LexisNexis Workbook

Public International Law

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LexisNexis Butterworths
Australia
2019
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Acknowledgements

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Sarah Heathcote
March 2019
# Table of Acronyms

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<tr>
<td>ASR</td>
<td>Articles on the Responsibility of States for Internationally Wrongful Acts</td>
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<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<td>COP</td>
<td>Conference of the Parties</td>
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<tr>
<td>CPW</td>
<td>Circumstances Precluding Wrongfulness</td>
</tr>
<tr>
<td>CSCE</td>
<td>Conference on Security and Cooperation in Europe</td>
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<td>DARIO</td>
<td>Draft Articles on the Responsibility of International Organizations</td>
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<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>ECtHRs</td>
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<td>ELR</td>
<td>Exhaustion of Local Remedies</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>ICC</td>
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<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>International Convention on the Elimination of Racial Discrimination</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IFRC</td>
<td>International Federation of Red Cross and Red Crescent Societies</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IWA</td>
<td>Internationally Wrongful Act</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>Full Citation</td>
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<tr>
<td><strong>NIA</strong></td>
<td>National Interest Analysis</td>
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<td><strong>NIS</strong></td>
<td>Newly Independent State</td>
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<td><strong>NGOs</strong></td>
<td>Non-governmental organizations</td>
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<td><strong>NSGTs</strong></td>
<td>Non-Self-Governing Territories</td>
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<td><strong>NSA</strong></td>
<td>Non-State Actor</td>
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<td><strong>OPT</strong></td>
<td>Occupied Palestinian Territories</td>
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<tr>
<td><strong>PCA</strong></td>
<td>Permanent Court of Arbitration</td>
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<td><strong>PCIJ</strong></td>
<td>Permanent Court of International Justice</td>
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<td><strong>R2P</strong></td>
<td>Responsibility to Protect</td>
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<td><strong>UN</strong></td>
<td>United Nations</td>
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<td><strong>UNCLOS</strong></td>
<td>United Nations Convention on the Law of the Sea</td>
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<td><strong>UNGA</strong></td>
<td>United Nations General Assembly</td>
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<td><strong>UNSC</strong></td>
<td>United Nations Security Council</td>
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<td><strong>UNTA</strong></td>
<td>United Nations Transitional Administration</td>
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<td><strong>UNTS</strong></td>
<td>United Nations Treaty Series</td>
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<td><strong>US</strong></td>
<td>United States of America</td>
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<td><strong>VCLT</strong></td>
<td>Vienna Convention on the Law of Treaties</td>
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<td><strong>VCSS-T</strong></td>
<td>Vienna Convention on State Succession in Respect of Treaties</td>
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<tr>
<td><strong>WMD</strong></td>
<td>Weapons of Mass Destruction</td>
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<td><strong>WTO</strong></td>
<td>World Trade Organisation</td>
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**Australia**

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**Germany**

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United States

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Anglo-Iranian Oil Company case (1952)  Anglo-Iranian Oil Co case (jurisdiction), Judgment of July 22nd, 1952: ICJ Reports 1952, p 93

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**International Criminal Tribunal for the Former Yugoslavia**

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**European Court of Human Rights**

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<td>The Revised General Act for the Pacific Settlement of International Disputes (28 April 1949) 71 UNTS 101</td>
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### UN Convention on Jurisdictional Immunities of States and Their Property (2004)


### UNCLOS (1982)


### VCLT (1969)


### VCLT (1986)

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, opened for signature 21 March 1986, UN Doc A/Conf 120/15

### VCSS-T (1978)


### Vienna Convention on Diplomatic Relations (1961)

Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 45 (entered into force 24 April 1964)

### UN General Assembly Resolutions

- **ASR (2001)**

- **Definition of Aggression (1974)**
  - Definition of Aggression, United Nations General Assembly Resolution 3514 (XXIX), 14 December 1974, UN GAOR, 29th Session, Supplement 31, 142

### Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), UN GAOR, 25th Session, 1883rd Plenary Meeting, 121 UN Doc A/8082 (1971)

### The Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly Resolution A/RES/37/10 (15 November 1982)

### Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), UN GAOR, 15th Session, 947th Plenary Meeting, 66, UN Doc A/RES/1514(XV) (1960)

### Principles which should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 of the Charter, General Assembly Resolution 1541 (XV), UN GAOR, 15th Session, 948th Plenary Meeting, 29, UN Doc A/RES/1541(XV) (1960)

### United for Peace, General Assembly Resolution 377 (V), UN GAOR, 5th Session, Supplement 2, 10, UN Doc A/1775 (1950)

### World Summit Outcome (2005)

- World Summit Outcome A/RES/60/1 (24 October 2005)

### UN Security Council Resolutions

- **Resolution 678 (1990)**
  - Security Council Resolution 678, UN SCOR, 45th session, 2963rd meeting, 27, UN Doc S/RES/678 (1990)

- **Resolution 687 (1991)**

- **Resolution 841 (1993)**
  - Security Council Resolution 841, UN SCOR, 3238th meeting, UN Doc S/RES/841 (1993)
International Law Commission


Books

Olivier Corten, Law Against War, Hart Publishing, 2010


Sundry


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**How to use this book**

This Workbook is designed to help students understand the structural features of the international legal system and can accompany any general course on public international law. It begins with a series of short answer quizzes which test understanding of the core areas of international law. Part Two of the Workbook consists of problem-based questions enabling students to actively apply their knowledge to fictitious, if generally not too improbable, scenarios. Answers to the quizzes, as well as worked answers to the problem-based questions are provided. Finally, Part Three of the Workbook provides some tips on how to approach essay questions and exams in international law.

Students will invariably have enough skills a few weeks into a course to start the quizzes, either with the chapter on 'Subjects of International law', or the one on 'Sources of International law' depending on how their own university course is structured. Each quiz chapter should take no more than an hour or two to complete assuming prior revision of topics, but opportunity for further reflection is accommodated as some questions are deliberately open-ended. Completing the quizzes with a group of friends might be a fun way of covering the material.

Mid-way through an international law course, students should have the knowledge to begin the problem-based questions. Topics covered by each problem-based question, as well as the approximate time for their completion, are both indicated. Problems 1-4 resemble tutorial questions and should be done slowly to consolidate knowledge and develop problem-solving technique, whereas the last three (Problems 5, 6, and 7) are best answered under open-book exam conditions. They are in some respects easier than the tutorial style problems though covering a broader range of matters – and so could best be attempted as exam preparation at the end of a course.

The Workbook uses abbreviations for cases and instruments for ease of readership but students will find a table in the front material matching the abbreviations of cases and instruments with full formal references. With the exception of the United Nations Charter and Statute of the International Court of Justice, if a reference to a treaty or other instrument is not in italics, it is fictitious.
Part 1

Topic Quizzes
Chapter 1

The Subjects of International Law

Who are the relevant actors of the international legal system? This is the question of the subjects of international law and the legal system itself determines the answer to that question. Having defined 'subject' for the purposes of the international legal order, attention can turn to the nature and role of the State, the legal system's principal subject, but also the nature and role of international organizations, as well as those entities that enjoy a degree of legal personality under international law, such as the individual, including the investor.

1. On the basis of the International Court of Justice (ICJ) decision in the Reparation for Injurious advice opinion (1949):
   a. A subject of international law is both the beneficiary of rights and obligations under international law but also has the capacity to exercise those rights, including the capacity to bring a claim.
      i. True
         ii. False
   b. To be a subject of international law, it is sufficient to be the beneficiary of rights and obligations.
      i. True
         ii. False
   c. The subjects of international law are not equal. The State, for example, can do all things – such as conclude a treaty on any subject matter – but international organizations have limited personality and only have capacity to do fewer things.
      i. True
         ii. False
   d. The limits of an international organization's legal personality (or capacity) are found in its constituent instrument – either expressly or by implication.
      i. True
         ii. False
2. If you worked for the United Nations (UN) as a peacekeeper, would the UN be able to bring a claim on your behalf if you were unlawfully injured during a peacekeeping operation (as opposed to your State of nationality alone having the capacity to bring the claim)?
   a. Yes
   b. No

Whether it is your State of nationality or the organization bringing a claim in this way, it is called 'diplomatic protection'. This is not to be confused with diplomatic and consular relations. Also, be careful not to confuse the question of the UN's responsibility for the unlawful activities of its agents — which is the question of the responsibility of international organizations.

3. A State for the purposes of international law has a technical meaning that can depart from the ordinary meaning of the word.
   a. True
   b. False

4. The 1933 Montevideo Convention on the Rights and Duties of States is:
   a. A treaty applicable to Australia, or
   b. A useful reference point in which to find listed the constitutive elements of Statehood (ie the conditions for an entity to be a State).

5. Contemporary international law, as reflected in both in the 1933 Montevideo Convention and the 1991 Arbitration Commission on Yugoslavia, Opinion No 1, does not include recognition as a requirement of Statehood. Recognition is thus considered 'declaratory' rather than 'constitutive' (ie a condition) of Statehood.
   a. True
   b. False

6. In the Aaland Islands decision (1920), the Committee of Jurists decided that Finland had not emerged as a new State in 1917 (the year of the Russian Revolution) because there was an 'absence of stable political organization' ie government.
   a. True
   b. False

7. When one of the constitutive elements of the State collapses, such as the government in Somalia, does that put an end to the State?
   a. Yes
   b. No

8. A State's population will be comprised primarily of nationals. The question of who is a national is a matter of domestic jurisdiction; meaning that it falls to each State to determine who is a national and third States are prohibited from interfering in that decision: see article 2(7) UN Charter and Nicanor case (1986).
   a. True
   b. False

9. List what you consider to be the constitutive elements of Statehood. Include all necessary nuances and make sure your definition is anchored both in the law and in the reality of State practice (which should be approximately the same thing — as we will see in the chapter on 'Sources of International Law' below).

10. Which of the following are States for the purposes of international law and if not, why not?
    a. The Sovereign Order of Malta
    b. The Holy See
    c. The Vatican City
    d. Taiwan

11. Why were neither the puppet State of Manchuko (created by Japan in 1931 following its invasion of Manchuria in China), nor Transkei (created by South Africa in 1976 under its Bantustan or 'Homeland' policy to perpetuate apartheid) ever considered States? Does this tell you something about the relevance of the maxim ex injuria jus non oritur to international law?

12. The reference in article 1(d) Montevideo Convention (1933) to the 'capacity to enter into relations with the other States' as a constitutive element of Statehood — which does not appear in the Arbitration Commission on Yugoslavia, Opinion No 1 (1991) definition — might best be seen to mean a requisite relationship of immediacy between the State and international legal order, thereby distinguishing the sovereign State as a legal subject from provinces or 'States' within a federation (which might otherwise meet the
13. Recognition is a discretionary and therefore political act of cognisance that has legal consequences.
   a. True
   b. False

Where does that leave ex injuria jus non oritur?

14. Recognition can apply to many things, such as: a State, a government (one of the State's constitutive elements), or a situation of belligerency.
   a. True
   b. False

15. Recognition can never be implied or retroactive.
   a. True
   b. False

16. A treaty concluded by the Obama Administration remains binding on the United States despite the change of administration since the election of Donald Trump as US President: see the Tieno Claims (1923).
   a. True
   b. False

17. Recognition of a government enables a State to know (pick the correct answer(s)):
   a. Who represents the State internationally
   b. Who to approach if a matter of State responsibility arises
   c. Who benefits from privileges and immunities

   a. True
   b. False

What is the advantage of this approach?

19. Sovereignty is a norm of jus cogens (a peremptory norm from which no derogation is allowed: Jurisdictional Immunities case, 2012).
   a. True
   b. False

   a. True
   b. False

21. What do we mean by sovereignty equality – for instance, that Nauru is the equal to the United States?
   a. Equality of power
   b. Equality before the law
   c. Equal capacity in law to perform all the functions of a State and engage in any matter of international law

22. Sovereignty is often described as consisting (in part) of plenary competence or 'full jurisdiction and control'. This means (pick the correct answer(s)):
   a. States can do everything subject only to international law
   b. States can do everything regardless of international law – even international law itself acknowledges that domestic law takes priority over international law
   c. States can do everything subject only to international law – a small number of domestic legal systems might seek to assert the hierarchy of domestic over international law, but from the perspective of international law, international law always takes the priority

23. A human rights 'treaty body' is set up by a treaty (an agreement between States) but might be administered by the United Nations. Human rights treaty bodies are quasi-judicial in nature. Examples are (pick the correct answer(s)):
   a. The Human Rights Committee which has oversight of the International Covenant on Civil and Political Rights (ICCPR, 1966)
   b. The Human Rights Council which has oversight of all human rights obligations binding on a State
   c. CERD which has oversight of the International Convention on the Elimination of Racial Discrimination (ICERD, 1965)

24. A human rights 'Charter Body' is an organ of the United Nations (so part of the organization's structure) established to administer human rights obligations arising under any source of international law. These bodies can be quite political. Charter Bodies include (pick the correct answer(s)):
   a. The Human Rights Council
   b. The (now defunct) Human Rights Commission
   c. The European Court of Human Rights

25. Non-governmental organizations (NGOs) are created under domestic law rather than international law and their international legal personality is extremely limited under international law, indeed it is generally negligible.
with a couple of exceptions such as the ICRC and IFRC, which enjoy a special status.

a. True
b. False

26. Self-determination in the sense of independence or free association with a State is a right attaching only to ‘People’ in situations of colonial dependence, apartheid or unlawful foreign occupation (UN General Assembly Resolutions 1514 (1960), 1541 (1960) and 2625 (1970)) but probably not to groups suffering egregious human rights violations (so-called ‘remedial secession’).
a. True
b. False

27. Placement by the UN General Assembly’s Special Committee on Decolonisation of a territory on the list of Non-Self-Governing Territories (NSGTs) confirms that the territory has a right to self-determination including independence. Indeed it could be considered constitutive of that right.
a. True
b. False

28. The ICJ in the Kosovo advisory opinion (2010) stated that a declaration of independence was more than a mere fact for the purposes of international law.
a. True
b. False

29. A people with a right to self-determination within the meaning of UN General Assembly Resolution 1514 (1960) have a right to territorial integrity of the NSGT: Chagos advisory opinion (2019).
a. True
b. False

**Acquisition of Title to Territory**

30. In establishing title to territory, a State need not establish absolute title, only better title than that put forward by another State: Island of Palma award (1928).
a. True
b. False

31. In assessing whether a State acquired title to territory in the seventeenth century by way of conquest, one must apply today’s rules of international law relative to the use of force – this is the principle of inter-temporal law: Island of Palma award (1928).
a. True
b. False

32. Acquisition of title by effective occupation requires (pick the correct answer(s)):
   a. That the territory be a terra nullius, AND
   b. That there be an animus (intention) together with a corpus (acts of occupation), AND
   c. That the intensity and nature of the acts of occupation be relative to the remoteness and accessibility of the territory, AND
   d. That the acts be carried out à titre de souverain (as State acts), AND
   e. That the acts be public

   Name two important pre-1950 cases that deal with effective occupation.

33. Contiguity is a root of title (with the exception of accretion).
a. True
b. False

34. Both a cession (a root of title) and a secession (a fact, which may or may not precede a cession), lead to a State succession.
a. True
b. False

35. Acquisitive prescription is a situation where de jure title to territory is displaced by de facto peaceful occupation by another State over a territory, for a long period, uncontested, and à titre de souverain. It is not controversial.
a. True
b. False

**State Succession**

36. A State succession is the replacement of one State for another in the responsibility for the international relations over a given territory.
a. True
b. False

37. The principle uti possideit juris means that an internal administrative boundary of a predecessor State becomes the international boundary after independence. It cannot apply outside the colonial context.
a. True
b. False
38. Is Russia the continuator State or successor State of the Soviet Union? What of Serbia in respect of Yugoslavia?

39. A Newly Independent State is a term used for all successor States.
   a. True
   b. False
   Explain

40. A successor State automatically succeeds to the membership of the international organizations of the predecessor.
   a. True
   b. False
   What are the ramifications for an independent Scotland or Catalonia in respect of membership of the European Union?

Answers: The Subjects of International Law

1. a. i. Note that capacity to bring a claim is separate to the question of the existence of a body to which that claim can be brought—access to judicial and arbitral bodies being relatively rare in international law.
   b. ii. The whole benefits from rights by virtue of international law and so is an object of that law, but it does not have the capacity to exercise those rights—eg bring a claim—and so is not a subject.
   c. i
   d. i
   c. ii
   2. a
   3. a
   4. b
   5. a
   6. a. Kosovo and the OPT might be similar in that a government in effective control seems to be tenuous (to a lesser and greater degree respectively), but it is crucial to note that in the case of the OPT, the Palestinian people benefit from a right of self-determination—on which see below Question 26.
   7. b. Certainly the conclusion will not be drawn easily that the State no longer exists. This has ramifications for those Pacific Island States whose "territory" is threatened by climate change and rising sea levels.
   8. a
   9. Briefly, the constitutive elements of Statehood are: a government in effective control of a territory (some of which is a natural part of the earth's surface), and a permanent population. Recognition can play a role in marginal cases—such as Germany's recognition of Croatia (even if, arguably, Germany was in breach of the prohibition on non-interference by prematurely recognising Croatia as independent from Yugoslavia). It may well be that a State that has emerged in contravention of fundamental principles of international law, such as apartheid or through aggression, will be precluded as a matter of law from emerging as a State. See further the answer to Question 11 below.
   10. a. Not a State since no territory
       b. Not a State since no territory
       c. Not a State since no permanent population (though some do in fact consider the Vatican City to be a State)
       d. Taiwan is de jure the same entity as the People's Republic of China; the question being who is the lawful government. However, de facto Taiwan operates in a number of spheres independently as a non-State entity, for instance as a customs union in the WTO.
11. Both were created contrary to fundamental principles of international law, respectively the prohibitions on aggression and apartheid, which today would be characterised as breaches of jus cogens norms (also called peremptory norms, which is to say norms from which no derogation is permitted: Jurisdictional Immunities case, 2012). These illustrations suggest that the principle ex injuria jus non oritur (essentially that legality cannot arise from illegality) holds some sway in international law. Another way of saying this is that 'legality' takes priority over 'effectivety' (the factual situation or reality). This may not always be the case, at least on the ground, and there is arguably a constant tension between legality and effectivety in international law. See, for instance, Question 13 below.

12. a
13. a. Discretion is not arbitrariness. Nonetheless, if recognition is discretionary, then it is political and need not in all circumstances be consistent with international law, in which case, ex injuria jus non oritur (legality) cedes to ex fata jus non oritur (effectivety) and the factual situation will take priority over the legal one – at least on the ground. Formalists will say that this effectivety alone does not alter the legal position – the law is merely not being respected. Pragmatists will argue that international law must take cognisance of effective situations.

14. a
15. b
16. a
17. All three
18. Activities such as the delivery of humanitarian aid can be made to a State after a coup, without the delivery constituting implied recognition of the new regime.

19. b
20. b
21. b and c
22. a (although some would argue 'a' is incorrect – that is the debate around 'abuse of rights') and c
23. a and c
24. a and b
25. a
26. a
27. a
28. b
29. a
30. a
31. b

32. a-c (all propositions are correct). Two relevant cases are the Island of Palmas award (1928) and the Eastern Greenland case (1933).
33. b The reverse is true.
34. a
35. b. It is controversial, though the conditions should it exist, are correctly listed.
36. a
38. Russia is a creator State (it has the same legal personality) and Serbia is a successor State (there is a novation).
39. b. A Newly Independent: State is a former colony.
40. b. Both an independent Scotland and Catalonia would have to apply for European Union membership, something likely to be vetoed by Spain (in both cases regarding Scotland, because of the precedent it would set).
Chapter 2

The Sources of International Law

The formal sources of international law are the means of creation of international law. The question of sources is at one level straightforward: the principal modes of law formation are treaties and customary international law. However, the conditions to which each of the sources are subject, the question of what other methods of law creation might exist, and the interaction between the various sources raise difficult issues, all of which are crucial to understanding what is positive (ie created) law and what is merely the allegation of it.

1. A source of law is a means of creation of law (formal source) or, either the location or rationale of a rule (material sources), but generally when we refer to a 'source of law' we mean a formal source.
   a. True
   b. False

2. The 2018 US decision to 'dump' the 'Iran nuclear deal' without adhering to the terms of the dispute settlement procedure was:
   a. A breach of treaty
   b. A breach of a UN Security Council resolution

3. Does one find a list of sources in all of article 38 of the Statute of the International Court of Justice (ICJ Statute) or just in its article 38(1)?
   a. All of article 38 ICJ Statute
   b. Just article 38(1) ICJ Statute

4. A rule emanating from a treaty is as much law as a rule emanating from a customary source and to that extent there is no hierarchy of sources.
   a. True
   b. False

5. A treaty is generally (but not always) in written form and, as such, its existence is easier to prove than a customary rule. This means there is in
practice a certain hierarchy of sources: one will apply treaty law before turning to customary law.

6. A treaty is binding by virtue of the principle *pacta sunt servanda*. Separately, some assert that *pacta sunt servanda* explains why international law as a whole is binding, which is a question of legal theory.
   a. True
   b. False

7. Is social need a formal source of law? What then of a State’s instinctive reactions, for instance, to protect its survival or to pursue the moral imperative (such as bombing a State that has used chemical weapons)? Can a State act in these cases in the absence of a mechanism that has emerged via a formal source? Does this mean that law is not the same thing as justice? From the law’s perspective, does fact control law or the reverse?

8. Customary international law consists of a general and uniform practice accompanied by the conviction that the practice is binding.
   a. True
   b. False

Name at least three cases that support or discredit the correct proposition. See if you can pinpoint precise features relative to the nature and quality of the requisite practice and *opinio juris* and associate these with the relevant cases.

9. If custom were a tacit treaty, State practice (the objective element of custom) would not be necessary for a rule of customary international law to emerge.
   a. True
   b. False

Is custom a tacit treaty?

10. Victor Raul Haya de la Torre was a Peruvian who did not benefit from a right of safe passage.
    a. True
    b. False

What might this potentially tell you about the situation of Julian Assange while in the Ecuadorian Embassy? What are the flaws in drawing conclusions here?
19. General Assembly resolutions are never binding.
   a. True
   b. False
   What does article 17 UN Charter state (for example)?

20. In addition to codifying customary rules, the Friendly Relations Declaration annexed to UN General Assembly Resolution 2625 (1970) is akin to an authentic interpretation by the parties to the UN Charter of the fundamental principles of international law codified by the UN Charter.
   a. True
   b. False

21. General principles of international law within the meaning of article 38(1)(c) ICJ Statute are a rare instance in which analogy is a source of international law.
   a. True
   b. False

22. The term 'general principle' can refer to both a source and a norm. Illustrate each.

23. Judges make international law.
   a. True
   b. False
   c. More false than true but some truth in it
   d. True as a matter of law (de jure) but false as a matter of fact (de facto)

24. Whoever comes up first on an Internet search-engine search will be an eminent writer for the purposes of article 38(1)(d) ICJ Statute.
   a. True
   b. False

25. The International Law Commission (ILC) was created pursuant to article 13 of the UN Charter and consists of eminent jurists initially nominated by their State of nationality. Are the ILC Reports therefore mere means of identification of the law under article 38(1)(d) ICJ Statute? What is the role of an international organization's practice in the creation of custom?

26. The ILC's 2006 Guiding Principles on Unilateral Declarations of States capable of Creating International Obligations deal with 'legal' acts, not mere facts (that being State practice), and these acts are characterised as legal because of the element of intention that accompanies them.
   a. True
   b. False

27. Adjunctive or 'quasi' unilateral acts are to be distinguished from the autonomous unilateral acts dealt with in the ILC's 2006 Guiding Principles. Adjunctive unilateral acts are mere facts that only gain legal value when brought into relationship with some external factor such as a treaty (eg reservations) or silence in circumstances when a response is to be expected (acquiescence).
   a. True
   b. False

28. The PCJ's Eastern Greenland case (1933) dealt with an adjunctive unilateral act; namely, Norwegian Foreign Miniser Ihlen's declaration to Denmark that Norway would not oppose Denmark's claim.
   a. True
   b. False

29. Explain the following types of equity:
   a. Equity ex aequo et bono
   b. Equity infra legem
   c. Equity praeter legem
   d. Equity contra legem

30. Is a decision of a Conference of the Parties (COP) to a multilateral treaty a unilateral act (ie one of the institution) or a unilateral act? What value might it have in terms of rule creation?

31. Is the list of sources in article 38(1) ICJ Statute exhaustive?
   a. Yes
   b. No
   Explain.
Answers: The Sources of International Law

1. a
2. b
3. b
4. a
5. a
6. a
7. No, social need is not considered a formal source of law. It is a material source in the sense that it inspires rules and generally therefore constitutes a rule's rationale or purpose. Strictly speaking, law governs fact and so instinct or the ethical imperative, as mere facts, are not themselves means of law creation. This positivist approach, requiring passage through a recognised source, rather than acknowledging a norm as a legal rule on the basis of its intrinsic social importance, whether political or ethical or other, means that law need not equate to justice. For some thinkers, especially historically, the content of the law necessarily equated to justice (natural law) and so the moral imperative was (and for a minority today, remains) a formal source. Today this view is not entirely discredited but is far from dominating our understanding of modern international law, which is a positivist one. Stepping away from the question of justice and natural law thinking, some thinkers, both today and in the past, whilst not in principle negating the need for the passage of emerging rules through a formal source, nonetheless maintain that fact will influence indeed sometimes change the law (in doing so, arguably as a matter of fact, tend to neglect the question of sources). This is the tension between effectiveness and legitimacy discussed above in relation to Questions 11 and 13 in the chapter 'Subjects of International Law'.

8. a. Asylum case (1950) Custom requires constant and uniform usage accepted as law (at 277). North Sea Continental Shelf case (1969): Although a short period of time might suffice (such as 10 years) the practice, including that of States whose interests are particularly affected, should be extensive and virtually uniform in such a way as to show that a rule of law or legal obligation is involved (at 43, paragraph 74). The frequency of the practice is not enough for a customary rule to emerge - it must also be motivated by a sense of legal duty (at 44, paragraph 77). Nicaragua case (1986): There is no need for rigorous conformity of the practice with the rule; it is sufficient that the practice in general be consistent with the rule and that States defend inconsistent conduct by invoking exceptions to the rule - something which in fact strengthens the rule (at 98, paragraph 186).

9. a

10. a. Even though the facts are similar, the Asylum case (1950) tells us very little about the legal situation of Julian Assange. This is because there is no doctrine of precedent in international law; the convention in question in the Asylum case (1950) was inter-American and the customary rule invoked by Colombia was a regional rather than a universal custom; and indeed, the Court found that the alleged custom did not exist. One needs to recall that analogy (which is in effect a source of the common law) is not a source of international law, except when it comes to general principles of law within the meaning of article 38(1)(e) ICJ Statute, which has its own conditions.

11. (1) The declaratory effect: writing down an existing customary rule. (2) The crystallising effect: the customary rule emerges with the conclusion of the treaty since the latter is the last expression of practice and/or opinio juris needed for the new customary rule to emerge. (3) The generating effect: the treaty generates a new customary rule of international law (subject to the conditions set out in the case). Normative resolutions of the UN General Assembly (ie ones that seek to establish broad rules of conduct) can, like treaties, have these three effects on custom but they must be approached with caution as States know when they are voting for a normative UN General Assembly resolution that they are not per se binding. Nicaragua case (1986).

12. The Court focussed on the subjective element of custom and considered that when a State invokes an exception to a prohibitive rule (such as self-defence), this is evidence of a belief that the rule exists and so indeed, strengthens the rule. Note that in focussing on opinio juris, the Court turned to soft law instruments (ie non-binding instruments whose content might subscribe custom), such as the Helsinki Final Act (1975) or certain normative UN General Assembly resolutions, but stated that it did so with caution: when States adopt such instruments they know that they are not binding so it is not a given that they reflect a State conviction that the described practice is binding ...


14. Silence has legal weight when it occurs in circumstances in which one would expect a response. This is the concept of acquiescence, on which see the decision of the ICJ Chamber in the Gulf of Maine case (1984).

15. a

16. Spying is not prohibited per se. All States spy and so the requisite practice (by abstention) is absent even were an opinio juris in support of a prohibition on spying to exist. Of course spying will be an offence under each State's domestic law but domestic law is a mere fact for the purposes of international law; see the PCIJ case Certain German Interests in Polish Upper Silesia (1926). This resonant domestic practice could be used in a circumstantial way as
proof of a consistent and uniform practice for the purposes of customary international law, but that is nonetheless undone by the actual activities of States at the universal level who rely on others all the time; meaning that overall no requisite consistent and uniform practice establishing the customary rule exists.

17. a
18. d. A UN General Assembly resolution might codify, crystallise or, subject to conditions, generate a customary rule. See Question 11 above.
19. b. Normative resolutions are not binding since the UN General Assembly can only make recommendations under article 10 UN Charter. However the General Assembly can make binding decisions in respect of matters internal to the UN itself, such as UN membership (article 4 UN Charter), or the UN budget (article 17 UN Charter).
20. a
21. a
22. Article 38(1)(c) ICJ Statute refers to general principles as a source of law, these being principles that are both common to most types of domestic legal systems and transposable to the international level, such as the principle that the burden of proof lies with the party making an assertion. A general principle as a norm (a rule of vast generality anchored in both treaty and custom) includes the prohibition on the use of force and a State's obligation to exercise due diligence.
23. c (although a or b could be correct if properly explained). De jure judges do not make law but rather identify it: article 38(1)(d) ICJ Statute. However, in identifying the law, judges describe the law, giving it contours and content and so do play a de facto role in law creation, at least marginally.
24. b
25. ILC members sit ex officio and so in their personal capacity. They are neither State organs nor UN organs and so their behaviour does not amount to either State or UN practice or opinio juris. ILC Reports are a means of identification of the law pursuant to article 38(1)(b) ICJ Statute because the members represent 'eminent publicists'. The role of international organizations in the development of custom has been considered by the ILC in its work on the Identification of Customary International Law, with draft conclusions on this topic adopted provisionally on first reading by the ILC in 2018.
26. a
27. a
28. a
29. a. Equity ex aequo et bono: equity in accordance with precepts of justice (which does not necessarily equate with law – see above Question 7, and

The Sources of International Law
below point d. in this question). The ICJ can, but never has, made decisions on this basis. Article 38(2) ICJ Statute.
30. b. Equity infra legem: equity ‘within the law’ which is often taken to mean that existing rules are to be applied and so interpreted as to favour an equitable outcome.
31. c. Equity praeter legem is that form of equity decided upon by the judge and so judge-made law where there is no applicable law (a gap in the law) – strictly speaking this does not arise in international law, but see concepts such as state of necessity in the law of State responsibility; a rule which presupposes the existence of a third party arbitral such as a judge to assess the merits of the weighing of the values at hand. The result in such cases could, from one perspective, be considered quite close to a decision praeter legem.
32. d. Equity contra legem: equity contrary to the letter of the law. A result ex aequo et bono may well be contrary to the law but in accordance with justice.
33. A decision of a Conference of the Parties (COP) will generally be multilateral since the States are representing themselves rather than sitting as an organ of the institution. The decision might therefore constitute an authentic interpretation of the treaty by the parties to the treaty for the purposes of articles 31(3)(a) or 31(3)(b) Vienna Convention on the Law of Treaties (1969).
34. On interpretation see chapter three below on the Law of Treaties.
35. Article 38(1) ICJ Statute may not be exhaustive of the sources of international law although, as seen over the course of this chapter, the contenders, such as autonomous unilateral acts, tend to be sources of obligation rather than more broadly sources of law. An article 38(1) ICJ Statute is merely a directive to the ICJ as to the law it must apply in solving a dispute, there is no reason why in theory there may not be other sources.
Chapter 3
The Law of Treaties

As a patent expression of State will, treaties are a preferred means of law making. Indeed, the second half of the twentieth century and early twenty-first century has been characterised by the conclusion of multilateral conventions with universal aspirations (for instance, the UN Charter (1945), the UN Convention on the Law Of the Sea (1982) (UNCLOS) and the Paris Agreement on Climate Change (2016)). The law on treaties is, however, both large and complex, with rules pertaining to a treaty’s creation (called the ‘conclusion’ of a treaty); its operation or application; and third, rules relative to defects constituting grounds for a treaty’s termination or suspension, or in other cases, its invalidity. For this reason States have concluded two treaties on the law of treaties, the 1969 and 1986 Vienna Conventions on the Law of Treaties – VCLT (1969) and VCLT (1986) respectively. We will focus on the VCLT (1969) which pertains to written treaties between States and consider also the rules of customary international law relative to treaties, which are of broader application, not being applicable solely to written treaties between States.

1. A concession contract is a treaty: Anglo-Iranian Oil Company case (1952).
   a. True
   b. False

2. It does not matter what a treaty is called but on the whole an instrument called a ‘resolution’ will not be a treaty but a unilateral act.
   a. True
   b. False

3. The date of a treaty is normally the date of its adoption and this usually, but not always, coincides with the treaty’s authentication (signature).
   a. True
   b. False
4. The expression of consent to be bound by a State in respect of a treaty subject to ratification (which is to say, the moment of deposit of that State's instrument of ratification) always signals a treaty's entry into force for that State.
   a. True
   b. False
   Explain.

5. For 'original parties' to the VCLT (1969) – i.e. those who attended the conference in Vienna in 1969 and signed the treaty at that time – the VCLT (1969) applies to treaties concluded after 27 January 1981.
   a. True
   b. False
   Why did the VCLT (1969) enter into force on the date on which it did?

   a. True
   b. False

7. Because it creates an international organization, the UN Charter is governed by the VCLT (1969) rather than the VCLT (1969).
   a. True
   b. False

8. In the Qatar v Bahrain case (1994) the ICJ held that signed Minutes were a treaty because they were more than a mere record of events but evidenced an agreement.
   a. True
   b. False

9. Whilst the existence of (1) an intention to create legal relations between (2) two subjects of international law is necessary for a treaty's creation, it is not sufficient for its creation.
   a. True
   b. False
   Explain.

10. By virtue of pacta sunt servanda a treaty signatory has no obligations between the time of signature and entry into force of a treaty.
    a. True
    b. False
   a. True
   b. False

18. The idea that a new customary rule can derogate from an existing treaty is therefore controversial.
   a. True
   b. False

19. a. Identify which of the following are grounds for invalidity and which are grounds for suspension and/or termination of a treaty and in each case name the corresponding VCLT (1969) article number:
   i. Conclusion of a treaty not undertaken in conformity with a notified restriction on the plenipotentiary
   ii. Conclusion of a treaty evidently not in conformity with a rule of fundamental importance of domestic law relative to the conclusion of treaties
   iii. Mistake of fact
   iv. Fraud
   v. Corruption
   vi. Coercion of a State representative
   vii. Prohibited use of force to procure the treaty
   viii. An act contrary to a peremptory norm was used to procure the treaty
   ix. A new peremptory norm emerges
   x. Consent
   xi. Breach of a provision essential to the achievement of the treaty's object and purpose
   xii. The disappearance of an object indispensable for the implementation of the treaty
   xiii. Since the treaty's conclusion an un-envisioned change of situation has arisen relative to an essential basis of consent, which radically transforms the extent of the obligations in the treaty
   b. To which of the above does the rule in article 45(b) VCLT (1969) relative to acquiescence apply?
   c. To which of the above does 'separability' (severance) apply?

20. On the facts, did the ICJ uphold supervening impossibility of performance, fundamental change of circumstances or material breach in the Gabčíkovo-Nagymaros (also known as the Danube Dam) case of 1997?
   a. Yes
   b. No

21. Can a State, pursuant to the rule in article 60 VCLT (1969), suspend the application of a treaty in response to a material breach by another State of another treaty? Is termination of a multilateral treaty possible under the rule in article 60 VCLT (1969)?

22. A treaty which has not been registered with the UN Secretariat pursuant to article 102 UN Charter is void
   a. True
   b. False

   Explain.
Answers: The Law of Treaties

1. b
2. a
3. a
4. b. Most treaties subject to ratification need a specific number of States to consent to be bound before the treaty enters into force. They may also specify that the passage of a certain period of time is required. See for instance article 84(1) VCLT (1969).
5. b. The VCLT (1969) entered into force on 27 January 1980 in accordance with article 84(1) VCLT (1969) which provides that the VCLT (1969) enters into force 30 days after the deposit of the 35th instrument of ratification.
6. b
7. b. Only States can be parties to the UN Charter (article 4, though some exceptions existed in 1945 in relation to article 3 UN Charter) and so it is a treaty between States.
8. a
9. a. To be a treaty the instrument must be governed by international law and not some other body of law.
11. Please refer to the answer to Problem 2 in Part 2 of this Workbook.
12. a
13. a
15. a. This method of interpretation is generally viewed as falling within the ambit of article 31(1) VCLT (1969).
16. a
17. a
18. a
19. a. i. article 47; ii. article 46; iii. article 48; iv. article 49; v. article 50; vi. article 51; vii. article 52; viii. article 53 - these all being grounds for invalidity. The remaining articles list grounds for termination and suspension: ix. article 64; x. articles 54 and 57; xi. article 60; xii. article 61; xiii. article 62.
   b. articles 46–49, 60 and 62.
   c. articles 46–50 and 60–62; see article 44 VCLT (1969)
20. b
21. No – material breach as a ground for suspension or termination of a treaty can only be invoked in respect of a material breach of the same treaty.

The Law of Treaties

Termination is not available in the case of multilateral treaties – meaning that only suspension is available in such cases.

22. b. The treaty remains valid but cannot be raised before UN fora. Contrast article 18 of the League of Nations Covenant (1919), which provided that unregistered treaties were invalid, although that provision was not strictly enforced.
Chapter 4

The Law of State Responsibility

When a State breaches one of its international obligations the law on State responsibility for internationally wrongful acts (IWAs) applies. As a system of general rules applicable to the breach by a State of any of its obligation, one refers to this body of law as consisting of secondary rules. These address: (1) the conditions giving rise to responsibility, called the generating act or origin of responsibility; (2) the consequences of an IWA, called the content of responsibility; and (3) the implementation of responsibility, consisting of the questions of invocation and enforcement.

1. Being annexed to a General Assembly Resolution (A/RES/56/83 (12 December 2001)), one does not apply the Articles on State Responsibility (ASR) as such, but rather the customary law which the ASR (2001) may transcribe.
   a. True
   b. False

2. It is fair to say that today nearly all of the provisions in the ASR (2001) reflect custom; only a few being controversial and fewer still being considered pure progressive development.
   a. True
   b. False

3. Which types of international responsibility are not dealt with by the ASR (2001)?

4. State responsibility for unlawful acts arises automatically in the presence of an internationally wrongful act (IWA), regardless of whether that responsibility is in fact enforced.
   a. True
   b. False

5. The 2001 ASR’s articulation of the elements of the IWA, with its consequences, is reflected in which of the following formulas:
   a. IWA = attribution + (breach + circumstances precluding wrongfulness) + secondary obligation of reparation

31
b. IWA = attribution + breach = secondary obligation of reparation – circumstance precluding wrongfulness

6. An 'act' for the purposes of an IWA can be an action (such as a prohibited use of force) or an omission (such as a failure to exercise due diligence).
   a. True
   b. False

7. Under the secondary rules of State responsibility, neither 'fault' (a particular intention or mental state), nor material damage are requisite elements of the IWA.
   a. True
   b. False

8. Why does international law leave it to municipal law to determine who is a de jure organ (see article 4(2) ASR, 2001)?

9. It is sufficient for an entity to be created by the State and to be acting in an official capacity in order for it to be a de jure organ.
   a. True
   b. False

10. You are a graduate trainee (and thus a junior employee) of an autonomous regional government and one day whilst you are at work, you commit an act that places the central State to which the region is a part, in breach of a treaty obligation in force. Are your acts a priori attributable to that State? Why?

11. A youth who is a member of the militant wing of a political organisation or party launches a rocket over the border from State X into neighbouring State Y. The same political organisation has members who are ministers in the government of State X. Is the youth who launched the rocket a de jure organ of State X? Why?

12. Although a general in the Bosnian Serb army (the Army of the Republika Srpska or VRS), Ratko Mladic was paid a salary by the Federal Republic of Yugoslavia (FRY) and so was a de jure organ of the FRY: Bosnia Genocide case (2007).
   a. True
   b. False

13. A guard at a detention facility for asylum seekers run by security guards hired on government contract will be an organ of the State for the purposes of the rule in article 5 ASR (2001) as long as she or he is acting in an official capacity.
   a. True
   b. False

   Explain your answer.

14. The rule in article 7 ASR (2001) – that official acts in excess of authority or contrary to instructions are attributable to a State – applies both to article 4 and 5 organs.
   a. True
   b. False

15. A non-attributable act of a private person can reveal a failure by a State’s de jure organs to respect its due diligence obligations. This occurred in the first phase of the Tehran Hostages case (1980): the storming of the US embassy and Iran's failure to protect it.
   a. True
   b. False

16. The second phase of the Tehran Hostages case (1980) can be seen as a situation in which:
   a. The students-hostage takers became de facto organ
   b. Iran adopted the acts of the students-hostage takers as provided for in article 11 ASR (2001)
   c. Both of the above

17. Why were the contra rebels' human rights abuses not attributable to the United States in the Nicaraguan case (1986)? Did the ICJ maintain the same test for de facto organs in the Bosnia Genocide case (2007)?

18. In the Bosnia Genocide case (2007) the ICJ found that a de facto organ was one in a situation of complete dependence on the State, with no margin for manoeuvre.
   a. True
   b. False

19. In the Bosnia Genocide case (2007), the ICJ stated that the attribution rule in article 8 ASR (2001) does not deal with de facto organs but rather with attribution to the State’s de jure organs which direct, instruct, or control a third entity.
   a. True
   b. False
20. The ICTY's approach in the *Tadić case* (1999) to de facto organs has been 'distinguished' from the rule envisaged in article 8 ASR (2001) by the ILC in its Commentary to article 8 ASR (2001) and also considered ' unpersuasive' by the ICJ in the *Bosnia Genocide case* (2007).
   a. True
   b. False

21. A breach of an obligation can be seen as the gap between what is required by a rule and what occurs in practice; whether that takes place by action or omission.
   a. True
   b. False

22. A State responsible for aiding or assisting another in the commission of an IWA (article 16 ASR (2001); *Bosnia Genocide case*, 2007) is likely to also be in breach of its due diligence obligations.
   a. True
   b. False

   Explain your answer.

23. An act of torture is an instantaneous breach even if the effects of the torture persist.
   a. True
   b. False

24. Why can a State consent to a prohibited use of force (it happens all the time) given the rule in article 26 ASR (2001)?

25. What are the similarities and differences between *jus cogens*, distress and necessity?

26. A situation in which the population of a State as a whole is imperilled is counter-intuitively classified as a necessity rather than a distress situation.
   a. True
   b. False

27. The conditions for counter-measures set out in the *Gabcikovo-Nagymaros* case (1997) are exactly the same as those set out in the *Air Services award* (1978): first, the existence of a continuing prior IWA (such as the failure to fulfill the secondary obligation to make reparation for an IWA); second, notice of intention to take counter-measures unless the wrongful act ceases; and third, a proportionate = meaning a commensurate = response.
   a. True
   b. False

28. There is a hierarchy of reparations: compensation, restitution, satisfaction.
   a. True
   b. False

29. Satisfaction, which is reparation for moral (i.e. non-material) damage, cannot take a pecuniary form: *Rainbow Warrior case* (1990).
   a. True
   b. False

30. A peremptory norm (i.e a norm of *jus cogens*) is one from which no derogation is allowed (*Jurisdictional Immunities case*, 2012) but when a peremptory norm is looked at from the perspective of who has a legal interest in that norm being respected, it can be termed an obligation *erga omnes* (an obligation owed to the international community as a whole).
   a. True
   b. False

31. A breach of a peremptory norm entails aggravated consequences for the wrongful State.
   a. True
   b. False

32. A breach of an obligation owed to the international community as a whole enables third States to demand that reparation be made in favour of the injured State or indeed, in favour of the beneficiaries of the norm breached: article 48 ASR (2001).
   a. True
   b. False

33. An injured State can enforce responsibility by recourse to self-help through either counter-measures or acts of retorsion, but whether a non-injured State can take a counter-measure to enforce responsibility in respect of another is controversial and article 54 ASR (2001), being merely a savings clause, does not itself provide the answer to whether this is possible.
   a. True
   b. False

**Diplomatic Protection**

34. When exercising diplomatic protection a State is asserting its own right to see its nationals treated in accordance with a minimum standard (*Morommuti case*, 1924). This means that if successful in a diplomatic protection claim,
the injured State need not pass any compensation awarded to the individual who suffered the material damage.

- True
- False

35. An individual need only exhaust reasonably available domestic remedies (ELSI case, 1989) and in some cases this might mean that the individual's claim has not been before a domestic court or administrative body at all prior to the injured State being entitled to exercise diplomatic protection.

- True
- False

36. In the case of multiple nationalities, only the effective or dominant nationality is the valid nationality.

- True
- False

37. Indirect expropriation is interference with property rights that is tantamount to removal of title (direct expropriation).

- True
- False


- True
- False

39. In the Diallo case (2010) the ICJ held that the Democratic Republic of the Congo was obliged to compensate Guinea not only for violations of the minimum standard of treatment but also for human rights violations, thus applying diplomatic protection in an expansive manner.

- True
- False

40. Whilst article 44 ASR (2001) touches on the conditions for the exercise of diplomatic protection, the ILC has also elaborated a series of draft articles on the customary international law rules of diplomatic protection: ILC Draft Articles on Diplomatic Protection (2006).

- True
- False
22. a. The rule in article 16 ASR (2001) requires actual knowledge by the State that is aiding and assisting, whereas the due diligence norm only requires constructive knowledge — that the State should have known. If the actual knowledge test is satisfied, the lower constructive knowledge test will also necessarily be satisfied.

23. a

24. The prohibition on the use of force is only breached in the first place if consent is absent (i.e. the force needs to be coerced in order to breach the prohibition). So it is not a matter of precluding an ostensible breach which would in turn enliven the rule in article 26 ASR (2001) — here there is no breach of the primary rule in the first place.

25. *Force majeure* is a situation of absolute impossibility, there being no choice available, whereas distress and necessity are situations of relative impossibility, meaning that there is a choice but only one: suffer the peril or avoid it by breaching the obligation. Necessity relates to the safeguarding of a State's essential interests and those of the international community as a whole, though the latter aspect is progressive development; whereas distress relates to the safeguarding of human life (and that human must be an organ or under an organ’s protection given that the ASR (2001) deals with State responsibility only).

26. a

27. b. The proposition is only false because the test for proportionality set out in the *Air Services award* (1978) was 'not disproportionate' and so differs to the more recent *Gakezovo-Nagymaros case* (1997) and ASR (2001) test of 'a commensurate response'.

28. b. Whilst there is a hierarchy, the preference is to be given to restitution, then compensation, then satisfaction.


30. a

31. b. Only serious breaches, meaning those that are gross or systematic (see article 40(2) ASR, 2001), give rise to what can be called 'aggravated responsibility' but the consequences are mainly for third States, not the wrongful State; article 41 ASR (2001). The term 'mainly' is used because consequences under the rule in article 30(b) ASR (2001) — an obligation to make guarantees and assurances of non-repetition — might arise for the wrongful State pursuant to a breach of a peremptory norm, but they might also arise pursuant to a breach of a norm not having that character.

32. a

33. a

34. a
Chapter 5

The Peaceful Settlement of Disputes

Under modern international law States must resolve their international disputes peacefully, without recourse to force: articles 2(3) and 2(4) UN Charter. The modes for doing so are mostly listed in article 33 UN Charter and these form two broad categories. The first is diplomatic or political dispute settlement, the outcome of which is not binding on the parties and these methods are generally distinguishable by reference to the degree of involvement of third parties in the settlement procedure. The second is adjudication, the outcome of which is binding on the parties. Adjudication can be divided into arbitration (which involves ad hoc bodies – tribunals – established to settle a particular dispute at hand) and judicial settlement (which involves permanent bodies – courts – with established membership and procedures), the latter including ICJ decision-making.

1. The principal difference between domestic and international dispute settlement is that all international dispute settlement methods are based on consent.
   a. True
   b. False

2. A dispute is a disagreement of law or fact, an opposition of legal views or interests. Name two cases that are authority for this definition.

3. How can the outcome of a diplomatic method of dispute settlement be rendered obligatory?

4. Name a means of diplomatic dispute settlement not mentioned in article 33 UN Charter.

5. There is always an obligation to negotiate prior to engaging in other dispute settlement methods.
   a. True
   b. False
6. Where an obligation to negotiate exists it need only be pursued as far as possible; North Sea Continental Shelf case (1969); Georgia v Russia case (2011).
   a. True
   b. False

7. In 2016 the ICJ held in all three Nuclear Disarmament case, brought by the Marshall Islands (against India, Pakistan and the United Kingdom respectively), that a State must be aware or could not be unaware that its views were positively opposed by the other party in order for a dispute to exist.
   a. True
   b. False

8. Identify two advantages of a commission of inquiry over an arbitration.

9. The 2016-18 Conciliation procedure between Timor-Leste and Australia regarding the Timor Sea (pick the correct answer(s)):
   a. Was compulsorily undertaken since pursuant to article 298 UNCLOS (1982), to which both States were parties
   b. Was the first conciliation commission established pursuant to article 298 UNCLOS (1982)
   c. Was conducted under Permanent Court of Arbitration (PCA) auspices
   d. Included hearings during which both parties pleaded their positions
   e. Included a competence/jurisdiction and merits phase
   f. Resulted in a report rather than an award
   g. The report led to the conclusion of a treaty between the two States

10. Which of the following instruments can be taken to elaborate on article 33 UN Charter:
    a. The Revised General Act for the Pacific Settlement of International Disputes (1949)
    b. The Friendly Relations Declaration (1970)
    c. The Manila Declaration on the Peaceful Settlement of International Disputes (1982)

11. Contrast the advantages and disadvantages of arbitration as opposed to judicial settlement.

12. The ICJ has never handed down a decision ex aequo et bono.
    a. True
    b. False

13. Who can ask the ICJ for an advisory opinion?

14. The ICJ refused to hand down an opinion in the Legality of Nuclear Weapons in Armed Conflict advisory opinion (1996) as, in the Court’s view, the question posed was, inter alia, beyond the scope of the World Health Assembly’s competence.
    a. True
    b. False

15. As stated in the Chagos advisory opinion (2019) the ICJ must have ‘compelling reasons’ to decline to exercise its advisory jurisdiction; for instance, where giving the opinion would circumvent State consent to have recourse to dispute settlement.
    a. True
    b. False

16. The ICJ can only hear contentious disputes between States: article 34 ICJ Statute.
    a. True
    b. False

17. What are the forms of consent to the Court’s jurisdiction embraced by articles 36(1) and 36(2) ICJ Statute?

18. Whilst State consent must be given for the ICJ to have jurisdiction, it need not take any particular form and so can be deduced from a State’s acts: Certain Questions of Mutual Assistance in Criminal Matters case (2008).
    a. True
    b. False

19. A reservation to a declaration under article 36(2) ICJ Statute is subject to the rules relative to treaty reservations codified by the VCLT (1969).
    a. True
    b. False

20. Please explain your answer.

21. What is a self-judging or automatic reservation and why are they problematic?
22. The so-called 'indispensable party' rule, also known as the 'Monetary Gold Principle', as applied in the Monetary Gold case (1954) and East Timor case (1995) is a ground for inadmissibility, not jurisdiction.
   a. True
   b. False

23. The 'indispensable party' rule will not apply where third-party interests are affected but do not form the very subject-matter of the dispute: Nicaragua case (1984), Certain Phosphate Lands in Nauru case (1992).
   a. True
   b. False

24. Provisional or interim measures will be ordered when (pick the requisite elements):
   a. The court has prima facie jurisdiction
   b. There is a link between the interim measure requested and the rights which will be subject of the proceedings
   c. There is a real and imminent risk of irreparable prejudice prior to the Court's final decision were the interim measures not awarded
   d. Arguably, the asserted rights appear to be plausible: Obligation to Prosecute or Extradite, order (2009)

25. ICJ decisions are 'final and without appeal' although there is a limited scope for revision should a new decisive fact arise (article 61 ICJ Statute) and a broader scope for a party to request an interpretation of a judgment (article 60 ICJ Statute).
   a. True
   b. False

26. Third party intervention under article 63(2) ICJ Statute is limited to the construction of the convention to which the intervener is a party, but any ensuing Court decision is not binding on the intervener: Whaling in the Antarctic, Order of 6 February 2013.
   a. True
   b. False

27. Non-appearance by a party precludes the Court from handing down a decision: article 53 ICJ Statute, Tehran Hostages case (1980).
   a. True
   b. False

28. The principle of stare decisis applies to ICJ decisions: article 59 ICJ Statute.
   a. True
   b. False

29. Article 52 UN Charter (located in Chapter VIII relative to regional arrangements) provides that States are to make every effort to settle their disputes through regional arrangements before referring them to the UN Security Council.
   a. True
   b. False

30. The European Court of Human Rights is a regional court attached to the European Union.
   a. True
   b. False
Answers: The Peaceful Settlement of Disputes

1. a
2. Mavrommatis case (1924) and Georgia v Russia case (2011).
3. Through the conclusion of a treaty entrenching the result, or through a binding decision of a third party, such as the UN Security Council.
4. Good offices.
5. b
6. a
7. a
8. (1) The full legal implications of the matter need not be examined and (2) a report is issued which might contain recommendations, but which is not binding.
9. All statements are correct.
10. All statements are correct.
11. Arbitration provides flexibility (rules of procedure, members of the bench and location) whereas judicial settlement provides certainty (rules of procedure, previous decisions and fixed members of the bench).
12. a
13. The UN Security Council and General Assembly can ask the ICJ for an advisory opinion on any question. Other UN organs (such as ECOSOC) and the Specialized Agencies (the organizations in the UN system such as the ILO), when duly authorised by the UN General Assembly, can only ask the ICJ for advisory opinions on questions of law arising within their field competence: article 96 UN Charter.
14. a
15. a
16. a
17. Under article 36(1) ICJ Statute consent can be by (1) special agreement, whether (a) express or (b) tacit, by conduct of the parties and then known as forum prorogatum, or (2) through a provision in a treaty, called a compromissory clause. (3) Under article 36(2) ICJ Statute, known as the Optional Clause, States can consent to the ICJ’s jurisdiction by way of unilateral declaration accepting the Court’s jurisdiction for those disputes whose subject-matter falls within the scope of another State’s declaration under the Optional Clause.
18. a
19. b. A reservation to a unilateral declaration made under article 36(2) ICJ Statute defines the scope of the initial consent given by the State to the Court’s jurisdiction. It is therefore by nature different to a treaty reservation, by which one State seeks to modify or exclude an otherwise agreed existing treaty provision. Being therefore different in nature, reservations to a declaration under the Optional Clause are not governed by the law of treaties’ rules on reservations.
20. A self-judging or automatic reservation or, in the case of the US, the ‘Connally amendment’, is a reservation to a unilateral declaration made under article 36(2) ICJ Statute which excludes from the Court’s jurisdiction matters falling to the State’s domestic jurisdiction as defined by the reserving State. They are controversial because they run counter to the principle that what falls to a State’s domestic jurisdiction is a matter determined by international law: Nationality Decrees advisory opinion (1923).
21. a
22. a
23. a
24. All four elements, a, b, c and d, should be present.
25. a
26. b. The first part of the proposition is true, but the ensuing decision is binding.
27. b
28. b
29. a
30. b
Chapter 6

The Prohibition on the Threat or Use of Force

States can no longer resolve their disputes forcibly – or even by threatening force – unless they are in a situation of self-defence (emergency self-help) or they have a UN Security Council authorisation. But what is ‘force’ for the purposes of this jus ad bellum prohibition and what are the conditions for self-defence to come into play? For instance, does prohibited force cover cyber-attacks or the training of rebels in a third State? Can self-defence be stretched to encompass anticipatory self-defence and self-defence against Non-State Actors (NSAs) such as terrorists? Arguably, in no other area do different ‘cultures’ of international law come into such stark contrast; the debates on the scope of the exceptions to article 2(4) UN Charter in fact turn on different understandings of the precise nature of customary international law, what the law requires for its modification, and when this is legally possible.

1. The prohibition on the threat or use of force codified in article 2(4) UN Charter is the corollary of the obligation to settle disputes peacefully codified in article 2(3) UN Charter.
   a. True
   b. False

2. Distinguish the jus ad bellum from the jus in bello.

3. As an authentic interpretation by the parties to the UN Charter of the UN Charter, the Friendly Relations Declaration, annexed to UN General Assembly Resolution 2625 (1970) extrapolates authoritatively on the extent of the prohibition in article 2(4) UN Charter, as well as other fundamental principles of international law codified elsewhere in article 2 UN Charter.
   a. True
   b. False

4. Clearly the prohibition on resort to war as an instrument of national policy, found in the Brandt-Kellogg Pact (1928) – also known as the Pact of Paris.
5. The nineteenth century requirement for a declaration of war to mark the commencement of hostilities enabled third States to declare themselves neutral and so protect themselves from being drawn into the conflict.
   a. True
   b. False

6. The nineteenth century ‘hostile measure short of war’ known interchangeably as self-preservation, necessity or self-defence (and to which reference is made in *The Caroline* correspondence, 1841) could not be a reference to self-defence as understood today because there was at the time no prohibition on the use of force.
   a. True
   b. False

7. When a State invokes an exception to the prohibition on the use of force to justify its acts, such as self-defence, it is strengthening the prohibition itself. *Nicaragua case* (1986).
   a. True
   b. False

8. Explain the 1946 US reservation—known as the ‘Vandenberg’ or multilateral treaty reservation—to the Court’s jurisdiction in the *Nicaragua case* (dealt with in 1986). Why could the Court only consider customary international law relative to the US use of force in that case?

9. Did the Court accept or reject the US argument in the *Nicaragua case* (1986) that the UN Charter law on the use of force superseded the customary international law on the use of force and therefore that the Court had no jurisdiction? Was there already an ICJ case that had made the same point of law?
   a. True
   b. False

10. The phrase ‘or in any other manner inconsistent with the Purposes of the United Nations’ in article 2(4) UN Charter was inserted at the behest of ‘Doc’ Evatt (the Australian delegate to the San Francisco UN Conference on International Organization in June 1945) in order to make the prohibition comprehensive. Consequently, a State cannot claim that a use of force is lawful simply because it is to promote a Charter goal, such as the protection of human rights.
   a. True
   b. False

11. A threat of use of force is unlawful if, in the same circumstances, the actual use of force would be unlawful: *Nuclear Weapons advisory opinion* (1996).
   a. True
   b. False

12. Is every prohibited use of force also a prohibited intervention (sometimes termed a prohibited interference)?
   a. Yes
   b. No

Note that sometimes a breach of the prohibition on intervention is called a breach of sovereignty. But sovereignty is not a right and so this phrase is best seen as a short-hand for a breach of the prohibition on intervention against the territorial integrity of a State or, where non-physical, a prohibited interference in the domestic affairs of a State. Both aspects of this rule (territorial integrity and political independence) protect sovereignty, as does the prohibition on the use of force.

13. A prohibited intervention is one which has an element of ‘coercion’ (*Nicaragua case*, 1986), by which is meant that it impinges on the free will of the State (in short, it is not wanted).
   a. True
   b. False

14. When referring to a ‘policy of force’ in relation to the United Kingdom de-mining of Albanian territorial waters without Albania’s consent, the ICJ in the *Corfu Channel case* (1949) was possibly not referring to force within the meaning of article 2(4) UN Charter; although States and commentators have in fact taken it to mean a use of force within the meaning of article 2(4) UN Charter, and that is what counts for the purposes of international law.
   a. True
   b. False

Now revisit Question 6 above.

15. Commentators who argue that a cyber-attack can be a prohibited use of force tend to rely on a ‘scale and effects’ test (or variants on it) as the relevant determinant of whether the attack is force contrary to article 2(4) UN Charter. Which ICJ case is this derived from?

16. Is economic coercion a prohibited use of force under customary international law?
   a. Yes
   b. No
Why? What does the *Friendly Relations Declaration* (1970) provide in this regard?

17. A military aircraft that *accidentally* strays into the territory of another State is generally not considered a prohibited use of force within the meaning of the rule in article 2(4) UN Charter.
   a. True
   b. False

18. Not only is the distinction between force and other forms of apparent violence (including police measures) hard to draw in some circumstances, but so too is the distinction, relevant to self-defence, between a grave and a less grave use of force. Which case or instrument is authority for each of the following propositions?
   a. A frontier incident is a less grave use of force
   b. The mining of a single military vessel might constitute a *grave* use of force
   c. The sending by or on behalf of the State of irregulars is a grave use of force by the State

19. In the *Nicaragua case* (1986) the ICJ found that the arming and training of rebels was a less grave use of force and that their financing was a prohibited intervention only.
   a. True
   b. False

What does this say about the US presence in Syria (assuming Syria has not consented)? Does the legal situation change according to whether or not Assad remains the lawful government?

20. If only a grave, but not a less grave, use of force were peremptory then it might be possible to invoke a circumstance precluding wrongfulness in relation to a less grave use of force since there would be no issue with the rule in article 26 *Articles on State Responsibility* (2001).
   a. True
   b. False

Is the prohibition on less grave uses of force considered peremptory?

21. The conditions for individual self-defence are: being the victim of an armed attack (ie a grave use of force), necessity and proportionality of the response, and notification of the UN Security Council if the State is a party to the UN Charter.
   a. True
   b. False

22. In the *Nicaragua case* (1986) the ICJ found that because the US was acting under the customary rule of collective self-defence it was not relevant whether it had notified the UN Security Council of its act.
   a. True
   b. False

Explain your answer.

23. In the *Nicaragua case* (1986) the US relied on collective self-defence of Costa Rica, Honduras and El Salvador but this argument was rejected by the ICJ because:
   a. The US intervened before the request to do so
   b. The armed intervention was in response to a less grave use of force
   c. Both of the above

24. No international treaty confers an explicit and autonomous right of either humanitarian intervention or anticipatory self-defence.
   a. True
   b. False

25. In which of the following cases did the ICJ (if not necessarily on the facts of the case) equate armed attack to an act of aggression as defined in the *Definition of Aggression* annexed to UN General Assembly Resolution 3314 (1974)?
   c. Both of the above

26. The rule codified in article 3(g) of the *Definition of Aggression* (1974) is a primary rule of attribution which can be used in the event of a grave use of force by irregulars or other NSAs.
   a. True
   b. False

27. The ICJ in the *Armed Activities case* (2005) did not expressly consider whether a right to self-defence against NSAs exists, instead considering the question from the angle of whether on the facts it was possible to attribute the acts of the NSAs in question under the attribution rule in article 3(g) *Definition of Aggression* (1974).
   a. True
   b. False
28. The majority opinion in the ICJ Wall Advisory Opinion (2004) stated that self-defence is allowed by a State against a NSA.
   a. True
   b. False

29. Pre-emptive self-defence (ie self-defence where there is no objectively identifiable imminent threat, but where waiting for that threat to emerge is simply too dangerous, – as in the case of the development of weapons of mass destruction (WMD) –) is considered unlawful by an overwhelming majority of States.
   a. True
   b. False

30. Anticipatory (sometimes called preventive) self-defence is self-defence against an objectively identifiable imminent threat of an attack. Please identify the correct statements in this regard:
   a. The ICJ has not made a firm pronouncement on anticipatory self-defence, expressly not pronouncing in the Nicaragua case (1986) and the Armed Activities case (2003)
   b. States did not retain anticipatory self-defence in the 2005 World Summit Outcome document, although it had been included in the preparatory reports, including the UN Secretary-General's report In Larger Freedom (2005)
   c. The UN Charter in article 51 and the North Atlantic Charter (1949) in article 5, together with most decisions of international courts and tribunals, refer to self-defence in relation to armed attacks that have already occurred
   d. If it exists as a matter of custom, the conditions to which anticipatory self-defence is subject are those set out in The Corning (1841) by US Secretary of State Webster
   e. Some States such as the US and Australia consider anticipatory self-defence to be lawful

Answers: The Prohibition on the Threat or Use of Force

1. a
2. The jus ad bellum is that body of law relative to recourse to the use of force (dealt with in this chapter) and the jus in bello deals with the body of law applicable during armed conflict, such as the obligation not to target civilians.
3. a
4. b. Virtually all States members of the international community were a party to the Pact of Paris in 1939 and the separate existence of multiple inter-War Treaties of Mutual Guarantee provides evidence in 1939 that there may well have been a customary prohibition on war (if not the broader concept of force) admitting a right of self-defence.
5. a
6. a
7. a
8. The Court did not have consent to determine a dispute under a multilateral treaty unless all the parties to the treaty affected by the decision were also parties to the case or the US specially agreed to the Court's jurisdiction. In the Nicaragua case (1986), El Salvador was a party to the UN Charter and the OAS Charter (1948), both multilateral treaties at issue and would be affected by the Court's decision (not necessarily adversely), but was not a party to the case. Consequently, the Court did not have jurisdiction to decide the case under those multilateral treaties – and so it would turn to the customary law they codified. Because it was sufficient to exclude jurisdiction in relation to multilateral treaties on the basis that El Salvador would be affected, there was no need for the Court to consider the situations of Honduras and Costa Rica, the two other potentially affected States.
9. The ICJ rejected the argument and went on to consider the case under customary international law. The Court’s decision in this regard was foreseeable on the basis of the 1969 decision in the North Sea Continental Shelf case.
10. a
11. a
12. a
13. a
14. a
15. Nicaragua case (1986), especially at 103–104, paragraph 195. Whilst the Court refers to ‘scale and effect’ in this passage, the reference here is actually to the distinction between an armed attack and a mere frontier incident; not a reference to what is ‘force’, whether an armed attack or less grave.
Chapter 7

Collective Security Measures

Created out of a wartime alliance, the United Nations sought to correct the League of Nations' failed attempt to create a collective security system. Hence the UN Charter acknowledges the great powers' special place by conferring on them a veto power over important decisions before the Security Council. And yet the Cold War, with the systematic threat of veto it entailed, prevented the Charter's collective security system from operating as envisaged. It was only with the fall of the Berlin Wall that the system began to function though still not as envisaged — and legal 'mechanisms' such as the implied powers doctrine (really a form of treaty interpretation) need to be brought to bear to square State and Council practice — relative to no less than the use of force — with the treaty law that the Charter contains. Today, and leaving aside political obstacles, the collective security system is arguably under stress in two main ways: first, the question of the legality of implied authorisations, and second, the question of when force is beyond the scope (ultra vires) of an authorising resolution. Both bear on the proper legal interpretation to be given to Council resolutions.

1. Broadly speaking one can contrast systems of collective defence from collective security, the former entailing two or more camps of allies which oppose one another; the latter bringing all States into a single camp.
   a. True
   b. False

2. The UN Charter sets up a system of collective security by first establishing goals, which do not per se confer rights; by then establishing in article 2 UN Charter the principles to be respected in the achievement of the goals, these mostly being the fundamental principles of international law; and thirdly, by creating in subsequent Chapters of the Charter an international organization to pursue the goals.
   a. True
   b. False
3. The UN’s so-called secondary goals found in articles 1(2) and 1(3) UN Charter, arguably helped to maintain the UN’s primary goal of peace and security during the Cold War when the Security Council could not fully function.
   a. True
   b. False

4. Articles 7, 21 and 28 UN Charter envisage the possibility of creating subsidiary organs, although the Charter only creates one subsidiary body itself: the Military Staff Committee, which since the 2005 World Summit Outcome is set to be abolished.
   a. True
   b. False

5. Unless it is acting under the Uniting for Peace Resolution (577(V), 1950), the General Assembly cannot deal with international peace and security: articles 10 and 12 UN Charter.
   a. True
   b. False

6. According to the ICJ in the Certain Expenses advisory opinion (1962), pursuant to the Uniting for Peace Resolution (1950) the UN General Assembly can (pick the correct answer(s));
   a. Make binding decisions
   b. Authorise collective security measures
   c. Authorise the use of force where it is otherwise lawful, such as action in self-defence when its conditions are met

7. The term veto is not used in the UN Charter; the latter requiring instead the ‘concurring votes of the permanent members’ for non-procedural questions.
   a. True
   b. False

8. Despite the wording of article 27(3) UN Charter, an abstention by a permanent member of the Security Council on a non-procedural question is not a veto: Namibia advisory opinion (1971).
   a. True
   b. False

9. Legally, how is this possible, especially given the rule pata amitumanda?
   a. True
   b. False

Collective Security Measures

10. The so-called Responsibility to Protect (R2P) is an attempt to force the Security Council to make an article 39 determination in situations of genocide, war crimes, ethnic cleansing and crimes against humanity: World Summit Outcome (2005).
   a. True
   b. False

11. Since the early 1990s, the Security Council has on many occasions characterised human rights situations as threats to international peace and security under article 39 UN Charter.
   a. True
   b. False

12. A determination by the Council under article 39 that a situation is a ‘genocide’ and thus a threat to international peace and security, does not necessarily mean that the situation meets the legal definition of genocide: Bosnia Genocide case (2007).
   a. True
   b. False

13. States can have recourse to the use of force pursuant to R2P without the need for a Security Council authorisation.
   a. True
   b. False

14. Peace-keeping is not explicitly envisaged by the UN Charter.
   a. True
   b. False

15. ‘First generation’ peace-keeping (ie peace-keeping not authorised under Chapter VII UN Charter) is considered lawful on the basis of
   a. The implied powers doctrine -- a method of interpretation that applies the effectiveness principle (effet mile)
   b. Subsequent practice by the parties to the UN Charter as a means of that treaty’s authentic interpretation: see article 31(3)(b) VCLT (1969)

16. The UN Charter uses the word ‘sanctions’ in relation to Chapter VII enforcement measures.
   a. True
   b. False
17. The implied powers doctrine holds that an international organization has those powers, which though not expressly provided for in the organization's constituent instrument (the treaty creating it), are necessary in order for it to fulfill its purposes.
   a. True
   b. False

Name three ICJ advisory opinions that define implied powers.

18. Although not operative (binding), the preamble to an international organization's constituent instrument is an aid to its interpretation: Namibia advisory opinion (1971).
   a. True
   b. False

A Security Council decision is binding by virtue of article 25 UN Charter, whether or not undertaken under Chapter VII UN Charter: Namibia advisory opinion (1971).
   a. True
   b. False

Pursuant to article 41 UN Charter the Security Council – a political organ – can create a legal organ (Tadic case, 1995) with which all members must comply (article 25 UN Charter). On this basis the Council created the following bodies (pick the correct answer(s)):
   a. The ICTY
   b. The ICTR
   c. The International Criminal Court

Article 41 UN Charter has increasingly been used by the Council to adopt quasi-legislative decisions. Explain what this means and illustrate.

With the end of the Cold War, article 22 UN Charter began to be applied as envisaged by the UN Charter (eg Operation Desert Storm, 1991).
   a. True
   b. False

A use of force pursuant to a UN Security Council authorisation to 'have recourse to all necessary means' is a UN operation in the sense that it is carried out by UN organs.
   a. True
   b. False

24. The legal analysis of the Operation Desert Fox (1998) – a four day bombing campaign by the United Kingdom and United States of military targets in Iraq – is almost the same as that to be made of the 2003 invasion: the argument being that Iraq's failure to comply with the terms of the conditional cease-fire imposed by Resolution 687 (1991) revived the authorisation to use force in Resolution 678 (1990).
   a. True
   b. False

Has this argument been accepted as valid?

25. To engage in a forcible collective security operation, a UN Charter Chapter VIII regional agency or arrangement needs a UN Security Council authorisation.
   a. True
   b. False

26. The UN Charter invalidates inconsistent regional agreements: article 103 UN Charter.
   a. True
   b. False

27. The preamble of Security Council Resolution 1368 (12 September 2001) preserved the US' inherent right to self-defence immediately following the 9/11 attacks. As such some see it as supporting the legality of the US 2001 invasion of Afghanistan and more broadly the use of self-defence against armed attacks by NSAs.
   a. True
   b. False

28. The legality of the overthrow of Libyan leader Mohammed Qaddafi rests not on whether there was an authorisation to use force in Libya in Security Council Resolution 1973 (2011) but on whether that authorisation extended to his overthrow as Libyan leader.
   a. True
   b. False

29. Unlike treaty interpretation, when interpreting a Security Council resolution, which is a type of unilateral act, recourse can be had to the preparatory works such as the debates leading the resolution's adoption: Kosovo advisory opinion (2010).
   a. True
   b. False
30. The purposes of a UN Transitional Administration (UNTA) established by the Security Council are the same as those of an occupying power: to restructure the institutions of State.
   a. True
   b. False

   1. a
   2. a
   3. a
   4. b. Only the article numbers are incorrect. The correct answer is articles 7, 22 and 29 UN Charter.
   5. b
   6. c
   7. a
   8. a. Subsequent practice by the parties to the UN Charter as a means of authentic interpretation of the treaty: article 31(3)(b) VCLT (1969). As a lawful method of interpretation, *pacta sunt servanda* is respected.
   9. a
   10. a
   11. a
   12. a
   13. b
   14. a
   15. a. The standard response and an argument can be made that b is also correct.
   16. b
   17. a. Reparation for Injuries advisory opinion (1949); Certain Expenses advisory opinion (1962); Legality of Nuclear Weapons in Armed Conflict advisory opinion (1996).
   18. a
   19. a
   20. a and b
   21. Rather than adopting decisions in relation to a particular situation and for a limited duration, the Council has adopted decisions imposing general obligations that are confined neither in time nor place. So for instance, Security Council Resolution 1373 (2001) required States *inter alia* to freeze terrorist assets, criminalise the financing of terrorism and bring terrorists to justice.
   22. b. 'Article 43 agreements' under the UN Charter have still not been concluded.
   23. b. The Council has been delegating the use of force to States.
   24. a. Opinions are divided on the legality of the 2003 invasion, though far fewer commentators accept the legality of the 2003 invasion today than at the time. Resolution 687 (1991) makes it clear in its paragraph 34 that the Security Council remains seized of the issue and so any decision on non-compliance must be made by the Council, and not by members acting unilaterally. Such a decision would require the adoption of a new Resolution, which itself would authorise the use of force.
Chapter 8

International Law and Domestic Law

Legal orders can take various forms: a queue at the bus stop, Canon Law, Sharia Law, domestic (or municipal) law and international law all being illustrations. What is the relationship between the latter two? Are they merely two aspects of the same legal order or are they distinct systems? In both cases, how do they articulate with one another? The answer differs not only according to the theories adopted but also from the different perspectives of international law and domestic law. Australian law, for instance, takes one of the most radical positions, seeing the international and domestic legal orders as distinct at almost every point.

1. From an international law perspective, international law always takes priority over municipal law: Applicability, of the Obligation to Arbitrate advisory opinion (1988).
   a. True
   b. False

2. From the perspective of international law, the primacy of international law over municipal law extends even to State constitutions: Treatment of Polish Nationals in Danzig advisory opinion (1932).
   a. True
   b. False

   a. True
   b. False

4. Domestic law is mere fact for the purposes of international law: Certain German Interests in Polish Upper Silesia (1926). As such it is potentially State practice for the purposes of customary international law.
   a. True
   b. False
5. International law can effect a renul to a rule of domestic law and elevate it into a rule of international law. Illustrate.

6. From the perspective of international law States have an obligation to ensure that their domestic law is consistent with their international obligations. Exchange of Greek and Turkish Populations advisory opinion (1925), a point when this involves peremptory norms: Obligation to Prosecute or Extradite Case (2012).
   a. True
   b. False

7. Monism and dualism are rules of international law, not merely theoretical constructs of the possible relationship between municipal and international law.
   a. True
   b. False

8. Monist views vary. For instance, Hench Lauterpacht ordered norms according to their substantive value, seeing the individual as the ultimate subject of all law, and so held a very different monist view to Hans Kelsen whose concern was with form: that each norm derives its validity from a higher norm.
   a. True
   b. False

9. Triepel and Anzilotti are often held up as leading exponents of dualism, a theory which holds that municipal and international law are two distinct legal orders.
   a. True
   b. False

10. Dualism tends to focus on the supremacy of the sovereign State and the positive (ie posited or created) nature of international law, but this need not be the case. Indeed a monist can be a positivist: Hans Kelsen.
    a. True
    b. False

11. Whether a State adopts the doctrine of incorporation (international law is automatically domestic law), or that of transformation (a deliberate act is needed to transform international law into domestic law) is a matter of domestic law.
    a. True
    b. False

12. Once international law is found applicable through either incorporation or transformation, the question arises as to what occurs in the event of a

13. English law generally adopts an incorporation approach to customary international law (Trendex, 1971) and this is categorically confirmed by subsequent cases (eg R v Jones, 2006).
   a. True
   b. False

14. Customary international law is part of the law of the land in the United States and so directly applicable: The Paquete Habana (1900).
    a. True
    b. False

15. Legal systems in the civil law tradition often make constitutional provision for customary international law's application as a part of domestic law.
    a. True
    b. False

16. A number of States in the civil law tradition (as well as the United States for self-executing treaties) give treaties the same status as (federal) statutes.
    a. True
    b. False

17. Which of the following States' domestic law in theory ranks international law above domestic law (other than the constitution)?
    a. Germany
    b. Japan
    c. Timor-Leste

18. With a small number of exceptions (such as peace treaties), treaties need to be transformed into municipal law according to both English and Australian law.
    a. True
    b. False

19. Under US law, self-executing treaties those which are sufficiently clear and unequivocal and are intended to create rights and duties in individuals do not need incorporating legislation.
    a. True
    b. False
20. Under English, Australian and US case law, when interpreting a statute that
enacts a treaty, one can apply the international rules of treaty interpretation.
  a. True
  b. False

**Australian Law**

21. Which sections of the Australian Constitution confer:
   a. On the Executive Government the power to negotiate and enter into
treaties (treaty-making power)
   b. On the Commonwealth Parliament, the power to implement treaties
and incorporate international law into domestic statutes (treaty-
implementation power)

22. Not all treaties entered into by the Commonwealth of Australia need be
approved by the Commonwealth Executive Government.
  a. True
  b. False

23. Australian practice is to consider an instrument termed an 'arrangement' or
    a 'memorandum of understanding' as an instrument of less than treaty status.
  a. True
  b. False

What is the position from the perspective of international law?

24. A National Interest Analysis (NIA) need not accompany all proposed treaty
    actions tabled before the Australian Parliament. Sometimes an explanatory
statement is sufficient.
  a. True
  b. False

25. With the exception of particularly urgent or sensitive matters, in Australia
    all treaties must go before Parliament before binding 'treaty action' is taken.
  a. True
  b. False

26. Australian courts appear to have adopted a transformation approach to
  a. True
  b. False
Answers: International Law and Domestic Law

1. a
2. a
3. b
4. a
5. The rule in article 4(b) ASR (2001) elevates the State organ under domestic law into the State organ for the purposes of international law. Note that the uti possidetis rule, whilst ostensibly another illustration, is slightly different. As the ICJ Chamber was careful to point out in Burkina Faso/Mali (1986), the better view is that the boundary lies where it lay at a moment in time, namely, at independence. This will coincidentally be where the municipal boundary lay.
6. a
7. b
8. a
9. a
10. a
11. a
12. a
13. b. Later cases such as R v Jones (2006) suggest that international law may just be one ‘source’ of English law.
14. a
15. a
16. a
17. All three
18. a
19. a
20. a
21. a. section 61
   b. section 51(xxix) the external affairs power. Note that other powers can also be used.
22. b
23. a. The international law position is that intention, not language is determinative. So, for instance, in the Maritime Delimitation in the Indian Ocean case (2017) the Court found that an MOU between Kenya and Somalia was a treaty (refer above to the chapter on ‘The Law of Treaties’).
24. a. Category 3 treaty actions require only an explanatory statement.
25. a
26. a
27. a
28. b. Courts have opposed the use of international law for the purposes of constitutional interpretation: Al Katch v Godwin (2004), although see Kirby J’s contrary position in that case and others, such as Noonan Mining (WA) Ltd v Commonwealth (1997).
29. b. Although Troh (1995) appeared to accept this, the Court in Lam (2003) rejected it.
30. a. True, but not from the perspective of international law.
Chapter 9

Jurisdiction and Immunities

What is the reach of a State's law, and when is principle applicable, how can a foreign State and its officials exempt themselves from its ambit? These are the questions of respectively, jurisdiction and immunities. Both topics generally fall to be determined by domestic courts and so the rules encountered rest on customary international law as well as domestic law (be it legislation or the common law or otherwise) as it purports to implement international law. The focus in this chapter in relation to jurisdiction, is on criminal jurisdiction, as it is in most general courses and textbooks on international law.

1. The term 'jurisdiction' refers to a variety of concepts including (pick the correct answer(s)):
   a. A State's domestic jurisdiction; comprising those things on which the State is free to decide since not regulated by international law, and to which the prohibition on interference attaches
   b. A court or tribunal's jurisdiction or capacity to hear a claim
   c. The extent to which a State can make, apply and enforce its municipal laws internationally

2. Prescriptive jurisdiction relates to the State's capacity to make laws applicable to an entity, including extra-territorially.
   a. True
   b. False

3. Enforcement jurisdiction relates to a State's capacity to execute national laws or decisions.
   a. True
   b. False

4. Enforcement jurisdiction is territorial in the sense that the State can only execute a law or judgment on its own territory or, on another State's territory with the latter's consent.
   a. True
   b. False
5. The 'Lotus principle' – derived from the 1927 PCJ case of the same name – holds that unless specifically prohibited, a State has prescriptive jurisdiction regardless of whether there is a connection between it (the forum State) and the object of regulation: *Lotus case* (1927).
   a. True
   b. False

6. In practice, there is arguably a presumption that a State has prescriptive jurisdiction when it can establish one of the accepted bases or links between it and the object of regulation; but where no such link exists or the link invoked is controversial, that presumption is reversed.
   a. True
   b. False

7. The potential bases of jurisdiction (ie links between the forum and the object of regulation) are: territoriality, active nationality, passive nationality, the protective or security principle and the universality principle; the latter itself divided into universality where there is absolutely no connection to the State and the treaty-based 'prosecute or extradite' (*aut dedere, aut judicare*) principles.
   a. True
   b. False

8. Territoriality as a basis of jurisdiction can be considered controversial when the only connection between the forum and object of regulation is the effect of the regulation on the forum’s territory (the so-called effects doctrine).
   a. True
   b. False

9. The active nationality principle is uncontroversial and indeed States in the civil law tradition – together with India – have traditionally relied on this basis of jurisdiction.
   a. True
   b. False

10. Historically controversial, there is increasing acceptance of the passive personality principle (where the link is between the forum and the victim of the offence): Joint Separate Opinion of judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case* (2002).
    a. True
    b. False

11. Universal jurisdiction, in its pure sense, holds that although there is no connection between the forum and the object of regulation, the crime is so heinous that jurisdiction should be allowed.
    a. True
    b. False

12. Though often termed a type of universal jurisdiction, treaty provisions stipulating an obligation to 'prosecute or extradite' (*aut dedere, aut judicare*) are best seen as obligatory territorial jurisdiction: a State can only relieve itself of the obligation to prosecute by extraditing the defendant: *Obligation to Prosecute or Extradite case* (2012).
    a. True
    b. False

13. In the *Arrest Warrant case* (2002) the ICJ upheld an immunity from suit and so did not proceed to examine the question of universal jurisdiction. However, in their Joint Separate Opinion Judges Higgins, Kooijmans and Buergenthal stated that although States do not legislate up to the full extent of their jurisdiction they can do so if they wish. In his Separate Opinion, Judge Guillaume agreed.
    a. True
    b. False

14. Under international law, governmental acts by a State on its own territory are generally considered non-justiciable by foreign courts.
    a. True
    b. False

15. Rationales for immunity are notably (pick the correct answer(s)):
    a. One sovereign cannot sit in judgment upon another (*par in parum non habit imperium*)
    b. International comity: immunities assist in the smooth functioning of international relations
    c. It is economically expeditious to avoid legal claims between sovereigns

    a. True
    b. False
17. The distinction is generally drawn between immunity attaching to the individual because of their position in the State (immunity *ratioc per insue*), and that immunity necessary for the State to function as a sovereign/engage in acts which are governmental (immunity *ratioc materiale*).
   a. True
   b. False

18. Whilst the statute of the International Criminal Court (ICC) excludes immunities – and a number of cases see this as the general international law position – controversies remain, especially in relation to referrals by the UN Security Council to the ICC.
   a. True
   b. False

19. Immunity from a court’s jurisdiction to hear a claim is distinct from immunity from execution of a judgment: *Jurisdictional Immunities case* (2012). Exceptions exist to the former but the latter is usually regarded as absolute.
   a. True
   b. False

20. In the *Arrest Warrant case* (2002) the ICJ accepted Belgium’s argument that a serving Minister of Foreign Affairs did not enjoy immunity from jurisdiction and inviolability when suspected of having committed war crimes or crimes against humanity.
   a. True
   b. False

21. According to the ICJ in the *Arrest Warrant case* (2002), a serving Head of State, Head of Government or Minister for Foreign Affairs does not benefit from immunity from jurisdiction (pick the correct answer(s)):
   a. Before the courts of their own countries;
   b. If the immunity is waived by the State they represent;
   c. Once they have left office, for acts done in a private capacity during their time in office
   a. True
   b. False

22. A diplomatic agent’s jurisdictional immunity, whilst subject to very few restrictions (see article 31 *Vienna Convention on Diplomatic Relations*, 1961), is nonetheless in principle limited to the jurisdiction of the receiving State. Third States need only recognise the immunity for the purposes of transit.
   a. True
   b. False

   a. True
   b. False

24. Sovereign (also called State) immunity – immunity *ratioc materiale* – arises mostly in civil rather than criminal cases.
   a. True
   b. False

25. The doctrine of restrictive or relative sovereign immunity holds that immunity extends to sovereign acts (acts *de jure imperii*) but not to commercial acts (acts *de jure gestionis*).
   a. True
   b. False

26. Despite the spread of the restrictive immunity doctrine, some States still adopt the doctrine of absolute immunity, including Russia and the Peoples’ Republic of China.
   a. True
   b. False

27. Under the restrictive approach to immunity, it is generally agreed that the nature of the act, not its purpose, determines whether an act is sovereign or not: *Trendex* (1971).
   a. True
   b. False

28. A number of common law courts have taken a two-step approach to determine whether an act is sovereign or commercial; considering first the nature of the act and then placing the act in its context (eg [Primero] *Congresso del Partido*, 1983).
   a. True
   b. False

   a. True
   b. False
30. Immunities are generally to avoid courts applying domestic law to a foreign sovereign, but sometimes the question arises as to whether they can be invoked in respect of a domestic court’s application of international law.
   a. True
   b. False

**Answers: Jurisdiction and Immunities**

1. all three
2. a
3. a
4. a
5. a
6. a
7. a
8. a
9. a
10. a
11. a
12. a
13. b. Judge Guillaume disagreed.
14. a
15. a and b
16. a
17. a
18. a
19. a
20. b
21. a, b and c
22. a
23. b. The 1946 Convention does not cover the Specialized Agencies.
24. a
25. a
26. a
27. a
28. a
29. b. It is yet to enter into force.
30. a
Part 2

Problem Questions
Problem Set 1

Time required for completion assuming prior revision of topics — approximately 20-30 minutes each

Mini Problem 1

Topics: Territory, nature and extent; Population including nationality; Statehood and sovereignty generally

It is well known that the rare earth cryptonite is found in the sea floor off the Republic of Alpha’s long glistening coastline. It is estimated that there is a particularly abundant supply between 150 and 500 km offshore. Andrea has recently graduated from the Alpha University with a law degree but is unable to find work. She was born in Alpha but her parents were both born in Beta and held Beta nationality. The local army base in Alpha, which keeps a registry of all of Alpha’s nationals and distributes national identity cards, confirms that Andrea is not an Alpha national. Whilst it is true the Alpha nationality legislation of 1612 comforts this conclusion, Andrea claims that this 1612 law is archaic and is today incompatible with international law. She wants a licence to be able to exploit cryptonite but Alpha only distributes these to nationals. Exasperated, Andrea declares the independence of a recently built steel and plastic floating platform, anchored 400 km off the Alpha coast and on it she proclaims the birth of the Andean Republic. Andrea’s boyfriend John joins his own floating steel platform to Andrea’s, claiming an artificial extension of Andean territory. Analyse the issues of international law arising from this scenario.

Mini Problem 2

Topics: Treaties, nature and types, interpretation; International organizations

The Presidents of States A and B have an oral exchange which A’s Official Senior Press Attaché, Able Andrew, notes down in the back of his diary and then has both presidents initial. At the top of the page is written Memorandum of Understanding (MOU), under which is written:

Pursuant to discussions held on this day, 5 April 2017, A and B agree that A shall supply the rare earth cryptonite, which it has in considerable abundance, to an independent authority, hereby established and called The Cryptonite Authority (CA), and that in return, B shall supply the technicians to process, at the CA, the highly sought after rare earth freely supplied by A. Income derived from the venture shall flow to the CA, to be distributed equally to the two ‘shareholders’ A and B at the end of each financial year. The CA shall have its
headquarters in B’s capital and its staff and premises shall enjoy privileges and
immunities. The CA shall have a permanent secretariat and decisions shall be
taken at quarterly meetings of 'the Board’, with A and B each nominating five
members on the Board, headed by a President, being an eleventh person, who
shall be independently nominated by CA’s Secretary-General. Disputes arising
in respect of the interpretation of this diary memo shall be submitted to the
International Court of Justice.

Both A and B are original parties to the Vienna Convention on the Law of
Treaties (VCLT, 1969). Shortly after CA’s creation, Boris, a cryptonite technician
employed by CA, was shot and killed by anti-CA activists while visiting State
employed by CA. At the time A’s security services were on strike. Able
Andrew points out that even if A were responsible, the CA cannot bring a claim
against A for compensation for the injuries suffered by Boris and his family.

Is Able Andrew correct in asserting that the CA cannot bring a claim? Leave
aside the question of whether the claim would succeed on the facts.

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**Mini Problem 3**

**Topics:** Sources (advanced understanding); Fundamental principles protecting sovereignty/
article 2 UN Charter

The Republic of Patland’s national parliament is run by a proud patriot called
Pat. Pat has decided to instruct his subordinates to spam all email accounts
globally (no rule of international law prohibits this) to promote Patland’s virtues.
This infuriates State Z’s authorities who are trying to conduct a sensible foreign
relations policy and would like to get some work done. Z seeks assurances from
Patland that the spamming will cease.

**Scenario 1.** There is no reply to Z's request. However, the spamming of Z stops for four years while continuing in all other States. Z sends Pat quarterly
messages of gratitude to Patland for its restraint. There is no reply. After four years
the spamming resumes. Z claims that this is unlawful.

**Scenario 2.** There is no reply but Pat continues to spam Z's email accounts.
Z institutes proceedings against Patland before the ICJ. Pat’s Foreign Minister
then addresses international television news channels live, stating that Patland
will cease its email spamming immediately and that Pat has been fired.

Please explain whether under these scenarios, Patland is under an obligation
to stop spamming Z.
3. The Solidarity Republic (SR), a State neighbouring Rortania, is a party to the Canberra Treaty. SR claims that the Canberra Treaty confers a benefit on Rortania though it is a non-party and that conferral of this benefit is invalid unless Rortania accepts the benefit in writing. Even if that is not the case, SR claims that a treaty cannot create a new exception to the prohibition on the use of force, even if for humanitarian purposes, and that article 5 renders the entire Canberra Treaty invalid.

4. Assume now that the Canberra Treaty is not invalid pursuant to the arguments raised in point 3. Just before depositing its instrument of ratification, Nod made the following statement:

_interpretative declaration_: Nod interprets article 6 as binding only in respect of those States that Nod has recognized.

Wink objects that this is an unlawful reservation and even if lawful, Wink objects to the opposability (applicability) of Nod's 'interpretative declaration' in Nod and Wink's mutual relations.

5. Australia forgot to register the Canberra Treaty with the UN Secretariat. Discuss the ramifications.

6. A dispute arises between Nod and Wink relating to the interpretative declaration of article 6 Canberra Treaty. Nod wants to take the matter to the ICJ. Can it?
between A and B would be suspended until such time as A made amends for Ralph’s behaviour.

Meanwhile Ralph had been arrested by A’s police forces and sent to B’s notoriously rough Blocker Prison which is run by a private security company. There, he managed to get autographs from some Puppy Fluffers, and was then told by a junior prison guard, that in light of the gravity of his offence, he would never be brought before a judge since he was automatically guilty of the most heinous crimes under B’s laws. After 18 hours in the prison, Ralph was reassured by more senior prison officers that he would soon be brought before a court.

A journalist in Alpha notes that both A and B have made unilateral declarations under the IJC’s Optional Clause, with only A having submitted a reservation excluding disputes arising under bilateral treaties in force. The journalist claims in a front page news column that A should immediately take its dispute with B to the International Court of Justice.

You work in A’s Office of International Law and have been asked to advise your Minister on the international law issues arising from this case. Specifically, you are instructed to deal in turn with the following issues:

1. A’s international responsibility for Ralph’s actions;
2. The lawfulness of B’s responses;
3. Whether A can make a claim in light of Ralph’s treatment (leaving aside any International Humanitarian Law issues arising due to the fact that he is a detained member of military forces); and
4. The suggestion that A and B’s dispute should be immediately taken to the IJC.

The Minister requires your structured, precise and concise advice.

Note: States A and B are parties to the United Nations Charter (1945) and the Treaty of Imminent Amity (1955). They have no other acracy relations.
3. Can A take the matter to the ICJ? Note the overlap with Section 1, Question 6.

**Note:** Alpha and Beta are both parties to the UN Charter, the **VCLT** (1969) and to the bilateral Treaty of Amorous Relations (1972). They have no other treaty relations.

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**Section 2**

The head of Beta's armed forces, General Kipri Mowels, is in fact a member of B's Raging minority. One day, she picks up her work phone and instructs her nephew (Knotmee), who runs his own bicycle shop next to the Raging River in Beta, to deliver weapons stolen from Beta military stockpiles to RNLN fighters still based in Alpha. On the allotted evening, Knotmee duly heads to the Raging River with the looted weapons in order to carry out his aunt's wishes. However, Knotmee's motorboat laden with weapons is destroyed by A's Special Forces as it crosses the Raging River. Knotmee swims back to his bike shop.

Frustrated, Alpha takes the matter to the International Court of Justice, claiming that the Court has jurisdiction on the basis of the compulsory clause contained in the TAI, and requesting that the Court find that Beta is responsible for breaching the prohibition on the use of force contained in article 2(4) UN Charter as well as its customary international law equivalent. Alpha also claims that it has only ever acted forcibly in conformity with the modern international law of self-defence.

1. Is B responsible for an internationally wrongful act?
2. Was A acting in conformity with the ‘modern law’ of self-defence in sending its Special Forces to destroy Knotmee’s vessel?
Problem 5

The Problem of Ire-Reverent Relations (The Medi-Ocre Case)

Time required for completion assuming prior revision of topics – 90 minutes, exam conditions

Topics: Sources; Law of treaties; State responsibility; Fundamental principles of international law (article 2 UN Charter); Dispute settlement including IJC

Triputy of the mighty River Ire, the Little Reverent River forms the boundary between the States of Medi and Ocre. Both States are poor, corrupt, and in all but one thing incompetently governed. That exception is in the traditional management of the Little Reverent River. Medi is sovereign over the fish, fishing its waters. Using a special technique developed by their early ancestors called “Twist, Lean, Flick and Hook”, Ocre villagers have preferred land-based fishing from the riverbank adjoining their houses, to more vigorous on-water fishing methods. Medi has never prevented the Ocre villagers from catching fish from dry land. When, on the other hand, villagers have occasionally fished from their vessels, Medi has always sent a protest note to Ocre’s authorities. Ocre has then dispatched its police to harass the responsible villagers. Both States hold up their shared history of Little Reverent governance as a model of harmonious and spontaneous social regulation.

In 1976, the Deputy Head of Mission to Ocre’s embassy in Medi and the Acting Head of Medi’s Fisheries Division within the Department of Primary Industry initiated a handwritten document entitled Memorandum of Understanding (MOU). The MOU acknowledged that in light of the warm friendship between the two States, “fishing in the Little Reverent might henceforth be permitted by Medi’s nationals for the purposes of sustainable growth”. The document also envisaged regular discussions between senior officials to ensure the effective implementation of the arrangement. In January 2016, both States released their Annals of the arrangement. However, Ocre villagers learnt of this MOU, together with other Ocre nationals, and they immediately started fishing from vessels on the Little Reverent; selling their catch to international wholesalers for lucrative profits. As a result, Ocre’s citizens have filled with welcome tax revenue.

Question 1: Discuss the status under international law of fishing in the Little Reverent by Ocre nationals, including villagers.

Irate, Medi’s Foreign Minister claims that Ocre’s fishing activity is unlawful and she declares Ocre’s ambassador persona non grata. Medi’s Foreign Minister also warns Ocre that it will suspend a 1939 Treaty of Bovine Commerce if...
Case Concerning the Territorial Dispute and Related Matters

Time required for completion assuming prior revision of topics—90 minutes, exam conditions

Topics: Law of treaties; State responsibility; Fundamental principles of international law (article 2 UN Charter); Dispute settlement, including IJC.

On 4 May 1978, the Head of State and Prime Minister of the States of Gin and Tonic respectively sign a hand-written piece of paper torn from the diary of Gin’s Head of State, Mr Ohn Isse. The paper describes the common interest that these States have in maintaining democracy in their region. To that end, Gin and Tonic affirm two understandings as follows:

Article 2: The Parties do solemnly undertake to maintain free and fair elections.

Article 3: The Parties agree that they shall promote international human rights obligations.

The document is entitled “International Memorandum of Understanding” (I-MOU). In 1985, and again in 1996, both States invoke the existence of the I-MOU as testimony to their friendly relations. In 1997, the two States conclude a treaty (the Loan Agreement, 1997) by which Tonic lends Gin, notorious for its poor economic management, a large sum of money to be repaid over the next 50 years.

In January 2018 — some 40 years after the signing of the I-MOU — hostilities break out between the dictatorial regime in the State of Lime and pro-democracy forces, known as the Rum, located on Lime’s territory. In May of the same year, Gin and Tonic consult each other and to fulfill the I-MOU’s objective of maintaining democracy decide to begin, via their elite special forces, the supply of weapons to Rum forces. This operation takes place from 1 to 20 September 2018.

As a result of a deteriorating and catastrophic financial crisis, on 31 October 2018, there is a coup in Gin and the new government, which is both uncomfortable with the I-MOU and has strong affinities with the Lime regime, claims:

a. That the I-MOU is not a treaty and as such is certainly not governed by the VCLT (1969);

b. Even if it were a treaty, because of the change of regime in Gin, Gin no longer considers itself bound by the I-MOU;

c. Mr Ohn Isse, who signed the I-MOU on behalf of Gin, had not complied with domestic Gin processes of fundamental importance for the conclusion of a treaty or instrument of lesser importance bearing on Gin’s external affairs. As it is universally known, the signature of any treaty or other instrument relative to Gin’s external affairs requires prior authorisation from Gin Executive Council. Mr Ohn Isse was therefore not competent to sign the I-MOU and it is consequently invalid;

d. That in order to ‘ensure that it can keep the electricity running’ during its severe financial crisis, Gin is suspending repayment of its debts owed to Tonic under the 1997 Loan Agreement. An explanatory memorandum put out by Gin’s Treasury states that non-repayment of Gin’s debts is a matter of absolute impossibility.

Question 1: Please address the four assertions above by reference to international law.

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Lime alleges that Gin and Tonic’s supply of weapons to Rum is unlawful.

Question 2: Are Gin and Tonic responsible to Lime as it asserts?

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Particularly angry with Tonic’s behaviour, Lime brings its claim against Tonic to the International Court of Justice. Not a party to the UN Charter, Tonic is indignant but begrudgingly sends its best lawyers to The Hague to defend the claim.

Question 3: Discuss the likelihood of the IJC being able to hear the case.

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Note: Gin, Tonic and Lime are original parties to the VCLT (1969). Gin and Lime are parties to the UN Charter and Tonic is a party to the IJC Statute. Gin and Tonic are parties to the Loan Agreement (1997). The I-MOU has been registered with the UN Secretariat.
Problem 7

Case Concerning the ‘Invece’ (Mo v Ment) Dispute

Time required for completion assuming prior revision of topics – 90 minutes, exam conditions

Topics: Territory, nature, extent; Fundamental principles protecting territory: article 2 UN Charter; Collective security; State jurisdiction; Immunities; Dispute settlement including ICJ.

The Kingdom of Mo and the Republic of Ment gained independence from the United States Republic on 26 January 1970. In 1971 they both joined the UN and being Newly Independent neighbouring States, concluded with each other a bilateral treaty setting the course of their common boundary. In so doing, they shifted the boundary away from the colonial administrative lines that had demarcated these two colonial provinces prior to their independence. In this way, the Invece Region came to fall within Ment's boundary. Once ratified, the Boundary Treaty (1971) was registered with the UN and authentic copies were placed in the archives of the Foreign Ministries of both Mo and Ment before being quickly forgotten.

In 2016 large deposits of the rare earth Zen were discovered in the soils of the Invece Region. Several months later, in early 2017, Mo claimed that the principle of uti possidetis was a rule of jus cogens and that consequently the boundary between the two States lies, as a matter of law, along the colonial era administrative line; meaning that Mo remains, as it always has been, sovereign over Invece and its precious rare earth Zen.

Question 1: Is Mo’s claim correct as a matter of law? Please explain.

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Australia is concerned by these developments and takes the matter to the UN Security Council. Ment protests that the Council cannot examine the situation as it falls within Ment’s domestic jurisdiction. The Council chooses to ignore this assertion and adopts Resolution 8888 (3 February 2018) which determines that in light of current differences between the States and the presence of Ment’s longstanding military base in the Invece Region, the situation regarding the Mo-Ment border is a threat to international peace and security. The Council subsequently adopts Resolution 8889 (5 February 2018) in which, acting under Chapter VII UN Charter, it decides to establish the ‘International Commission of Inquiry into the Mo-Ment Dispute’ (the Commission) and further decides that all States shall cooperate with the Commission in its work relative to the Mo-Ment boundary situation. Ment claims that the Council cannot adopt these two resolutions, the first (ie Resolution 8888), because there is visibly no threat to international peace and security and the second, Resolution 8889, because it is incompatible with the legal characteristics of Inquiry as a method of international dispute settlement.

Question 2: Please address Ment’s objections to the Security Council’s behaviour.

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Stressed by these events, Ment’s Head of State decides to go on vacation to a third State, Lotus Kingdom. Whilst in a suburban shopping mall in Lotus, he is arrested by local authorities and charged with shoplifting. Ment’s lawyers claim that he is immune from suit and demand the prompt release of their Head of State. Lotus complies but declares Ment’s ambassador to Lotus persona non grata.

Question 3: Analyse the issues of law arising from the prosecution of Ment’s Head of State as well as Lotus’ treatment of Ment’s ambassador.

***

Mo decides to bring the territorial dispute with Ment to the ICJ on the basis of article 12 of the Boundary Treaty (1971) which provides:

The States Parties hereby agree to submit any dispute arising in relation to the interpretation or application of this Treaty to the International Court of Justice for binding determination.

Mo initially seeks an order of provisional measures from the Court, requiring Ment to cease its breach of article 2(4) UN Charter; namely, the continued presence of Ment’s military base in the Invece Region. Ment claims that the Court does not have jurisdiction and that in any event it is neither threatening nor a fortiorti using force as Ment is sovereign over the Invece Region.

Question 4: What are Mo’s prospects for success? Please explain.

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Note: Only Australia and Mo are parties to the VCLT (1969). Australia, Mo, Ment and Lotus are all parties to the UN Charter.
Mini Problem 1
Andrea wants a license from Alpha to mine cryptonite. Failing that, she wants to create an independent state, the Andean Republic, from which to mine the resource.

1. Can Alpha issue licenses? Alpha has exclusive rights of exploitation (sovereign rights, not sovereignty) over its continental shelf which extends 200 nautical miles from its baseline. Alpha can therefore freely determine to whom it issues mining licenses over its continental shelf, for cryptonite or other resources located there. (With no evidence that the UN’s Commission on the Limits of the Continental Shelf has proclaimed an extended continental shelf, this hypothesis should not be pursued.)

2. Alpha only grants licenses to Alpha nationals. Is Andrea an Alpha national? Nationality is a matter of domestic jurisdiction: not being governed by international law, States can confer it on whomsoever they want. No rules of international law require that a State’s nationality rules be recent, or administered by civilian authorities, and so Andrea cannot challenge Alpha’s 1612 domestic law simply on the basis of the fact that Alpha’s military authorities administer Alpha nationality to its military personnel.

3. Andrea has proclaimed the independence of the Andean Republic. Has she created a new state? A declaration of independence is a fact, neither prohibited nor permitted by international law. Kosovo Advisory Opinion, 2010 and so Andrea’s declaration is legally immaterial. Secondly, Andrea has set up her platform beyond Alpha’s 200 nautical mile continental shelf, and so the fact that Alpha’s military authorities administer Alpha nationality to its military personnel is irrelevant to the purpose of international law for purposes of the purposes of international law since not a natural part of the earth’s surface (Territorial and Maritime Dispute (2012) and (2) the Andean Republic has no permanent population as required by international law; Duflot of Selandia (1978). The Andean Republic is not a State.

Worse, the Andean Republic extends its territory by adjoining its artificial structure could increase the size of the Andean Republic’s territory (see for instance Johnston/Kalama Arolley). However, because John is appending his platform to an artificial structure, it is of no legal effect.

Problem Questions: Model Answers

Problem Set 1

Mini Problem 2
Boris’ family will want reparations for Boris’ death. Able Andrew believes that CA cannot bring a claim. Is the MOU a treaty creating an international organization with distinct legal personality enabling CA to bring the claim?

1. Is the MOU on the back page of Able Andrew’s diary a treaty? Terminology is not conclusive of whether an instrument is a treaty (Namibia advisory opinion, 1971). International law is not formalistic and in the Maritime Delimitation in the Indian Ocean case (2017) the ICJ held that an instrument called an MOU was a treaty. The question is whether, as objectively ascertained, the MOU evidences an intention to create a treaty (Qatar v. Bahrain case, 1994; Aegean Sea case, 1978). The document uses language of obligation (shall); it is intended to be governed by international law rather than some other law since it concerns privileges and immunities and refers disputes to the ICJ; and it is signed by Heads of State (the latter automatically having full powers; see customary rule in article 7 VCLT, 1969). The latter is evidence of the importance attached to the agreement by the two States. The MOU is arguably a treaty.

2. As a treaty in written form between States and concluded after the entry into force of the 1969 VCLT; namely, 27 January 1980, (see article 84(1) VCLT, 1969), and being between two original parties to the VCLT (1969), the VCLT (1969) applies to the treaty.

3. The treaty creates an international organization; namely, an association of States created by treaty, with common organs and a legal personality distinct from its members: see broadly article 2 Draft Articles on the Responsibility of International Organizations (2011) (DARIO). An international organization can consist of only two members: Pulp Mills (2010). Even were the MOU an instrument of less than treaty status, it might exceptionally create an international organization (article 2 DARIO, 2011) – see, for instance, the Helsinki Final Act (1975), an instrument of less than treaty status which created the CSCE. The CA is an international organization.

4. The scenario is the same as that in the Reparation for Injuries advisory opinion (1949); although the treaty creating the CA does not explicitly confer on the CA the capacity to bring claims, the CA benefits from implied powers; namely, those powers which though not expressly provided for in the constitution are necessary for the fulfillment of its purposes (Reparation for Injuries advisory opinion 1949, Legality of Nuclear Weapons in Armed Conflict advisory opinion, 1996). So Able Andrew is wrong to say that the CA cannot bring a claim. Whether the claim succeeds is another matter.
Under general international law, spamming is not *per se* prohibited, although if it amounts to coercion by one State against another (i.e., impair free will/is not consented to), it can be a prohibited interference: article 2(7) UN Charter, Nungapak case (1986). Similarly, spying is not *per se* prohibited but can be a prohibited interference. But has a new rule prohibiting spamming emerged which binds Poland in relation to Z?

Scenario 1: The scenario involves P's acquiescence (a fully aware silence/compliance) to Z's demands for P to stop spamming. Acquiescence is an adjunctive or quasi-unilateral act which can be analysed from several perspectives. First, there is potentially a tacit treaty between P and Z relative to the cessation of spamming. A tacit treaty is one in which intention is expressed by way of conduct. Here P's silence/lack of spamming would evidence an intention to be bound under international law, but on the facts this would be very hard for Z to prove. Second, P's acquiescence might potentially give rise to a local/special/bilateral custom (and bilateral custom is possible: Related Rights case, 2009), in which case P's silence in circumstances in which one expects a response, would go to both the elements of State practice (the aware silence) and *opinio juris* (the conviction that abstaining from spamming is required by law). The difficulty is that the other conditions for custom, notably the passage of a certain period of time, may not be satisfied as here the practice is only four years old (see North Sea Continental Shelf case, 1969 where the Court intimated that there is an inverse relationship between the intensity of the practice and the length of time needed for the emergence of a customary rule). On the facts here, it is not clear that Z could prove that a custom has emerged. Finally, the ICJ in the *Obligation to Negotiate Access to the Pacific Ocean case* (2018) rejected the idea of 'autonomous' acquiescence (dissociated from another source), as it did the concept of legitimate expectations alone giving rise to obligation. Note moreover that estoppel is not relevant on the facts: as the Court reiterated in the 2018 *Obligation to Negotiation case*, for an estoppel to operate, amongst other conditions, detrimental reliance is required and there is no evidence that Z relied to its detriment on P's behaviour. It would therefore seem that Z would only be correct in asserting that P is under an obligation not to spam if Z can prove either a tacit treaty or a bilateral custom to that effect, both of which look unlikely.

Scenario 2: The question is whether the promise made by P to stop spamming is binding on P as an autonomous unilateral act. The *Nuclear Tests case* (1974) set out most of the conditions for a promise to be binding: the ICJ Chamber in the *Burkina Faso/Mali case* (1986) reiterated that this would be rare (if circumstances allow for the conclusion of a treaty, a Court will not find that the promise was binding); and, in the *Armed Activities case* (2006) the ICJ added that in order to bind, the promise cannot be indeterminate. The 2006 ILC Guidelines on autonomous unilateral acts reiterates and extrapolates on these conditions. Applied to the facts:

- The Foreign Minister has made the promise and like the Head of State or Prime Minister, is someone authorised to speak on behalf of the State. [Note that a minister in their field of activity might be authorised to speak on issues within their portfolio: see *Armed Activities case* (2006)]

- The statement was made publicly (contrast here *Eastern Greenland case* (1933) which dealt with a promise made in private by Norwegian Foreign Minister Ibsen which was relied on by Denmark. But that case is arguably best seen as dealing with an adjunctive or quasi-unilateral act).

- The statement was made *en force* (towards all). This was held up as a condition in the *Nuclear Tests case* (1974) but the ILC in its 2006 *Guiding Principles on Unilateral Declarations* considers that the promise could alternatively be made to the other State directly.

- There must be an intention to be bound and one looks to the circumstances in which the promise was made to ascertain that intention. A general reference to being bound by certain human rights instruments was insufficient in the *Armed Activities case* (2006) to bind the State to its promise since the statement was indeterminate. Note the statement is to be interpreted in a restrictive manner (2006 ILC *Guiding Principles on Unilateral Declarations*). This is consistent with the rules of interpretation of unilateral acts in general: a unilateral act is to be interpreted favourably to the entity asserting it—*Fisheries Jurisdiction* (1998).

Rationale: promises are binding by virtue of the principle of good faith (*Nuclear Tests case*, 1974).

On the facts, Z has a good case that P's promise is binding.
Problem 2

Case Concerning the Canberra Treaty for Perpetual Amity and Sustainable Commerce (Nod v Wink)

1. What impact does participation at the Canberra Conference have on Nod and Wink's mutual recognition? Nil. Recognition can be tacit meaning that it can be conferred by conduct, such as participation in bilateral treaty negotiations. However, participation in universal or quasi-universal treaty negotiations is not taken to constitute tacit recognition.

2. Does the VCLT (1969) apply to the Canberra Treaty? The VCLT (1969) applies to those treaties concluded after entry into force of the VCLT (1969) but then only in respect of those States already parties to the VCLT (1969). Here Nod ratified the VCLT (1969) after entry into force of the Canberra Treaty and so the customary international law of treaties applies to the Canberra Treaty in respect of Nod and Wink. One can however, turn to the VCLT (1969), not to apply it per se, but as a codification of the customary rules on the law of treaties.

3. The Solidarity Republic (SR), a State neighbouring Rortania, is a party to the Canberra Treaty. SR claims that the Canberra Treaty confers a benefit on Rortania though it is a third party and that conferral of this benefit is invalid unless Rortania accepts the benefit in writing. Even if that is not the case, SR claims that a treaty cannot create a new exception to the prohibition on the use of force, even if for humanitarian purposes, and that the presence of article 5 Canberra Treaty renders the entire Canberra Treaty invalid.

   a. A treaty does not create rights or obligations for third parties without their consent: the pacts equals principle: customary rule in article 34 VCLT (1969), Certain German Interests in Polish Upper Silesia (1926). However, so long as it emerges from the proper interpretation of the Canberra Treaty that the parties intended to confer rights on Rortania, there is a presumption – albeit not one lightly to be presumed (Free Zone case, 1932) – that Rortania has accepted the right (customary international law in article 36 VCLT, 1969). Treaties creating third party obligations require acceptance in writing (rule in article 35 VCLT, 1969) and SR is wrong to assert that the Canberra Treaty can only confer a right on Rortania if Rortania accepts it in writing.

   Note, moreover, that the grounds for treaty invalidity are exhaustive (article 42(1) VCLT, 1969) and this is customary international law (Gakowska-Nagymaros case, 1997, by implication). Claiming that a treaty is invalid because a condition attaching to third parties has not been satisfied could therefore be hard to argue.

4. Answering a question on reservations involves a three step procedure:
   a. Is the 'Interpretative Declaration' an interpretation or reservation? A reservation is a unilateral statement made before or when the State expresses its consent to be bound that seeks to modify or exclude
the legal effect of a treaty provision (article 2(1)(d) VCLT (1969) as a reflection of custom). Whether a statement is a reservation is a matter of interpretation. What the statement is called is not deterministic but can play a role. 

In the *Bellisos case* (1988) the ECtHRs found that a statement termed an ‘interpretative declaration’ was a reservation. In that case Switzerland itself argued before the Court that the provision was a valid reservation and whilst the Court would agree on that point, it would also go on to hold that it was an invalid reservation. The rules governing the interpretation of this type of (variously called non-autonomous, adjunctive, quasi-) unilateral act are found in Conclusion 1.3 of the ILCs 2011 *Guide to Practice on Reservations to Treaties* (Guidelines). The primary factor is the actual text of the reservation, but the treaty’s object and purpose, and the circumstances of its adoption, including the subjective intentions of the reserving State when making the reservation also play a role (contrast treaty interpretation in respect of the last factor). On the facts of the case at hand, Nod’s Interpretative Declaration is clearly a reservation since it seeks to modify article 6 Canberra Treaty by excluding Nod from the obligation to fly flags of States that Nod has not recognised.

b. Is the reservation valid? The Canberra Treaty contains no provision regarding reservations, and so article 19(c) VCLT (1969) applies, which means one needs to see if the reservation is contrary to the treaty’s object and purpose. The Canberra Treaty dealt with peace and security and so like treaties dealing with human rights or the law of the sea, it is a standard setting treaty. In the *Genocide Convention advisory opinion* (1951) the Court stated that broad adherence is sought for such treaties and so, by extrapolation, it will be less likely that a reservation is contrary to such treaties’ object and purpose. The *ILC Guidelines* (2011) assist in assessing whether a reservation is contrary to the treaty’s object and purpose. Guideline 3.1.5 provides that:

> A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the raison d’être of the treaty.

Arguably on its proper interpretation Nod’s reservation does not ‘impair the raison d’être of the treaty’ – which is to end the scourge of war and create sustainable wealth (article 1 Canberra Treaty), but one could argue both ways. If the Reservation is valid – go to point c. below. The effect of an invalid reservation is dealt with in Conclusion 4.5.3. *ILC Guidelines* (2011) and results in nullity of the reservation, meaning

5. Australia forgot to register the Canberra Convention with the UN Secretariat. Discuss the ramifications. Article 102 UN Charter provides that unregistered treaties cannot be invoked before UN fora. However an unregistered treaty remains valid. Under article 18 of the *League of Nations Covenant* (1919) an unregistered treaty was invalid. That said, in practice, article 18 operated much the same way as article 102 UN Charter.

6. A dispute arises between Nod and Wink relating to the question of article 5 Canberra Treaty. Nod wants to take the matter to the ICJ. Can it? A dispute is a disagreement on a point of fact or law (*Martensmits case*, 1924) and this is the case here on the facts in respect of the reservation; the parties to the dispute are States (article 34 ICJ Statute) who are parties to the ICJ Statute (article 35 ICJ Statute, article 93 UN Charter) and who have consented to the Court’s jurisdiction pursuant to article 36(1) ICJ Statute since article 10 Canberra Treaty is a compromissory clause. The ICJ appears to have jurisdiction to hear the dispute. The Court would also need to establish that the case is admissible. As noted, Australia’s failure as depository to register the Canberra Treaty might render the dispute inadmissible (article 102 UN Charter). Nod should encourage Australia to register the treaty before bringing its claim.
Problem 3

The Teddy Bear Drop Case

1. A's international responsibility for Ralph's actions

As a matter of law, the commission by a State of an internationally wrongful act (IWA) automatically entails that State's responsibility (article 1 ASR, 2001), whether or not that responsibility is enforced. B must prove that A has committed an IWA; which is to say an attributable breach of an international obligation (article 2 ASR, 2001). Alpha can negate the element of breach by proving the existence of a circumstance precluding wrongfulness (CPW), in which case no responsibility arises: IWA = Attribution + (Breach – CPW).

Attribution:

- Ralph is a pilot in A's air force, which being part of a State's structure under domestic law, makes him a de jure organ of A (article 4 ASR, 2001). His acts will thus be attributable to A if he was acting in an official capacity.

Alpha would do well to argue that Ralph's acts were undertaken in a private rather than an official capacity. However, this might be difficult as Ralph was on duty when he took the plane and he used means put at his disposal by virtue of his official function – a State aircraft – suggesting that Ralph was acting officially for the purposes of the law (see generally: the second assault in Melen (1927); Caire (1929); Youmann (1923)). If his acts were official, it is immaterial that he was acting *ultra vires* or contrary to instructions: article 7 ASR (2001); *Armed Activities case* (2005). Ralph's acts are arguably attributable to A.

Breach and its potential negation by a circumstance precluding wrongfulness (CPW):

- By entering B's airspace, which begins 12 nautical miles from B's baseline, A has breached the prohibition on intervention (Niagra case, 1986). This breach might also amount to a prohibited use of force (article 2(4) UN Charter), but the text here is not clear: some refer to 'scale and effects' (Niagra case, 1986, paragraph 195) as the relevant standard (see Rule 69, Tallian Manual 2.0 on the International Law Applicable to Cyber Operations), others point to both gravity (which is arguably the same thing as scale and effects) and intention as key but non-exhaustive parameters (see Olivier Corten, *Law Against War*, Hart Publishing, 2010). Alpha would do well to argue that the act was not a prohibited use of force, particularly as there was no intention to use force, but merely to drop teddy bears. However, if Ralph's acts do amount to prohibited force, arguably it is a 'less grave' rather than a grave use more akin to a frontier incident (Niagra case, 1986) than the laying of a mine which might constitute an aggression (Oil Platforms case, 2003). Moreover, the act was only carried out by a subordinate acting autonomously, which suggests that it was not an act of aggression. In sum, there is a prohibited intervention but arguably no breach of the prohibition on the use of force.

- The breach ceased with the landing, making it instantaneous: article 14(1) ASR (2001).

- When making an emergency landing, Ralph was trying to save his life and hence the life of a State organ, so A would seek to invoke distress (article 24 ASR, 2001) to preclude the wrongfulness of the intervention. A CPW cannot preclude the wrongfulness of a prohibited use of force since that prohibition has the status of jus cogens (article 26 ASR, 2001). In respect of the prohibited intervention, a distress argument also fails: (1) the prohibited intervention (penetration of B's territory 12 nautical miles from the shore) occurred before the situation of distress (engine failure) arose (five kilometres from the shore); (2) there was a contribution to the onset of the situation of distress since Ralph knew the plane was not serviced (see article 24(1)(a) ASR, 2001); and (3) the balancing test is not satisfied: more lives were lost than saved (article 24(2)(b) ASR, 2001). Alpha cannot invoke distress.

Thus, unless A can show that Ralph was acting in a private capacity, A's responsibility is engaged for the prohibited intervention and potentially the prohibited use of force, and a secondary obligation arises for A; namely, the obligation to make reparation to B to wipe out the consequences of the IWA (Charouse case, 1928). Given that restitution (article 35 ASR, 2001) is arguably not possible, reparations will here take the form of compensation for the material damage caused to the commuters and to the highway, as well as the cost of the teddy bear clean-up: article 36 ASR (2001), and satisfaction for the prohibited intervention which caused moral damage: article 37 ASR (2001), Corfu Channel case (1949). Alpha would do well to acquit itself of this secondary obligation to make reparation as a failure to do so constitutes a continuing IWA.

2. The lawfulness of B's responses

Given that A has not acquitted itself of its secondary obligation to make reparation, B can engage in lawful measures of self-help.

B's declaration of A's ambassador as *persona non grata* is an act of retorsion which is an intrinsically lawful but unfriendly act.
Can B suspend the 1955 Treaty of Amity Amity?

a. Neither A nor B are parties to the VCLT (1969) and so one must apply the customary international law of treaties, turning to the VCLT (1969) as a codification of those rules. Material breach of a treaty’s provision by one party is a conventional and customary ground for a treaty’s suspension (and in some cases termination) of a treaty by another party (article 60 VCLT (1969), Gakhestan-Nagymaros case, 1997) and is reflected in the maxim inadimplentum non est adimplendum. The rule distinguishes between bilateral treaties (article 60(1) VCLT (1969) – the case at hand) and multilateral treaties (article 60(2) VCLT, 1969), both of these being subject to the conditions in article 60(5) VCLT (1969). The material breach in question must be of the treaty that is to be suspended or terminated (Gakhestan-Nagymaros case, 1997); on the facts here, the Treaty of Amity itself which B claims that A has materially breached and in turn would like to suspend. Next, the provision breached must be one essential to the accomplishment of the object and purpose of Treaty of Amity (though not necessarily of a provision per se important – it is the relationship of the provision to the ends of the treaty that counts). The breach itself cannot be trivial (Tania Arris award, 1925). On the facts, the precise provision breached is unknown but a prohibited intervention is not trivial and the provision breached is undoubtedly of a type essential the Treaty of Amity’s purpose; namely, friendly relations. If B proves material breach, B can choose to suspend the treaty in whole or in part (article 60(1) VCLT, 1969) and the effect is ex nunc: article 72 VCLT (1969). If there is no material breach, B can nonetheless adopt countermeasures if the conditions for countermeasures are satisfied.

b. Can suspension of the treaty be justified as a counter-measure? Injured States can enforce responsibility through counter-measures if the IWA is continuing which on the facts, is A’s failure to make reparation for its breach. The customary conditions for counter-measures, with which A would need to comply, are: a prior continuing IWA (present on the facts); notice of intention to take counter-measures (arguably here given over the phone); and proportionality of the response in the sense that the proposed suspension of the Treaty of Amity must be commensurate to the injury (hard to judge on the facts). Counter-measures must also be reversible (fulfilled on facts). These customary conditions can be found in the Gakhestan-Nagymaros case (1997).

Thus in response to A’s continuing failure to make reparation, B can declare A’s ambassador persona non grata; can probably suspend the Treaty of Amity on grounds of a material breach of one of its essential provisions by A; and in any event can take counter-measures, so long as the conditions including proportionality, are fulfilled on the facts.

3. Ralph’s treatment

Ralph’s arrest is an exercise by B of its territorial jurisdiction. Can A exercise diplomatic protection in favour of Ralph who is now languishing in Bloker Prison?

a. Attribution: the prison is privately run, but detention is an inherently governmental function, making the prison guards organ of B pursuant to the rule in article 5 ASR (2001) – exercising elements of governmental authority – and to which the rule in article 7 ASR (2001) applies; these acts are attributable even if ultra vires or contrary to instructions (Armed Activities case, 2005) so long as carried out in an official capacity. On the facts, the junior prison guard might be acting contrary to authority in asserting that Ralph will not be brought before a judge, but his acts will be attributable since manifestly carried out in an official capacity in the prison.

b. Breach: If Ralph is indeed refused access to a court or tribunal, which is a denial of justice (in the form of a failure to respect due process (Harry Roberts Claim, 1926; Clyde Dwyer Claim, 1929), this would breach the minimum standard of treatment B owes A. However Ralph has only been held for 18 hours and the senior guards have contradicted the junior guard’s statement that Ralph will not be brought before a judge. Thus, the breach is not yet consummated and acts in preparation of a breach are not themselves a breach: Gakhestan-Nagymaros case (1997).
4. ICJ Jurisdiction

The ICJ can hear contentious cases between States (article 34 ICJ Statute) that are parties to the ICJ Statute (which is automatically the case for UN Charter parties: article 93(1) UN Charter), so long as there is consent to the Court’s jurisdiction (article 36 ICJ Statute — here article 36(2) being relevant). Here the dispute arises under customary international law and not merely the Treaty the dispute arises under customary international law and not merely the Treaty of Amity and so A’s reservation (which can be invoked by the other party; namely, B against A: Certain Norwegian Loans case, 1957) would preclude any issues relative to the 1955 Treaty (such as material breach) being discussed before the Court. However, whilst the Court might have jurisdiction on the basis of article 36(2) ICJ Statute, A’s case would be inadmissible insofar as the issue of diplomatic protection is concerned, since even assuming there were a breach of diplomatic protection, the minimum standard of treatment by B, ELR, has not been satisfied by Ralph. This means that the Court would only be able to decide on A’s infringement of B’s territorial integrity — in other words, the Court only has jurisdiction for the time being to rule against A. Alpha might want to rethink if taking the matter to the ICJ is a good strategy. Perhaps diplomatic settlement of this dispute is a better option...

Section 4

The Case Concerning the Ragers

1. Where is the A/B boundary located?

The principle of uti possidetis juris applies: Onyabike’s pre-independence administrative boundary dividing the colonial provinces of Alpha and Beta becomes the new international boundary: Arbitration Commission on Yugoslavia, Opinion No. 2 (1992). The boundary lies on A’s bank of the Raging River.

When A and B became independent, there was a State succession since two new States replaced O in the responsibility for the international relations over a given territory: article 2 of the 1978 Vienna Convention on State Succession in Respect of Treaties (VCSS-T). As former colonies, A and B are termed ‘Newly Independent States’. As such, none of O’s treaties bind A and B, except for those creating a boundary or other territorial regime: customary rule in respectively articles 11 and 12 VCSS-T (1978).

2. Have the Ragers been treated unlawfully?

A’s repression of the Ragers is in full respect of its international human rights obligations (necessarily customary because there is no indication that a human rights treaty applies to A) and so long as A remains in compliance with its international obligations, A’s treatment of the Ragers falls to its domestic jurisdiction (Nationality Denies advisory opinion, 1923). B is clearly treating the Ragers as a minority as they enjoy heightened autonomy, and there is no allegation it is breaching any obligations owed in respect of the Ragers.

3. Do the Ragers in A have a right to self-determination?

They have created an armed wing that purports to be a National Liberation Movement, the RNL. The RNL’s declaration of independence is not prohibited by international law: Kosovo advisory opinion (2010). Self-determination as codified in UN General Assembly Resolutions 1514 (1960), 1541 (1960) and the Friendly Relations Declaration (Resolution 2625 (1970)), entitles ‘a people’ to independence or free association with another State, if they are subjected to colonial domination, apartheid or unlawful foreign occupation. ‘Remedial secession’, a concept that attaches to situations of egregious human rights violations, is probably not a ground for (external) self-determination given that in the Kosovo advisory opinion (2010) the ICJ said ‘opinions were divided’ on this question, intimating that no generality of practice and opinio juris existed: see the conditions for custom in North Sea Continental Shelf case (1969). On the facts, the Ragers have not been recognised as a people by the UN General Assembly
through its Committee on Decolonisation; that is tasked with listing Non-
Self-Governing Territories, and recognition by the international community
as represented in the General Assembly and its subsidiary is constitutive of a
people (ie creates them). Instead the UN General Assembly ignored the Ragers'
claim. Moreover, self-determination was already exhausted when O granted
independence to A and B and ulu pasifikis deployed its effects (sometimes called
the 'one-shot' rule). Had the Ragers been a people with a right to 'external'
self-determination, they could take up arms, here via the RNLM, and forcibly
self-determination, they then be characterised as a breach of the prohibition on the use of force by A,
since contrary to the purposes of the UN Charter (see wording article 2(4) UN
Charters, 1955), since it is well
the jus cogens right to self-determination (East Timor case, 1995), since it is well
established that there is no right of collective self-defence for Peoples, something
it being a breach of Charter). However, a better view is that such repression is simply
the jus cogens right to self-determination (East Timor case, 1995), since it is well
established that there is no right of collective self-defence for Peoples, something
that would logically flow if the State was breaching article 2(4) UN Charter in
denying a people's right of self-determination.

In conclusion, the Ragers and RNLM are not recognised as a people and
self-determination was exhausted in 1970. Alpha can represent their activities as
long as it does so within the confines of its obligations under international law.

4. Discuss the Security Council's activity in relation to the matter brought
before it.

Once seized, the Security Council can make a determination under article 39
UN Charter which enables the possible adoption of enforcement measures under
article 41 UN Charter (non-forcible measures) and article 42 UN Charter (forcible
measures). The article 39 determination is political (ie discretionary) but has legal
consequences. Alpha is wrong in asserting that the Council has an obligation to
make an article 39 determination. Since the 1990s it is, however, quite common
for the Council to determine that a human rights situation constitutes a threat
to international peace and security. Moreover the Council can determine that
to international peace and security. Moreover the Council can determine that
to international peace and security. Moreover the Council can determine that
international peace and security' (eg Resolution 841 (1993) regarding the 1991
international peace and security) since Chapter VII measures are an
exception to the prohibition on intervention: article 2(7) UN Charter.

On the facts, the Council is blocked by the systematic threat or use of veto
pursuant to article 27(3) UN Charter and so cannot act.

5. Can the UN General Assembly take up the matter?
The General Assembly can deal with international peace and security (article 10
UN Charter) so long as the Council is not seized of the matter (article 12
UN Charter). However, under the Uniting for Peace Resolution (Resolution 337
UN Charter).
Section 2

1. Is B responsible for an IWA?

In law the presence of an IWA automatically entails responsibility. IWA = Attribution + Breach – CPW.

Attribution: Since Kootmee is acting on Kiapri’s instructions, to attribute Kootmee’s acts, one must first show that Kiapri’s acts are attributable. Kiapri is the head of the armed forces and thus a de jure organ of B (custom in article 4 ASR (2001); Bosnia Genocide case, 2007), but has no doubt acted contrary to B’s laws in stealing weapons and supplying weapons to foreign rebels. These acts will nonetheless be attributable to B if Kiapri acted in an official capacity (custom in article 7 ASR (2001); Armed Activities case, 2005). Kiapri has used her official position and means put at her disposal as head of the armed forces in order to access the weapons and to instruct Kootmee, suggesting that the acts were official: the second assault in Mullen (1927); Caine (1929); Youmans (1923). Kiapri’s acts are attributable to B.

Kootmee is a private person. The acts of private persons are not attributable to the State unless they act under the State’s effective control (Teheran Hostages case, 1980). Is B in effective control of Kootmee?

- On the Nicangua case (1986) test of “control on the one hand and dependence on the other”, Kootmee might be a de facto organ of B, but the test is very strict and the facts are not sufficiently clear for A to establish Kootmee’s dependence;

- On the Bosnia Genocide case (2007) de facto organ test of “complete dependence leaving no margin for manoeuvre”, the entity being a ‘mere political instrument’, it might also be possible to attribute the acts, though again, the test is strict and A might have difficulty proving Kootmee’s dependence on B;

- Arguably most relevant is the Bosnia Genocide case (2007) interpretation of the article 8 ASR (2001) test: control by the State of ‘each operation’. Kootmee is acting under the instructions of Kiapri who is arguably in control of each operation. In this situation, Kootmee’s acts are directly attributable via B’s de jure organ Kiapri. Kootmee’s delivery of weapons is attributable to B.

Breach: In the Nicangua case (1986), the E/C held that the supply of weapons to rebels was a less grave use of force and a prohibited intervention in contravention of the customary rules codified by articles 2(4) and 2(7) UN Charter. However,

Problem Questions

B is sovereign over the Raging River and so Kootmee never reached A’s territory. There is no breach of international law by B, as acts in preparation of a breach are not in themselves a breach: Gabdulov-Nagyvanszki case (1997).

In the absence of a breach, there is no IWA and so B’s responsibility is not engaged.

2. Was A acting in conformity with the modern law of self-defence?

Kootmee’s boat has been sunk in B’s territory and so the question is whether the acts of A’s Special Forces (de jure organs under article 4 ASR, 2001) might be justified as anticipatory self-defence; namely, self-defence against an objectively verifiable ‘imminent threat’, with conditions defined in The Caroline correspondence of 1841.

Anticipatory self-defence is controversial, relying principally on The Caroline (1841) as authority for its status, even though in 1841 no prohibition on the use of force existed, and indeed, the ILC in the ASR treats this incident under necessity (article 25 ASR, 2001), not self-defence (article 21 ASR, 2001). Moreover, anticipatory self-defence was rejected by States at the UN World Summit in 2005, despite the UN Secretary-General’s invitation in his report, In Larger Freedom (2005) to include it in the World Summit Outcome (2005) document, which resembles, much like the Friendly Relations Declaration (1970), an authentic interpretation by the parties of the UN Charter by means of subsequent practice: custom in article 31(3)(b) VCLT (1969), Kashiw/Sedudu Island case (1999).

Even assuming anticipatory self-defence exists under customary international law (logically it must then, in the first instance, be an authoritative interpretation by the parties to the UN Charter of the Charter, given the jus cogens status of article 2(4) UN Charter as well as the presence of article 103 UN Charter), the conditions are not made out here since the imminent attack must be ‘grave’. B’s supply of weapons would arguably be – had it been achieved – a less grave use of force (Nicangua case, 1986). Moreover, whilst the conditions of necessity and proportionality of A’s acts might be satisfied, the final condition – notification of the Security Council if acting under the treaty rule in article 51 UN Charter – was not fulfilled by A even though A is a UN member.

A has committed an IWA: a prohibited use of force and a prohibited intervention in breach of article 2(4) and 2(7) UN Charter. A must make reparation, no doubt here in the form of satisfaction (Cofa Channel case, 1949). Though rare, given the severity of the norm breached – article 2(4) UN Charter, A may also be obliged to make guarantees and assurances of non-repetition (Jurisdictional Immunities case, 2012). If considered a ‘grave’ breach of article 2(4) UN Charter as a grave use of force (article 3(6) Definition of Aggression, 1974), the argument can be made that as a ‘serious breach of a peremptory norm’ (article 40 ASR, 2001), that third States have an obligation of non-recognition, non-assistance and were the
serious breach continuing in character, of cooperation to end the IWA: article 41 ASR (2001), Wall advisory opinion (2004), Chagos advisory opinion (2019). Because there is a breach of a peremptory norm, third States can, whether the breach is serious or not, call on A to make reparation to B: article 48 ASR (2001).

Self-defence against a Non-State Actor (Knotonee) need not be considered since Knotonee’s acts are attributable to B (above Section 1).

3. Can A take the matter to the ICJ?

The ICJ ostensibly has jurisdiction: both A and B are States (necessary for contentious jurisdiction: article 34 ICJ Statute) and are parties to the UN Charter and so ipso facto parties to the ICJ Statute (article 92(1) UN Charter). There is a compromissory clause in the TAR and this dispute concerns amorous relations, so the Court has the consent it needs for jurisdiction (article 36(1) ICJ Statute). However, the case is arguably not admissible given that A and B have not negotiated as required by article 42 TAR, which replicates article 22 ECTR (1965). In Georgia v Russian case (2011) this was held to be an obligation to negotiate.

1. Status of fishing on the river

a. There is a bilateral/special/local custom of subsistence fishing by the villagers from the riverbank: a practice undertaken since ‘time immemorial’ that was tolerated by Medi. This tolerance manifests as: silence accompanied by awareness (given the contrasting active response by Medi to on-water fishing) and so Medi acquiesced to the practice: Gulf of Maine case (1984). The belief that the practice is binding as a manner of law (opinio juris) also needs to be present and can be discerned from the dispatch of notes by Medi’s authorities and Ocre’s response in its police berating locals for on-water fishing. The facts are very similar to the Related Rights case (1999).

There may also be a tacit treaty – conduct evidencing an intention to create legal relations governed by international law – between the two States to the same effect (the Right of Passage case (1960) can be interpreted this way). The two sources, custom and treaty, can co-exist: Nicaragua case (1986).

There is a bilateral custom and a bilateral treaty conferring a right of river bank based subsistence fishing by Ocre’s villagers.

b. Is the MOU a treaty? If so, it would allow (1) fishing from vessels on the river, (2) for any purpose that relates to ‘sustainable growth’, which is broader than mere subsistence purposes, and (3) could be undertaken by any of Ocre’s nationals and not just the fishing villagers. If the MOU is a treaty, the VCLT (1969) would not apply since concluded prior to the 1969 VCLT’s entry into force, but one can nonetheless turn to its provisions to the extent they reflect custom.

Whether it is a treaty is to be objectively determined in light of plain meaning of the terms in their context and in light of the object and purpose (custom in article 31 VCLT (1969), Territorial Dispute (Libya/ Chad), 1994). Was there an intention to create legal relations? Here the terms of the MOU are not mandatory (using terms such as ‘might’ not ‘shall’), the signatories are junior in the State hierarchy and so very unlikely have full powers, and the instrument is not public, let alone registered pursuant to article 102 UN Charter, suggesting it is not a treaty. Whilst nomenclature is not important (Namibia advisory opinion, 1971), here the term ‘MOU’ does indeed suggest that the instrument is an instrument of less than treaty status.
Thus, only subsistence fishing by villagers from the riverbank is lawful by virtue of the bilateral custom and tacit treaty. Oce has clearly exceeded those limits, acting on the MOU as if it were a treaty rather than an instrument of less than treaty status.

2. Are the acts of Medi’s Foreign Minister lawful?
   a. As an act of retaliation, declaring an ambassador persona non grata might be unfriendly, but it is intrinsically lawful.
   b. Medi’s other acts of self-help (suspension of the treaty) can only be lawful if it can show that Oce has committed a prior IWA. IWA = Attribution + (Breach – CPW)

Are the acts of fishing attributable to Oce? Clearly not, but they reveal that Oce’s de jure organs (custom in article 4 ASR (2001); Bosnia Genocide case, 2007) have failed to deploy efforts to prevent unlawful fishing, and thus Oce is in breach of its due diligence obligations by allowing its territory to be used in a manner contrary to the rights of other States (Corfu Channel case, 1949).

Oce claims it was in a state of necessity (custom in article 25 ASR (2001); Gabcikovo-Nagymaros case, 1997): breaches its obligations not to engage in on-water fishing was the sole means by which it could avert the grave and imminent peril of bankruptcy threatening its essential interests – here, its economic survival. A financial crisis is indeed recognised as an area in which necessity might operate (CMS Gas Transmission case, 2005), but here Oce apparently contributed to the onset of the peril since the facts state that it is corrupt and mismanages its governance. Oce cannot invoke necessity.

Consequently, there is an IWA and Oce is under an obligation to ensure cessation of the unlawful fishing and to make reparation: restitution in the form of altering its domestic laws to ensure compliance (jurisdictional Immunities case, 2012) and compensation for the damage to Medi’s resources.

c. To enforce that responsibility, can Medi suspend the Treaty of Bovine Commerce?
   i. Suspension of the Bovine Treaty (a cattle related agreement) cannot be justified on grounds of material breach since there is no prior breach of the Bovine Treaty itself: Gabcikovo-Nagymaros case (1997).
   ii. Is the suspension of the Bovine Treaty a lawful counter-measure?
      The suspension is lawful as a counter-measure since there is:
      - an ongoing IWA: fishing of the resources beyond the limits of the tacit treaty/bilateral custom, as well as Oce’s failure to make reparation in accordance with its secondary obligations; and

3. Does the ICJ have jurisdiction to hear Medi’s claim?

The Court can hear contentious cases between States (article 34 ICJ Statute), who are parties to the ICJ Statute (article 35 ICJ Statute). Both States are parties to the UN Charter and so ipso facto to the ICJ Statute (article 93(1) UN Charter). The Court has prusa facie jurisdiction since both States have consented to it under the Optional Clause (article 36(2) ICJ Statute). Medi has appealed a reservation which Oce can invoke: Certain Norwegian Loans case (1957), article 36(3) ICJ Statute. This means that Medi must make any arguments about subsistence fishing as a breach of bilateral custom and not as a tacit treaty. It does not have much, if any, prospect of success here. In terms of all other fishing, because the MOU is not a treaty, Oce cannot invoke Medi’s reservation in this context. Consequently it makes sense for Medi to pursue its claim for breaches by Oce of its due diligence obligation.
Case Concerning the Territorial Dispute and Related Matters

1. Please address the four assertions by reference to international law.
   a. Is the I-MOU a treaty or an instrument of less than treaty status?
      There is an agreement between a Head of State and Head of Government who both enjoy full powers (custom in article 7(2) VCLT, 1969), concluded with an apparent intention to create legal relations as objectively ascertained via interpretation (article 31 VCLT, 1969); the wording of the agreement is solemn and concrete. Registration with the UN (article 102 UN Charter) is also indicia that the I-MOU is a treaty and, whilst unilateral acts are sometimes registered, instruments of less than treaty status are less likely to be. It does not matter what the instrument is called: Namibia advisory opinion (1971). For instance in Maritime Delimitation in the Indian Ocean (2017) an instrument was called an MOU and found to be a treaty. The I-MOU is arguably a treaty. However, being concluded in 1979, so before entry into force of the 1969 VCLT (ie 27 January 1980), the I-MOU is not a treaty governed by the VCLT (1969) but rather by the rules of customary international law as reflected in the VCLT (1969).
   b. Is the I-MOU binding after the change of government in Gin?
      There is no State succession and so the treaty remains binding on the State despite the change of government: Timoco Claims (1923). Gin is wrong in its assertion and remains bound by the I-MOU.
   c. Is the I-MOU invalid?
      The Head of State and Head of Government have full powers (custom in article 7(2) VCLT, 1969). However, a manifest violation of a domestic law provision relative to treaty-making of fundamental importance is a ground for treaty invalidity (custom in article 46(1) VCLT, 1969). Note that the State can only invoke its own failure to comply with constitutional processes (Territorial and Maritime Dispute, 2012) – this is satisfied here since Gin is claiming it had not complied with its own procedures. The ground in article 46 VCLT (1969) with its three criteria highlighted in italics above, may or may not be made out on our facts, but that is irrelevant here as Gin has clearly acquiesced (custom in article 45(6) VCLT, 1969).
      The I-MOU remains a valid treaty, binding on both Gin and Tonic.
   d. Can Gin suspend repayment of its debt?
      Gin, via its de jure organs (article 4 ASR, 2001) breached the Loan Agreement by suspending the Loan Agreement. There are no relevant grounds under the law of treaties to justify that suspension: (1) supervening impossibility of performance (article 61 VCLT, 1969) relates to absolute impossibility, not to situations in which it is more difficult to fulfill the treaty, which is Gin’s situation since it is choosing not to pay. There is moreover no destruction of something ‘indispensable’ to the performance of the treaty. (2) Fundamental change of circumstances (article 62 VCLT, 1969) does not apply since there is no change to an essential basis for the State’s consent, radically altering the extent of the obligation.
      However, Gin appears to be claiming the circumstance precluding wrongfulness of necessity under the law of State responsibility, namely, that the sole means of safeguarding an essential interest from a grave and imminent peril is temporarily not to apply an obligation protecting a lesser interest: article 15 ASR (2001); Gabon-Ngoyimana case (1997). Unfortunately for Gin, it has contributed to the onset of the peril through poor economic management as was the case in Gabon-Ngoyimana case (1997) and CMS Gas Transmission case (2009). Necessity is therefore not available, and Gin has committed an IWA.
      Gin has an obligation of cessation of the unlawful conduct and must make reparation, no doubt in the form of compensation to restore the situation that would have existed but for the IWA (Chorzow case, 1928); namely make its loan repayments under the Agreement. In reality, although Gin is responsible, Gin and Tonic will probably negotiate a solution.

2. Are Gin and Tonic responsible to Lime as asserters?

The supply of weapons by Tonic’s secret services and thus de jure organs (article 4 ASR, 2001); Bosnia Genocide case, 2007) is both a prohibited ‘less grave’ use of force (Nicaragua case, 1986) and a prohibited intervention, the latter because it is a coercion since contrary to Lime’s free will: Nicaragua case, 1986. As a ‘less grave’ force, discussion of self-defence is incorrect here unless to exclude it from consideration. Note also that Tonic is not a party to the UN Charter and so one must apply customary international law to this problem. No CPW exists as a matter of law in relation to the prohibited use of force since both grave and less grave force are jure cognos (article 26 ASR, 2001). Moreover, on the facts there is no potential CPW relevant to either the intervention and the use of force. Gin and Tonic must cease their unlawful acts and make reparation in the form of compensation. There is arguably no ‘serious breach’ of jure cognos and no obligations arise for third parties under article 41 ASR (2001). However third States, such as Lime, may call on Gin and Tonic to make reparation in favour of Ruma given the jure cognos nature of the breach: article 48 ASR (2001).

3. What is the likelihood of the ICJ being able to hear the case?

Though not a party to the UN Charter, Tonic is nonetheless a party to the ICJ’s Statute and so the Court can hear its claim (article 93(2) UN Charter).
assuming jurisdiction and admissibility. By appearing before the Court, Tonic may have consented to its jurisdiction by tacit consent – forum praecognitum (Coffin Channel case (1949), article 36(1) IJC Statute). If there is consent, the case may not be admissible since Gin is not a party to the proceedings and arguably any decision necessarily affects its legal interests (Monetary Gold/necessary third party rule: Monetary Gold case (1954); East Timor case (1995)). Finally, since there is no evidence that the dispute has been brought to Tonic’s attention, there may in fact be no dispute for the purposes of the law (Nuclear Disarmament cases, 2016) in which case the claim will for this reason also be inadmissible.

Problem Questions

Problem 7

Case Concerning the 'Invee' (Mo v Ment) Dispute

1. Is uti possidetis a norm of jus cogens as claimed by Mo?

The principle of uti possidetis juri holds that pre-independence boundaries become those of a successor State on independence. This principle certainly applies in the decolonisation context: Burkina Faso/Mali (1986), as is the case on the facts here. However pre-independence boundaries apply 'except where the States concerned agree otherwise': Arbitration Commission on Yugoslavia, Opinion No 2 (1992). Therefore the uti possidetis principle is not a peremptory norm and Mo is incorrect. Ment is sovereign over the Invee Region pursuant to the 1971 Boundary Treaty.

2. Are Ment’s three objections to the Security Council’s activity in relation to the Invee Region valid?

a. Ment claims that the situation falls to its domestic jurisdiction and so the Council cannot consider it. Ment is sovereign over the Invee Region and events there will fall to Ment’s domestic jurisdiction to the extent not governed by rules of international law (Nationality Decree advisory opinion, 1923). However, measures under Chapter VII UN Charter are an exception to the prohibition on intervention in the domestic affairs of a State: article 2(7) UN Charter. Ment is incorrect in claiming that the Council cannot consider the matter on this basis.

b. Can the Council declare a threat to international peace and security when there is visibly no such threat (Resolution 8888)? When making a determination under article 39 UN Charter that a situation constitutes a threat to international peace and security, the Council is making a political – and so discretionary – decision. Whilst discretion is not arbitrary, it would be exceptionally hard to challenge the Council’s determination.

c. In relation to Resolution 8889, can the Council require a State to comply with a commission of inquiry given that one of the legal characteristics of international dispute settlement, including inquiry, is that it is premised on consent and indeed, as a method of diplomatic dispute settlement, the outcome is non-binding? Whilst dispute settlement is broadly dealt with in Chapter VI UN Charter, the Security Council can nonetheless make a decision under Chapter VII UN Charter in respect of that subject matter as it has done here. Security Council decisions are binding: article 25 UN Charter, Namibia advisory opinion (1971). Moreover, a characterisation made by the Council pursuant to...
its Chapter VII powers need not correlate with the characteristics of the object under international law (so, for instance, a finding of “genocide”: Bosnja Genocide case, 2007). This applies equally to “inquiry”. Finally, one can note that it is quite common for States to consent in advance by treaty to a particular diplomatic dispute settlement method becoming compulsory under certain circumstances, and the scenario at hand can also be seen as just an application of that principle (see, for instance, the 2016–18 Timor Sea Conciliation procedure between Timor-Leste and Australia). In conclusion the Council can require that a commission of inquiry be held and Men’s objections to the decision are without legal foundation.

Note that the Boundary Treaty (1971) is registered with the UN Secretariat and so can be invoked before UN fora, including the Security Council article 102 UN Charter.

3. What are the issues of law arising from the prosecution of Men’s Head of State as well as Lotus’ treatment of Men’s ambassador? Lotus is fully within its rights in declaring Men’s ambassador persona non grata – this is an intrinsically lawful, if unfriendly, act.

The arrest of Men’s Head of State is an exercise by Lotus of its territorial jurisdiction. However, as an exception to that principle (Marshall CJ, The Schooner Exchange v McFadden, 1813), Men should invoke Head of State immunity from the applicability of Lotus’ law and ensuing prosecution for their breach before Lotus’ courts. As serving Head of State he enjoys immunity from prosecution for all acts, whether or not official in character: Arrest Warrant case (2002).

4. What are Mo’s prospects for success before the ICJ?

It can certainly invoke the Boundary Treaty (1971) before the Court given that it has been registered with the UN Secretariat (article 102 UN Charter). The first issue is whether the Court can issue provisional measures.

Where the Court deems it warranted by the circumstances, it can pursuant to article 41 ICJ Statute order provisional or interim measures to preserve the rights of a party pending the Court’s final decision. These measures are binding on the parties (LaGrand case, 1999) and will be ordered on the following conditions:

- that the Court considers that it has prima facie jurisdiction to hear the case: Fisheries Jurisdiction case (1972). Article 12 Boundary Treaty is a compensatory clause that confers jurisdiction on the Court in respect of a dispute relative to the boundary, which is indeed the issue at hand. The Court has prima facie jurisdiction;

- that there is a link between the provisional measure sought and the rights at issue in the proceedings (LaGrand case, 1999). Mo seeks an order requiring Men to cease any breach of article 2(4) UN Charter as a result of the presence of Men’s military base in the Inver Region, which Mo claims as its territory. Without prejudicing any conclusion on the merits, this measure sought appears to be linked to the dispute, which is over the status of the Inver Region;

- that irreparable damage would be caused if the Court did not order the interim measure (LaGrand case (1999) and Pulp Mills, 2007). Were Men to continue to be (again without prejudice to the merits of the argument) in breach of article 2(4) UN Charter prohibiting the threat or use of force on Mo’s territory, it is possible that Mo’s rights would be irreparably damaged but the argument here seems weak: would the continued presence of the military base pending a decision on the merits irreparably damage Mo’s rights? It is doubtful. On the other hand, a breach of article 2(4) UN Charter is a breach of a jus cogens norm and so a particularly serious breach. It is nonetheless arguably unlikely that the Court will make the order, but the matter could be argued either way.

A possible fourth condition exists and this addresses also the broader question of Mo’s prospects for success – namely that the claim must be plausible/has some chance of success: Obligation to Protect or Extradite, order (2009). Assuming that this is a condition for the granting of interim measures, again Mo’s argument is weak: a military fortification on territory which is so clearly within Men’s sovereignty is not a threat of use of force, just as amassing troops on a border has been held not to be a threat of use of force in the Nauru case (1986). A prohibited threat is a stated readiness to use force in a situation in which the actual use of that force would be unlawful: Legality of the Threat or Use of Nuclear Weapons advisory opinion (1996). However, it is not clear that there is a stated readiness to use force by Men and it would be incumbent on Mo to prove this. Moreover Mo would have to prove that the use of force itself would be unlawful and it is impossible to prove a counter-factual. Men has given no indication it would use force. Perhaps the presence of its military base is simply a signal that it would be prepared to use force in conditions of self-defence only.

Mo has little prospect for success.
Part 3

Essay Writing and Exam Technique in International Law
Essay Writing

Form

Focus on being structured, precise and concise.

Structured

Sequence ideas logically to assist the reader. Develop an argument which is introduced, then reasoned in the body of the essay, and finally, concluded upon. Use headings that highlight the paper’s storyline. Start with general propositions and then detail. Signal controversies and focus on those topics that relate to the question and less on incidental matters, however interesting they may be.

Precise

Avoid over-generalisations. Substantiate points wherever possible with cases, instruments, and the views of eminent writers. Ensure these writers are in fact eminent or at least work in the field of international law. If you cite a radical view, acknowledge it as such. It can still be a good view!

Concise

Use adjectives sparingly and cul words that do not convey meaning. Use the active voice wherever possible and prefer words with Anglo-Saxon origins over those with Latin origins, such as ‘buy’ rather than ‘purchase’; prefer ‘above’ to ‘aforementioned’. English loves short sentences and simple words.

Proofread, out loud if necessary. Poor written expression is a fault in itself but can also mask substantive ideas.

Substance

Essay topics are often designed to test understanding of class material and/or seek to apply the law covered in lectures to an issue from practice. Revise the lecture materials before attempting the question even if the connection between the two is not immediately apparent.

Whilst there may be no set answer or content to the essay, parameters are generally needed. Sometimes giving key terms legal definition – which should be drawn from authoritative material such as international instruments, cases or

eminent writers – can be useful. If there are controversies over a definition say so! In all cases make sure that it is clear what you are writing about.

Remember to answer the question. Is it really whether an entity is a State under the Montevideo Convention criteria or are you instead being asked whether a State has acquired sovereignty over a parcel of territory? Are domestic law principles really relevant? Bear in mind that ultimately you will be answering questions for clients who are not interested in any well-researched or even brilliant argument. They want to know the answer to their question.

Give due weight to issues that warrant extrapolation and less weight to straightforward issues that are either uncontroversial or not central to the essay. Sometimes it may nonetheless be necessary to set out this incidental material, to give due context and relevance, and to show the marker that you understand international law.

Implausible lines of enquiries that defy evident situations of fact or law have to be exceptionally clever to earn, rather than lose, marks. This may not be impossible but can be extremely difficult.

Check whether prominent courts or tribunals or codification bodies have recently pronounced on the subject.

Finding time for revision of an initial draft can be the difference between a low and a high quality paper.

Exam Technique

Answers need to be structured, precise and concise and so target a comprehensive and persuasive answer in as few words as possible.

‘Dumping’ the law onto the page is unacceptable. Provide applied or relevantly reasoned answers which specifically urges the question asked. This is especially true for problem-based questions.

Due weight should be given to issues requiring more consideration and easy points disposed of quickly. In short, prioritise.

To assist in achieving the above:

Volume is generally not sought, but rather answers that are to the point and resolve the problem or address the issue comprehensively. For problem questions identify the relevant issues of fact and law; take time to analyse the relevant law’s application to the facts and structure ideas before beginning to write. For essays, map a general structure and the main points to be raised before beginning to write.
2. An exam is fast, a certification exercise: it is your task to communicate your knowledge of, and skills in, manipulating the law relevant to the question asked. Communication includes legible handwriting (where relevant).

3. For open-book exams, include check-lists in your notes; these may also serve as a table of contents to your notes. This will help you to give a comprehensive answer.

4. Allocate time to re-read your answer critically: make sure you have addressed the questions asked, corrected typographical errors, tightened both the English and the reasoning of your text if possible (so do leave plenty of room in your script book where relevant), and ensure that you have provided appropriate authorities where you can.
International law is more than a single subject. It is a legal system and differs considerably from domestic law. This can make the study of international law challenging. Designed for first-time international law students or those wishing to refresh their generalist knowledge, this workbook captures the international legal system's structural features and supports learning through a series of practice quizzes and problem questions covering all core areas of international law.

Part One of the workbook consists of short topic overviews followed by a mixture of multiple choice quizzes covering the principal features of each topic, and short-answer questions to prompt further reflection and consideration of the relevant concepts. Answers to all questions are provided at the end of each chapter.

The second section of the workbook consists of tutorial and exam-style problems. These build in complexity and scope as the reader works through the materials. At the end of the section are worked answers that explain the applicable law. The book concludes with a section providing general advice on essay writing and exam technique in international law.

The workbook is an essential resource for students and is an ideal companion to any substantive text on international law.

About the Author
Sarah Heathcote is Associate Professor and until recently, Deputy Director of the Centre for International and Public Law at the ANU College of Law, Australian National University. She has taught general international law courses for over twenty years at both the introductory and advanced levels, has published in that and related fields and holds a PhD from the University of Geneva.

Related LexisNexis Titles
- Hall, Principles of International Law, 6th ed, 2019