

1. Nature & Scope of Public International Law

International Legal Personality

○ LEGAL CAPACITY IN INTERNATIONAL RELATIONS

- Legal personality depends upon
 - a) Objective factors: whether the entity has the capacity to do what it claims
 - b) Political factors: the extent to which other states are willing to recognize the entity
- Provided that state has signed the relevant convention/treaty, international courts may have jurisdiction to protect individuals' human rights or prosecute individuals for humanitarian crimes (ICC).
- UN has legal capacity to sue and be sued under international law; *Reparations case ICJ Advisory opinion 1949*

○ STATEHOOD

- **1933 Montevideo Convention of the Rights and Duties of States** is commonly accepted as reflecting the requirements of statehood at customary international law (Harris 1998):
 - 1) Permanent population
 - No minimum requirement; nomadic tribes regarded as population in *Western Sahara Case*
 - 2) Defined territory
 - Complete certainty over the extent of territory not required; e.g. India v Pakistan over Jammu Kashmir
 - 3) Effective government
 - Does not mean an established state loses statehood when it ceases to have effective gov't
 - 4) Capacity to enter into relations with other states
 - Territory must not be under lawful sovereign authority of another state
 - Consider manner of attainment of capacity; e.g. Turkish Republic of Northern Cyprus not regarded as a state due to illegal use of force

- UN is based on 'sovereign equality of all its members' Art 2(1).
- No state is amenable to the judgment of any other state, thus no state cannot be brought to an international court unless willing and no judgment binding unless previously consented to.
- New states bound by existing international law but states may object to evolving rules e.g. USA objects to ban on unilateral claims on deep-sea resources.
- Near impossible for established states to lose statehood involuntarily (Dixon 2007)
- *Lotus presumption*: "restrictions upon the independence of states cannot... be presumed," i.e. states can do anything so long as it is not prohibited by international law. Applied in Kosovo Advisory Opinion case.

○ RECOGNITION OF STATES

- Constitutive theory: recognition is a precondition for the existence of legal rights claimed by a state. Problematic because states often deny recognition for political reasons; *Tinoco Arbitration (1923)*
- Declarative theory: recognition merely acknowledges existence of the independent state and a willingness to engage in international relations with it – ICJ favours this.
- Montevideo Convention only a variable benchmark for whether states can claim statehood. International courts also consider (Triggs 2011):
 - a) Compliance with international law e.g. principle of self-determination
 - b) Prohibitions on racial discrimination, use of force
 - c) Satisfaction of democratic processes
 - d) Respect for established borders
- Stimson doctrine: duty to refrain from recognizing any state established via illegal use of force or threat of use of force.

- **Principle of self-determination** is today a right *erga omnes* i.e. applicable to all and valid against all; *Palestinian Wall Advisory Opinion*
 - Statehood via self-determination requires a free and genuine expression of the will of the peoples concerned; *Western Sahara Case*
 - Consider balance between protecting human rights of peoples and preserving fabric of international society. Often statehood via self-determination recognized to be remedial e.g. Kosovo

Sierra Leone Tele Co Ltd v Barclays Bank

- Military coup in SL requests blocking old gov't access to its UK bank account
- Issue: is the military coup able to be recognized as the “government” of SL?
- Factors to be taken into consideration:
 - Constitutionality of new gov't
 - **Degree, nature and stability of control over territory**
 - Existence and nature of dealings with UK gov't
 - In marginal cases, international recognition
- Refused to recognize military coup on grounds of lack of control of territory and international condemnation (UN imposed sanctions)
- * NOTE: case law is not binding at international law but may be influential

○ EFFECT OF NON-RECOGNITION

- In the absence of recognition, a state or gov't has no standing before national tribunals of the non-recognizing state and no right to privileges or immunities from the jurisdiction; *City of Berne v Bank of England (1804)*
- Treaties negotiated in breach of a duty of non-recognition are invalid; ICJ found no such duty in *East Timor (Portugal v Australia)*

Territory

○ ACQUIRING TITLE TO TERRITORY

- **Modes of acquisition** (start with this when problem solving):
 - Occupation of *terra nullius*
 - Mere discovery is not sufficient
 - Prescription i.e. possession adverse to the abstract titleholder
 - Must be continuous and unchallenged display of sovereignty; *Island of Palmas Case*
 - Degree of display of state power required may vary according to territory
 - Acts must be accompanied by the intention to act as sovereign, but retrospective intention is probably sufficient; *Clipperton Island Arbitration*
 - Cession i.e. transfer by treaty
 - Accretion, where gradual deposits of soil changes land contours
 - Conquest, now prohibited by Art 2(4) of the UN Charter

Island of Palmas Case (Netherlands v US) (1928)

- US claimed island ceded into their territory by Spain in the Treaty of Paris; Dutch claimed sovereignty on the title of peaceful and continuous display of state authority over the island
- Dutch had taxed local people, distributed goods. No evidence of Spanish acts of sovereignty.
- Issue: did the Netherlands do what was sufficient to acquire the territory via prescription?

Huber J:

- Island is Dutch territory due to the “**unchallenged acts of peaceful display of sovereignty** in the period from 1700 to 1906,” notwithstanding the acts being nominal
- Acts must be continuous, relevant acts are those prior to the critical date (date at which dispute first arises)

- The nature of acts necessary to constitute sovereignty will depend on the nature of the territory
- Contiguity principle purports states may claim title over islands by virtue of being the nearest sovereign state. However, this alone is usually not sufficient and is liable to be defeated by effective occupation.

Temple of Preah Vihear

- Map mistakenly represented temple to lie on Cambodian territory
- Dispute as to which side of the Siam-Cambodian border the temple lay
- ICJ recognized Cambodian title on **basis of implicit recognition** by Siam (acquiescence) and its failure to protest over 50 years
- Inaction of a state may mislead another to its detriment thereby creating an estoppel

○ **OCEAN SPACE**

- States have exclusive sovereignty within 12 nm of land; exclusive economic zone within 200 nm subject to allowing innocent passage of shipping.
- Some consensus that EEZ extends to entire continental shelf that State lies on e.g. Australia has >300 nm
- **1982 UN Convention on the Law of the Sea (UNCLOS)**
 - 118 parties, certain provisions regarded as customary law
 - Art 136: deep seabed and its resources are the common heritage of mankind; status as customary law questionable (Triggs 2011)

○ **ANTARCTICA**

- **Antarctic Treaty 1959**
 - Art V bans detonation of nuclear devices and disposal of radioactive waste
 - Art II protects freedom of scientific investigation
- Madrid Protocol 1998 establishes a 50-year moratorium on mining; relies on cooperation and persuasion as primary tools of enforcement.

2. SOURCES OF PUBLIC INTERNATIONAL LAW

Statute of the ICJ: Article 38

When deciding on international law disputes submitted to it, the ICJ applies

- a. International Conventions
- b. International Customs
- c. General principles of law recognized by civilized nations
- d. Subj. to Art 59, judicial decisions and teachings of most highly qualified publicists (merely a **subsidiary means**)

Statute of the ICJ: Article 59

ICJ decisions have no binding force except between the parties and in respect of that particular case.

TREATIES

- A treaty cannot be law making other than for parties to it.
 - However, can be a means of creating new customary rules that through state practice, acquiescence and absence of protest can become binding on all States; e.g. formation of EEZ in *Tunisia v Libya*
 - Not in all cases, treaty provision must be capable of general application and intended to be the basis for future state practice, as well as being supported by the necessary *opinio juris* and by acts of non-parties; *North Sea Continental Shelf Cases*
 - Treaty provisions may be merely codifying existing international custom and therefore binding on all states; *Nicaragua*, VCLT in *Danube Dams case*

For further details on the VCLC (Art 1-6, 18, 34, 53, 64), see LAW OF TREATIES notes.

CUSTOMARY INTERNATIONAL LAW

CIL is composed of **two** components:

1. An objective element ('*general state practice*'), and
 2. A subjective or psychological element ('*opinio juris*') - belief that the practice is obligatory
- * Subject to the **persistent objector** rule

State Practice (**OBJECTIVE ELEMENT**):

Includes acts/omissions, statements, national legislation, practice of international organisations etc

- a) Should **constant and uniform**; *Lotus*. Need not be 100% consistent; *Anglo-Norwegian Fisheries case*
- b) **Generality**: practice must be common to significant number of states. Special weighting given to states that are specially affected by subject matter; *North Sea Continental Shelf cases*

North Sea Continental Shelf Cases (FRG v Denmark; FRG v Netherlands)

- **Facts**: dispute over delimitation of continental shelf between GER and DEN, GER and NED
- NED and DEN parties to the 1958 Geneva Convention on Continental Shelf (GCCS) but GER not ratified
- **Issue 1**: Is the 1958 GCCS binding for all parties in the case?
Court: No, GER not legally bound by provisions of Art 6 as they had not ratified the convention
- **Issue 2**: Is the equidistance principle a rule of customary international law such that DEN and NED can both apply it notwithstanding the non-binding nature of the GCCS on GER?
Note: DEN and NED argued that a customary rule had come into being firstly due to the Convention's impact, and secondly on the basis of subsequent State practice.
Court: No, Art 6 of Convention **NOT** of a **norm-creating character**.
- Equidistant principle was only to be called upon **after a primary obligation** to effect **delimitation by agreement**, therefore evidence of state practice was equivocal and ill-developed.
- In regards to whether a treaty might articulate a new rule of custom: "...even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided that it included States who were especially affected."