

Nature of Public International Law

States & State Sovereignty

Defining a State

- Requires application of 1933 Montevideo Convention on the Rights and Duties of States, Art 1
 - a) **Permanent population**
 - The population can be small, but requires a permanent or defined population
 - Requirements fairly loose - even a territory occupied by nomadic people could potentially qualify under this criterion → Western Sahara
 - b) **Defined territory**
 - Must have a reasonably well-defined territory over which sovereignty is exercised
 - Could have a number of unresolved boundaries
 - c) **Government**
 - Must have a practical identity - a government that is responsibly for assuming international rights and duties
 - The government must have effective control over the defined territory
 - d) **Capacity to enter in relations**
 - Must have capacity on its own independent behalf - cannot be a 'puppet state'

Sovereignty over Territory

- There are several ways in which states can lawfully acquire rights to territory:
 1. **Cession**: the voluntary transfer of territory from one state to another
 2. **Occupation**: where one state enters foreign territory and occupies that territory, and claims it as its own
 - Occupation as a mode of acquiring territory **requires that that territory is *terra nullius*** → **Western Sahara Case**
 - **Continuous and peaceful display** of State authority supports a claim of state sovereignty: **Island of Palmas Case**
 - In relation to remote territories, **a somewhat lesser standard of occupation applies**
 - Need not prove constant presence and exercise of control
 - Even fairly low level of activity may constitute prescription in such cases
 3. **Prescription**: take title over property that is contrary to the title of the true owner, because of your length of possession
 - **Continuous and peaceful display** of State authority supports a claim of state sovereignty: **Island of Palmas Case**
 - **NOTE: point of distinction between prescription and occupation is simply whether the land was *terra nullius***
 4. **Discovery**: originally, mere discovery of a territory could conceivably give you ownership over it
 - Inchoate title - must be perfected by subsequent act of occupation → **Island of Palmas Case**
 5. **Conquest**: unlawful to use force in international relations unless used in self-defence or with the authority of the UN Security Council
 - Certainly not permissible to use force to acquire new territory
- **Critical date**:
 - The date at which the dispute between the two parties becomes crystallised and after which no acts can be taken into account in determining sovereignty

- A display of state authority in the period leading up to the “critical date (i.e. the date on which the location of territorial sovereignty is decisive) can defeat any other claim.
- **Western Sahara Case:**
 - A claim to sovereignty based upon continued display of authority involves:
 - the intention and will to act as sovereign, and
 - some actual exercise or display of such authority

Recognition of States & Governments

I. States

- 1933 Montevideo Convention on the Rights and Duties of States, Art 1
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- **Stimson Doctrine of Non-Recognition** → cannot recognise the authority of a new entity that has been born out of the illegal use of force

II. Governments

- **Republic of Somalia v Woodhouse Drake Carey Suisse S.A.:** the factors to be taken into account when deciding whether a government exists as the government of a state are:
 - Whether it is the **constitutional government** of the state
 - The **degree, nature and stability of administrative control**, if any, that it of itself exercises over the territory of the state
 - Whether Her Majesty’s Government **has any dealings with it** and if so what is the nature of those dealings, and
 - In marginal cases, **the extent of international recognition** that it has as the government of the state

III. Other Legal Persons

- **International organisations** → can have international legal personality
 - **Reparation for injuries suffered in the Service of the UN Case, ICJ 1949:**
 - **Principle:** An international organisation (i.e. the UN) can be regarded as an international person
 - It is a subject of international law and is capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.
 - The UN has a right to bring a claim even against a non-member

- Responsibility for wrongful acts:
 - ***Behrami v France (2007)***:
 - UN → had effective control over the individuals who are placed at the disposal of the UN by their governments
 - May be legally responsible for wrongful acts, even when committed by agents
- **Corporations** → no international legal personality: ***Kiobel v Royal Dutch Petroleum (2010, 2013)***

Territory & Maritime Space

- Maritime space can be divided into several sections:
 - All coastal states entitled to 12 nm of territorial sea
 - Same rights as they have over land
 - Contiguous zone - extends another 12 nm from the coast
 - Enforcement zone - can enforce customs, fiscal, sanitary and immigration laws in this zone
 - Exclusive economic zone - 200 nm from coast
 - Zone in which coastal states have ownership over the living and non-living resources of the zone
 - Continental shelf zone - at least 200 nm from coast
 - Own living and non-living resources of the sea bed and sub-soil
 - High seas - owned by the international community

Sources of Public International Law

Overview

Article 38(1) of the Statute of the ICJ:

- I. The Court shall apply:
 - a) **International conventions** recognised by the disputing state
 - b) **International custom**, as evidence of general practice accepted by law
 - c) **General principles of law** recognised by civilised states
 - d) As a subsidiary means, **judicial decisions and writings of publicists**

Article 38(1) is a complete statement of the sources of international law: **Polyukhovich v Commonwealth (1991)**.

Customary International Law

- 'International custom, as evidence of a general practice accepted as law'
 - **Objective element** → general practice - body of practice of states sizeable enough and widespread enough to give rise to a customary rule: **North Sea Continental Shelf Cases**
 - The practice of particularly affected states likely to have greater bearing: **North Sea Continental Shelf Cases**
 - Need not entail perfect adherence - sometimes the deviation proves the rule: **Nicaragua (Merits) Case**
 - **Subjective element** → accepted as law → *opinio juris sive necessitatis* (belief that the practice is required as a matter of law)

Case name:	Lotus Case (1927)
Principles:	<p>A State cannot exercise its jurisdiction outside its territory unless it an international treaty or customary law permits it to do so.</p> <p>Within its territory, a State may exercise its jurisdiction, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, States have a wide measure of discretion, which is only limited by the prohibitive rules of international law.</p>

Case name:	North Sea Continental Shelf Cases (1969)
Principles:	<ul style="list-style-type: none"> • Must be of a fundamentally norm-creating character (not vague, not discretionary) • Passage of short period of time not necessarily a bar to the formation of new customary law <ul style="list-style-type: none"> • BUT state practice should have been extensive and uniform • A treaty may relate to custom in one of three ways: <ul style="list-style-type: none"> • May be declaratory of custom at the time it is adopted • May crystallise custom • May come to be accepted and followed as custom after the treaty's adoption

Case name:	Nicaragua (Merits) Case (1986)
Principles:	<ul style="list-style-type: none"> • No reason that, where customary law is crystallised in treaty law, the latter supervenes the former so as to eliminate the standalone authority of the customary law • Inconsistencies in adherence can actually point towards the existence of a customary rule (notion of breach → acknowledgment of rule) • UNGA resolutions are key in producing practice, <i>opinio juris</i> and therefore customary international law
Case name:	Anglo-Norwegian Fisheries Case
Principles:	<p>Persistent objector: if a state has persistently objected from the time when the rule began to emerge it can opt out</p> <ul style="list-style-type: none"> • Must oppose the rule during its formative stages & must maintain opposition consistently

Regional or Local Custom

- Customary law that binds only a relatively small number of states
- Requires that all states in the region have accepted a rule
- **Strong requirement of uniformity of practice for regional customs**
 - Cf global customary → not uncommon for there to be divergence in opinion and practice when creating international customary law

Case name:	Asylum Case (Colombia v Peru) (1950)
Principles:	<p>General practice can allow for local or regional customs amongst a group of states or just two states in their relations</p> <ul style="list-style-type: none"> • Local customs may supplement or derogate from general customary international law <p>Requires that the rule invoked by international custom is in accordance with a constant and uniform usage, accepted as law, practised by the States in question</p>

Customary Law-Making

- Requirements for generating customary rules:
 1. Consistency of practice over time
 2. Widespread
 3. Representative - geographically, wealthy & developing etc (including states most likely to be affected)
 4. Need not be entirely uniform - can be some defections/breaches
 5. Normally practice over a lengthy period, but customary norms may emerge rapidly if practice overwhelming
- *Opinio Juris*: notionally as important as state practice
 - If extensive state practice, *opinio juris* tends to be less important (gives rise to a rebuttable presumption that there is sufficient *opinio juris*)
 - If there is limited state practice, *opinio juris* may be more important