PPL EXAM NOTES

TABLE OF CONTENTS

Key:
Green – write exactly
Purple – Readings
Red – case

THE STATE

What is a state? – A territorially bound region through which we organize power.

Key ideas here are:

- A state is sovereign – can choose its own constitutions, regulate its own jurisdictions, defend its borders
- A state has territory
- All members have state equality.

Sovereignty

- Sovereignty is a term for the 'totality of international rights and duties recognized in international law' as residing in an independent territorial unit – the State' (Crawford)
- Sovereignty signifies independence – this independence is 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… The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (Island of Palmas arbitration per Judge Huber)

Authorities:

Morris on TERRITORY, STATE CONTINUITY

- Emphasizes the notion of **territory** – argues that a state is fundamentally defined by its control over a specific, delimited geographic area
- Emphasizes distinction between the state and the government
    - The State is a continuing legal entity which possesses sovereignty & is defined by a criteria
    - The Government is a set of individuals or institutions that exercise authority and performs *on behalf* of the State at any given time
- This distinction is relevant because when a government is replaced (peacefully or otherwise) – the state still exists and does not lose its international legal personality
- Therefore treaties, debts, and international obligations **are attached to the state** not the particular government

Alternative criteria for statehood:

- Continuity in space and time (in reference to the distinction between a state and its government; states will continue on even with a change in government)
- Transcendence (states maintain identity regardless of change in leadership)
- Political organisation
- Authority (legitimacy in making decisions)
- Allegiance (citizens need allegiant to the state – social contract)

Crawford on SOVEREIGNTY

States exist because they meet a certain critera, not simply because other states choose to recognize it. Recognition is relevant but not decisive. This criteria is:

- International competence (to perform acts in the international sphere, such as making treaties)
- Domestic competence (exclusive jurisdiction and control over their internal affairs)
- Free from compulsory international processes, jurisdictions or settlement without consent;
- Equal;
- Derogations from these principles will not be assumed.

<u>Two competing theories of statehood:</u>

- **Declaratory theory**: Statehood is a matter of objective fact: if an entity meets criteria for statehood (territory, population, government, etc) – it is a state, regardless of whether other states recognize it.
- **Constitutive theory**: An entirety becomes a state and acquires rights and duties under international law only when it is recognized as such by other existing states. Recognition is constitutive to statehood. If a community is not recognized, it is not a state in the eyes of international law.

Kwaymullina for Indigenous SOVEREIGNTY & TERRITORY

- A reciprocal relationship between people and country, where land is a living entity.
    - Contrast this with Morris's reading: country is alive and has agency, it's not a 'domain of land' which can be owned by an entity (such as the State)
    - Territory is spiritual, relational and dynamic – not static and defined by its borders.
- 'Narrative Sovereignty' centres on storytelling, culture and spiritual connection to the land, creating a socio-political environment which relies upon the interdependence of the people and the land on which they live.
- To claim ownership (sovereignty over) land, 'you must know its stories', and place yourself within the reciprocal relationship between man and country. It is a relationship comprised by both rights over Country and responsibilities to it.

STATEHOOD UNDER INTERNATIONAL LAW

Refer to previous definitions of statehood from Crawford & Morris up above.
However, the most convincing criteria for statehood is the: **Montevideo Statehood Criteria**

1. Defined Territory
    a. State must be capable of exercising full governmental powers with respect to an area of territory
    b. There is 'no minimum area' of state territory
    c. A 'state' continues to exist despite claims to its territory
    d. Territory is defined under international law by reference to governmental power over territory (i.e. not a private law real property concept such as ownership)
2. A Permanent Population
    a. No minimum size required
    b. Not concerned with nationality
3. An Effective Government
    a. In practice, the application of the government criteria is more difficult, e.g. Republic of Congo declared independence and was a state in 1960 but "[a]nyting less like effective government it would be hard to imagine." (Crawford, p.57)
    b. Must possess a system of government in general control of territory to the exclusion of other entities claiming control
4. The Capacity to Enter into Relations with Other States
    a. Really a consequence of statehood rather than a criteria: a conflation of the requirements of government and independence

DO STATES NEED RECOGNITION?

Crawford: argues that recognition by other States has important legal and political effects, but the status of a State is independent of recognition… this thinking assumes that there is a **correct criterion** for which constitutes to a State. If this criterion isn't applied, the constitutive theory would return.

INDEPENDENT STATEHOOD IN AUSTRALIA

What is independence? – 'Independence is closely connected to the notion of sovereignty – the identification of the source of power and control over a territory and its people' – *Twomey*, 96.

How do we assess independence? Authorities:

Crawford's Framework:

- Immediate grant/seizure of independence (where independence has been granted to the State)
- **Devolution** (gradual transfer of power in a political entity over a period of time)
    - Unitary State Theory
        - In international law a state is regarded as a single legal entity with undivided sovereignty regardless of its internal structure
    - Delegation of Independent powers
        - Legal status of political entity develops over time until it satisfies statehood criteria
- Rather than breaking away unilaterally, territory or entity gains independence by a process of agreed transfer of authority

Twomey's Framework:

- Power or capacity to exercise independence (power to both act and not act in international affairs)
- Actual exercise of independence (asserting an independent foreign policy, declaration of war as a state)
- Breaking off of all links to previous sovereign

Case:	**XYZ V THE COMMONWEALTH (2006)**
Facts	• The Crimes Act 1914 (Cth) made it an offence for an Australian citizen or resident, while outside Australia, to engage in sexual intercourse with a person under 16.
Issue	• Are laws prohibiting the conduct of Australia citizens and residents outside Australia valid? • S 51(xxix) of the Constitution: includes power to make laws with respect to places, persons, matters or things outside the geographical limits of Australia (Gleeson CJ [10]).
Links to Independence	• In 1900, Australia lacked sovereignty and could legislate only for its territory. • Legal recognition came through the Statute of Westminser 1931, and later adoption by Australia • Framers of the Constitution were building a future where Australia WOULD be independent, so the 'external affairs' head was made for the future, even if it couldn't be exercised at the time
Morris Reading (recall)	• Remember that sovereignty means the State's exclusive authority over its domain and certain independence from other States • Australia is 'allowed', technically, to violate international laws because independence & sovereignty gives it power to make laws outside the boundaries of Australia • To deny it this power would expose weakness in Australia's capacity to exercise its full powers associated with sovereignty

So, when did Australia <u>actually</u> become independent? (*Crawford*)

- Events of the 1914-18 which brought about Dominion independence which was fully achieved in Australia by 1939
    a. Signature of Dominions to the Treaty of Versailles, and their separate membership of the League of Nations in 1918-19.
    b. Recognition of equality between Great Britain and Dominions in period of 1923-26 constituted a 'recognition'
    c. Statute of Westminser (1931) UK – marking renunciation by Great Britain of ultimate legislative authority over the Dominion
    d. Essentially argues that the **Balfour Declaration** itself was the final act to independence, as referred to the equal status of the Dominions already established in practice

- Note here that Australia's independence was gradual, and their elimination of post-Imperial links included:
    a. Conferences in 1982 and 1984 addressed the matter of remaining constitutional links and restrictions between the 6 states of Commonwealth (which had separate constitutional arrangements with the Crown and the UK)
    b. Result was a set of agreements by the Commonwealth, each State, and the UK, referred to as the 'Australia Acts'
        i. s 2 and s 3 of these Acts ended the remaining links between the UK and state law

TERRITORIAL ACQUISITION IN AUSTRALIA

Background to the Constitution's treatment of Indigenous peoples

s. **51 (26):** so called 'race power', indicating that the Australian government had no power to make laws which applied to Indigenous people
"*The people of any race, other than the Aboriginal race in any state, for whom it is deemed necessary to make special laws*"

s. **127:** Indigenous people not counted amongst the people of Australia

<u>Before</u> the 1945 UN Charter, there were 3 modes of acquisition:

- **Conquest**
    a. Victory in war over another state
    b. Maintenance of occupation after the conclusion of that war
    c. A formal annexation of the conquered territory
- **Settlement**
    a. Occupation of 'uninhabited' territory
    b. Requires Terra Nullius
    c. Has to be peaceful and continuous
- **Cession (ceded)**
    a. Transfer of sovereignty by one state to another by legal agreement
    b. A cession agreement
- 'whether the legal paradigm used to explain colonization is 'conquest', 'cession', or 'settlement', the reality is that colonizers were intruders who imposed their will upon societies that had pre-existing systems of law and governance' (*Saunders*)

Competing Definitions

1. Blackstone's Rules – if acquired by cession or conquest, law of original inhabitants/settler laws automatically apply (Mabo, 35).
2. *International Court of Justice in Western Sahara case* (1975) – the presence of nomadic tribes with a degree of political and social organisation precluded the territory from being regarded as terra nullius
    a. This view was highly relevant to *Mabo (no.2)* later on, as Brennan J said: 'The fiction by which the rights and interests of indigenous inhabitants in land were treated as non- existence has no place in the contemporary law of this society' – basically he rejects ideas on the fact that there was an absence of law in Australia

However, <u>post</u> UN-Charter has shifted things:

Article 2(4) - All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

- Indicates one can no longer use force against a state
- Outlawing conquest and annexation
- **Terra Nullius** also no longer a valid means of acquisition

Case:	**MABO V QLD (NO. 2) (1992)**

Facts	• The Meriam people, residing on three islands in the Torres Strait – Mer, Dauar, and Waier – long before European contact, sought legal recognition of their ownership, possession and rights to use and enjoy the Murray Islands. • Plaintiffs, including Eddie Mabo, argued that they were entitled to these lands. • QLD Government contended that when land was settled as terra nullius the Eng law applied, granting Crown absolute ownership of all territory.
Legal Issues	• Did the crown acquire beneficial ownership when it acquired sovereignty? • How can common law and native title be reconciled? If it is reconciled, what indigenous communities are entitled to compensation?
History of Acquisition	• The British gained sovereignty based on conception of terra nullius (Brennan J) – Cooper v Stuart shows that Aus was said to be 'practically unoccupied without settled inhabitants' • Therefore, England gained sovereignty over the region per Blackstone's rules so the common law of England was applied in Australia • Growing evidence of laws and customs indigenous people in International law developed to find the 'expansive doctrine of terra nullius as wrong' (*Western Sahara* case)
International Law Implications	• International laws are not neutral laws which can just be manipulated by European powers and applied conveniently not consistently! • Common law system of Aus was operated on a foundation which is not only false but is inconsistent with International Law regimes of acquisition of territory
KEY Findings	• Given that International law no longer supports expansive terra nullius (and never did?) its inclusion in common law can't be retained • 'If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that common law should neither be nor be seen to be frozen in age of racial discrimination' • When the Crown took sovereignty over Australia, it got a radical title which gives it ultimate authority over the land – BUT NOT AUTOMATIC OWNERSHIP • Rights and interests of occupying Indigenous inhabitants continue to exist where not extinguished by the Crown • These are native title rights, which could and did survive British sovereignty – it exists where Indigenous people maintain a connection to the land and follow its customs • Native title rights do not come from common law (as it survived BEFORE common law) but are recognized by them

Brennan and Davis: Why is there no mention of Indigenous people in the Constitution? + how much did *Mabo* actually help?

- Clear constitutional silence: there are approximately 700,000 Aboriginal & Torres Strait Islander peoples (3% of the population) but there is no mention of these First Peoples or their societies, laws, and cultures in the Constitution

A brief history of this constitutional silence:

- After the Constitution was written, Australia shifted from frontier violence to a 'protection era' where Indigenous peoples were forced onto Crown-controlled reserves. These reserves denied them property rights or security of tenure and were administered by government or church authorities, facilitating tighter legal control over Aboriginal populations.
- *Cooper v Stuart (1889)*: at this point this case had just passed judicial comment on legal basis for Australian colonization – was basically dismissive of the idea that the continent had been occupied in 1788 by groups with territory & authority … NSW was 'practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions'
    - Due to this widespread understanding at the time, the 'drafters of the 1890s followed suit'
- Only 2 references both denying intrinsic national importance: s 51(xxvi) excluded them from Commonwealth jurisdiction under the 'races power', and s 127 excluded them from the population count (affecting funding and parliamentary seat allocation).

- Lack of constitutional protection: Aboriginal and Torres Strait Islander peoples had no Bill of Rights and limited voting access, leaving them powerless against discriminatory legislation
- ***Mabo No 2*** **(landmark event): pre-existing rights were finally recognized under a native title.**
    - While Mabo may have hinted at Indigenous sovereignty and recognizing customary law in limited contexts, the High Court FIRMLY rejected its application to property rights and rejected its extension to criminal law or broader sovereignty claims.
    - Subsequent legal attempts, including post-Mabo claims, were unsuccessful, with High Court reaffirming that British sovereignty precluded parallel lawmaking systems (once British Crown had claimed sovereignty, it legally excluded possibility of a separate or independent legal system such as the Indigenous)

Sovereignty

- Change occurred in Constitution in 2010, s(51) now referred to 'Aboriginal and Torres Strait Islander people' rather than 'race'
- Aboriginal people do not see that their societies ever ceded sovereignty to the Crown
- Invisibility of Indigenous legal systems persisted 70 yrs after the Federation until J BlackBurn in *Milirrpum v Nabalco* in 1961 – Blackburn said 'evidence shows a subtle and elaborate system highly adapted to the country in which people led their lives…'

Treaty-Making

- Outside the courts, a typical way of addressing colonization effects has been treaty-making
- Uluru Statement called for a treaty process overseen by a newly legislated Makarrata Commission
- If such agreements come to fruition, the issue of Indigenous sovereignty will need to be addressed in some way
- Final Report of the Council for Aboriginal Reconciliation in 2000 urged agreements or treaties, and recommendation was rejected by PM Howard

Klabbers on International Law… what is it?

- Absence of single overarching authority
- More so binding on States as a matter of 'positive morality' rather than a matter of law
- **How does it even function without a sovereign body then?**
    - Once states make international law, they have little incentive to break it
    - Unless something dramatic happens (new treaty, new court ruling, new gov) states will continue to do what they are used to doing to help strengthen int law
    - Considerations of reciprocity
    - Role of legitimacy – 'compliance pull'
    - States have to interact w one another, so they need to be reasonable
- Int law is not politically innocent
- Its emergence was literally due to the struggle for European powers to gain influence everywhere in the world
- Ironically, now it's trying to come into terms with the effects of decolonization (link back to Mabo?) – this is seen through the UN 1945
- Int law is connected to the economy → faced w economic profit, states are way less obedient concerning non-intervention principle → economically beneficial to have 'friendly' governments
- States cannot be imprisoned, but there is no obstacle sending individuals ACTING in the name of the state to prison