

Research seminar
Reshaping Public International Law in the
Age of Cyber: Values, Norms and Actors
(10/Mar/2020)



NATIONAL RESEARCH
UNIVERSITY

Territorial Sovereignty in the Age of Cyber

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I. Theories of Territorial Sovereignty

Alaa N. Assaf

Island of Palmas (Netherlands/USA), PCIJ, [1928]

- Sovereignty **in relation to a portion of the surface of the globe** is the legal condition necessary for the inclusion of such portion in the territory of any particular State.
- 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.
- Sovereignty in relation to territory is in the present award called “territorial sovereignty”.

Montevideo Convention on the Rights and Duties of States (1933)

Art. 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 into relations with the other states.

1. *Eigentumstheorie* (The object theory)

- Roman Law
- *res immobilis*
- The *imperium* and the *dominium*
- *Cuius est solum eius est usque ad coelum et ad inferos*
(Whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell)



2. *Eigenschaftssthorie* (The trait theory)

- Hegelianism
- Territory is primarily **physical** land
- Territory is an attribute of the state (constitutive part of the state)
- Blurring property with authority



NORVEGIA

SVETIA

OCEANVS GERMANICVS

MARE SARMATICVM

SCOTIA

DANIA

HIEBERNIA

ANGLIA

SVETIA

IRLAND

LOXFRVM

DANIA

HOLSATIA

SAXONICA

SSIA

SARMATIA

ALPES

GERMANIA

ROMANA

POLONIA

LITHVANIA

PARIS

BRUNNICA

BOHEMIA

EVROPA

TRANSYLVANIA

GALLIA

VIENNA

HUNGARIA

Danubius fl

NAVARRA
HISPANIA
ARRAGONIA

ALPES

SWEVIA

VIENNA

Danubius fl

ALBA GRAECA

BVLGARIA

Buda

MONS ALBANVS

ILLIRICVM

ALBANIA

MAVRITANIA

ITALIA WELSHLANDI

MEDI

ROMA

TERRANEVM

GRAECA

AFRICA PARS

Corsica

SARDINIA

NEAROLI

MAGLIA

Cor Inthus
PELOPONNESVS

Spa-ta

3. *Kompetenztheorie* (The competence theory)

- Legal positivism (Pure theory of law)
- Territory as the metaphysical **framework** of the validity of public powers (Competence; Jurisdiction)
- **Hans Kelsen**: State as a coercive legal order
 - Territory in narrow sense: exclusive power inside the borders
 - Territory in wider sense: non-exclusive restricted powers



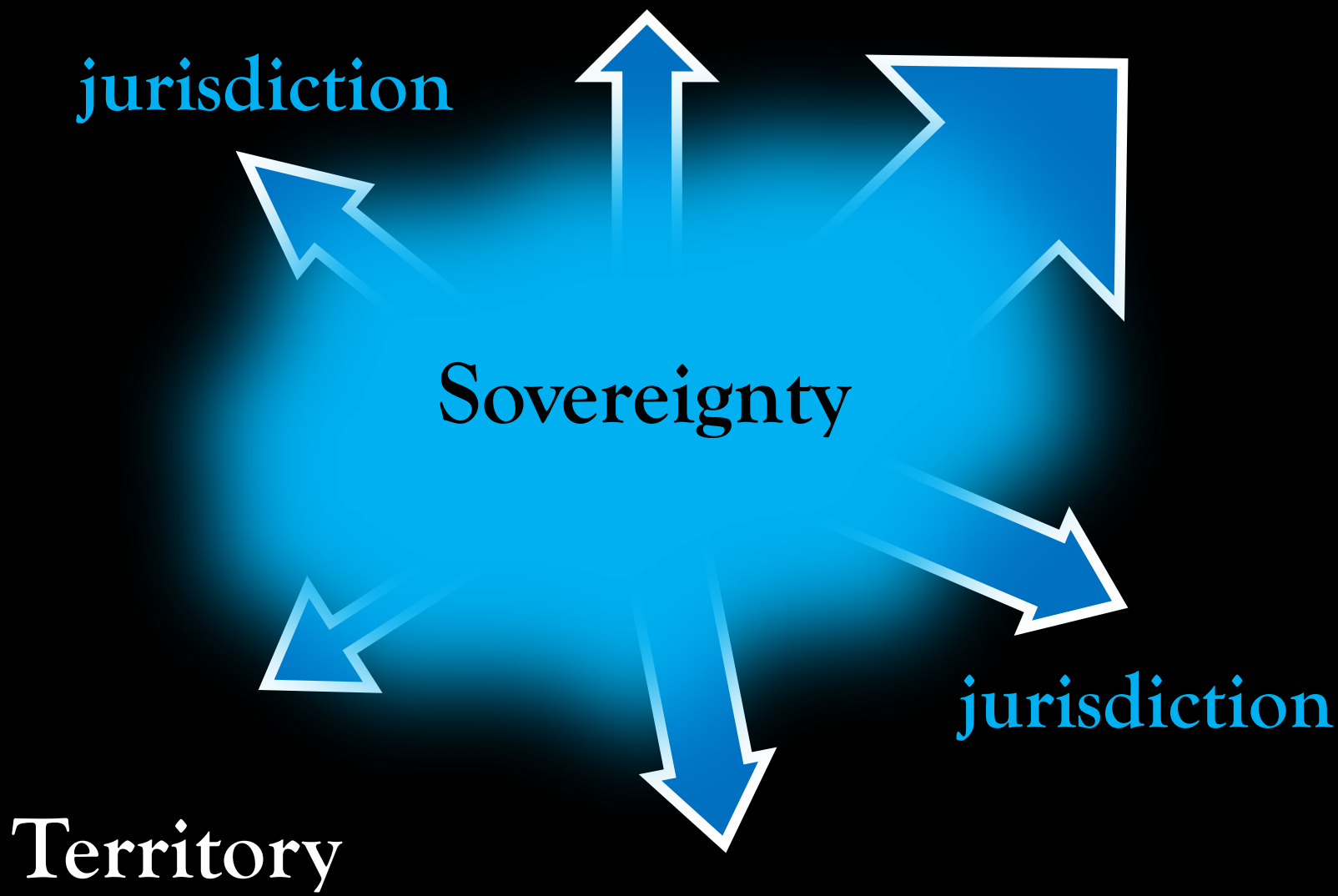
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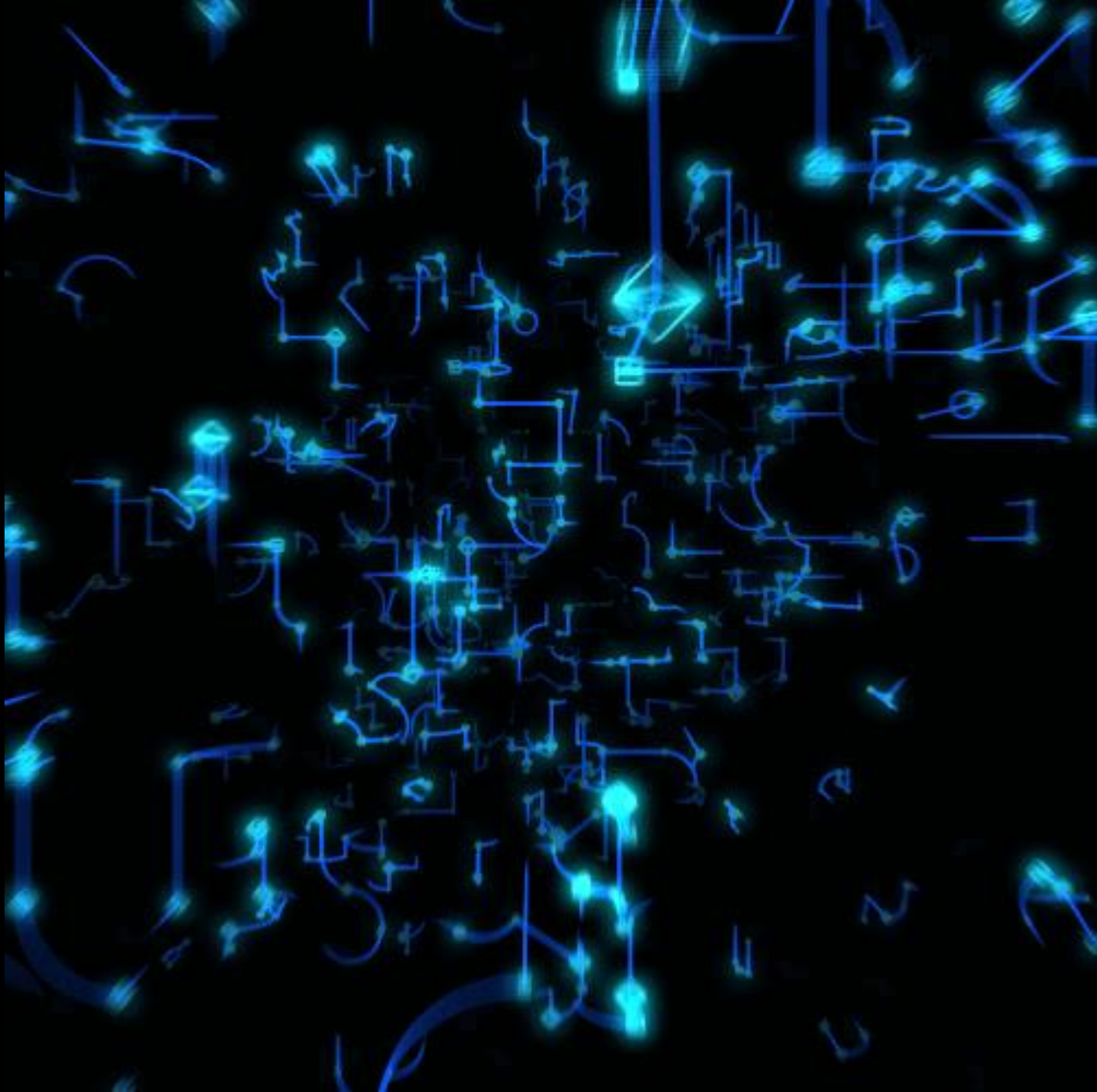
ПЕРЕКОП

3.1. The Function theory


- Competence: the independent title to exercise coercive powers recognized by international law
- **Issue-specific** rather than territorial lines (state's interests)
- The plentitude of personal and territorial competences
- Territory is one of the (spatial) ambits in which sovereignty displays its functions







The Tallinn Manuals (2013, 2017)

- Cyberspace as a *res communis omnium*, global domain
- Layers of cyberspace (**physical**, logical, social)
- “Spoofed presence does not suffice” [Tallinn Manual 2013]
- Jurisdiction 

4. Quantum sovereignty

- RAND corporation
- Cyberspace as a shared artifact
- Quantum superposition,
Copenhagen interpretation,
The role of the observer,
Heisenberg's uncertainty principle...
- Imprecision of cyberspace

Schrödinger's cat



II. Sovereignty in Cyberspace?

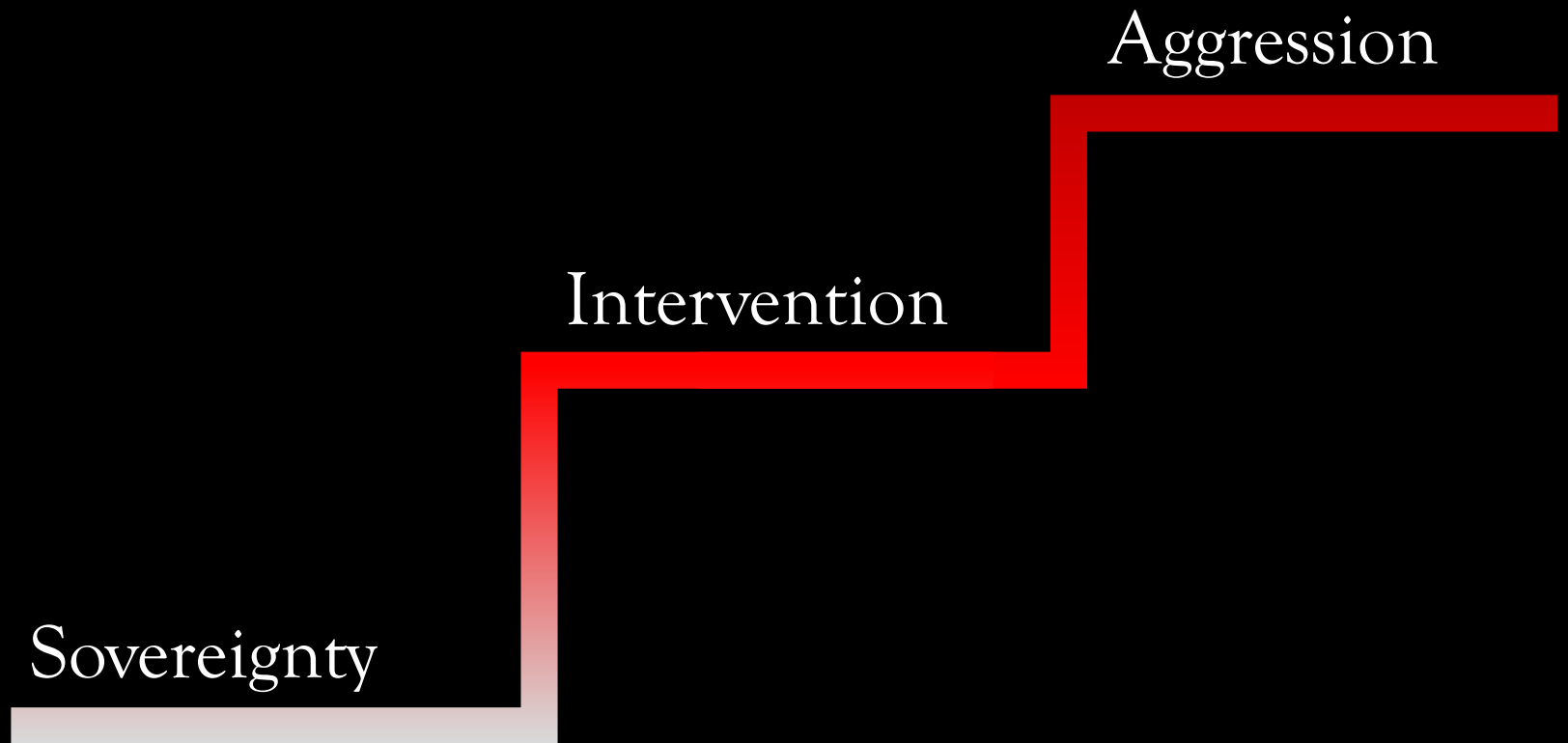
Daniil Moshnikov

The very design of the internet may lead to some encroachment on other sovereign jurisdictions

- Brian J. Egan, State Department Legal Adviser, Legal Adviser to the National Security Council and Deputy Assistant to the President and Deputy Counsel to the President at the White House



Violations?



Tallinn Manual 2.0

A State **must not** conduct cyber operations that **violate the sovereignty** of another State.

1) the degree of infringement upon the target State's territorial integrity; and (2) whether there has been an interference with or usurpation of inherently governmental functions

It certainly applies to the situations when attacks cause *damage*.



International Court of Justice

- "Between independent States, respect for territorial sovereignty is an essential foundation of international relations." - *Corfu Channel* (U.K. v. Alb.), Judgment, 1949
- "Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory ... has acted, against the Republic of Nicaragua, in **breach** of its **obligation** under customary international law **not to violate the sovereignty** of another State" - *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), Judgment, 1986



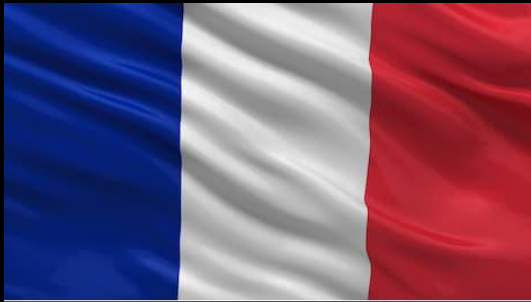
International Court of Justice

- "Finds that, by excavating three caños and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica" - *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua v. Costa Rica), Judgment, 2015

States' practice



"In general the government endorses Rule 4, proposed by the drafters of the Tallinn Manual 2.0. The precise interpretation of these factors is a matter of debate."



"France exercises its sovereignty over the information systems located on its territory and takes the necessary measures to protect that sovereignty."

Sovereignty-as-a-rule vs. Sovereignty-as-a principle



Michael Schmitt



Gary Corn

Permanent Court of International Justice



"the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State"

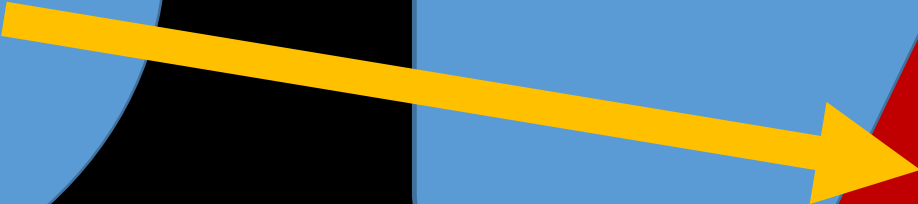
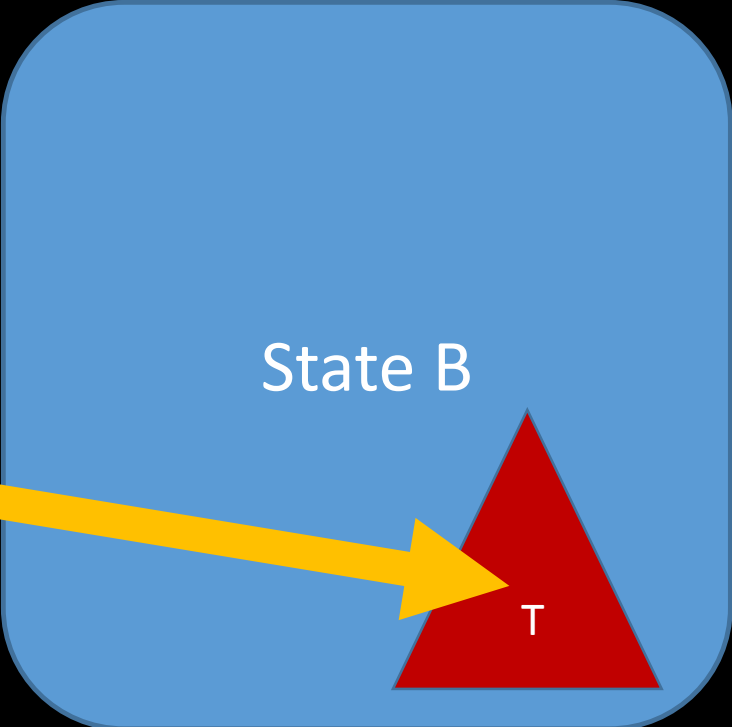
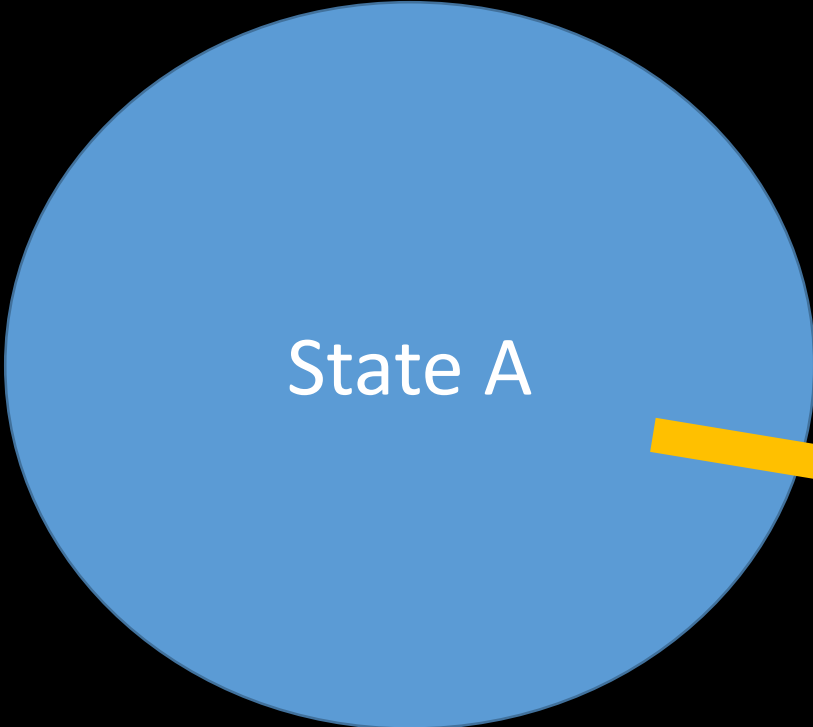
"Restrictions on the independence of states cannot ... be presumed."

- S.S. "Lotus" (Fr.v.Turk.), Judgment, 1927

Judge Alvarez dissenting opinion in Corfu



"I have in mind the four traditional spheres—terrestrial, maritime, fluvial and lacustrine—to which must be added three new ones—aerial, polar and floating (floating islands). The violation of these rights is not of equal gravity in all these different spheres."





States' practice

”Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government’s position is therefore that **there is no such rule** as a matter of current international law.

Online as well as everywhere else, the principle of sovereignty should not be used by states to undermine fundamental rights and freedoms and the right balance must be struck between national security and the protection of privacy and human rights.

Conclusions

The Competence vs. The Function

Inter-governmental vs. Multi-stakeholders



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Questions?