PUBLIC INTERNATIONAL LAW-AR

UNIT 5. THE STATE AS SUBJECT OF INTERNATIONAL LAW

1. Constitutive elements.
2. The sovereignty of the State and its corollaries.
3. Dynamics of the State.

CONSTITUENT ELEMENTS OF THE STATE

A) The figure of the State.
B) The constituent elements of the State.
b.1. The territory
b.2. The population
b.3. The political-legal organization

A. GENERAL ASPECTS

- The State is a complex reality that can be examined from various perspectives: sociological, political, legal.
  - Form of political organization arose with the European monarchies of the 15th and 16th centuries and its emergence is historically linked to the birth of international law.
  - Since Treaty of Westphalia, sovereign state is the fundamental element of international society and the quintessential subject of international law
- **Doctrine definition:** the State is "an entity endowed with a territory, a population and a government, which is sovereign and independent, in the sense that it is not subordinate to any other State or entity, depending directly on international law".
- Matter of fact not of law: **principle of effectiveness** important role. The birth of states is a relatively constant process that continues to occur in a variety of ways in today's world: as a result of a resolution of an international organization; by virtue of an international agreement; as a result of the dismemberment or dissolution of a State, or as a result of a series of armed conflicts through the exercise of the right of self-determination of the peoples; or through unilateral declaration of independence supported by the major powers.
- Diversity of States but they have the same legal status under international law as entities endowed with sovereignty and defined by the principle of sovereign equality.

B. THE CONSTITUTIVE ELEMENTS OF THE STATE

- For international law, the existence of a State results from the concurrence of three constitutive elements: territory, population and political-legal organization.
  - *Example:* German-Polish Mixed Arbitral Tribunal has already stated in its Judgment of August 1, 1929: "For a State to exist, it requires as indispensable "a territory, a human collectivity that a public power exercised over this collectivity and this territory”.

B.1. THE TERRITORY

- Territorially based entity (IO do not possess territory): the territory constitutes the support or physical base on which the population is settled and over which it exercises its sovereignty. IL is indifferent to dimensions o configuration of the territory (micro-States).
- It comprises:
  - Terrestrial space delimited by its borders
  - Marine spaces subject to its sovereignty
  - National airspace.
- The territory is delimited by borders, which must be well determined and have a certain firmness. International jurisprudence has pointed out that for the existence of a State "it is sufficient for the territory to be of adequate consistency, even if its frontiers have not yet been precisely delimited, and that the State is currently exercising its independent public power over that territory".
  - International disputes over border areas.
- The territory of the State is inviolable against any external action.
  - UN Charter of the United Nations prohibition of the use or threat of force
  - Resolution 2625 (XXV) of 24 October 1970.

B.2. THE POPULATION

- **Definition**: The human community established on the territory of the State and over which the State exercises its authority. The number, density, homogeneous character or the sedentary or nomadic character of the inhabitants of the State is immaterial in IL.
  - *Example*: ICJ 1975 Advisory Opinion on Western Sahara.
- **Composition**: Persons politically linked to the State by the nexus of nationality (the nationals) but, in a broad sense, it also includes foreigners residing in the territory.

B.3. THE POLITICAL AND LEGAL ORGANIZATION

- State must have a governmental and administrative structure that makes possible the effective exercise of State functions in the internal and international order.
  - It must also have a legal system capable of establishing the rights and obligations of citizens and of effectively ensuring the exercise of these rights and obligations.
- The form of organization of the State (unitary, federal, autonomous, etc.) is irrelevant for international law, which recognizes the principle of self-organization of the State.
  - Example: ICJ Advisory Opinion 1975, concerning the Western Sahara case
  - However, the political organization and its exercise ad intra and ad extra must be effective and guarantee the fulfillment of the State's own functions.
    - Art. 4 UN Charter: The membership requires a State "able to carry out" the obligations set out in the Charter.
    - Doctrine: authority in its territory and over the State's population;
      - the government must guarantee:
        - the necessary organic mechanisms to enter into relations with other States and and with the other subjects of the international order
        - the necessary organs to exercise the legislative, executive and judicial functions,
        - to ensure the control of its economy, national security and other public services.

- capable of ensuring the stability of international relations vis-à-vis the other States.

- **Traditionally**, the political status of the government was indifferent to international law: Resolution 2625 (XXV) of 1970: right to choose freely the form of government as an essential element of the principle of sovereign equality and non-intervention in in internal affairs.
- **Today**, universal consensus on the protection of human rights, political democracy and the rule of law: changes, but it cannot yet be affirmed that the democratic character of government is a condition for the existence of the State.

A. THE INTERNATIONAL STATUS OF THE STATE. STATE SOVERIGNTY

- The international status of the State is marked by the recognition of its **sovereignty**, which is a constitutional principle of the legal system.
- **Definition**: is the characteristic and exclusive attribute of the State.
  - In the internal sphere: supreme (*summa potestas*) and complete (*plenitudo potestatis*) authority.
  - At the international level: absence of subjection to a power superior to that of the State itself and is equivalent to independence. It implies exclusive competence for the exercise of authority over a given territory to the exclusion of any other State.
- **Content**: entails a broad sphere of powers (competences of State) which it can exercise independently and autonomously, and also duties:
  - Exclusive powers for the exercise of legislative, executive and jurisdictional powers in the domestic sphere.
  - Permanent sovereignty over natural resources and wealth and over the economic activities carried out in its territory. GA Resolution 1803 (XVII) of 14 December 1962.
  - Sovereign powers to decide freely on its external action, with no limitations other than those established by international law.
  - Duty: the need to respect the sovereignty of the other States and the requirements introduced for this purpose by international law.

B. CONTENT OF SOVERIGNTY: THE COMPETENCES OF THE STATE

B.1. NATURES AND SCOPE OF THE STATE'S COMPETENCES

- Powers of the State: domestically and internationally.
  - In its internal dimension: power to legislate for the whole of its territory, the exercise of jurisdictional competence by its courts of justice and the monopoly of coercive power within its territory.
  - In its external dimension: freedom to conduct its international relations independently and without being subject to requirements other than those deriving from international law itself.
- State's competences:
  - original or inherent character (sovereignty). , which constitutes an essential attribute recognized by international law.
  - Discretionary: they can be exercised freely without any interference by the other subjects of international law. Effect:
    - Existence of competences that have not been regulated by international law and therefore belong to the internal jurisdiction: domaine reservé of the State and "exclusive competences" (an autonomous power of decision).
      - Art. 2.7 UN Charter
  - Initially full: general scope and are not restricted by the principle of specialty.

B.2. LIMITS TO THE EXERCISE OF STATE'S COMPETENCES

- The powers of the State are subject in their exercise to certain limits set by international law:
  - PCIJ Lotus case of 1927, the powers of the State cannot be exercised in the territory of another State: *"In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".*
  - Limited by obligations that have been freely assumed with respect to specific matters: PCIJ Wimbledon case of 1923 *"The right to enter into international agreements is an attribute of state sovereignty."*
  - Limitation of the so-called "regulated competences (competences which under international law are subject to a restrictive regulation to ensure their compatibility with the competences of other States or with the collective interests of the international community).
    - Process of progressive reduction of original competences.
    - International Organizations/Human rights developments.

C. COROLLARIES OF STATE SOVERIGNTY

C.1. SOVEREIGN EQUALITY

- Fundamental principle of international law
  - Article 2.1 of the Charter of the United Nations.
  - Developed in GA Resolution 2625 (XXV) of October 24, 1970: *All states enjoy sovereign equality. They have equal rights and equal duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.*
- It comprises the following elements:
  - States are legally equal;
  - Each State enjoys the rights inherent to full sovereignty;
  - Each State has the duty to respect the personality of other States;
  - The territorial integrity and political independence of a State are inviolable;
  - Each State has the right to freely choose and carry out its political, social, economic and cultural system;
  - Each State has the duty to comply fully and in good faith with its international obligations and to live in peace.
- Compatible with certain treaty derogations that admit disparities of treatment in favor of certain States:

- Privileges accorded to some States by granting them a pre-eminent position in certain areas (the right of "veto" of the permanent members of the Security Council).
- Practices of positive discrimination in favor of certain States suffering from a structural situation of inequality or vulnerability.
  - Advantages of developing countries in the World Trade Organization system.
  - the special status of landlocked or geographically disadvantaged States.
  - Principle of "common but differentiated responsibilities" in International Environmental Law.

C.2. NON-INTERVENTION IN INTERNAL AFFAIRS

- The principle of the sovereign equality of States implies the obligation not to intervene in matters within the domestic jurisdiction of other States.
  - ICJ Judgment of April 9, 1949 Case of the Straits of Corfu
  - Proclaimed by GA Resolution 2131 (XX) of 21 December 1965 "Declaration on the Inadmissibility of Intervention in the Internal Affairs of States and the Protection of their Independence and Sovereignty".
  - Content of this principle specified in Resolution 2625 (XXV) of 24 October 1970: No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State: armed intervention, other form of interference or threat against the personality of the State or the political, economic and cultural elements that constitute it, are violations of international law.
- Analysis by ICJ Judgment of June 27, 1986 concerning the case of military and paramilitary activities in and against Nicaragua:
  - Principle of Customary international law.
  - This principle prohibits any State or group of States from intervening directly or indirectly in the internal affairs of another State.
    - matters in respect of which the principle of sovereignty of States recognizes their right to decide freely.

- Recent times: trend towards the introduction of certain exceptions to the prohibition of intervention in the internal affairs of other States
  - assistance, interference or "humanitarian intervention".
  - The "responsibility to protect" populations when the territorial State does not duly fulfill its duties in this respect: reaffirmation of the obligation of States to be responsible for the well-being of their populations and to assist the United Nations in protecting populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

C.3. SOVEREIGN IMMUNITY OF THE STATE

- A State may not be subjected against its will to the judicial (immunity from jurisdiction) or coercive (immunity from execution) powers of another State without its consent: *par inter pares no habet imperium.*
- Body of customary rules:
  - Absolute theory of immunity: the courts of a State could never exercise jurisdiction against a foreign State without its consent or take enforcement measures against it.
  - Relative theory of immunity: It distinguishes between acts of the State performed in the exercise of its sovereign powers (*acts iure imperii-State's immunity*) and those performed in the context of civil and commercial activities (*acts iure gestionis*).
    - This relaxation begins to be pointed out also with respect to the immunity of execution of the foreign State.
- ICJ: in favor of maintaining the immunity of the foreign State from jurisdiction and enforcement of civil claims brought in national courts alleging a violation of peremptory norms (*ius cogens*).
  - Judgment of 3 February 2012 concerning State jurisdictional immunities: *"A State is not deprived of immunity merely because it is accused of serious violations of international human rights law or the international law of armed conflict that could constitute war crimes or crimes against humanity".*
- ILC: United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (not in force, missing 8 parties).

GENERAL CONSIDERATIONS

- States are social bodies subjects to historical dynamic: changes and modifications ("transformations of the State“) that may affect its various component elements (population, territory and government), and are of interest to international law when they affect its relations with other States.

A. IDENTITY AND CONTINUITY OF THE STATE

- General principle relating to the transformations of the State: principle of "identity and continuity" of the State: except in cases where the State is totally extinguished, the State entity remains identical for international law despite changes.
  - Application in cases of revolutions (changes in governing regimes).
- Rationale: do not alter the international status of the State or affect the persistence of the rights and obligations established under international law.

B. BIRTH AND RECOGNITION OF NEW STATES

- Emergences of new States: colonial emancipation, dismemberment or splitting of another State, unification of States, etc.
- Other members of the international community reaction: recognition or non-recognition of the new State.

B.1. CONCEPT AND MODALITIES OF RECOGNITION

- Doctrinal (Institute of IL) definition: *free act by which one or more States declare the existence on a given territory of a politically organized human society, independent of any other existing State, capable of observing the prescriptions of international law, and by which they consequently express their willingness to consider it as a member of the international community.*
- Modalities:
  - Expressly, by means of a specific and formal declaration of recognition
  - Tacitly or implicitly, by means of other acts implying recognition of the State (complex question).
  - Cases of (mis)so-called "collective" or concerted recognition: a group of States have agreed on the conduct to be followed with respect to the recognition of new States in a given case (is rather a concerted act adopting criteria for the recognition, which will then materialize through individual recognition by each of the States).

B.2. DISCRETIONARY NATURE OF RECOGNITION

- It is a free act because it is within the discretionary competence of the State, with total independence and based on criteria of opportunity.
  - Political nature.
  - Evolution of IL: limit discretion in matters of recognition
    - Implications of principle prohibiting recourse to the threat or use of force against the territorial integrity or political independence of any State, or in any manner incompatible with the purposes of the United Nations.
      Ex: *Declaration on November 15, 1983, by the Turkish community in the northern part of Cyprus as an independent state under the name "Turkish Republic of Northern Cyprus" (TRNCNK).*

B.3. DECLARATORY NATURE OF RECOGNITION

- The recognition does not have a constitutive value (it does not create the State being recognized) but is merely declaratory, since it merely states that the State exists.
  - Existence of the State is governed by the principle of effectiveness, precedes recognition and does not depend on it.
  - The State exists when a government exercises its authority over a given territory and population, regardless of its recognition or non-recognition by other States.
  - Recognition does not create the recognized State, but simply expresses the acceptance of its existence by the recognizing State.
- However, the effects of recognition are not inconsequential.

C. POLITICAL TRANSFORMATIONS: RECOGNITIONS OF GOVERNMENTS

- General rule: changes in the regime of government do not affect the international status of the State.
- However, in cases where a revolutionary change in the power structure occurs within a State, the question of "recognition of governments" often arises in practice.
  - Third States are free to decide whether or not to recognize the *de facto* government.
  - Attemps have been made in international practice to subject this process to predetermined criteria or guidelines:
    - "legitimacy" criteria.
    - theory of "effectiveness“.
    - "Estrada doctrine“: the maintenance or withdrawal, as it seemed convenient, of diplomatic agents".

D. TERRITORIAL TRANSFORMATIONS: SUCCESSION OF STATES

- Changes in the territory: specific problems of "State succession". Complexity of situations by diversity of cases (the emergence of new States as a result of the emancipation of colonial countries, the merger of two pre-existing States the division of a State into two States, the dismemberment of a State, the segregation of a part of the territory of a State).
- Definition: replacement of one State (predecessor State) by another (successor State) in the responsibility for the international relations of a territory. Questions regarding:
  - the treaties concluded by the predecessor State with respect to the territory being succeeded;
  - the property, archives and debts of the predecessor State;
  - the membership of the predecessor State in international organizations;
  - the nationality of the population of the predecessor State;
  - the private property affected by the succession, etc.
- Some of the matters: international codification:
  - the succession of States in respect of treaties of 1978: principles of tabula rasa (newly states) and continuity of treaties (other cases).
  - the succession of States in respect of property, archives and debts of 1983 (casuistic).
  - ILC Draft Articles on the nationality of natural persons in relation to the succession of States.

- Generally: Problems solved by special agreements between the predecessor State and the successor State.