
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 5, States as Subjects of International Law

Question 1. *'A "State" is an objective characterisation of an entity under clear criteria laid down under international law.'* Analyse this statement critically.

There are several ways to address this answer. One of the easiest is to point to the widespread acceptance of the criteria laid out in the Montevideo Convention as evidence of customary international law on the definition of statehood. In it, a number of criteria are laid out:

- 1) Permanent population
- 2) Defined territory
- 3) Effective government
- 4) Capacity to enter into relations with other States.

After identifying them, a student could claim that all four are reasonably objective: a population can be counted; a territory can be objectively ascertained, at least to a relatively specified extent; a government's effectiveness is usually a matter of fact; and whether a State has the capacity to enter into relations with other States is measurable. Such an answer would reflect a basic knowledge of the Montevideo criteria and, depending on the extent to which it draws on the declaratory theory of recognition and uses relevant practical examples, is defensible.

However, perhaps the more nuanced response would demonstrate that all of these purportedly objective criteria also embody a degree of subjectivity. Practice suggests that a permanent population can be incapable of reproduction (Vatican

City has a population almost exclusively composed of men), or significantly nomadic (*Western Sahara* advisory opinion). Though these are probably exceptional circumstances, a State is permitted to have boundary disputes, and a government in exile can exist for significant time without 'territory' (see e.g. the governments of Poland, Norway, and the Netherlands during World War II). A government can have minimal control yet be admitted to the United Nations (e.g. Bosnia, or South Sudan) or can collapse completely for decades without statehood being extinguished (e.g. Somalia).

More subjective of course is the capacity to enter into relations with other States. Self-governing but not fully independent entities, such as British Dominions before 1931 or India in 1945, could not enter into relations with other States without approval from the British Parliament in Westminster. That degree of 'actual' independence has been invoked against the questionable grant of independence by South Africa to the 'Bantustans' in the 1970s, and to the Turkish Republic of Northern Cyprus, under the effective control of Turkey (see *Loizidou*).

Finally, there are emerging, or contested, additional criteria for statehood. Democracy, self-determination have all been invoked (e.g. by the EU Badinter Commission), and there is some practice that would seem to confirm this (such as the holding of referenda or plebiscites in Montenegro and South Sudan; but referenda have not been deemed relevant in relation to Kosovo by many States). Recognition has been denied to Rhodesia for its racist apartheid regime; but it is unclear as to whether these constitute settled practice. The best answers will be able to identify these facts and the ambivalence that surrounds them rather than take a strident, one-sided position.

Question 2. *'The recognition of governments serves no purpose and should not be practised because it only confirms an established set of factual affairs.'* Discuss.

Historically, recognition of governments was only *de jure*: without it, a new government would have no standing in the courts of other States. However,

following some jurisprudential developments (e.g. the *Tinoco* arbitration and the *Luthor v Sagor* case in the UK), courts began to accept that *de facto* governments with effective control needed no recognition from other governments. This move towards *de facto* control grew until in the early 1980s, the US and the UK and other States made statements that they would no longer ‘recognise’ governments, leaving such matters for factual determination by domestic courts (see e.g. *Somalia v Woodhouse Drake*). This would have suggested that recognition of governments was becoming obsolete.

However, since 2011 there have been several key departures by States that had adopted explicit policies of non-recognition. The first was Libya, in which the US, UK and France, alongside several NATO allies, collectively decided to ‘recognise’ the rebel NTC as the legitimate representatives of the Libyan people. This led to the ouster of the Qaddafi regime. A similar group of States recognised, in late 2011, the ‘Syrian National Council’ rebel group as the legitimate government of Syria, though the Assad government remained in power. In early 2019, the United States, and EU member States led by Spain, recognised Juan Guaidó as the legitimate leader of Venezuela in protest at the Maduro Government. Finally, in August 2021 the Taliban took full control over Afghanistan, and as of 2022 has received virtually no international recognition. The best answers would not conclude pre-emptively that these practices have restored the importance of recognition, but rather, would suggest that they inject a degree of indeterminacy in the practice of the recognition of governments.