STATE ELEMENTS

WHAT DOES A STATE REQUIRE?

1. Permanent Population
2. Defined Territory
3. Effective Government
4. Capacity to Enter into Relations with Other States
WHAT IS A GOVERNMENT?

Note third element of state is a government in effective control

Tendency is to define government not in terms of centralized public authority, but rather to focus on effective control
EFFECTIVE CONTROL

RELATIVE DEFINITION OF EFFECTIVE CONTROL

Governments and effective control are typically defined more in relative terms.

Often competing governments (secession or similar cases) in which the question is not what is a centralized public authority but rather who among competing claimants is in actual control on the ground in a somewhat chaotic situation.
GOVERNMENTS

RELATIVE DEFINITION OF EFFECTIVE CONTROL (CONT’D)

Retaining recognition is a different problem from obtaining it in first place.

Politics & governments in exile (for example WW II Dutch government in UK & Baltic states pre-break up of USSR) even where clear loss of effective home territory control to viable competitor govt (e.g., US views of Taiwan vs. PRC pre-1970s).

[current governments in exile]
STATES VS GOVERNMENTS

WHY DISTINGUISH BETWEEN STATE & GOVT?

Issue whether recognizing states same thing as recognizing governments?

What is the difference, if any, between recognizing a government and maintaining diplomatic relations with it?

Is recognition of a government even necessary, assuming the form of government is a choice solely for locals?
OLDER HISTORY

HISTORICAL VIEWS

1. Jefferson said if French wanted monarchy or republic, US should deal with French people’s choice

2. Wilson & Betancourt views circa WW I, required constitutional succession unless election

3. US with Soviet Union & PRC conditioned recognition on effective control plus willingness to live up to int’l commitments

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4. Truman & Cold War limitations on recognizing govt of “Communist Subversion” (Baltic Countries)

5. EU conditioned recognition of Former Yugoslavia’s new states on democracy & respect for boundaries (reintroducing apparent political element analogous to Wilson view)

US was considerably more skeptical about the value of accelerated recognition. What did the EU want, and what did it get conditioning recognition?
Most current (US) view of recognition is probably Estrada Doctrine (1930)

Not necessary to recognize government once a state is recognized, reducing to effective control test
UNRECOGNIZED GOVTS

ISSUES

CAN THEY BIND THE STATE?

De facto vs de jure character

WHAT ABOUT THE ACT OF AN INSURGENT AUTHORITY IN CONTROL OF TERRITORY?

Traditional exceptions, certain contracts like concessions connected with land yes, torts no (state responsibility via attribution doctrine, for example for insurgent military violations, only if rebellion succeeds)

WHAT OF UNRECOGNIZED GOVERNMENTS IN MUNICIPAL LAW?

De facto govt analysis, often expropriation (Salimoff v. Standard Oil, 262 N.Y. 220 (1933), also commercial activities (Upright v. Mercury Business Machines, 213 N.Y.S.2d 417 (1961))

DUTY OF RECOGNITION/NON-RECOGNITION?

Arguments usually about duties in recognizing states (constitutive vs objective views of capacity to enter into int’l agreements), but issues as with non-recognition of Rhodesia vs Zimbabwe at point of decolonization

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Regime came to power in a coup and remained two years, during which time it granted oil concession to British company. After coup regime replaced, new govt repudiated contract. British had not recognized coup regime, but said contract valid. Held a de facto govt exercising authority can bind state.
INSURGENCIES & GOVERNMENTS

PROBLEM OF INSURGENCY AND WHEN ITS AUTHORITY BECOMES DE FACTO GOVERNMENT?

1. Issue re belligerent rights for insurgents

2. Insurgents in control of territory may be de facto govt which can bind the state (some issues re ordinary govt functions vs other such as contracts with test in size of territory & population controlled; traditionally, responsibility for contracts but not torts)
DOMESTIC TREATMENT

PROBLEM OF UNRECOGNIZED GOVT IN MUNICIPAL LAW

Who controls recognition in US Govt?

[Off the record] UK Govt? [Off the record]

Normally recognized on a passive basis as at least de facto and so can affect private rights (problem is usually nationalization, etc.)

Traditional rule (including US) is that unrecognized govts cannot maintain action in US courts. Consistent with Estrada Doctrine?
SELF-DETERMINATION

WHAT IS THE RELATIONSHIP BETWEEN A PEOPLE AS DISTINCT ETHNIC GROUP AND THEIR RIGHT, IF ANY, TO THEIR OWN STATE?

Issue is ultimately where you draw the line between minority rights in a larger state versus own state?

Indonesians as acutely conscious of problem since two simmering insurgencies presently (Aceh & Papua/Irian Jaya) plus recent secession of East Timor (Timor Lorosae)
INTERNAL VS EXTERNAL

WHAT IS INTERNAL VS EXTERNAL SELF-DETERMINATION?

External self-determination more 1940s-1960s decolonization traditionally in terms of right (of Asian or African state) to not be subject to control of metropolitan (European) state

Current problem is how to deal with external self-determination vis-à-vis decolonized states as with the British colony of India splitting into India and Pakistan under partition in the late 1940s, followed by Bangladesh seceding from Pakistan in early 1970s

Internal self-determination understood as democratic government question, raising different issues and minority protection problems in ethnically/religiously mixed as opposed to homogenous states (yes, you may have a right to independence from your colonial masters, but do you become one or do you become many states?)

[Off the record] [Do you agree?]
HISTORY & SELF-DETERMINATION

PRE-WW I 19TH Century COLONIAL INDEPENDENCE IN SOUTH AMERICA

However, colonial administrative boundaries preserved in South America (same pattern followed in Africa decolonization post-WW II)

Effectively, little recognition of ethnic self-determination rather only colonial independence (continuing social legacy with Indios, Chiapas Mexican insurgency as latest product)
VERSAILLES TREATY

WILSON’S 14 POINTS & TREATY OF VERSAILLES ENDING WW I AS FIRST MODERN SELF-DETERMINATION

1. Break-up of multi-ethnic Austro-Hungarian Empire, problem re Balkans & small nationalities (old absentee monarch approach, now democracies)

2. Problem of League of Nations mandatory territories headed for independence (e.g., Middle East as Ottoman Empire break-up)

LOOK AT WHAT HAPPENED 1990S IN FORMER YUGOSLAVIA, 1990 TO DATE IN MIDDLE EAST COMPARED TO A HISTORICAL MAP; HOW MUCH FURTHER ALONG ARE WE THAN VERSAILLE & 14 POINTS IN SOLVING MULTI-ETHNIC STATE PROBLEMS? DO THE HELSINKI ACCORDS’ LINKAGE OF SELF-DETERMINATION & MINORITY PROTECTIONS DO THE JOB?
POST WW II

1. Nationality determined by language (displaced persons & Germans in Eastern European)

2. Decolonization wave late 1940s-1960s (mostly respecting ex-colonial administrative boundaries: UTI POSSIDETIS JURIS)

3. 1970s-1980s and continuing secessions in ex-colonies, example of East & West Pakistan splitting into Pakistan & Bangladesh
TO PRESENT

POST WWII (CONT’D)

4. 1990s Former Yugoslavia split up

5. Among most recent splits Timor Lorosae seceding from Indonesia (former East Timor)

6. Helsinki Accords emphasis on minority protection

7. Former Yugoslavia & doubtful success of Dayton Accord
ULTIMATE TESTS

WHAT IS THE TEST OF SUCCESSFUL SELF-DETERMINATION/SECESSION?

1. Establishing elements of state under traditional test by force of arms (effective government, but for how long & external interference issues)

   [Your opinion?]   [Historical view]

2. Plebescite of population sometimes (issue who is population, example in Israel does it include Palestinian refugees now 50 Yyears outside country’s borders)

   [Off the record]
INTERVENTION

INTERFERENCE IN INTERNAL AFFAIRS

Problem in (premature) recognition of seceding state is extent to which treated as prohibited intervention concerning state from which it secedes (interference in internal affairs)

[Off the record]   [Your opinion?]   [Your opinion?]

Particular problem of selling/supplying arms to new, secessionist movement & borderline between intervention & aggression (indirect aggression & sponsored insurgencies)
INTERVENTION IN CIVIL WARS & BORDER TO ARMED CONFLICT LAW

Problem of one-sided hands-off policy vs proxy wars, starting with intervention in the Spanish Civil War (future Axis powers actively supported conservative military revolt; future Allied powers favored serving Republican government but largely respected non-intervention)

Ideological proxy wars & “wars of liberation/subversion” during Cold War period (starting with Greece 1947, extending into Central America & Nicaragua 1980s)

What is different about “ideologically” inspired as opposed to “ethnically” inspired civil wars? How does self-determination play into the equation? What do you say to socialist views of international law under which a socialist revolution, aka national liberation struggle, was traditionally viewed as a change in state rather than government? We pick up on intervention again under the law of armed conflict.