

State Based Problem Question

1. Determine Existence of relevant International Law

- a. Treaty Law
- b. Customary Law

2. Is the state bound by this international law?

- a. If treaty, reservation to treaty?
- b. If customary international law, is the state a persistent objector?

3. Has there been a breach of the obligation?

- a. Treaty Breach – go to treaty interpretation etc.
- b. Customary International Law Breach
 - i. Mistreatment of Foreign Nationals
- c. Illegal Use of Force
- d. Justified use of countermeasures?

4. Does the ICJ (or similar) have jurisdiction?

- a. Only need to go here if facts are begging an answer.
- b. Example – reservation to ICJ jurisdiction.

5. Entitlement of Injured State to Bring Claim

- a. General State entitlement
- b. Diplomatic Protection
 - i. Nationality of Claims
 - ii. Exhaustion of Local Remedies

6. Responsibility of Breaching State

- a. Attribution of breach to State
- b. Any defences? (circumstances precluding wrongfulness)

7. Consequences of Breach

- a. Remedies for victim state
- b. Possible consequences for treaty – e.g. termination for material breach etc.

Individual Responsibility Problem Question

- 1. What is the crime(s)/tort(s) being prosecuted?**
- 2. Bases for Jurisdiction**
 - a. Territorial Principle
 - b. Nationality Principle
 - c. Protective (security) Principle
 - d. Passive Personality Principle
 - e. Universal Jurisdiction
- 3. Immunity from Jurisdiction**
 - a. Diplomatic Immunity
 - b. Foreign State Immunity
 - c. Head of State Immunity
 - d. Former Head of State Immunity
 - e. Other Ministers of State Immunity
- 4. International Liability of Individuals**
 - a. Rome Statute and the ICC
 - b. International Liability as Complementary to Municipal Jurisdiction
- 5. Extra Factors**
 - a. Illegally Obtained Custody
 - b. Duty of State to Prosecute

Topic One – Nature of Public International Law

Definition of International Law

International Law is a binding regime of principles and rules that regulates the relations among states, individuals and other non-state entities.

- Comprised of a system of customary law upon which a **superstructure** of convention or treaty-made law has been erected.
- International law is composed of **customary** rather than **formal** rules – this means states must obey them as a matter of individual impetus and obligation, not by any formal external mechanism of enforcement.

Key Debate: Legitimacy of International law as ‘real law’ – doctrine of state sovereignty and equality VS enforceability and practical implementation

- **State Sovereignty, Equality and Consent** – international law premised on the existence of states as the primary actors in international sphere.
 - All states are considered notionally equal no matter their relative power.
 - No state can be compelled by another to obey international law.
- **Complement to Plenary Freedom** – international law should be seen as a complement to the plenary freedom of independent action of states, not as giving rise to it. Merely seeks to regulate the nature of their interactions.
- **Limited Nature and Scope** – the laissez-faire nature of international law is an accident of history – international law only developed out of the necessity of 19th Century commerce and 20th Century – **only developed to the extent of necessity, not as a means to actively regulate.**
- **Advantages of State Sovereignty** – avoidance of compulsion, maintenance of domestic sovereignty and democracy, vitiates imperialism, morally acceptable in a primitive legal order.
- **Enforceability** – greatest criticism of international law is the lack of direct enforceability of the obligations and rights that it details:
 - No central legislative body to make automatically binding law.
 - Lack of a legitimate global enforcement mechanism.
 - Arbitration mechanism exists – decisions not enforceable.
- **Importance of Enforceability** – enforceability is just one aspect or characteristic of a legal system. It could be better understood as an indicator of the effectiveness of a **municipal** legal system.
 - **Observance** – observance rather than enforceability of international law should be the measure of its legitimacy and relative effectiveness.
 - **Self-Conscious Conformity** – norms and practices of international relations largely followed and conducted along legalistic lines to facilitate mutual convenience.
 - **Self-Regulation** – it is mutually convenient and beneficial for states to follow international law in the vast majority of cases simply because their own compliance, even if to its immediate detriment, promotes compliance by other states in their actions towards the original state.
- **International law is legitimate and effective to the extent of the jurisdiction of powers which it purports to regulate** – international law generally seeks to only codify the existing obligations and practices of states and prevent deviation from those obligations and practices.
- **Problems with universal State Consent** – persistent objectors, multilateral agreements become too general/vague/non-binding to promote state consent, withdrawal of parties based on inconvenience, voting blocs, relative inequality of power/influence of states under one state-one vote system.

International Legal Personality

Various entities have legal personality under international law. Not all entities have equal legal capacity under their personality in international law.

- Entities with international legal personality are:
 1. **States** – *Montevideo Convention*
 2. **International/intergovernmental organisations** – *Behrami v France*
 3. **Individuals** – *Rome Statute, Nuremberg Tribunal*
- Transnational corporations DO NOT have international legal personality, but are capable of recognition in international law – *Kiobel v Royal Dutch Petroleum*.

1. **States** – *Montevideo Convention* – Article 1

- **Montevideo Convention** de facto adopted as authority on statehood
- 'State' may be given a different meaning for purpose of an individual treaty.

A state needs to meet the following qualifications to be a state in international law:

a. **Permanent Population**

- Must have a specific group of people linked to a specific area.
- No lower limit on statehood – e.g. Vatican City/Nauru.

b. **Defined Territory**

- Definitive physical presence with sufficient consistency – exact boundaries can unclear/hazy – *Deutsche Continental Gas v Polish State*

c. **Government**

- Effective control over a defined area is the core requirement:
 - Stable political organisation with public authorities able to assert authority throughout territory without external assistance – *Aaland Islands Case*.
 - Stable political order nonexistent during civil war or collapse in law and order – *Aaland Islands Case*.

d. **Capacity to enter relations with other states**

- Decided on substance not form of the state. If relations are externally controlled in practice despite domestic mechanisms, then no capacity.
- **Failed States** – only states in form not substance – lost practical capacity to exercise the key indicators of statehood status.
- **General Rule** – requirements for statehood are high – i.e. burden to become a state is difficult to prove. Loss of statehood once gained is however generally only by express consent of the state. **Presumption of continuity of statehood**.
- **Acceptance of Statehood & International Law** – territorial entities can opt out of statehood – Taiwan. New states presumed bound by international law.
- **Independence of states necessary for Statehood** – independence of a state from external control is necessary for statehood.
 - **Influence vs Control** – **matter of degree** when influence exerted over another as normal aspect of international relations becomes a violation of sovereignty.
 - **Colonial Rebellion** – colonial people rebelling from metropole through insurgency will generally be recognised – e.g. Guinea Bissau.
 - **Rebel Force with International Help** - if external power only assists existing movement, then new state recognised, e.g. India with Bangladesh. If external power foments, then new state will not be recognised, e.g. Turkey-Cyprus.
 - **Austro-German Customs Union Case 1931**
 - Independence is impinged upon when the sole right of political, economic and financial decision making of the government is lost.

- Independence lost when a state's sovereign will is legally or formally subordinated to the will of any other power.
- ***French Indemnity of 1831*** – substance over form to determine independence.

2. **International/intergovernmental organisations**

- **Legal Personality** - set up by states and which holds a separate and independent legal personality to those states – ***Reparations for UN Service Case***.
 - Members of such an organisation can be states or other organisations.
 - NGOs are NOT international organisations.
 - Open/closed membership, regional/global in scope, general/specific function.
- **Rights and Obligations** – an international organisation with legal personality is the subject of international law, and is capable of possessing international rights and duties – ***Reparations for UN Service Case***.
- **Nature/Scope of Personality** – the nature and scope of an international organisation's legal personality is determined by reference to what is reasonably necessary for the organisation to fulfill its purpose – **form follows function**.
- **Right to Sue** – international organisations have the right to bring an international claim for the breach of international obligations – ***Reparations for UN Service Case***.
- **International Liability** – International organisations can be legally liable for wrongful acts under international law, even when carried out by agents – ***Behrami v France***.

3. **Individuals** – *International Military Tribunal (Nuremberg)*

- Individuals do have international legal personality, especially given the growth in international instruments that place obligations and rights on individuals.
- Individuals cannot bring a case in the ICJ however.

State Sovereignty

Sovereignty means the right to exercise within a certain territory, to the exclusion of any other states, the functions of a state.

Modes of Acquiring Sovereignty over Territory

1. **Cession** – one state willingly agrees to peacefully give territory to another state.
2. **Occupation** – for occupation, territory must be terra nullius prior to occupation.
3. **Prescription** – title to territory taken contrary to title of true or original owner by way of long term habitation and administration of the territory – **de facto becomes de jure sovereignty** – *Island of Palmas Case*.
 - **Occupation/Prescription** – key to attaining sovereignty by these methods is by **effective control** exhibited in **continuous and peaceful displays of authority** over territory – *Island of Palmas Case*.
4. **Discovery** – only gives **inchoate/embryonic title** that must be **improved** to acquire actual sovereignty – must be a **practical manifestation of sovereignty** in order to gain it. Unclear and questionable under international law – *Island of Palmas Case*.
5. **Conquest** – use of force to acquire territory is unlawful, but effective..
6. **Accretion/Avulsion** – growth/diminishing of territory by natural processes.

Elements of Acquiring Sovereignty

1. **Superior Title** - Need to determine which state holds a **superior title** to the land – *Island of Palmas Case*
2. **Formal Agreement** – a treaty between nations that prescribes sovereignty as a matter of international law will generally take precedence – *Frontier Land Case (Bel v Neth)*
3. **Continuous and peaceful displays** of territorial sovereignty through acts of:
 - a. Public administration,
 - b. Exercises of state power, and
 - c. Demonstrations of authority over landwill defeat any other claim to territory, whatever the basis of that claim - *Palmas*
4. Meaning of **Peaceful displays of authority** – *Island of Palmas Case*:
 - No protest by other interested states - physical dispute or diplomatic effort to contest sovereignty.
5. **Critical Date** – point in time at which the dispute over an area is crystallised between states. An arbiter cannot consider any facts after this date in determining sovereignty, except those part of continuous process of administration – *Island of Palmas Case*.
6. Meaning of **Continuous displays of authority**:
 1. Must be **intention/will** to act as sovereign over territory – *Western Sahara Case*
 2. Must be some **actual exercise or display** of authority – *Western Sahara Case*
 3. Some flexibility allowed – territory only needs to be subject to intermittent displays of sovereignty – need **sufficient consistency** – question of fact – *Palmas*.
7. **Inchoate Title** - Continuous displays of authority will prevail over an inchoate title created by mere discovery or sighting - *Palmas*
8. **Terra Nullius** – if a territory is inhabited by people with any form of social or political organisation, then the territory is NOT terra nullius – *Western Sahara Case*.
9. **Contiguity** – contiguity is a highly questionable and unreliable means of establishing sovereignty – *Island of Palmas Case; Western Sahara Case*.
10. **Individual Ties** – ties between individuals and a territory do not establish sovereignty. Must be an exertion of **political authority**.

Law of the Sea

The **United Nations Convention on the Law of the Sea 1982** is the treaty governing the state sovereignty over portions of the sea. It has been almost universally accepted in practice .

Critical Points About Law of the Sea regarding State Sovereignty

- **Territorial Sea** – extends 12nm off coast. State has almost equivalent rights in this area as they have on land.
- **Contiguous Zone** – 12-24nm off coast. State can enforce customs, fiscal, sanitary and immigration laws in this area.
- **Exclusive Economic Zone** – up to 200nm off coast. State has ownership over living and non-living resources in this area.
- **Continental Shelf Zone** – states own seabed and subsoil to edge of the shelf.
- **The High Seas** – Area of ocean open to free use by all states and actors thereof. Owned community by all. Largely unregulated.
- **The Deep Sea Bed** – seabed beyond national jurisdiction by managed by international organisations – International Sea Bed Authority. Regarded as common heritage of all mankind.

Sovereignty over Airspace

The **Chicago Convention on International Civil Aviation 1944** is the governing multilateral treaty regarding state sovereignty over airspace. There are a number of relevant provisions:

- **Article 1** - States have exclusive sovereignty over airspace above their territory.
- **Article 3** - Convention only applies to civil aircraft, not state aircraft. State aircraft may not fly in airspace of another state without authorization of that state. States must regard the safety of all civil aircraft flying through their airspace in regulations.
- **Article 3 bis** - States must refrain from using weapons on civil aircraft. States may require an aircraft flying in its airspace to land and may give instructions to aircraft.
- **Article 5** - Generally, civil aircraft do not require express permission to fly into another state's airspace, but a state may require such permission for a reasonable purpose.

Sovereignty over Antarctica

The **Antarctica Treaty 1959** is the governing multilateral instrument. It includes:

- **Article 1** - Antarctica to be used for peaceful purposes only. No military acts.
- **Article 4** - 1959 treaty does not affect any existing claim of sovereignty by a party to the treaty. No further acts asserting sovereignty in Antarctica may occur.
- **Article 5** - Nuclear explosions or disposal of nuclear waste in Antarctica is prohibited.
- **Article 6** - Treaty applies to land or ice shelves below 20 degrees South, not sea.
- **Article 8** - Provision made for parties to come together and come to a mutually agreeable solution when a dispute arises surrounding Antarctica

Recognition of States and Governments

*Recognition of a foreign government as the legitimate government of a state **is determined by courts based on the facts of each case**, and not the position of the executive government in relation to the foreign government. Whether a government will be recognised by a court will generally turn on whether that government has effective control of the state. **Remember the nuanced difference between recognising a state and recognising a government.***

Declaratory vs Constitutive Theories of Recognition

- **Declaratory** – a state can exist in fact without actually being recognised by other governments so long as it meets certain criteria. If so, it has the right to be treated as a state and have the legal personality of a state.
- **Constitutive** – only through recognition by other states can a state be classified as an international legal person.
- **Balance of Opinion** – Declaratory theory is the **legal** means of determining statehood and is most widely accepted. Constitutive theory is really only useful for political purposes, especially leveraging of states and access to international forums.

Modes of Recognition

- **No single method** – recognition can be express or implied through actions.
 - Entry into a bilateral treaty implies recognition, admission to UN implies widespread recognition.
- **Intention** – if a state interacts with an entity with the **express intention** that the interaction does not mean implied recognition, then recognition does not occur.
- **Retroactive Recognition** – recognition may be granted retroactively by states to other states if politically or legally convenient.

Principles for Recognition of Foreign Governments

*In deciding whether a government of a foreign state should be recognised, courts are not to adopt any 'official' position taken by the executive government. Instead, they must look at the **substance of the government's administration and foreign dealings** and decide for themselves. The executive government should follow the ruling of the court.*

- Factors to be considered whether a government exists as the government of a state – ***Somalia v Woodhouse Drake Carey Suisse SA; Sierra Leone Telecommunications***:
 - a. Whether it is the **constitutional government**
 - b. **Degree/nature/stability of administrative control** that government exercises of the territory of the state.
 - Exercising administrative control is to hold all the functions of maintaining law and order and courts, and adopting or imposing laws regulating the inhabitants and government of the territory.
 - c. Whether **other governments have dealings** with it and the nature of those dealings.
 - d. In marginal cases, **extent of international recognition** of the government.
 - Important and can be considered, but is not determinative.
- Once recognition is given, that recognition is effective retroactively back to the point when the recognised government established itself – ***Luther v Sagor***.
- Unrecognised governments do not have standing in foreign courts – ***Luther v Sagor***
- Courts should not enforce or recognise the laws of an unrecognised government – ***Luther v Sagor***

Australian Policy on Recognition

Australian government position is that DFAT stays silent when a new government comes to power and leaves it to courts to decide whether a government is well established enough to be recognised as the need arises. Australian only interacts as is necessary in any one case.

Self-Determination and Unilateral Declarations of Independence

Self-determination is the principle that the political future of an ex-colonial or similar non-independent territory should be **determined by the wishes of the territory's inhabitants**, within the constraints of *uti posseditis* (the principle that a new territory's borders should remain the same as that which it had when a non-independent territory).

- Self-determination is a ***jus cogens*** norm of international law – there is no derogation allowed from it whatsoever.
- It is also ***erga omnes*** in that it is an obligation owed to all people and all states.
- The **Declaration on the Granting of Independence to Colonial Territories and Peoples 1960** established that the right of self-determination was a permanent and substantive element of international law.
 - All people have the inalienable right to self-determination – may freely determine their political status and pursue economic/social/cultural development.
 - Delaying independence cannot be excused by lack of political/economic/social preparedness.
 - No armed action or suppression of dependent people.
 - Imperial states must take action to transfer control to people of dependent territories.
 - **Resolution 1514** – independence to be achieved within the existing territorial boundaries.

Principles of Self-Determination

- UN Resolutions have made self-determination the objective of all non-self-governing territories – ***Western Sahara Case***.
- For self-determination to be valid, needs a free/genuine expression of democratic will.
- **Three possible outcomes** of an expression of self-determination:
 - Emergence as a sovereign independent state
 - Free association with another independent state
 - Integration within an independent state.