1. The State

What makes 'a state' at int'l law?

Declaratory Theory: when a state declares itself to be a state - *Montevideo*

1. Permanent population   2. Defined territory   3. Effective govt (monopoly on force)
4. Capacity to enter into r/ss w/ other states   *Doesn't recog sub-states (e.g. VIC)
- No need for recog by other states: art 3 says no; art 6 similarly says it '*merely* signifies'

Constitutive Theory: when others recog it as a state - *Crawford*; state is a 'form of standing'
Circularity: 'no generally accepted & satisfactory definition' despite numerous attempts

Statehood is a 'central concept of int'l law [w/] an open texture'

Thus, Declaratory Theory on its own is insufficient.

Powers + obs of States

UN Charter Art 2: Characteristics of State

- (1): Principle of **state equality** - 1 nation = 1 vote
- (4): States have **territorial integrity** (non-use of force)
- (7): Dom **sovereignty**; non-interference in dom matters, subject to Ch VII:

Art 39: SC to det existence of threat to int'l peace & security

Art 40: May call upon parties concerned to comply w/ provisional measures

Art 41: SC to auth. measures not involving use of armed-force

Art 42: SC to auth. measures involving use of armed-force

Presumptions on which Int'l Law are built:

1. **Treaty making**: consent; obs; limitations on your own decision-making
2. Ctrl over **internal affairs** <- intended to prevent war: the more likely you are to intervene in another state's affairs, the more likely war will break out.
   - Note later revision to core principles - R2P: Responsibility to Protect
3. **Equality** b/w states: 'a dwarf is as much a man as a giant' (*Crawford*)
4. **Can't subject to compulsory enforcement**, particularly int'l judicial bodies, e.g. ICJ; consent

Presumptions: above 4 principles are presumptions on which int'l law is built.

Malleability of Defining States
UN Charter Art 51 allows collective self-defence (for Iraq, who requested it) against ISIS; yet, coalition also atking Syrian govt forces: legally justified by tying ISIS & Syrian govt together

2. State Acquisition of Territory

3 ways to acquire territory: [*Mabo* suggests 4th way]

1. Conquest (via war): conquered nation's law remain in place until changed (legal continuity)
2. Cession (ceded by treaty/agreement) - again: legal continuity
3. Occupation (terra nullius); reqs:
   a) Sufficiently effective occupation   b) Intention to acquire sovereignty
   - Terra nullius -> occupier's law is immediately effected, since there's no pre-existing law

CASE: *Mabo*

HC Jurisdiction

Acquisition of Aus may be <u>act of state</u> (ct has no jurisdiction), <u>BUT</u> we'll <u>consider</u> the <u>effects on CL</u>.

Terra Nullius

HC adopts <u>narrow definition</u>; rejects *Cooper* definition (restrictive & racist); *Western Sahara (ICJ):* 'land <u>empty of inhabitants</u>' -> adopted in CL

- Basis: recog <u>'legit & important influence' of int'l law & int'l HRs on Cth's CL</u>

Essay: How radical is *Mabo*?

Ct recogs in CL the ability for 1st peoples to make claim re native title, e.g. *Yunupingu*

Not radical: still filtering through the settler's legal system.

Radical:

- Ct: Aus = a settled, yet legally inhabited colony. Judicially this is radical, as this is fundamentally an act of state (ct's jurisdiction here is questionable).
- Ct: Aus='a settled, yet legally inhabited, colony' (not conquered/ceded but also diff fm occupied)

Uluru Statement - Claims for sovereignty

1st Nations

1. Makarrota commission: treaty-making commission (treaty b/w Cwth govt & 1st Australians)
2. 1st Nations Voice: some kind of const'l institution that'll consider questions/statutes that relate to indigenous Australians, advising parliament

1st Nations prefers these changes over const'l changes: believes textual changes to const wouldn't be enough: instead, structural reform is needed. Fundamentally, there's a push for the formal recog of an indigenous legal system, instead of having it filtered through the settlers' legal system.

Otto

A truly indigenous conception of sovereignty is important b/c:

- There's a symbolic aspect to creating a post-colonial <u>ID</u>
- Also argues that indigenous ppl should have <u>int'l legal standing</u>
- This will all lead to new conceptions of <u>land rights (beyond native title)</u>

Strat to create this new conception must be beyond *politics* & involve actual *legal* arguments presumably made to int'l cts/forums (UNGA etc.); inextricable link b/w the law & the politics.

Comparison

Uluru: narrower conception of sovereignty

- Idea of <u>internal</u> self-determination w/in conception of nation-state -> treaties w/ Aus govt/states, <u>NOT</u> int'l treaties
- Predominantly about *political* attainment of sovereignty, whether through treaty or participation in law-making (voice institution)

Otto: broader conception of sovereignty

- <u>External</u> self-determination (de-constructed conception; further step away fm idea of nation-state) -> pushes for <u>int'l</u> standing for indigenous ppls (treaties w/ other int'l states etc.)

- Legal arguments req'd: politics alone can't achieve the fundamental goals that Uluru also shares (de-colonisation, which Otto argues is blocked at the Int'l level)

Both: emphasise ID; want to go beyond *Mabo*; fundamentally about sovereignty

3. The State & Extraterritorial Legislation

Aus States: *Aus Act 1986* allowed state extra-territoriality; CASE: *Port MacDonnell*

Act allowed states to legislate 3NM fm border; wedge of base 200NM fm border protrudes into VIC

Nexus test: there must be '<u>sufficient connection</u>': 'any real connection' (*Pearce*)

1. <u>Cth can auth states to legislate extraterritorially</u> (via statute)
2. <u>Strong presumption against extra-territoriality in state legislation</u>

State boundaries end at low-water mark. Legislation valid. Easy here coz no Vic legislation.

Cth - CASE: *XYZ*

1. AUTH: does Aus have power to draft legislation re these affairs?

Use ord meaning of **external affairs** (s51 xxix): external to Aus

- 1901: Aus not sep to UK; independent now -> external affairs *must* = places/matters external to Aus, i.e. Cth can draft legislation re ANYTHING! <- PLENARY POWER
- Int'l law irrelevant for const'l interpretation *Horta* (despite legality principle)

2. STATUTORY INTERPRETATION:

Presumption against extra-territoriality <u>not held</u>: law *specifically* intends to be <u>extra-territorial</u>;

[Gen] ***Principles of Int'l Law* (Brownlie):**

a. <u>'Substantial + bone fide connection'</u>
   i. <u>Territoriality:</u> cts of the place where crime is committed has jurisdiction
   ii. <u>Nationality:</u> [Act explicitly refers to Aus citizens/res; if it didn't, likely to be read down to it]
   iii. <u>Passive personality:</u> aliens may be punished for acts abroad harmful to nationals
   iv. <u>Protection/security:</u> jurisdiction over aliens for acts done abroad affecting state security
   v. <u>Effects doctrine:</u> ^some other harm to state
b. Respects <u>non-intervention</u>: *this doesn't intervene w/ Thailand's affairs.
c. IAW <u>accommodation, mutuality, & proportionality</u>

IMPLICATION re **state self-determination**: a state's <u>legal auth. extends to</u> not just its territory, but to <u>its ppl</u> as well (hence auth. for <u>extra-territoriality</u>)

4. State & Citizenship

Parliamentary Power - S51 of Aus Const allows Parliament to legislate re:

(xix) naturalisation & aliens   (xxvii) immigration & emigration

CASE: *Singh* - Interp of 'Alien'; born in Aus to non-Aus citizen/res parents

1. Always start w/ text. Failing that, go to step 2 (context).
2. Context: '<u>orthodox</u>' principles make judicial role <u>predictable</u>, gives structure to legal argument, & sets legal reasoning (cf political arguments)
   a. Structural LOC: see sections around it   b. Purpose
   c. Focus on clear def of words at enactment, cf framer's subjective intention

i. *Cheatle*: 'by jury' ltd to unanimous verdicts, or does it allow majority verdicts?
  - *Ct:* must be unanimous - when Const was enacted, was clear that there was 1 def: unanimous; <u>definition locked b/c essential feature</u> (cf male jury)
ii. <u>Cf 'alien': def contested at the time: CL definition = by place; UK legislation = by descent</u>
  - <u>THUS, Parliament can choose how it's defined</u>; held: all aliens, even if born here; GTFO

Ct suggests orthodox principles to be used for both const & statute (ongoing question)

Dawson J reconciling *XYZ* & *Singh*: connotation/denotation
XYZ: meanings change over time. *Singh*: meanings are fixed.

<u>Connotation is fixed, but denotation will change</u>: underlying concepts behind word meanings (connotation) don't change, but can be applied to diff things (denotation)

Sue: 'foreign powers' -> 'foreign' has fixed meaning, but circumstances change (UK is foreign)

Contested Sovereignty; R2P
ICISS: approach changed fm <u>sovereignty as 'ctrl'</u> -> <u>responsibility</u> (involves notions of morality, esp. re HRs + democracy)

R2P very narrow: reqs UNSC approval & srs crime (e.g. genocide); still, abusable (e.g. US)

5. The Acquisition of Independent Statehood in Aus

When did Aus become sovereign? [Note implications for cases: *XYZ*, *Singh*, *Sue*]
1. Permanent pop: non-issue   2. Defined territory: non-issue
3. <u>Effective govt</u> (monopoly on force): does autonomy of law-making reflect effective govt? Fm Cth POV, appears to be 1931 (Westminster), but fm states POV, may be 1986 (Aus Act)
4. <u>Capacity to enter into r/ss w/ other states</u>: 1918 League of Nations & Treaty of Versailles

Devolution Process
1865: Colonial Laws Validity Act

- Confirms colonial legislation has full effect, but UK still has supreme power to legislate

1901: Fed Constitution in effect

1918: Aus joins League of Nations, signs Treaty of Versailles, indicating sovereignty (*Montevideo*: entering into treaties)

1926: Balfour Declaration - UK & dominions 'in no way subordinate'

1931 - 42: Statute of Westminster emerges (1931), Aus passes (1942), effecting Balfour Declaration

- Cancels/repeals colonial laws validity act (UK parliament & its supremacy in Aus)

1975: Aus Cwth cuts final ties w/ Privy Council - Judicial

1986: *Aus Acts* severs final links b/w UK & Aus states

Present: Crown still exerts power through GG (exec dominance)

Gradual devolution cf sudden revolution: test waters cf risk everything; avoid power vacuum