

CHAPTER 2: THE STATE SYSTEM

The basic unit of the international legal system is the State. One may think of the State as a legal “person” that has a status in international law similar to the status of a real person in national law. The State has a will or “personality” by which it expresses itself; it is equal with other States before the law; and it is seen as an indivisible whole.

It is important to notice from the beginning the difference between the State and that State’s government. The State is an idea that has a great deal of meaning to its citizens and incredible endurance over the long term despite whatever internal divisions and tensions it may suffer. The stability of the State System rests on the stability of States, and for this reason international law places a great deal of emphasis on a State’s continued legal existence and relative permanence of its borders. The government of a State may change, through normal constitutional processes or otherwise, and the State itself will continue to exist. As will be seen, even a total change in the structure of government – for example, by rewriting the constitution – will not change a State’s legal obligations to other States at the international level.

To get a better idea of how States operate under international law, it helps to compare the activities of individuals in the national arena with the activities of States in the international arena. Unlike the national legal system, the international legal system is incredibly decentralized and loosely bound together, leading some scholars to the conclusion that the international system is not a “legal” system at all but rather a changing network of moral bonds between largely autonomous State actors. Consider this issue as you look at the following chart.

National Legal System	International Legal System
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Individual people have rights and duties under the law.	States have rights and duties under the law.
The government makes the laws (typically the legislature).	There is no international government or legislature that makes laws applicable to all States. Rather, States have to consent to the laws individually, either by entering into treaties with other States or by creating customs through their behavior.
The judiciary decides on the rights and duties of individual people.	Although there are many international tribunals, for example the International Court of Justice, none of them has compulsory jurisdiction to decide on the rights and duties of States. Rather, States must first consent to the jurisdiction of an international court before the court can make a decision about those States' rights and duties.
The government enforces the law (typically the executive branch).	Again, there is no international government with the authority to command States. This has led some scholars to argue that there are no real enforcement mechanisms at the international level. Individual States, acting alone or through the United Nations or some regional organization like NATO, must enforce their own rights. This results in uneven enforcement of

	international laws. Is this a problem? Is enforcement a matter of politics, that is, at the discretion of powerful States?
Individuals have formal equality before the law. Thus, the law applies the same to the weak and the powerful, the poor and the rich.	States also have formal equality before the law in the international system. When States go before the International Court of Justice, for example, there are no special privileges accorded to more powerful States. Still, because enforcement is only possible with the backing of a powerful State, the law in practice may be applied unequally.

The State system came into being with the birth of the so-called “nation-state” in Europe in the 16th and 17th centuries. Of course, certain international principles such as the binding nature of peace treaties and the exchange of diplomats date back to ancient times. Nonetheless, *modern* international law is based almost entirely on the State system and, as the student will see, is derived in the first instance from the principle of State *sovereignty* that establishes the State as the relevant unit that is to be ordered by international laws. In a sense, then, the first international law is the law that established the State as the subject of international law.

The next question for theorists has been, *what form will these international laws take that are to order State relations?* Roman law and Christian “Canon” law have had some influence here but mostly through their expression of the so-called “natural law.” This natural law envisions some *natural* ordering of the relations among nations according to a rational principle, for example the desire for peace and harmony. One early theorist

of natural law was Hugo Grotius, a Dutchman of the late 16th century who is known as the “father” of modern international law. Later on – predominantly in the 19th century – the theory of positivism came to dominate the field of legal theory and had a strong influence on this question about the form that international laws should take. As will be discussed extensively in subsequent chapters, positivism emphasized not some abstract “natural” order of States but rather the *consent* of States as the basis for all the international rules that bind States in their relations with one another.

It is positivists who raise the point that international law should not be called “law.” The argument is that law, by definition, requires some centralized enforcing power. At the national level, the government (particularly the executive) enforces the laws. In international relations there is no centralized enforcing power. Rather, there is a loose amalgamation of individual sovereign States who may or may not follow their own rules. Looking at the above chart, it is clear that enforcement at the international level will be less consistent and law-like than enforcement at the national level. Nonetheless, this theoretical prediction is not borne out in practice to the extent that positivist scholars might predict. It has been noted that most States obey most international laws most of the time. Other reasons have been given for State obedience to international laws aside from the threat of enforcement, as will be made clear in the section on State behavior. As the student will see, this text expressly rejects the positivist criticism of international law. The student of course is advised to consider the arguments on both sides of this issue as they are presented in subsequent chapters and come to his or her own conclusions.

The traditional State system has suffered more recent changes from globalization and improved technologies that force more expansive areas of international cooperation. In the traditional State system, international

laws at the international level applied only to States. That is, only States had international “legal personality” – the ability to sue and be sued in international tribunals. Only a State could commit international wrongs, and only a State had international rights which, when violated, could form the basis for an international claim. The modern international system is still a “State System,” composed of States, but many new actors now play a role in international relations. Principal among these new actors are international organizations like the United Nations and the World Trade Organization. Such organizations are composed of Member States and act like States – like “super-states” in fact – entering into treaties with States and other international organizations and taking on an international personality of their own with a corresponding set of rights and duties under international law. International organizations thus have gained international “legal personality”; they can sue and be sued in international tribunals.

Interestingly, in some international tribunals even individuals may assert rights against States. A set of human rights laws has emerged that imposes obligations on States in respect of their citizens. Through the work of international human rights tribunals, these laws increasingly intrude beyond a State’s borders to redeem the rights of individual citizen-victims.

Hugo Grotius

There is no state so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it. In consequence we see that even the most powerful peoples and sovereigns seek alliances...

Virginia Black, *A Normative Critique of State Personality*, 1983

Hugo Grotius held to a doctrine sometimes called “parallelism.” Since individual persons can be virtuous and just, reasonable, dutiful and sociable, keep contracts and obey laws, then corporate organizations like the state can also be virtuous, reasonable and just, can be sociable, obey laws, conform to the same duties as individuals, etc. It seems that Grotius thought such analogous predication an exemplary condition for international peace. As civil law regards and regulates the rights and interests of persons, so should international law regard and regulate the rights and interests of nations.

Hans Kelsen, *The Pure Theory of Law*, 1967

...The state is a relatively centralized legal order.

This centralization distinguishes the state as a legal order from the primitive pre-state order and the super-state order of general international law. In neither order are the general legal norms created by a central legislative organ but by way of custom, which means that the creation of general legal norms is decentralized. Neither the pre-state nor the super-state legal order establishes courts authorized to apply the general norms to concrete cases, but authorizes the individuals subjected to the legal order themselves to render this function and, particularly, to execute, by way of self-help, the sanctions prescribed by the legal order. According to primitive law, it is the members of the murdered man’s family who take blood revenge against the murderer and his family, which means, they are authorized to carry out the primitive punishment; it is the creditor himself who can satisfy this claim against the debtor by taking some property of the debtor and holding it in pawn. It is the government of the individual state which, according to general international law, is authorized to resort to war or take reprisals against a law-violating state, which means: against the subjects of the state whose government has violated the law. True, the individuals who in the pre-state and in the super-state community create (by

custom) or apply the law and execute the sanctions, are legal organs and thus organs of the legal community; but they are not functioning in the manner of division of labor and therefore not centralized organs like a government, a legislature, and courts under a national legal order. The legal order of primitive society and the general inter-national law order are entirely decentralized coercive orders and therefore not states.

John R. Bolton, *Is There Really 'Law' in International Affairs?* 2000

Treaties are often analogized to contracts, agreements between people, businesses, or other kinds of associations. This analogy is fundamentally wrong... [With contracts], the promises take place within a system, where if one party breaches its promise, there is a defined way to get remedies. There is a process to decide which promises are legitimate and a procedure to enforce a court order that a party has breached a promise. The very concept of a contract, in other words, takes place within a coherent universe.

Compare this to a treaty. A treaty is an exchange of promises – period. It is a flat misunderstanding of reality to believe that there are enforcement mechanisms ‘out there’ internationally that conform to the kind of legal system that exists in the United States...

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are party to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war...

International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.

Jonathan Baert Wiener, *Global Environmental Regulation*, 1999

...National legislation, at least in democracies, employs a version of Majority rule... By contrast, the voting rule for international treaty law is Voluntary Assent: Treaties bind only those who consent to be bound... The fundamental difference between [domestic voting rules] on the one hand, and [international voting rules] on the other, is thus the ability to coerce dissenters. Under [domestic majoritarian processes]... losing dissenters never have the option to refuse to be bound by the law. Under a Voluntary Assent paradigm, dissenters cannot be coerced; rules are binding only on those who agree to be bound...

As the number of participants who must be consulted increases, the cost of multiple negotiations and the chance that a nation will act as a holdout, insisting on satisfaction of its interests as the price for its assent, rise as well. Even if all countries would reap net benefits from the treaty, uncertainty about others' likely cooperation may induce strategic noncooperation (free riding). Each party's perception of its own gain in turn depends partially on its perception of whether other parties are likely to keep their end of the deal; cooperation is thus endogenous, delicate, and potentially difficult to arrange. Even after becoming parties to the treaty, nation-states can withdraw or decide not to comply. Although such withdrawal or noncompliance might be made illegal under the terms of a treaty, the practical question is whether any enforceable sanctions could be brought to bear against the defector. The threat of withdrawal or noncompliance gives the nation a continuing ability to exact concessions from other parties to the treaty.

The costs to the entire group of negotiating a consensus treaty can be high in terms of the time and effort needed to craft a successful consensus, the side payments extracted by dissenters, and the collective gains forgone when individual countries delay or block action on parochial strategic grounds...

Questions:

1. Why do we say that a State has a “personality,” that it can act, that it can give its assent, that it continues in its life even after a revolution and after new leaders take control over it? Virginia Black has pointed out in “A Normative Critique of State Personality” (1983) that a State is not at all like a person because a State does not have unity of mind or purpose; a State is not “motivated” like an individual; a State does not need other States in the same way that an individual needs social interaction with other individuals; and a State does not respond to social pressure from other States. Do you agree? Is the “State” then a fictional concept, behind which is a whole range of dissenting voices and changing officials? Is it nonetheless a useful concept in international relations?
2. Is it better to say that international law is a “decentralized legal order,” or is it better to say that it is not a legal order at all but rather something else? If we do not call international rules “law,” does that take away from the authority of these rules and make it less likely in the future that States will conform to them?
3. Is it true that States are independent of one another? One may argue that States, like individuals, have many ways to exert pressure on other States and, in essence, “coerce” dissenters. There are a number of organs through which a majority of States may exert pressure, most obviously through the international press and by granting or denying foreign aid. Also, because States depend on international trade, international communications, and international travel, they are willing

to bend to international rules in order to be able to participate in these international activities.

2.1 State Sovereignty

Part A: Definition of Sovereignty and History

A State's sovereignty is its independence. The word "sovereign" implies some ultimate authority, a master with no master above him, a free and autonomous entity. The concept of State sovereignty has two core elements. First, the State has exclusive control over its territory and its internal affairs. Other States cannot go into Ethiopian territory without Ethiopia's permission. Second, States are autonomous entities and, in principle, cannot be bound to an obligation without their consent. Treaties are not imposed on Ethiopia but rather entered into upon Ethiopia's free consent.

The concept of State sovereignty has many implications for interstate relations. The first implication is that the State must speak with one voice at the international level. This is important because, in reality, a State has many voices, dissenting political parties, and even groups within its territory that oppose the central government. Other States, out of respect for State sovereignty, are not supposed to engage in dealings with these sub-state groups at all. Another point is that other States should not concern themselves with certain internal matters of a sovereign State like the type of government a State adopts - whether monarchical, tyrannical, democratic, socialist, or otherwise - or the State's religion or the way a State treats its citizens. In fact, other States should not concern themselves with anything that the State does within its territory that does not affect other States.

The principle of State sovereignty is based on international customary law but it is often confirmed in international treaties. For example, the UN Charter states in Article 2, Section 7: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...” This is an affirmation of the first aspect of sovereignty, that a State should have exclusive control over its internal affairs. Notably, it is an affirmation of State sovereignty vis-à-vis the UN, not vis-à-vis other States. (The Charter in this article goes on to make an exception to the principle of sovereignty for certain actions undertaken by the UN Security Council and so confirms sovereignty and erodes it at the same time.) Another expression of State sovereignty is found in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* (a UN General Assembly resolution adopted in 1970, not a treaty):

[n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.

State sovereignty and the modern nation-state really came into being in 1648 with the Treaty of Westphalia that ended the 30 Years War in Europe. The War arose in part out of tensions between Catholics and Protestants and fears of civil strife between these two religious groups. Disputes between Catholic and Protestant communities in the same State came to involve Catholic and Protestant rulers. As a result, nations were destabilized, rulers were afraid of certain sections of the populace, and all of Europe was plagued by incessant scheming and mistrust.

The Treaty of Westphalia resolved religious tensions by giving each State the power to determine religious affairs within its own territory. The idea

was to block interstate alliances based on religious affiliation – for example, block Catholics in England from uniting with Catholics in France – and force States to come to terms with different religious groups in their territory within the framework of a single national identity. To put this point more broadly, the Treaty recognized independent territorial States and gave State governments exclusive authority to deal with their internal affairs. With the State government usurping religion as the ultimate “sovereign” in domestic affairs, it can be said that the end of the 30 Years War saw the birth of the modern *secular* state. (Note that Jean Bodin in his *Republic* had already elaborated the idea of sovereignty in 1576.)

This gives us some history on the development of the first aspect of sovereignty – the exclusive control by the sovereign over internal affairs – but what about the second aspect of sovereignty relating to the freedom of States in their relations with other States? If States are truly independent of one another, then their relations must be based on their free consent. A treaty is binding on a State only so long as that State agrees to be bound by it. International customs apply only so long as States continue to act in the customary way.

This is a logic that did not develop out of the Treaty of Westphalia. Rather, the concern with State consent to international obligations came in the 19th century with the emergence of the theory of legal positivism. According to this theory, “law” properly defined includes only the law posited by a sovereign and obeyed by subjects. The international system is not a system of *law* at all because there is no international body to enforce obligations, hence no fear of punishment on the part of States, hence no obedience by States. Once we accept the notion that international law is not “law,” we fall back on the idea of complete and total autonomy for each State. A sovereign State is a free State, and a free State does not abide by the will of

other States. Such arguments contribute to the idea that States are free even to the extent that their consent will bind them only temporarily, until they consent to something else.

Whether or not one supports this second aspect of sovereignty – for policy reasons or otherwise – is a separate issue. It is enough to note here that the second aspect of sovereignty is a recent development and, seemingly, is not a necessary aspect of the State system. That is, the State system functioned for many years without this emphasis on the complete independence of States in their relations with one another.

Corfu Channel Case (U.K. v. Albania), individual opinion by Judge Alvarez, 1949.

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.

Sovereignty confers rights upon States and imposes obligations on them.... Some jurists have proposed to abolish the notion of the sovereignty of States, considering it obsolete. That is an error. This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted...

...We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules which they had accepted. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will.

Werner Levi, *Contemporary International Law*, 1991

Mainly as a result of new economic forces, the Holy Roman Empire broke down, which brought about the collapse of the at least nominally centralized order of Europe and foreshadowed the need for a different legal system...

As new centers of independent power arose, laws regulating their coexistence and relations were needed... Gradually, the relationships of subordination and superordination under the universalist reign of one emperor and pope were replaced by a system of coordination among sovereign rulers. The feudalistic entities with their relatively uncertain borders gave way to states based upon sharply defined territory... The preeminent role of territory in international law began...

Once the multitude of specific limited jurisdictions... was replaced by the principle of territoriality with one sovereign ruler as the basis of the state, a number of legal consequences followed. One was the absolute power and exclusive jurisdiction of one ruler in his or her territory. The second was the prohibition of interference by other monarchs in a state's internal affairs. The third was the rise of immunity. The fourth was the gradual elaboration of equality among states in diplomatic practice and of the principles regulating this practice...

Stephen C. McCaffrey, *Understanding International Law*, 2006

The "modern" system of international law is generally regarded as having emerged in the aftermath of the Thirty Years War, which ended with the Peace of Westphalia in 1648. With the conclusion of this conflict came the end of the Holy Roman Empire..., the recognition of the sovereign

independence of its member states, and the consequent rise of the modern secular state.

But with the disappearance of the unifying influence of the Empire, the question arose as to whether anything would take its place; whether, that is, the very sovereignty of states – a doctrine elaborated in Jean Bodin's *Republic* in 1576 – meant that there was nothing binding them together, no order governing their relations. It might be thought that the sovereignty of nations is a negation of the notion that they are subject to law. A country's sovereignty, so the argument might go, means that it alone determines what it does or refrains from doing. "Sovereignty," wrote Philip Jessup in 1948, "in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built." If this is the true meaning of sovereignty, there would seem to be little room for international law.

Yet Bodin himself never conceived of sovereignty in this way. As Brierly points out, for Bodin, sovereignty "was an essential principle of internal political order, and he would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature states are above the law." Bodin's sovereign, or supreme power, was an essential attribute of statehood. Bodin believed that such a single source of authority, rather than a chaotic mass of independent ones, was the defining characteristic of a state. However, he also held that the sovereign did not have absolute discretion to act in any way he or she wished. Instead, Bodin's sovereign was subject to certain laws: "the divine law, the law of nature or reason, the law that is common to all nations, and... the laws of government." The latter are what we would call today constitutional law. Even Bodin's "supreme power," therefore, was subject to the fundamental law of the state, as well as other kinds of law.

Thus, the doctrine of sovereignty, as originally conceived, did not imply absolute, unbridled power, even on the domestic level; and, it was never intended to apply to the relations of states *inter se*, much less to imply that those relations were not governed by a body of law. Unfortunately, however, it has subsequently been invoked as proof that international law is not really binding on states, since they are “sovereign” and may do as they wish. Yet simple observation of the way in which states relate to each other does not support such an anarchic theory. Humans prefer order to chaos, and states, which are merely groups of humans organized to serve certain purposes, do as well. While there is doctrinal debate about the basis, or source, of international legal obligation, there is not significant disagreement about the general tendency of states to observe international law.

Questions:

1. The Treaty of Westphalia was an agreement between European countries. Is State sovereignty then a Euro-centric doctrine? How have other countries been incorporated into such an international system of sovereign States? Does it make sense to impose one model of the State (in other words, the sovereign Nation-State) on the rest of the world? Are there other possibilities for international order?
2. Do you agree that State consent is the basis for all international law and thus the “quicksand” on which international law is built? Or do you think that there are certain “constitutional principles” in international law – such as the obligation to observe treaties – that do not depend on the consent of States? How does international law come into being? Is it really about conscious agreement between autonomous entities, or is it rather a system of order that arises out of the “habits” of States, repeated behaviors over a period of time?

Part B: Erosion of State Sovereignty

State sovereignty is a background concept in international law. In fact, State sovereignty is an international custom, established through the behavior of States, but it is a custom so fundamental that it is not necessary to prove it when arguing before an international court. In a sense, State sovereignty is a constituting principle in international law, somewhat analogous to a constitutional provision in a particular State.

That said, it is not clear how this constituting principle relates to the body of international laws that have been built up around it. Many people have argued that States are no longer free and sovereign; that sovereignty has been eroded by international laws and international bodies; that such laws and such bodies tend to restrain the activities of States from the outside. This argument has been made numerous times in the Congress of the United States, for example, and has led certain U.S. politicians to hold back support from international organizations like the United Nations and the International Criminal Court for fear that the U.S. is giving up its sovereignty. Imagine, for example, that the Dispute Settlement Body of the World Trade Organization decides a case that in effect strikes down a domestic law of a Member State. The WTO is saying to that State's government, "You cannot have this law." Must a State change its laws to conform to the opinions of some panelists sitting at the WTO?

Imagine how you might raise a State sovereignty argument in an international case. Let us say that Egypt is trying to prevent Ethiopia from building a hydro-electric dam on the Nile river. As representative for Ethiopia, you might say the following: "This portion of the Nile is in Ethiopian territory. According to the principle of State sovereignty, the Ethiopian government has exclusive control over its own territory. Therefore it is our sovereign discretion whether to build the dam or not."

On the other hand, Egypt may assert various treaty rights to the water that flows from Ethiopia into Egypt and furthermore may remind Ethiopia of its obligation under international custom to use its water resources in such a way as to not bring harm to downstream neighbors. How do we resolve such a conflict between State sovereignty and other international laws? Consider this problem as you go through the readings.

Jessica Matthews, *Power Shift*, 1997.

The absolutes of the Westphalian system – territorially fixed states where everything of value lies within some states' borders; a single, secular authority governing each territory and representing it outside its borders; and no authority above states – are all dissolving. Increasingly, resources and threats that matter, including money, information, pollution, and popular culture, circulate and shape lives and economies with little regard for political boundaries.... Even the most powerful states find the marketplace and international public opinion compelling them more often to follow a particular course...

Lieutenant Colonel Jeffrey K. Walker, *SPEECH AND COMMENT: The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future for the Profession of Arms*, 2001.

It has become somewhat trendy within international law and political science circles over the last few years to speak of the post-modern or "Post-Westphalian" international order. The argument usually runs something like this. The international system has, since the Peace of Westphalia in 1648, contained only one type of relevant actor – the sovereign state run by a government in exclusive charge of a geographically defined territory and people. This resulted from the horrible depravations wrought by the religion-charged Thirty Years' War – that final and tragic denouement of the Reformation. Although it took thirty bloody years to figure out, the

European powers came to the realization that trying to impose one's own ideas of what was spiritually correct – like Lutheranism or Calvinism or Catholicism – on someone else's subjects was a formula for producing unspeakable violence. The theory therefore ran for 350-odd years, based on the original 1555 Peace of Augsburg rule that the religion of the sovereign determined the religion of the state, that within their own borders, sovereigns could do as they pleased. Admittedly, this rule was as often honored in the breach as in the observance, but that is what we had as a basic international system for the better part of four centuries.

In contrast, the *post-Westphalian* idea is that: 1) what a sovereign does to his own people isn't *necessarily* his own business – and other states may rightfully intervene under certain conditions; 2) *non-state entities* such as international organizations, regional alliances, and non-governmental organizations have a place at the international table; and 3) there are some *universally applicable ideas* that no one gets to reject, such as the inherent right of persons to fundamental human rights, the right of peoples to self-determination, and perhaps the right of everyone to democratic governance and environmental protection.

It is simply incorrect – and getting less correct every day – to say that sovereign states are the only relevant actors within the international system. Today, there are many forces that pull mightily at the fabric of this time-worn monopoly of individual states. First and foremost among these forces is a rapidly broadening and deepening global economic interdependence. The paradigm example of a surrender of state sovereignty in the economic arena is, of course, the European Union... Today, the EU is moving almost inexorably toward deeper social and political union, with only a few self-selected and self-marginalized laggards like the United Kingdom and Denmark resisting. Soon, even one of the most emotional and tangible symbols of state sovereignty – national currency and coinage – will either disappear or undergo a radical transformation within the Euro

monetary area. Even the brass in your pocket will no longer identify you as a Frenchman or a Spaniard or a German.

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Economic interdependence runs much deeper, however, than just these formal regional arrangements. Literally scores of international bodies have made significant and at least tacitly consensual inroads on individual state sovereignty: the WTO, where trade disputes are authoritatively adjudicated and effectively enforced; the World Intellectual Property Organization, where international patent and trademark policy is set and enforced; meetings of the world's major central bankers, where interest rate and inflation targets are set; the G-8, where much international economic policy is hammered out; the association of the world's stock markets, where international trading and settlement rules are determined; transnational anti-trust enforcement, that makes it increasingly impossible for state governments to coddle and protect national corporate darlings; the domination of world investment flows by a handful of multinational banking conglomerates, whose allegiance is to shareholders and bottom lines, not sovereigns; or development and marketing of drugs by just a few multinational pharmaceutical companies, with enormous impact on everything from the worldwide price of aspirin to the availability of anti-AIDS drugs in Africa. These are just a few examples of bodies or organizations or informal groupings that wield significant influence over large swaths of the world economy. Each and every one represents a whittling away of traditional notions of state sovereignty...

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Related to but separate from economic interdependence, the movement of people and ideas has also accelerated since the end of the Cold War. Borders of every state - with the exception of only the most autarkic countries like North Korea--have become remarkably permeable...

...

This frenetic and almost frictionless movement of people combines with another new development in the international system, the free and rapid movement of ideas and information, with the result that there just are not too many secrets any more. Every corner of the globe is subject to the 24-hour news cycle – today even in the most remote reaches of the world, one can find a hotel with CNN. The internet and the world wide web have, at least as far as information and ideas are concerned, completely eliminated borders as well as distance.

This revolution – and it is undeniably a revolutionary development – in the movement of people, information, and ideas has had, in my opinion, two significant effects. First, state governments, even those controlling the most closed or authoritarian societies, can no longer escape notice. Be it interethnic genocide in Rwanda or Bosnia, deliberate famine in Somalia, the desecration of ancient Buddhist carvings in Afghanistan, or government corruption in the Philippines, it makes it to the television screens and newspapers of a global audience near real-time. Some states have tried to resist – China, for example, persists in attempting to regulate access to the internet, but with remarkably poor results. An instructive example of the futility of fighting the tide of information technology was the Tiananmen Square debacle in 1988. In that long-ago, pre-internet day, dissent groups kept the world apprised of events in Beijing through the use of fax machines. So the first major impact on sovereignty is the plain fact that would-be bad actors can no longer do dirty deeds in the dark.

The second, and I think more important effect of this revolution in the movement of people, information, and ideas is that what we are now beginning to witness is the capability for the formation of *instantaneous transnational communities of interest* around almost any issue – big or small. It's simply no longer necessary to have a state sponsor for an interested group of people to effect changes within the international

community. Anthony Lake, former national security advisor to President Clinton, described this phenomenon as "technology enabling local groups to forge vast alliances across borders, and . . . a whole host of new actors challenging, confronting, and sometimes competing with governments on turf that was once their exclusive domain."

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So our beleaguered nation-state...has essentially lost control over its economy and can no longer effectively control the movement of information and ideas through and within its borders.

Could it get any worse for our nation-state? Well, yes it could.

Quick on the heels of the end of the Cold War, the rapid growth in economic interdependence, and the revolutionary expansion in the movement of information came the resurgence of group identification below the state level. When physical or political or economic survival had been in question, people were more or less willing to sacrifice smaller group impulses for effective membership in a militarily and economically viable nation-state – it was just the price that had to be paid to keep a hostile neighbor or would-be hegemon from dominating significant parts of the world. In short, grudging acquiescence to domination by people *kind of* like us was preferred to subjugation to people very alien to us. This really began in response to Napoleon – Germany is a prime example of 'kind of' similar peoples – and continued more or less unabated until the end of the Cold War.

...

Interestingly, economic interdependence has actually hastened the centrifugal forces of self-determining nationalism – and in some very interesting places. Italy, from unification in the 19th century of a country patched together on vaguely linguistic and cultural grounds, has seen the rise of an influential northern separatist party, the *Lega Nord*, that has held the balance in government on one occasion and may well do so again. A

powerful and - unlike the Basques in the north - non-violent Catalan separatist movement has sprung up in the area of northeast Spain centered on Barcelona. Most interestingly, the government of Tony Blair in the UK has delivered on an election promise to devolve powers from the center to regional assemblies in Wales, Scotland, and Northern Ireland. The success of these efforts in Scotland is manifested by the fact that the avowedly separatist Scottish National Party is now the official opposition in the Edinburgh Assembly. As a result, it is not an unreasonable possibility that we may see the end of the United Kingdom in our lifetimes.

One characteristic these European nationalist-separatist movements have in common is an appeal that runs something like this. "We're all in the EU now. Tiny Denmark and tinier Luxembourg are in the EU as well. Our would-be independent country has a population and economy equal to or greater than Denmark or Luxembourg, so why can't we go it alone within the EU, too?" Coupled with the fact that more and more of the traditional functions of the central state government are now performed in Brussels - labor and monetary policy, safety and health regulation, environmental and business standards - this idea of finding one's own way within the EU framework is attractive to many.

So the supposed sovereignty of our beleaguered nation-states continues to be undermined by increasing economic interdependence, the instantaneous and unimpedable flow of information and ideas, and the centrifugal forces of separatism. Of course, this is not to gainsay any future role for the state as we know it--just a greatly changed and vastly reduced role.

James Crawford, *International Law as an Open System*, 2002

...[I]nternational lawyers have developed some strategies for dealing with [the power of sovereignty], an attempt to produce a system of limitations on power when faced with the assertion of an ostensibly unlimited or at least

fundamentally uncontrolled power. Without entering into details, it may be helpful if I catalogue six of the basic strategies:

(a) Limits on sovereignty as the result of the exercise of sovereignty (the principle of consent)

The Wimbledon was a case decided in 1923, the very first interstate case to come before the Permanent Court of International Justice, the predecessor of the International Court of Justice. It was argued there that a treaty provision should be restrictively interpreted because otherwise it would amount to an infringement on Germany's sovereignty. The Court, in a passage echoed many times since:

decline[d] to see in the conclusion of any Treaty by which a State... undertakes to perform... a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

Thus an argument from sovereignty is evaded by an appeal to sovereignty: if states could not enter into binding international obligations, they would lack an attribute of sovereignty. The problem shifts to the interpretation of the commitment actually made, which can then be treated as a more narrowly legal and technical issue.

(b) Sovereign claims presumed to be conceded to other sovereignties (the principle of equality)

Thus a claim made by a powerful state – for example, the United States’ claim to a continental shelf adjacent to its coast, first made in 1945 – is accepted on the footing that the entitlement to a continental shelf extends to all coastal states, irrespective of their power to enforce that claim. The process of acknowledging a special right vested only in the most powerful states would require much more by way of justification and acceptance...

(c) Limits on sovereignty derived from the coexistence of sovereignties (the principle of coexistence)

Thus a state should not carry out activities on its territory which cause substantial damage to the territory of other states. To quote the formulation contained in Principle 21 of the Stockholm Declaration:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

...

(d) The tolerability of limited sovereignty because sovereignty includes the capacity to exceed those limits (sovereignty as non-subjection to the legal authority of another)

The idea that intrinsic limits on sovereignty exist but escape external enforcement goes back to Vattel. In his *Le Droit des Gens*, the single most influential international law work of the period before 1914, Vattel did not reject the idea that natural law and moral requirements bound the state, but he denied that other states could do much about it: ‘If it [the state] abuse its liberty it acts wrongfully; but other nations cannot complain, since they have no right to dictate to it.’ Sovereignty, although in principle

limited, is defined as non-subjection to the rule of another, and thus – short of war – the decision as to compliance becomes an essentially internal one, a matter for the ('subjective') conscience of governments and public opinion.

(e) The tolerability of limited sovereignty because the existence of legal constraints is not equated with their application in a given case (the principle of choice of means)

The principle of choice of means obviously applies in negotiation. It also applies to dispute settlement, i.e. to controversies about the implementation of negotiated norms. It is classically expressed, for example, in Article 33(1) of the United Nations Charter, which says that:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

As the last phrase indicates, this is a menu and not a hierarchy. In consequence, even when there is agreement on the content of a negotiated norm, the modalities of implementation may have to be further negotiated, and the parties to any disagreement remain on an equal footing in that regard.

...

(f) Sixthly, the cumulation of these strategies (the principle of a system of international legal relations)

The five strategies listed here are obviously related to each other.... [T]hey are consequences of the absence at the international level of a centralized authority of the kind we are used to imagining as controlling each state...

Over time, the five strategies have combined with real societal needs and exhaustive diplomacy to produce not a system governed by the rule of law but one that might be described as in a pre-legal condition, one which is moving towards a relative state of order, although still decentralized and highly differentiated. This description is not intended to deny the existence of law or of a legal system at the international level. What it does suggest is that certain basic legal values are not yet systematic, and given the iniquities daily reported and unreported, this is certainly the case. We are still in a situation where international justice resides in enclaves...

Questions:

1. Is it true that State sovereignty as a concept has been eroded? Or, is it better to say that sovereign States have limited themselves – bound their own hands – through their actions and through their consent?
2. Individuals retain a residual freedom as individuals even when living in a community. For example, on entering a community governed by law, an individual gives up his freedom to steal. Nonetheless, that individual retains so many other freedoms, for example the freedom to use his own property as he sees fit. Does the same logic apply to States? That is, States retain a residual freedom to act, even though the community of States has forbidden certain actions?
3. Imagine a world in which States no longer exist. There is one international government, with an international legislature, executive, and judiciary. Do you think it would be possible for this international government uniformly to manage population groups from London, Shanghai, and Addis Ababa to rural towns in Siberia and Mongolia? If not, then won't it be necessary for this international government to have regional administrative units? And what would be the difference

between such a regional administrative unit and a State operating under international laws?

Part C: Theories of State Behavior

International lawyers tend to see in the international relations among States a web of legal obligations that guide States' behavior. That is, lawyers argue that States will perform treaties and continue to follow international customs out of a sense of legal obligation on the part of the officials in those States' governments. Certainly it is true that most international laws are obeyed most of the time.

The student should be aware, however, that, more so than in other legal subjects, there is a strong political dimension to international legal relations. That means that international law is not about memorizing a set of laws that will be applied uniformly to each and every State and situation. The "laws" are more flexible, more subject to power relations, and therefore more elusive and harder to grasp. The black-letter law still has important meaning for States, but it is not as clear what this meaning is.

If students are asked to create international laws on their own, for example by drafting a treaty, they usually place too much emphasis on objective fairness and legal consistency. They forget that the overall quality of their laws as judged by the legal profession will not matter if most States do not agree to these laws. International laws must incorporate previously established claims that are defended by strongly interested States, whether fair or not (one thinks immediately of Egypt's claims to Nile waters); and, sadly, the ideal, objective law must give way, in some cases, to the present interests of more powerful States. These are the necessary sacrifices for consensus among States.

Many theorists argue that lawful behavior by States is merely a coincidence that arises out of a mixture of other motives on the part of States. You can imagine the various concerns of a State official – to satisfy the citizens of the State, to satisfy other officials, to work against enemy States and help friends, to leave some lasting imprint on world affairs. The State is an aggregate of State officials, and it does not obey the law because it has to obey the law but rather because it is in its **self-interest** to do so at any given moment. Such theorists are quick to point out that international laws are not enforced consistently. In fact, as mentioned already, there is no central body in international relations with the ability to enforce international obligations – especially not against powerful States. International laws that cannot be enforced are not “laws” at all but rather more like suggestions. If this is true, then it is unlikely that the fear of punishment prevents States from breaking international obligations, and again unlikely that a concern with legality really motivates State officials to follow international norms.

Even theories based on self-interest, however, admit that it may be in a State’s self-interest at least to give the impression of following international laws most of the time. Officials tend to prefer predictability in State relations that only a legal system can provide. International violations by these officials tend to be strategic and only on particular points rather than systemic and against all of international law. In a cost-benefit analysis, it is apparent that breaking rules to the point of undermining them has too great a cost. It is better to break rules occasionally and attempt to hide this action than it is to break the rules openly and flaunt it.

The main problem with any theory of State behavior is that it is difficult to define what the controlling interests of the State are. For example, a theory based on the State’s self-interest merely begs the question, *What* is the State’s self-interest? How do we connect the

individual interests of State officials with the interests of the State? Are we talking about long-term interests or short-term interests? Even if State officials are motivated by a concern with morals or legality rather than self-interest, moral choices are not always clear and laws often conflict with one another. We can hardly expect a State's behavior to be consistent and predictable through this maze of hard choices. Is it possible then to devise a theory of State behavior at all? Perhaps States are inherently unpredictable.

Contemporary theories of State behavior can be divided broadly into (1) interest-based theories including realism, institutionalism, and liberal theory; and (2) norm-based theories including constructivism and legal process theories. The student should not be concerned so much with memorizing the different schools of thought. Rather, the student should be careful to identify the unexplained assumptions of some of these theories.

The student can contrast more modern theories of State behavior with the approach taken in Thucydides' *History of the Peloponnesian War*. While modern theories seek to turn the State into a creature of predictable and mathematical movements, the Greek men in Thucydides' *History* seem to assume that the State may be swayed at any given moment by the advice of its councilors. Is the State's behavior pre-determined, or may it be changed by advice from theorists and law scholars? This is a question of free will.

Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner, *International Organization and The Study of World Politics*, 1998.

Realism's core assumptions can be variously classified, but four are particularly important: (1) states are key actors in world politics; (2) states can be treated as homogeneous units acting on the basis of self-interest; (3)

analysis can proceed on the basis of the assumption that states act as if they were rational; and (4) international anarchy – the absence of any legitimate authority in the international system – means that conflict between self-interested states entails the danger of war and the possibility of coercion...

The development of neoliberal institutionalism posed a serious challenge for realist analysis... Drawing an analogy to problems of market failure in economics, [Keohane] argued that high transaction costs and asymmetrical uncertainty could lead, under conditions such as those modeled by Prisoners' Dilemma (PD) games, to suboptimal outcomes. Chiefly by providing information to actors (not by enforcing rules in a centralized manner), institutions could enable states to achieve their own objectives more efficiently. Institutions would alter state strategies by changing the costs of alternatives; institutionalization could thus promote cooperation. Keohane argued that institutions mattered because they could provide information, monitor compliance, increase iterations, facilitate issue linkages, define cheating, and offer salient solutions. Keohane did not deny the importance of power, but within the constraints imposed by the absence of hierarchical global governance, states could reap gains from cooperation by designing appropriate institutions...

...For realism, power and conflict are inherent aspects of international politics. The interests of states will differ. Force and coercion are always available options. The astonishingly peaceful end of the Cold War and the collapse of the Soviet Union are not what a realist would have expected...

Neoliberal institutionalism correctly anticipated that the end of the Cold War would not undermine such institutions as NATO and the European Union, so it did not go through an "agonizing reappraisal" such as that experienced by some realists. Indeed, institutionalists began to apply their

theory to security institutions such as alliances and to interpret post-Cold War politics in institutionalist terms...

Claire R. Kelly, *Realist Theory and Real Constraints*, 2004.

The United States balks at the International Criminal Court (ICC). The European Union (EU) bristles at relinquishing its ban on beef hormones. Argentina and the International Monetary Fund (IMF) struggle to negotiate Argentina's rescue from a fiscal freeze. The United States and its coalition of the willing enter Iraq, despite the opposition of other members of the United Nations Security Council. The contentiousness of these events undermines the notion that "international law" makes a real difference in state behavior. These are the hard cases, where the resolution of a dispute is subject to factors other than the application of law or rules to the facts of the dispute. Arguably, these cases support the realist premise that nations pursue power, and thus, the realist critique that power matters more than law. According to the realist critique, hard cases arise because states seek power and because states exercise their power to achieve relative gains in power, despite international institutions, rules or norms...

These hard cases are symptomatic of international institutions achieving a greater degree of "legalization" and "enmeshment." "Legalization" refers to the degree of obligation, precision, and delegation achieved by regime rules. Enmeshment reflects nations' entanglement with the regime and its rules. Hard cases arise from the evolution of "highly-legalized institutions" in which nations become "enmeshed" because these regimes produce discernable obligations and offer significant benefits for compliance.

Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, 2005

The assumption that states act rationally to further their interests is not self-evident. All components of this assumption – that the state is the relevant agent, that a state has an identifiable interest, and that states act rationally to further these interests – are open to question...

The existence of the state depends on the psychology of its citizens. If all U.S. citizens stopped believing that the United States was a state, and instead began to believe that they were citizens of Indiana or Texas or some other subunit, then the United States would cease to exist and numerous new states would come into existence... Moreover, “the state” is an abstraction. Although the identity of the state is intuitively clear, the distinction between the state and the influences on it sometimes blurs. Relatedly, the state itself does not act except in a metaphorical sense. Individual leaders negotiate treaties and decide whether to comply with or breach them. Because the existence of a state and state action ultimately depend on individuals’ beliefs and actions, one could reject the assumption that states have agency and insist that any theory about the behavior of states must have micro-foundations in a theory of individual choice.

Despite these considerations, we give the state the starring role in our drama. The main reason for doing so is that international law addresses itself to states and, for the most part, not to individuals or other entities such as governments. NAFTA did not confer international legal obligations on President Clinton or the Clinton administration, but rather on the United States. The United States remains bound by these obligations until a future government withdraws the United States from the treaty. Moreover, although states are collectivities, they arrange themselves to act like agents, just as corporations do...

...

By state interest, we mean the state’s preferences about outcomes...

[A] state... can make coherent decisions based upon identifiable preferences, or interests, and it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve.

We generally identify state interests in connection with particular legal regimes by looking, based on many types of evidence, to the preferences of the state's political leadership...

We avoid strong assumptions about the content of state interests and assume that they can vary by context. This distinguishes our work from the work of some realists, who assume that a ***state's interests are limited to security and (perhaps) wealth...***

The concept of state interest used in this book must not be confused with the policy that promotes state welfare. In every state, certain individuals or groups - elites, corporations, the military, relatives of dictators - have disproportionate influence on leaders' conduct of state policy... The inevitable presence of these distorting mechanisms means that the "state interest" as we use the term is not necessarily, or even usually, the policy that would maximize the public good within the state...

...

Our theory of international law assumes that **states act rationally to maximize their interests**. This assumption incorporates standard premises of rational choice theory: the preferences about outcomes embedded in the state interest are consistent, complete, and transitive... And we do not deny that states sometimes act irrationally because their leaders make mistakes, because of institutional failures, and so forth. Our claim is only that our assumptions lead to better and more nuanced explanations of state behavior

...As understood by economics, rationality is primarily an attribute of

individuals, and even then only as an approximation. The term's application to collectivities such as corporations, governments, and states must be performed with care... [W]hen states exist, people have adopted institutions that ensure that governments choose generally consistent policies over time – policies that at a broad level can be said to reflect the state's interest as we understand the term.

...

...As is usual...in rational choice theory, we take state interests at any particular time to be an unexplained given. Constructivists challenge this assumption. They seek to show that the preferences of individuals, and therefore state interests, can be influenced by international law and institutions... [But] constructivists have not shown that international law transforms individual and state interests...

...

The relations between the two states at any time can be described as a set of rules. But here care must be used, for several very different things might be going on. Consider a border between A and B. The border is a rule that delineates the territory of each state, where it is understood that neither state can send individuals or objects across the border without the permission of the other state. Territorial borders are generally thought to be constituted and governed by international law. Assume that states A and B respect the border. Our theory of international law posits that one of four things might explain this behavioral regularity.

First, it is possible that neither of the two states has an interest in projecting power across the border. State A does not seek resources in state B's territory and would not seek them even if B were unable to resist encroachment. A is barely able to control its own territory and wants to have nothing to do with B's. State B has the same attitude to state A. When a pattern of behavior – here, not violating the border – results from each state acting in its self-interest without any regard to the action of the other

state, we call it a *coincidence of interest*.

There is a second possible explanation for the border. State A might be indifferent between one border and another border deeper in what is now state B's territory. The additional territory might benefit state A, but it would also bring with it costs. The main concern for the states is to clarify the point at which state A's control ends and state B's begins, so that the two states can plan accordingly and avoid conflict. State B has the same set of interests and capacities. Once the two states settle on a border, neither violates the border because if either did, conflict would result. This state of affairs is called *coordination*. In cases of coordination, states receive higher payoffs if they engage in identical or symmetrical actions than if they do not. A classic coordination game from domestic life is driving: all parties do better if they coordinate on driving on the right, or driving on the left, than if they choose different actions.

A third possible explanation for the border is *cooperation*. States A and B would each benefit by having some of the other's territory, all things being equal. But each knows that if it tried to obtain more territory, the other state would resist, and a costly breakdown in relations, and possibly war, would result, making both states worse off. Thus, the states agree (implicitly or explicitly) on a border that reflects their interests and capacities, and the border is maintained by mutual threats to retaliate if the other state violates the border. In such cases of cooperation, states reciprocally refrain from activities (here, invasion or incursion) that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits.

The final possibility is *coercion*. State A is satisfied with the existing border, but state B seeks to expand its territory at A's expense. If B is sufficiently powerful, it can dictate the new border. Because state A is

weaker and state B benefits from the extra territory whether or not state A resists, state A yields (either before or after military conflict) and a new border is created. Other states might or might not object: they also might benefit from the new border or be powerless to resist it. Coercion results when a powerful state (or coalition of states with convergent interests) forces weaker states to engage in acts that are contrary to their interests (defined independently of the coercion).

This book argues that some combination of these four models explains the state behaviors associated with international law...

Thucydides, *History of the Peloponnesian War*, 431-404 BC

[The following was a debate in Athens over what to do about the city of Mytilene. This city had been an ally of Athens in the war against the Peloponnesians but had betrayed Athens and rebelled from Athens' influence. The Athenians decided to put to death the whole adult male population of Mytilene and to make slaves of the women and children. They sent a ship to communicate this decree to the Athenian commander in Mytilene for him to carry out the order.]

Next day, however, there was a sudden change of feeling and people began to think how cruel and how unprecedented such a decision was – to destroy not only the guilty, but the entire population of a state. Observing this, the deputation from Mytilene which was in Athens and the Athenians who were supporting them approached the authorities with a view to having the question debated again... [A]n assembly was called at once. Various opinions were expressed on both sides, and Cleon... spoke again. It was he who had been responsible for passing the original motion for putting the Mytilenians to death. He was remarkable among the Athenians for the violence of his character...

“Personally I have had occasion often enough already to observe that a democracy is incapable of governing others, and I am all the more convinced of this when I see how you are now changing your minds about the Mytilenians. Because fear and conspiracy play no part in your daily relations with each other, you imagine that the same thing is true of your allies, and you fail to see that when you allow them to persuade you to make a mistaken decision and when you give way to your own feelings of compassion you are being guilty of a kind of weakness which is dangerous to you and which will not make them love you any more. What you do not realize is that your empire is a tyranny exercised over subjects who do not like it and who are always plotting against you; you will not make them obey you by injuring your own interests in order to do them a favor; your leadership depends on superior strength and not on any goodwill of theirs. And this is the very worst thing – to pass measures and then not to abide by them. We should realize that a city is better off with bad laws, so long as they remain fixed, than with good laws that are constantly being altered...

“As for me, I have not altered my opinion, and I am amazed at those who have proposed a reconsideration of the question of Mytilene, thus causing a delay which is all to the advantage of the guilty party. After a lapse of time the injured party will lose the edge of his anger when he comes to act against those who have wronged him; whereas the best punishment and the one most fitted to the crime is when reprisals follow immediately...

“...I say that no single city has ever done you the harm that Mytilene has done. Personally I can make allowances for those who revolt because they find your rule intolerable or because they have been forced into it by enemy action. Here, however, we have the case of people living on an island, behind their own fortifications, with nothing to fear from our enemies except an attack by sea against which they were adequately protected by

the their own force of triremes [ships]; they had their own independent government and they were treated by us with the greatest consideration. Now, to act as they acted is not what I should call a revolt (for people only revolt when they have been badly treated); it is a case of calculated aggression, of deliberately taking sides with our bitterest enemies in order to destroy us. And this is far worse than if they had made war against us simply to increase their own power. They learned nothing from the fate of those of their neighbors who had already revolted and been subdued; the prosperity which they enjoyed did not make them hesitate before running into danger; confident in the future, they declared war on us, with hopes that indeed extended beyond their means, though still fell short of their desires. They made up their minds to put might first and right second, choosing the moment when they thought they would win, and then making their unprovoked attack upon us.

“...What we should have done long ago with the Mytilenians was to treat them in exactly the same way as all the rest; then they would never have grown so arrogant; for it is a general rule of human nature that people despise those who treat them well and look up to those who make no concessions. Let them now therefore have the punishment which their crime deserves. Do not put the blame on the aristocracy and say that the people were innocent. The fact is that the whole lot of them attacked you together...

“Now think of your allies. If you are going to give the same punishment to those who are forced to revolt by your enemies and those who do so of their own accord, can you not see that they will all revolt upon the slightest pretext, when success means freedom and failure brings no very dreadful consequences?...

“...To feel pity, to be carried away by the pleasure of hearing a clever argument, to listen to the claims of decency are three things that are entirely against the interests of an imperial power...”

So Cleon spoke. After him Diodotus...came forward...and spoke as follows:

“I do not blame those who have proposed a new debate on the subject of Mytilene, and I do not share the view which we have heard expressed, that it is a bad thing to have frequent discussions on matters of importance. Haste and anger are, to my mind, the two greatest obstacles to wise counsel – haste, that usually goes with folly, anger, that is the mark of primitive and narrow minds. And anyone who maintains that words cannot be a guide to action must be either a fool or one with some personal interest at stake; he is a fool, if he imagines that it is possible to deal with the uncertainties of the future by any other medium, and he is personally interested if his aim is to persuade you into some disgraceful action, and, knowing that he cannot make a good speech in a bad cause, he tries to frighten his opponents and his hearers by some good-sized pieces of misrepresentation...

...

“...If we are sensible people, we shall see that the question is not so much whether they are guilty as whether we are making the right decision for ourselves. I might prove that they are the most guilty people in the world, but it does not follow that I shall propose the death penalty, unless that is in your interests; I might argue that they deserve to be forgiven, but should not recommend forgiveness unless that seemed to me the best thing for the state.

“In my view our discussion concerns the future rather than the present. One of Cleon’s chief points is that to inflict the death penalty will be useful to us in the future as a means for deterring other cities from revolt; but I, who am just as concerned as he is with the future, am quite convinced that

this is not so... You may well find [Cleon's] speech attractive, because it fits better with your present angry feelings about the Mytilenians; but this is not a law-court, where we have to consider what is fit and just; it is a political assembly, and the question is how Mytiliene can be most useful to Athens.

"Now, in human societies the death penalty has been laid down for many offences less serious than this one. Yet people still take risks when they feel sufficiently confident. No one has ever yet risked committing a crime which he thought he could not carry out successfully. The same is true of states. None has ever yet rebelled in the belief that it had insufficient resources...to make the attempt. Cities and individuals alike, all are by nature disposed to do wrong, and there is no law that will prevent it, as is shown by the fact that men have tried every kind of punishment, constantly adding to the list, in the attempt to find greater security from criminals... Either, therefore, we must discover some fear more potent than the fear of death, or we must admit that here certainly we have not got an adequate deterrent. So long as poverty forces men to be bold, so long as the insolence and pride of wealth nourish their ambitions, and in the other accidents of life they are continually dominated by some incurable master passion or another, so long will their impulses continue to drive them into danger... In a word it is impossible...for human nature, when once seriously set upon a certain course, to be prevented from following that course by the force of law or by any other means of intimidation whatever.

"We must not, therefore, come to the wrong conclusions through having too much confidence in the effectiveness of capital punishment, and we must not make the condition of rebels desperate by depriving them of the possibility of repentance and of a chance of atoning as quickly as they can for what they did. Consider this now: at the moment, if a city has revolted and realizes that the revolt cannot succeed, it will come to terms while it is

still capable of paying an indemnity and continuing to pay tribute afterwards. But if Cleon's method is adopted, can you not see that every city will not only make much more careful preparations for revolt, but will also hold out against siege to the very end, since to surrender early or late means just the same thing? This is, unquestionably, against our interests - to spend money on a siege because of the impossibility of coming to terms, and, if we capture the place, to take over a city that is in ruins so that we lose the future revenue from it. And it is just on this revenue that our strength in war depends.

"...[W]e should recognize that the proper basis of our security is in good administration rather than in the fear of legal penalties. As it is, we do just the opposite: when we subdue a free city, which was held down by force and has, as we might have expected, tried to assert its independence by revolting, we think that we ought to punish it with the utmost severity. But the right way to deal with free people is this - not to inflict tremendous punishments on them after they have revolted, but to take tremendous care of them before this point is reached...

"Consider what a mistake you would be making on this very point, if you took Cleon's advice. As things are now, in all the cities the democracy is friendly to you; either it does not join in with the oligarchies in revolting, or, if it is forced to do so, it remains all the time hostile to the rebels, so that when you go to war with them, you have the people on your side. But if you destroy the democratic party at Mytilene, who never took any hand in the revolt and who, as soon as they got arms, voluntarily gave the city up to you, you will first of all be guilty of killing those who have helped you, and, secondly, you will be doing exactly what the reactionary classes want most. For now, when they start a revolt, they will have the people on their side from the beginning, because you have already made it clear that the same punishment is laid down both for the guilty and the innocent...

This was the speech of Diodotus. And now, when these two motions, each so opposed to each, had been put forward, the Athenians...still held conflicting opinions, and at the show of hands the votes were nearly equal. However, the motion of Diodotus was passed.

Questions:

1. What do you think the “self-interest” of a State is in international politics? Do you agree with the realists that the main goal of a State is to increase its power and wealth? Or is this an oversimplification? Is it a simple thing for a State to increase its relative power and wealth by the way the State treats other States in particular cases, for example in a dispute over diplomatic immunities, or a dispute over the interpretation of a particular treaty?
2. Do you think that a State is concerned with its international image, that is, how other States view its activities? One method of enforcing human rights norms in a particular State is by reporting breaches of human rights in that State to all other States. The idea is that such a report will “mobilize shame” and cause the offending State to change its behavior. Is it likely that a State will feel shame before the international community for its bad actions?
3. Do international laws merely normalize pre-existing power relations? For example, an international institution like the United Nations concentrates coercive power in the five permanent members of the Security Council (U.S., Britain, France, China, and Russia). Although all States may become “enmeshed” in the institution (the UN) and its rules, the permanent members of the Security Council have retained some control over what the rules are. Therefore, it is not the rules that are influencing the five permanent members but rather the five permanent members who are influencing the rules.

4. Many realists, like Goldsmith and Posner in their book, reject the idea that international law and institutions can affect State interests and State behaviors. In this respect, they are limiting the options for State policymakers. It is one thing to advise policymakers that a State *should not* follow international institutions and laws as a matter of good policy, and quite another thing to tell policymakers that a State *cannot* follow international laws for their own sake because a State always acts in its self-interest. Notably, the speakers in Thucydides' History focus on giving the State advice rather than telling the State inevitably what the State will do.

2.2 State Formation and the Self-Determination of Peoples

Part A: Legal and Political Issues of Statehood

States come into existence in many different ways. A former colony may gain its independence; a part of a State may split off to form a new State; an old State may die and dissolve into several new States; or two States may merge to form a single new State. In these situations, the international community must decide the question, When does an emerging entity become a legal State with all the rights and duties of a State under international law?

One might expect that an international body like the United Nations would decide this question. Unfortunately, this is not the case. International bodies may be influential in directing the opinion of the international community, as we will see in a moment, but ultimately the decision of how to treat an emerging entity – or indeed a long-existing entity – is left to the discretion of each existing State. In other words, Ethiopia will decide for itself whether to recognize Israel as a State or not, or indeed whether to

recognize the U.S. as a State or not. Kenya likewise will make a decision as to whether or not Israel and the U.S. are States. There are, of course, legal criteria that tell us when an emerging entity has become a legal State (see below). Some scholars have argued that, for example, Ethiopia has a duty under international law to recognize an emerging entity as a State once that entity has met the legal criteria for statehood. This does not change the fact that each State has a great deal of discretion in regard to its foreign relations and there is little opportunity for the international community to force a State like Ethiopia to recognize an emerging entity as a legal State. (The student should note that recognition of States and recognition of governments are two entirely different issues. Recognition of governments will be dealt with shortly.) More than just recognition, existing States will decide on an individual basis whether or not to confer the *benefits* of Statehood on an emerging entity, for example whether or not to enter into treaties with the emerging entity, whether or not to accept embassies, and whether to entertain diplomatic representatives from the emerging entity in international forums.

The purely legal question of when a State becomes a State is a different matter. The 1933 Convention on the Rights and Duties of States (known as the Montevideo Convention), sets out four simple criteria for statehood. "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; d) capacity to enter into relations with the other states." Seemingly, if an entity has these four things, it is a legal State.

The four criteria have been interpreted rather liberally in application. In regard to the first criterion, there is no minimum number of inhabitants necessary to make a State. The Pacific Island State of Nauru has roughly 10,000 inhabitants; Lichtenstein in Europe has roughly 30,000 inhabitants. The fact that the population must be "permanent" means that Antarctica

cannot be a State because no one lives there year-round. (One might well ask, what will be the rights of nomads in international law?) Second, an entity's territory may qualify as a "defined territory" even though its borders are disputed, as for example with Israel. Third, States have been recognized in the midst of civil war when the States are seemingly without effective governments. This was the case in Burundi and Rwanda which emerged from colonialism in a state of virtual anarchy but nonetheless were recognized as States. (Notably, the requirement of "effective government" may be more stringent when a new State is trying to assert its independence against the will of a predecessor State, as when a part of a State wages a war of secession in order to form a new State. At the same time, this requirement may be loosened in cases of the legitimate expression of the right to self-determination – see below.) Finally, in regard to the fourth and last criterion, there are many cases in which all or part of the foreign relations of a State is undertaken by another State. The national defense of Liechtenstein is managed by Switzerland; the defense of Monaco is managed by France. The emphasis here should be on the *capacity* to enter into relations with other States; whether or not a State *actually* takes up management of all of its foreign relations is not important for the question of Statehood.

As with other aspects of international law, the criteria of Statehood differ in theory and in practice. In practice, even after new States have met the four legal criteria of Statehood, they are not automatically recognized as States by other States. This is not to say that there are additional legal criteria for Statehood but rather to point out that there is a strong political dimension to this issue. After all, State formation usually involves taking away territory that previously belonged to another State and for this reason is politically very sensitive.

There has been some debate in the scholarship about the role that recognition of States plays in deciding whether an emerging entity is a State. As mentioned before, the benefits of Statehood only come with recognition by other States. In theory, however, the weight of legal authority rests with the so-called “declaratory” view that a State exists once it has met the four legal criteria, whether or not it has been recognized by any other State. According to the Institut de Droit International: “The existence of a new State with all the legal consequences attaching to this existence is not affected by the refusal of recognition by one or more states.” (1936). The other view is the “constitutive” view, holding that other States “constitute” or create a new State by recognizing it. Although this theory gives proper deference to international politics, it does not provide a clear point at which a State becomes a State and in fact may misrepresent the way that States make recognition decisions. How many States must recognize an emerging entity as a State before it can be a legal State? A majority of 100? Or what? And how should States make this decision whether or not to recognize?

Similar problems arise when determining whether a State is no longer a legal State. In other words, it is just as difficult to say when a State has died as to say when a State has been born. Logically, it would make sense to apply the four criteria again and say that, when an existing State can no longer satisfy all four criteria, it ceases to exist. In practice, this is not done. International law places a great deal of emphasis on stability in international relations and thus resists any sudden withdrawal of Statehood status. In short, a State may lose its government for a time and still remain a State. A State may lose control over its relations with other States and likewise remain a State, etc. For example, the collapse of the central government in Somalia during most of the 1990s did not change Somalia’s status as a State in international law. Neither did Iraq’s occupation of Kuwait for nine months alter Kuwait’s status as a State.

Philip C. Jessup (as U.S. Representative to the UN Security Council),
Comments on the Admission of Israel to the United Nations, 1948

The consideration of the application requires an examination of...the question of whether Israel is a State duly qualified for membership. Article 4 of the Charter of the United Nations specifies the following:

Membership in the United Nations is open to...peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

...My Government considers that the State of Israel meets these Charter requirements.

The first question which may be raised in analyzing Article 4 of the Charter and its applicability to the membership of the State of Israel, is the question of whether Israel is a State, as that term is used in Article 4 of the Charter. It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.

In so far as the question of capacity to enter into relations with other States of the world is concerned,... I believe that there would be unanimity that Israel exercises complete independence of judgment and of will in forming and in executing its foreign policy...

When we look at the other classic attributes of a State, we find insistence that it must also have a Government. No one doubts that Israel has a Government...

According to the same classic definition, we are told that a State must have a people and a territory. Nobody questions the facts that the State of Israel has a people...

The argument seems chiefly to arise in connection with territory. One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example, my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. To the North, the exact delimitation of the frontier with the territories of Great Britain was not settled until many years later. And yet, I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.

...The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement...

Questions of Statehood are particularly tricky when dealing with a rebel group that is trying to secede from an existing State. The State that is losing territory (predecessor) almost always will oppose the creation of the new State, and recognition of the new State by other States will be perceived as an aggressive move or as interference with the internal affairs (sovereignty) of the predecessor State. In fact, early recognition of a rebel group by another State is illegal – a violation of the predecessor State’s sovereignty. It would seem that the international community must wait until most of the fighting between the rebels and the central government has stopped. As mentioned before, the four legal criteria will be applied more strictly, especially the criterion of an effective government. The rebels will have to show to the international community that they, rather than the central government of the predecessor State, have effective control over their territory.

A rebel group usually begins its campaign for a new State with a “unilateral declaration of independence.” Such a declaration of itself does not achieve a new State, but, without such a declaration, an otherwise independent entity might not obtain Statehood. This is the case with Taiwan, an entity of questionable status in international law that for a long time claimed to be the rightful government of all of China. Taiwan did not declare its independence from China as a separate State (even though Taiwan has every intention now of preserving its actual independence from China). Taiwan’s appeal in the past has been for the recognition of its government as the rightful government of all China rather than the recognition of its independent Statehood. Many people in Taiwan now support Taiwanese independence, but China strongly opposes the creation of a separate State of Taiwan. So Taiwan’s status remains uncertain.

Eritrea provides an interesting example of secession and State formation in Africa. Eritrea was able to form an independent State in part because its request for Statehood came at the end of civil war in Ethiopia and the fall of the “Derg” regime in 1991. Eritrean rebel forces were part of the coalition that defeated the Derg, and, at the 1991 peace conference that established Ethiopia’s transitional government, Eritrea was given permission to hold a referendum on independence. The President of the transitional government informed the UN Secretary General of this and requested that the Secretary General “make the necessary arrangements with the Provisional Government of Eritrea to facilitate . . . United Nations supervision of the referendum.” Eritrea did not declare independence at this time but rather waited for the referendum. The referendum took place in 1993 and a majority of Eritreans voted for independence.

Eritrean independence has been characterized in different ways – as a case of deferred decolonization from the Italians, as an illegal act in violation of international law, and as a consensual arrangement with the transitional government of Ethiopia. What makes the Eritrean case different is that, when Eritrea made its formal move towards independence in 1991, it did not appear to act unilaterally. Eritrea did not make an immediate declaration of independence in 1991. Rather, Eritrea made a request to the transitional government and to the UN for a referendum on independence. Whether this was a “request” or a “demand” is another matter. To the international community, it appeared that Eritrea was following a fair procedure to achieve its independence. After the referendum, other States did not have to worry about the perils of “early recognition” of Eritrea as a State, and the UN, which had helped organize the referendum, was ready to admit Eritrea as a member State.

David A. Ijalaye, Was Biafra at Any time a State in International Law? 1971.

[Biafra was a territory of Nigeria that attempted to secede from Nigeria during the Nigerian civil war of 1967-1970 and ultimately failed. Five countries recognized Biafra: Tanzania, Gabon, Ivory Coast, Zambia, and Haiti. Nigeria objected that such recognition was a violation of its sovereignty and was contrary to the Charter of the Organization of African Unity.]

...Although Biafra had a government, it was very difficult to say that it had a permanent population or a defined territory. These were the very things that the civil war had to decide... Whenever part of an existing state breaks away to form another independent state, recognition is always controversial; perhaps that was why no country came forward to recognize Biafra until eleven months after secession [from Nigeria]...

...

The Organization of African Unity took a strong stand in favor of Nigeria... [As] Emperor Haile Selassie of Ethiopia said:

The Organization of African Unity is both in word and deed committed to the principle of unity and territorial integrity of its member states. And when this Mission was established by our organization its cardinal objective was none other than exploring and discussing ways and means together with and the help of the Federal Government, whereby Nigerian national integrity is to be preserved and innocent Nigerian blood saved from flowing needlessly. The national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved. It is our firm belief that the national unity of individual African states is an essential ingredient for the realization of the larger and greater objective of African Unity.

It is interesting to note that, despite this strong statement in favor of Nigeria, the O.A.U. did not at any of its subsequent meetings consider the grants of recognition accorded Biafra by the four African states.

...

According to the declaratory theory, statehood or the authority of a new government exists as such prior to, and independently of, recognition...

The act of recognition is thus a formal acknowledgment of an established situation... If an entity does not fulfill all the factual conditions of statehood as required by international law, a declaration of recognition by a state is invalid, and any consequential participation by the new entity in international relations cannot be on the footing of international law. A clear example of an illegal and thus invalid recognition is where the act of recognition is premature and thus an unwarranted interference in the affairs of another state. In this connection, Brierly has laid down these guiding principles:

It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.

...

[By the declaratory theory], the recognition of Biafra by Tanzania, Gabon, Ivory Coast, Haiti, and Zambia would appear to be unjustifiable and illegal in that at the time of recognition "a real struggle" was still proceeding, and it was not "abundantly clear that the lawful government has lost all hope or abandoned all effort to assert its dominion." In other words, the recognition given to Biafra was, in the circumstances, premature, thus "constituting a tortuous act against the lawful government [of Nigeria] and thus a breach of international law."

According to the constitutive theory, it is the act of recognition alone which creates statehood. This theory has some inherent difficulties. First, it is capable of creating an international monster in that "the status of a state

recognized by state A, but not recognized by state B, and therefore apparently both 'an international person' and 'not an international person' at the same time would be a legal curiosity." The second difficulty is more substantial. How many recognitions will be sufficient to constitute an entity a state in international law? ...[I]t would be difficult under this theory to conclude that recognition by only five small states was sufficient to constitute Biafra an independent nation.

As it has been shown above, it is very difficult to justify the existence of Biafra as a state under either theory, as it would appear that it received only *premature recognition* "which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid." It is conceded that there are no clearly established customary or conventional rules of international law governing premature recognition; but, as shown above, it seems that the preponderance of juristic opinion is that premature recognition is wrong and illegal in international law...

James Crawford, *International Law as an Open System*, 2002

...It has... always been possible for a group to separate from a state and to achieve independence by achieving exclusive control over its territory - if necessary, by winning a war of independence. The Spanish American colonies did so in the early nineteenth century, and the Confederacy attempted to do so in the American Civil War. Secession of this kind was a process, which could take years and which might or might not lead to a successful outcome. From the perspective of different participants it might be seen either as an expression of an inherent right to be free from oppression or as an act of treason. But, however described by the participants, unilateral secession did not involve the exercise of any right conferred by international law. International law has always favoured the territorial integrity of states, and correspondingly, the government of a

state was entitled to oppose the unilateral secession of part of the state by all lawful means. Third states were expected to remain neutral during such a conflict, in the sense that assistance to a group which had not succeeded in establishing its independence could be treated as intervention in the internal affairs of the state in question, or as a violation of neutrality...

But on the other hand international law has been prepared to acknowledge political realities once the independence of a seceding entity was firmly established and in relation to the territory effectively controlled by it. This had, and has, nothing to do with any pre-existing right in international law on the part of any group or territory to secede. In international law before 1945, there was no such right. The only arguable basis in modern international law by which a right to secession might exist would be by virtue of the principle of self-determination...

...

Since 1945, the only new states, emerging from situations which were not formally recognized as colonial..., have been:

- Senegal (1960);
 - Singapore (1965);
 - Bangladesh (1971);
 - the three Baltic States, Latvia, Lithuania, Estonia (all 1991);
 - the eleven successor states of the former Soviet Union, Armenia, Azerbaijan; Belarus; Georgia; Kazakhstan; Kirgizstan; Moldova; Tajikistan; Turkmenistan; Ukraine, Uzbekistan (all 1991);
 - the five successor states of the former Yugoslavia, Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, Federal Republic of Yugoslavia (Serbia and Montenegro) (1991-2)
 - Czech Republic and Slovakia (1993), and
 - Eritrea (1993)
-

Increasingly, States and international organizations like the European Union and the United Nations are making express demands that must be met by new States before these States will be recognized. It is not that existing States are adding to the four criteria for Statehood. Rather, existing States are offering recognition in exchange for promises by the new States to support human rights, prevent nuclear arms proliferation, etc. Recognition is being used as political leverage to further certain policy goals at the international level.

One might take as an early example of such practice the response of the United Nations to Rhodesia's declaration of independence from Britain in 1965. The UN seemingly ignored the four legal criteria of Statehood and "[c]ondemn[ed] the usurpation of power by a racist settler minority in Southern Rhodesia and regard[ed] the declaration of independence by it as having no legal validity." S.C. Res. 217. In fact, Rhodesia met all four criteria of Statehood. Rather, the UN Security Council seemed to be asserting that Rhodesia (now Zimbabwe) was racist and therefore not a State. The UN cannot force the non-recognition of a State by other States, but the practical effect of the resolution was that other States would not conclude treaties with Rhodesia. (This problem was not resolved until 1978 when a peace accord led to a majority government in Zimbabwe.)

Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 1993.

The political need to take action in both the Yugoslav and the Soviet Union situations was mounting. It was becoming clear that the application of the traditional criteria for statehood would not provide the European Community, the principal mediator in the Balkan crisis, with a sufficient choice of diplomatic tools with which to work. Recognition as a simple

declaration of an ascertainable fact did not provide sufficient means to allow the EC to influence the situation.

On 16 December 1991, the EC Foreign Ministers meeting in Brussels issued a 'Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union'²⁹. Accompanying this Declaration was a 'Declaration on Yugoslavia'³⁰. These two documents were significantly to influence international reactions on the issue of recognition of the newly emerging states of Eastern Europe and, arguably, transform recognition law.

At the time the Declarations were issued, the EC countries had welcomed the return of the three Baltic states into the community of nations but had not extended recognition to any 'new States' in Eastern Europe. Yet the use of this term in the title of the Guidelines document clearly foreshadowed that they would. The Declaration begins by referring to the Helsinki Final Act and the Charter of Paris, 'in particular the principle of self-determination'. It then affirms the readiness of the EC countries to recognize new states 'subject to the normal standards of international practice and the political realities in each case.'

The rider concerning political realities is a stark reminder of Lauterpacht's comment that recognition of states is a matter of policy but rarely has it been expressed in such a direct way. The Guidelines describe the candidates for recognition as those new states which 'have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations'. The Guidelines then list the following requirements:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the

Charter of Paris, especially with regard to the rule of law, democracy and human rights

- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The Guidelines conclude with the warning that the EC countries 'will not recognize entities which are the result of aggression' and, cryptically, that 'they would take account of the effects of recognition on neighbouring states.'

It could be argued that the Guidelines make the process of recognition more difficult because they purport to retain the 'normal standards of international practice' while adding a series of new requirements. In fact, however, the new requirements have tended to supplant the previous practice which was largely based on meeting the traditional criteria for statehood.

Having set a new regime for recognition of states in 'Eastern Europe and the Soviet Union', the EC then added further tests with regard to the situation in Yugoslavia. The Declaration on Yugoslavia introduced a process for applying the Guidelines which required any Republic of the Socialist

Federal Republic of Yugoslavia (SFRY) to apply for recognition by 23 December 1991 stating whether:

- they wish to be recognized as independent states
- they accept the commitments contained in the above-mentioned Guidelines
- they accept the provisions laid down in the draft Convention under consideration by the Conference on Yugoslavia – especially those in Chapter II on human rights and rights of national or ethnic groups
- they continue to support
 - the efforts of the Secretary General and the Security Council of the United Nations, and
 - the continuation of the Conference on Yugoslavia.

The written applications would then be submitted to the Arbitration Commission established in parallel with the Conference on Yugoslavia for advice, and a decision would be taken and implemented by 15 January 1992. The Declaration included an interesting final paragraph which will be considered in relation to the SFRY's Republic of Macedonia.

This method of requiring an application for recognition which is examined by an arbitrator and then decided upon according to a set timetable is virtually unprecedented in recognition practice. The invitation by the EC was thus extended to all six Republics of the SFRY but there was to be no uniformity in the responses or the results.

...

All six Yugoslav republics responded to the invitation extended in the EC's Declaration on Yugoslavia but only four sought recognition. In his reply to the EC on 23 December 1991, Serbia's Foreign Minister recalled that Serbia acquired 'internationally recognized statehood' as early as the Berlin

Congress of 1878 and on that basis had participated in the establishment in 1918 of the Kingdom of Serbs, Croats and Slovenes which became Yugoslavia. He concluded that Serbia 'is not interested in secession.'

The reply of the Montenegrin Foreign Minister of 24 December 1991 was also in terms of declining the EC offer to recognize Montenegro on the grounds that his country retained potential international personality. 'By the decision of the Berlin Congress of 1878 the then great powers unanimously recognized the independence and sovereignty of Montenegro... When Montenegro, upon unification became part of Yugoslavia, the sovereignty and international personality of Montenegro did not cease to exist, but became part of the sovereignty of the new state. In case Yugoslavia disunited and ceased to exist as an international entity, the independence and sovereignty of Montenegro continue their existence in their original form and substance.'

The other four republics of Yugoslavia requested recognition and undertook to comply with the requirements listed in the EC's Guidelines...

...

...Recognition has been a major political question for centuries. Britain declared war on France for its action in recognizing the independence of the American colonies in 1778 and in 1816 Spain protested the recognition by Britain and others of the independence of the former Spanish colonies in Latin America.

...

There have always been exceptions to the rule, but the international community had generally come to accept the traditional criteria for statehood as the proper means for taking decisions on recognition. The reason for this is that these criteria provide a way of maintaining consistency as well as a defence against doubtful claims. They were found

to be useful tools. But in the break-up of the USSR and Yugoslavia, their utility came under question and the EC countries took the view that recognition should be used more as an instrument of foreign policy rather than a formal declaration of an ascertainable fact.

The formulation by the EC of the new criterion of 'the political realities in each case' introduces a new level of *ad hoc* decision making that will, if this precedent is followed, make the issue of recognition more uncertain and unpredictable than hitherto.

...

While the EC Guidelines are stated to be 'subject to the normal standards of international practice,' their application in fact has thrown doubt on the relevance of the traditional criteria for statehood. There has been widespread recognition of a state which has no control over one third of its territory (Croatia). A country has been admitted to the UN while it was clear that its government had no effective control over any areas including the capital city (Bosnia and Herzegovina). A putative country (Macedonia) is being denied recognition because a neighbouring country objects to its name even though it meets all traditional criteria and appears to meet the conditions set by the EC.

Part B: The Right of Self-Determination

No principle has been as important to the formation of new States as the so-called "right of peoples to self-determination." This principle was articulated first as a right of colonized people to self-government, but it has since been used to justify the creation of States in other ways, as by secession. U.S. President Wilson was one of the first to advocate the right of self-determination, following World War I. (Notably, the idea of the right

of self-determination goes back at least to the time of the American and French Revolutions, and Lenin also expressed this idea in his revolutionary theses published in 1916. Wilson's idea, however, as it was later incorporated into the UN Charter, is the beginning of the history of the modern international law right of self-determination.) Wilson envisioned "a post-war order informed by the notion that ethnically identifiable peoples or nations would govern themselves." Of course, in 1920 the right of self-determination was not yet international law. As explained by a Committee report of the League of Nations, "The recognition of this principle [of self-determination of peoples] in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations."

Whatever Wilson's intentions, European powers continued to have colonies after World War I and carefully ignored any right of these colonized peoples to self-determination. The League of Nations, begun after World War I, included the "Mandates System" for the administration of the colonies of the losing European powers (Germany, Austria-Hungary, and the Ottoman Empire). Certain States were given "Mandates" to govern these colonies (for example, South Africa had a Mandate to govern Namibia, a former German colony). The Mandates System did not provide for independence of the colonies, but it did require the new rulers (Mandatory Powers) to treat inhabitants better, for example duties "to endeavour to secure and maintain fair and humane conditions of labour." The League was responsible for oversight.

The right of self-determination, even at this time, was not exclusively a matter of decolonization. Sadly, in the time leading up to World War II, Hitler invoked the right of self-determination to unite German speaking peoples from other nations in Europe into one Reich.

The right of self-determination was affirmed as an international law when it was written into the Charter of the United Nations in 1945. The right was included in Article 1 as one of the major purposes of the United Nations: "To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples..." Notably, many of the victorious Allied Powers like France, Britain, and the Netherlands still had their colonies. For this reason perhaps the Charter did not call specifically for decolonization, nor did it explain exactly what was meant by the self-determination of peoples. Seemingly, the right of self-determination was not to redraw political boundaries according to "ethnically identifiable peoples," as Wilson would have had it, but rather to provide a basis for claims for better treatment against an existing government.

Nowhere does the Charter specifically call for freedom for colonized territories. Apart from the undefined "right of self-determination," the UN Charter in Article 73 laid out some specific duties of colonizing countries, "to promote to the utmost... the well-being of the inhabitants of these [colonial] territories, and, to this end... to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions..." These are ideal goals for political freedom, not specific requirements that can be measured. The Charter continued the policies of the League of Nations in stronger form, placing even greater responsibilities on the colonizers as part of their "sacred trust" to promote the well-being of colonized people. The Charter set up a "Trusteeship System," similar to the Mandates System under the League, to administer colonies of the losing powers. (Decolonization nonetheless took place after World War II and was more-or-less completed by the mid 1970s.)

From the beginning, then, the right of self-determination is not clearly explained or defined. Is this merely a right to a good (and maybe democratic) government? Or is this a right to have a State of one's own? If so, who are the "peoples" who have this right to their own State? May "peoples" use violent means to form their new State (i.e. secession)? What about State sovereignty and the State's right to control its own territory? The biggest problem with the right of self-determination is written into the UN Charter. That is, the UN Charter both guarantees the right of peoples to self-determination and the right of States to territorial integrity. If self-determination is to mean anything as a political right - with some real method of enforcement - then it will pose a threat to a State's territorial integrity. What will a politically oppressed minority group do otherwise? Take a petition for self-determination passively to the central government and be denied? The history of self-determination bears this point out. The right of self-determination became the justification for decolonization, and forceful decolonization inherently goes against a State's right to territorial integrity. The guarantee of territorial integrity seemingly would include *all* of a State's territory, colony or otherwise.

Sadly, as the student will see, the right of self-determination has not become clearer with time. Most of the international instruments that include the right of self-determination gloss over its various contradictions and leave its definition vague. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), two of the most important international treaties on human rights, contain identical statements affirming the right of peoples to self-determination. (The student should note that Ethiopia is a signatory to both of these treaties.) The Covenants begin in Article 1 with "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." As with the UN

Charter, the Covenants do not go on to explain what is meant by the right of self-determination or who the “peoples” are.

Interestingly, the ICCPR contains a separate article dealing with minority rights. Article 27 explains that “persons belonging to... minorities shall not be denied the right... to enjoy their own culture, to profess their own religion, or to use their own language.” Some scholars have argued that Article 27 should be interpreted as the exclusive article on minority rights, meaning that minorities *only* have the right to culture, religion, and language, and not, as under one interpretation of the right of self-determination, the right to their own State. If “peoples” was meant to include “minorities” why did not the ICCPR specify “peoples and minority groups” in Article 1? At the same time, why limit the rights in Article 27 to the right to culture, religion, and language? Why not include self-determination in Art 27? These scholars argue that “peoples” means the entire populace of a State. If the entire populace together has the right of self-determination, then this can only mean the democratic right to have some say in government, not the right to secede or form separate States.

The right of self-determination is contained also in the African Charter on Human and People’s Rights. According to the African Charter, “[all peoples] shall have the unquestionable and inalienable right to self-determination...” Again, the right is not clearly defined. (As will be seen below, the African Commission on Human and People’s Rights has attempted to interpret this right to self-determination in its opinions.)

The UN General Assembly has passed several resolutions concerning the right of self-determination. (In fact, the General Assembly currently – 2007 – is considering the adoption of the Declaration on the Rights of Indigenous Peoples which would define “peoples” and explain in detail what the right of self-determination means.) General Assembly resolutions, as will be

explained later in this text, are not of themselves binding as international laws. They are, nonetheless, definitive expressions of the opinions of the international community and can become binding through time if complemented by the subsequent practice of States. In short, these resolutions are important.

Two very important General Assembly resolutions make reference to the right of peoples to self-determination. The first, passed in 1960, is the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. The resolution repeats the language of the ICCPR and ICESCR in paragraph 2: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." More importantly, the resolution in paragraph 6 seems to resolve the conflict between self-determination and territorial integrity in favor of territorial integrity: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations..." The second resolution, passed in 1970, is the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*. This resolution seems to reinstate the tension between self-determination and territorial integrity. It first explains that, "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." Thus, the right to establish a new State (which implies the right to secede at least in certain situations) is expressly confirmed. The resolution goes on to restate the right to territorial integrity, with an added twist: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part,

the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination...*" (emphasis added). How do we read this? The last part might imply that a State that does not comply with the principle of equal rights and self-determination (presumably a State that denies certain political rights to minorities) has forfeited its right to territorial integrity. So, it is okay for a minority group to secede when the government has denied political rights to this group? The Canadian Supreme Court took up the exact issue, as will be seen.

Interestingly, Ethiopia deals with these same problems regarding the right of self-determination in its constitution. Unlike the international instruments, Ethiopia's Constitution is quite clear about what the right of self-determination means, who the "people" are who can claim this right, and how this right can be lawfully exercised. The Constitution states in Article 39 that, "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession." So, at the beginning we know that self-determination includes the right to secession. The Constitution goes on in the same Article to define "Nations, Nationalities, and peoples" as "a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory." Finally, constitutional procedures are established by which a people may secede. First, a demand for secession must be made by the people and approved by two-thirds of the legislature of the people. Then the federal government will organize a referendum on secession which must be approved by a majority vote.

The following is an excerpt from a decision by the Canadian Supreme Court on the issue of the right of the people of Quebec (a province of Canada) to secede from Canada. The student should note that this is *not* a decision by an international tribunal and therefore bears less authority as a definitive statement of international law. The Canadian Supreme Court takes an interesting approach in its analysis however, and the case helps to clarify some of the issues involved in the right of self-determination.

This is the first case presented in this text, and for this reason some explanation is necessary to show the student how to read such cases. Many of the subsequent cases in the text will be cases before international tribunals like the International Court of Justice, but the student's reading of all these cases will be in essence the same.

First, the student should make a note of where the case is being adjudicated, whether in a national court, before the ICJ, or before some other international tribunal. The student should know that international tribunals like the ICJ are not bound by their previous decisions. There is no *stare decisis*, no slow development of common law in the international system. A decision of the ICJ is a non-binding source of international law – it is binding on the parties before it in the particular case but not generally binding on future parties in future cases. Decisions of international tribunals are extremely persuasive, however, and, with international laws often being unclear, “the imprimatur of a court attests to [international law’s] jural quality.” (from a case decided by U.S. Justice Cardozo). In other words, a strong statement by an international tribunal may mark a previously unclear principle with the authority of law.

The student should read cases in this text very carefully. Cases are models of legal analysis that the student may follow. Also, in order to criticize cases, the student needs to know more than just the general conclusions of

the Court but how the Court reasoned. There are many ways a student may organize his or her notes on a particular case. One particular method is suggested here. The student should write down the basic facts of the case (what the dispute is about), the procedural posture of the case (what court is hearing the case and how the case got there), the main issues that the Court is considering, the main points that the Court makes in its analysis of each issue, and finally the holding of the Court (the answer that the Court gives for the issue raised). This method will be demonstrated here, but, with the rest of the cases in this text, the student should do this him or herself.

Reference re Secession of Quebec, Supreme Court of Canada, 1998.

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. *External* self-determination can be defined as in the following statement from the *Declaration on Friendly Relations* as

[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a *people* constitute modes of implementing the right of self-determination by *that people*. [Emphasis added.]

The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's

right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are *not* to

be construed as authorizing or encouraging any action that would dismember or *impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples* and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the *Helsinki Final Act* again refers to peoples having the right to determine "their internal and *external* political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the *Helsinki Final Act*, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, *including those relating to territorial integrity of States*" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

. . . confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by

direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. *No actions or situations in contravention of this principle will be recognized as legal by the participating States.* [Emphasis added.]

Accordingly, the reference in the *Helsinki Final Act* to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, *supra*, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding

protection granted to the territorial integrity of "parent" states. However..., there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession...

The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context...

A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current

Quebec context cannot be said to approach such a threshold. As stated by the *amicus curiae*, Addendum to the factum of the *amicus curiae*, at paras. 15-16:

[TRANSLATION] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.

For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers...

The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in

effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

Facts:

1. Quebecers, French-speaking people of Canada, want to secede from Quebec.
2. They have petitioned the Supreme Court of Canada to confirm their right to secede based on the self-determination of peoples.

Procedural Posture (note, this information was not included in the excerpt above): The Canadian Parliament asked the Supreme Court to assess the legality of unilateral secession under the Canadian Constitution and international law.

Issues:

1. Does a minority people have the right to unilateral secession from the parent State? (If so, in what circumstances?)
2. Have Quebecers been denied their “internal” right of self-determination such that they have a basis for their claim for external self-determination?

Analysis:

1. As to the first issue, the Court considered whether secession is legal under international law:
 - a. Secession is “external” self-determination and is allowed only in carefully defined circumstances.
 - b. A State has a right to territorial integrity and, as such, self-determination should be exercised in such a way as to not conflict with this right.

- c. There are three circumstances in which interference with a State's territorial integrity (by unilateral secession) may be justified: colonialism; alien subjugation outside colonial context; and when internal self-determination has been denied.
- 2. As to the second issue, the Court considered whether Quebecers were given internal self-determination by the government of Canada
 - a. What criteria must be met to have internal self-determination? Access to government (voting, ability run as a candidate); actual representation in the organs of government (legislative, executive, and judicial); and maybe actual representation in the military.
 - b. Quebecers have been granted their right to internal self-determination. Quebecers are not "oppressed"; presumably, they can vote and participate in government like any other Canadian citizen. Quebecers have filled the positions of Prime Minister of Canada, members of the federal Cabinet, leaders in the House of Commons, justices of the Supreme Court, and Chief of Staff of the Canadian Armed Forces.

Holding: A minority group may have a right to secession when the right to internal self-determination has been denied, but in this case the Quebecers have failed to show that they have been denied their right to internal self-determination and so they cannot secede from Canada.

Questions:

- 1. Who will determine whether a minority group has been denied the right of internal self-determination and as such can proceed with its movement for secession? If this determination is made by the minority group itself, won't every group claim that it is being oppressed to some degree? Is there any secessionist movement that claims that it would like to secede

despite the good treatment it has received at the hands of the government?

2. Is the right to vote enough for internal self-determination? Or must a minority group have actual representation in all branches of government? Must the number of representatives correspond exactly to the overall percentage of the minority in the population of the country? If the U.S. is 5% African-American, then must at least 5% of the U.S. Congress be composed of African-Americans if the U.S. is to claim that it has granted African-Americans the right of internal self-determination?
3. Do minority groups have a right to a degree of autonomy in their local government? If a minority group has a great deal of local autonomy, would it matter less that this minority is not as well represented in the central government?
4. What do we do with social and economic data indicating that a particular minority group has a lower literacy rate when compared with the majority, or has lower average income than the majority, or has lower life expectancy? Do these things indicate a lack of political representation and a denial of the right to internal self-determination? Remember the definition of self-determination from the ICCPR, that peoples have a right "to freely pursue their economic, social and cultural development."

Alfred Rubin, *Secession and Self-Determination*, 2000.

It would thus seem that despite various treaties, there is no positive law right to secession. The general multilateral treaty terms referring to national self-determination as a right represent agreement as to moral or political principle, not legal entitlement... For example, if there is universal acceptance of a right to reasonable compensation for work done as well as to self-determination, and the price of self-determination is unemployment until a degree of economic stability is achieved, there are two inconsistent

rights, and which right dominates will depend on the analyst's own preferences.

Kristin Henrard and Stefaan Smis, *Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right of Self-Determination*, *Journal of African Law*, 2000.

...Plural societies and their difficulties inevitably raise the issue of what is the best way to accommodate the population diversity they are faced with. In view of the fact that, on the one hand, states basically want to avoid disintegration at all costs while, on the other hand, the distinctive population groups in the state want their right to identity recognized, it appears crucial to find ways to achieve unity in diversity in its most optimal balance.

...

...States are generally reluctant to recognize a right to self-determination to population groups within a state, which can often be qualified as "minorities." This reluctance is mainly related to their fear that such a grant might lead to the territorial break-up of the state because it would amount to a right to secession for these groups, contrary to the right to territorial integrity, considered as a cornerstone of international law...

...

...[T]here is no generally accepted let alone firm legal definition of "people." This concept is characterized by a certain indefiniteness as it seems doubtful that objective criteria can be determined to describe it. Brownlie recognizes the continuing doubts and uncertainties about the definition of the concept "people" but argues that the references to nationalities, peoples, minorities and indigenous peoples in the debates on the right to self-determination would appear to be inspired by the same idea. It can, however, not be denied that there are very divergent opinions

as regards the question whether or not and to what extent minorities could be considered peoples with a right to self-determination...

...

Although the nations, nationalities and peoples have pursuant to the [Ethiopian] Constitution an “unconditional” right to self-determination, it was the will of the drafters of the Constitution that the right to self-determination would be exercised through constitutionally established procedures. It seems that the drafters found their inspiration in the ICCPR and the African Charter on Human and Peoples’ Rights... Regarding self-determination, the Constitution taken as a whole is a very progressive document recognizing almost all aspects of the principle, even those which are still controversial in international law...

.....[T]he Constitution uses a mixture of subjective and objective criteria to define the beneficiaries. In fact, according to the Constitution, a nation, nationality or people is “a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.” Although there is room for self-identification on other grounds, the core aspect used by the drafters of the constitution to define the rightholders is a linguistic criterion...

...

...[I]f one compares the definition of the beneficiaries of self-determination in the Constitution with the term “people” under international law, one must again conclude that the Constitution of Ethiopia is representative of a progressive school of thought... If there is consensus in international law... the term “people” refers to the inhabitants of a territorial unit... The international community is generally reluctant to recognize that people themselves decide upon their peoplehood for fear of being confronted with secessionary demands. As the Constitution of Ethiopia explicitly recognizes

a right of secession as an expression of self-determination, this fear for secessionary self-determination is presumably less present in the case of Ethiopia.

Buchanan, *The Morality of Secession*, 1995.

“...among the strongest arguments and most widely applicable arguments for a right to secede are the argument for rectificatory justice and the argument from discriminatory redistribution. Under extreme conditions, secession may also be justified on grounds of self defense, and perhaps more controversially in some cases where it is necessary for the preservation of a culture...”

Lea Brilmayer, *Commentaries on Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation*, 2000.

“...Secession...is correctly understood as an appropriate remedy for prior illegal annexation.”

...

“...What matters is not that it is a “people” who are seeking to be free. What matters is that this group – whether a homogenous “people” or not – has a right to a particular parcel of land, a right that was wrongfully taken from them by a powerful neighbor.”

Paul Szasz, *The Irresistible Forces of Self-Determination Meets the Impregnable Fortress of Territorial Integrity*, 1999.

When the Territorial Integrity of a State is threatened anywhere in the world, other countries instinctively come to its defense. This is what has happened in respect of Cyprus, which has been effectively divided between a Northern (Turkish) sector and a Southern (Greek) one since 1974, when

both sectors were ethnically cleansed; it is clear that the twenty percent Turks will not live in a state with a massive Greek majority, but nevertheless the international community is insisting there can be only one Cyprus – even if the United Nations must patrol the boundary between the two sectors indefinitely.

...”...My proposition is that when Terrorism becomes so strong that it can no longer be suppressed without an unacceptable level of State-Terrorism, then the state concerned has, either as a victim of Violence or as its perpetrator, lost the legitimacy that enables it to insist on its Territorial Integrity...”

Questions:

1. What if the struggle for self-determination, though justified, will necessarily involve a temporary stoppage of economic activity and thus a lowering of standards of living in the entire State? What if the territory that is attempting to secede contains resources which are vital to the economy of the entire State? In such cases the right of self-determination may conflict with some other human right, like the right to an adequate standard of living. How do we choose between two equally authoritative human rights? Can we strike a balance between the two rights?
2. If “peoples” is defined to include minority groups, how will we determine whether a group qualifies as a legitimate “minority”? Just because all the members of your Public International Law class have something in common, can you all be a minority group? Can you all attempt to secede from the State of Ethiopia? No... Note that the Ethiopian Constitution deals with this problem by defining minorities largely by language. If you speak a different language, then you are a minority. But aren’t other types of groups equally vulnerable to oppression by the central government? What about a religious group or a political group or even a

civil society organization? Then again, why should such minorities be entitled to their own land and government?

African States in particular are sensitive to the issue of self-determination. This is so because many of the African States are composed of multiple ethnic groups - "peoples" who might make a claim for self-determination. Consider the following decisions by the African Commission on Human and Peoples' Rights. Has Africa taken a different approach to this issue?

Katangese Peoples' Congress vs. Zaire, African Commission on Human and Peoples' Rights, 1995.

The Facts

1. The communication was submitted in 1992 by Mr. Gerard Moke, President of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights to: recognize the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga; recognize the independence of Katanga; help secure the evacuation of Zaire from Katanga.

The Law

2. The claim is brought under Article 20(1) of the African Charter on Human Rights'. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination.

3. All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese. Whether The Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect.

4. The Commission believes that self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity.

5. The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, member of the OAU and a party to the African Charter on Human and Peoples' Rights.

6. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire...

Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights on Indigenous Peoples, 2007.

...the ACHPR [African Commission on Human and Peoples' Rights] is of the view that, a definition [of indigenous populations] is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.

...

The concept [used to identify indigenous populations] in effect embodies the following constitutive elements or characteristics, among others...:

a) Self-identification;

- b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
- c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model;

Moreover, **in Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.** This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the Continent.

...

Article 3 of the [Draft UN Declaration on the Rights of Indigenous Peoples] specifies that Indigenous Peoples “*freely determine their political status and freely pursue their economic, social and cultural development.*” Article 4 states that “*in the exercise of their right to self-determination, the indigenous peoples have the right to autonomy or self-government in everything that concerns their internal and local affairs as well as ways and means to finance their autonomous activities.*”

...

The ACHPR advises that articles 3 and 4 of the Declaration should be read together with Article 46 of the Declaration, which guarantees the inviolability of the integrity of Nation states. Article 46 of the Declaration specifies “*that nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN*”.

In the opinion of the ACHPR, Articles 3 and 4 of the Declaration can be exercised only in the context of ***Article 46 of the Declaration which is in conformity with the African Commission's jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity.***

In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized.

In this context, Article 20(1) of the African Charter is drafted in similar terms: *"all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen"*.

...

In its jurisprudence on the rights of peoples to self-determination, the ACHPR, seized of Communications/Complaints claiming for the enjoyment of this right within State Parties, has constantly emphasized that these populations could exercise their right to self-determination in accordance with all the forms and variations which are compatible with the territorial integrity of State Parties...

...

...[I]f it is taken from the political perspective, the right of Indigenous Populations to self-determination refers mainly to the management of their "internal and local affairs" and to their participation as citizens in national

affairs on an equal footing with their fellow citizens without it leading to a total territorial break up which would happen should there be violation of the territorial integrity of the State Parties. Therefore this mode of attaining the right to self-determination should not at all be confused with that which issued from the Resolution 1514(XV) of the 14th December 1960 which is applicable to the populations and territories under colonial dominance or foreign occupation and to which the UN Declaration, which is the objective of this Advisory opinion, does not refer to at all.

In consequence, the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties.

...

On the basis of this Advisory Opinion, the ACHPR recommends that African States should promote an African common position that will inform the United Nations Declaration on the rights of indigenous peoples with this African perspective so as to consolidate the overall consensus achieved by the international community on the issue.

Questions:

1. Did the ACHPR in these two cases decide the issue of self-determination differently from the Supreme Court of Canada? Does the ACHPR recognize the right to secede in cases in which the right to so-called “internal” self-determination has been denied to indigenous populations?

2. Note that the ACHPR considers that discrimination or marginalization of a group helps us to know that the group is in fact an “indigenous population.” The ACHPR goes on to explain that indigenous populations do not have the right to secede outside of the colonial context. By implication, if indigenous populations do not have the right to secede, then mere “marginalization” or “discrimination” cannot be the basis for seceding from a State. How will indigenous populations enforce their rights?
3. Note also that the decision by the ACHPR in the *Zaire* case is somewhat at odds with its advisory opinion on the UN Declaration on the Rights of Indigenous Peoples. The ACHPR implied in the *Zaire* case that, had the Katangese brought evidence of severe human rights abuses by the government of Zaire, then maybe they could have proven their right to secede: “In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire...”

Part C: State Territory and Borders

The formation of a new State inevitably brings with it the question of where the new State’s boundaries will be. This problem is well known to Ethiopia, which has an ongoing dispute with Eritrea (formed in 1993) over their shared border. Such disputes in Africa have been decided by the principle of *uti possidetis, ita possidetis* (or just *uti possidetis* for short), a Latin phrase which means literally, “[you may] keep what you had.” By this is meant that former colonies, on gaining independence, will keep the borders established previously by the colonizing power. The principle applies both

to administrative boundaries in territories controlled by one sovereign (e.g. Italy has two colonies that border one another) and boundaries established by treaty between two sovereigns (e.g. Italy enters into a treaty with Ethiopia establishing the border between Italy's colony and the Ethiopian State). The borders of the new States will be determined by looking at maps showing the administrative divisions of the colony or by treaties entered into with the previous colonial power. To give a specific example, the border between Chad and Niger was determined by the French administrative line that ran between these two French colonies. The border between Niger and Nigeria, on the other hand, was determined by a treaty between the French and the British.

That the principle of *uti possidetis* is still recognized in modern times may be offensive to the student. After all, what business does France or England have establishing borders for African States, splitting up previous African political units and ethnic groups? This is not a question of rights or justice, however. The main problem is that there is no other *peaceful* way to determine the territory and borders of States in previously colonized territories. Most people fear that any alternative to the *uti possidetis* principle simply would result in endless wars over land. The Organization of African Unity itself issued an opinion on this crucial matter. "Recognizing the... necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States...", the OAU declared "that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence."

The real alternative to *uti possidetis* would have been to allow each particular ethnic group and "people" to form a new State at the time of decolonization based on the right of self-determination. As mentioned before, this is exactly what President Wilson had in mind when he first articulated the principle of self-determination. For good or for bad, this is

not what happened during decolonization. Presumably, if decolonization had gone this way, there would have been a lot more fighting in Africa and South America and Asia and a lot more States formed.

Case Concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ, 1986.

...[T]he principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single... State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

It was for this reason that, as soon as the phenomenon of decolonization characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of *uti possidetis*, in the sense described above, fell to be applied...

There are several different aspects to this principle [of *uti possidetis*]... The first aspect...is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty... The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign... [as with] the States

Parties to the present case, which took shape within the vast territories of French West Africa. *Uti possidetis*...upgraded former administrative delimitations, established during the colonial period, to international frontiers...

...

...[I]t may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle [of *uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 2000.

...The structural crises currently facing these post-colonial states stem from their structural illegitimacy. Such illegitimacy has derived...from their lack of affinity with constituent sub-state groups and their origins as external impositions rather than organic entities created through an internal process of consensus-building...

...

...The [post-colonial African] leaders generally realized that the borders were far from ideal... Having only just won their independence, [however,] they considered their most urgent mission to be the construction of cohesive nation-states...

...

...According to Jeffrey Herbst, "...there is widespread agreement that the boundaries [in Africa] are arbitrary, yet the vast majority of them have remained virtually untouched since the late 1800s, when they were first demarcated."

...

...Despite this remarkable record [of no conflict between African states]... the post colonial African state has faced internal crises virtually since the very moment of its independence...

...

Peer review, as used here, is the process of determining state legitimacy... according to the... "say so" of pre-existing states...Infra-review [on the other hand] requires that the decision-making process regarding state legitimacy pay significant attention to the say-so of sub-state groups...

...

...Other states, the so-called peers of the would-be or established state, have traditionally decided whether to admit a candidate to membership in the family of nations. A would-be or established state that failed peer review was deemed illegitimate while a state that passed was automatically legitimate...In the same vein, it did not matter how the candidate state treated its sub-state groups or any other section of its population...

...

...The type of peer review that traditional international law mandated at least before the era of the League of Nations, was Eurocentric in nature since it was conducted almost entirely by European countries who decided amongst themselves which polities qualified as legitimate states...These European states, influenced by their own historical experiences, ineluctably

based their peer review on a particular set of criteria that were not generally applicable. For example, they assumed that all states ought to resemble the relatively homogenous European nation-state, a disposition that formed the basis for launching the nation-building project in most African and Asian states during the colonial era.

...

...Stabilizing norms of international law, such as *uti possidetis* and... territorial integrity of established states, are important expressions of the law's desire to upwardly homogenize state populations. Both norms forbid the breakup of socio-culturally fragmented states into smaller separate states...

...

...Under the contemporary law of the United Nations, threats to national unity and the territorial integrity of established states still outrank protection of the rights of minority populations...

...

...Strict peer review has allowed many African states to avoid addressing minority rights and sub-state group autonomy, contributing to the violence that often results from the processes of state formation, survival and reconfiguration on the continent.

...

...internal legitimacy among a state's citizenry has mattered far less to those in power than did the opinion of the pre-existing states.

Questions:

1. Do you think that "legal title" should take precedence over "effective possession" in the determination of sovereignty, as the ICJ posited in the *Burkina Faso* case above? Is this consistent with other international law principles? As we saw previously, having an effective government is one of the four legal criteria for Statehood. If the central government of a

newly decolonized State has effective control over only part of its territory, then should not the State consist of only that part of territory?

2. Do you agree with Obiora Okafor that States formed on the basis of colonial boundaries (according to the principle of *uti possidetis*) are structurally illegitimate? Does that mean that “internal crises” are inevitable for post-colonial African States? Why can’t such a State work to build its legitimacy for all the people in its assigned territory?
 3. What is “peer review” according to Okafor? It is true that the criteria for Statehood – and indeed the continued practice of State recognition – are Eurocentric, i.e. under the predominant control of Western countries. But what are the alternatives for determining that a new entity is a State? Okafor seemingly wants “infra-review,” but this would be to turn the question of Statehood over to the populace of the newly formed entity. How can we expect to find a unified voice in the populace? Will there be a vote on whether Statehood has been achieved for a particular stretch of territory, with the majority prevailing? Seen this way, infra-review seems rather impractical.
-

Case Concerning the Territorial Dispute (Libya/Chad), ICJ, 1994.

[The Court looked at the 1955 Treaty between Libya and France to determine whether the Treaty was meant to settle all border questions or whether the Treaty was somehow inconclusive as to the Aouzou Strip. The Court then looked at the colonial agreements that were incorporated into the 1955 Treaty and determined the exact boundary line. The Court continued:]

66. Having concluded that a frontier resulted from the 1955 Treaty, and having established where that frontier lay, the Court is in a position to consider the subsequent attitudes of the Parties to the question of frontiers.

No subsequent agreement, either between France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty. On the contrary, if one considers treaties subsequent to the entry into force of the 1955 Treaty, there is support for the proposition that after 1955, the existence of a determined frontier was accepted and acted upon by the Parties. The Treaty between Libya and Chad of 2 March 1966, like the Treaty of 1955, refers to friendship and neighbourly relations between the Parties, and deals with frontier questions. Articles 1 and 2 mention "the frontier" between the two countries, with no suggestion of there being any uncertainty about it. Article 1 deals with order and security "along the frontier" and Article 2 with the movement of people living "on each side of the frontier". Article 4 deals with frontier permits and Article 7 with frontier authorities. If a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty...

67. The Agreement on Friendship, Co-operation and Mutual Assistance concluded between Chad and Libya on 23 December 1972 again speaks in terms of good relations and neighbourliness, and stresses adherence to the principles and objectives of the Organization of African Unity, and in Article 6 the parties undertake to make every effort to avoid disputes that may arise between them. They also pledge themselves to work towards the peaceful resolution of any problems that may arise between them, so as to accord with the spirit of the Charters of the Organization of African Unity and the United Nations. A further agreement was concluded between the two States on 12 August 1974, at a time when the present dispute had reached the international arena, with complaints having been made by Chad to the United Nations. While friendship and neighbourliness are again mentioned, Article 2 states that the

frontiers between the two countries are a colonial conception in which the two peoples and nations had no hand, and this matter should not obstruct their co-operation and fraternal relations.

The Treaty of Friendship and Alliance that the Parties concluded on 15 June 1980 is one of mutual assistance in the event of external aggression: Libya agrees to make its economic potential available for the economic and military rehabilitation of Chad. The Accord between Libya and Chad of 6 January 1981 also implies the existence of a frontier between those States, since it provides in Article 11 that:

The two Parties have decided that the frontiers between the Socialist People's Libyan Arab Jamahiriya and the Republic of Chad shall be opened to permit the unhindered and unimpeded freedom of movement of Libyan and Chadian nationals, and to weld together the two fraternal peoples.

68. The Court now turns to the attitudes of the Parties, subsequent to the 1955 Treaty, on occasions when matters pertinent to the frontiers came up before international fora. Libya achieved its independence nearly nine years before Chad; during that period. France submitted reports on this territory to the United Nations General Assembly. The report for 1955... shows the area of Chad's territory as 1,284,000 square kilometers.... Moreover United Nations publications from 1960 onward continued to state the area of Chad as 1,284,000 square kilometres ... Libya did not challenge the territorial dimensions of Chad as set out by France.

69. As for Chad, it has consistently adopted the position that it does have a boundary with Libya, and that the territory of Chad includes the "Aouzou strip", ... In 1977 Chad submitted a complaint to the Organization of African Unity regarding the occupation by Libya of the Aouzou strip... Before the OAU, Libya's position was, *inter alia*, that the frontier defined by the Treaty of 1935 was valid.

70. In 1971, Chad complained in a statement to the United Nations General Assembly that Libya was interfering in its internal and external affairs. In 1977 it complained that the Aouzou strip had been under Libyan occupation since 1973. At the General Assembly's thirty-third session, in 1978, Chad complained to the Assembly of "the occupation by Libya of Aouzou, an integral part of our territory". In 1977 and 1978, and in each year from 1982 to 1987, Chad protested to the General Assembly about the encroachment which it alleged that Libya had made into its territory.

71. By a communication of 9 February 1978, the Head of State of Chad informed the Security Council that Libya had "to this day supplied no documentation to the OAU to justify its claims to Aouzou" and had in January 1978 failed to participate at the Committee of Experts (the *Ad Hoc* Committee) set up by the OAU. The Permanent Representative of Chad requested the President of the Security Council to convene a meeting as a matter of urgency to consider the extremely serious situation then prevailing. Chad repeated its complaints to the Security Council in 1983, 1985 and 1986. Libya has explained that, since it considered that the Security Council, being a political forum, was not in a position to judge the merits of the legal problems surrounding the territorial dispute, it did not attempt to plead its case before the Council. All of these instances indicate the consistency of Chad's conduct in relation to the location of its boundary.

72. Article 11 of the 1955 Treaty provides that:

"The present Treaty is concluded for a period of 20 years.

The High Contracting Parties shall be able at all times to enter into consultations with a view to its revision.

Such consultations shall be compulsory at the end of the ten-year period following its entry into force.

The present Treaty can be terminated by either Party 20 years after its entry into force, or at any later time, provided that one year's notice is given to the other Party."

These provisions notwithstanding, the Treaty must, in the view of the Court, be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court (*Temple of Preah Vihear*, I.C.J. Reports 1962, p. 34; *Aegean Sea Continental Shelf*, I.C.J. Reports 1978, p. 36).

73. A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed...

75. It will be evident from the preceding discussion that the dispute before the Court, whether described as a territorial dispute or a boundary dispute, is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France. The Court's conclusion that the Treaty contains an agreed boundary renders it unnecessary to consider the history of the "Borderlands" claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy. Moreover, in this case, it is Libya, an original party to the

Treaty, rather than a successor State, that contests its resolution of the territorial or boundary question...

Conference on Yugoslavia Arbitration Commission Opinion No. 3

[The following question was posed to the Arbitration Commission: Can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?]

The Committee... takes the view that once the process in the SFRY [Socialist federal Republic of Yugoslavia] leads to the creation of one or more independent states, the issue of frontiers, in particular those of the Republics referred to in the question before it, must be resolved in accordance with the following principles:

First - All external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations... and in the Helsinki Final Act...

Second - The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.

Third - Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali...:

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...

The principle applies all the more readily to the Republic since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

Fourth - According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations... and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia...

Question:

1. There is so much emphasis on the stability of borders in international law that it seems that international tribunals are willing to go out of their way to find a basis for upholding any *clearly demarcated* border even if its legal grounding is questionable. In the case of the dissolution of Yugoslavia, the Arbitration Commission applied the principle of *uti possidetis* and analogized Yugoslavia to the colonial situation. The argument was that the administrative borders within the SFRY were similar to the administrative borders between former colonies under the same sovereign. Does this make sense? Why should new States emerging from Yugoslav territory respect boundaries established by the

federal Yugoslav government? Would this not make a federal government somewhat hesitant to provide a minority group with a strong local government and a great deal of local autonomy? The stronger the administrative boundary surrounding the locality, the better the claim this locality will have to Statehood.

Problem 1: State formation.

The student should attempt to identify all relevant issues of international law in the problems. For each issue the student should: (1) identify the issue, (2) state the rule, (3) apply the rule to the facts, and (4) give a brief conclusion. This is the so-called "IRAC" method.

The imaginary State of "Ibex" is composed of two territories, "Fox" territory and "Zebra" territory. The majority ethnic group in Ibex is the "Horns" who occupy most of the Fox territory. Zebra's inhabitants are mostly from the ethnic group the "Stripes" who form a small but vocal minority in Ibex.

Zebra recently declared its independence from the State of Ibex. Although fighting continues between the government of Ibex and the Stripes rebels, the people of Zebra have set up a functioning government complete with a constitution, a governing council, a court system, policemen, and even a postal service. Unfortunately, the borders of Zebra on all sides are uncertain, as neighboring States took advantage of the fighting to claim some of Zebra's territory. Nonetheless, diplomats from Zebra have been negotiating with these neighboring States to resolve the border issues, and

a solution to some of the problems is likely. Zebra is now petitioning the international community for recognition as a State.

Ibex stated before the United Nations General Assembly that any recognition of Zebra as a State would be an illegal interference in the internal affairs of Ibex in violation of the UN Charter. The Stripes of Zebra responded that they are engaged in a legitimate war of secession based on their right of self-determination. The Stripes pointed out that their ethnic group has a far lower average income than that of the majority Horns. The Stripes admitted that they are allowed to vote in the general elections of Ibex and run for office, but they emphasized that they only managed to elect a Stripe to national political office one time, as a legislator in a Congress of 200 people. The Stripes said that they have no way to voice their concerns to the Ibex government and no way to get legislation passed in their favor. They claimed that this was one explanation for their lower average incomes. Ibex responded that the territory of Zebra has a strong local government with a great deal of freedom to govern itself. In fact, it was for this reason that Zebra was capable of starting its rebellion. Ibex argued that it should not be punished for allowing the Stripes so many political rights and that the Stripes had no right to secede.

Answer to Problem 1

Generally, answers to the problems will not be provided in the text. Instructors may work on the problems with the students in class. The answers to the first problem are provided here in order to give the student a better idea of how to answer.

1. **Issue:** Does Zebra fulfill the four requirements of Statehood? **Rule:** The requirements of Statehood are (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations

with the other states. **Analysis:** Zebra definitely has a population. It also appears to have a functioning government – although the government continues its war of secession with Ibex, the government clearly has administrative control over its territory and performs the normal functions of a government in respect of its territory. Zebra has demonstrated its capacity to enter into relations with other states by negotiating with neighbors over their shared borders. The fact that Zebra's borders are uncertain does not prevent Zebra from having a defined territory. **Conclusion:** Zebra has met the criteria for Statehood.

2. **Issue:** Is it unlawful for other States to recognize Zebra as a State?

Rule: Whether or not to recognize a new State is at the sovereign discretion of every State. Nonetheless, early recognition would be unlawful as an illegal interference in the sovereignty of Ibex. In such a case, the legal criteria of Statehood will be applied more strictly.

Analysis: As explained above, Zebra has satisfied the legal criteria of Statehood. Although fighting between Zebra and Ibex is on-going, it is clear that it is Zebra and not Ibex that controls all of the ordinary functions of government in Zebra territory. **Conclusion:** Other State may recognize Zebra at their discretion.

3. **Issue:** Is Zebra right in claiming that the former borders of Ibex should

apply as between Zebra and its neighbors? **Rule:** The stability of interstate borders is recognized as a general principle of international law. When a country gains independence, either from colonial domination or, as in the case of Yugoslavia, from the dissolution of another State, the borders will be those established by treaty of the predecessor State or those following the internal administrative units of the predecessor. This is known as the principle of *uti possidetis*. Notably, international law will recognize a border jointly agreed upon by

neighboring States even if the border is a change from that previously established. **Analysis:** There is no legal basis given in the problem that would justify the claims of Zebra's neighbors to the former territory of Ibex. Presumably, there are colonial treaties that establish the borders of Ibex conclusively, and, at any rate, it is unlikely that these borders will be upset in contradiction of the principle of the stability of international borders. In any case, once Zebra settles its borders by negotiation, this will be recognized by international law. The border between Ibex and Zebra will correspond to the former administrative border between Fox territory and Zebra territory. **Conclusion:** Zebra's neighbors have no basis in law for disputing their border with Zebra.

4. **Issue:** Are the Stripes of Zebra engaged in a legitimate war of self-determination? **Rule:** The right of self-determination may include a right to secession, but only under specified conditions such as colonial domination, other foreign conquest, or denial of certain basic political rights by the government. **Analysis:** There is no question of colonial domination or foreign conquest here. The only justification for secession would be if Ibex denied the political rights of Stripes peoples living in Ibex. (This issue will be analyzed below.) **Conclusion:** Whether or not Zebra's rebellion was legitimate when it started, it is clear now that Zebra has become a State. Thus, the rebellion has become a war between States and self-determination has become an issue of political rhetoric rather than a issue of legal consequence.
5. **Issue:** Were the Stripes of Zebra denied their right to internal self-determination? **Rule:** At least according to the Canadian Supreme Court, the right to internal self-determination includes the right to participate meaningfully in politics and the right to actual representation in the organs of government. The right of self-determination includes also the right to freely pursue economic development. **Analysis:** Stripes were allowed to vote and run for office in Ibex. Whether this constitutes meaningful participation in politics is another matter. The Stripes were

not really a presence at all in Ibex's Congress. Nonetheless, the Stripes had significant autonomy in their local government. This may be enough to satisfy the criteria of meaningful participation. Actual representation in the organs of government by Stripes may be extremely limited, but the extent of representation actually required by law has never been clearly established. Finally, the Stripes' lower level of economic development may indicate that Stripes have not been able to get the government of Ibex to address their concerns. This would show a lack of internal self-determination. On the other hand, the Stripes' lower income may be explained by historical inequalities. So long as Ibex is continuing to work to end inequalities, its territorial sovereignty should be respected. **Conclusion:** The Stripes' had significant involvement in the government of Ibex and therefore were not denied their right of internal self-determination.

2.3 State Succession

There are additional legal issues involved when the political map changes and control over territory shifts from one State to another. Even if the international community unanimously recognizes a new State, there remain certain "succession" issues, or in other words issues over how property and rights will be transferred from the predecessor State to successor States. Will the new State inherit the treaty obligations of its predecessor? Will the new State inherit membership in international organizations? Will the new State inherit assets and debts of the predecessor? Will the new State be responsible for wrongs committed by the predecessor State?

First, a note on vocabulary: "*Succession of States*" means the replacement of one State by another in the responsibility for the international relations of territory; a "*predecessor*" State is the parent State from which the new State is formed or territory transferred; and a "*successor*" State is the new

State, the “child” of the predecessor (or the State that inherits territory). To give a concrete example, the dissolution of the Soviet Union resulted in a Succession of States. The Soviet Union was the predecessor State; and Russia, Ukraine, Belarus, etc. were the successor States. The student should note that succession issues arise basically in the same situations that we dealt with before when considering recognition of States: decolonization, secession of part of a State, dissolution of an entire State, and merger of two States to form one State. An additional situation is relevant for succession: the transfer of territory from one State to another (no new State is formed).

The first point to be made is that a succession of States should not be confused with a succession of governments. For new governments, there is a simple rule. The new government will inherit *all* the rights and obligations of its predecessor government. Some scholars have argued that this does not make sense, considering that a change in government may be as dramatic, as violent, as world-altering as a change in States. Why should a communist government that came to power through a revolution be forced to respect the treaties of the very government it overthrew? Well, according to international law, that is the way it is.

Unfortunately, international law in relation to succession of States is *not* clear. In theory, there are two extreme positions, and in practice there is everything in-between. On the one hand is the “clean slate” position, which holds that the successor State should assume *none* of the rights and obligations of the predecessor State. The successor State starts its life with a “clean slate,” or in other words with none of the baggage from the predecessor State. On the other hand is the “continuity” position, which holds that the successor State should assume *all* the rights and obligations of the predecessor State. Most of the time our answer to succession issues will fall somewhere between these two extreme positions.

Even though international law in this area is hopelessly confusing, there is a relatively simple method that the student can use to analyze succession problems. First, the student must know some basic principles of contract law. In general, if two parties come to an agreement, the terms of their agreement will govern any dispute that may arise. On the other hand, if the two parties have not explained all terms in their agreement, as happens frequently, a domestic Court likely will apply certain default rules to fill in the gaps. For example, the agreement may be for the delivery of 100 kilos of mangos to a certain location in Addis Ababa. If the parties forget to specify the delivery date, the Court may decide to enforce a “reasonable” delivery date, i.e. one that accords with the business practices of people in this particular business and takes into account the season for this type of mango, etc.

On the whole, the same is true for succession issues. The student should first look for an agreement among the affected parties. If for example all the successor States of the Soviet Union get together and enter into an agreement that clearly distributes the property of the Soviet Union among all of them, then the student can rely on the terms of this agreement for the purposes of determining State property for each successor State. If on the other hand there is no agreement among the successor States, or the agreement is incomplete, then the student should apply the default rules (which will be explained momentarily), just as in contract cases a Court will fill in where the parties failed to specify terms.

Another principle of contract law is important here. The parties to a contract cannot make terms that harm a “third party” who is not part of the agreement. There can be no “third-party detriment.” The same is true for succession issues. Two successor States cannot get together and distribute property and debt between them in such a way that harms the interests of another successor State. Along the same lines, all successor States cannot

get together and alter treaty obligations in such a way that harms the interests of other State parties to the treaty. Obviously, all successor States cannot get together and agree to cancel all debts of the predecessor. This would harm third parties – the creditors that loaned the money.

So the objective is to bring *all* the interested parties to the table and have them conclude an agreement. This is in reality how most succession issues are resolved. The student should consider all the possible types of agreement. Predecessor States may negotiate among themselves and with successors to determine the rights and duties of successors. Such an agreement is called a devolution agreement. East and West Germany entered into three devolution agreements to determine the rights and duties of their successor, unified Germany. Also, in dissolution situations in which the predecessor ceases to exist, all successors may get together and form an agreement. In cases of treaties successor States may negotiate with other parties to the treaty on a case-by-case basis. For example, if there is a bilateral treaty between the predecessor state and the U.S., the successor state and the U.S. can negotiate as to whether the treaty will apply between them.

In the absence of agreement, the student must look to the default rules for State succession. In truth, there are few default rules in State succession that have attained the status of international law. Two important treaties on succession have been created, but few States have joined these treaties. The first, the Vienna Convention on Succession of States in Respect of Treaties, was completed in 1978. It has some seventeen members (including Ethiopia) and has entered into force for these members. The second, the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts, was completed in 1983. It is not yet in force for lack of State signatories. (This means that, even for those States that have signed this treaty, the treaty is not yet binding on them.) More than anything, the rules in these two treaties are persuasive authority – the rules

will be used to the extent that they provide logical solutions to practical problems. Nonetheless, the student should note that (1) some scholars think that many of the rules in these treaties are already binding as international customary laws, and (2) the rules are in the background of negotiations over succession issues and may tell the parties what to ask for and create expectations of what they deserve in their agreements. In this way the default rules in these two treaties can be rather influential.

Let us look now first at the default rules for State succession in respect of treaties. The rules vary depending on the type of situation. Nonetheless, certain general principles apply. First, the student should remember that the treaties in question are between a State involved in State succession (a predecessor State) and other State parties that are “innocent,” i.e. not involved in this succession. The rules are intended to avoid prejudicing the rights of these innocent parties to the treaty. Second, and along the same lines, the rules will not be applied if applying them would somehow go against the underlying object and purpose of the treaty.

If the State is newly independent from foreign domination (for example a former colony that gains independence), the State generally begins its life with a “clean-slate.” That is, the new State inherits none of the treaty obligations of its predecessor. Of course, the principle of *uti possidetis* still applies, so the new State will be bound by colonial treaties establishing borders.

If the new State is a product of dissolution (for example, successor States to the former Yugoslavia), default rules for succession in respect of treaties will be more complex. According to the Vienna Convention, *most* treaties will pass to the successor States. The question here is whether the treaty concerns the *territory* of the successor State. Any treaty that deals with the *entire territory* of the predecessor State will apply to all of the successor

States. On the other hand, if the treaty concerns the territory of only one or two successor States, then only those successor States will be bound by this treaty. For example, the treaty might concern a dam on a river that flows through only one of five successor States. In this case, only one successor State will be bound by the treaty terms and the other four successor States will not be bound. Notably, there are competing rules on this particular point. The U.S. Restatement, for example, says that the treaties of the predecessor State will *not* apply to successor States unless the successor State and the other parties to the treaty agree to be bound. (When faced with competing default rules, the student simply should make note that international law in this area is not clear and that there are different options.)

If the situation is not complete dissolution but rather partial dissolution (only part of the predecessor State breaks off to form a new State, just as Eritrea broke off from Ethiopia), then very similar rules apply as in a complete dissolution situation. The concern is how to deal with the predecessor State which continues to exist after the formation of the new State or States. According to the Vienna Convention, all treaties will continue to apply to the predecessor State unless it can be shown that “the treaty related only to the territory which has separated from the predecessor State.”

What if two or more States merge to form one State? The Vienna Convention says, apply *all* treaties of the two predecessor States to the successor State, but only in the territory that was controlled by the particular predecessor that entered into that treaty. According to this rule, the treaties of East Germany would apply to the unified Germany but only in the territory of the former East Germany.

Finally, when territory is transferred from one State to another, as for example when Britain transferred Hong Kong to China, the Vienna Convention's default rule is to cancel old treaty obligations for the territory in question and apply the treaties of the acquiring State.

As with treaties, the default rules for property and debt are applied in the absence of an agreement among the affected parties. For property the main question is, What type of property is this? According to the Vienna Convention, *immovable property* will go to the successor State in which the property is found. An example would be a building or a well or a communications tower. The successor State that has the land under the building will get the building as well. This is a logical rule; otherwise, buildings and other structures would have to be removed or sold. A second category of property is *moveable property*, but "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates." Any property that we can connect to territory, including currency and state public funds located in the territory of the successor, probably will stay in the territory where the moveable property is found. Finally, *moveable property* not connected to territory (for example, any property outside the territory or intangibles like bank accounts) will be distributed in some equitable fashion. If the predecessor State continues to exist after succession, then it will take all moveable property. (The justification is that this was the State that originally earned the money.) If the predecessor State ceases to exist, moveable property is distributed equitably (for example, in proportion with the distribution of debt and considering such factors as the population of the successor, national income, etc.).

For debt, more than for treaties or property, the parties are likely to come to an agreement and the default rules will not matter. That said, there are default rules, and they stand in the background of negotiations. Naturally, successor States would prefer not to pay any debt at all. Creditor States

and organizations generally rely on two means of coercion. First, there is the threat that if the successor State does not take up its portion of debt, it will not get any future loans from the international community. Second, there is reliance on the fall-back default rules that generally preserve the creditors' rights.

The general rule from the Vienna Convention is that "the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account...the property rights and interests which pass to the successor States in relation to that State debt." (This rule will apply in cases of dissolution, secession of part of territory, and transfer of part of territory.) Here, the rule is saying that, for example, if the debt is incurred in building a fleet of aircraft, then the successor State that gets the aircraft should also pay the debt. A more general rule could be applied, however, that said that debt should pass to each successor in proportion to the *total assets* of the predecessor that pass to each successor. (This is done sometimes by agreement but it is not the default rule - although one supposes that it could be one form of distribution "in equitable proportions".)

The default rules are different for new States emerging from foreign domination and for the uniting of States. According to the Vienna Convention, States emerging from foreign domination will inherit *none* of the debt of their predecessors, and a unified State will inherit *all* of the debt of its predecessors.

Paul Williams and Jennifer Harris, *State Succession to Debts and Assets: The modern Law and Policy*, 2001.

...[C]reditor states have been less obliged to follow the principles of international law, whereas successor states generally have been held to those principles by the creditor states or other successor states.

International law has played an effective role in further preserving the rights of creditor states and in countenancing reasonable agreements reached by the successor states. In all of the recent cases of state succession, the creditor states relied upon the international law of *pacta sunt servanda* and the 1983 Vienna Convention to require that the successor states were bound by the debt of the predecessor state and to dictate or consent to an allocation of that debt. This reliance on international law naturally was coupled with a clear warning that if the successor states wished to participate in the financial community, they would have to agree to service their allocation of debt. In the case of the former Czechoslovakia, the creditor states also successfully relied upon international law to sanction the agreement of the successor states to allocate the debt on a two-to-one basis.

Although international law provided for the link between the allocation of the debts and assets of the predecessor state, this link was only established in the cases of the former Soviet Union and Czechoslovakia upon the initiative and for the benefit of the successor states. With respect to the former Soviet Union, the creditor states ignored this link and pursued their own interest in joint and several liability. In the case of the former Yugoslavia, the successor states were unable to establish a link between the allocation of debts and assets among themselves, and the creditor states showed no interest in establishing such a link. The lack of interest on the part of creditor states in establishing a link between the allocation of debts and assets was short-sighted. If such a link were created, successor states would be more willing and able to service their share of the debt. Not only would the successor states see the allocation as just and fair, but they

would be able to use or convert their assets in order to generate income to pay the debt.

Similarly, although international law provides for an equitable allocation of debts and assets, it has not been able to force or dictate an allocation by the successor states in non-consensual break-ups, nor has it been able to persuade third-party states to become involved in allocating or preserving the assets for future allocation...

...With respect to debts, it does appear that whether or not the break-up is consensual, the creditor states will invoke the principles of equitable allocation and consent of creditors to ensure that the debt is fully allocated in a manner likely to ensure that it is properly serviced...

The enhanced application of the role of international law with respect to succession to the debts and assets of predecessor states would benefit from: (1) a requirement to consider the allocation of assets when assigning liability for debts; (2) a detailed definition of an equitable allocation, with criteria such as proportion of population and economic indicators as employed in the cases of the former Soviet Union and former Czechoslovakia; (3) a greater willingness and ability of international legal bodies to articulate and apply the principles of international law and to reject expedited and vague conclusions; and (4) the rejection of inequitable principles such as joint and several liability for all successor states regardless of their share of the assets or actual ability to repay the entire debt of the predecessor state.

Questions:

1. In regard to succession of treaty obligations, should it matter what type of treaty it is? Will the issues be different for a bilateral treaty (treaty with only two parties) concerning economic development and a

multilateral treaty (treaty with three or more parties) concerning human rights?

2. Which debt should a successor State inherit? According to the Vienna Convention, the successor State is liable only for debts owed to other States or international organizations like the United Nations or World Bank. Others say that the successor should be liable for debts owed to private corporations as well (for example, money owed to a foreign corporation for the construction of highways).

Another consideration in the succession of States is, Which successor State will inherit the predecessor's membership in international organizations? If Yugoslavia was a member of the UN, which of Yugoslavia's successor States will take Yugoslavia's seat? The simple answer is that we look to the particular rules of the organization in question. In case of the UN, new States must reapply for admission. Thus, if a State dissolves, all the successors will have to reapply for admission to the UN. (Notably, if only a part of a State secedes and the predecessor State survives – as in the case of Ethiopia and Eritrea – then the predecessor State will retain its membership in the UN.)

The student should note, however, that, to the extent that we are dealing with a sensitive political issue, the rules may be bent slightly. For example, the Soviet Union was one of the five permanent members of the Security Council and thus had a veto power in important matters of international peace and security. What if, after the dissolution of the Soviet Union, Russia as a successor State had to reapply for admission to the UN? Presumably, as a newly joined State, Russia would *not* be given a permanent seat on the Security Council. This would change the structure of international power relations dramatically. Therefore, perhaps for this reason, the UN allowed Russia to take the place of the Soviet Union at the

UN. This is not the only time exceptions have been made. When Pakistan split off from India at the time of independence from the British, for example, the UN decided to allow India to keep the seat of “British India” at the UN because India had a larger population than Pakistan. These cases should be contrasted with what happened to Serbia and Montenegro who, together as the “Federal Republic of Yugoslavia” (FRY), tried to succeed to Yugoslavia’s seat at the UN after the dissolution of Yugoslavia. The UN did not permit the FRY to take Yugoslavia’s seat. This left the FRY in an indeterminate position in the UN until eight years later Slobadan Milosevic’s rule ended and a new government in FRY reapplied for UN membership.

The last succession issue is a simple succession issue. Successor States do not inherit wrongs committed by predecessor States. Thus, if there is a case pending against a State before an international tribunal and that State ceases to exist, the case will be dropped. Successor States will not inherit liability.

Problem 2: State succession.

State P (predecessor) dissolves into States S1, S2, and S3 (successors). State P had property and outstanding debt. State P also had a treaty with neighboring State N to improve an existing dam on a river that passed along the border of the two States.

After State P dissolves, States S1, S2, and S3 enter into a devolution agreement. The three States agree to cancel all outstanding treaties of P relating to economic development in their territories. The States do not agree, however, on the distribution of P’s assets and debt.

P owned a radio tower that now lies in the territory of S2, one of P's successors. (A radio tower, like a building, is affixed to the land.) After P dissolved, S2 sold the tower to a private business for one million Birr and kept the money.

2.4 Recognition of Governments

Change of government is quite common. In democracies, elections often result in the formation of new governments. For the purposes of international law, a change in government is not a problem. As already discussed, the law strongly emphasizes continuity in international obligations from one government to the next. The international obligations of a State do not change when the government changes.

Problems may arise when a change in government happens through unconstitutional means, as for example by revolution or military coup. In such cases, other States' governments may not like the new government and may want to change their relations with it. For the most part, this is a political decision and not a matter of international law. Other governments have various options for expressing their dissatisfaction with a new government. As an expression of disapproval, other governments may refuse to recognize the government, cut off diplomatic contacts, suspend travel to that country, or cut off trade and foreign aid. A further step may be taken, somewhat more controversial: other governments may refuse to recognize a new government and continue to recognize the previous government living in exile. After the communist takeover in China in 1949, the U.S. refused to recognize the new communist government and continued to recognize the previous government in exile in Taiwan as the legitimate government of China. This went on until 1979 when the U.S.

finally recognized the communist government. Taiwan even occupied China's seat at the UN from 1949 until 1971.

Each State has discretion as to how it will conduct its foreign relations. Recognition of new governments is thus a decision for each State to make on its own. The issue of recognition is separate from the issue of whether to continue diplomatic relations, travel, and trade. A government may decide, again at its discretion, to recognize a new government but nonetheless to cut off diplomatic relations and trade with a new government. A State also may make *no statement* as to whether it recognizes or does not recognize a new government.

To the extent that recognition practice affects the internal affairs of a State – as would be the case if lack of international recognition weakened a new government – it could be argued that recognition of governments is an interference in the sovereignty of a State. The U.S. for some time applied the so-called “Tobar Doctrine” which said that, in order to promote democratic transfers of power, new governments formed by use of force or subversion of legitimate democracies would not be recognized. The idea was to use recognition practice to promote a certain type of government in other States. This certainly comes close to interference in another State's internal affairs. One aspect of sovereignty is the right to form whatever type of government a State wants.

In the 1970s the U.S. moved away from this practice: “In recent years, U.S. practice has been to deemphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments.” (1977). This is the prevailing view – that it is better not to engage in recognition practice at all. This view was most strongly expressed in a

statement by the Mexican foreign minister Estrada, reproduced below. It has become known as the “Estrada doctrine.”

Despite the logic and current popularity of the Estrada Doctrine, there are situations when the international community *must* determine the legitimacy of a new government. Imagine that a small band of people takes over the central government of Ethiopia for a very brief period, say a few months. This band of rebels never controls all the territory of Ethiopia but nonetheless enters into treaties with other States. Then the legitimate government overthrows the rebels and comes back into power. The legitimate government probably will not recognize the treaties entered into by the rebels. But what about the other State parties? Are these treaties binding on Ethiopia as a matter of international law or not?

For such cases, there are two opposite legal positions that one can take. First, there are the so-called *de jure* criteria of governmental legitimacy. The question is, Does the government have a legal title to govern (based on internal laws)? Going by these criteria, all governments formed by revolutions are out. This presents obvious problems, considering the number of governments formed illegally, including the U.S. government which was originally the product of a revolt from Britain. On the opposite end there are *de facto* criteria. The only question here is whether the government has effective control over the State’s territory. This is the accepted approach in international law, clearly explained by William Howard Taft in his decision in the *Tinoco Claims Arbitration*, reproduced below.

In recent years, the United Nations has taken action several times against governments that came to power unlawfully. For example, in Sierra Leone in 1997 the national army seized power from the democratically-elected President. The UN condemned this unlawful seizure of power, and the UN

continued to recognize the former democratic government and continued to seat its delegation. With the help of such actions, the former government was restored to power the following year. The UN responded similarly to violent changes of government in Haiti, Afghanistan, and Somalia. In all of these cases the UN refused to recognize *de facto* governments but rather, as the U.S. did in the 50s and 60s, continued its recognition of *de jure* governments in exile as a means to censure undemocratic transfers of power. It seems as though the UN is continuing the Tobar Doctrine in a different form.

Statement by the Mexican Foreign Minister Estrada, 1930.

It is a well-known fact that some years ago Mexico suffered, as few nations have, from the consequences of that doctrine, which allows foreign governments to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners.

...

...[T]he Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign regimes.

The Tinoco Claims Arbitration (Great Britain v. Costa Rica), Opinion of William Howard Taft, 1923.

[The Tinoco government came to power in Costa Rica by military coup and ruled for two years until the previous government regained control. During this time, the Tinoco government entered into some international contracts, including one with a British oil company. With the return of the previous government, these contracts were nullified. Great Britain argued that the Tinoco government was the government of Costa Rica and that the contracts could not be nullified.]

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.

Second. It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a *de facto* government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for

a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.

...

...The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?

Statement by UN Secretary-General Trygve Lie on the Seating of the Communist Government of China at the UN, 1950.

The Chinese case is unique in the history of the United Nations, not because it involves a revolutionary change of government, but because it is the first in which two rival governments exist. It is quite possible that such a situation will occur again in the future and it is highly desirable to see what principle can be followed in choosing between the rivals. It has been demonstrated that the principle of numerical preponderance of recognition is inappropriate and legally incorrect. Is any other principle possible?

It is submitted that the proper principle can be derived by analogy from Article 4 of the Charter. This Article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry

to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.

If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organization, even though the individual Members of the Organization refuse, and may continue to refuse, to accord it recognition as the lawful government for reasons which are valid under their national policies.