

International Law Notes

1. Nature of International Law	1
Actors within International Law	1
2. Sources of International Law	2
Customary International Law	2
Elements of customary international law	2
State Practice	2
Opinio Juris	2
Persistent Objection	3
Military and Paramilitary Activities in and against Nicaragua	3
Regional or Local Custom	4
Relationship to Treaties	5
Treaty Law	5
What is a Treaty?	5
Consent to be Bound	6
Legal Effects of a Treaty	6
Interpretation of a Treaty	7
Reservations	7
Invalidity	8
Termination and Suspension	9
General Principles, Soft Law and Subsidiary Sources	10
General Principles	10
Soft Law	10
Subsidiary Sources	10
3. Sovereignty and Territory	11
The Importance of Sovereignty	11
The Importance of Territory	11
Fundamental Propositions	11
Acquisition of Title	12
Exercise of Authority	12
Case Studies	13
Maps	15
Contiguity	15
Critical Date	16
Intertemporal Law	16
Uti possidetis juris	16
4. Statehood, Self-Determination and Legal Personality	17
Statehood	17
Why Statehood Matters	17
Criteria for Statehood	17
Contentious Cases	18
Does Recognition Matter?	18
Change of Government	19
Self-Determination	19
Development of Criteria	19
Consequences	20
Internal Self-Determination	20

Legal Personality	21
UN and International Organisations	21
Other Legal Personality	21
5. State Responsibility	23
Acts Committed by a State	23
Attribution	23
Rules Relating to Breach	26
Circumstances Precluding Wrongfulness	27
Legal Consequences of Wrongful Act	28
6. International Fact Finding	30
General Relevance and Importance	30
Contemporary Example	31
7. Jurisdiction	33
Types of Jurisdiction	33
Territorial Jurisdiction	33
Nationality Jurisdiction	33
Protective Jurisdiction	34
Universality Jurisdiction	34
8. Space Law	35
What Defines Outer Space?	35
Boundary Between Outer Space and Air Space	35
The Outer Space Treaty	36
Article I	36
Article II	37
Article III	38
Article IV	38
Article V	39
Article VI	40
Article VII	40
Article VIII	43
Article IX	44
9. Law of the Sea	45
Baselines	46
Maritime Zones	48
Internal Waters	48
Territorial Seas	48
Contiguous Zones	50
Exclusive Economic Zones	51
Continental Shelf	51
The High Seas	51
Safety Zones	52
Straits and Archipelagos	52
International Strait	52
Transit Passage	52
Archipelago	53
Navigation in an Archipelago	53
Use of Force in International Maritime Law	54

10. Use of Force	56
Principles of Non-Intervention	56
UN Charter	56
Nicaragua Case - ICJ	57
Self-Defence	58
Article 51	58
Self-Defence Requirements in the Caroline Case	59
‘Armed Attack’	59
Summary of Self-Defence Principles in Cases	60
Collective Self-Defence	60
Anticipatory Self-Defence	61
Procedural Requirements	62
Self-Defence Against Non-State Actors	62
Bethlehem Principles	63
Security Council Role	64
Chapter VII	64
Case Study – Iraq 1990	66
Intervention with Consent	69
Rescue of Nationals	69
Humanitarian Intervention	70
Legal Grounding	70
Case Study - Kosovo	70
Responsibility to Protect (R2P)	71
11. Law of Armed Conflict	73
Legal Framework	73
Existing Agreements and Conventions	73
When is There an Armed Conflict?	73
General Observations	76
Distinction	76
Who May Be Targeted?	76
What May Be Targeted?	77
Proportionality	78
Military Advantage	78
The Ratio Between the Two	79
ICC Statute	79
Precautions in Attack	80
Weapons Prohibitions	80
Problem Question Summary	82
12. International Human Rights	83
Evolution of International Human Rights Law (IHRL)	83
Historical Documents	83
UN Charter Provisions	83
Universal Declaration of Human Rights	84
ICCPR and ICESCR (The Binding Treaties)	85
Nature of Human Rights	86
Monitoring, Adjudication and Enforcement	87
Mechanisms of Enforcement	87
Case Studies	89
Regional Human Rights Protection	91
Consequences in Australia	91

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) -----	91
HR(PS) Act 2011 (Cth) in Practice -----	91
13. Diplomatic Protection -----	94
14. International Law in Australia -----	96
Monism v Dualism-----	96
Executive Power and International Relations -----	96
Treaties -----	96
External Affairs Power -----	97
Application of IL in Australian Courts -----	98
General Principle -----	98
Case Studies -----	98
Direct Implementation of IL (Legislation) -----	101
Treaties Implemented -----	101
Customary IL Implemented -----	102
Indirect Implementation of IL-----	103
Presumption of Statutory Interpretation -----	103
Development of the Common Law -----	103
Influencing 'Leeways for Judicial Choice' -----	104
Executive Discretion?-----	104
Constitutional Interpretation? -----	105
Legislative Influence -----	105

1. Nature of International Law

'The field of international law is concerned with law that principally operates among sovereign countries (or 'States'), arising from sources such as treaties and the customary practice of states'. Damrosch, Henkin, Murphy, Smit, INTERNATIONAL LAW (5th Ed), 2009, 2.

Actors within International Law

- States are the primary actors within international law
 - Legal capacity to make international law; bind themselves to treaties, create/resist customary international law; right to appear before the International Court of Justice.
 - States = Sovereignty
 - Old view that sovereignty reigned supreme, and a state could do whatever they wanted within. This was articulated in *Case of the S S Lotus, (France v Turkey)* (1927) PCIJ Reps Series A No 10.
- International Organisations
 - Multilateral
 - high geographical coverage: UN, WHO, UNESCO
 - more restrictive geographical coverage: NATO, Commonwealth
 - Regional
 - EU, OAS, African Union, Arab League
- Non-Government Organizations
 - International Committee of the Red Cross, Amnesty International
- Juridical – Private Entities
 - International Corporations
- Individuals – human rights and international criminal law.
- Courts and Tribunals
 - Who are they and what is their role?

2. Sources of International Law

There are several different sources of international law.

Customary International Law

What is customary international law?

- 'international custom, as evidence of a general practice accepted as law'.
 - *Statute of the International Court of Justice*, Article 38 (1)(b).
- Binding on States regardless of individual consent.

Elements of customary international law

- State practice (objective)
 - Extensive and substantially uniform practice by states.
 - What states *actually* do.
- *Opinio juris* (subjective)
 - A conviction that certain conduct is required by law.
 - *opinio juris sive necessitatis*: an opinion of law or necessity, 'the sense of legal obligation, as opposed to motives of courtesy, fairness, or morality'.
 - What states believe they *must* do.
 - Statements saying action not legally bound can't be evidence (*Torrey Canyon*)

State Practice

- Evidence of conduct attributable to States.
 - Actual conduct
 - Domestic acts of State organs (courts, parliaments, executive).
 - International acts of the State (comments and votes in international organisations, military conduct and instructions).
 - Signature, accession, ratification of treaties.
 - Statements
 - Speeches, diplomatic correspondence, public comments.
- No set proportion of States that must conform to a pattern of behaviour, however it is necessary that those States whose interests are particularly affected by the rule should participate in the practice.
- For a rule to have universal force it is necessary that participation should be broadly representative of all States in the world and not confined to a particular region or political grouping.

Opinio Juris

- How it is proved
 - Statements of legal obligation.
 - Support for Resolutions or Declarations of international bodies expressing views on legal requirements (esp. of the UN General Assembly).
 - Diplomatic correspondence.
 - Military and diplomatic instructions and manuals.
 - Domestic explanations (Parliamentary statements, court judgments)