

Ultimate Problem-solving guide

Instruction:

- 1) Gray highlight colour=something you need to state in your answer/ something you need to consider.
- 2) []=answer. You need to replace your answer in order to fit what the question is asking.

Problem 2 – International law and Domestic law

1. Is it a treaty rule or customary rule?
 - a. The treaties mentioned in question:
 - i. [United Nations General Assembly resolutions they say they were acting to uphold: 1949 Geneva Conventions, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970) and the Definition of Aggression (1974).]
2. Whether the defendants can have a defence in treaty rule – unincorporated treaties
 - a. AUS follows transformation approach to treaties.
 - b. In AUS, treaty is not directly effective in domestic court unless say in domestic Statute.
 - c. By treaties, they say that [public international law imposes upon every citizen an affirmative obligation to prevent international crimes and other serious violations of international law.]
 - d. To implement that obligation, AUS has to pass legislation making it a criminal offence if the obligation is not followed.
 - e. [Here, there is no evidence that AUS has made legislation in relation to any of the treaties.]
 - f. If they are unincorporated treaties, they are not to be applied by domestic court. This means that the treaties cannot be a defence as they do not have domestic legal effect.
3. Whether there is CIL that require the individual to stop war crime
 - a. UN Charter has no rule on [every individual has a duty to stop war crime] → CIL
 - b. This concerns the effect of municipal law on international law
 - c. Two requirements:
 - i. ① state practice re **art. 38(1)(b)** of the Statute of the ICJ
 1. whether there are many states doing the same practice that can be regarded as the evidence of a general practice accepted as law and constituted an international custom.
 2. State practice is “any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions” [Akehurst 1975]
 - ii. We do not have enough information about this area.
 - iii. However, if there is evidence that the relevant practice is general, meaning that it must be sufficiently widespread and representative, as well as consistent (ILC is working on

Problem 8 – Immunity from Jurisdiction – State immunity and diplomatic immunity

- ☑ Identify the persons (who is he). Deal with them separately.
 - ☑ Identify the events/injuries (official/unofficial act). Deal with them separately.
 - ☑ Identify the status of the person (different position entitles to different immunity) [VCDR Art]
 - Staff of the mission
 - Head of the mission (have most privileges and immunities)
 - Diplomatic staff (have most privileges and immunities)
 - Administrative and technical staff (pretty much privileges and immunities)
 - Service staff (limited privileges and immunities)
 - ☑ be aware of whether it is a criminal jurisdiction or civil jurisdiction. Immunity applies differently. Cases are different.
1. Injuries:
 - a. Torture
 - b. Assault at the airport which caused personal injuries
 2. Injury ①: Torture in civil proceeding
 - a. Where did it take place? [Dystopia]
 - b. Who are the defendants?
 - i. against the foreign state (Dystopia)
 - ii. against the guy called Neelix (head of state and a foreign minister)
 - iii. against Dax (government minister)
 - c. civil proceeding against Dystopia:
 - i. Immunity or not? [YES]
 - ii. Case: **Germany v Italy**
 - iii. The case concerns the Jurisdictional Immunities of the State. The ICJ affirmed that jurisdictional immunities are available to a State before foreign courts.
 - iv. If a state wants to sue a foreign state for torture, it is a violation of jus cogens which is an international crime.
 - v. Conclusion: [there is no case against Dystopia. Dystopia has immunity.]
 - d. civil proceeding against Neelix:
 - i. Is this person a diplomat? [YES.]
 - ii. What is the status of Neelix in the mission (embassy)? :

1. [A Foreign Minister and Head of State]
 - iii. What immunities does he have?
 1. Immunity *ratione persone*
 - a. Definition: this is an immunity granted to certain officials because of the office they hold, rather than in relation to the act they have committed.
 - b. [Current Head of State therefore cannot sue him in civil case.]
 - c. Case: **Arrest Warrant**
 - i. It is a case in regards to criminal jurisdiction
 - ii. But the principle applies in civil jurisdiction as well: When the defendant is incumbent head of state/head of government or foreign minister, he has immunity *ratione persone*
 - d. Conclusion: [there is no case against Neelix. He has immunity *ratione persone*]
 2. Immunity *ratione materiae*
 - a. Definition: this is an immunity granted to people who perform certain functions of state or official act.
 - b. Whether the wrongful act is an official act or not? [torture]
 - i. [YES. Dystopian government arrested them because it though they brought contraband and infiltrated Dystopia to assassinate the Emperor and Neelix is entitled to immunity]
 - ii. Case: **Al-Adsani; Jones V UK**
 - iii. You cannot sue someone in civil case in regard to official act or torture
 - c. Conclusion: [Neelix is protected by both immunity if we assume the torture act is acted on behalf of the government]
 - e. civil proceeding against Dax:
 - i. Is this person a diplomat? [YES.]
 - ii. What is the status of Dax in the mission (embassy)? :
 1. [Government Minister]
 - iii. What immunities does a government minister have?
 1. Immunity *ratione persone*
 - a. It is possible but controversial because the ILC is still working on it so it is not clear.
 - b. Conclusion: [probably not possible]
 2. Immunity *ratione materiae*
 - a. [YES because the act of torture can be characterized as an official act]
3. Injury ①: Torture in criminal proceeding
 - a. In State immunity, a state cannot bring criminal proceeding against a foreign state.
 - b. Criminal proceeding against Neelix:
 - i. Is this person a diplomat? [YES.]
 - ii. What is the status of Neelix in the mission (embassy)? :
 1. [A Foreign Minister and Head of State]