

LAWS1023 PUBLIC INTERNATIONAL LAW CASES

Ure v Commonwealth FEDERAL COURT	Facts: - Two remote reefs in North Pacific off the Australian coast - In 1970, Ure put a sign on a shipwreck on the island saying that he owned the island and claimed private title - In 2010, Ure's son brought proceedings in FC against Commonwealth that Ure family had ownership over the remote islands as they were recognised by nation states as terra nullius - argued custom and general principles of law as source (Art 38(1)(b) and (c)) Issue: general question of law whether under public international law there is a rule that a natural private person can acquire title in unoccupied land unclaimed by a sovereign state > traditionally only sovereign states can claim land Held by federal court - Australian courts generally accept Art 38(1) of the ICJ Statute, at [14] - Ure's proposed evidence was not sufficient to satisfy requirements of customary international law nor general principles of law [132] Ure would have to prove that the principle is recognised by the laws of civilised nations [128] Art 38(1)(c) concerns general principles recognised by civilized nations, which suggests a focus on municipal systems. There has been no consensus on the definition of the general principles mentioned, but little doubt they are - Unwritten legal norms of a wide ranging character - Recognised in the municipal laws of states - Must be transposable at the international level [131] express reference to municipal legal systems suggests that general principles of law derived from natural law can have no direct application under it - Customary rule cannot be established by demonstrating the existence of a general principle under Art 38(1). "These are distinct sources of international law that stand on their own" Nor can reliance be placed on teachings if there is insufficient evidence of the custom.
North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands) [1969] ICJ Rep 3	Facts - Overlapping continental shelves between neighboring states Denmark, Germany and Netherlands > how to determine the continental shelf as Germany said the perpendicular equidistance rule was unfair as they had a small shelf due to the concave coast shape - Netherlands argued that Art 6 of the Geneva Convention on the Continental Shelf, which used the equidistance approach, was customary (not just treaty) > necessary as Germany was not a party to the Convention Held - Treaty norms can become custom, but not here - for treaty to become custom, it must be of a 'fundamentally norm creating character' (42[72]) ie be a generally applicable rule of international law - 'this result is not lightly to be regarded as having been attained'

	- Art 6 did not reflect custom or create it > Art 6 was not of a 'fundamentally norm creating character' (there was uncertain / ambiguous meaning of the equidistance plus the 'special circumstances' formula referred to in rule > not rigid) - Court specifically considered Art 6 to determine whether the principle has come to be regarded as a rule of customary international law, "it is necessary to examine the status of the principle as it stood when the Convention was drawn up... and in the light of State practice subsequent to the Convention. • Mere widespread participation in a treaty regime is insufficient to prove customary status [76] > here also few ratifications - States that used the equidistance principle were just acting or potentially acting in the application of the convention - the acts did not amount to a settled practice (in addition to requiring opinio juris) • Two or more states can derogate from custom by agreement that the rule does not apply in certain circumstances [72] (but not jus cogens norms) • Judge Tanaka: determine opinio juris from "the fact of the external existence of a certain custom and its necessity felt in the international community" (175-176) - "The frequency or even habitual character of the acts is not itself enough" • Short time not a bar, but it is an INDISPENSABLE REQUIREMENT that within the period that state practice, particularly the states whose interests are specially affected, should have been both extensively and virtually uniform in the sense of the provision invoked... in such a way that a legal obligation is involved 42-43 [73]-[74] - Here it has been 10 years since convention signed, 5 years in force and less than 1 since negotiations about the continental shelf begun • Therefore principles of equity used (general principles) as relevant for decision making process, rather than as a source of law, to allow equitable outcome for Germany in determining the boundaries [46]-[52] • "The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right" 22[19] > definition of continental shelf in UNCLOS is customary international law
Nicaragua (Paramilitary Activities) (Merits)	Facts • Nicaragua claimed US engaged unlawfully in military and paramilitary activities against it eg laying mines and supporting the Contra Rebels, in breach of obligations under general and customary international law on prohibition on use and threat of force • US provided 'planning, direction and support' to the Contra rebels to carry out certain operations against the Nicaraguan government at [86], [115] - US concerned about communism in the new government, supported overthrow • US contended ICJ did not have jurisdiction as Art 36(2) declaration to the Court excluded disputes arising out of multilateral treaties eg UN Charter art 2(4) which prohibited the use of force in resolving international disputes

	Issue: requirements for establishing customary norms, role of UN General Assembly resolutions, determine the rules of use of force and prohibition of intervention by reference to customary international law Held norms relied upon by Nicaragua (prohibition on use of force and intervention in other states) was part of customary international law, but UN Charter and custom had separate applicability • US not exempt from following norms just by excluding ICJ jurisdiction • 'Even if a treaty norm and a customary relevant to the present dispute were to have exactly the same content, this would not be a reason for the court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability' - Separate existence of customary and treaty norms • The UN Charter itself refers to pre existing customary international law in the text of Art 51, which mentions the "inherent right" of individual or collective self-defence, which "nothing in the present Charter shall impair" - "hard to see how this can be other than of a customary nature" • Although the court has no jurisdiction to determine whether the conduct of the US constitutes a breach of those conventions, it must take them into account in ascertaining the context of the customary international law which the US is also alleged to have infringed • To give rise to custom, state practice need not be 'perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs' • 'Instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule' - If a state acts in a way prima facie INCOMPATIBLE with a recognised rule, but DEFENDS its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significant of the attitude is to CONFIRM rather than weaken the rule. • Prohibitions of use of force and of intervention supported by UN Charter and extensive <i>opinio juris</i>, including practice from US itself, as supporting the rule • "Opinio juris may be deducted from, inter alia, the attitude of the Parties and of States towards certain GENERAL ASSEMBLY RESOLUTIONS." - The effect of state's consent to the text of GA resolutions is acceptance of the validity of the rule or set of rules declared by the resolution itself - the declaration may only be a statement of political intention and not a formulation of law, so look to the adoption of subsequent declarations • If a treaty gives rise to a customary norm, that customary norm exists independently of the treaty • 'The basic legal concept of State sovereignty in customary international law, expressed in...Art 2(1), of the UN Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory' • 'Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making
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the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations'

Held per state responsibility

- US provided 'planning, direction and support' to the Contra rebels to carry out certain operations against the Nicaraguan government at [86], [115]
- US financing, organising, training, supplying and equipping of the Contra rebels, selection of its targets, and the planning of the whole of its operation was not sufficient to attribute the acts of the Contras to the US
 - Consider the nature of support provided and the extent of involvement
- To be attributable to the US, the US must exercise 'effective control' over those acts at [115]
 - "Even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the US directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state. Such acts could well be committed by members of the Contras without the control of the US" [115]
 - General dependance on support not sufficient
 - **High threshold for control**
- Contras could not be equated, for legal purposes, with an organ of the United States Government
 - Art 8 (since created adopting Nicaragua) in requiring effective control, to satisfy that test, the acts of these private individuals must be effectively assimilated to those of an organ of the state
- US still responsible for its own acts, e.g. violating principle of non-intervention by supporting the Contras, and violated the obligation not to use force by certain US military acts in Nicaragua
- The Nicaragua 'effective control test' has been affirmed by the court subsequently in the Genocide Case, nothing that it was customary international law as reflected in art 8 ASR

Re self defence and force

- The principles on the use of force in UN Charter correspond to custom, subject to certain exceptions ie self defence in Art 51 for collective and individual self defence
- Court expressed no view on the issue of the right of self defence in situations where an armed attack has not yet occurred and where there is an imminent threat
 - ie no view about anticipatory self defence
- In the case of individual self-defence, the exercise of this right is subject to the state being a victim of an armed attack
- An armed attack must be understood as including not only action by regular armed forces across an international border, but also the sending by or behalf of a state of armed bands, groups, irregulars or mercenaries
- Sending by a state of armed bands to the territory of another state is an armed attack if the operation, because of its **scale and effects**, would have been classified as an armed attack if carried out by regular forces