

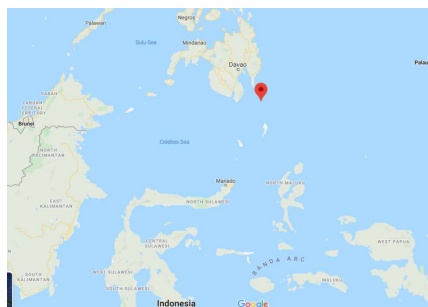
# Sovereignty and Jurisdiction

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## What is sovereignty?

“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.”

(Island of Palmas case, Netherlands v US, 1928)



## Sovereignty

- *Sovereignty* is the exclusive right to exercise supreme political authority (legislative, judicial and executive) over acts and events within a territory.
- Since it is the exclusive right, it means that no other State can have formal political authority within that State.
- Therefore, sovereignty is closely associated with the concept of political independence.
- This right is usually described as “territorial sovereignty”.

## Sovereignty Claims

- Classical international law developed doctrines by which States could make a valid claim of sovereignty over territory.
- During the period of Western colonial expansion new territories and islands were subject to claims of sovereignty by discovery and occupation.
- Sovereignty could also be transferred to another State by conquest (use of force) or by cession.
- If the Western colonial powers recognized a ruler in an overseas territory as the sovereign, they would often enter into a treaty of cession with the ruler by which sovereignty over the territory would be ceded in to the Western colonial power.
- Problems often developed because the peoples in those territories did not fully understand the Western European concepts of sovereignty and cession.

## Territorial Sovereignty

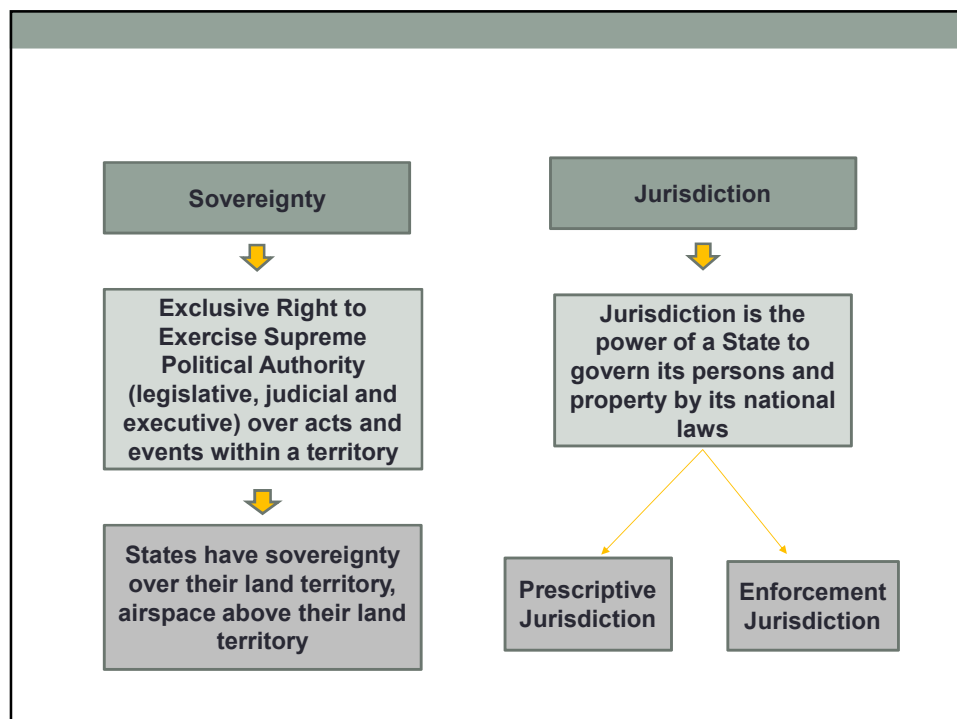
- States have sovereignty over their land territory and over the airspace above their land territory.
- The land territory includes off-shore islands if they are naturally formed areas of land which are above water at high tide.
- Among the attributes of sovereignty is the right to exclude foreigners from entering the territory, which is traditionally referred to as the right to exclude aliens.
- Thus, the entry into its territory or airspace by the armed forces of another State without consent is a prima facie breach of international law.

## Consent to International Rules

- Sovereign equality of States means that International law applies only on the basis of consent
  - There is no higher authority or legislature
  - Horizontal structure of legal system
  - ... so how can international law rules be made?

## What power do states have to make rules?

- i.e. when and where is a State able to make and apply its own laws?
- This is a question of Jurisdiction: the ability of a State to make and enforce laws through its national legal institutions.
- Two types of jurisdiction:
  - Prescriptive – the power to regulate an activity or behaviour
  - Enforcement – the power to enforce rules – i.e. to arrest, try, convict and punish for infringements



## Bases of jurisdiction under International Law

- **Territory**
- **Nationality**
- **Protective**
- **Universal**
- **Passive Personality**

## Territorial Jurisdiction

- 'A nation possesses and exercises within its own territory an absolute and exclusive jurisdiction'
- The 'effects doctrine' - claim jurisdiction over activities outside its territory which have an effect within its territory

## Nationality Jurisdiction

- A state retains jurisdiction over its national wherever they are:
  - Most civil law countries extend their criminal law to cover their nationals while abroad.
  - Common law countries usually extend their criminal laws to the actions of their nationals while abroad only in exceptional cases such as offences against the State and terrorist acts.

## Protective jurisdiction

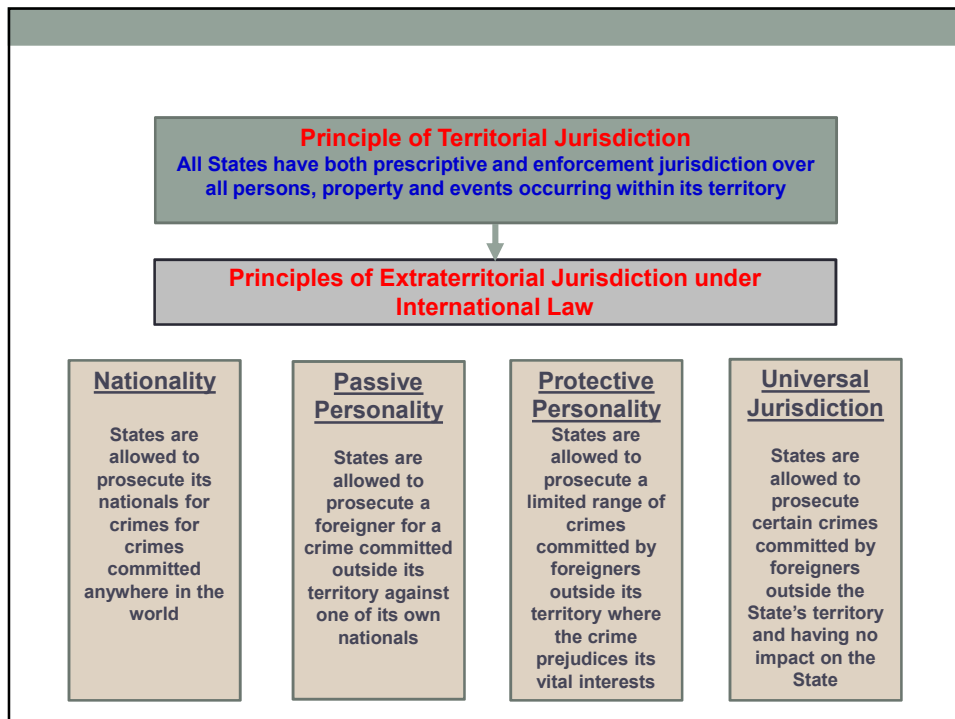
- Jurisdiction over acts committed outside their territory that are prejudicial to its security, such as treason, espionage, and certain economic and immigration offences.
- Almost all States claim jurisdiction under the *protective principle*

## Universal jurisdiction

- It is accepted that there is a narrow category of crimes over which States may assert jurisdiction based upon the universality principle.
- All States have jurisdiction over offenders, no matter their nationality and no matter where the offence was committed.
- There is universal jurisdiction over crimes such as genocide and war crimes, giving any State which the right to assume jurisdiction.

## Passive personality jurisdiction

- The most controversial basis for jurisdiction is the **passive personality principle**, which establishes jurisdiction based on the nationality of the victim.
- Very few States attempt to extend the reach of their criminal laws to situations where there only link to the crime is that their national was the victim.
- However, there is a recent trend to base jurisdiction based on the passive personality principle when a State's nationals are the targeted by terrorists.
- Modern **counter-terrorism treaties** establish jurisdiction among State Parties based on the presence of the offender within their territory.



## How does this work in the Maritime space?

- Territory – land territory is the basis of maritime zones
- Nationality - states have jurisdiction over individuals and ships that hold their nationality (for ships, this is the state they are 'flagged' to)
- Other bases
  - Universal – eg Piracy



## Concurrent Jurisdiction

- If two or more States have jurisdiction over a particular offence, they are said to have **concurrent jurisdiction**.
- In such cases the State which is most likely to prosecute the offender is the State which has custody over him.
- No State may exercise jurisdiction in a place under the territorial sovereignty of another State.
- States enter into bilateral treaties to provide for the extradition of alleged offenders from one State to another.

## Immunities from Jurisdiction

- The principle of **sovereign equality of States** requires that the official representatives of one State should not be subject to the laws of another State.
  - For example, the law of the sea provides that warships on the high seas are subject only to the jurisdiction of the flag State.
  - Warships may never be intercepted and boarded by another State, even if they commit acts contrary to the laws and regulations of the coastal State.
  - However, if a warship violates the right of innocent passage, it may be escorted out of the territorial sea by warships of the coastal State.
- The principle of **State immunity** or **sovereign immunity** provides that foreign sovereigns enjoy immunity from the jurisdiction of other States.

## Diplomatic Immunity

- The principle of **diplomatic immunity** provides that the diplomatic agents of the sending State have complete immunity from the criminal jurisdiction of the receiving State.
- The immunity of the diplomatic agent is not personal to the diplomatic, but belongs to the State.
- Therefore, the immunity of a diplomat can be waived by the sending State.
- Also, the receiving State has the right to expel any diplomatic agent from its country by declaring them **persona non grata**.

## Foreign Embassies

- A foreign embassy is under the territorial sovereignty of the receiving State, and the laws of the receiving State apply to acts within the embassy.
- However, diplomatic relations law provides that the premises of an embassy or diplomatic mission as well as its records and archives are **inviolable**.
- This means that the authorities of the receiving State **cannot enter** a foreign embassy without the express permission of the head of mission, even in the case of an emergency.
- Similarly, "**diplomatic bags**" are inviolable and cannot be opened by the receiving State.
- This is necessary to ensure that the embassy officials can communicate with their home country in secrecy.

Questions?