

# LCP4801 Past Paper Q & A

**Write an essay in which you discuss the term “customary international law”. In your essay you must define “customary international law”, describe the requirements for its formation (with reference to applicable case law) and explain whether and to what extent customary international law is part of South African law. [25]**

Article 38 of the Statute of the ICJ provides that in settling disputes the court shall apply “international custom, as evidence of a general practice accepted as law”. Custom is therefore a practice followed by states because they feel legally obliged to behave in such a way. There are two main requirements for the creation of a customary international rule:

- 1) Usus (settled practice)
- 2) *Opinio iuris* (a sense of obligation on the part of the states)

*Usus* is constant and uniform usage as defined in the *Asylum* case. In this regard:

- The practice need not be “universal”, therefore widespread acceptance by states would be sufficient (*Fisheries Jurisdiction* case).
- Usage can develop between two, or only a few states to form a local or regional custom (*Case Concerning Right of Passage over Indian Territory*, contrary to the *Asylum* case).
- The number of states is not as important as the identity of those states. In every activity, some states’ actions are more important than others (eg the US and USSR played an important role in developing the law of outer space).
- The number of repetitions necessary to create a custom depends on the nature of the rule involved and the number of states affected.
- The duration for which the states’ practice must have persisted likewise depends on the nature of the usage. For example, in *S v Petane* the court cited a GA Resolution as a customary rule which developed with little practice (the Resolution concerned the law of outer space).
- The practice must be characterised by a degree of uniformity, or rather substantial compliance (*Nicaragua v USA*). It is sufficient that the conduct of states is generally consistent with a rule. An inconsistency should be treated as a breach of the rule, rather than an indication that a new rule has been created.
- According to the rule of the persistent objector, a state isn’t bound if it persistently objects to the practice while the custom was being developed (*Anglo-Norwegian Fisheries* case, *North Sea Continental Shelf* case).

*Opinio iuris* is the second requirement which must be present before the usage can become a binding rule of customary international law. As was stated in the *North Sea Continental Shelf*

case, the states concerned must feel that they are conforming to what amounts to a legal obligation. In other words, they must feel that if they did not follow the usage, they would be breaking international law and would have to bear the consequences for not complying with it.

In terms of section 232 of the Constitution, “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. From this provision it is clear that customary international law is South African (domestic) law and as such it will be applied directly. If the alleged rule meets the requirements of *usus* and *opinio iuris*, the court will take judicial notice of it and apply it. Only two conditions must be met: the rule must not contradict the Constitution, and it must not contradict an Act of Parliament. Common law rules and judicial decisions are subordinate to or at least on par with customary international law.

- 2. In November 2012, the United Nations General Assembly passed a resolution changing the status of Palestine from an “observer entity” to a “non-member observer state” within the United Nations system. Susan Rice (the US Ambassador to the UN) told the Assembly: “This resolution does not establish that Palestine is a state”. You have been tasked by the South African government to write a legal opinion on whether or not Palestine has become an independent state in light of the requirements for statehood in international law. [25]**

For an entity to qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states”.

#### Permanent population

The “permanent population” requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic does not affect statehood adversely, as was pointed out by the court in the *Western Sahara* case. What is important for the purpose of the “permanent population” requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command.

#### Defined territory

It is important for a state’s territory to be defined. There is no required minimum size. This requirement does not imply that the territory must have undisputed borders. Israel serves as an example: despite the ongoing dispute with Palestine, Israel still satisfies the requirements for statehood. Furthermore, the territory need not necessarily form one single unit. What is important is that the state must be sufficiently homogenous to be able to perform its function of government effectively (eg USA and Alaska separated by Canada; East and West Pakistan were separated by India). In other words, there must be a stable community within an area

over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted. The case of *Van Deventer v Hancke & Mossop* is an example of a case where a community of people, ruled by a particular government, qualified as a state despite the fact that it had no territory.

### Effective government

The entity must have a government that is independent of any other authority, and it must have legislative and administrative competencies. Brownlie suggests some guidelines which can be used to assess a government's effectiveness:

1. Does it have its own executive organs?
2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

If the answer to these questions is yes, that is an indication of an effective government.

### Capacity to enter into relations with other states

This requirement means that a state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of its statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognise a state and to enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

### Recognition

The "requirement" of recognition is not specifically mentioned in the Montevideo Convention. However it is crucial in practice and underlies the ability of the state to enter into relations with other states. If an insufficient number of states were to recognise Palestine (in this scenario), it is doubtful whether it will be considered to have the ability to enter into international relations, and it would therefore be unable to satisfy the requirements of the Montevideo Convention.

The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: the declaratory theory, and the constitutive theory. Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. The proponents of the declaratory theory advocate that the act of recognition is not a requirement of statehood; statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The

court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because:

- it was objective, and
- it took into account only those 4 requirements which are based on well established rules of international law.

The court criticised the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognised by a sufficient number of states, Palestine will fail to become a state in the eyes of the international community (and arguably international law, depending on the chosen theory).

### 3. Consider the following statement:

**“A non-self-executing treaty binding on South Africa internationally but not incorporated into municipal law will have no direct force of law but may be used to interpret an ambiguous statute or to challenge legislation, along the lines indicated in *Glenister v President of the Republic of South Africa*” - Dugard 2011**

**Write an essay in which you explain whether you agree with this statement and why. Discuss the relevant provisions of the Constitution of the Republic of South Africa, 1996, as well as recent South African judicial decisions in which our courts have commented on this issue.**

#### Direct application (“no direct force of law”)

The direct application of international law (in the form of treaties) is governed by section 231 of the Constitution. In terms of section 231(4) any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Therefore, this part of the statement is true: a treaty which has not been incorporated into SA legislation cannot be applied as law unless the treaty is self-executing.

#### Indirect application

Treaties can, however, be applied indirectly. The treaty provisions will not be applied as law, but they will be used to interpret and give meaning to existing SA law. In the *Glenister* case the court considered the constitutionality of legislation setting up the specialised unit known as the Hawks and disbanding the Scorpions. It held that the legislation was unconstitutional because the unit in question failed to meet the requirements of independence. The court discussed section 7(2) of the Constitution, in terms of which the state must respect, protect, and fulfill the rights in the Bill of Rights, and therefore has the duty to create an independent

anti-corruption mechanism. The content of this requirement was to be found in international anti-corruption agreements which bound SA internationally although they had not been incorporated into SA law. The court also discussed the obligation to consider international law when interpreting the Bill of Rights: in terms of section 39(1)(b), when interpreting the Bill of Rights a court must consider international law. The court is not obliged to apply such law. It must, however, use it to find the correct meaning of our Bill of Rights provisions.

Section 39(2) of the Constitution also requires a court, when it develops common law or customary law, and when interpreting any legislation, to promote the spirit, purport, and objects of the Bill of Rights. This shows that the spirit, purport, and objects of the Bill of Rights are inextricably linked to international law and the values and approaches of the international community and international role players.

Another provision of the Constitution which integrates international law into our law in an indirect manner is section 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". International law in this context includes unincorporated treaties to which SA is a party.

In addition, many statutes refer to international law and state that they ought to be interpreted in accordance with international law.

- 4. During a recent revolution, belligerents killed former President Muammar al-Gaddafi of Libya, and a change of regime followed. In a further attempt to distance itself from the Gaddafi regime, during January 2013 the new Government of Libya changed the country's extended-format name from "Great Socialist People's Libyan Arab Jamahiriya" to "The State of Libya".**

**Libya acceded to the Convention on the Elimination of all forms of Discrimination against Women (1979) on 16 May 1989. On 5 July 1995 Libya amended its original reservation to the Convention to read: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah".**

**Many states responded in opposition to Libya's reservation, for instance, Finland entered the following declaration:  
"A reservation which consists of a general reference to religious law without specifying its contents [sic] does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving state to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle**

**of the observance of treaties according to which a Party may not invoke the provisions of internal law as justification for failure to perform a treaty.**

**In light of these facts, answer the following questions:**

**1) Discuss Libya's reservation to the Convention in light of the applicable law of treaties, specifically in relation to reservations to treaties. [10]**

Article 2(1) of the Vienna Convention defines a reservation as a "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state". Article 19 of the Vienna Convention provides that a State may formulate a reservation unless:

- a. the reservation is prohibited by the treaty;
- b. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c. the reservation is incompatible with the object and purpose of the treaty.

Two paradigms have developed: one that holds that a reservation which is contrary to the object and purpose of the treaty would be null and void regardless of how the rest of the states have reacted to it; and that which deems the reservation valid until the other states have questioned its validity. The International Court of Justice has held that it may pronounce on the validity of a reservation on the grounds of incompatibility with the object and purpose of the treaty.

Libya's reservation preserves the Islamic Shariah, but seemingly defeats the object and purpose of the Convention. The fact that some states have not objected to such reservations, or that they have failed to stipulate that they object to the coming into force of the treaty between themselves and the reserving state, can be put down to a lack of political will. Libya will presumably continue to be bound by the treaty to which it has sought to attach an invalid reservation.

The effects of the reservation are as follows:

- Between Libya and the states that accept the reservation: the entire treaty applies, but the provision in the original treaty to which the reservation has been entered will be replaced by the provisions in the reservation.
- Between Libya and the states rejecting the reservation: the reservation does not come into operation, but the clause to which the reservation is entered is removed from the treaty for those parties. If a vacuum arises from the cancellation of that clause, customary international law will apply to that aspect. The rest of the treaty applies between the parties. If the state rejects the reservation and the treaty coming into operation, the treaty will not operate between Libya and the state.

- Treaty obligations between all other parties remain unaffected.

**4. 2) Is Libya still bound by the Convention in light of the fact that there has been a change in regime since it ratified the Convention? Discuss the application of two relevant theories to this question, with reference to authority and examples where appropriate. [10]**

A change in government does not affect the operation of treaties which have already been concluded, regardless of how that change was brought about and regardless of its extent. The question of succession to treaties arises only when a new state (with a new international legal personality) has emerged, for example as a result of decolonisation, or one state that has dissolved into a few smaller ones, etc). If there has been a change in international legal personality, the question of treaty succession will depend on the chosen theory.

According to the theory of universal succession, the new state succeeds to all the treaties of its predecessor and the rights and duties therein. This would pose a problem if the ideologies of the new state were different from those of the old state, and the new state simply did not find the old obligations acceptable.

In terms of the clean slate theory reflected in the 1978 Vienna Convention on the Succession of States with Respect to Treaties, the exact opposite happens: the new state does not have to continue with its predecessor's treaty obligations. This Convention does not seem to reflect customary international law, because the view is not very popular amongst states. This is not surprising because the adoption of such a view would mean that the new state would have to start from scratch and renegotiate all treaties, which is impractical.

In terms of the provisional succession theory, the state would be bound to existing treaties for a certain period of time. The state would therefore not have to exist in a legal vacuum, but would be free to terminate the inherited obligations which it did not wish to accept.

In Southern Africa, the tendency seems to be to continue with treaty obligations. This principle of continuity is reflected in both the 1993 and 1996 Constitutions. The 1996 Constitution states that "the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect". Likewise, Namibia did not adopt the clean slate doctrine. Its 1990 constitution provides that "all existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly... otherwise decides". In *S v Eliasov* and *S v Oosthuisen*, the clean slate theory was used.

**4. 3) Provide an explanation of the formation and elements of norms of customary international law. [5]**

Custom is a practice followed by states because they feel legally obliged to behave in such a way. There are two main requirements for the creation of a customary international law rule:

- 1) Usus (settled practice)
- 2) Opinio iuris (a sense of obligation on the part of the states)

*Usus*, as defined in the *Asylum* case, is “constant and uniform usage”. *Opinio iuris* is the second requirement and, as was stated in the *North Sea Continental Shelf* case, the states concerned must feel that they are conforming to what amounts to a legal obligation. In other words, they must feel that if they did not follow the usage they would be breaking international law and would have to bear the consequences for not complying with it.

5. **Peter is a British citizen and international terrorist. He is wanted in many countries by Interpol, and by Tunisia, where he has lawful residency, but he has been responsible for numerous subversive attacks against the Tunisian Government since he has left that country. The Botswana police discovered that he was hiding in a small town on the South African border (but within the territory of Botswana). During the operation to capture him, Peter started shooting indiscriminately. In the process he fired a round across the border into South Africa, killing Francois, a French tourist on holiday in South Africa.**

**1) Identify which of the countries mentioned are able to exercise jurisdiction over Peter. In each instance, state the crimes for which they can exercise such jurisdiction, and upon which bases they can exercise jurisdiction (for example, passive personality jurisdiction). Refer to applicable authority in your answer. [13]**

1. Tunisia can exercise jurisdiction on the basis of state protection for attacks against the government. In *R v Neumann* the court stated that a sovereign state is automatically entitled to punish crime directed against its independence and safety by an alien, provided that the alien has a connection to the state, such as residence. In *R v Holm* and *R v Pienaar* the court held that no international custom debars a state from trying and punishing offenders who committed acts of treason against South Africa overseas.
2. Botswana and South Africa can both exercise jurisdiction in the shooting of Francois on the basis of territoriality. In *Bankovic v Belgium* the court remarked that “the jurisdictional competence of a state is primarily territorial”. In this regard, Botswana can exercise jurisdiction on the basis of subjective territoriality, since the shooting started on its territory. South Africa can exercise jurisdiction on the basis of objective territoriality, since the shooting was completed there. Objective territoriality is sometimes referred to as “effects” and in *S v Mharapara*, the court observed that the determining factor was the “place of impact, or intended impact, of the crime”.
3. France could exercise jurisdiction for the shooting of Francois on the basis of passive personality. In *United States v Yunis*, a US court relied on the principle of passive



personality to exercise jurisdiction over a Lebanese national who had hijacked an aircraft with US nationals onboard.

4. Theoretically, Britain can exercise jurisdiction for the shooting of Francois on the basis of nationality but, traditionally, Anglo-American common law countries have not exercised jurisdiction over their nationals who have committed crimes abroad unless domestic law has made specific provisions to that effect.

**5. 2) Discuss the nature and scope of universal jurisdiction. Include in your discussion the crimes that are covered by universal jurisdiction and substantiate your answer with reference to authority. [12] - [15]**

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture. The national court is said to exercise universal jurisdiction over a crime with which it does not have any jurisdictional links (eg territoriality, nationality, state protection, effects, passive personality). The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty obligation to the contrary.

Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed” and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

The Rome Statute of the International Criminal Court does not confer universal jurisdiction on the court. However, state signatories have enacted legislation which would enable them to try crimes which fall under the jurisdiction of the ICC (they are war crimes, crimes against humanity, genocide, and the crime of aggression). Should the state party be unable or unwilling to prosecute the offender, the case is deferred to the ICC, which will prosecute, provided that the requirements laid down in the statute are met. The Implementation of the Rome Statute of the International Criminal Court Act is an example of national legislation

conferring jurisdiction on a South African court to try an offender who has allegedly committed one of the crimes falling within the jurisdiction of the ICC, even if those crimes were committed outside of South Africa, if the person after commission of the crime is present in the territory of the Republic.

- 6. The role and relevance of international law within the South African municipal law is regulated by the Constitution of the Republic of South Africa, 1996. Write a legal opinion in which you discuss and analyse the relevant provisions of the Constitution in this regard. In particular, you must differentiate between customary international law, treaties, and international law as it relates to the Bill of Rights. It is important that you write your opinion with direct reference to Constitutional provisions, as well as any relevant legal authority. [25]**

#### Section 39(1)

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights. In *S v Makwanyane* it was stated that international law in this context refers both to binding and nonbinding international law. International agreements and customary law provide the framework within which the Bill of Rights can be evaluated and understood. It is important to remember that the role of international law in such instances is advisory. The courts do not apply the international law rules directly, in a way they would apply, say, the provisions of a South African statute. The courts consult international law in order to flesh out the provision of our Bill of Rights which has come under their scrutiny. It is the Bill of Rights provision that the courts apply, but the meaning of that provision has been moulded by international law. Therefore we refer to an indirect application of international law.

#### Section 39(2)

In terms of section 39(2), any court, tribunal or forum is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and objects are linked to international law and the values and approaches of the international community. In *Carmichele v Minister of Safety and Security* the court developed a new rule of common law, dealing with the delictual liability of the SAPS. It considered extensively international jurisprudence (including soft law sources). For example, the court cited decisions of the ECHR, and provisions on the Convention on Elimination of All Forms of Discrimination Against Women. Once again, acting in terms of this provision, the court will be applying international law indirectly.

#### Section 231

This section provides among other things:

- (4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been

approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

- (5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

This section sets out the process in which treaties would apply in South Africa. Unless the provision of a treaty is self-executing, it will have to be transformed into municipal legislation. This can be done in a number of ways:

- Including the provision in the wording of an Act of Parliament
- Including the treaty as a Schedule to an Act of Parliament
- An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*

What is important to understand that whatever the legislative shape the treaty takes, the end result of the process will be that its provisions can be applied directly by the South African courts.

#### Section 232

This section provides as follows: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

From this provision it is clear that customary international law is South African (domestic) law, and as such it will be applied directly. If the alleged rule meets the requirements of *usus* and *opinio iuris*, the courts will take judicial notice of it and apply it. Only two conditions must be met: firstly the rule must not contradict the Constitution; secondly it must not contradict an Act of Parliament. Common law rules and judicial decisions are subordinate or at least on a par with customary international law.

#### Section 233

Section 233 provides: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". What is being applied directly is the actual legislative provision, but its meaning will have been determined by international law. International law is therefore being applied indirectly in terms of this provision. International law in this context includes incorporated and unincorporated treaties to which SA is a party, as well as customary international law.

### **7. 1) Discuss the three theories governing succession to treaties. [10]**

See 4. 2)

### **7. 2) Discuss the notion of self-defence in international law. [10]**

One of the exceptions to the rule against the threat or use of force (contained in Article 2(4) of the UN Charter) is an act carried out by a state in self-defence.

Article 51 of the Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right to self-defence shall immediately be reported to the Security Council”.

This Article contains a number of crucial points:

- The act in the exercise of the right to self-defence must be reported to the Security Council.
- The action is therefore valid only until the Security Council acts.
- The purpose of the use of force must be clear, namely to defend oneself.
- The force exercised in self-defence must be proportionate to the threat used.

There is uncertainty as to whether the right to self-defence can be exercised only if an armed attack occurs or whether Article 51 allows anticipatory self-defence.

**7. 3) What are traditionally recognised as the sources of public international law? [5]**

1. International agreements (treaties) (Article 38(1)(a))
2. International custom (Article 38(1)(b))
3. The general principles of law recognised by civilised nations (Article 38(1)(c))
4. Judicial decisions and “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law” (Article 38(1)(d))

- 8. Botha, in “Rewriting the Constitution: The ‘strange alchemy’ of Justice Sachs, indeed”, which analyses the impact of the *Quaglini* judgment, concludes with the following: “In brief, and for the present, therefore, extradition treaties may or may not be self-executing, but they do not at present require to be incorporated into our law. The basis of this “addendum” to section 231(4) of the Constitution remains, at best, enigmatic”.**

**1) Explain the process to be followed in terms of section 231(1), (2), (3), and (4) of the Constitution in order to incorporate treaties into South African law. [15]**

Section 231 reads as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 231(1) sets out who may negotiate and sign treaties, namely the executive. In practice, the President does not negotiate treaties and signs very few personally. This power is delegated to the Department of Foreign Affairs or line-function minister in charge of the topic covered by the treaty.

Section 231(2) deals with the process by which a treaty becomes binding for South Africa on the international plane. This occurs by approval by the National Assembly and National Council of Provinces by resolution in both houses.

Section 231(3) also deals with treaties binding for South Africa on the international plane, but this time regarding treaties that bind South Africa without approval by the National Assembly and National Council of Provinces. In practice, the treaties mentioned in this section are approached as two categories. First there are technical, administrative, or executive agreements. These are regarded as agreements of a routine nature flowing from the day-to-day activities of government departments. They generally also have no budgetary implications for the country.

The second category is treaties not requiring ratification. This is a relatively simple determination, in that a treaty will generally provide whether or not ratification is required.

Section 231(4) deals with the process through which treaties become enforceable on the domestic front (in South Africa) - after it has been incorporated into South African law. In other words, it deals with the process necessary to transpose a treaty from the international plane to the national plane. The section allows for one exception in the case of a self-executing provision of an agreement that has been approved by Parliament. Such a provision will be law in the Republic provided that it is not inconsistent with the Constitution or an Act of Parliament. A self-executing treaty is defined by Shearer as: [A treaty] which does not in the view of American courts expressly or by its nature require legislation to make it operative

within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.

**8. 2) With the above quote in mind, explain the enigma that the *Quagliani* judgment has brought into our law. [10]**

As discussed, on the basis of section 231(4) of the Constitution, there are only two ways in which a treaty can become part of our law, and therefore form the basis for action in our national courts, namely the following:

- 1) If it has been made part of our law by legislation.
- 2) If it is self-executing (in which case it is automatically part of our law).

*Quagliani* involved an extradition treaty validly concluded between South Africa and the United States of America. This treaty had not (by all the parties' admission) been incorporated by legislation. Therefore in terms of section 231(4), the treaty could not be used by the courts unless it was found to be self-executing.

Justice Sachs confirmed that the extradition treaty had not been incorporated by legislation. He also held that he was not finding that the treaty was self-executing. However, he somehow found that it was enforceable in our law! Thus, he seemingly created a third, unspecified manner in which treaties become law in South Africa (unspecified because it is not one of the two ways provided for by section 231(4)). This is the enigma that the *Quagliani* judgment has brought into our law.

**9. 1) Discuss the principles, as set out in the *Lotus* case, which form the basis of jurisdiction in public international law and list the bases of jurisdiction. [10]**

The three principles laid down by the court were:

- 1) One state cannot exercise jurisdiction in the territory of another unless they have agreed thereto.
- 2) One state may exercise jurisdiction in its own territory over acts that happened in the territory of another state unless an international law rule forbids this.
- 3) The territoriality of criminal cases is not absolute.

The result was an extra-territorial free-for-all.

The bases of jurisdiction are:

1. Territoriality
2. Effects (subjective and objective territoriality)
3. Nationality
4. State protection
5. Passive personality

6. Universality

**9. 2) Write a legal opinion on universal jurisdiction, explaining its development, use, and crimes covered. [15]**

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture.

The national court is said to exercise universal jurisdiction over a crime with which it does not have any jurisdictional links (which are territoriality, nationality, state protection, effects, and passive personality). The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty to the contrary. Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed”, and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

The Rome Statute of the International Criminal Court does not confer universal jurisdiction on the court. However, state signatories have enacted legislation which would enable them to try crimes which fall under the jurisdiction of the ICC (they are war crimes, crimes against humanity, genocide, and the crime of aggression). Should the state party be unable or unwilling to prosecute the offender, the case is deferred to the ICC, which will prosecute, provided that the requirements laid down in the statute are met.

The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is an example of national legislation conferring jurisdiction on a South African court to try an

offender who has allegedly committed one of the crimes falling within the jurisdiction of the ICC, even if those crimes were committed outside of South Africa, if the person after the commission of the crime is present in the territory of the Republic.

**10. South Africa, as the most industrialised state in Southern Africa, is in desperate need of additional water supplies. Lesotho, as an economically less developed state, needs revenue and has abundant water supplies. The two states therefore conclude a treaty in terms of which they agree that South Africa will erect a series of dams in Lesotho which will eventually supply South Africa with water and Lesotho with revenue.**

**During the planning stages of the dams, Lesotho is shaken by a severe earthquake as a result of which the river on which the dams were planned is diverted and its flow permanently reduced. Engineers, who are amazed by the earthquake as there has never before been such an occurrence in the region, advise that the project is no longer viable. South Africa claims that it may validly terminate the treaty.**

**You are approached for a legal opinion on South Africa's claim.**

**1) Provide a well-reasoned opinion setting out the argument which South Africa should raise. [8]**

South Africa may terminate the treaty on the basis of *rebus sic stantibus* (fundamental change of circumstances). The situation is governed by Article 62 of the Vienna Convention. The following requirements must be fulfilled:

1. The existence of the circumstances must have been an essential basis for the conclusion of the treaty.
2. The change of circumstances must drastically transform the extent of the state parties' obligations.
3. The circumstances (which a state claims to have been changed) existed at the time the treaty was concluded.
4. The change in circumstances must have been unforeseen by the parties.

*Rebus sic stantibus* may not be raised to terminate treaties which establish boundaries, or by the state party responsible for the change.

From the facts, it is evident that at the time of the conclusion of the treaty earthquakes were not a feature in Lesotho and could not have been foreseen by the parties. The earthquake radically affected the obligations under the treaty - Lesotho could not deliver the water that was the essential basis for the conclusion of the treaty. No party may be held responsible for the earthquakes. There was a fundamental change of circumstances which would give rise to a right to terminate the treaty.



**10. 2) Explain fully whether, and if so, how, your opinion would differ if Lesotho were regularly plagued by earthquakes. [5]**

If Lesotho were regularly plagued by earthquakes it would be a circumstance which existed when the treaty was concluded, and would therefore have been clearly foreseeable. In these circumstances, another earthquake could not have been raised as a ground for terminating the treaty.

**10. 3) What other grounds are available in international law which would allow for the termination of a treaty? List these with a practical example of each. [12]**

1) Fulfilment of obligation

Treaties concluded to serve a specific purpose will terminate once the object of the treaty has been fulfilled. For example, after post-election riots in Kenya in 2007, there was a food shortage. SA and Kenya concluded a treaty for the delivery of maize. Once the maize had been delivered, the object of the treaty had been fulfilled and the treaty will terminate.

2) Treaty provision

Where a treaty specifically provides that it may be terminated in a specific way, the treaty will terminate if the prescribed procedure is followed. For example, Article XVIII of the extradition treaty concluded between Great Britain and Peru provides: “[This treaty] may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months”. If the necessary notice is given, the treaty will terminate once this period has passed.

3) Consent

If all parties concerned agree to its termination.

4) Conclusion of a new treaty

If all the original treaty parties conclude a new treaty which covers the same subject matter, and it appears that the parties intended the new treaty to govern the issues, or the two treaties conflict to such an extent that they cannot operate concurrently.

5) Impossibility of performance

If an object indispensable for the performance is permanently destroyed, and this isn't the fault of the party raising impossibility.

6) Breach of treaty

7) War and suspension of diplomatic/consular relations

8) *ius cogens*

If the treaty is in conflict with a newly developed *ius cogens*, it is automatically terminated.

9) Unilateral repudiation

10) *Rebus sic stantibus*

**11. The World Health Organisation is an agency of the United Nations. The International Aid Organisation (IAO) is an organisation made up of the following members: the Zuba government - a small poverty-stricken African state with massive health problems; Asio European - a multinational mining conglomerate; and Aid International - a humanitarian organisation with membership drawn from the councils of the leading universities of Nigeria and Uganda.**

**The WHO and IAO conclude an agreement in terms of which the WHO undertakes to build a multi-million dollar hospital and research centre in Zuba to fight the spread of AIDS in that country. Problems, however, arise and the WHO decides to pull out of the agreement. Zuba wishes to enforce the agreement.**

**Discuss fully the position from the point of view of both the WHO and IAO in light of**

**1) The classification of these two organisations in light of their characteristics [8]**

The one feature that will always be common to all international organisations is the fact that their members are states, or other international organisations made up of states. International organisations may also consist of organs of state.

WHO is an international organisation made up of states. It functions under the auspices of the UN.

The IAO is not an international organisation since its members are neither states nor international organisations. Asio European is a company, but even a transnational company which operates in various countries is not an international organisation. Aid International is not an international organisation either, because its members are universities. Strictly speaking, universities are not organs of state. The IAO may try to argue that universities are organs of state, but either way the status of IAO remains the same because of the fact that one of its members, Asio European, is an international company and not an international organisation.

**11. 2) The classification of the agreement between them. [5]**

The agreement between the different shareholders is an ordinary contract, not a treaty, as only international law subjects can conclude treaties. In this case, we have an agreement between an international organisation and a private entity. Although it is possible to make a contract subject to international law, this was not mentioned in the facts.

**11. 3) Who should sue and who should be sued for fulfilment of the agreement? [2]**

The IAO should sue the WHO. The only problem that may arise is that the international organisation may invoke immunity to block the process. Generally speaking, immunity does not apply to commercial contracts and the court will in all likelihood have jurisdiction.

**11. 4) What legal system will govern the agreement and conflicts arising from it? [4]**

The municipal legal system of Zuba will govern the contract and any conflicts arising from it. The contract itself may specify what legal system should govern its terms and any disputes arising from it.

**11. 5) What court(s) the agreement should serve before and why. [4]**

The agreement will serve before the municipal court in Zuba (or as provided for in the contract itself). It will not serve before the ICJ

**12. State A and State B are neighbouring states. The border of State A has become a stronghold of Z, a militant organisation sponsored by State X, which harbours strong anti-State B sentiments. The government of State A claims to be too weak to disarm Z. Members of Z keep on acquiring weapons and building strongholds on the border. One day, some of Z's members kidnap two soldiers from State B. State B invades state A and bombards the area at the border and its surroundings, hoping to bring Z to its knees.**

**Evaluate the lawfulness or otherwise of State B's actions. [10]**

The first problem that State B may run into is showing that Z's actions are attributable to State A (although they are certainly attributable to State X).

If that is overcome, State B may be said to be acting in reprisal to the kidnapping of the two soldiers, in which case the most glaring example of unlawfulness on State B's part would be the lack of proportionality between its action and that of Z. Furthermore, it appears that B has not attempted to rectify the situation peacefully before proceeding to bomb the area at the border.

State B may also claim to be acting in self-defence. The requirements for self-defence for Article 51 of the UN Charter are:

1. An armed attack must occur.
2. The purpose for the use of force must be clear: to defend oneself.
3. The force exercised in self-defence must be proportionate to the posed threat.
4. The act of exercising the right to self-defence is valid only until the Security Council acts.

The armed attack has not yet occurred, but Z is showing signs of planning an attack on State B. Whether or not Article 51 of the UN Charter includes the right to launch a preemptive strike is a moot point. Under customary international law, states have the right to respond in situations that fall short of an armed attack. However, it must be shown that:

1. State B has been targeted by the hostile activities of another state.
2. State B has exhausted all alternative methods of protecting itself. The use of force in self-defence must be a last resort.
3. The threat or danger is impending.
4. The use of force is proportional to the threat.

If all of the above requirements have been complied with, State B will have acted lawfully.

**13. South Africa is not formally a party to the Vienna Convention on the Law of Treaties but has declared that it regards the treaty's provisions as binding. Treaty interpretation is governed by Articles 31 and 32 of the Vienna Convention. You are an advocate for the defence in a case before a South African municipal court where the interpretation of a treaty is at issue. You argue that the court must interpret the treaty in terms of the Vienna Convention. The advocate for the state, on the other hand, argues that because South Africa has not formally signed the Vienna Convention, its provisions are not relevant in a South African court.**

**Explain, with reference to the Constitution of the Republic of South Africa, 1996, why you feel the court is entitled to make use of such an interpretation. [15]**

The Vienna Convention on the Law of Treaties (VCLT) cannot be applied as a treaty incorporated into our law because South Africa is not a party to it and there is no indication in the facts that it has been incorporated as law, which is required in terms of section 231(4) of the Constitution.

The other basis upon which the court would be required to make use of the VCLT is therefore custom. Section 232 of the Constitution states that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Before the

court can apply customary international law, it will have to establish whether there is in fact such a rule: this it will do by applying the requirements for custom:

- 1) *Usus* (settled practice)
- 2) *Opinio iuris* (a sense of obligation on the part of the states)

*Usus* is defined as constant and uniform usage in the *Asylum* case. The very fact that the VCLT was drawn up proves this requirement has been met because the VCLT is a compilation of the rules governing treaties that states at the time considered to be general rules of international law. The practice need not be “universal” therefore a widespread acceptance by states would be sufficient (*Fisheries Jurisdiction* case).

*Opinio iuris* has also been met because South Africa has declared that it regards the provisions as binding.

The VCLT therefore meets the requirements set in South African law for the existence of a customary rule of international law. The VCLT does not conflict with the Constitution or an Act of Parliament, therefore in terms of section 232 of the Constitution it is municipal law, and the court must interpret the treaty in terms of its provisions.

**14. Four states (A, B, C, and D) conclude a treaty regulating their trade relations.**

**State A enters a reservation to one of the articles of the treaty. The reservation is not forbidden by the provisions of the treaty and it does not contradict its object and purpose. State B does not respond to the reservation, while states D and C object to the reservation. Explain the consequences of A’s reservation to the operation of the treaty between the parties.**

If a state does not object to a reservation (within 12 months of having been informed of the reservation, or within 12 months of expressing consent to be bound by the treaty), it will be deemed to have consented to the reservation. State B is therefore deemed to have tacitly accepted the reservation.

States C and D expressly object to the reservation. We can assume they have objected to the reservation only and not to the treaty coming into operation as a whole. As a result:

- As between A and B: The entire treaty operates between them, but the provisions of the original treaty to which a reservation has been entered into will be replaced by the provisions of the reservation.
- As between A and C: The reservation does not come into operation between them, since there is no consensus. Likewise, the provision of the original treaty to which the reservation was entered does not come into operation between them due to lack of consensus. Therefore, the treaty will apply between them minus the provision to which

A entered a reservation. The vacuum created will be governed by the applicable principles of customary international law.

- As between A and D: same as between A and C.
- As between B, C, and D: The treaty in its original form will apply, since the treaty obligations between all non-reserving parties remain unaffected by the reservation.

**15. The Draft South African Weather Service Amendment Bill prohibits anyone from issuing a severe weather warning without permission from the Weather Service. Suppose the Bill becomes legislation in South Africa. You want to challenge the Act before the Constitutional Court on the grounds that it limits the right to one's freedom of expression. Explain whether you would rely on international law in your argument, and to what extent. Substantiate your answer with reference to case law and the relevant Constitutional provisions. [25]**

Yes, international law will have to be relied on, as provided for in the Constitution.

Firstly, the court will have to interpret the right to freedom of expression. In terms of section 39(1)(b), the court (or tribunal or forum) must consider international law when interpreting a provision of the Bill of Rights. In *S v Makwanyane* it was stated that public international law in this context refers to binding and non-binding international law. International agreements and customary international law form the framework within which the Bill of Rights can be evaluated and understood. Guidance on the Bill of Rights interpretation can be obtained from views expressed by the UN Committee on Human Rights, the European Commission on Human Rights, as well as from decisions of the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court of Human Rights. It must be remarked, however, that public international law which may advise the courts in terms of section 39(1)(b) is not limited to international human rights law. For example, in *Prince v President of the Law Society, Cape of Good Hope*, the court had to interpret the provision protecting religious freedom. It was found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

It is important to remember that the role of international law in such instances is advisory. The courts do not apply the international law rules they have consulted directly, in the way they would apply the provisions of a South African statute. It is the Bill of Rights provision which the courts apply, but the meaning of that provision has been moulded by international law. Therefore we refer to an indirect application of international law.

However, although this is the basic rule, you also have to consider which source of international law the court is working with in interpreting the Bill of Rights. If it is a treaty which has been transformed into South African law in terms of section 231(4), or if it is a rule of customary international law which does not conflict with the Constitution or an Act of

Parliament under section 232, then it forms part of South African law and as such will have to be applied, and not merely considered, even when interpreting the Bill of Rights under section 39.

Secondly, the court will interpret the SA Weather Service Amendment Act itself. In terms of section 39(2), any court, tribunal, or forum is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and objects are linked to international law and the values and approaches of the international community.

Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

**16. Write a legal opinion on universal jurisdiction, explaining its development, use, and crimes covered (both custom and treaty based). Explain further whether it is effective. Substantiate your answer with reference to authority. [15]**

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture.

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Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty obligation to the contrary. Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed” and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction,

except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

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**17. State X is a new state, which has recently declared its independence from State Y. The borders of State X are not fully defined since they are disputed by State Y. In fact, State Y has made an official declaration to the effect that should State X not agree to the boundary parameters as they have been determined by State Y, the latter will not accord it any recognition as a state. State X relies heavily on financial assistance from State Y, and fearing the loss of such assistance, it follows a foreign policy as dictated by State Y. It is, however, developing a form of government totally alien to that of State Y. State X's Prime Minister has travelled extensively in an attempt to establish diplomatic relations in Africa, but the African states display mixed reactions to State X's newly declared independence, and some enter into diplomatic relations with it, whilst others do not. Discuss fully whether State X is an entity enjoying international legal personality. [25]**

For an entity to qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition:

“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states”.

#### Permanent population

The “permanent population” requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic does not affect



statehood adversely, as was pointed out by the court in the *Western Sahara* case. What is important for the purpose of the “permanent population” requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command.

#### Defined territory

It is important for a state’s territory to be defined. There is no required minimum size. This requirement does not imply that the territory must have undisputed borders. Israel serves as an example: despite the ongoing territorial dispute with Palestine, Israel still satisfies the requirements for statehood. Furthermore, the territory need not necessarily form on single unit. What is important is that the state must be sufficiently homogenous to be able to perform its functions of government effectively (eg USA and Alaska separated by Canada; East and West Pakistan were separated by India). In other words, there must be a stable community within an area over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted. The case of *Van Deventer v Hancke & Mossop* is an example of a case where a community of people, ruled by a particular government, qualified as a state despite the fact that it had no territory.

#### Effective government

The entity must have a government which is independent of any other authority, and it must have legislative and administrative competencies. Brownlie suggests some guidelines which can be used to assess a government’s effectiveness:

1. Does it have its own executive organ?
2. Does it conclude relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

#### Capacity to enter into foreign relations with other states

This requirement means that the state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognise a state and to enter into relations with it, the state will for all practical purposes be deprived of its capacity to enter into relations with other states.

#### Recognition

The “requirement” of recognition is not specifically mentioned in the Montevideo Convention. However, it is crucial in practice and underlies the ability of the state to enter into relations with other states. If an insufficient number of states were to recognise X, it is doubtful whether

it will be considered to have the ability to enter into international relations, and it would therefore be unable to satisfy the requirements of the Montevideo Convention. The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: the declaratory theory and the constitutive theory.

Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. The proponents of the declaratory theory advocate that the act of recognition is not a requirement for statehood; statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because it was objective, and it took into account only those 4 requirements which are based on well-established rules of international law. The court criticised the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognised by a sufficient number of states, X will fail to become a state in the eyes of the international community (and arguably international law, depending on the chosen theory).

**18. The international legal personality of states and international organs differs as regards both basis and extent. Bearing this statement in mind, answer the following questions**

**1) Discuss fully, referring to practical examples, the requirements for statehood in contemporary international law. [15]**

See 17.

**18. 2) With reference to the decision of the International Court of Justice (ICJ) in *Reparations for Injuries Suffered in the Service of the United Nations*, discuss whether, and if so on what basis and to what extent, an international organisation enjoys legal personality. [10]**

An international organisation is made up of states, or other international organisations. It has a limited international legal personality because its legal personality depends on its creators' discretion. International organisations are limited by their respective constituent charters (the agreements that establish them). They must be created by virtue of an international agreement among states.

Even though international organisations do not have a capacity as extensive as that of states, they can act independently on the international plane. This was confirmed by the ICJ in *Reparations for Injuries Suffered in the Service of the United Nations*. In this case, the ICJ was asked to find whether the UN could exercise diplomatic protection over its agents and also institute action on their behalf for injuries suffered in the course of their duties. The exercise of diplomatic protection and the institution of a claim for harm to a national are both capacities which typically accrue to a state. By finding that the UN could in fact do both, the ICJ recognised that it was a subject of international law enjoying international legal capacity.

The extent of international legal personality enjoyed by international organisations differs. The powers of any given organisation depends on the purpose for which it was created and the functions and powers which it has been given. As stated above, what an international organisation may or may not do is set out in its founding document, or constituent charter, and may be further developed by practice.

An international organisation may:

- Pursue legal remedies and enjoy rights and duties under international law.
- Sue and be sued.
- Have the capacity to own, acquire, and transfer property.
- Enter into contractual and international agreements with states and other international organisations.

The one feature that will always be common to all international organisations is the fact that their members are states or other international organisations made up of states.

### **19. Answer the following questions on jurisdiction in international law**

**1) Miss Aim stands on the banks of the Orange River in Namibia and fires a warning shot at a poacher in Namibia. The shot goes awry and hits Ms BD Luck, who is standing on the opposite bank of the river in South Africa watching events. Indicate (yes or no) whether Namibia and/or South Africa will have jurisdiction and name the bases of such jurisdiction. [4]**

Yes.

Namibia: Subjective territoriality - the act commenced in its territory and was completed in the territory of another state.

South Africa: Objective territoriality - the act commenced in the territory of a foreign state and completed on SA territory.

**19. 2) Ms PS Port, a South African national, travels on holiday to Portugal. While in Portugal, she shoots and kills a fellow South African staying at her hotel in**

**Lisbon. State briefly (yes or no) whether Portugal can exercise jurisdiction over Ms PS Port and, if yes, list on what basis. [2]**

Yes. Portugal can exercise jurisdiction on the basis of territoriality.

**19. 3) Mr T Reason, a British national living in London, plots to bring down the government of South Africa by introducing a vicious computer virus that will bring South Africa's internet and commerce to a standstill. State briefly (yes or no) whether South Africa may exercise jurisdiction over Mr T Reason and if so, list on what basis. [2]**

Yes, on the basis of state protection because the foreigner has performed an act which endangers the safety of the state.

**19. 4) Mr D Evil, a notorious war criminal, is hunted down by Interpol agents and found in the peace-loving country, Idyll. State briefly (yes or no) whether a third party state, not connected to Mr D Evil in any way, could exercise jurisdiction over Mr D Evil, and if so, list on what basis. [2]**

Yes. D Evil has committed an international crime, which is said to threaten the interests of the international community as a whole, and any state may claim jurisdiction on the basis of universality.

**19. 5) John Dugard *International Law a South African Perspective* states:**

**“The extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate”**

**Discuss fully, referring to the requirements set by international law for the development of custom, whether United Nations resolutions can give rise to binding customary international law. Refer to relevant case law. [15]**

Customary international law rules form if they meet two requirements: *usus* and *opinio iuris*. In *South West Africa, Second Phase*, Justice van Wyk rejected the idea that General Assembly resolutions could give rise to custom, because that would give the General Assembly legislative powers, which would bind dissenters, and the General Assembly was not empowered to do this. Justice Tanaka, however, held a dissenting opinion, which has gained support.

A General Assembly resolution is adopted by a vote, which expresses the acceptance of the principle by those states voting in favour. These votes demonstrate the states' support for the principle. In *S v Petane* Conradie J stated that resolutions of the General Assembly may constitute *opinio iuris*, which, if coupled by state practice, could create a rule of customary

international law. However, he cautioned that if there was no preceding *usus*, the resolution itself could not create custom. He did mention that one could treat the resolution itself as *usus* and *opinio iuris* at the same time, but was quick to point out that that would stretch the definition of *usus* far too wide, since *usus* ought to be evidenced by material, concrete, and specific acts by states.

A different approach was taken in the *Nicaragua* case. The court discussed the prohibition on the use of force and concluded, relying on the presence of *opinio iuris* alone, that the latter was part of customary international law. As Dugard points out, the court's reasoning "does suggest that a customary rule may be established with little evidence of settled practice where the *opinio iuris* on the part of the states is clear from their support for resolutions of the General Assembly". In *Legality of the Threat or Use of Nuclear Weapons*, the court noted that General Assembly resolutions may be evidence of the existence of *opinio iuris*, but that one also needs to look at the manner in which such resolutions were adopted. For example, a resolution adopted with a number of negative votes and abstentions will fail to establish the existence of *opinio iuris*.

**20. John Smith (JS), a United States (USA) national, commits fraud in the USA and thereafter flees to South Africa. The USA approaches the South African government with a request for JS's extradition to the USA, to stand trial. Although there is an extradition treaty between South Africa and the United States, this treaty has not been incorporated into South African municipal law. At the extradition hearing, X argues that as the treaty has not been incorporated, the court cannot hear his case. The court rejects this argument, and after a full extradition hearing, an extradition order is issued against JS. JS appeals to the Constitutional Court.**

**In light of these facts, and with reference to the case law, especially the Constitutional Court's decision in *Quagliani*,**

**1) Explain fully, the process which must be followed in terms of South African law, in concluding and ensuring the international application of a treaty [8]**

In terms of section 231 of the Constitution

(1) The negotiating and signing of all international agreements is the responsibility of the national executive

This is self-explanatory.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless

it is an agreement referred to in subsection (3).

This explains the process by which a treaty is binding on South Africa on the international plane.

- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly or the National Council of Provinces, but must be tabled in the Assembly and Council within a reasonable time.

This subsection also deals with the process through which treaties become binding on South Africa on the international plane, but this time regarding treaties that bind without approval by the National Assembly and National Council of Provinces. In practice, the treaties referred to in this subsection are approached as two categories. First, there are the technical, administrative, or executive agreements. These are regarded as agreements of a routine nature flowing from the day-to-day activities of government departments. They generally also have no budgetary implications for South Africa.

The second category are treaties which do not require ratification, and this is a relatively simple determination in that a treaty will generally provide whether or not ratification is required.

## **20. 2) How does such an internationally binding agreement become South African law? [8]**

Section 231(4) of the Constitution states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This section deals with the process necessary to transpose a treaty from the international plane to the national plane. This is done by enacting the treaty into national legislation. This may be done by:

- An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*
- Writing the provisions of the treaty into an Act of Parliament
- Enacting the treaty as a schedule to an Act of Parliament

This subsection allows for one exception in the form of a self-executing provision of an international treaty that has been approved by Parliament. Such a provision will be law in the Republic if it is not inconsistent with the Constitution or an Act of Parliament. Shearer defines

a self-executing provision as: [A treaty] which does not in the view of the American courts expressly or by its nature require legislation to make it operative within the municipal field...”

**20. 3) What effect, if any, has the judgment of the Constitutional Court in *Quagliani* has on your answer to the previous question? [9]**

In terms of section 231(4) of the Constitution, there are only two ways in which a treaty can become part of our law. These two ways form the basis for action in our national courts:

- 1) If it has been made part of our legislation
- 2) If it is self-executing (in which case it is automatically part of our law)

*Quagliani* involved an extradition treaty validly concluded between South Africa and the USA. This treaty had not (by all parties' admission) been incorporated into our law by legislation. Therefore, in terms of section 231(4), the treaty could not be used by the courts unless it was found to be self-executing.

Justice Sachs confirmed that the extradition treaty had not been incorporated into South African law by legislation. He also held that he was not finding that the treaty was self-executing. However, he somehow found that it was enforceable in our law! Thus, he seemingly created a third, unspecified manner in which treaties become law in South Africa (unspecified because it is not one of the two ways provided for by section 231(4)). This is the enigma that the *Quagliani* judgment has brought into our law.

**21. Write a brief paragraph discussing the differences between international law and national law. [10]**

In international law there is no legislator, whereas in national law there is a complete legislative process.

There is no court to enforce international law, and there is no precedent system either. States are the judges in their own cases. In national law, there is a fully developed judiciary which applies a precedent system, as well as the principle of *nemo iudex in sua causa*.

There is no executive to enforce judgments in international law, whereas in national law there is a complete executive machinery for enforcing judgments.

The subjects of international law are generally states and international organisations, whereas in national law they are individuals or legal persons.

**22. South Africa (represented by her Minister of Health), the United States of America (represented by her President), and the Republic of Zeldonia (represented by one of her provincial premiers) meet at a conference in Washington, DC. They conclude an agreement entitled “Treaty for the Ethical Implementation of Stem Cell Research”.**

**Analyse the facts in this scenario with respect to the requirements for the conclusion of a treaty as set out in the 1969 Vienna Convention on the Law of Treaties, and explain whether a valid treaty has been concluded between the three states. [15]**

Certain people are presumed to validly conclude binding treaties because of the position they hold (*ex officio*). In terms of Article 7(2) of the Vienna Convention, they are:

1. The head of state
2. The head of government
3. The Minister of Foreign Affairs
4. The head of a diplomatic mission (ambassador/consul)
5. State representatives at treaty-making conferences

If a person does not fall into one of these categories (ie the Minister of Health and the provincial premier in our scenario), then Article 7(1)(a) applies, and he/she must produce “full powers”. Full powers are documentary proof issued by his/her government stating that he/she is authorised to represent the state in the conclusion of the treaty.

Alternatively, Article 7(1)(b) provides that, if it is clear from the practice of the states or from other considerations, that the parties intended the person to represent the state, full powers aren't necessary.

The Minister of Health and the premier of the province would have to produce full powers.

**23. State A and State B have joined forces to invade State C in search of weapons of mass destruction. The sentiment amongst the international community, however, is that the reason for the invasion is unfounded and that the situation poses a threat to international peace and security. The resolution brought before the Security Council in the United Nations calling for the withdrawal of State A and State B's troops is vetoed by one of the permanent members of the Security Council.**

**1) Briefly discuss the international legal personality of international organisations and their general characteristics. [10]**

See 18. 2) and don't forget to mention *Reparations for Injuries Suffered*.

**23. 2) In light of the abovementioned set of facts, explain whether this crisis arising from the veto has paralysed the United Nations, or whether the General Assembly could take some action. In your answer, you must discuss the powers of the General Assembly and the question whether the General Assembly has**



**any authority pertaining to the maintenance of international peace and security.  
[10]**

The main purpose of the United Nations is to maintain international peace and security. It does this through its principal organs, which are the General Assembly (GA), the Security Council (SC), the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice. The primary organ charged with maintaining peace and security is the Security Council.

As with any international organisation, the GA has only the powers which are given to it in its constituent document, the UN Charter. The GA may consider and make recommendations to UN members, or the SC regarding the general principles of cooperation in the maintenance of peace and security. It may also make recommendations on any matter relating to peace and security which is referred to it by a UN member, the SC, or a non-member state. This is subject to one proviso: the GA must refer any question which requires action to the SC before or after the GA has discussed the matter. It may further alert the SC to matters which are likely to endanger peace and security. The GA may make no recommendations on matters which are pending before the SC (unless the SC requests so).

In terms of the powers conferred on it, therefore, the GA is not empowered to act: in other words to actually enforce peace and security. This it must refer to the SC. The five permanent members (US, UK, Russia, France, China) have veto power, in terms of which any of them may veto any resolution before the SC. If one of the permanent members does not approve of proposed action to maintain peace and security, it can kill it right there.

In response to this “veto crisis”, the GA argues that although the SC has the primary power for the maintenance of international peace and security, it does not have the sole power. Where the SC can’t or won’t act and the GA is paralysed, the GA draws on “residual powers” and can recommend “collective measures, including, in the case of a breach of peace or an act of aggression, the use of armed force”. In other words, what the GA is attempting to do here is to expand the powers conferred on it in the Charter through creative interpretation.

**24. According to Dugard, wide jurisdictional powers are conferred on South African Courts in respect of offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33.**

**Name the grounds on which jurisdiction may be exercised by a South African court in terms of the provisions of this Act.**

1. Territory
2. Nationality
3. Passive personality

4. Protection of the state
5. Any other basis recognised by law

**25. In June 1994 South Africa and State X conclude a treaty providing for their mutual cooperation with respect to the treatment and prevention of tuberculosis (“The 1994 Treaty”). One of the provisions of the treaty deals with the establishment of a Joint Tuberculosis Assistance Fund (JTAF), the money from which is to be used to acquire and distribute the necessary medication to individuals who cannot afford to purchase it for themselves, and pay for these individuals’ hospitalisation costs. In 1995 the South African Parliament expressly provides in a declaration that the treaty forms part of South African municipal law.**

**1) Consider the following situation: Mr Poor believes that he qualifies for free TB treatment as envisaged by the 1994 treaty and the creators of JTAF. In 1997 he applies to the South African government in order to obtain it. His application is denied. The South African government argues that no assistance may be obtained from the JTAF at this stage, since the provisions of the treaty have not been enacted into South African municipal law. The Government refers extensively to *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*. Analyse this argument with reference to the position of treaties in South African law at the time the treaty was concluded. [5]**

The legal position in this scenario is governed by the interim Constitution, 1993. The interim Constitution provided that an international agreement, that is binding on South Africa on the international plane, will become law in South Africa if Parliament “expressly so provides”. (There was no requirement of enactment into legislation, as in the pre-Constitutional era, and after the final Constitution.) The meaning of “expressly so provided” was uncertain, and academics were divided on this question.

One group, including Dugard, felt that a mere declaration by Parliament was sufficient to meet this criterion (and this was the procedure in fact followed by Parliament in a number of cases). Another group claimed that parliamentary legislation was still required.

If one follows the first group’s viewpoint, it would seem that the treaty in question has become part of SA law and Mr Poor’s application should not have been denied.

**25. 2) Suppose the treaty was concluded in 1997. Describe the procedure which must be followed in terms of the Constitution of 1996 before the treaty would become part of South African municipal law. [5]**

Section 231(4) provides:

Q&A by yash0505

Any international agreement becomes law in the Republic when it is enacted into legislation as law; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Thus, all treaties must be transposed into domestic law by a legislative process. There are three main methods by which this may be accomplished:

1. The provisions may be rewritten in an Act of Parliament.
2. The treaty is enacted as a Schedule attached to an Act of Parliament.
3. An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*.

**25. 3) Suppose the treaty was concluded in 1997 and Mr Poor's application was denied in 2008. His legal representative prepares an argument in which she refers to relevant South African legislation, as well as to the provisions of the Bill of Rights contained in the South African Constitution, 1996, namely the right of access to healthcare services. Her argument is heavily substantiated with reference to international law. In response, the government claims that the reference to international law is unnecessary, and legally irrelevant. Analyse this argument with reference to the indirect application of international law as provided for in the Constitution. [15]**

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights. In *S v Makwanyane* it was stated that international law in this context refers to binding and nonbinding international law.

International agreements and customary international law form the framework within which the Bill of Rights can be evaluated and understood. Guidance on the interpretation of its provisions can be obtained from views expressed by the UN Committee on Human Rights and the European Commission on Human Rights, and from decisions of the Inter-American Court of Human Rights and the European Court of Human Rights. It must be noted that international law, which may advise the court in terms of section 39(1)(b), is not limited to international human rights law. For example, in *Prince v President of the Law Society, Cape of Good Hope*, the court had to interpret the provision protecting religious freedom and found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

In terms of section 39(2) any court (or tribunal or forum) is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and object are linked to international law and the values and approaches of the international community.

Section 233 provides:

When interpreting any legislation, every court must prefer any reasonable interpretation of the

legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Lastly, some statutes may specify that international law should be used in their interpretation. But even if such instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law.

So, the government's argument in this scenario is incorrect, since the Constitution provides for the indirect application of international law, be it in the interpretation of the Bill of Rights, or interpretation of legislation.

**26. Write a paragraph explaining how the types of sanctions available for violation of national (domestic) laws within a state differ from the type of sanctions available at an international level against states which have violated international law. [10]**

Municipal (national law) judgments are backed by the complete executive machinery of the state, in the form of a police force. In international law, there is no central executive authority with a police force at its disposal. At the international level, the Security Council does have some "sanctions" that can be used: Chapter VII of the UN Charter allows the Security Council to direct its members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace.

States can resort to self-help. The different types of actions that can be taken include:

1. Reprisal
2. Retortion
3. Self-defence
4. Embargo and boycott
5. Sanction
6. Diplomatic action

**27. Discuss the interpretation of treaties in international law. [15]**

Treaty interpretation is governed by Articles 31, 32, and 33 of the Vienna Convention. There are two principal streams in the interpretation of treaties:

- 1) The literalist or textual approach, which concentrates on the actual text of the treaty.
- 2) The purposive approach, which interprets the treaty to give effect to the purpose for which it was concluded.

The Vienna Convention marries the two approaches in Article 31 by providing that treaties must be interpreted in good faith in accordance with the ordinary meaning of the words used in context, bearing in mind the object and purpose of the treaty.

Context is defined as:

- Text, preamble and annexures;
- Agreements between parties relating to the conclusion of the treaty;
- Instruments by certain parties accepted by other parties relating to the conclusion of the treaty.

Once the primary means of establishing meaning have been used, you can turn to the secondary means, but only:

- to confirm the meaning you have established
- if the meaning established is ambiguous or obscure, or
- if the meaning established is manifestly absurd or ambiguous

The secondary means referred to in Article 32 of the VC are the preparatory work leading to the conclusion of the treaty and the general circumstances surrounding the conclusion of the treaty.

## **28. Briefly list and explain the bases for jurisdiction in international law. [10]**

1. Territoriality
2. Effects (subjective and objective territoriality)
3. Nationality
4. State protection
5. Passive personality
6. Universality

Territoriality:

A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts.

Effects:

A state has jurisdiction over acts performed outside its territory which have an effect inside its territory.

Nationality:

A state has jurisdiction over its own nationals wherever they act.

Passive personality:

Where a foreigner violates the rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner.

Q&A by yash0505

State protection:

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

Universality:

In the case of international crimes any state may claim jurisdiction. The tradition, customary law international crimes are piracy, war crimes, and crimes against humanity.

**29. X, a foreign national, commits fraud in State A and thereafter flees to South Africa. State A approaches the South African government with a request for X's extradition to State A to stand trial. There is no extradition treaty between State A and South Africa, but the SA Extradition Act provides in section 3(2) that suspected criminals may be extradited in the absence of a treaty if "the President so decides". The SA President does "so decide" and the case is referred for an extradition hearing in terms of the Act. The full extradition process is followed, and the result is an extradition order against X.**

**X's advocate claims that the President's decision under section 3(2) of the Act amounts to the conclusion of an informal agreement, and that the definition of "international agreement" in section 231(1) includes informal agreements. Discuss the term "international agreement" as used in section 231 of the South African Constitution. Indicate what meaning the SA courts have given to this term, and the definition which they have accepted. [10]**

The meaning of "international agreement" is addressed in *Harksen v President of the RSA and Jurgen Harksen v President of the RSA* (CC). In an extradition case, it was claimed that the term "international agreement" was wider than the term "treaty" and included informal agreements between states. Although the Cape Provincial Division held that the term could include informal agreements, this was rejected by the Constitutional Court.

In terms of the Constitutional Court decision, therefore, "international agreement" as occurring in section 231 is to be understood as "treaty" as defined in Article 2(1) of the Vienna Convention on the Law of Treaties:

"An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

**30. Define a treaty and discuss fully the characteristics identified in the Vienna Convention on the Law of Treaties for the creation of a valid treaty. [10]**

A treaty is an agreement, whether written or oral, concluded between public international law subjects, with the intention of creating a public international law relationship. The agreement must give rise to reciprocal rights and duties and must be governed by public international law.

Because a treaty is a consensual agreement, there must be consent between the parties. The parties must agree to create a public international law agreement.

The parties must be competent to conclude the treaty. Certain people may bind the state *ex officio* in terms of Article 7(2) of the VC:

1. Heads of state
2. Heads of government
3. The Minister of Foreign Affairs
4. The head of a diplomatic mission (ambassadors/consuls)
5. State representatives at treaty-making conferences

If a person falls outside of this category, they must produce full powers.

The treaty must give rise to reciprocal rights and duties, and the rights and duties must be governed by public international law.

**31. Define *ius cogens* and explain the effect of this concept on the validity of a treaty. [10]**

*Ius cogens* is defined as an obligatory rule of general international law, accepted and recognised by the community of states as a whole as a rule from which no derogation is allowed, which can be altered only by another norm or rule of the same kind.

States cannot “contract out” of *ius cogens* - it is absolutely binding on all states whether they like it or not. The only rule more or less accepted as *ius cogens* is the prohibition on the use of force. A treaty which conflicts with an already existing norm of *ius cogens* is void from the outset, and no treaty comes into existence. However, if a treaty is already in existence and a new rule of *ius cogens* then develops, the treaty isn't void; performance which has already been rendered in terms of it is perfectly valid, but there can be no further performance.

**32. The treaty establishing the International Criminal Court (Rome Statute) came into force in July 2002. List the situations in which this court may exercise its jurisdiction. [5]**

1. At least one of the parties involved is a state party.

2. The accused is a national of a state party.
3. The crime is committed in the territory of a state party.
4. A state, not party to the Statute, may decide to accept the court's jurisdiction over a specific crime that was committed within its territory, or that was committed by its national.
5. The United Nations Security Council refers a situation to the prosecutor.

## **TOPIC 2: IMMUNITY AS AN EXCEPTION TO JURISDICTION: STATE/SOVEREIGN IMMUNITY**

**33. State Z is in the throes of a civil war with frequent clashes between rebels and governmental forces. Mr C Ruel, State A's President, orders the torture and murder of all the rebels who have been caught by the governmental forces, but the rebellion continues. In January 2013, the rebels destroy two of the major textile factories producing army attire. State Z has no choice but to conclude a contract with a South African company in terms of which the company would supply camouflage army uniforms to State Z for one year in return for payment. The company delivers the clothing as per the agreement, but State Z fails to pay. The company wishes to institute an action against State Z in a South African court, claiming the outstanding payments. When rumours start circulating that President Ruel himself is about to visit South Africa, the CEO of the company begins to wonder whether President Ruel may be prosecuted in a South African court for the crimes he has committed in State Z. You are the company's legal advisor. Write a well-substantiated legal opinion in which you discuss sovereign immunity on the one hand, and Head of State immunity on the other, in order to explain whether State Z and President Ruel (respectively) will be able to raise immunity before South African courts. [25]**

### State Z's immunity in a South African court (sovereign immunity)

The theory of restricted sovereign immunity entails that a state is, in principle, immune from being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. When a state acts as an ordinary trader it is expected to honour its obligations and is subject to the laws which all ordinary traders must abide by. Therefore, we must distinguish between:

- 1) Public governmental acts (*acta iure imperii*): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts.
- 2) Commercial activities (*acta iure gestionis*): a state will not be immune from jurisdiction if claims arise from these activities.



In the South African *Inter-Science* case, the court concluded that the theory of restricted sovereign immunity was a general rule of international law, and applied it.

In terms of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when the proceedings relate to a “commercial transaction” into which that state has entered. “Commercial transaction” is defined in the Act as:

- 1) any contract for the supply of goods and services
- 2) any loan or transaction for the provision of finance...
- 3) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters... otherwise than in the exercise of sovereign authority.

The general rule of the Foreign States Immunities Act is that you look at the nature of the transaction rather than the purpose, to determine whether the act is *imperii* or *gestionis*. However, the American *Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

In our case the state has bought army attire from a South African company. At first glance this is an act related to armed forces, and therefore will be regarded as *imperii*. However, having regard to the nature of the contract (purchase and sale contract), it could be regarded as commercial activity. In the American case of *Aerotrade v Republic of Haiti*, the Republic of Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

#### President's immunity for international crimes (head of state immunity)

The Diplomatic Immunities and Privileges Act provides that a head of state is immune from the criminal and civil jurisdiction of the courts of the Republic and enjoys the same privileges as:

- a. heads of state enjoy in accordance with the rules of customary international law
- b. are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state, or
- c. may be conferred on such a head of state by virtue of section 7(2)

At the moment, head of state immunity is a hotly debated issue in international law:

- The *Pinochet* case was a British case. Pinochet, a former Chilean head of state, was arrested on an extradition request while he was on a visit to Britain. He claimed that he enjoyed absolute immunity from extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity for acts performed in the “exercise of his functions as head of state”. Where the acts complained of were not acts which fell within the office of a head of state, he no longer enjoyed immunity.
- In the *Gaddafi* case, a complaint was filed in the French court against Gaddafi, the Libyan leader. It claimed that the Libyan government was involved in the bombing of an aircraft which killed French citizens. However, the French prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

From the *Pinochet* and *Gaddafi* cases a very clear distinction between serving and former heads of state emerges - a serving head of state is absolutely immune, while a former head of state may well lose immunity and be liable.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment the provisions of the resolution can only be classified as non binding “soft law”. The main provisions of the resolution provide the following:

- For the period in which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
- It is expressly stated that they may be prosecuted for acts constituting a crime under international law, or misappropriation of the state’s assets or resources.

In our case we are dealing with a serving head of state, so it would appear that he is immune.

**34. Write a legal opinion on the scope and extent of diplomatic immunity. Include in your discussion the inviolability of diplomatic missions, as well as the question of whether the premises of a mission are extraterritorial or not. You must substantiate your answer fully with reference to appropriate legal authority. [25]**

Diplomats and consuls are state agents appointed to represent their states in foreign countries for specific purposes.

Diplomats by and large represent their states, protect the interests of their nationals, act as representatives of their government in negotiations with the government of the host state, report on conditions in the host state, and promote friendly relations.

In international law, the protections of diplomats is laid down in the Vienna Convention on Diplomatic Relations. In South Africa, these matters are regulated by the Diplomatic Immunities and Privileges Act.

Diplomats and embassies need immunity so that the mission is able to perform its functions. Diplomatic immunity is generally divided into two "legs": Diplomatic premises (embassies); and the person of the diplomat.

Immunities/privileges of diplomatic premises:

- May not be entered by the host state without permission of the ambassador.
- Premises, furniture, property, cars etc may not be searched, requisitioned, attached, or sold in execution.
- Embassy archives, correspondence, post bags etc may not be opened, searched, or seized.
- Diplomatic premises remain part of the host state's territory - they are not part of the sending state - this was confirmed in *Santos v Santos*.

Immunities/privileges of the person of the diplomat:

- A diplomat may not be arrested or detained (it is a criminal offence to do so).
- A diplomat is absolutely immune from criminal jurisdiction.
- A diplomat is immune from civil jurisdiction unless the action involves real action for immovable property held in personal capacity; matters of succession in private capacity; professional or commercial activities outside of official functions.
- A diplomat is not obliged to give evidence as a witness.
- This immunity extends to the diplomat's family.

As with sovereign immunity, diplomatic immunity can also be waived. A diplomat may not be arrested even for an act endangering the state. The person should rather be declared a *persona non grata* and expelled from the country.

**35. Temba is an artist from Pretoria who concludes an agreement with the government of Goldava. The agreement stipulates that he will paint a portrait of the wife of the Goldavian Ambassador to South Africa (Mrs Nip), which is to be hung on the wall of the Ambassador's office, and that in turn he will be paid R10000 as a deposit before he starts working and R25000 when his work is completed. He receives the deposit in good time. A month later the portrait is finished, and he shows it to Mrs Nip at the embassy. Mrs Nip is not satisfied with the way in which she has been depicted by Temba. Temba quietly insists that the portrait is lifelike and as requested. Mrs Nip loses her temper and throws her paperweight at Temba. Temba is seriously injured and taken to hospital. When**

**his condition improves he approaches you for legal advice. With reference to authority, advise Temba whether Mrs Nip can be arrested and charged with assault; whether the embassy premises can be searched for the paperweight which was allegedly used in the assault, and whether Temba can institute an action in a South African court claiming R25000 from the Goldavian government.**  
**[25]**

Diplomats and embassies need immunity so that the mission is able to perform its functions. In international law, the protection of diplomats is laid down in the Vienna Convention on Diplomatic Relations. In South Africa, these matters are regulated by the Diplomatic Immunities and Privileges Act. The DIPA provides for immunities/privileges of diplomatic premises, and immunities/privileges of the person of the diplomat:

#### Immunities/privileges for the diplomatic premises

- May not be entered by the host state without permission of the ambassador.
- Premises and property thereon may not be searched, requisitioned, attached or sold in execution.
- Embassy archives, correspondence, post bags etc may not be opened or seized.
- The diplomatic premises remain part of the host state's territory - they are not part of the sending state - this was confirmed in *Santos v Santos*.

#### Immunities/privileges for the person of the diplomat

- A diplomat may not be arrested or detained (it is a criminal offence to do so).
- A diplomat is absolutely immune from criminal jurisdiction.
- A diplomat is immune from civil jurisdiction unless the action involves a real action for immovable property held in personal capacity; matters of succession in personal capacity; professional or commercial activities outside of official functions.
- A diplomat is not obliged to give evidence as a witness.
- This immunity extends to the diplomat's family.

As the ambassador's wife, Mrs Nip enjoys diplomatic immunity. She therefore cannot be arrested or charged, and the diplomatic premises cannot be entered or searched (unless immunity has been waived).

The theory of restricted sovereign immunity entails that a state is in principle immune from being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. We must therefore distinguish between:

- 1) Public governmental acts (*acta iure imperii*): if a claim arises from such acts, the acting state will be immune from jurisdiction.

- 2) Commercial activities (*acta iure gestionis*): a state will not be immune from jurisdiction if claims arise from these activities.

In terms of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when proceedings relate to a “commercial transaction” into which that state has entered. “Commercial transaction” is defined as:

- a. any contract for the supply of goods and services
- b. any loan or transaction for the provision of finance...
- c. any other transaction or activity of commercial, industrial, financial, professional or other similar character (not made in the exercise of sovereign authority)

The general rule is that you look at the nature of the transaction, rather than the purpose, to determine whether or not the act is an *acta iure imperii* or *acta iure gestionis*. However, the *American Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

The contract for the painting of the portrait falls under the definition of a “commercial transaction” in terms of the Foreign States Immunities Act and is therefore one of the exceptions to sovereign immunity. Temba may, therefore, institute an action in a South African court.

**36. Using case law, analyse the practical problems that arise in respect of immunity with regard to acts related to the armed forces and to diplomatic activity. Discuss the concepts of acts *iure imperii* and *iure gestionis* in your answer. [25]**

Acts *iure imperii* are public governmental acts. If a claim arises from such acts, the acting state will be immune from jurisdiction.

Acts *iure gestionis* are commercial activities. If a claim arises from these activities, a state will not be immune from jurisdiction.

In order to determine whether an act is *iure imperii* or *iure gestionis*, as is evident from the wording of the Foreign States Immunities Act, one must look at the nature of the contract, rather than its purpose.

In terms of the provisions of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when the proceedings relate to a “commercial transaction” into which the state has entered. “Commercial transaction” is defined in the Act as:

- a. any contract for the supply of goods or services
- b. any loan or other transaction for the provision of financial services...
- c. any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters or engages otherwise than in the exercise of sovereign authority

The American *Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

The practical problems that arise in respect of immunity with regard to acts related to armed forces and diplomatic activity can be illustrated by the following example:

Suppose there is a contract of purchase and sale in terms of which State A buys tyres for its army trucks from a South African company. At first glance, this is an act related to armed forces, but it would also fall within the scope of a “commercial transaction” because the nature of the contract, not its purpose, is relevant. Therefore State A would not be immune from jurisdiction. However, Dugard highlights the fact that courts are likely to be weary in asserting jurisdiction over any matter related to the armed forces.

In the American case of *Aerotrade v Republic of Haiti*, Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

**37. Write an essay in which you explain how the restricted approach to sovereign immunity has gradually become part of South African law. You must discuss applicable South African case law and legislation in your essay.**

Sovereign immunity has its roots in the immunity of the person of the foreign sovereign (the king) from municipal courts’ jurisdiction. Later, this immunity was accepted as belonging to the state and its organs. In other words, the acts of the head of a foreign state, its government, and its government departments cannot be challenged in municipal courts.

According to the theory of absolute sovereign immunity, a state was always immune from prosecution in the courts of another state with regard to all acts it performed.

The theory of restricted sovereign immunity entails that a state is, in principle, immune from

being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. One must therefore distinguish between:

- 1) Public governmental acts (*acta iure imperii*): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts.
- 2) Commercial activities (*acta iure gestionis*): if claims arise from such acts, the acting state will not be immune from jurisdiction.

Initially, South African courts applied the theory of absolute immunity. The turning point was the *Inter-Science* case, where the court concluded that the theory of restricted sovereign immunity was a general rule of international law, and applied it. The *Inter-Science* decision was approved by the court in the *Kaffraria Property* case.

The position of restricted sovereign immunity in South African law was "solidified" by legislation in the form of the Foreign States Immunities Act. This Act provides that foreign states are immune from the jurisdiction of South African courts, but there are exceptions to this general rule:

#### 1. Waiver

A state is immune if it expressly waives its immunity

- in writing before the cause of action arises
- in writing after the dispute has arisen
- or tacitly, for example where the foreign state itself institutes the action

#### 2. Commercial transactions. A commercial transaction is:

- a contract for the supply of services or goods
- a loan or the provision of finance...
- any other activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters or engages in otherwise than in the exercise of sovereign authority

Whether or not a transaction is of a commercial nature or not is determined by the nature of the transaction and not its purpose.

#### 3. Contracts of employment. A foreign state will not be immune if it enters into a contract of employment and

- the contract is concluded in South Africa
- the work must be completed entirely or in part in South Africa, and
- when the contract was concluded, the individual involved was a South African citizen, or was a resident in South Africa, and
- when the action was instituted, the individual was not a national of a foreign state

**38. Using the Diplomatic Immunities and Privileges Act as your starting point, discuss head of state immunity and the implications that international developments (cases, resolutions, etc) may have on the South African law. [25]**

The DIPA provides that a head of state is immune from the courts of the Republic and enjoys the same privileges as

- a. heads of state enjoy in accordance with the rules of customary international law.
- b. are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state.
- c. may be conferred on such a head of state by virtue of section 7(2)

At the moment, head of state immunity is a hotly debated issue in international law:

- The *Pinochet* case was a British case. Pinochet, a former Chilean head of state, was arrested on an extradition request while he was visiting Britain. He claimed that he enjoyed absolute immunity from extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity for acts performed in the “exercise of his functions as head of state”. Where the acts complained of were not acts which fell within the office of a head of state, he no longer enjoyed immunity.
- In the *Gaddafi* case, a complaint was filed in the French court against Gaddafi, the Libyan leader. It claimed that the Libyan government was involved in the bombing of an aircraft which killed French citizens. However, the French prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

A distinction is drawn between immunity that attaches to the person because of their office and immunity that relates to acts performed in an official capacity. Immunity *ratione personae* attaches to senior state officials while they are still in office. Immunity *ratione materiae* attaches to official acts and can be invoked by both serving and former officials in respect of acts performed while they were still in office.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment, the provisions of the resolution can only be classified as non binding “soft law”. The main provisions provide the following:

- For the period during which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.



- A former head of state or government enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
- It is expressly stated that he/she may be prosecuted for acts constituting a crime under international law, or misappropriation of the state's assets or resources.

## **LISTS THAT CAN BE MEMORISED**

### **1. Usus and opinio iuris:**

#### Usus

1. Need not be "universal", widespread usage sufficient (*Fisheries Jurisdiction*).
2. Can develop between 2 or a few states -> local custom (*Right of Passage over Indian Territory*).
3. Number of states not as important as identity of states.
4. Number of repetitions necessary depends on nature of the rule.
5. Duration of persistence of practice depends on nature of the rule (*S v Petane* -> outer space).
6. Practice must be characterised by substantial compliance (*Nicaragua*).
7. Persistent objector not bound if persistently objected during development of rule (*North Sea Continental Shelf*).

#### Opinio iuris

1. States must feel that they are conforming to what amounts to a legal obligation (*North Sea Continental Shelf*).

### **2. A state may formulate a reservation to a treaty unless (Article 19 VC):**

1. Treaty prohibits the reservation.
2. Treaty provides that only specific reservations may be made.
3. The reservation is incompatible with the object and purpose of the treaty.

### **3. Theories of succession to treaties:**

1. Theory of universal succession.
2. Clean slate theory.
3. Theory of provisional succession.

#### **4. Requirements for self-defence (Article 51 UN Charter):**

1. An armed attack must occur.
2. The purpose for the use of force must be clear: to defend oneself.
3. The force exercised in self-defence must be proportionate to the posed threat.
4. The act of exercising the right to self-defence is valid only until the Security Council acts.

#### **5. Traditionally recognised sources of public international law:**

1. International agreements (treaties) (Article 38(1)(a)).
2. International custom (Article 38(1)(b)).
3. The general principles of law recognised by civilised nations (Article 38(1)(c)).
4. Judicial decisions and “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law” (Article 38(1)(d)).

#### **6. Three principles set out in the *Lotus* case:**

1. One state cannot exercise jurisdiction in the territory of another unless they have agreed thereto.
2. One state may exercise jurisdiction in its own territory over acts that happened in the territory of another state unless an international law rule forbids this.
3. The territoriality of criminal cases is not absolute.

#### **7. Bases of jurisdiction:**

1. Territoriality.
2. Effects (subjective and objective territoriality).
3. Nationality.
4. Passive personality.
5. State protection.
6. Universality.

#### **8. Requirements for *rebus sic stantibus* (Article 62 VC):**

1. Existence of circumstances were essential basis for conclusion of treaty.

2. The circumstances (which have purportedly changed) exist at the time of treaty conclusion.
3. The change of circumstances must drastically transform the extent of the states' obligations.
4. The change of circumstances must have been unforeseen by the parties.
5. May not be raised to terminate treaties that establish boundaries.
6. May not be raised by the state party responsible for the change.

**9. Grounds available for the termination of a treaty:**

1. Fulfilment of obligations.
2. Consent.
3. Treaty provision.
4. Conclusion of a new treaty.
5. Res sic stantibus.
6. Impossibility of performance.
7. Ius cogens.
8. Unilateral repudiation.
9. Breach of treaty.
10. War and suspension of diplomatic/consular relations.

**10. Requirements for statehood:**

1. Permanent population.
2. Defined territory.
3. Effective government.
4. Capacity to enter into international relations.
5. Recognition.

**11. Things international organisations can do:**

1. Sue and be sued.
2. Enter into contractual and international agreements with other international organisations and states.
3. Acquire, own, transfer property.
4. Pursue legal remedies and enjoy rights and duties under international law.

**12. Methods of enacting a treaty into national legislation:**

1. Writing the provisions of the treaty into an Act of Parliament.
2. Enacting the treaty as a Schedule to an Act of Parliament.
3. An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*.

**13. People who are presumed to be able to validly conclude binding treaties *ex officio*:**

1. Heads of state.
2. Heads of government.
3. Heads of diplomatic missions (ambassadors/consuls).
4. State representatives at treaty-making conferences.

**14. Enforcement measures available to states in international law:**

1. Reprisal.
2. Retortion.
3. Boycott/Embargo.
4. Sanction.
5. Diplomatic action.
6. Self-defence.
7. Use of force authorised by Security Council.
8. Hot pursuit.

**15. Situations in which the International Criminal Court may exercise jurisdiction:**

1. At least one of the parties involved is a state party.
2. Accused is a national of a state party.
3. Crime committed on the territory of a state party.
4. A state not party to the Rome Statute may decide to accept the court's jurisdiction over a specific crime committed within its territory, or by its national.
5. The Security Council refers a situation to the prosecutor.

**16. Definition of “commercial transaction” as per Foreign States Immunities Act:**

1. A contract for the supply of services or goods.
2. A loan or transaction for the provision of finance...

3. Any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters otherwise than in the exercise of sovereign authority.

**17. Acts regarded as *acta iure imperii* in the American *Victory Transport* case:**

1. Internal administrative acts.
2. Legislative acts.
3. Acts in relation to diplomatic activity.
4. Acts in relation to armed forces.
5. Public loans.

**18. Privileges afforded to the Head of State as per the Diplomatic Immunities and Privileges Act (...the same privileges as):**

1. Heads of State enjoy in accordance with customary international law.
2. As provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a Head of State.
3. May be conferred upon such a Head of State by virtue of section 7(2).

**19. Main provisions of the resolution adopted by the Institute of International Law:**

1. For the period in which they are in office, Heads of State or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
2. A former Head of State enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
3. It is expressly stated that they may be prosecuted for acts consisting of a crime under international law, or misappropriation of the state's assets or resources.

**20. Immunities/privileges of diplomatic premises in terms of the Diplomatic Immunities and Privileges Act:**

1. May not be entered by the host state unless permission from ambassador.
2. Premises and property thereon may not be searched, requisitioned, attached, or sold in execution.
3. Embassy archives, correspondence, post bags etc may not be opened, searched, or seized.
4. Diplomatic premises remain part of the host state's territory - they are not part of the sending state - this was confirmed in *Santos v Santos*.

## **21. Immunities/privileges of the person of the diplomat in terms of the Diplomatic Immunities and Privileges Act:**

1. May not be detained or arrested (it is a criminal offence to do so).
2. Is absolutely immune from criminal jurisdiction.
3. Is immune from civil jurisdiction, unless action involves a real action for immovable property held in personal capacity; matters of succession in personal capacity; professional or commercial activities outside of official functions.
4. Is not obliged to give evidence as a witness.
5. This immunity extends to the diplomat's family.

## **22. Brownlie's test for effective government:**

1. Does it have its own executive organs?
2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

## **CONSTITUTIONAL PROVISIONS**

### **Section 231**

- (1) The negotiating and signing of international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative, or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly or National Council of Provinces, but must be tabled in the Assembly and Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

### **Section 232**

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

### **233**

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

### **39(1)(b)**

When interpreting the Bill of Rights, every court, tribunal or forum must consider international law.

### **39(2)**

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.