Fundamentals of International Law

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Table of contents

1. Introduction: What is International Law?
1.1. Activity: Your Turn

2. Statehood

3. Sovereignty and Jurisdiction

4. Sources of International Law

5. Treaties
5.1. Activity: Your Turn

6. Customary International Law

7. Other Sources of International Law

8. Territory

9. The International Legal System: The United Nations

10. International Dispute Settlement

1. Introduction: What is International Law?

Our first topic is an introduction to international law. International law is fundamental to the law of the sea. The law of the sea is a subset of public international law, and to begin our course, it is necessary to understand some basic principles of international law. If you've already had some legal training and done international law, this will be something of a refresher. But if it's new material, there are some important ideas and principles that will be key to understanding where the law of the sea has come from, where we find it and how it operates in practice.

To begin, we should start with a definition of international law, a definition that can encompass what is meant by international law and help commence your understanding. The definition we'll use is one by Ivan Shearer, a former Challis Professor of International Law at the University of Sydney.

> "International law may be defined as 'that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe in their relations with each other."

The definition has a number of key elements which we we examine in turn.

Body of Law

The phrase '**body of law**' is emphasising the international legal system as a body of law and not merely some anarchical system explained by generic rules of behaviour which States can ignore pretty much as they like. In the past, some political theorists have suggested that the international legal system is an illusion and the reality is States are governed entirely by self-interest. Such a view is at best simplistic. States recognise there is an international legal system and generally they wish to be seen to be compliant with it. State behaviour is therefore modified to comply with international rules.

States

The use of the capital 'S' in the word State here is quite deliberate and it's being referred to what it is popularly described as 'countries'. Entities such as Australia, the United States of America, the United Kingdom, Kenya, China, Iceland, and Tonga are examples of these States. What are popularly 'states' in the United States or Australia, places like Alabama, Alaska, California, Texas, or Queensland, are not States in the international law sense. The capitalised version is limited to bodies which possess what can best be described as an international personality. States occupy a central role, and get to participate fully, within the international legal system and public international law revolves around States. The number of States within the legal system is around 200, although the exact number depends on how you count the States concerned. Some entities which claim to be States lack international acceptance, so would not be counted by all people at all times.

Sense of obligation

The next element is the term '**feel themselves bound to observe**'. This phrase indicates the nature of the international legal system, where States are participants at the apex of the system. They are not merely the participants within the legal system, they are the ones who make the law. This can be demonstrated by comparison to a legal system you might find within most States. In most domestic legal systems, if you were asked to identify the content of law, this can be accomplished by consulting statute books of the Parliament, Congress or legislature. We know these documents represent binding law because they are made by a body constituted under some form of constitution or longstanding arrangement which indicates this body is a sovereign law-making body with authority to make laws for the relevant territory concerned.

Within the international legal system, there is no clear equivalent to the legislature in the domestic sphere. Such a body would be able to make rules for States, and this is not acceptable. States are each sovereign in their own right and no one State occupies a superior position to another, at least in law. The legal system more closely resembles a collective-style village with around 200 participants who each are equal at law and therefore cannot dictate to another about what they can and cannot do. Such a legal system does not have a single point of reference for where law is made, and that makes the international legal system far more difficult to pin down. It also means, too, that States only accept those obligations they feel themselves bound to observe. This means that if they do not wish to participate in a particular treaty or convention they need not do so, and similarly, if they do not wish to participate in legal proceedings that might be before an international court, again, they do not have to do so, unless they have accepted some obligation where they have already effectively agreed to submit their dispute to the court.

Relations between States

The final portion of the definition looks at the phrase 'relations with each other'. This describes the application of the international legal system. It's essentially about States interacting with each other, not so much about States interacting with individuals. The prerogative to make laws to govern people is something which is essentially vested within the States themselves and applied to persons in their territory, or to persons holding their nationality, as the two most common types of jurisdiction. What international law attempts to regulate is the way States interact with each other, and in the context of the law of the sea, this is particularly important. Much of the world's oceans are beyond national jurisdiction and it's a place where all States have the right to interact and therefore do interact from time to time. Consequently, it's an area of greater potential for conflict and disagreement and it makes the law of the sea a particularly interesting and compelling area in which to work.

1.1. Activity: Your Turn

Activity

Fundamentals of International Law - Drag and Drop activity

Basis of Obligation

Horizontal system of coordinator between states

Based on consent

Vertical (hierarchical) system

Law Making Process

Deliberate agreement

Enforcement

No compulsory dispute resolution

UN Security Council

Police Force/Courts

Drag and drop these terms ont

2. Statehood

Having considered the definition of international law, we need to move on to what are the subjects of international law, and for this our discussion turns again to the concept of the State. States are at the heart the international legal system. The term ‘State’ can be a confusing one as States in international law are not necessarily what you might think. Broadly speaking, a State is what we know to be a country. Australia is a State, the United States of America is a State, the United Kingdom is a State, and the Congo is a State. New South Wales or Tasmania might be States within Australian law, but they're not States from an international law point of view. They're provincial entities which don't have an international personality, and just because something is called a State doesn't mean that it necessarily is. For our purposes, when we use the word 'State', we capitalise the 'S', and it's to indicate this special international status that has it participating within the international legal system. But if States are at the centre, how does one become a State? What makes a State a State and how does it get this status?

The **1933 Montevideo Convention on the Rights and Duties of States** sets out four criteria for statehood:

> Article 1
>
> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter relations with the other states.

These criteria are each discussed below.

Permanent Population

A State needs to have a permanent population in order to exist, although what level of population it will need is not entirely clear. The largest States have populations in the billions. More than a billion people live in India and in China. But the smaller States are quite at the other end of the spectrum. Places like Nauru and Tuvalu, which are accepted by the international community as States and are members of the United Nations, have fewer than ten thousand people living within their territory and consequently are at very much the lower end of what a permanent population will entail.

Defined Territory

All States need some form of territory. It is what defines them. It's how they represented physically on maps and in diagrams, and land is essential for a State to be viewed as a State. This doesn't mean if a State is temporarily dispossessed of its territory it loses that status. Kuwait, in the early 1990s after being invaded by Iraq, was removed from the map in Iraq to become a province of that State. However this was not accepted by the international community and, after an armed intervention by the United Nations, Kuwait was restored to its former sovereignty, but there was no suggestion that it ceased to be a member of the United Nations or ceased to be a State. On the other hand, were a State to lose its territory indefinitely and not be able to be restored, its future would be very bleak indeed, and it would be unlikely to remain within the community of States.

Government

Related to territory, but distinct from it, is the requirement that a State be governed. All States must have a government, and you would think this would be something that would be relatively easy. Having a president or a prime minister, having cabinet ministers, having people responsible for the administration of government— these are all things that States seem to do quite easily. And yet having government is more than simply having people with titles, who have responsibilities to discharge. It actually involves physical control, the physical administration of territory. A State that can't control its territory; that cannot show that it is governing and administering lands under its sovereignty, is going to struggle to demonstrate the sovereignty over that territory as against other States. One reason why so many States have armed forces is to protect their land territory and to ensure that their sovereignty is not violated, and this is an important part of being a State. Obviously the type of territory will indicate broadly what form of government is required. A small, remote island with a small or non-existent population will require less government than a large city. Demonstrating that you have sovereignty over a city of millions of people will require indications that you have police, that you have control over the day-to-day operation of the city. A remote, isolated, uninhabited island won't need anything like this level of government. Creating the area as a national park, giving people licences to visit, or perhaps to exploit resources that might be available would be more than sufficient to support sovereignty in the context of such a territory.

The capacity to enter into international relations

This is the most conceptually difficult element because it's something a State can't do on its own. It requires some degree of engagement with the international community. Essentially, it's the ability of a State to be able to carry on relations, discourse, exchange ambassadors with other States, and it means that there needs to be at least some level of recognition of a State being a State by the rest of the international community. It's not necessary for all States to recognise your State, even if only a few recognise it, that may be sufficient in order to be able to get you across the line. But some degree of interaction and recognition is accepted by most commentators as essential.

States are not the only players within the international legal system. There are also international organisations and in this context, we're talking about things like the United Nations or the North Atlantic Treaty Organisation or the European Union. International organisations do have a role to play within the international legal system. Aside from the vital coordination and cooperation work that organisations like the UN do, they are players in the international system in their own right. They have the power to enter into treaties and can even exchange ambassadors in the context of something like the European Union. The reality of international organisations though, is that they have their status because their membership is made up of sovereign States. Even something like the European Union consists of individual States and it is the status of these entities that are members of the international organisation that give the organisation itself a status to be able to play within the international legal system.

International Legal Personality (I.L.P)

If you have I.L.P then you have rights and obligations under international law.

States

- have ILP to the fullest degree.
- international law applies primarily to/for States

Non-State Actors

Individuals	**International Organisations**	**Multinational Companies**
usually not directly impacted by international law	limited ILP related to their functions	unclear whether or not they have ILP
limited ILP under human rights law	are typically allowed to make and enter into treaties, e.g. UN, NATO, EU	are treated as individuals of the country they are incorporated in

3. Sovereignty and Jurisdiction

Sovereignty

Sovereignty over territory is a key concept in international law. As we have already seen, for a State to exist it must have a defined territory. Sovereignty means that the State possesses full control over matters within that territory and is not subject to the government or laws of a foreign State within that territory. In the Island of Palmas Case of 1928, the arbitrator Judge Max Huber famously stated that:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."

Consent to International Obligations

An important consequence of sovereignty is that international law can only apply on the basis of consent. No other State can control matters within a State's sovereign territory. Therefore States are only parties to treaties to which they have given their consent, and customary international law can be opted out of through a process of 'persistent objection' (that is, repeatedly and publicly objecting to the application of the rule in question). International courts and tribunals such as the International Court of Justice only have jurisdiction to hear a matter if both parties consent.

Jurisdiction

Jurisdiction in international law refers to the ability of a State to make and enforce laws. Under the principle of State sovereignty, a State can make and enforce laws that apply within its territory, including to any people who are present there. Interesting questions arise however when we look at the ability of a State to make laws that apply beyond its land territory. This is particularly important in relation to the law of the sea as the oceans are, to a varying degree, shared international space.

Prescriptive and Enforcement Jurisdiction

To make matters more complicated, there are two types of jurisdiction that we need to think about. The first, prescriptive jurisdiction, refers to the power of a State to regulate a particular activity or behaviour. The second, enforcement jurisdiction, refers to the ability of a State to actually enforce rules, for example through arresting alleged offenders, prosecution and imposing punishments for those found in breach.

Just because a State has prescriptive jurisdiction in relation to a particular person/activity does not mean that it will also have enforcement jurisdiction. This is because different issues are important in relation to enforcement jurisdiction. For example, the person or body against whom the law is sought to be applied must not be subject to various immunities (sovereign, diplomatic); the chosen court must be an appropriate forum; and, practically speaking, there must be a relevant person or property within the enforcing State's territory against which to take the enforcement action.

International law recognises a number of bases upon which States may assert the right to prescribe laws. These represent different ways of showing a sufficiently strong connection between the State and the subject of the law to justify the State taking action.

Bases of Jurisdiction: Territory and Nationality

The first two categories, territory and nationality, represent the most widely accepted bases of jurisdiction. Both are important for the law of the sea. Territorial jurisdiction is the right of a State to make laws that apply to matters within its sovereign territory. Sovereignty over land territory provides the foundation for States to claim maritime zones and control activities in adjacent ocean territory. Nationality as a basis for jurisdiction is the right to make laws that apply to the nationals of your territory, wherever in the world they may be. Jurisdiction based upon nationality is reflected in the law of the sea through the concept of flag State jurisdiction, whereby the State in which a vessel is registered or 'flagged' has the primary right and responsibility for regulating the activities of the vessel.

Universal Jurisdiction

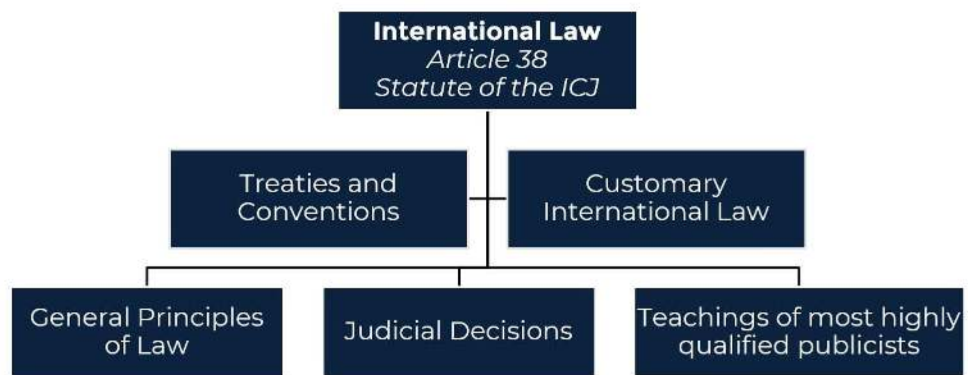
Another less common category of jurisdiction is universal jurisdiction, which is recognised in relation to certain crimes under international law that are regarded as so serious that, regardless of where the crimes took place and regardless of the nationality of the accused, any state may exercise jurisdiction. Piracy provides an example of universal jurisdiction that relates to the law of the sea. Having custody of the accused is usually the key factor in the ability of a State to exercise universal jurisdiction.

4. Sources of International Law

We need to move now to look at where international law is made—where it comes from. And for this, we need to consider the sources of international law. International law, like any domestic legal system, draws from certain sources from which the law can be identified. Within a domestic legal system, this is relatively straightforward. A congress or a parliament, or other form of legislature, is usually easily identified, and its pronouncements that become acts (or binding law) within that polity, can be easily identified. One can look at the statute books, read acts, and see what the law is, because an identifiable sovereign, in the form of a legislature, usually authorised under a constitution, is making law pursuant to procedures that are well established.

Within the international legal system, this is far more difficult, because a single identifiable sovereign does not exist. The players within the system are the 200 or so sovereign States, and each of these bodies is treated as equal, pursuant to the doctrine of sovereign equality, where each State, regardless of its size or power, notionally has the same status within the system and cannot be forced into the acceptance of law by another. So, if no single unit is in charge, then there are other difficulties. We have to identify where the sources of law are from. And in this context, the diagram below is quite useful.

The diagram is drawn from Article 38 of the Statute of the International Court of Justice. Article 38's function is to help the court to identify what the sources of international law are when it has to apply international law in deciding a legal case. The five elements we will deal with each in turn, but you should note that treaties and conventions and customary international law are higher up on the diagram than general principles of law, judicial decisions and the teaching of qualified publicists. This is because treaties and conventions and customary international law are far more important as contemporary sources of international law than the other three, although each has a role in determining what the sources of international law are. We'll look at each in turn.



5. Treaties

The first source of international law that we will look at are treaties and conventions. The term "treaty" is one that's in common parlance and it refers to an agreement between States. So does the term "convention", and in fact, there are a range of terms that can describe an agreement between States. An agreement, in this context, is one that creates obligations between State parties. What distinguishes a treaty and a convention from simply diplomatic correspondence, is that there is an agreement that will flow between two or more States, that creates a binding obligation which they are obliged to carry out. A treaty or a convention can be bilateral (between two States) or multilateral (between many States). Normally, the term "treaty" refers to an agreement that has a smaller number of States attached to it, and the term "convention" usually refers to a multilateral agreement that is intended to have a larger number of States. However there is no precise definitional difference between them and the terms are often used interchangeably. Certainly though, you should view "treaty" as being the overarching term to describe an agreement between a State, and "convention" to refer to a treaty that is intended to apply between a larger number of individual States.

Other terms are also used. You might find, for example, references to "agreements", "covenants", "protocols", or even "memoranda of understanding". "Agreement" is a generic term that can describe all treaties and conventions. A "covenant" is typically an international convention that deals with human rights norms, like the International Covenant on Civil and Political Rights. A "protocol" is an additional piece to a treaty or convention. It's something which is typically negotiated after a treaty is entered into force, and it's an additional optional extra which a State party can choose to become a party to. Protocols aren't intended to stand on their own. They're intended to be add-ons to existing arrangements. A "memorandum of understanding" ("MOU") is also a binding agreement, but it's one that is usually concluded by officials, rather than by ministers or heads of State. A "treaty" or a "convention" is usually entered into by somebody who is in charge, typically, a president or a prime minister, or a minister for foreign affairs. Such individuals are deemed to have what are called "full powers", to be able to conclude agreements.

When something is deemed insufficiently important to attract the attention of a head of State or head of government, or even a minister of foreign affairs, an MOU is often concluded instead. An MOU will be typically agreed to by lower-level officials or senior public servants, but officials who are not at a ministerial level, and this reflects the lesser stance of the instrument, albeit that it is still binding upon States. An example of an MOU that's still in force and still very relevant from a law of the sea perspective, is the MOU concluded between Australia and Indonesia in the mid-1970s. This was an agreement that was concluded between officials, rather than at a ministerial level, and it provides for access for Indonesian fishermen to be able to fish in certain waters in the vicinity of Ashmore Island.

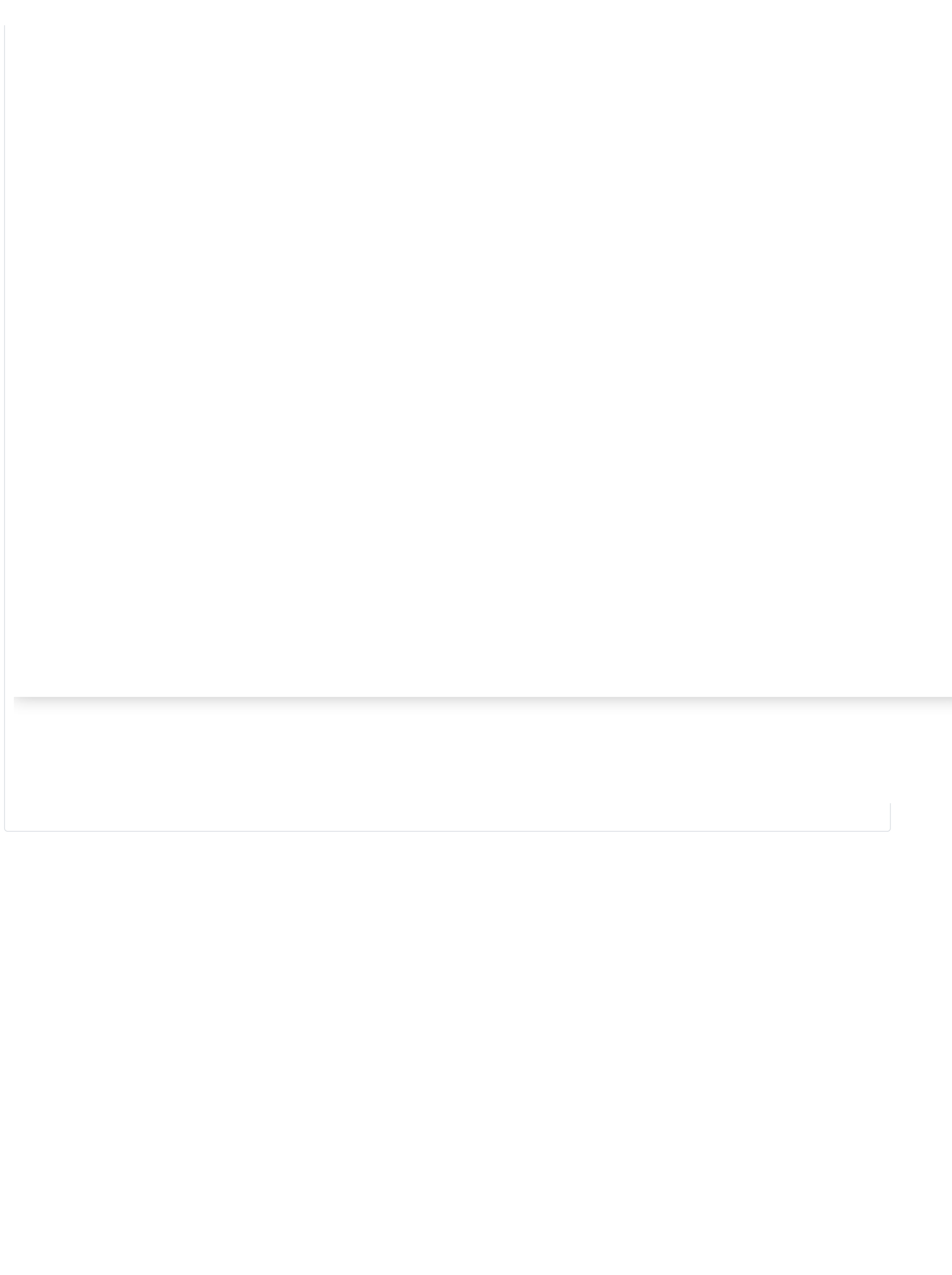
There are literally thousands of international treaties that have been concluded. They are nowadays covering subjects as wide as international environmental law, regulating matters concerning trade, dealing with prisoner exchange and extradition, and dozens and dozens of other matters. They're very important. They underlie much of the fabric of the international legal system, and provide for arrangements that allow people to be able to interact and cross State boundaries. Every time you post a letter, you're making use of an international treaty. It's an old treaty (it's dealt with by the International Postal Union), and it means that when you post a letter from Australia, perhaps to China, you don't have to pay the Chinese post office in order to have that letter delivered. You only have to pay at one end. That's an example of an international agreement which is of a very practical nature, and demonstrates why treaties and conventions can be very important.

Treaties are particularly important and relevant to the law of the sea, because much of the discussion that we'll have focuses upon the content of one very important treaty—the United Nations Convention on the Law of the Sea, which was concluded in 1982. The Law of the Sea convention is huge. It was designed to be a constitution for the world's oceans, as we'll see later in the course. However, as an international agreement, it still functions like other international treaties, and so a basic understanding of treaty law is very important to understand how the law of the sea works. We'll come back repeatedly to the Law of the Sea convention throughout this course. And if you haven't already taken a look at it, it's worth making sure you have it available to you in the materials that we've provided.

The Law of the Sea convention is by no means the only international treaty or convention that is applicable to the world's oceans, although it is at the very heart of how oceans are regulated. There are specific international agreements that deal with a range of other matters. There are a number of international fisheries conventions, for example, that deal with particular regions or particular stocks, and again, these are examples of international treaties. Much of the world's shipping is regulated by treaty as well. International treaties provide for disaster response in the context of accidents that occur at sea, and make sure that ships are safe to be able to navigate around the world. At a broader level, international environmental protection is also dealt with by sea and by treaty, and these are important too. Treaties now inculcate the whole of the law of the sea, and we'll come back repeatedly to specific international treaties as we move through the course. But be aware. These won't be the only ones, and there may be specific treaties that are applicable to your part of the world, or to particular things which are relevant to you in your work on a day-to-day basis.

The following activity will introduce you to the basic parts of an international treaty. We are using the treaty that establishes the Western and Central Pacific Fisheries Commission (WCPFC), a regional fisheries management organisation, as an example in this activity. You can download a full copy of that treaty here if you wish.

Read



5.1. Activity: Your Turn

Activity

Remember the WCPFC Convention that we looked at in the previous activity? Find a copy of that Convention using this link: WCPFC Text. Recall the rules for citing an international agreement from the previous activity - go back and check that page again if you need to. Then answer the following practice question:

Find the article that sets out the principles and measures for conservation and management in the WCPFC Convention. How would

Check

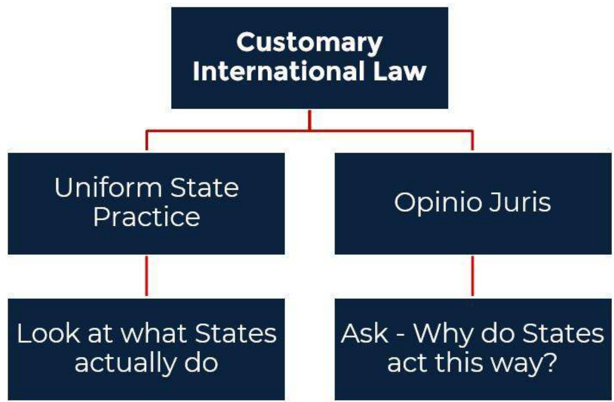
Now find a copy of the 1982 Law of the Sea Convention. Look for the article that contains the definitions that are used throughout th convention).
How would you reference the definitions provision of the 1982 Law of the Sea Convention?

Check

6. Customary International Law

The next source of public international law is conceptually the most difficult, and this is what is called "customary international law". Customary international law is that part of international law which is derived from the practice of States, and it forms over long periods of time. In the distant past, most of the content of public international law was derived from custom, although these days, treaties and conventions tend to dominate. The elements of customary international law can be difficult to demonstrate, and there are two.

The two elements that are used are, first of all, uniform State practice, and secondly, what is referred to as "opinio juris".



Uniform State practice is reasonably easy to ascertain by looking at what States actually do. If you have a practice which virtually all of the international community accept, you have your uniform State practice. You can look at what States do in a range of situations, and if there is continuity of behaviour, if they are all behaving essentially the same way, you can demonstrate this element.

Opinio juris, on the other hand is much more difficult to demonstrate. Opinio juris is concerned with *why* States are acting in a particular way. Essentially, opinio juris is the belief that States are acting in a particular fashion in order to comply with a rule of customary international law. So you don't just need to identify what the State has done, you need to understand why it has behaved in that particular way. Unfortunately not all States feel the need to explain their actions when they interact with each other in the international community, so demonstrating opinio juris can be difficult. We may have to rely on the fact that uniform state practice exists and that there is no other apparent justification for that uniform practice other than a sense of legal obligation. It means that custom is difficult to form and forms very slowly over long periods of time. Nevertheless, there are clear rules of customary international law that we can look to and see, that have been around for a very long time, and that are accepted by the international community.

An example of a rule of custom is the rule dealing with the issue of sovereign immunity. The concept of sovereign immunity has been around for a very long time. Generally speaking, sovereign immunity refers to the rule that one sovereign State cannot be subject to legal action in another State without its consent. It has significant practical application in the law of the sea because it means that there are certain types of vessels at international law (chiefly warships), which are immune from the operation of any State's laws, regardless of where they might be in the world, including even in a foreign port. By way of example, if a ship of the Royal New Zealand Navy was alongside in Port Moresby Harbour, that ship would only be subject to New Zealand law, and not the law of Papua New Guinea. There's no treaty with respect to this. It's a rule of custom. It's demonstrated because there's widespread State practice that States must accept the immunity of a warship, and equally, that there is acceptance of this as a rule. Therefore it qualifies as a rule of customary international law.

Rules of custom, like those dealing with sovereign immunity, are often clear, but it is also possible to have rules of custom that are not clear, particularly as they are forming. New principles may be difficult to demonstrate as rules of custom as they emerge. One difficulty in the use of customary international law is identifying precisely when a rule of custom actually forms. This can be illustrated by example. International environmental law is partly reflected in treaty, but many States would like to see these rules as part of customary international law. Although there is widespread support for certain features of international environmental protection, there is not universal acceptance of it. Exactly when the level of acceptance reaches the point that a new rule of customs can form is difficult to identify. It is unclear exactly when you cross the threshold and a new rule of custom forms. This is described as *de lege ferend*a, or "soft law", something that might be law in the future, but isn't quite there to the present point in time.

The rules for identifying what is customary international law are derived from a very important International Court of Justice case—the North Sea Continental Shelf Case. This was a case about identifying which parts of the old Continental Shelf convention were ultimately going to be binding upon a State that was not a party to it, so identifying what was custom was critically important. The court, in this decision, sets down the two key criteria that we have already noted the high level of State practice, and opinio juris.

Customary international law will require a very high level of compliance in terms of State practice. It's not enough that simply a large number of States agree that a particular principle has become custom. It will require almost all of the international community, and certainly, will require those States who have a strong level of interest in what is being regulated. For example, a rule of custom that affects the way navies operate would certainly need the acceptance and participation of the United States of America, given the size of its navy and its important interests in the world's oceans. On the other hand, the views of somewhere like Lesotho might not be so important given that Lesotho is a small landlocked State with no navy.

The high level of compliance means that custom can be very difficult to demonstrate, and you need clear evidence of State behaviour and the opinio juris. Even something like a UN General Assembly resolution, of itself, won't be enough. Rules of custom can form out of General Assembly resolutions, which are not binding. However, this can only happen after a long period of time, with the broad acceptance of the international community to the resolutions in question, and a consistent effort over time. This was confirmed by the International Court of Justice in the Nicaragua cases.

It may also be possible to demonstrate that custom is regional in certain circumstances. That is to say, you don't need to find the whole international community supporting the emergence of a rule, but nearly all the States in a particular region. Only two cases have dealt with the issue of regional custom. The Rights of Passage case dealt with access to Portuguese Goa through India in the 1960s. The Asylum case dealt with the rights of individuals to seek asylum and then be released from that asylum in the event of a coup d'etat. In the Rites of Passage case, it was held that regional custom did exist, but as an example, this one's no longer around, as the relevant subject matter of the case no longer exists. The asylum case was held not to demonstrate regional custom.

The line between customary international law and treaty law is not as great as you might think. Often, rules of custom (like, for example, the rule dealing with sovereign immunity) need to be clarified to make sure that everyone understands exactly what the obligation is. In order to get this clarity, what is done is to take the rule of custom and to write it up—to put it into a treaty. This is known as "crystalising" customary international law, and it means that rules of custom may be reflected in treaties. Or, if not crystalised, they simply remain unwritten and are determined by identification of State behaviour.

Custom can also form around some treaties, and it's likely that the Law of the Sea convention is an example of this. The Law of the Sea convention exerts a normative impact upon the way States behave. Parts of the convention which may not have had the complete range of support by the international community, may, over time, have become things which the international community recognise as custom. Certainly, it seems likely that very basic principles in the convention do represent custom. The rules with respect to the Exclusive Economic Zone are a good example. They didn't really exist to any substantial extent before the convention, but certainly, few States would doubt the validity of the concept of the Exclusive Economic Zone today.

7. Other Sources of International Law

Having considered treaties and custom as sources of international law, we'll now move to the remaining three sources. These are not as important, but they are still significant, because they fill in the gaps that are left by the other two sources. The first of these are general principles of international law.

General Principles of Law

The idea of the general principles of law are essentially to fill gaps that arise between treaties, which will only deal with particular subjects and apply to particular States, and rules of custom, which by their nature, require wide-ranging acceptance. General principles are not derived from any particular domestic legal system, but rather are derived from common elements found across all legal systems. They can be best illustrated by example.

A good example comes from the Chorzow Factory case, which is a case of the Permanent Court of International Justice from just after the First World War. In this case, property had been wrongfully seized by one party and the court needed to fix upon a method to provide for how compensation should be paid. There was nothing in the relevant treaty provisions beyond demonstrating that it was illegal to seize the property. Nor was there any rule of custom providing for compensation. Accordingly, there needed to be something drawn from national legal systems with respect to calculating compensation. Reparation was the concept that the Court fixed upon, that was common across a number of legal systems, and accordingly used this principle to calculate what compensation should be paid for the wrongful seizure of property.

The same is true with the concept of acquiescence. In the case regarding the Temple of Preah Vihear, there was a dispute between Cambodia and Thailand over the ownership of a valuable historic temple. The temple stood on land right on the border between Cambodia and Thailand, and ascertaining the precise border was what the dispute was about. Both States took the view that they wished to have this historic temple within their territory. What was crucial to the outcome of the case was the fact that the government of Thailand, in the early 1900s, had produced a government map of the region which showed the temple was based in Cambodia. This amounted to acquiescence of Cambodian sovereignty, because the map was a government publication. In domestic legal systems, if you acknowledge a particular situation as existing, it may become impossible to deny the existence of that situation at a later date, and this concept is found in both common law and civil law systems. Consequently, the court was comfortable in applying the same principle in the Temple case.

Another example of what can be done, in a case that's relevant to the law of the sea, is the application of the law of evidence in the Corfu Channel case. The Corfu Channel case involved an issue of laying mines in an area of water just off the coast of Albania. At issue was the question of whether or not Albania had awareness that the mines had been laid in its waters. The court, to ascertain this, decided to stage a demonstration, where a vessel that potentially could lay mines chugged up and down the Albanian coast, and the court tried to determine whether or not this vessel was visible from posts where Albanian soldiers had been based at the time when the mines almost certainly were laid. There was nothing in the court statute, nor was there anything in terms of custom or treaty law, that provided for how this demonstration ought to be undertaken. But the court found that within the rules of evidence of many States, the ability to undertake such a demonstration was perfectly lawful, and therefore its application was the application of a general principle of law.

Judicial Decisions

Another category, or source, of international law comes from judicial decisions. The principle judicial body of the United Nations is the International Court of Justice, which sits in the Hague. The International Court of Justice has its own statute under the UN Charter, and it's made up of 15 judges drawn from geographically diverse regions around the world. The judges are the leading international lawyers of their time, and they deal with a range of disputes, but they're not the only international bodies that are there to decide disputes.

Other bodies exist. Within the Law of the Sea Convention, the International Tribunal for the Law of the Sea (ITLOS)is an example. This tribunal exists under the Law of the Sea Convention to deal with a range of disputes arising under the convention, if that's the choice States wish to make. It consists of 21 judges and sits, according to the convention, in the Free Hanseatic City of Hamburg in Germany.

In addition to specialist bodies, you can also set up what, effectively, is your own court for a particular dispute. As long as the States agree, an ad hoc tribunal can be set up. This will consist of judges selected by the parties that will only convene for the particular dispute concerned, and when that dispute is finished, the tribunal, or arbitral court, will cease to exist. Each of these different types of dispute resolution find their examples in the law of the sea, and the Law of the Sea Convention provides for each of these options in different circumstances.

What is common with all international dispute resolution is that it is litigation only by consent. In a legal system where States are at the apex of the system and each State is sovereign, it is impossible for a court to be constituted by a body superior to the States themselves. Accordingly, a State can only be compelled before a court where it consents to do so. Should a State not want to appear in a particular case, it simply refuses to turn up, and the case will not be able to be undertaken. The consent of a State need not only be explicit. States may have given their consent in a variety of ways. In the Corfu channel case, Albania was deemed to have consented to the jurisdiction of the court simply by participating in the proceedings at their initial phase. In the Nicaragua case, the United States was deemed to have consented because it had a Treaty of Peace and Freedom with Nicaragua, in which it had been agreed that, in the event of a dispute, either party could refer the matter to the International Court of Justice. The fact that the government of Nicaragua had changed from being one sympathetic to the United States to a communist regime that was very hostile to the United States did not mean that treaty had ended and so the United States was deemed by the court to have consented to the litigation.

The Law of the Sea Convention has provisions for compulsory dispute resolution, and we'll look at these later in the course. It is sufficient to say now that by becoming a party to the Law of the Sea Convention, some States are deemed to have consented to have particular types of dispute automatically dealt with by an international tribunal if the other party to the dispute elects to do so. This is one aspect of the Law of the Sea Convention which was quite innovative, and also quite controversial.

Another element of international litigation is that the outcomes are only binding between litigating parties. That is to say, although judicial decisions are a source of international law, they aren't binding on the international community as a whole, although they may be very persuasive to future courts, or influence the way States behave. But of themselves, an individual case will only be binding between the actual parties to the dispute, and that's consistent with notions of litigation only by consent.

One small point to note is that a decision of an international court or tribunal is typically made pursuant to rules of international law. But this doesn't always need to be the case. It's possible to make decisions without reference to international law, providing the parties agree to this. This is known as making a decision "ex aequo et bono" under Article 38 of the Statute of the International Court of Justice. The idea here is that the decision is made simply on what the judges feel is fair and appropriate, without reference to legal principles. While this sounds like a tempting idea, it would require the consent of both parties to a dispute to make use of it, and in practice, this has never occurred in over 80 years of litigation, through the Permanent Court of International Justice and the International Court of Justice.

Writings of Eminent Publicists

The final source of international law that we should consider, are the writings of eminent publicists. This is very much a subsidiary source of international law, and to be used only when the other sources of law have effectively been exhausted. Even though it is a subsidiary source, it's important to note that it only applies to the most eminent publicists—leading international lawyers who have written eminent treatises about particular issues. Ultimately, as a source it's not much use to anyone, because effectively it's only identifiable out of judicial decisions in the ordinary course of events. We're not to know that a writer's particular view on an issue is ultimately going to become part of the lexicon. This can only be done when a court chooses to take the principle as enunciated by the publicist, and give it the status of a source of international law. Certainly though, it means that international lawyers occupy an unusual space, because unlike their domestic counterparts, it's possible, if their writing is deemed eminent in the future, that it could become part of the fabric of international law and be a source in its own right.

8. Territory

Having considered the sources of public international law, we move now to an important area of law that is relevant in the context of the law of the sea and that is the notion of title to territory. Title to territory is all about how States assert rights over land, and you might think that that's not relevant to the law of the sea. In fact it is the exact opposite. Rights at sea are largely determined by rights over land, and so possession and title to territory is very important in the context of the law of the sea.

Occupation

Title to territory can be asserted in a number of ways. Occupation is one. This is where a State takes an area of territory and does the things necessary to assert its title over that area. An example of what is necessary through occupation can be seen in the operation of a police force. When a State has title to a piece of territory, it applies laws to that territory and it asserts the application of those laws. If people don't comply then police may be called; individuals may be arrested. If the non-compliance is of a more fundamental nature, through the presence of an invading army, then the use of armed force to repel another State may be necessary to assert occupation. What's necessary for occupation will depend very much on the type of territory concerned, but ultimately, by demonstrating that you have occupied territory and can assert your sovereignty over it, is a fundamental way of identifying title to territory.

Annexation

Occupation is not the only way of identifying title to territory, though. Historically a State could acquire territory through annexation and States went to war on occasions to try to secure territory and to ultimately annexe it. The international community has decided that the use of force to conquer territory is no longer acceptable; it is now inconsistent with the United Nations Charter. Nevertheless, as a means to acquire territory, in historic times this was was valid.

Cession

You can also obtain territory through cession. This is where one State gives part of its territory away to another. It's not common but it does occur. An example of cession would be the way in which Australia acquired sovereignty over its territory of Christmas Island in the Indian Ocean. Up until 1958, Christmas Island was a colony of the United Kingdom, but at that time, the United Kingdom decided it no longer wished to possess Christmas Island and that it would be more conveniently administered under Australian jurisdiction. Accordingly, the UK parliament passed an act which ceded Christmas Island to the government of Australia and Christmas Island became an Australian territory.

Accretion

Another type of acquisition of territory is through accretion, and this is through natural processes. This is the idea that territory gradually builds up over time, literally accreting. The world is a dynamic place and the coast is constantly changing. Parts of the coast are eroded, other parts of the coast may build up. The area in a river delta, for example, over time, may produce new islands, may extend the coast further and further out to sea. In these circumstances, the new territories created in this way are an example of accretion. Normally this is done through very slow processes, but on occasions, for example if there is a volcanic eruption, territory may accrete more rapidly. At some point in the last 15 years, the Australian territory of McDonald Island, a very small and remote island in the Southern Ocean, appears to have trebled in size because the volcano that makes up McDonald Island has erupted. The remote nature of the territory meant that no one was aware of this eruption, but after its conclusion that the island was three times its original size, and this new territory became part of Australia through the notion of accretion.

Prescription

If accretion is rare, then prescription is almost unheard of. It's a notion rather like adverse possession in domestic law. That is to say, if I occupy a piece of territory and no one objects, eventually that lack of objection means that I have acquired title to that territory. Since both States are very aware of the extent of their territory, prescription is something which is exceedingly rare and in the ordinary course of events would not occur.

Discovery

A rather old-fashioned way of acquiring territory is the notion of discovery. This is very much one from hundreds of years ago because clearly people are aware of what territory there exists on our planet today. Even in historic times, discovery didn't give you full title—it gave you what could be described as in inchoate title. That is to say, if an explorer found an island that no one had been to before, where no one was living, that explorer could claim that island for their State, but their claim to discovering it would not of itself give them title. It would merely give them first refusal to acquire title to the particular territory concerned. The State would have to follow up that claim with some form of occupation in order to 'perfect', or complete, the title. That is to say, if you found an island but then did nothing to follow up, and then somebody else arrived and went into occupation, you would find that your discovery would not give you title to territory because somebody else had moved into occupation and you had done nothing to prevent that.

Establishing title to territory

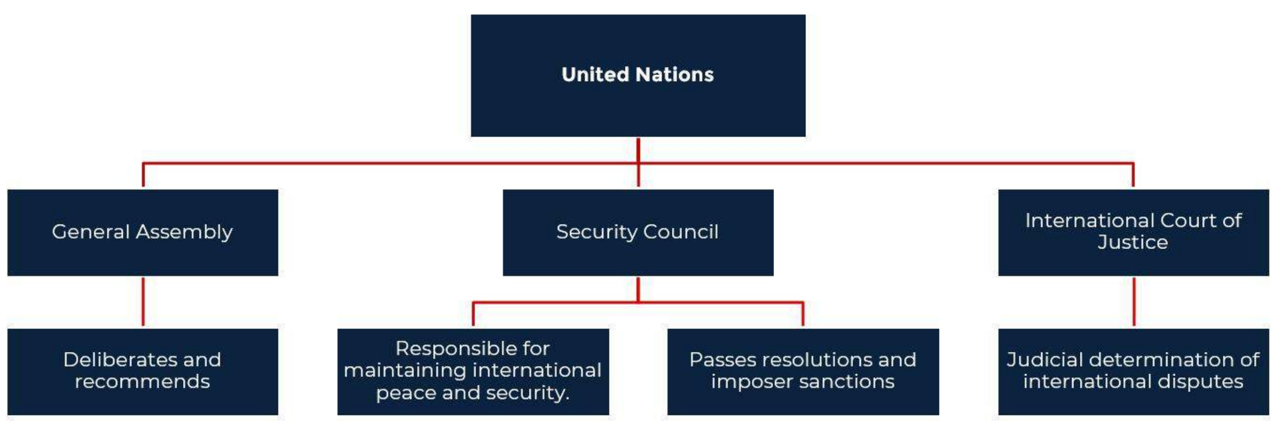
The different types of title have been described in some detail in a series of international law cases stretching back to the beginning of the 20th century, right through to the present. States, often to settle sovereignty over particular features, have referred these sovereignty cases to international courts, and this has given the courts the opportunity to describe the different types of title and what is needed to establish them. Occupation is the most important category in practice and the courts have provided guidance on a number of points. To begin it's important to note that what you do in occupation needs to reflect the nature of the territory which you are claiming. A territory might be busy, it might have millions of people in it, and what you will need to do to establish sovereignty over such a territory will need to be quite substantial. You will need to control law and order; you will need to regulate the transportation system; and you will need to deal with the ingress and egress of people in and out of the territory. On the other hand, if you are claiming a small desert island or a small island in the middle of nowhere, what you might need to do to show occupation and thereby establish your sovereignty over that territory is likely to be very different. If a territory is remote or uninhabited, you may need only show that you are exercising control over the territory by giving somebody a licence to go and visit the territory and engage in a particular activity. Some international law cases have turned upon whether or not licences to collect turtle eggs or licenses to harvest guano licences have been issued. Guano—if you are curious—is effectively fossilised bird droppings, and it was popular in the 19th century to collect guano as a substitute for the now synthetic fertilisers we use today. In conclusion, the nature of the territory will determine what you have to do in order to show occupation and establishing precisely what is required can only really be determined by a court or by looking at the surrounding circumstances.

9. The International Legal System: The United Nations

The United Nations was established at the end of the Second World War to act as a forum between States with the aim of trying to preserve international peace and security. The UN does not always achieve this lofty aim but it is a central player in a range of international debates and certainly has been very important in the development of the law of the sea.

The UN was established in accordance with a 1945 treaty known as the United Nations Charter. The purposes of the UN are set out in Article 1 of the Charter and include the maintenance of international peace and security and support for cooperation in solving international problems, including economic, social, cultural or humanitarian issues. The organisation is based upon a number of important principles which include the sovereign equality of all member States, a duty to refrain from threatening or using force against other States and a duty to settle their international disputes peacefully.

The United Nations consists of a number of key institutions as the diagram below shows.



View the full UN Structure (from the United Nations website)

Security Council

The Security Council is arguably the most important part of the United Nations. It's the arm of the UN which can make binding resolutions upon the international community with a view to guaranteeing international peace and security. The fact that these resolutions are binding on members demonstrates their importance. The Security Council consists of 15 States, 10 of whom are elected and the remaining five, the “Permanent Five” or “P5”, the United Kingdom, France, Russia, China, and the United States of America. These were the five great powers at the end of the Second World War and they remain the permanent five on the Security Council. The P5 are the guarantors of international peace and security, and to ensure the Security Council does not bring them into conflict, any one of the P5 can veto any resolution. They have only to vote against a resolution for it to fail. The Security Council's importance to international peace and security is underscored by the fact that it can make a resolution and use binding force in order to get compliance. In other words, the Security Council can authorise its members to attack another member to ensure that that member's behaviour upholds international peace and security, and you can appreciate this is a very important power.

General Assembly

The General Assembly is the general forum of the United Nations in which all member States participate. The General Assembly can make resolutions, too, but unlike those of the Security Council, these are merely persuasive and they're not binding on the international community at all. That doesn't mean that General Assembly resolutions are not relevant. They can be about aspirational targets, and as we've seen, they can also help in the formation of custom. They've been used, too, as an authority for peacekeeping operations, so the General Assembly has played an important role in upholding international peace and security, as well as in furthering some of the ambitions of States around the law of the sea. In this, General Assembly resolutions have been useful in the formation of custom, and we'll come back to how this has affected the law of the sea through the rest of the course.

The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the UN. All members of the UN are entitled to bring their international disputes before the Court and the Court will hear them if it has jurisdiction. The Court's powers are set out in an international agreement called the Statute of the International Court of Justice, which is part of the UN Charter. The Court is made up of 15 Judges who, once elected, do not represent their own government but rather must exercise their powers impartially.

Remember that under the principle of State sovereignty, the ICJ has no compulsory jurisdiction. Instead, States must show that they consent to the Court's jurisdiction. They may do so in one of three ways. First, they may do so as part of a treaty that gives the ICJ jurisdiction over disputes. Second, they may enter into a special agreement to submit a dispute to the Court for resolution. Third, they may do so under what is called the 'optional clause', a provision in the Statute of the ICJ that allows each State to agree in advance that other States can take it to the court if they are in dispute.

Other UN Organisations

Finally, within the UN system, there are other players too. These are UN organisations that are charged with particular activities to assist in their regulation, to help States coordinate their activities and to try to further positive steps within the international legal framework. These organisations cover a lot of ground. Examples that are relevant to our course in this time are:

- the International Maritime Organisation—the IMO—which is headquartered in London,
- the International Civil Aviation Organization–or ICAO–which is headquartered in Montreal in Canada,
- the United Nations Food and Agriculture Organisation–the FAO–which is headquartered in Rome, and
- UNESCO–the United Nations Economic Social and Cultural Organisation which is headquartered in Paris.

Each one of these organisations has a relevance to the law of the sea, although some are more relevant than others. For our purposes, we'll repeatedly hear about the IMO. The IMO takes the lead in the coordination of matters dealing with shipping, particularly ship safety and security, but also in broader aspects of dealing with oil spills and related matters. The FAO is also important. It tries to coordinate a range of fisheries matters and has been responsible for facilitating the creation of a number of regional fisheries management organisations.

It is important to recognise that the UN takes a great interest in the law of the sea. It's Department of Oceans and the Law of the Sea, headquartered in New York, is a very useful source and you may find that its web site is particularly useful in giving you access to legislation that States have about the law of the sea and international treaties that delimit boundaries between States.

Further information

United Nations: Oceans and Law of the Sea: https://www.un.org/depts/los/index.htm

The United Nations System (PDF)

10. International Dispute Settlement

The peaceful settlement of disputes is a fundamental principle of international law, and a direct corollary of the prohibition on the threat or use of force. Although UN member States are obliged to settle their disputes peacefully, there is no specific requirement as to how a particular dispute must be settled. The UN Charter refers to a variety of mechanisms (Article 33, below) and establishes the International Court of Justice as a forum for judicial settlement of international disputes.

Article 33 of the UN Charter requires States to settle their international disputes 'by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' These methods of dispute settlement vary in their approach, the extent to which outside parties are involved and the level of formality of the process. Each has its own strengths and weaknesses, and often a combination of processes will be involved in the resolution of a particular dispute.

Negotiation

Negotiation is the most common method of international dispute resolution and is present to some extent in the resolution of most, if not all, international disputes. Negotiation may provide a complete solution to some disputes; in others, it may be confined to producing an agreement to submit the dispute to formal resolution procedures.

Enquiry

Enquiry will form part of any dispute resolution process undertaken by an arbitrator, conciliator or other third-party intermediary. Enquiry processes are particularly valuable because they can help reduce the risks of stalemate in negotiations when an objective third party assessment is made of the situation.

Mediation and conciliation

Mediation and conciliation involve a neutral third party in negotiating a settlement to the dispute. The mediator's role is to suggest ways in which the parties might compromise and reach a settlement. Conciliation formalises the dispute resolution process one step further by using an institution, a conciliation commission, to examine the dispute. The conciliation commission may be set up on either a permanent or an ad hoc basis. Unlike arbitration, the conciliation commission is not empowered to make a binding determination resolving the dispute. Instead, the commission's role is to examine the dispute and suggest terms of settlement that are acceptable to both parties.

Arbitration and judicial settlement

Arbitration and judicial settlement are both relatively formal methods of dispute settlement. Like judicial settlement, arbitration involves the binding determination of a dispute by a third party according to legal principles. Unlike judicial settlement, however, arbitration provides more flexibility to the parties, particularly because they can choose the arbitrators. As with other non-judicial forms of international dispute settlement, arbitral tribunals can be set up on an ad hoc or a permanent basis.

The Permanent Court of Arbitration was established under the 1899 and 1907 Hague Conventions and provides an institutionalised structure for the settlement of international disputes through arbitration. Despite the name, it is not a "permanent" court. Parties to the Convention appoint up to four people at a time to serve as members of the Court. Should a dispute arise, the disputants may then appoint a tribunal from members of the Court, according to their own agreement or in accordance with the Court's standard procedures.

Because of its flexibility, arbitration has been a popular choice for the resolution of international disputes. Dispute settlement under multilateral agreements in key areas such as international trade and the law of the sea are based around arbitration. Arbitral tribunals have made substantial contributions to the development of international law in many areas including the law of the sea.

The operation of the International Court of Justice (ICJ) has already been discussed as part of our consideration of the United Nations. In addition to determining disputes between States, the ICJ is empowered to give advisory opinions to the UN General Assembly, Security Council and other authorised UN bodies and agencies. This power has been exercised on a regular basis in relation to a wide range of questions, including very broad questions of international law such as the legality of the use of nuclear weapons.