

Public International Law

March 2013

Examiner's comments

This is a guide to the issues and primary materials relevant to answering the questions in the examination. Overall, candidates displayed a sound understanding of the principles of public international law and the application of those principles to the questions.

Question 1

Bases of state jurisdiction in criminal matters. Universality principle. State torture (torture by a public official) as a crime against public international law. Statutory vesting in Australian law of universal jurisdiction. *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97; Convention against Torture 1984; Criminal Code Act 1995 (Com) Division 274.

Diplomatic immunity from criminal jurisdiction. Vienna Convention on Diplomatic Relations 1961, Article 31(1) (which has the force of law in Australia under the Diplomatic Privileges and Immunities Act 1967 (Com)). Consular immunity from criminal jurisdiction. Vienna Convention on Consular Relations 1963, Article 43(1) (which has the force of law in Australia under the Consular Privileges and Immunities Act 1972 (Com)).

Foreign state immunity in respect of civil proceedings. See definition of "foreign state" in s 3(3) of the Foreign States Immunities Act 1985 (Com). Compare *Zhang v. Zemin* (2010) 243 FLR 299.

Question 2

Individual criminal responsibility under public international law. *International Military Tribunal (Nuremberg)* 41 AJIL 172 (1947); *Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 ALR 394; *Prosecutor v. Kanyabashi; Decision on Jurisdiction Case No ICTR-96-15-T* (1997); *In re Flick Ann Digest 1947, Case No 122, p 266; Rutaganda v. The Prosecutor Case No ICTR-96-3-A* (2003).

Alien tort claims in the United States. *Filartiga v. Pena-Irala* 630 F 2d 876 (1980); *Kadic v. Karadzic* 70 F 3d 232 (1995).

Question 3

(a) Relationship between customary international law and Australian law. Doctrines of incorporation and transformation. *R v. Keyn* (1876) 2 ExD 63; *The Paquete Habana* 175 US 677 (1900); *Nulyarimma v. Thomson* (1999) 165 ALR 621; *Mortensen v. Peters* (1906) 14 Scots LTR 227.

(b) The requirement of enabling or implementing legislation. *The Parliament Belge* (1879) 4 PD 129; *Post Office v. Estuary Radio* [1967] 2 QB 740. Australia has ratified and implemented into municipal law treaties relating to e.g. diplomatic and consular immunity and inviolability; state torture; genocide, crimes against humanity and war crimes; piracy jure gentium and aircraft hijacking.

Question 4

(a) State practice and opiniojuris. *Polyukhovich v. The Commonwealth* (1991) 17 CLR 501; *Victoria v. The Commonwealth* (1996) 138 ALR 129; “*Lotus*” Ann Digest 1927-1928, Case No 98, p 153. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 226.

(b) Imputability and attribution: conduct for which the state internationally is responsible; acts of the executive, legislature and judiciary at every level of government, including state organs (e.g. the judiciary) independent of executive power and the ultra vires acts of public officials acting in a *public* capacity. The state also is internationally responsible for the acts of *successful* revolutionaries but not the acts of private individuals, e.g. insurrectionists and rioters, where there has been no dereliction of duty by the state. *Youmans v. Mexico* 21 AJIL 571 (1927); *Jean-Baptiste Caire Claim 5* RIAA 516 (1929).