

SAMPLE: QUICK REFERENCE GUIDE

WEEK THREE: INTERNATIONAL AND DOMESTIC LAW

Monism and dualism; incorporation and transformation; influence on domestic law.

Page 11 **(a) Practical Problems and Theoretical Considerations**

Discussion: theories of dualism and monism

Page 12 Case: Libyan Arab Jamahiriya v UK (Lockerbie Case)

- Art 103 of the UN Charter claims that UN resolutions prevail over any other international agreement.
- Inability under domestic law to act is not a defence to non-compliance

(b) Municipal Law in International Law

Discussion: how municipal law influences international law

Page 13 Case: The Alabama Arbitration

- International law is superior to domestic law in an international tribunal

Case: Arbitration between Sandline International and Papua New Guinea

- An agreement between a private party and a state is an international and not a domestic contract

(c) Customary International Law in Municipal Law

i) Incorporation or Transformation?

Discussion: blurred lines of incorporation and transformation

Page 14 *Discussion: the implementation of international law in domestic courts*

- Two questions to determine
 1. *What is the precise content of the purported rule of Customary International Law?*
 2. *Have the necessary constitutional and legislative processes been met under which international law can be received into national law?*

SAMPLE: DETAILED NOTES

WEEK FIVE – TITLE TO TERRITORY

Methods of acquiring title to territory; extent of land and maritime territory

State Sovereignty over Territory

- After the period of colonial expansion most territorial claims concern insignificant islands or strategic interests regarding natural resources.
- Traditional modes of acquisition are: Occupation of terra nullius, Prescription, Cession, Accretion and Conquest. However, international tribunals have tended to ignore these categories and rely on overlapping modes.
- Boundary disputes, while having the effect of recognising territorial sovereignty, are essentially matters of treaty interpretation rather than relying on the principles of acquisition.
- Determination by a tribunal that title rests with one state rather than another cannot foreclose the rights of a third state. Yet in practice, this has not been contested and a decision by a tribunal effectively grants sovereignty.

Effective Occupation and Control

<i>Effective Occupation and Control</i>	
<i>Island of Palmas (Netherlands v US)</i>	
<p>Mere discovery is insufficient.</p> <p>Continuous display of state functions is a flexible term, specifically in the case of isolated territory.</p> <p>Absence of protest by other states was influential</p>	<p><u>Facts</u> After the Spanish-American war, Spain ceded Philippines including an island called Palmas island to the US. US thought they had sovereignty over the island but US officials discovered the Dutch there. Dutch claim rested on the treaties negotiated by the Dutch East Indian Company. Dutch held title</p> <p><u>Reasoning</u></p> <ul style="list-style-type: none"> • Mere discovery is insufficient • There were no traces of Spanish activity yet the Dutch had demonstrated a peaceful, continuous display of authority e.g. taxing the local people and distributing the coat of arms (relatively nominal). • Huber recognised that ‘continuous’ display of state functions is a flexible term, specifically in the case of isolated territory. • Relevant evidence of social functions were close to the time of the dispute • Absence of protest by other states was influential
<i>Eastern Greenland (Denmark v Norway)</i>	
<p>Continued display of authority involves two elements: the intention and will to act as sovereign and some actual exercise or display of sovereignty.</p> <p>Limited settlement can be countered by display of more comprehensive acts of occupation.</p>	<p><u>Facts</u> Norway issued a Royal Resolution claiming part of the east coast of Greenland under Norwegian sovereignty. They based this claim on history of Norwegian activities limited to fishing and hunting. Denmark made an application claiming sovereignty over all of Greenland based on continuous and peaceful occupation (despite limited settlement in east Greenland). Denmark held title.</p> <p><u>Reasoning</u></p> <ul style="list-style-type: none"> • Continued display of authority involves two elements: the intention and will to act as sovereign and some actual exercise or display of sovereignty. • Denmark’s administrative hunting and fishing regulations and scientific, mapping and exploratory expeditions fulfilled these requirements. • The court was unconcerned with the lack of Danish coastal settlements in Eastern Greenland believing that Denmark was able to show more comprehensive acts of occupation

- It is questionable whether the two limbs of the Eastern Greenland decision are in fact distinct. However, it does prove that the activities must have been undertaken on behalf of the state and not as private acts (Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia))
 - There is an exception where private persons have been given a mandate to claim territory by their sovereign and is acting 'a titre de souverain'.
- State activities have a relative rather than absolute value and the weight accorded them depends upon the strengths of the counter-balancing activities advanced by the opposing state.

Title to Territory	
Western Sahara (Advisory Opinion)	
Occupation is not grounds for sovereignty if land is inhabited by tribes or people with social and political organization (not terra nullius)	<p><u>Facts</u> Western Sahara had been colonised by Spain in 1884. In 1966 the General Assembly invited Spain, Morocco and Mauritania to hold a referendum to enable the people to exercise their right to self-determination.</p> <p>Before this, however, Morocco and Mauritania made overlapping claims to the area based on historic title. Two questions were asked:</p> <ul style="list-style-type: none"> • At the time of Spanish colonisation was the land terra nullius? • What were the legal ties between Western Sahara and Morocco and Mauritania? <p>Neither Morocco nor Mauritania held title over the land</p>
Contiguity title claims have no standing in international law	
Legal ties are not equivalent to established ties of territorial sovereignty	<p><u>Reasoning</u></p> <ul style="list-style-type: none"> • This was the first decision that did not award title to any state • At the time of Spanish colonisation, the land was not considered terra nullius, the nomadic tribal inhabitants were deemed to have had sufficient social and political organisation to constitute an administrative authority. This was backed by the fact that Spain took protection of the area on the basis of agreements with the chiefs. • Legal ties were found between the tribal leaders of the Western Sahara region and the sultan of Morocco, however these relations were not sufficient to claim effective control and therefore sovereignty. • The court acknowledged that its opinion on the question of historic title should in no way be seen as detracting from the fundamental right of self-determination of the people of Western Sahara and ordered the referendum continue to take place
Self-determination is an ultimate objective of UN Charter	

- Inter-temporal law claims that the acts must be judged according to the law contemporaneous with them. Huber added a controversial second limb that rights validly acquired may be lost if they are not maintained in accordance with evolving international law.
- The critical date is the date at which the dispute has crystallised between competing claims. It is important in ensuring states have not embarked on activities with the purpose of improving its legal position.
- Where both states claim title on longstanding historical grounds, it may be necessary to allow evidence over the whole period (Miniquers and Ecrehos – the ICJ considered evidence from feudal times but gave greater weight to evidence from the period at which the dispute arose).
- Evidential factors
 - Recognition by other states is persuasive. Recognition by the competing state is powerful evidence of title (Temple of Preah Vihear)

SAMPLE: ESSAY GUIDE

LAWS5005 PUBLIC INTERNATIONAL LAW FINAL EXAM – ESSAY GUIDE

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WEEK TWO – SOURCES OF INTERNATIONAL LAW

ICJ Statute; treaties; customary international law; judicial decisions; soft law; jus cogens

- Page 5 **Sources of International Law**
Discussion: considerations around opinion juris and problems in practice
- Page 9 **ii) Judicial Decisions and Academic Writings**
Discussion: role of juristic writers in influencing judicial decisions
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- Page 11 **(a) Practical Problems and Theoretical Considerations**
Discussion: theories of dualism and monism
- Page 12 **(b) Municipal Law in International Law**
Discussion: how municipal law influences international law
- Page 13 **(c) Customary International Law in Municipal Law**
i) Incorporation or Transformation?
Discussion: blurred lines of incorporation and transformation
- Page 14 *Discussion: the implementation of international law in domestic courts*
- Page 17 **(d) Treaties and Resolutions of International Organisations in Municipal Law - i) The Treaty-making Process**
Discussion: Australian treaty-making processes have been subject to wide criticism for the lack of transparency and consultation between executive and legislative arms. (Constitutional powers, concerns, reforms, other proposals)
- Page 19 *Discussion: Constitutional and Legislative Considerations in Australia*
- Australia has ratified most multilateral human rights treaties but in legislating, has made them benchmarks rather than justiciable rights
 - In *Dietrich v R*, the High Court chastised the federal government for exposing the nation to the risk of censure by the UNHRC