

PUBLIC INTERNATIONAL LAW

INDIVIDUAL RESPONSIBILITY

- A. What is the crime being prosecuted?
- B. Basis for jurisdiction
- C. Immunity from jurisdiction
- D. International liability of individuals

STATE BASED RESPONSIBILITY – CUSTOMARY INTERNATIONAL LAW

- A. Does the ICJ have jurisdiction?
- B. What is the relevant international law?
- C. Is the state bound by this international law?
- D. Has there been a breach of the customary international law?
- E. Has there been a use of force?
- F. Has there been a mistreatment of foreign nationals?
- G. Is the State responsible for the breach? (attribution)
- H. Are there circumstances precluding wrongfulness? (defences)
- I. Are there any consequences of the state's responsibility? (remedies)

STATE BASED RESPONSIBILITY – TREATY LAW

- A. Does the ICJ have jurisdiction?
- B. What is the relevant international law?
- C. Does the state have capacity to enter into the treaty? (recognition)
- D. Is the state bound by the treaty?
- E. Application of treaties.
- F. Is consent to the treaty invalid?
- G. Has there been a breach of the treaty?
- H. Are there grounds for terminating the treaty?
- I. Has there been a use of force?
- J. Is the State responsible for the breach? (attribution)
- K. Are there circumstances precluding wrongfulness? (defences)
- L. Are there any consequences of the state's responsibility? (remedies)

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Note: all legislation refers to the following:

- [International Law Commission's Articles on State Responsibility \(ILC\)](#)
- [Vienna Convention on the Law of Treaties 1969 \(VCLT\)](#)
- [Vienna Convention on Diplomatic Relations 1961 \(VCDR\)](#)
- [Vienna Convention on Consular Relations 1963 \(VCCR\)](#)
- [UN Charter](#)
- [Rome Statute](#)

INDIVIDUAL RESPONSIBILITY

A. WHAT IS THE CRIME BEING PROSECUTED?

- On the facts, consider the act that may be in contravention with the state's domestic laws.

B. BASIS FOR JURISDICTION

- States may have jurisdiction to make and enforce domestic laws over certain individuals, places and events.
 - Prescriptive jurisdiction: power to make law
 - Enforcement jurisdiction: power to enforce domestic law
- The UN is not authorised to intervene in matters within the domestic jurisdiction of any State (*Article 2(7) UN Charter*).
- For domestic courts, there must be a specific jurisdictional head upon which the court is acting in order for it to validly exercise jurisdiction in international law

Heads of jurisdiction

Territorial Principle

- Where a crime takes place in territory
- A state may assert/exercise criminal jurisdiction when an element (i.e. part of the process of commissioning an offence) of a criminal offence takes place within its territory (*Lotus Case*)
- Subjective territoriality: exists where events take place within the State's territory, even though they might have effects elsewhere (*Lotus Case*)
- Objective territoriality: applies to events which take place in the territory of another State but which have an impact on the territory of the State claiming jurisdiction (*Lotus Case*)

Nationality Principle

- Where a national commits crime overseas
- A state may enforce its laws against one of its nationals, even though the national committed the offence in another state (*Lotus Case*).
 - For example, Australians committed child sex offences overseas. Australia was able to assert jurisdiction over the offenders by way of the nationality principle (*XYZ V Commonwealth*)

Protective (security) Principle

- Where State's security interests are threatened. For example, physical attacks on state organs (*Eichmann*), forgery of official documents, counterfeiting of currency, and espionage.
- Allows states to exercise criminal jurisdiction over non-nationals who have committed an act abroad prejudicial to the security of the state exercising jurisdiction (*Eichmann*).
- The offence must threaten or cause detriment to the vital interests of the asserting state.

Passive Personality Principle

- Where a national is a victim of the crime
- Allows the national state of the victim of an offence to assert jurisdiction over the offender who is a national of another state (*Lotus Case*)
- Only crimes that are subject to widespread/universal international condemnation should be subject to the passive personality principle (*US v Yanis (No. 2)*)

Universal Jurisdiction

- Where a crime is a threat to all international community.
- A state may be able to exercise jurisdiction over crimes no matter where they occur, if the state can establish that the conduct is so serious that it represents a threat to the entire international community (*Eichmann*).
- There is no nexus needed between the offender and the prosecuting state.
- Crimes giving rise to universal jurisdiction include piracy, war crimes against humanity (*Eichmann*), torture (*Ex parte Pinochet Ugarte*) and genocide (*Eichmann*).

C. IMMUNITY FROM JURISDICTION

- The principle of immunity prohibits a State from exercising its domestic jurisdiction against another State (*Germany v Italy: Greece Intervening*).

Functional immunity (*ratione materiae*)

- It will apply to all acts undertaken, which are 'governmental' in nature, and it attaches to the individual who committed the action.
- A person is entitled to immunity for official conduct during their time in office, even though they are no longer in office.
- That is, immunity to protect a person because he/she has performed a state duty in an official capacity, and not a private capacity (*Arrest Warrant Case*).
- It is irrelevant that the person is no longer in office (*Arrest Warrant case*) as the sovereign immunity extends beyond a person's term in office (*Ex parte Pinochet Ugarte (No 3)*).
- Once a person leaves office, they are only protected from acts committed that were official in nature (*Ex parte Pinochet Ugarte (No 3)*).

Personal immunities (*ratione personae*)

- Immunity conferred by virtue of a person's status or office.
- Personal immunity is only reserved for certain position holders and only operates whilst they hold that position.
- Former head of state has absolute immunity for acts done whilst they were in office (*Ex Parte Pinochet*).
- It is irrelevant that the person's conduct was in the course of his/her private life, as they still remain in office/hold a government position (*Arrest Warrant Case*).

Diplomatic Immunity

- A diplomat of a sending State shall enjoy immunity from the criminal jurisdiction of the receiving State, (*Article 31 VCDR*).
- Diplomats are considered inviolable and not subject to arrest (*Article 29 VCDR*).
- Diplomats are immune from civil proceedings except in relation to private activities that are outside their official functions (*Article 31 VCDR*).
- Generally, a Diplomat's family will also enjoy the same immunities, provided they are not a citizen of the receiving/host State.
- The purpose of this immunity is to maximise efficiency in the conduct of international relations and diplomacy (*US v Iran*).
- The immunity belongs to the State, not the diplomat. Therefore, the immunity from jurisdiction of a diplomat may be waived by the sending State (*Article 32(1) VCDR*).

Consular immunity

- Consular officials are not immune from either criminal or civil jurisdiction of receiving/host State, unless action arises out of the performance of their official duties ([Article 43 VCCR](#)).
- Consular officials may not be arrested or detained, unless it is in relation to a 'grave crime'.

Head of State Immunity

- Heads of States (i.e. the Prime Minister or Queen) are immune from civil and criminal action by other States.
- Immunity of a former Head of State only extends to official functions undertaken whilst holding the position ([Pinochet's Case](#)).

Foreign Ministers

- Foreign ministers enjoy absolute immunity while in office, covering acts performed in both their public and private capacity ([Arrest Warrant Case](#)).
- It is necessary to ensure the proper and efficient conduct of a State's international relations and diplomacy, as foreign ministers have functions that make them representatives of the State.

D. INTERNATIONAL LIABILITY OF INDIVIDUALS

- If a State has jurisdiction to prosecute an offending individual, and the individual is not protected by an immunity, then that State may prosecute the offending individual in the State's domestic Court.

OR

- Where a State does not have jurisdiction to prosecute an individual, the International Criminal Court may have jurisdiction over the individual ([Article 25\(1\) Rome Statute](#)).
- The individual may be held criminally responsible and liable for punishment of the crime within the ICC's jurisdiction ([Article 25\(3\) Rome Statute](#)).
- The ICC has jurisdiction to prosecute an individual for crimes of genocide, crimes against humanity, war crimes and the crime of aggression ([Article 5 Rome Statute](#)).