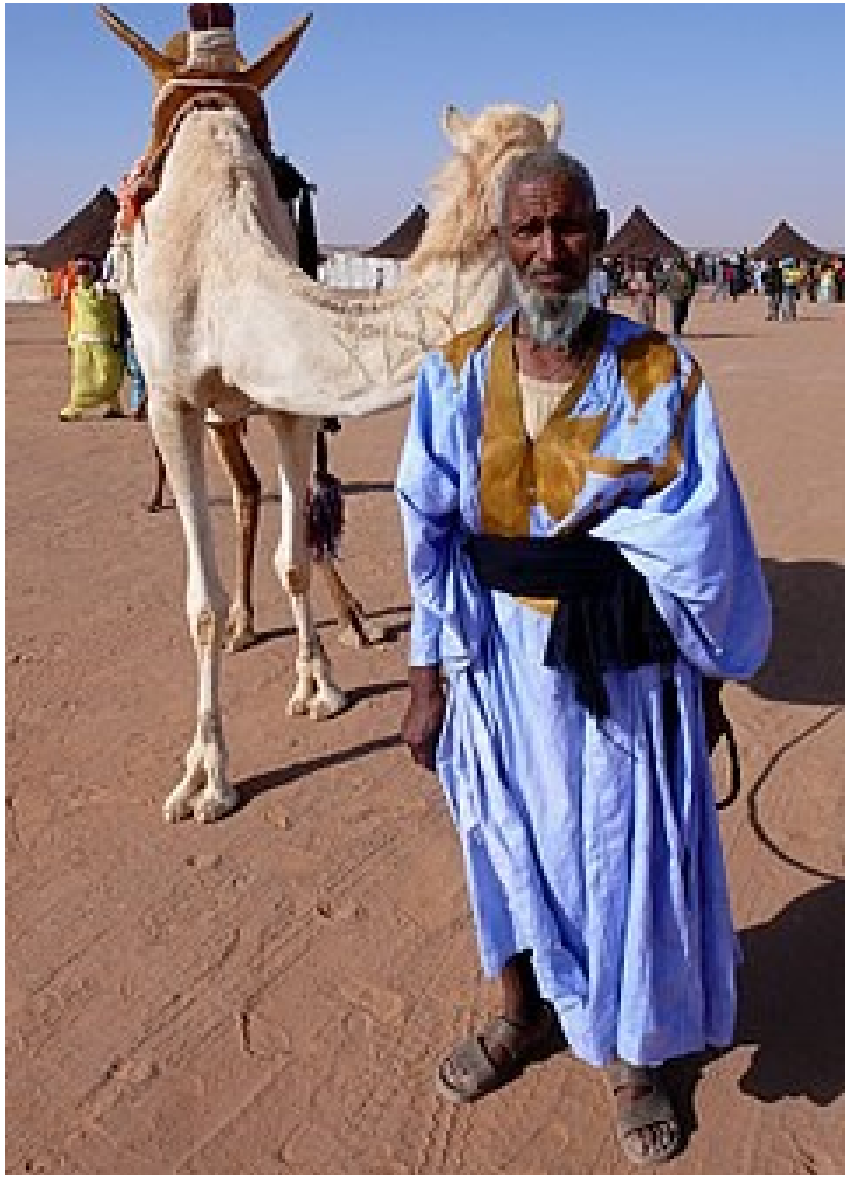
- There is no doubt that Poland exists as a State exercising sovereignty over the Russian and Austrian parts of Poland. It is unnecessary to dwell upon the subtle distinction between recognition de jure and recognition de facto.
- The recognition of a State is not a constitutive element but merely declarative. The state exists by itself (par lui meme) and the recognition is nothing else than a declaration of existence.
- In order to say that a state exists and can be recognised as such ... it is enough that its **territory has a sufficient consistency**, even though its boundaries

Western Sahara Case, Advisory Opinion, ICJ 1975

- En 1976 España dejó el Sahara Occidental
- La Asamblea General preguntó:
- Era el Sahara Occidental Terra nullius cuando España lo colonizó
- Cual es el vínculo legal entre el Sahara Occidental y Marruecos / Mauritania

Western Sahara Case, Advisory Opinion, ICJ 1975

- Territories inhabited by tribes of peoples having social and political organization were not regarded as terra nullius in 1884.
- It was not established any tie of territorial sovereignty between WS and Morocco or Mauritania.



Western Sahara Case, Advisory Opinion, ICJ 1975

- It was not found legal ties that affe the application of res 1514 XV, in th decolonisation of WS, in particular self-determination principle through the free and genuine expression of the will of the peoples of the territory
- Self determination is part of corpus iuris gentium
- (derecho de un “pueblo” a decidir su forma de gobierno, perseguir su desarrollo económico, social y cultural, y estructurarse libremente, sin injerencias externas y de acuerdo con el principio de igualdad)

Island of Palmas Case, Netherlands v US, 1928, PCIJ

- Por un tratado de paz en 1898 España cede el archipiélago de Filipinas a Estados Unidos
- En 1906 un oficial visita la Isla Palmas y encuentra una bandera holandesa, vivían menos de 1000 persona, nativas
- Holanda reclamó que había ejercido su soberanía sobre la

Island of Palmas Case, Netherlands v US, 1928, PCIJ

- **Sovereignty** signifies **independence**. Territorial sovereignty involves exclusive right to display the functions of a State. This right has as corollary a duty: obligation to protect within the territory the rights of other states.
- The development of the national organisations of states during the last few centuries and, as corollary, the development of IL, have established this principle of the **exclusive competence of the state in regard to its own territory** in such a way as to make it the point of departure in settling most question that concern international relations.

Island of Palmas Case, Netherlands v US, 1928, PCIJ

- IL cannot be presumed to reduce a right such as territorial sovereignty without concrete manifestations [**settlement**].
- A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century … the question arises whether sovereignty yet existed at the critical date, i.e., the moment of the conclusion and coming into force of the Treaty of Paris [1898]
- La Isla de Palmas es de los Países Bajos

Austro-German Custom Union Case, Advisory Opinion, PCIJ, 1931

- Por el Tratado de St Germain (hermano del de Versalles) se puso fin al Imperio Austro-Húngaro. De su ruptura nacen nuevos estados: Austria, Hungría y Checoslovaquia.
- Se establece la prohibición del Anschluss.
- 88 Treaty of St Germain 1919: independence of Austria is inalienable. Austria undertakes to abstain from any act, which might directly or indirectly or by any means whatever to compromise her independence
- Austria y Alemania habían alcanzado un acuerdo preliminar en 1931 sobre una Unión Aduanera
- Le preguntan a la Corte si dicho acuerdo preliminar era compatible con el Tratado de St .Germain